

DOES STARE DECISIS APPLY IN THE EIGHTH AMENDMENT DEATH PENALTY CONTEXT?*

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Throughout the past few decades, the Supreme Court has steadily chipped away at the death penalty. It was only recently, however, that courts have confronted what role precedent plays in the Eighth Amendment death penalty context. Surprisingly, few scholars have yet explored this important and complicated issue. Precedent in this area is unique because the law of the Eighth Amendment is always changing and the Eighth Amendment has been interpreted to be applied more broadly in the death penalty context. This Article argues that precedent in the Eighth Amendment death penalty context does not apply in the typical fashion. Instead of applying Supreme Court outcomes as precedent in this context, lower courts should apply Supreme Court rationale. This is consistent with the language of Supreme Court opinions and will afford greater and speedier justice to death penalty defendants.

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INTRODUCTION

In recent years, the Supreme Court has steadily chipped away at the constitutionality of the death penalty. In 1986, the Court held that it was unconstitutional to execute the insane,¹ in 2002 the Court held that it was unconstitutional to execute the mentally retarded,² and in 2005 the Court held that it was unconstitutional to execute persons who were juveniles when they committed their crimes.³ With this flux in Eighth Amendment jurisprudence, it has become difficult to apply Supreme Court precedent in this area—if Supreme Court precedents even do apply in the typical fashion. Surprisingly, few, if any, scholars have yet sought to provide an indepth exploration of the role that precedent plays in Eighth Amendment death penalty jurisprudence.⁴

This Article argues that precedent plays a unique role in Eighth Amendment death penalty jurisprudence. Instead of applying the specific outcomes of Eighth Amendment death penalty cases, lower courts should continuously reapply the Supreme Court's reasoning in these types of cases. Each Eighth Amendment case is unique because the prevailing standards of decency vary with each passing moment, thus making each Supreme Court holding confined to its specific "external facts"⁵ and distinguishable from many new death penalty

1. *Ford v. Wainright*, 477 U.S. 399, 409–10 (1986).

2. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

3. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

4. *But see* Margaret S. Hewing, Note, *Stare Decisis and the Illinois Death Penalty*, 1986 U. ILL. L. REV. 177 (arguing that horizontal precedents—as opposed to the vertical precedents discussed in this Article—should play a diminished role in constitutional and capital punishment cases and that the Illinois Supreme Court should overturn its own precedent that the Illinois death penalty statute is constitutional); Colin P. Mahon, Case Note, *Simmons v. Roper: Trying to Strike the Balance Between Strictly Obeying Supreme Court Precedent and Overruling Outmoded Concepts of Capital Punishment*, 23 QUINNIPIAC L. REV. 937 (2004) (discussing the advantages and disadvantages of anticipatory overruling, determining that “the Missouri Supreme Court was bound to follow [the United States Supreme Court precedent articulated in] *Stanford v. Kentucky*,” and concluding that “it will be very interesting to see how the tension between the emerging national consensus against the juvenile death penalty and the Court’s bar on anticipatory overruling will play out” in *Roper v. Simmons*).

5. This Article uses the term “external facts” to refer to the objective factors that the Court takes into account in determining whether a consensus exists under the evolving standards of decency test. *See infra* text accompanying notes 36–64; *see also, e.g., Roper*, 543 U.S. at 564–67 (examining state legislation and the frequency with which juveniles are sentenced to death in determining whether there is a national consensus against the juvenile death penalty). *But see, e.g., Carhart v. Gonzales*, 413 F.3d 791, 799 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (2006) (referring to a similar class of facts as “legislative facts”). These “external facts” include the substance of legislative enactments of the states, *see Atkins*, 536 U.S. at 312, the frequency with which states allowing the

cases that lower courts confront. Part I of this Article traces the origins of the *stare decisis*⁶ doctrine and explains the role of precedent in lower courts' decisionmaking processes. Part II outlines the Supreme Court's death penalty jurisprudence and its evolving standards of decency test that is used to determine whether a practice is cruel and unusual under the Eighth Amendment. Part III explains that, traditionally, the death penalty has been viewed as very different from other punishments, and thus greater protections are constitutionally required in the death penalty context. Part IV examines the debate among particular judges as to whether inferior courts must apply the outcomes or reasoning of Supreme Court decisions in the Eighth Amendment death penalty context. Part V argues that the outcomes in prior Supreme Court death penalty cases are not proper precedent but are instead distinguishable from many Eighth Amendment cases that face lower courts. Consequently, lower courts do not act improperly in reassessing these Eighth Amendment questions in light of the prevailing standards of decency. Part VI asserts that allowing lower courts to reassess the current standards of decency with respect to the death penalty, at least when there has been a significant change in these standards of decency, will allow greater justice to defendants and encourage abidance by the terms of the Constitution. This Article concludes that lower courts should be confined only by the Supreme Court's rationale in its Eighth Amendment death penalty cases but not by the specific results it reaches in these difficult cases.

practice actually utilize it, *see Roper*, 543 U.S. at 564–65, 567, and even how the punishment is viewed by other nations, *see id.* at 575–78. This is in contrast to facts that are at the heart of most cases, such as who committed a crime, and where, when, why, and how the crime was committed.

6. The terms “*stare decisis*” and “precedent” are used interchangeably in this Article to refer to the doctrine of vertical *stare decisis*—a court's obligation to follow a superior court's precedents. This is in contrast to the doctrine of horizontal *stare decisis*, which refers to a court being bound by its own earlier decisions. *See* LAWRENCE GOLDSTEIN, *PRECEDENT IN LAW* 81–82 (1987); *see also* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024–25 (1994) (explaining the difference between horizontal and vertical *stare decisis*). *But cf.* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 n.2 (1994) (using the term “*stare decisis*” to refer to a court's obligation to follow its own precedents, while using the term “*hierarchical precedent*” to denote a court's obligation to follow a superior court's precedents).

I. THE DOCTRINE OF STARE DECISIS AND ITS ROLE IN AMERICAN JURISPRUDENCE

The longstanding doctrine of stare decisis dictates that lower courts are bound to follow precedents established by their superior courts.⁷ There are numerous possible rationales for requiring lower courts to follow precedent.⁸ First, the doctrine of stare decisis provides certainty in the law.⁹ Individuals “must be able to predict what courts will do before they can make [important decisions regarding their] general welfare.”¹⁰ This certainty can result only when known rules are applied in a consistent manner.¹¹ Second, stare decisis serves to achieve uniformity in the law.¹² It is a way of fostering fairness in the judicial system and is based on the concept that similar cases should be treated alike, regardless of the particular judge presiding over the case.¹³ Third, requiring lower courts to follow their superior courts’ precedents nurtures the stability of society.¹⁴ Finally, there are certain costs associated with disregarding precedent, such as increased anxiety with respect to criminal law, “the reeducation of lawyers and judges, publication of the [changes to the law], general social upheaval, and maintaining the authority of political institutions, including the legislature and the judiciary.”¹⁵

Prior to 1989, anticipatory overruling, which is arguably at odds with the doctrine of stare decisis, was a rather common practice among lower federal courts.¹⁶ This once prominent doctrine provided

7. 1B JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 0.401, at I-2 (2d ed. 1996).

8. Robert S. Summers, *Precedent in the United States (New York State)*, in *INTERPRETING PRECEDENTS* 355, 379 (D. Neil MacCormick & Robert S. Summers eds., 1997).

9. *See id.*

10. JOHN ARTHUR, *WORDS THAT BIND: JUDICIAL REVIEW AND THE GROUNDS OF MODERN CONSTITUTIONAL THEORY* 137 (1995).

11. *See Summers, supra* note 8, at 379.

12. *See, e.g., Menge v. Madrid*, 40 F. 677, 679 (E.D. La. 1889); MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 50 (1988); RUSSELL FRANKLIN MOORE, *STARE DECISIS: SOME TRENDS IN BRITISH AND AMERICAN APPLICATION OF THE DOCTRINE* 4 (1958); Summers, *supra* note 8, at 379.

13. *See Summers, supra* note 8, at 379.

14. *See id.*

15. ARTHUR, *supra* note 10, at 137–38.

16. *See Summers, supra* note 8, at 398; *see also* *United States v. City of Phila.*, 644 F.2d 187, 192 (3d Cir. 1980) (anticipatorily overruling Supreme Court precedent because the Supreme Court appeared to be moving toward a different rule); *Andrews v. Louisville & Nashville R.R.*, 441 F.2d 1222, 1224 (5th Cir. 1971) (anticipatorily overruling Supreme Court precedent because the Supreme Court had indicated that it was awaiting the proper case in which to overturn its precedent); *Hobbs v. Thompson*, 448 F.2d 456, 472–74 (5th

that “lower courts should disregard Supreme Court decisions when they [were] reasonably sure that the Supreme Court would overrule [its previously decided cases] given the opportunity.”¹⁷ This view was based on the notion that because the Supreme Court could hear relatively few cases each year, disregarding cases that would almost certainly be overturned was the best method of achieving justice in a greater number of cases.¹⁸ In the 1989 securities case of *Rodriguez de Quijas v. Shearson/American Express, Inc.*,¹⁹ however, the Supreme Court condemned this practice, stating that if there is Supreme Court precedent of direct application, lower courts should follow it, “leaving [the Supreme] Court the prerogative of overruling its own decisions.”²⁰

Cir. 1971) (anticipatorily overruling Supreme Court precedent because the applicable precedent had been eroded by subsequent Supreme Court decisions).

17. C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 *FORDHAM L. REV.* 39, 41 (1990).

18. *See id.* at 71–74 (outlining the argument in favor of anticipatory overruling).

19. 490 U.S. 477 (1989).

20. *Id.* at 484. In *Rodriguez de Quijas*, securities investors had brought an action against a brokerage firm and others for violations of § 12(2) of the Securities Act of 1933. *See id.* at 478–79. The district court ordered that, despite the arbitration agreement between the parties, the claims raised under § 12(2) should not be submitted to arbitration because *Wilko v. Swan*, 346 U.S. 427 (1953), held that an agreement to arbitrate in this context was void under § 14 of the Act. *See Rodriguez de Quijas*, 490 U.S. at 479. The Fifth Circuit reversed, concluding that the arbitration agreement was enforceable because the Supreme Court's subsequent decisions had “reduced *Wilko* to ‘obsolescence.’” *Id.* The Supreme Court affirmed, but stated that the Fifth Circuit should not have renounced *Wilko* on its own authority:

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the settling of business transactions. Although we are normally and properly reluctant to overturn our decisions construing statutes, we have done so to achieve a uniform interpretation of similar statutory language and to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation. Both purposes would be served here by overruling the *Wilko* decision.

Id. at 484 (citations omitted). Today, *Rodriguez de Quijas* is generally cited as standing for the proposition that the Court rejected the doctrine of anticipatory overruling in toto. *See, e.g., Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001) (noting that the Supreme Court rejected the doctrine of anticipatory overruling in *Rodriguez de Quijas*); *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 698 n.13 (3d Cir. 1991) (same), *aff'd in part and rev'd in part*, 505 U.S. 833 (1992). *But see Bradford, supra* note 17, at 88 (arguing that there is good reason to limit the holding in *Rodriguez de Quijas* to cases involving statutory interpretation).

