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The Evolution of Justice Kennedy's Eighth Amendment Jurisprudence on Categorical Bars in Capital Cases

Linda E. Carter*

I. INTRODUCTION

Death penalty cases are inevitably controversial. The crimes committed are shocking and the public reaction is strong. On a legal level, the cases are also difficult. They cause stress on the judicial system and raise complex constitutional issues. With such strong emotional content and complicated legal issues, it is important to have consistency of approach and predictability of analysis from the courts. Justice Kennedy has become a leader in the consistent application of Eighth Amendment analysis to some of the most challenging issues in the death penalty field. This Article examines Justice Kennedy's jurisprudence and leadership in cases involving "categorical bars" to the death penalty.

When Justice Kennedy was appointed to the United States Supreme Court in 1988, the Court had already decided *Furman v. Georgia* (1972),¹ *Gregg v. Georgia* (1976),² and *Woodson v. North Carolina* (1976).³ These three cases were the initial steps towards framing an approach to interpreting the Eighth Amendment in death penalty cases. In *Furman*, the Court invalidated death penalty statutes primarily for arbitrariness in imposing death sentences.⁴ In *Gregg*, the Court upheld three death penalty statutes passed in response to *Furman*.⁵ In *Woodson*, the Court struck down mandatory death sentences.⁶ As a result of these cases, states established death penalty systems that narrowed those who were death eligible through aggravating circumstances and allowed for

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1. 408 U.S. 238 (1972).

2. 428 U.S. 153 (1976).

3. 428 U.S. 280 (1976); see also *Roberts v. Louisiana*, 428 U.S. 325 (1976) (decided at the same time and dealt with the same issue as *Woodson*).

4. 408 U.S. at 256–57 (Douglas, J., concurring).

5. *Gregg*, 428 U.S. at 207.

6. 428 U.S. at 305.

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individualized consideration through mitigating circumstances.⁷ Both narrowing and individualization were conceived as ways in which to eliminate the arbitrariness or unreliability in the decision on who would live and who would die.

However, the storm of death penalty cases was just beginning. Cases challenging many aspects of the death penalty have come before the Court each term. Issues arose, for example, regarding the vagueness of aggravating circumstances,⁸ preclusion of mitigating evidence,⁹ voir dire of capital jurors,¹⁰ racial impact of the death penalty,¹¹ admissibility of victim impact evidence,¹² and ineffective assistance of counsel.¹³ In each case, the Court faced the need to interpret the Eighth Amendment.

Among the cases coming before the Court were ones challenging whether certain crimes or certain classes of defendants could constitutionally be subject to the death penalty. These are the cases that involve “categorical bars.” For example, prior to Justice Kennedy’s appointment to the Court, the Court held that the death penalty could not be imposed for rape of an adult woman in *Coker v. Georgia* (1977).¹⁴ The Court also held that there was a categorical bar in certain felony-murder situations in which the defendant was not the actual killer in *Enmund v. Florida* (1982)¹⁵ and *Tison v. Arizona* (1987).¹⁶

In these early decisions, the Court began developing a two-prong test to evaluate when the death penalty was categorically barred for a particular crime or class of defendants. The Court refined this test into its current form in the course of various cases, including three important cases that came before the Court after Justice Kennedy was appointed.¹⁷ The test draws upon a basic proportionality principle in the Eighth Amendment as interpreted through “evolving standards of decency.”¹⁸ Evolving standards of decency is determined by assessing two prongs: (1) objective evidence of the values of contemporary society (often

7. LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW §§ 6.01, 6.07 (3d ed. 2012).

8. *Arave v. Creech*, 507 U.S. 463, 470 (1993); *Maynard v. Cartwright*, 486 U.S. 356, 360 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 423 (1980).

9. *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982); *Lockett v. Ohio*, 438 U.S. 586, 589 (1978).

10. *Morgan v. Illinois*, 504 U.S. 719, 721 (1992); *Wainwright v. Witt*, 469 U.S. 412, 414 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 513–14 (1968).

11. *McClesky v. Kemp*, 481 U.S. 279, 282–83 (1987).

12. *Payne v. Tennessee*, 501 U.S. 808, 811 (1991).

13. *Wiggins v. Smith*, 539 U.S. 510, 514 (2003); *Strickland v. Washington*, 466 U.S. 668, 671 (1984).

14. 433 U.S. 584, 592 (1977).

15. 458 U.S. 782, 788 (1982).

16. 481 U.S. 137, 149 (1987).

17. *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

18. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958).

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called national consensus) and (2) the Court's own judgment whether the punishment serves legitimate purposes of punishment.¹⁹

Justice Kennedy's leadership role in consistently applying the two-prong test in *Simmons* and *Kennedy* is especially notable for two reasons. First, the two-prong test has been under intense attack in dissenting opinions.²⁰ These attacks forced the majority to answer those arguments and to explain the application of the test in the current case. Secondly, categorical bars completely preclude the death penalty when they apply. This makes the cases even more controversial than many other aspects of the death penalty. The nature of the cases and the division on the Court have been challenging. Justice Kennedy's leading role in writing the majority opinions that apply the two-prong test has resulted in consistency and predictability in Eighth Amendment interpretation.²¹

In order to fully understand the significance of the categorical bar cases and Justice Kennedy's role, Part II provides background on death penalty proceedings in general. Part III explains the function of categorical bars. In Part IV, the background and analysis of the two-prong test for the constitutionality of categorical bars is developed. Part V explores the evolution of Justice Kennedy's position on the two-prong test and analyzes the significance of his leadership on this test and in these cases. Part VI concludes the Article with some final reflections.

II. GUILT AND PENALTY PHASES IN A CAPITAL TRIAL

To put categorical bars in perspective, it is helpful to understand how death penalty cases usually proceed. First, there must be a death-eligible crime and a death-eligible defendant.²² In most cases, the crime is murder in the first degree and the defendant is an adult who is within the group that is eligible for death.²³ Conviction of murder in the first degree, however, is insufficient to send the case to a jury for a decision on life or death.²⁴ Additionally, there must be a narrowing of those who are convicted of murder into a smaller group that become death eligible.²⁵ In most states, this narrowing function is accomplished through "aggravating circumstances."²⁶ Aggravating circumstances typically include double homicides; murder in the course of a serious felony, such as robbery,

19. See *Kennedy*, 554 U.S. at 421; *Atkins*, 536 U.S. at 312–13.

20. See *Kennedy*, 554 U.S. at 447–70 (Alito, J., dissenting); *Simmons*, 543 U.S. at 587–607 (O'Connor, J., dissenting); *id.* at 607–30 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 321–28 (Rehnquist, C.J., dissenting); *id.* at 337–51 (Scalia, J., dissenting).

21. See, e.g., *Simmons*, 543 U.S. 551; *Kennedy*, 554 U.S. 407.

22. CARTER ET AL., *supra* note 7, § 9.01.

23. See generally *id.*

24. See *id.* § 9.02.

25. *Id.*

26. *Id.*

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rape, or kidnapping; murder of a person with a particular status, such as a judge, witness, or prosecutor; and murder for financial gain.²⁷

If an aggravating circumstance is found, then the next step will be consideration of whether to impose life or death as the penalty.²⁸ At this point, additional aggravating evidence and mitigating evidence is presented to the jury.²⁹ Additional aggravating evidence often includes victim impact evidence and the criminal record of the defendant.³⁰ Mitigating evidence depends upon the individual on trial, but may include mental illness, drug or alcohol addiction, an abusive childhood, organic brain damage, and remorse.³¹ After all this evidence is admitted, the jury will be asked to render a decision on the penalty. The formula that is given to the jury varies from state to state.³² A typical one asks the jury to weigh aggravating circumstances and mitigating circumstances.³³ For example, in California, the jury is instructed “[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.”³⁴

The process of analyzing aggravating circumstances and mitigating circumstances is found in the procedures of every state that has the death penalty.³⁵ There are two trials: a guilt phase and a penalty phase.³⁶ In most states, the aggravating circumstances and the mitigating circumstances are proved in the penalty phase; the guilt phase is the trial on murder.³⁷ In some states, however, the aggravating circumstances are proved in the guilt phase after murder is established.³⁸ In those states, the penalty phase is the weighing or other process for determining death or life.³⁹

Both the procedures related to narrowing through aggravating circumstances and to the consideration of mitigation come from the interpretations of the Eighth Amendment by the U.S. Supreme Court. In *Furman*, the Court held that a death sentence cannot be arbitrary and must distinguish those who deserve to die from those who do not.⁴⁰ Aggravating circumstances were developed to meet this

27. *See id.*

28. *Id.* § 9.03.