Today, the doctrine of stare decisis is generally considered axiomatic in the American jurisprudential system and is rarely debated in the literature.²¹ According to former Assistant Attorney General Charles Cooper, the question of whether lower federal courts are obligated to follow Supreme Court decisions is not in serious debate, “perhaps because the alternative is so obviously chaos.”²² The doctrine of stare decisis can only be ignored at the risk of the legal system’s stability.²³ Yet some judges flout the Supreme Court’s precedents on occasion, which may subject their decisions to summary reversal by a superior court.²⁴ Further, this disregard for Supreme Court precedent usually subjects these judges to severe attacks by other judges, scholars, and the general public.²⁵ In 1992, for example, several judges on the Ninth Circuit faced major disapprobation for continuing to issue stays on Robert Alton Harris’s execution despite the fact that the Supreme Court continued to vacate each of the stays.²⁶ Judge Harry Pregerson, in particular, was denounced for issuing a fourth stay while Harris was strapped into a chair in the gas chamber.²⁷ While few came to the defense of the Ninth Circuit judges in this case, some scholars have argued that there is a need for deviation from strict stare decisis principles in other cases, citing mainly the justification of flexibility to achieve justice.²⁸

21. See Caminker, *supra* note 6, at 820.

22. Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 n.6 (1988).

23. MORRIS P. FIORINA & PAUL E. PETERSON, *THE NEW AMERICAN DEMOCRACY* 494 (1998).

24. See, e.g., *Salinas v. United States*, 126 S. Ct. 1675, 1675 (2006) (per curiam) (reversing the Fifth Circuit’s holding that a prior conviction for simple possession of a controlled substance constitutes a “controlled substance offense” under U.S. Sentencing Guideline § 4B1.1(a) (2003)), *rev’g* 142 F. App’x 830 (5th Cir. 2005). While it is generally rare for the Supreme Court to take a case for the sole purpose of correcting an inferior court’s erroneous decision, scholars have noted that this practice has become more common with the Roberts Court. See Posting of Douglas A. Berman to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2006/week27/index.html> (July 5, 2006, 12:59 EST); Orin Kerr.com, <http://www.orinkerr.com/2006/06/20/youngblood-young-blood-and-the-supreme-courts-role-in-the-criminal-justice-system> (June 20, 2006, 19:44 EST).

25. See, e.g., Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225, 229–30 (1992) (describing the criticism to which some Ninth Circuit judges were subjected for flouting Supreme Court precedent).

26. See *id.*; Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 188–92; see also Robert Bork, *An Outbreak of Judicial Civil Disobedience*, WALL ST. J., Apr. 29, 1992, at A19 (criticizing the lower courts’ resistance to Supreme Court precedent).

27. See Caminker & Chemerinsky, *supra* note 25, at 230; Fried, *supra* note 26, at 188–89.

28. See CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM* 33 (1997) (“[I]t is essential for some institution within our government to have the power to ‘adapt’ the Constitution to our new circumstances; this is what judicial activism accomplishes.”); John C. Coffee, Jr.,

Still, most scholars adhere to the common view that abiding by the doctrine of stare decisis, at least to some extent, is vital to our system of ordered justice.²⁹

II. THE EVOLVING EIGHTH AMENDMENT

Applying precedent is especially difficult in the context of the Eighth Amendment because the law is always changing. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³⁰ Although the text of the Constitution fails to mention exactly what constitutes cruel and unusual punishment and there is scant evidence of whether the Framers intended the Amendment to be interpreted in a dynamic manner,³¹ in *Trop v. Dulles*,³² the

The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role, 89 COLUM. L. REV. 1618, 1621 (1989) (“Judicial activism is the necessary complement to contractual freedom.”); see also Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J.L. & RELIGION 33, 82–83 (1989) (arguing that federal judges have the duty to uphold their own understandings of the Constitution). According to Professor Paulsen, however,

The argument for the power of lower court judges to “under-rule” the Supreme Court is both straightforward and controversial: First, the judge’s obligation, by oath, is to the Constitution, not to Supreme Court interpretations of the Constitution. There is nothing morally disingenuous in taking the oath and disobeying “controlling” precedent. As Andrew Jackson put it, “[e]ach public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.” Second, there is nothing in the Constitution that requires lower courts to follow the constitutional decisions of the U.S. Supreme Court. There may be Supreme Court opinions that hold, or strongly suggest, that lower court judges are bound, by virtue of their oaths to uphold the *law*, to uphold also the precedents of higher courts. But that only begs the question of whether lower courts are bound to follow the holdings of the Supreme Court in all circumstances.

Third, the fact that not all decisions of “higher” federal courts are binding precedent, together with the strong Article III structural arguments for the equality of all federal judges, suggests that the obligation to follow controlling precedent is less a constitutional *duty* than an observed regularity attributable to the practical operating reality of a hierarchical system.

Id. (footnotes omitted).

29. See RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION* 56 (1961) (“[M]any consider precedent to constitute the essence of the case-law system, to exemplify all that is truly magnificent in the notion of ‘the rule of law.’”); Caminker, *supra* note 6, at 820; Cooper, *supra* note 22, at 402 n.6; Dorf, *supra* note 6, at 2025 (“A lower court must always follow a higher court’s precedents.”); Mark Sabel, *The Role of Stare Decisis in Construing the Alabama Constitution of 1901*, 53 ALA. L. REV. 273, 286 (2001) (“[S]tare decisis doctrine plays a vital role in federal constitutional adjudication.”).

30. U.S. CONST. amend. VIII.

31. See *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (“The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual

Supreme Court stated that the Eighth Amendment ensures that the government's power to punish is "exercised within the limits of civilized standards."³³ It explained that the scope of the Amendment is not static and that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³⁴ In applying this evolving standards of decency test and holding that the use of denationalization as a punishment violates the Eighth Amendment, the Court relied on its finding that "[t]he civilized nations of the world [were] in virtual unanimity that statelessness [was] not to be imposed as [a] punishment for crime."³⁵

In determining whether a practice is cruel and unusual punishment under the evolving standards of decency, the Supreme

punishments, but they made no attempt to define the contours of that category."); Benjamin Wittes, *What is "Cruel and Unusual"?*, POL'Y REV., Dec. 2005–Jan. 2006, at 15, 22 (noting that the Amendment "received very little debate during the First Congress" and stating that "the notion that the amendment may have a dynamic character based on changing judicial interpretation of its terms was not beyond the realm of the imagination of members of the Congress that sent it to the states for ratification"); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 13–14 (1980) (noting that the language of the Eighth Amendment seems "to call for a reference to sources beyond the document itself and a 'framers' dictionary'"). But see ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 145 (1997) (explaining that the Eighth Amendment today means the same thing as when it was drafted). For an extensive discussion of the history and meaning of the Cruel and Unusual Punishments Clause, see Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 852–53 (1969).

32. 356 U.S. 86 (1958).

33. *Id.* at 100 ("While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards.")

34. *Id.* at 100–01.

35. *Id.* at 102–03. Although the Court relied, at least in part, on international law in *Trop v. Dulles*, see *id.*, prior to the Supreme Court's opinion in *Roper v. Simmons*, 543 U.S. 551 (2005),

it remained possible to view the appearance of foreign law in constitutional decisions as nothing more than a minor hobbyhorse for Justice Stephen Breyer or Justice Kennedy—a merely rhetorical nod in the direction of the mostly Western European judges with whom they have become friends at international judicial conferences and other such venues over the years.

Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June–July 2005, at 33, 33. *Roper* sparked a heated debate over whether it is ever appropriate for U.S. courts to cite or defer to foreign law. Jeremy Waldron, *Foreign Law and the Modern Jus Gentium*, 119 HARV. L. REV. 129, 129 (2005); see also Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 111–12 (2005) (arguing that U.S. courts should consult and engage with international law, although it should not be deemed controlling); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 149 (2005) (arguing that the *Roper* Court went too far in consulting foreign law and gave "the practices of those jurisdictions authoritative legal weight").

Court has looked to certain objective indicia of contemporary values.³⁶ The primary indicator of the evolving standards of decency that the Court examines is the actions of state legislatures.³⁷ Additionally, the Court looks to juries' actions, the opinions of professional organizations, and international opinions to determine whether a consensus has emerged, thus rendering a practice cruel and unusual.³⁸

Applying these standards, the Court has begun defining the bounds of the Eighth Amendment in the death penalty context. For example, in 1976 in *Gregg v. Georgia*, the Supreme Court held that the death penalty, in general, is not unconstitutional and that imposing the death penalty as a punishment for the crime of murder does not violate the Eighth Amendment.³⁹ In 1977, in *Coker v. Georgia*, the Court determined that imposing the death penalty for the rape of an adult woman is forbidden by the Eighth Amendment because it is a grossly disproportionate and excessive punishment for the crime.⁴⁰ In 1982, in *Enmund v. Florida*, the Court concluded that the death penalty cannot be imposed on a defendant who aided and abetted in a felony in the course of which murder was committed by others when the defendant did not, himself, take a life, attempt to take a life, or intend that a life be taken in the course of committing

36. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (looking to “the legislation enacted by the country’s legislatures” and the Court’s “own judgment” in evaluating the requirements of the Eighth Amendment); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (looking to “legislation enacted by the country’s legislatures” and “data concerning the actions of sentencing juries” in evaluating the requirements of the Eighth Amendment).

37. *Atkins*, 536 U.S. at 312 (“We have pinpointed that the ‘clearest and most reliable evidence of contemporary values is the legislation enacted by the country’s legislatures.’” (quoting *Penry*, 492 U.S. at 331)); see also *Roper*, 543 U.S. at 589 (O’Connor, J., dissenting) (“Laws enacted by the Nation’s legislatures provide the ‘clearest and most reliable objective evidence of contemporary values.’” (quoting *Penry*, 492 U.S. at 331)).

38. See *Roper*, 543 U.S. at 564–65, 575; *Atkins*, 536 U.S. at 312; *Stanford v. Kentucky*, 492 U.S. 361, 370–72 (1989); *Penry*, 492 U.S. at 334–35; *Thompson v. Oklahoma*, 487 U.S. 815, 824, 830 (1988).

39. *Gregg v. Georgia*, 482 U.S. 153, 169 (1976).

40. *Coker v. Georgia*, 433 U.S. 584, 592 (1977). In conducting its analysis, the Court sought “guidance in history and from the objective evidence of the country’s [then] present judgment concerning the acceptability of death as a penalty for rape of an adult woman.” *Id.* at 593. This included considering how many states and countries authorized the death penalty for the crime of raping an adult woman at that time and how often juries imposed the death penalty for this crime when it was authorized. See *id.* at 593–97. The Court also reflected on its own judgment in reaching its decision. See *id.* at 597.