29. *Id.*

30. *See id.* § 9.02.

31. *Id.* § 12.01.

32. *Id.* § 9.03.

33. *See id.*

34. CAL. JURY INSTRUCTIONS – CRIMINAL § 8.88 (2012).

35. *See* CARTER ET AL., *supra* note 7, § 9.02.

36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.*

40. *Furman v. Georgia*, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring).

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constitutional command.⁴¹ The admission of mitigating evidence comes from two major lines of cases. The first was the *Woodson* and *Roberts* line, which held mandatory death sentences unconstitutional.⁴² The unconstitutionality was in the failure to afford an individualized consideration of each defendant.⁴³ Individualized consideration was required by the Eighth Amendment to ensure a nonarbitrary, reliable decision on death or life.⁴⁴ The second line of cases began with *Lockett v. Ohio*.⁴⁵ In *Lockett*, the Court established the principle that the Eighth Amendment requires that a defendant have the opportunity to present any evidence that is relevant to mitigation of the penalty.⁴⁶ In *Lockett*, Ohio law precluded the state court from considering Lockett's character, youth, lack of a record, and minor role in the crime.⁴⁷ The Supreme Court viewed all of the evidence as mitigating and, consequently, constitutionally required to be admitted and considered.⁴⁸ In subsequent cases, the Court applied the basic *Lockett* principle to other proffered mitigating evidence.⁴⁹

The primary restraint or variation on the open-ended approach to mitigation occurred in decisions of the Court on the sentencing formula. The Court found constitutional a wide range of different jury instructions. For instance, instructions weighted towards life are constitutional, such as instructing a jury that they may only impose death if they find that aggravating circumstances outweigh mitigating circumstances and, even then, may still impose life.⁵⁰ Instructions weighted towards death, even with a mandatory aspect, are also constitutional (for example, an instruction that the jury must impose death unless there are sufficient mitigating circumstances to outweigh aggravating

41. See *Gregg v. Georgia*, 428 U.S. 153, 196–97 (1976) (detailing Georgia's post-*Furman* use of aggravating factors); *Proffitt v. Florida*, 428 U.S. 242, 247–51 (1976) (detailing Florida's post-*Furman* statute); *Jurek v. Texas*, 428 U.S. 262, 268–69 (1976) (detailing Texas's post-*Furman* statute).

42. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

43. See *Woodson*, 428 U.S. 280; *Roberts*, 428 U.S. 325.

44. See *Woodson*, 428 U.S. at 305 (“Because of that qualitative difference [between the death penalty and a non-death punishment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

45. 438 U.S. 586 (1978).

46. *Id.* at 608.

47. See *id.* at 597.

48. See *id.* at 608–09.

49. *Johnson v. Texas*, 509 U.S. 350, 361 (1993); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982). The only case where the Court noted that evidence was likely irrelevant was in *Franklin v. Lynaugh*, where the Court held that “residual doubt” was not constitutionally mandated mitigation. 487 U.S. 164, 172 (1988).

50. For example, in Virginia: “If you find from the evidence that the Commonwealth has proved that [aggravating] circumstance beyond a reasonable doubt, then you may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at [a lesser sentence].” See CARTER ET AL., *supra* note 7, § 7.03 n.19 (quoting VIRGINIA MODEL JURY INSTRUCTIONS – CRIMINAL P33.125 (1998 Replacement Edition)).

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circumstances).⁵¹ Even the Texas system of imposing death if the jury answered three questions affirmatively was held to be constitutional.⁵² In each case, the touchstone was whether the *Woodson/Lockett* principle was implemented.⁵³ If the jury had a meaningful way in which to consider the mitigating evidence, then the state was free to determine *how* they used the evidence.⁵⁴

III. THE ROLE OF CATEGORICAL BARS

How do categorical bars fit into the death penalty proceedings? A categorical bar is a type of crime or a class of individuals that are not death eligible. The bar preempts seeking the death penalty. Without the death penalty as an option, the proceedings in a typical trial, described in the preceding section, would stop after the conviction for murder. There would be no aggravating circumstances, mitigating circumstances, or decision on death or life. The maximum sentence would be life without parole. The categorical bar is in contrast to mitigating evidence, which may convince a jury not to impose a death penalty, but does not completely preclude it. Most of the categorical bars that exist today were, at an earlier point in time, grounds for mitigation.⁵⁵

51. For example, in *Kansas*: “If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death” *Kansas v. Marsh*, 548 U.S. 163, 166 (2006) (finding this formulation constitutional); *see also* *Boyde v. California*, 494 U.S. 370, 373 n.1 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299, 302 (1990) (upholding similar statutes).

52. *Jurek v. Texas*, 428 U.S. 262 (1976). In *Jurek v. Texas*, the questions were:

- (1) [W]hether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. at 269 (citing Texas’s capital punishment statute) (internal quotation marks omitted). The instructions in Texas have since been amended to require answers to only two questions and has now added an open-ended question regarding the propriety of the death penalty. *See* TEX. CODE CRIM. PROC. ANN. art. § 37.072 (West 2012). The latter allows the jury to impose life despite answering the questions affirmatively. The statute reads:

- (e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Id. (emphasis added).

53. *See Johnson*, 509 U.S. at 361; *Skipper*, 476 U.S. at 4; *Eddings*, 455 U.S. at 105.

54. *See Johnson*, 509 U.S. at 372–73 (Scalia, J., concurring).

55. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 337–38 (1989) (“A number of States explicitly mention ‘mental defect’ in connection with such a mitigating circumstance. . . . [T]he sentencing body must be allowed

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To date, the U.S. Supreme Court has held that the death penalty is categorically barred in five significant situations.⁵⁶ In two of the cases, the Court barred the death penalty for particular crimes.⁵⁷ In the other cases, the Court held that the death penalty was precluded for particular classes of individuals.⁵⁸ The first case that came before the Court was *Coker v. Georgia* in 1977.⁵⁹ The Court held that the death penalty could not be imposed for the crime of rape of an adult woman.⁶⁰ In *Enmund v. Florida*⁶¹ and *Tison v. Arizona*,⁶² the Court held that certain accomplices to felony-murder killings are a class of individuals exempt from the death penalty.⁶³ In order to be death eligible, an accomplice who does not kill must either intend that a killing occur, attempt to kill, or must be a major participant who acts with reckless disregard of human life.⁶⁴ *Enmund*, the getaway car driver in a robbery, was not death eligible because he did not have the requisite intent, nor was he a major participant in the crime.⁶⁵ The next case before the Court was *Atkins v. Virginia* in 2002.⁶⁶ In *Atkins*, the Court held the death penalty unconstitutional for those who are mentally retarded.⁶⁷ *Roper v. Simmons* followed three years later in 2005, holding that the death penalty was

to consider mental retardation as a mitigating circumstance in making the individualized determination whether death is the appropriate punishment in a particular case.”), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

56. *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (holding the crime of rape of a child to not be death eligible); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (crimes committed by individuals under the age of eighteen are not death eligible); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (crimes committed by mentally retarded individuals are not death eligible); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (individual convicted of felony murder who does not intend to kill, is not present at the time of the killing, and is not a major participant in the underlying crime is not death eligible); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding the crime of rape of an adult to not be death eligible); *Hooks v. Georgia*, 433 U.S. 917 (1977) (holding the crime of robbery where no death results to not be death eligible). Additionally, the Court has held that the addition of a kidnapping conviction to a rape conviction does not make an offender death eligible. *Eberheart v. Georgia*, 433 U.S. 917 (1977) (companion case to *Coker*).

57. *Kennedy*, 554 U.S. at 446–47 (rape of a child); *Coker*, 433 U.S. at 592 (rape of an adult).

58. *Simmons*, 543 U.S. at 578–79 (crimes committed by individuals under the age of eighteen); *Atkins*, 536 U.S. at 321 (crimes committed by mentally retarded individuals); *Enmund*, 458 U.S. at 801 (individual convicted of felony murder who does not intend to kill, is not present at the time of the killing, and is not a major participant in the underlying crime). Compare *Enmund*, 458 U.S. 782, with *Tison*, 481 U.S. at 158 (finding death eligibility for individuals convicted of felony murder when their participation in the underlying crime is major and acts with a reckless indifference to human life).

59. 433 U.S. 584.

60. *Id.* at 592.

61. 458 U.S. 782.