In that same year, the Supreme Court also found that the death penalty was disproportionate to the crime of kidnapping and rape when the victim was not killed, *Eberheart v. Georgia*, 433 U.S. 917 (1977) (per curiam), and to the crime of robbery when the victim was not killed, *Hooks v. Georgia*, 433 U.S. 917 (1977) (per curiam).

the felony.⁴¹ In 1986, in *Ford v. Wainwright*, the Court held that the Eighth Amendment prohibits executing persons who are insane at the time of execution.⁴² In 1988, in *Thompson v. Oklahoma*, the Supreme Court held that the Eighth Amendment also prohibits executing persons who were under the age of sixteen when they committed their offenses.⁴³ The Court noted that no state that had given express consideration to a minimum age for the death penalty had set the age lower than sixteen.⁴⁴ It also observed that “professional organizations, . . . other nations that share our Anglo-American heritage, and . . . leading members of the Western European community” would be offended by the execution of a defendant who was less than sixteen years of age at the time he committed his crime.⁴⁵ Finally, the Court stated that juries only rarely imposed the death penalty on offenders who were under the age of sixteen when they committed their crimes.⁴⁶

In 1989, in *Stanford v. Kentucky*, the Supreme Court determined that it was constitutionally permissible to execute defendants who committed their offenses when they were under the age of eighteen because there was no national consensus against the practice.⁴⁷ The Court again examined the actions of state legislatures and observed that twenty-two of the thirty-seven death penalty states permitted the death penalty for sixteen-year-old offenders and that among the thirty-seven death penalty states, twenty-five permitted it for seventeen-year-old offenders.⁴⁸ The Court concluded that these numbers failed to constitute a national consensus sufficient to label imposing the death penalty on juvenile offenders cruel and unusual.⁴⁹

Also in 1989, in *Penry v. Lynaugh*, the Supreme Court determined that it did not violate the Eighth Amendment to execute

41. *Enmund v. Florida*, 458 U.S. 782, 788 (1982).

42. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986). *But cf.* *Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) (holding that a state may forcibly medicate prisoners who have become insane on death row in order to render them competent for execution), *cert. denied*, 540 U.S. 832 (2003).

43. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

44. *See id.* at 824. The Court noted, however, that nineteen death penalty states had set no minimum age for the punishment. *Id.* at 826–27.

45. *Id.* at 830.

46. *Id.* at 831–33.

47. *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005).

48. *Id.* at 370.

49. *Id.* at 371–72.

the mentally retarded.⁵⁰ In this case, the Court noted that only two states had enacted laws banning the imposition of the death penalty on mentally retarded persons.⁵¹ It stated that “the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.”⁵²

In 2002, in *Atkins v. Virginia*, however, the Supreme Court determined that the evolving standards of decency dictated that it was now unconstitutional to execute the mentally retarded.⁵³ The Court noted that eighteen states, as well as the federal government, had banned the practice of executing the mentally retarded.⁵⁴ Further, one additional state had adopted such a bill and similar bills had passed at least one house in at least two other states.⁵⁵ The Court also explained that in the states that allowed the execution of mentally retarded offenders, the practice was uncommon.⁵⁶

Finally, in 2005, in the case of *Roper v. Simmons*, the Supreme Court determined that the evolving standards of decency now prohibit the execution of defendants who committed their crimes while they were under the age of eighteen.⁵⁷ In reaching this conclusion, the Court examined the indicia of a consensus and determined that the evidence was parallel to the evidence in *Atkins*.⁵⁸ The Court explained that thirty states had prohibited the juvenile death penalty—twelve had rejected the death penalty completely and eighteen had expressly excluded juveniles from the state’s death penalty.⁵⁹ Further, in the sixteen years since *Stanford*, only six states had executed defendants for crimes committed as juveniles, and in the ten years prior to *Roper*, only three had done so.⁶⁰ Additionally, five states that had allowed the juvenile death penalty at the time *Stanford* was decided had since abandoned it.⁶¹ The Court also noted

50. *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989), *overruled by Atkins v. Virginia*, 536 U.S. 304 (2002). The Court determined, however, that mental retardation should be considered as a mitigating factor in sentencing. *Id.* at 337–38.

51. *Id.* at 334.

52. *Id.*

53. *Atkins*, 536 U.S. at 321.

54. *See id.* at 315.

55. *Id.*

56. *Id.* at 316.

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

58. *Id.* at 564 (citing *Atkins*, 536 U.S. at 313–15).

59. *Id.*

60. *Id.* at 564–65.

61. *Id.* at 565. Four states had abandoned the juvenile death penalty through legislative enactment and one had abandoned it through judicial decision. *Id.*

that the United States was the only country in the world that continued to sanction the juvenile death penalty.⁶²

In examining these indicia of a consensus, the Supreme Court has consistently stated that “[i]t is not so much the number of [states that ban a specific practice] that is significant, but the consistency of the direction of change.”⁶³ It remains uncertain, however, exactly what constitutes such a consensus.⁶⁴ What is certain is that due to the

62. *Id.* at 575. The Court also noted that every country in the world, except for the United States and Somalia, had ratified Article 37 of the United Nations Convention on the Rights of the Child, which contains an express prohibition on the juvenile death penalty. *Id.* at 576. The Court further noted that, other than the United States, only seven countries—Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China—had executed juvenile offenders since 1990. *Id.* at 577.

63. *Id.* at 566 (citing *Atkins*, 536 U.S. at 315).

64. The following table sets forth rough estimates, at the time a particular case was decided, of the number of death penalty states that had outlawed the practice at issue, the number of states without the death penalty, and how often juries in jurisdictions where the practice was permitted sentenced that particular class of defendants to death. It also notes whether the Court took into account the opinions of professional organizations and other nations in determining whether a consensus existed against a particular practice. Finally, the last column of the table notes whether the Court concluded that a consensus existed against the practice, rendering it cruel and unusual punishment. Although this table attempts to make sense of the Court’s determination of what constitutes a consensus against a practice, it is of limited use because, as the *Roper* and *Atkins* Courts noted, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.” *Id.* at 567 (citing *Atkins*, 536 U.S. at 315). Further, note that the table does not include whether the Court took into account its own judgment in determining whether the practice was unconstitutional.

The data for this table were retrieved from only the cases summarized within the table. For graphs displaying the change in the number of states banning execution of the mentally retarded and banning juvenile execution, see *infra* notes 193 and 195, respectively.

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evolving standards of decency test, the state of the Eighth Amendment is in flux, and a constitutional practice can easily metamorphose into an unconstitutional one within a relatively short period of time.

III. DEATH IS DIFFERENT

When the death penalty is at issue, the Supreme Court has imposed a broader construction on what constitutes cruel and unusual punishment than in other Eighth Amendment contexts. The Supreme Court has stated that this extra protection is necessary in death penalty cases because “the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”⁶⁵ The “death is different” doctrine finds its roots in Justice Brennan’s concurrence in *Furman v. Georgia*.⁶⁶ There, Justice Brennan stated that “[d]eath is a unique punishment in the United

	# of DP States Outlawing Practice	# of Non-DP States	Juries Impose Where Practice Allowed	Professional Orgs.	Int’l Opinions	Consensus Against Practice?
<i>Ford v. Wainwright</i>	41	9	Not discussed	Not discussed	Not discussed	Yes
<i>Thompson v. Oklahoma</i>	18	14	0.27% of those eligible; 0.36% of total executions	Generally against	Generally against	Yes
<i>Stanford v. Kentucky</i>	12–15	14	0.71–1.42% of total executions	Plurality rejected as unhelpful	Rejected as irrelevant	No
<i>Penry v. Lynaugh</i>	2	14	No evidence	Generally against	Not discussed	No
<i>Atkins v. Virginia</i>	18 + federal gov’t	12	Infrequent	Generally against	Generally against	Yes
<i>Roper v. Simmons</i>	18	12	Infrequent	Not discussed	Against	Yes

65. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

66. 408 U.S. 238, 286–91 (1972); see Victor L. Streib, *Standing Between the Child and the Executioner: The Special Role of Defense Counsel in Juvenile Death Penalty Cases*, 31 AM. J. CRIM. L. 67, 82–83 (2003) (noting that the *Gregg* Court credited Justice Brennan’s concurring opinion as “the source of the current ‘death is different’ reasoning”). The Court had, however, suggested this distinction in earlier cases. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (distinguishing capital punishment from other penalties by determining that the Constitution requires certain extra protections for defendants who stand “in deadly peril of their lives”).

States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction.”⁶⁷ Justice Brennan explained that death is different because of its severity.⁶⁸ It is “unusual in its pain, in its finality, and in its enormity.”⁶⁹ Further, the practice is unique in the infrequency with which it is imposed.⁷⁰

The uniqueness of the death penalty is reflected in society:

There has been no national debate about [other] punishment[s] . . . comparable to the debate about the punishment of death. No other punishment has been so continuously restricted . . . [T]hose States that still inflict death reserve it for the most heinous crimes. . . . [And the Supreme] Court . . . almost always treats death cases as a class apart.⁷¹

As Justice Brennan stated, “The evidence is conclusive that death is not the ordinary punishment for any crime.”⁷²

The Supreme Court has latched onto Justice Brennan’s distinction and in subsequent opinions has reiterated this doctrine of difference.⁷³ For example, in *Gregg*, the Court stated:

While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution’s ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.⁷⁴

67. *Furman*, 408 U.S. at 286.

68. *Id.* at 287.

69. *Id.*

70. *Id.* at 291.

71. *Id.* at 286–87.

72. *Id.* at 291.

73. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (noting that “death is different” and that, in the death penalty context, the Court has “imposed protections that the Constitution nowhere else provides”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”); see also Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1599 (2001) (“That ‘death is different’ from other penalties the state may impose has become an axiom of American law.”).

74. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

Because death is different, the Court has required greater procedural safeguards in capital cases than in any other Eighth Amendment cases.⁷⁵ For example, when the death penalty is at issue, courts examine not only whether the specific practice is barbaric such that it “makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering,”⁷⁶ they also examine whether the punishment is greatly disproportionate to the offense.⁷⁷

IV. LOWER COURTS’ VIEWS ON THE ROLE PRECEDENT PLAYS IN EIGHTH AMENDMENT DEATH PENALTY JURISPRUDENCE

The uniqueness of the death penalty and the flux of the Supreme Court’s Eighth Amendment jurisprudence make precedent in the Eighth Amendment death penalty context especially difficult to apply. Although few, if any, scholars have addressed this important and complex issue of the unique role that precedent plays in this context,⁷⁸ lower courts have been forced to grapple with it. In general, most lower courts have applied Eighth Amendment death penalty precedent in the same manner as other precedents and have interpreted the outcomes of Eighth Amendment death penalty cases, instead of their reasoning, as binding.⁷⁹

75. Compare *Harmelin*, 501 U.S. at 994 (rejecting Eighth Amendment proportionality review in noncapital case), with *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (determining “that the death penalty is disproportionate punishment for offenders under 18” and thus violates the Eighth Amendment). But see *Ewing v. California*, 538 U.S. 11, 20 (2003) (stating that the “Eighth Amendment . . . contains a ‘narrow proportionality principle’ that ‘applies to noncapital sentences.’” (quoting *Harmelin*, 501 U.S. at 996–97 (Kennedy, J., concurring in part and concurring in judgment))); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (noting that “[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare”).

76. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

77. See *Harmelin*, 501 U.S. at 1013 (“Proportionality review is one of several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides.”). Note, however, that the Supreme Court has held that the “Eighth Amendment . . . contains a ‘narrow proportionality principle’ that ‘applies to noncapital sentences.’” *Ewing*, 538 U.S. at 20 (quoting *Harmelin*, 501 U.S. at 996–97 (Kennedy, J., concurring in part and concurring in judgment)); see *supra* note 75.

78. See *supra* note 4 and accompanying text.

79. See, e.g., *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002) (citing *Beazley v. Johnson*, 242 F.3d 248, 263 (5th Cir. 2001)); *Beazley*, 242 F.3d at 268–69 (citing *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989), and stating that it was obviously bound by Supreme Court precedent); *Prejean v. Smith*, 889 F.2d 1391, 1401–02 (5th Cir. 1989) (citing *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), and *Stanford*, 492 U.S. at 380, and refusing to reassess the evolving standards of decency); *Servin v. State*, 32 P.3d 1277, 1285–86 (Nev. 2001) (citing *Stanford*, 492 U.S. at 361; *Domingues v. State*, 961 P.2d 1279, 1280 (Nev. 1998)); *Ex parte Pressley*, 770 So. 2d 143, 149–50 (Ala. 2000) (applying *Stanford*, 492

In its 2003 decision in *State ex rel. Simmons v. Roper*,⁸⁰ however, the Missouri Supreme Court made a bold move in the field of Eighth Amendment death penalty jurisprudence. Despite the general acceptance of the Supreme Court's 1989 ruling in *Stanford* that executing defendants who were sixteen or seventeen years old when they committed their crimes did not violate the Eighth Amendment's prohibition of cruel and unusual punishment,⁸¹ the Missouri Supreme Court held that the practice of executing juveniles violated the Eighth Amendment.⁸² Instead of applying the Supreme Court's outcome in *Stanford*, the Missouri Supreme Court applied the evolving standards of decency reasoning from the Supreme Court's more recent Eighth Amendment cases.⁸³ Three dissenters in *Simmons* emphatically condemned what they viewed as the majority's disregard for Supreme Court precedent and argued that in light of *Stanford*, the Missouri Supreme Court was bound to find that the juvenile death penalty was not cruel and unusual punishment banned by the Eighth Amendment.⁸⁴

Although it made a significant statement in deciding that it had the authority to reevaluate the constitutionality of juvenile execution despite the result reached by the Supreme Court in *Stanford*, the Missouri Supreme Court majority only briefly addressed the issue.⁸⁵ The court dismissed the argument that it did not have the authority to reevaluate the *Stanford* question in light of *Atkins* as ignoring the fundamental premise of Eighth Amendment jurisprudence that the Eighth Amendment is to be interpreted in a "flexible and dynamic manner."⁸⁶ Accordingly, the Missouri Supreme Court stated that it "clearly has the authority and the obligation to determine [an Eighth Amendment case] based on current . . . standards of decency."⁸⁷

U.S. at 361, and failing to reassess the evolving standards of decency); *Ex parte Burgess*, 811 So. 2d 617, 629 (Ala. 2000) (citing *Ex parte Pressley*, 770 So. 2d at 149–50, and failing to reassess the evolving standards of decency); *Domingues*, 961 P.2d at 1280 (citing *Stanford*, 492 U.S. at 361 and failing to reassess the evolving standards of decency). *But cf.* *Carhart v. Gonzales*, 413 F.3d 791, 799, 801 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (2006) (suggesting that the court might have reassessed the state of " 'substantive medical authority' " in the abortion context if the external facts, or "legislative facts," had changed).

80. 112 S.W.3d 397 (Mo. 2003), *aff'd*, 543 U.S. 551 (2005).

81. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005).

82. *Simmons*, 112 S.W.3d at 413.

83. *See id.* at 407.

84. *See id.* at 418–21 (Price, J., dissenting).

85. *See id.* at 406–07 (majority opinion).

86. *Id.* at 406.

87. *Id.* at 407.

Led by Justice Price, the three dissenters on the Missouri Supreme Court vigorously disagreed on this point.⁸⁸ They argued that the Supreme Court has not overruled *Stanford* even after its decision in *Atkins* and after considering arguments similar to the majority's argument.⁸⁹ They explained that "[i]t is the United States Supreme Court's prerogative, and its alone, to overrule one of its decisions. . . . [The Missouri Supreme Court] is bound by the United States Supreme Court's decision in *Stanford v. Kentucky* and simply has no authority to overrule that decision."⁹⁰ According to the dissenters, lower courts are charged with the "solemn duty" to abide by Supreme Court decisions, regardless of whether they agree with them, because Supreme Court decisions are the supreme law of the land.⁹¹ Lower courts do not have the power to imply or anticipate the overruling of a Supreme Court decision.⁹²

Apart from its emphasis that Supreme Court decisions are the law of the land, the *Simmons* dissent also highlighted Supreme Court actions that could be interpreted as supporting the dissent's position. The dissent pointed to the Supreme Court's opinion in *State Oil Co. v. Khan*,⁹³ an antitrust case in which the Court applauded a lower court for respecting the doctrine of stare decisis despite its disagreement with the controlling Supreme Court decision.⁹⁴ Additionally, the *Simmons* dissent argued that the Supreme Court's decisions refusing to grant certiorari in juvenile death penalty cases since *Stanford* indicated that the Court had intentionally not overruled the *Stanford* precedent.⁹⁵ The *Simmons* majority easily refuted this argument by reciting the fundamental principle that Supreme Court denial of

88. *See id.* at 397 (noting that Justices Benton and Limbaugh joined in Justice Price's dissent).

89. *See id.* at 419 (Price, J., dissenting). The dissent cites *Mullin v. Hain*, 538 U.S. 957 (2003), *In re Stanford*, 537 U.S. 968 (2003), and *Patterson v. Texas*, 536 U.S. 984 (2002), for the proposition that the Court had, in fact, affirmed its decision in *Stanford* as recently as 2003. *See Simmons*, 112 S.W.3d at 419 (Price, J., dissenting).

90. *Simmons*, 112 S.W.3d at 419 (Price, J., dissenting) (citing numerous cases supporting this proposition). Missouri Attorney General Jay Nixon similarly accused the Missouri Supreme Court of overreaching. *See Virginia Young, Court Halts Executions for Crimes by Juveniles*, ST. LOUIS POST-DISPATCH, Aug. 27, 2003, at A1. He stated that "[i]t's not generally considered [the Missouri Supreme Court's] prerogative to overrule U.S. Supreme Court cases that are based on federal [constitutional] amendments." *Id.*

91. *Simmons*, 112 S.W.3d at 420 (Price, J., dissenting).

92. *Id.*

93. 522 U.S. 3 (1997).

94. *See Simmons*, 112 S.W.3d at 420–21 (Price, J., dissenting). *Khan* was not an Eighth Amendment case, however, so it does not speak to whether precedent plays a unique role in Eighth Amendment death penalty jurisprudence.

95. *See id.* at 421.

certiorari has no bearing on the Supreme Court's views as to the merits of the case.⁹⁶ Faced with almost 6,000 certiorari petitions each year, the Court can grant certiorari in only one to two percent of those cases.⁹⁷ Even though the Court pays unusually close attention to petitions for certiorari in death penalty cases, it denies most of these petitions.⁹⁸ Further, the Supreme Court has time and time again noted that denial of certiorari indicates nothing regarding the Court's view on the merits of a case.⁹⁹

The question of what is the proper role of precedent in Eighth Amendment death penalty jurisprudence has been addressed in depth by only one other court. In the Delaware case of *State v. Jones*, defendant Michael Jones argued that it was unconstitutional to execute him because he was only seventeen years old when he murdered two people in the course of an armed robbery.¹⁰⁰ The Delaware superior court rejected this argument, taking the same position that Justice Price and his fellow dissenters took in *Simmons*. The Delaware court stated that "the Supreme Court alone has the power to overrule its precedents,"¹⁰¹ otherwise the Supreme Court would no longer be the land's highest court or the final arbiter of the Constitution.¹⁰² Elaborating on Justice Price's dissent, the Delaware court explained that the Supreme Court has the sole authority to

96. See *id.* at 407 n.6 (majority opinion) ("[A] denial carries no implications whatever regarding the Court's views on the merits of the case which it has declined to review.").

97. See SUSAN LOW BLOCH & THOMAS G. KRATTENMAKER, *SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES* 334 (1994).

98. See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 92-97* (1991); see also Derick P. Berlage, Note, *Pleas of the Condemned: Should Certiorari Petitions From Death Row Receive Enhanced Access to the Supreme Court?*, 59 N.Y.U. L. REV. 1120, 1136 n.108 (1984) (noting that during its 1982 term, the Supreme Court granted certiorari in only two to three percent of death sentence petitions); Warren M. Kato, Note and Comment, *The Juvenile Death Penalty*, 18 J. JUV. L. 112, 149 (1997) (noting that getting the Supreme Court to grant certiorari in a death penalty case—especially in a case in which the "evolving standards of decency" question has already been decided—is extremely difficult); Hudson Sangree, *Trials by Fire: Law Clinics Put Students to the Test as Real-World Advocates*, N.U. MAGAZINE ONLINE, Jan. 2001, <http://www.numag.neu.edu/0101/law.html> (noting that the "Supreme Court grants review in only a tiny percentage of indigent death-penalty appeals, about ten in every four thousand").

99. See, e.g., *Teague v. Lane*, 489 U.S. 288, 296 (1989) ("As we have often stated, the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.' " (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923))); *Maryland v. Balt. Radio Show*, 338 U.S. 912, 919 (1950) ("[T]his Court has rigorously insisted that such a denial [of certiorari] carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.").

100. *State v. Jones*, 2004 WL 2190097, at *2 (Del. Super. Ct. Aug. 31, 2004).

101. *Id.* at *3.