62. 481 U.S. 137.

63. *Id.* at 158 (finding death eligibility for individuals convicted of felony murder when their participation in the underlying crime is major and acts with a reckless indifference to human life); *Enmund*, 458 U.S. at 801 (individual convicted of felony murder who does not intend to kill, is not present at the time of the killing, and is not a major participant in the underlying crime is not death eligible).

64. *Tison*, 481 U.S. at 158.

65. *Enmund*, 458 U.S. at 798.

66. 536 U.S. 304 (2002).

67. *Id.* at 321.

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unconstitutional for defendants who were juveniles (under eighteen) at the time of the crime.⁶⁸ The most recent and probably the most controversial death penalty case involving a categorical bar was *Kennedy v. Louisiana* in 2008.⁶⁹ In *Kennedy*, the Court struck down Louisiana’s law authorizing the death penalty for rape of a child.⁷⁰ The next question to consider is why the Constitution mandated that these categories of crimes or classes of individuals were exempt from the death penalty.

IV. THE TWO-PRONG TEST FOR THE CONSTITUTIONALITY
OF CATEGORICAL BARS

The Eighth Amendment of the Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁷¹ The phrase “cruel and unusual punishments”⁷² has been the source of most of the U.S. Supreme Court’s jurisprudence on the death penalty. Although an early case and some later cases invoked the Due Process Clause,⁷³ almost all case law developing constitutionally mandated procedures in capital cases has resulted from interpretations of the Eighth Amendment.

What does “cruel and unusual punishment” mean? The Court has found that the Amendment is not static and, instead, “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁷⁴ Specifically in the case of categorical bars, the Court has analyzed whether a particular penalty is disproportionate to the crime or for a class of persons.⁷⁵ A

68. 543 U.S. 551, 568 (2005).

69. 554 U.S. 407 (2008).

70. *See id.* at 413.

71. U.S. CONST. amend. VIII.

72. *Id.*

73. *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001); *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994); *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985); *Gardner v. Florida*, 430 U.S. 349, 351 (1977); *McGautha v. California*, 402 U.S. 183, 196 (1971).

74. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (internal quotation marks omitted); *see also* *Furman v. Georgia*, 408 U.S. 238, 242 (1972).

75. *Kennedy*, 554 U.S. at 419 (“Whether [the proportionality] requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that ‘currently prevail.’”); *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (“[W]e have established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.”) (quoting *Trop*, 356 U.S. at 100–01)); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense.”) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997–98 (1991)); *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (“[T]he Eighth Amendment is directed, in part, ‘against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.’”) (quoting *Weems v. United States*, 217 U.S. 349, 371 (1910) (internal quotation marks omitted)); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“[A] punishment is ‘excessive’ and unconstitutional if it . . . is grossly out of proportion to the severity of the crime.”) (citing *Gregg*, 428 U.S. 153).

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disproportionate sentence is excessive in violation of the Eighth Amendment. With evolving standards of decency as its touchstone, the Court had to establish how it would assess the proportionality of imposing the death penalty. In cases challenging the constitutionality of the death penalty itself and categorical bars to its imposition, the Court has consistently applied a two-prong test. The two-prong test examines whether a practice is (1) acceptable to contemporary society and (2) comports with the Court's own judgment on the constitutionality of the practice.⁷⁶ Over time, the Court has further refined each prong.

The Court has defined the acceptability to contemporary society in terms of a "national consensus."⁷⁷ To determine a national consensus, the Court has turned to legislative enactments and actual sentences imposed.⁷⁸ In addition, the Court has considered whether there is a trend and, if so, whether that trend has been consistent.⁷⁹ For example, in *Atkins*, the Court noted that, at the time of the decision, thirty out of fifty states prohibited the execution of those with low intellectual functioning (mentally retarded).⁸⁰ Only five individuals with IQs below seventy had been executed since the Court had last considered the issue in 1989 (and found it constitutional to execute the mentally retarded).⁸¹ Since that prior case, however, eighteen states had changed their laws to prohibit the execution of those with low intellectual functioning, and no state had changed its law to allow such executions.⁸² The consistency of this trend among states was an important factor to the Court in deciding that a national consensus now existed against the execution of the mentally retarded.⁸³