102. *Id.*

overrule its decisions, and nothing in *Atkins* indicated that it intended to overrule *Stanford*: “[T]o find otherwise would be a dangerous usurpation . . . of Supreme Court authority”¹⁰³ The superior court added to Justice Price’s argument by explaining that while the *Atkins* and *Stanford* Courts did state that the Eighth Amendment is interpreted in a “flexible and dynamic manner,” in accordance with the “‘evolving standards of decency,’” the Supreme Court was explaining its *own* power to interpret the Eighth Amendment in this manner.¹⁰⁴ Referring only to itself, the Supreme Court stated that “‘[t]his Court has had little occasion to give precise content to the Eighth Amendment’” and that the Eighth Amendment issue “‘confronts *us*, and the task of resolving it is inescapably *ours*.’”¹⁰⁵ The Delaware superior court concluded by explaining that it has the power to decide Eighth Amendment issues of first impression and to overrule its own or even lower court precedents, but that it may not reach its own conclusions on Eighth Amendment death penalty issues already decided by the Supreme Court.¹⁰⁶

Although the Supreme Court did not have the opportunity to review the Delaware superior court’s decision in *Jones*, it did grant certiorari in *Simmons*.¹⁰⁷ In its 2005 *Roper v. Simmons* opinion, the U.S. Supreme Court affirmed the Missouri Supreme Court’s decision that the juvenile death penalty violates the Eighth Amendment.¹⁰⁸ Surprisingly, however, the Court did not comment on whether the Missouri Supreme Court acted within its authority in finding that *Stanford* was not controlling in the case.¹⁰⁹ It neither acknowledged the Missouri court’s action as legitimate nor condemned the lower court for arguably disregarding Supreme Court precedent.¹¹⁰

The Supreme Court’s silence on this matter, while in line with its treatment of evolving standards of decency death penalty cases, is in contrast to its history of readily admonishing lower courts for ignoring Supreme Court precedents in other contexts. In *Hutto v. Davis*, for

103. *Id.* at *4. The Delaware court also found that to allow a lower court to in effect overrule a Supreme Court decision would also usurp “the legitimate right of elected legislatures to create laws within the constitutional guidelines expressed in Supreme Court cases.” *Id.*

104. *Id.* at *5 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989)).

105. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101–03 (1958) (emphasis added)).

106. *Id.*

107. *Roper v. Simmons*, 540 U.S. 1160 (2004).

108. *Roper v. Simmons*, 543 U.S. 551, 566, 568 (2005).

109. *See id.* at 574 (noting only that *Stanford* “should no longer be deemed controlling on this issue”).

110. *See id.*

example—an Eighth Amendment case not involving the death penalty—the Court sharply criticized the Fourth Circuit for its disregard of Supreme Court precedent.¹¹¹ Defendant Davis had argued that his sentence of forty years in prison and a \$20,000 fine was so grossly disproportionate to his crime of possession with intent to distribute and distribution of fewer than nine ounces of marijuana that it constituted cruel and unusual punishment under the Eighth Amendment.¹¹² The Fourth Circuit agreed based on the four factors set forth in its *Hart v. Coiner* decision.¹¹³ The Supreme Court reversed “[b]ecause the Court of Appeals failed to heed [its] decision in [*Rummel v. Estelle*],” in which it had held that a defendant’s sentence of life imprisonment for his third felony of obtaining \$120.75 by false pretenses was not cruel and unusual and in which it rejected the Fourth Circuit’s reliance on *Hart*.¹¹⁴ In reversing the Fourth Circuit, the Supreme Court stated that:

[T]he Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases “by virtue of their commissions, not their competence.” And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from [*Rummel*]. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.¹¹⁵

Similarly, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Supreme Court admonished the Fifth Circuit for disregarding direct Supreme Court precedent in an arbitration case.¹¹⁶ The Court stated that, by affirming, it was not suggesting

that the Court of Appeals on its own authority should have taken the step of renouncing [the applicable Supreme Court precedent in the case]. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should

111. *Hutto v. Davis*, 454 U.S. 370, 374–75 (1982) (per curiam).

112. *Davis v. Zahradnick*, 432 F. Supp. 444, 449 (W.D. Va. 1977), *aff’d per curiam sub nom.*, *Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev’d sub nom.*, *Hutto*, 454 U.S. 370.

113. *See Davis*, 646 F.2d at 124.

114. *Hutto*, 454 U.S. at 372 (citing *Rummel v. Estelle*, 445 U.S. 263 (1980)).

115. *Id.* at 374–75.

116. *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989).

follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.¹¹⁷

The Court issued this admonishment even though it went on to overrule the applicable precedent in affirming the Fifth Circuit's decision.¹¹⁸

Although the *Roper* majority was silent as to whether the Missouri Supreme Court acted appropriately in reevaluating the *Stanford* decision, four dissenting Justices admonished the Missouri Supreme Court for undermining precedent.¹¹⁹ In her dissent, Justice O'Connor took "issue with the Court's failure to reprove, or even to acknowledge, the [lower court's] unabashed refusal to follow . . . *Stanford*."¹²⁰ Justice O'Connor viewed the Missouri court's action as "clear error" because it is only the U.S. Supreme Court's prerogative to overrule its precedents.¹²¹ According to her, "The Eighth Amendment provides no exception to this rule."¹²² Instead, predictability and uniformity are especially desirable in this context.¹²³ Similarly, the dissenting coalition of Justices Scalia, Thomas, and Chief Justice Rehnquist reproofed the majority not only for its holding in *Roper*, but also for its failure to admonish the Missouri Supreme Court for its "flagrant disregard" of Supreme Court precedent.¹²⁴ The dissenters asserted that the Court's silence on this matter was in fact approval of the state court's rejection of precedent.¹²⁵ While the dissenters were sympathetic toward the hardship of applying Supreme Court precedent in this area,¹²⁶ they concluded that ignoring Supreme Court precedent "is no way to run a legal system."¹²⁷ Allowing lower courts to ignore precedent would leave the Supreme Court's decisions

117. *Id.*

118. *See id.* at 484–86.

119. *See Roper v. Simmons*, 543 U.S. 551, 593–94 (O'Connor, J., dissenting); *id.* at 628–30 (Scalia, J., dissenting).

120. *Id.* at 593–94 (O'Connor, J., dissenting).

121. *Id.*

122. *Id.*

123. *Id.* Justice O'Connor failed to clearly state why predictability and uniformity are especially desirable in the context of Eighth Amendment death penalty jurisprudence, except to note that "[b]y affirming the lower court's judgment without so much as a slap on the hand, [the majority's opinion in *Roper*] threatens to invite frequent and disruptive reassessments of [the Supreme Court's] Eighth Amendment precedents." *Id.*

124. *Id.* at 629–30 (Scalia, J., dissenting).

125. *Id.* at 629.

126. *See id.* ("One must admit that the Missouri Supreme Court's action, and this Court's indulgent reaction, are, in a way, understandable.")

127. *Id.*

without force, which would result in arbitrary and chaotic jurisprudence.¹²⁸

Although it is difficult to take lessons from the Supreme Court *sub silentio*, the Supreme Court's failure to reprimand the Missouri Supreme Court could be interpreted as approval of the Missouri Supreme Court's reassessment of the evolving standards of decency. Indeed, the coalition of dissenters in *Roper* stated that the majority of the Court had done just that.¹²⁹ Another possible explanation for the Supreme Court's silence is that the Justices who constituted the majority in *Roper* could not agree on the matter. Perhaps to marshal the Court on the issue of the juvenile death penalty, the majority bloc had to avoid the question of what role precedent plays in Eighth Amendment death penalty jurisprudence because not all of the Justices in the majority shared the same view on the matter. Finally, there is another possibility of why the majority was silent on the issue: judicial restraint. The Court did not need to decide whether the Missouri Supreme Court properly reassessed the evolving standards of decency in this case.

V. APPLYING THE EVOLVING STANDARDS OF DECENCY TEST IN THE LOWER COURTS

While the *Simmons* court concluded that lower courts should reassess the evolving standards of decency anew in Eighth Amendment death penalty cases, most scholars accept that lower courts are bound to follow Supreme Court outcomes as precedent in most cases.¹³⁰ Eighth Amendment death penalty cases, however, present a unique question because Eighth Amendment constitutionality is based on the evolving standards of decency and because the Eighth Amendment is construed more broadly in death penalty cases.¹³¹ As the *Simmons* court explained, because constitutionality depends on these evolving standards, the set of practices permissible under the Eighth Amendment may very well always be changing.¹³² While no other area of law contains such a

128. *See id.* at 630.

129. *See id.* at 629 (“Today, however, the Court silently approves a state-court decision that blatantly rejected controlling precedent.”).

130. *See, e.g.*, Caminker, *supra* note 6, at 820; Cooper, *supra* note 22, at 402 n.6. *But see* Paulsen, *supra* note 28, at 82–83 (arguing that the Constitution does not require lower courts to follow the decisions of the Supreme Court but only requires lower courts to uphold the law as they interpret it).

131. *See* *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *supra* Part III.

132. *See* *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 406 (Mo. 2003), *aff'd*, 543 U.S. 551 (2005).

flexible, ever-changing standard, the questions of whether an officer is entitled to qualified immunity or whether a person has a reasonable expectation of privacy in the Fourth Amendment context might be the best analogies.

In the qualified immunity context, a law enforcement officer is entitled to immunity if his conduct does “not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’”¹³³ Because the Court is constantly interpreting the Constitution, this standard—like the standard under the evolving standards of decency analysis—is always changing. Analogizing the qualified immunity analysis to an evolving standards of decency analysis breaks down, however, because the question in the qualified immunity context is whether a reasonable officer would know whether a practice is unconstitutional under the outcomes of relevant Supreme Court precedents. Thus, the officer can clearly rely on the outcomes of precedents in this context. In contrast, in the evolving standards of decency context, the question is simply whether a practice is currently unconstitutional. Whether a practice is currently unconstitutional depends upon the surrounding circumstances, not solely upon Supreme Court precedent.

In the Fourth Amendment privacy context, the Supreme Court case of *Katz v. United States* sets forth a two-pronged test for determining whether government conduct constitutes a search.¹³⁴ “First, the government conduct must offend the citizen’s subjective manifestation of a privacy interest. Second, the privacy interest invaded must be one that society is prepared to accept as legitimate.”¹³⁵ One could compare the second prong of the *Katz* test to the evolving standards of decency analysis because, in theory, the second *Katz* prong evolves with society’s expectations of privacy. In Fourth Amendment search cases, however, courts spend little to no time examining society’s expectations of privacy.¹³⁶ This is in stark

133. See *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *Am. Civil Liberties Union of Md., Inc. v. Wicomico County*, 999 F.2d 780, 784 (4th Cir. 1993).

134. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see also STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 42 (7th ed., 2004) (explaining the application of the two-pronged *Katz* test).

135. SALTZBURG & CAPRA, *supra* note 134, at 42–43.

136. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (purporting to examine society’s expectations of privacy in determining whether the use of a thermal imaging device constituted a search, but failing to delve into any depth in examining society’s expectations by assessing, for example, what percentage of the population possessed such a device or how many such devices had been sold).

contrast to the Court's indepth surveys of state legislation, jury verdicts, the opinions of organizations, and the laws of foreign countries in its Eighth Amendment analyses of what constitutes cruel and unusual punishment.¹³⁷ It seems, then, that courts view the evolving nature of society's expectations of privacy with less gravitas than the evolving nature of the standards of decency. In this respect, the Fourth Amendment analogy is inadequate to an examination of how precedent should be applied in the Eighth Amendment context.

Under the evolving standards of decency analysis, unconstitutional practices do not generally become constitutional as time progresses, but constitutional practices may come closer to being considered unconstitutional cruel and unusual punishment as society's standards of decency evolve.¹³⁸ In this way, the Cruel and Unusual Punishments Clause has been considered to be a "one-way ratchet."¹³⁹ In oral arguments in the *Atkins* case, Justice Scalia indicated that an Eighth Amendment consensus must be declared only with great caution because "once [the Court has] decided that you cannot legislate the execution of [a particular group of people], there can't be any legislation that enables us to go back."¹⁴⁰ Another Justice¹⁴¹ followed up by stating that:

Logically it has to be a one-way ratchet. Logically it has to be because a consensus cannot be manifested. States cannot constitutionally pass any laws allowing the execution of the mentally retarded once [the Court determines] it's unconstitutional. That is the end of it. [The Court] will never be able to go back because there will never be any legislation that can reflect a changed consensus.¹⁴²

This assertion appears valid both because Supreme Court precedent is binding on state legislatures and because the Court imposes its own independent judgment as to the current state of the evolving

137. *See supra* text accompanying notes 36–38 and 43–62.

138. *See generally* Transcript of Oral Argument at 10, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/00-8452.pdf (noting that the Eighth Amendment is a "one-way ratchet").

139. *Id.*

140. *Id.* at 9.

141. The identity of the Justice who made this statement is unknown because the identities of the inquiring Justices are not recorded and the responding attorney did not answer the Justice by name. *See id.*

142. *Id.* at 10.

standards of decency.¹⁴³ This does not mean, however, that lower courts are precluded from reassessing the current standards of decency anew in each of their Eighth Amendment cases. Despite Supreme Court precedent condoning punishment methods, state legislatures are still free to ban punishments that they deem cruel or unusual.¹⁴⁴ Lower courts can interpret these state actions as rendering a punishment unconstitutional even though the Supreme Court found it constitutional some years before. It would be difficult, however, for lower courts to allow a punishment that the U.S. Supreme Court has previously found unconstitutional. Theoretically, it seems that a lower court could declare a practice that has been deemed cruel and unusual no longer violative of the Eighth Amendment because there could be increased acceptance of the practice among professional organizations and in the international community. This scenario is unlikely, however, because the Supreme Court has determined that the actions of state legislatures are the most important indicia of a consensus.¹⁴⁵ Without Article III powers, state legislatures cannot utilize a punishment that has been deemed unconstitutional. Absent this evidence, lower courts cannot find objective indicia that the practice is generally accepted among the states.

While only changing in one direction, the standards of decency are always in flux. Even Justice Scalia, in arguing that the Missouri Supreme Court acted inappropriately in *Simmons*, conceded that Supreme Court Eighth Amendment precedents are “nothing more than a snapshot of American public opinion at a particular point in

143. See *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (“We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”). Inherent in the Court imposing its own independent judgment is the possibility of a change in judgment when new Justices join the Court or when some Justices, such as Justice Thomas, place less value on the importance of precedent. See KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 281–82 (2004) (stating that Justice Thomas “is the most willing of all his colleagues to overrule precedent” and quoting Justice Scalia as stating that Justice Thomas “does not believe in *stare decisis*, period” and that “[i]f a constitutional line of authority is wrong, he would say let’s get it right”); Douglas T. Kendall, *A Big Question About Clarence Thomas*, WASH. POST, Oct. 14, 2004, at A31 (same).

144. For example, the states of Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin, as well as the District of Columbia, do not employ the death penalty even though the U.S. Supreme Court has determined that the death penalty is, in general, constitutional. See Death Penalty Information Center, *State by State Information*, <http://www.deathpenaltyinfo.org/state/> (last visited February 12, 2007).

145. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

time.”¹⁴⁶ Both *Atkins* and *Roper* are good examples of the notion that such a “snapshot” may not be a fair interpretation of society’s standards when the next case comes along in a few years. In *Atkins*, the Supreme Court found that while executing handicapped persons was constitutional when *Penry* was decided in 1989, by 2002 standards had evolved such that the practice had become unconstitutional.¹⁴⁷ Since the time *Penry* had been decided, sixteen more states had banned the practice, three additional state legislatures had passed bills banning the practice, and no states that had previously banned the practice had adopted it.¹⁴⁸ Similarly, in *Roper*, the Court found that although executing juveniles was previously constitutional, by 2005 it had become unconstitutional.¹⁴⁹ Since the time *Stanford* had been decided, five more states had banned the execution of juveniles.¹⁵⁰

To reflect the ever-changing nature of the evolving standards of decency, as well as the Court’s unique treatment of death penalty cases, lower courts should apply Supreme Court rationale as precedent instead of Supreme Court outcomes in Eighth Amendment death penalty cases.¹⁵¹ In reassessing the constitutionality of a practice under the Eighth Amendment, a lower court would not be completely disregarding Supreme Court precedent as the dissenters in *Roper* and *Simmons* argue. Instead, the lower court would be applying the framework of the Supreme Court precedent, but acknowledging that the outcome of that case is not binding in the new case. This is because the outcome of the Supreme Court precedent is easily distinguishable from the case before the lower court for the simple reason that the external facts of the cases—the number of states that have banned the punishment, how often juries impose the punishment, and the international community’s and professional organizations’ opinions of the practice¹⁵²—differ. The Supreme Court case was decided earlier, so the facts the Supreme Court took into account may differ from the facts before the lower court in the new

146. *Roper*, 543 U.S. at 629 (Scalia, J., dissenting).

147. *See Atkins*, 536 U.S. at 331.

148. *Id.* at 314–15.

149. *See Roper*, 543 U.S. at 574–75 (supplanting prior Eighth Amendment jurisprudence that permitted juvenile executions).

150. *Id.* at 565.

151. The notion of charging lower courts with reassessing the evolving standards of decency raises the question of whether the state of the prevailing standards of decency should be a determination left to the jury. Such a question requires further analysis and will be left for another day.

152. *See supra* text accompanying notes 36–64.

case. In *Simmons*, for example, the facts before the Missouri Supreme Court differed from those that were before the Supreme Court in *Stanford*: five additional states had banned the practice of executing juvenile offenders in the fifteen years intervening between the *Stanford* and *Simmons* decisions.¹⁵³ The *Roper* Court found that this change in facts was significant under the Supreme Court's evolving standards of decency jurisprudence.¹⁵⁴ Additionally, after *Stanford*, numerous organizations that had previously remained silent on the issue of the juvenile death penalty began calling for an end to the practice.¹⁵⁵ This, too, provided a change in the external facts such that *Simmons* could easily be distinguished from *Stanford*.

Distinguishing cases on the facts from previously decided Supreme Court cases is not unique in lower court jurisprudence. In *United States ex rel. Chandler v. Cook County*,¹⁵⁶ for example, the Seventh Circuit distinguished the Supreme Court case of *Vermont Agency of Natural Resources v. United States ex rel. Stevens*¹⁵⁷—which had previously held that a state may not be found liable under the False Claims Act¹⁵⁸—from the case before it and held that counties may be liable under the Act.¹⁵⁹ The Supreme Court affirmed the circuit court's decision, holding that the circuit court properly distinguished *Stevens*.¹⁶⁰ Numerous such distinctions are made by lower courts on a frequent basis and are subsequently cited with approval by the Supreme Court.¹⁶¹

Distinguishing on the basis of external facts, rather than facts central to the particular case at hand, however, is not a common practice because there are few contexts in which such outside facts are as relevant as in Eighth Amendment jurisprudence. Perhaps the best analogy that can be drawn is from the area of eminent domain. In this context, a “taking” requires the government to pay just

153. See *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003), *aff'd*, 543 U.S. 551 (2005).

154. See *Roper*, 543 U.S. at 565–66 (explaining that although the change in facts between the Supreme Court decisions in *Penry* and *Atkins* was more dramatic, the change in facts between *Stanford* and *Roper*—the name of the *Simmons* case when it was appealed to the Supreme Court—was nevertheless significant).

155. See *Simmons*, 112 S.W.3d at 410.

156. 277 F.3d 969 (7th Cir. 2002), *aff'd*, 538 U.S. 119 (2003).

157. 529 U.S. 765 (2000).

158. *Id.* at 788.

159. See *Chandler*, 277 F.3d at 40–41.

160. *Chandler*, 538 U.S. at 124–25.

161. See, e.g., *Tahoe Sierra Reservation Council v. Tahoe Reg'l Planning Agency*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

compensation.¹⁶² The appropriate level of compensation is determined by the fair market value of the property at the time of the taking.¹⁶³ If a parcel of land is valued at \$10,000 in previous litigation, however, a lower court is not bound by this value in determining how much the land is worth in the subsequent takings litigation.¹⁶⁴ Although a court has reached a determination that the land valued \$10,000 in the prior litigation, during the intervening time period external facts such as the state of the real estate market and the growth of industry surrounding the property may have altered the fair market value of the land. This change in external facts in the eminent domain context is similar to the change of additional states adopting legislation banning a punishment in the Eighth Amendment death penalty context.¹⁶⁵ In both instances, lower courts should not be bound by the results reached by their superior courts when the circumstances surrounding the case—the external facts—have changed.

This argument that lower courts would not be disregarding Supreme Court precedent, but would instead be reassessing the evolving standards of decency in factually distinct cases within the Supreme Court's framework, is buttressed by the Court's language in its Eighth Amendment death penalty jurisprudence.¹⁶⁶ Since it

162. See generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 497–526 (2001) (outlining the law regarding takings under the Fifth Amendment of the U.S. Constitution).

163. See Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984) (citing United States v. 564.54 Acres of Land, 441 U.S. 506, 512 (1979)).

164. See, e.g., Comm'r of Transp. v. Schuchmann, No. CV0200802555, 2004 WL 113497, at *2 (Conn. Super. Ct. Jan. 5, 2004) (determining that while the land was previously valued by the court at \$12.50 per square foot, “[c]onsidering the passage of time since that determination,” the land should now be valued at \$13.00 per square foot).

165. See *supra* notes 36–38 and accompanying text.

166. But the retroactivity analyses of lower courts do not support this proposition. In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court's seminal retroactivity case, the Court held that generally “new constitutional rules of criminal procedure” will not be applied retroactively to cases that have become final before the new rules are announced. *Id.* at 310. The Court explained that “a case announces a new rule when it breaks new ground or imposes a new obligation on the [government]. . . . [A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.” *Id.* at 301 (citations omitted). The Court stated that there are two exceptions to this general rule precluding retroactive application of new rules:

First, a new rule should be applied retroactively if it places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” Second, a new rule should be applied retroactively if it requires the observance of “those procedures that . . . are ‘implicit in the concept of ordered liberty.’ ”

Id. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 693 (1975)) (citations omitted). When the Court does not announce a new rule, but instead its holding is

promulgated its evolving standards of decency test in *Trop v. Dulles*, the Court has avoided explicitly overruling its prior Eighth Amendment death penalty cases.¹⁶⁷ Instead, the Court has reassessed similar cases in light of the current standards of decency.¹⁶⁸ In *Roper*, for example, the Court stated that the considerations that the Court took into account in its opinion “mean *Stanford v. Kentucky* should be deemed no longer controlling on this issue. To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, it suffices to note that those indicia have changed.”¹⁶⁹ This is in stark contrast to the Court’s decisions in other areas of law. In *Lawrence v. Texas*, for example, the Court was clear in overruling its prior decision in *Bowers v. Hardwick*, which addressed a similar matter.¹⁷⁰ The Court stated that “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”¹⁷¹ The Court has explicitly overruled its prior holdings in numerous other non-death penalty cases.¹⁷² That it has avoided doing so in the Eighth Amendment death penalty context is evidence

dictated by precedent, the holding is retroactive. *See id.* Although little has been said on whether the *Roper* decision should be applied retroactively, there is good reason to believe that if *Atkins* applies retroactively, then so should *Roper*. Lower courts and scholars have assumed, with little exception, that indeed *Atkins* should be applied retroactively. *See, e.g.*, Timothy S. Hall, *Mental Status and Criminal Culpability After Atkins v. Virginia*, 29 U. DAYTON L. REV. 355, 368–69 (2004); *Leading Cases, Constitutional Law*, 118 HARV. L. REV. 324, 329–33 (2004); Lisa Odom, Note, *Jumping on the Bandwagon: The United States Supreme Court Prohibits the Execution of Mentally Retarded Persons in Atkins v. Virginia*, 31 PEPP. L. REV. 875, 908–10 (2004). The stated reasoning for this is that the *Atkins* holding falls within the first *Teague* exception. *See Hall, supra*, at 368–69 (indicating that lower courts view *Atkins* as promulgating a new rule).

167. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958); *see also*, *Roper v. Simmons*, 543 U.S. 551 (2005) (failing to state that *Roper* overruled *Stanford*); *Atkins v. Virginia*, 536 U.S. 304 (2002) (failing to state that *Atkins* overruled *Penry*).

168. *See, e.g.*, *Atkins*, 536 U.S. at 314–16 (explaining that “[m]uch has changed” since the Court held that executing the mentally retarded was constitutional, and stating that “[t]he practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it”).

169. *Roper*, 543 U.S. at 574 (internal citations omitted).

170. *See Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which refused to find constitutional protection for a right to engage in private consensual homosexual activity).

171. *Id.* at 578.

172. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (“*Apprendi*’s reasoning is irreconcilable with *Walton*’s holding in this regard, and today we overrule *Walton* in relevant part.”); *United States v. Cotton*, 535 U.S. 625, 631 (2002) (“Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled.”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (“We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled.”).

that application of the evolving standards of decency test acknowledges that not all Eighth Amendment death penalty cases are exactly alike and thus can be permissibly distinguished by lower courts.

The *Roper* and *Simmons* dissenters' argument that allowing lower courts to "disregard" Supreme Court precedent is inconsistent with the rule of law and will lead to arbitrary and chaotic results,¹⁷³ while valid, does not justify according case outcomes in this area the weight of controlling authority. This contention seems to be Justice Scalia and his fellow dissenters' strongest argument against allowing lower courts to apply the evolving standards of decency test instead of the outcomes of previously decided Supreme Court cases in the death penalty context. After all, the *Roper* dissenters conceded that to allow lower courts to do this would be philosophically sound.¹⁷⁴ Their central criticism of the Missouri Supreme Court's action was that "[a]llowing lower courts to reinterpret the Eighth Amendment whenever they decide enough time has passed for a new snapshot leaves [the Supreme Court's] decisions without any force."¹⁷⁵ This criticism, however, fails to acknowledge that lower courts are still bound to follow the *reasoning* of the Supreme Court's decisions on the matter. Lower courts are not left with standardless discretion to rule on the Eighth Amendment death penalty issue as they see fit. Instead, they are confined to the indicia of consensus that the Supreme Court weighed in *Stanford*, *Atkins*, and other relevant Eighth Amendment death penalty cases. They are bound to carefully apply the evolving standards of decency test in conformity with Supreme Court precedent.

Leaving lower courts with a framework, not necessarily an outcome, is not new because rarely do cases address the same facts. In the First Amendment context, for example, a court must determine whether a speaker has directed his speech to incite imminent lawless danger and whether the speech is likely to produce that danger before it can determine whether the speaker's speech is protected under the

173. See, e.g., *Roper*, 543 U.S. at 594 (O'Connor, J., dissenting); *id.* at 629–30 (Scalia, J., dissenting); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 419–21 (Mo. 2003) (Price, J., dissenting), *aff'd*, 543 U.S. 551 (2005).

174. *Roper*, 543 U.S. at 629 (Scalia, J., dissenting) ("One must admit that the Missouri Supreme Court's action, and this Court's indulgent reaction, are, in a way, understandable. . . . However sound philosophically, this is no way to run a legal system. We must disregard the new reality that . . . our Eighth Amendment decisions . . . purport to be nothing more than a snapshot of American public opinion at a particular point in time . . .").

175. *Id.* at 630.

First Amendment.¹⁷⁶ This is a very fact-specific inquiry and lower courts are entrusted to carefully apply the test in each such case it faces. Similarly, when a court determines whether an individual has been denied his due process rights, rarely would a Supreme Court precedent be exactly on point. Instead, lower courts are left to apply Supreme Court rationale to determine whether the requirements of due process have been met.¹⁷⁷ While both of these examples require a court to decide based on unique facts that are at the heart of the case instead of on external facts as required in the Eighth Amendment context,¹⁷⁸ the concept is similar. Again, examples analogous to the Eighth Amendment context are difficult because of the rare evolving standards of decency test applied in this area. However, drawing on the eminent domain hypothetical,¹⁷⁹ an analogy can be made to applying a Supreme Court test to external facts to reach a conclusion instead of blindly following a Supreme Court result. For example, a court determining the proper compensation for a taking will still be bound by the Supreme Court dictate that just compensation is the fair market value of the property at the time of the taking.¹⁸⁰ The lower court will not be able to autonomously determine the value of the land but is instead bound by Supreme Court reasoning on the matter. Lower courts routinely and competently apply these constitutional tests and thus are equally capable of applying the evolving standards of decency test anew in each death penalty case that they confront.

Not only is this concept not new, but judges are indeed constitutionally required to declare a practice invalid once it has become unconstitutional.¹⁸¹ If judges were not allowed to apply the

176. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that the First Amendment does not protect speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

177. Cf. *Nebbia v. New York*, 291 U.S. 502, 510–11 (1934) (explaining that laws cannot be arbitrary or capricious).

178. See *supra* text accompanying notes 32–62, 152.

179. See *supra* text accompanying notes 162–65.

180. Cf. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984) (relying on *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979), which held that just compensation is the fair market value of the property on the date it is appropriated).

181. When sworn into office, federal judges are required to take the following oath:

I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.

28 U.S.C. § 453 (2000); see also Paulsen, *supra* note 28, at 82–83 (“The judge’s obligation is, by oath, to the Constitution, not to Supreme Court interpretations of the Constitution.

evolving standards of decency instead of Supreme Court outcomes, they would potentially be violating their oaths as they waited around for the Supreme Court to decide an Eighth Amendment death penalty case after the external facts had become such that a practice had become unconstitutional.¹⁸²

Even though lower courts are bound by the Supreme Court's evolving standards of decency reasoning in adjudicating their Eighth Amendment death penalty cases, there is still the concern that lower courts will routinely find sentences cruel and unusual even though the Supreme Court would not agree. This difficulty, however, does not dictate that Supreme Court outcomes should be considered precedent in this context instead of Supreme Court analysis. Such reasoning would ignore the inherently changing status of the Eighth Amendment and the broad construction applied to the Eighth Amendment in the death penalty context because death is different. This chaos among lower courts, however, is a valid concern and may be addressed in other ways. For example, the Supreme Court could clarify its objective test as to what is the standard of a consensus under the evolving standards of decency test.¹⁸³ For instance, the Court could state that a punishment is unconstitutional if eighteen death penalty states have adopted legislation banning it, or if eighteen states have either banned the practice or rarely use it.¹⁸⁴ Alternatively, the Court could state that a punishment is unconstitutional if, on average, two states have abandoned the practice per year for at least five years. Such clear statements from the Supreme Court seem unlikely in the near future, however.

Another possibility is that the Court could impart that lower courts are to overturn Supreme Court outcomes only if the external facts of the case—meaning the number of states that have adopted contrary legislation, how frequently the practice is actually used, and the like—have *significantly* changed since the last time the issue was addressed by the Supreme Court. This standard of significant change in the external facts of the case finds foundation in the *Roper* Court's statement that the Missouri Supreme Court reached the correct result because the change in external facts since *Stanford* had been decided

There is nothing morally disingenuous in taking the oath and disobeying 'controlling' precedent.').

182. Cf. Paulsen, *supra* note 28, at 82–86 (arguing that lower courts are not bound by precedent because lower court judges have taken oaths to follow the Constitution, not the Supreme Court).

183. See *supra* text accompanying notes 36–64.

184. But see *supra* note 63 and accompanying text.

was significant.¹⁸⁵ Further, requiring a significant quantum of change before lower courts can reassess the constitutionality of a punishment accords warranted credence to the Supreme Court's independent judgment by which lower courts, being bound by the Supreme Court's reasoning, are required to abide.¹⁸⁶ This standard of significant change would limit the potentially chaotic effect of lower courts being bound by only Supreme Court reasoning instead of Supreme Court outcomes in the Eighth Amendment death penalty context.¹⁸⁷

Even if such a standard were not adopted, however, allowing lower courts this power of interpreting vague constitutional tests is not unique. Lower courts are often forced to muddle through unclear Supreme Court precedents and at any one time there are often numerous federal circuits that are split on questions of constitutional law.¹⁸⁸ While such uncertainty is undesirable, it is all but unavoidable under our system of justice.¹⁸⁹ Lower courts should not be barred from administering justice simply because of this ambiguity in the law.

VI. ACHIEVING GREATER JUSTICE IN THE LOWER COURTS

Perhaps most importantly, allowing lower courts to reassess Eighth Amendment death penalty questions of cruel and unusual punishment in light of Supreme Court reasoning will afford justice to a greater number of defendants. Once the external facts have become such that a punishment is unconstitutional under the Eighth Amendment, defendants should not have to be subjected to the punishment simply because it has not yet been declared

185. See *Roper v. Simmons*, 543 U.S. 551, 565 (2005).

186. See *supra* note 143 and accompanying text.

187. Although a standard of significant change would not relieve lower courts from having to determine the current standards of decency in each case, it would slow the rate of change at which lower courts would declare practices unconstitutional and in this way limit any potential chaos that the dissenting Justices in *Roper* predicted.

188. See, e.g., *United States v. Scott*, 413 F.3d 839, 840 (8th Cir. 2005) (noting that there is a circuit split on whether auto theft qualifies for a crime of violence sentencing enhancement under the federal sentencing guidelines); *In re Foust*, 310 F.3d 849, 859 (5th Cir. 2002) (noting that the Supreme Court test for qualified immunity is "highly fact-dependent" and potentially difficult for "reasonable" law enforcement officers to apply); *Rodriguez Rodriguez v. Munoz Munoz*, 808 F.2d 138, 144 (1st Cir. 1986) ("Given these two lines of Supreme Court precedents, formulating the proper constitutional test for a discharge based on partisan political activity is a difficult, and vexed, task." (citation omitted)).

189. See Peter Margulies, *After Marek, the Deluge: Harmonizing the Interaction Under Rule 68 of Statutes That Do and Do Not Classify Attorneys' Fees as "Costs,"* 73 IOWA L. REV. 413, 427 (1988) (noting that "[s]ome uncertainty is unavoidable in all legitimate legal systems in which no party can rig procedures to ensure a favorable outcome").

unconstitutional by the Supreme Court. Because the Supreme Court is limited in the number of cases that it can address each year,¹⁹⁰ it is unlikely that the Supreme Court will have the opportunity to decide the case in a timely manner. Rather, a significant period of time will likely pass between the moment the practice becomes unconstitutional and the moment of Supreme Court adjudication.¹⁹¹ For example, before the Court granted certiorari in *Atkins v. Virginia*, it denied certiorari in numerous other cases involving the execution of mentally retarded persons, including denying petitions in 1990, 1992, 1993, 1995, and 1996.¹⁹² During this time period, states were increasingly enacting legislation prohibiting the execution of the mentally retarded.¹⁹³ Similarly, before the Court granted certiorari in

190. See *supra* notes 97–98 and accompanying text.

191. As previously discussed, defendants can likely take advantage of a later Supreme Court determination that a practice has become cruel and unusual on habeas, see *supra* note 166 (discussing retroactivity), but this still does not benefit as many defendants as would benefit if lower courts could reassess the evolving standards of decency in each new death penalty case that they confront.

192. See *Woods v. Johnson*, 519 U.S. 854 (1996); *Andrews v. Scott*, 513 U.S. 1114 (1995); *Mathenia v. Delo*, 507 U.S. 995 (1993); *Dixon v. Williams*, 506 U.S. 991 (1992); *Prejean v. Smith*, 494 U.S. 1090 (1990).

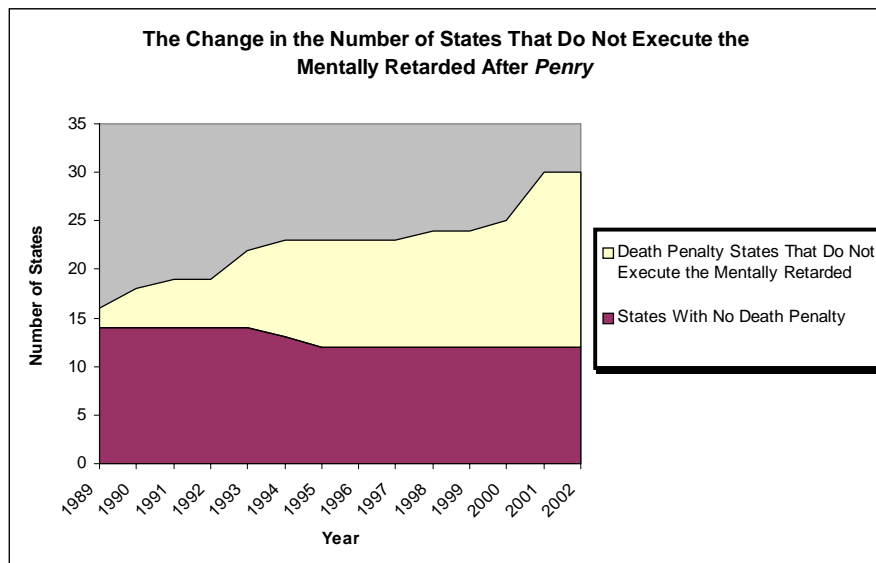
193. The chart depicted below graphs the number of states rejecting the execution of the mentally retarded and the number of states rejecting the death penalty in its entirety in the years between the *Penry* and *Atkins* decisions. The data for this chart was retrieved from *Roper v. Simmons*, 543 U.S. 551, 565 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313–16 (2002); AM. BAR ASS'N, JUVENILE JUSTICE CTR., CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY: EVOLVING STANDARDS OF DECENCY (2004), available at www.abanet.org/crimjust/juvjus/EvolvingStandards.pdf [hereinafter EVOLVING STANDARDS]; HOUSE RESEARCH ORG., TEX. HOUSE OF REPRESENTATIVES, FOCUS REPORT: SHOULD TEXAS BAN EXECUTION OF MENTALLY RETARDED OFFENDERS? (2001), available at www.hro.house.state.tx.us/focus/execute.pdf [hereinafter TEXAS REPORT].

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Roper v. Simmons, it denied certiorari in numerous other juvenile death penalty cases, including denying petitions on the issue in 1999, 2000, 2001, 2002, and 2003.¹⁹⁴ At the same time, states were increasingly rejecting the juvenile death penalty as an acceptable means of punishment.¹⁹⁵ However, if lower courts are empowered

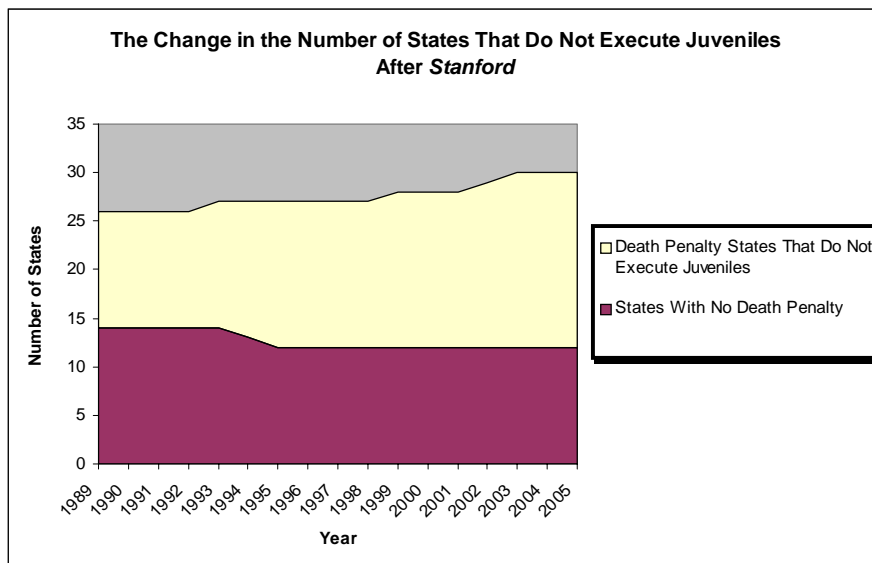


194. See *Hain v. Mullin*, 538 U.S. 957 (2003); *Patterson v. Texas*, 536 U.S. 984 (2002); *Beasley v. Johnson*, 532 U.S. 908 (2001); *Ex parte Pressley*, 531 U.S. 931 (2000); *Domingues v. Nevada*, 528 U.S. 963 (1999).

195. The chart depicted below graphs the number of states rejecting the juvenile death penalty and the number of states rejecting the death penalty in its entirety in the years intervening the *Stanford* and *Roper* decisions. The data for this chart was retrieved from *Roper*, 543 U.S. at 565; *Atkins*, 536 U.S. at 313–16; *EVOLVING STANDARDS*, *supra* note 193; *TEXAS REPORT*, *supra* note 193.

with the authority to reassess whether the evolving standards of decency dictate that the death penalty has become unconstitutional under certain circumstances, justice can be afforded to these defendants in a more timely manner.¹⁹⁶

Additionally, charging lower courts with reassessing these Eighth Amendment questions in light of Supreme Court reasoning would improve the quality of Supreme Court decisions and the Supreme Court's efficiency. While the Supreme Court has the authority to grant certiorari in any case it chooses, it is more likely to grant certiorari if lower courts are split on an issue.¹⁹⁷ If lower courts are



196. One might argue that the Court would certainly not deny a petition for certiorari from a defendant who was about to be executed even though the practice had become unconstitutional. Such a conjecture, however, is in direct conflict with Supreme Court statements that a denial of certiorari “carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review.” *Maryland v. Balt. Radio Show*, 338 U.S. 912, 919 (1950); *see also supra* note 99 and accompanying text.

197. SUP. CT. R. 10. Supreme Court Rule 10 provides that:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a

required to apply the Supreme Court's outcomes in evolving standards of decency death penalty cases instead of the Court's rationale, however, these lower court splits cannot come about.¹⁹⁸ This likely decreases the Supreme Court's interest in the cases,¹⁹⁹ and justice—if the evolving standards of decency have changed such that a previously constitutional practice has become unconstitutional—would not be attained for some time.

Even if the Supreme Court were to grant certiorari in an evolving standards of decency case despite the fact that lower courts did not disagree on the outcome (because they could not disagree due to any decision that Supreme Court outcomes in these types of cases were binding), the Supreme Court might suffer from the lack of arguments percolating among the circuits and state supreme courts. When a split exists among the circuits or state supreme courts, the Court is more assured that each side of the case before it will be well argued, and the Court benefits from the combined wisdom of all the courts below it. Surely, even if lower courts reach the same conclusion that the Supreme Court reached in a previous case, the courts' judges can file specially concurring opinions to express their disagreement with the outcome. However, lower court judges are less likely to clearly express this sentiment if they are bound to reach the same outcome that the Supreme Court reached several years before. Allowing lower courts to be bound by only Supreme Court reasoning in the evolving standards of decency death penalty context, then, would further the Court's own acumen and aid the Court to engage in its decisionmaking in a more educated and efficient manner. Without this benefit of percolation among the lower courts, the Supreme Court may be more limited in the arguments upon which it can draw

departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10(c).

198. *Cf. supra* text accompanying notes 139–50.

199. *But see* SUP. CT. R. 10(c) (stating that the Court may grant certiorari if “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by” the United States Supreme Court).

in determining the proper outcome of a case. This detracts from the process and quality of Supreme Court decisionmaking.

CONCLUSION

In most cases, Supreme Court precedent should be interpreted as the outcome of the relevant Supreme Court case, provided that the facts of the case are similar enough that the prior case is applicable. The context of the Eighth Amendment death penalty, however, differs from other areas of Supreme Court jurisprudence. The state of the law in this area is constantly changing because the Court has adopted an analysis that is dependent on external facts that generally change as time progresses. Due to this constant change in the law, the outcomes of Supreme Court cases on specific Eighth Amendment issues may quickly become outdated, causing precedent in this area of law to differ from precedent in other areas. Further, the Court has traditionally viewed the Eighth Amendment prohibition on cruel and unusual punishment more broadly in the death penalty context because “death is different.”²⁰⁰ This fast-paced nature of the Eighth Amendment and broad construction of its prohibition in the death penalty context should be acknowledged and addressed by allowing lower courts to apply Supreme Court rationale instead of Supreme Court outcomes in this context. This will afford greater and quicker justice to death penalty defendants who eagerly await the Supreme Court’s grant of certiorari in Eighth Amendment death penalty cases. If lower courts instead blindly apply stale Supreme Court outcomes, there is a good chance that particular individuals will continue to be executed even though the evolving standards of decency have reached a point such that the particular practice is no longer constitutional. This injustice will result simply because the Supreme Court has not yet gotten around to granting certiorari and issuing an opinion on the issue since the time the practice had become unconstitutional.

200. *See supra* Part III.