Similarly, by the time of *Roper v. Simmons* in 2005, thirty out of fifty states prohibited execution of those who were juveniles at the time of their crime.⁸⁴ In the ten years before *Simmons*, only three juveniles were executed, and since the Court had last considered the issue in 1989, only six juveniles had been executed.⁸⁵ Moreover, since 1989, five states no longer permitted the execution of juveniles.⁸⁶ Although the trend involved fewer states than in *Atkins*, the consistency was all in one direction, the same as in *Atkins*.⁸⁷

76. See *Kennedy*, 554 U.S. at 421; *Atkins*, 536 U.S. at 312.

77. See *Kennedy*, 554 U.S. at 421.

78. See *id.* ("In these cases the Court has been guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.'") (quoting *Simmons*, 543 U.S. at 563).

79. See *Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

80. *Id.* at 314–15.

81. *Id.* at 316.

82. *Id.* at 314–15.

83. *Id.* at 315.

84. 543 U.S. 551, 564 (2005).

85. *Id.* at 564–65.

86. *Id.*

87. *Id.* at 565.

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The second prong on the independent judgment of the Court on the constitutionality of the practice examines whether the practice serves a legitimate purpose of punishment and comports with the culpability of the offender.⁸⁸ In both *Atkins* and *Simmons*, the Court concluded that those with low intellectual functioning and those who were juveniles at the time of their crime are less culpable due to their status.⁸⁹ Furthermore, in each case, the Court analyzed whether executing members of that class of individuals furthered deterrence or retribution rationales and, in each case, found the rationale lacking.⁹⁰ These individuals were not those “most deserving of execution.”⁹¹ Although not central to the Court’s conclusion under this prong, the opinions also included the consistency of views of professional organizations (for example, the American Psychological Association and the American Association on Mental Retardation) and religious communities.⁹² These references were controversial for the dissenting justices. Even more controversial was the inclusion of references to the practices of other countries and the status of treaties.⁹³ For example, in *Simmons*, the Court noted that the United States was the only country in the world presently executing juveniles and that only the United States and Somalia were not parties to the Convention on the Rights of the Child.⁹⁴

The Court has applied the two-prong test in two other cases since *Atkins* and *Simmons*. In *Kennedy v. Louisiana*, the Court held that imposing the death penalty for rape of a child violated the Constitution.⁹⁵ In *Graham v. Florida*, a noncapital case, the Court found life without parole for juvenile offenders who had committed non-homicide crimes was unconstitutional.⁹⁶ The next section discusses *Kennedy* in more detail.

V. THE EVOLUTION OF JUSTICE KENNEDY’S ROLE IN CASES
OF CATEGORICAL BARS

Since joining the Court in 1988, Justice Kennedy has played an increasingly important role in Eighth Amendment cases. These cases begin with *Harmelin v.*

88. See *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008); *Atkins*, 536 U.S. at 312.

89. *Atkins*, 536 U.S. at 320; *Simmons*, 543 U.S. at 571.

90. *Atkins*, 536 U.S. at 319–20; *Simmons*, 543 U.S. at 572.

91. *Atkins*, 536 U.S. at 319; *Simmons*, 543 U.S. at 553 (quoting *Atkins*, 536 U.S. at 319) (internal quotations omitted).

92. *Atkins*, 536 U.S. at 316 n.21 (citing to the amici curiae briefs of organizations such as the American Psychological Association, American Association on Mental Retardation, European Union, U.S. Catholic Conference, in addition to representatives of various religious communities as additional evidence of a broader social and professional consensus); *Simmons*, 543 U.S. at 576 (citing to amici curiae briefs from organizations such as the European Union and the Human Rights Commission of the Bar of England and Wales).

93. See, e.g., *Atkins*, 536 U.S. at 325–26 (Rehnquist, C.J., dissenting).

94. 543 U.S. at 576.

95. 554 U.S. 407, 413 (2008).

96. 130 S. Ct. 2011, 2030 (2010).

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*Michigan*⁹⁷ in 1991 and continue with the recent cases of *Kennedy* and *Graham*.⁹⁸ Justice Kennedy's role evolved from joining the Court's opinion or authoring a concurring opinion, to writing the majority opinion for the Court.

Although *Harmelin* was not a capital case, the case provides significant background for death penalty cases that follow because a majority of the Justices clearly safeguard the interpretation that proportionality is part of the Eighth Amendment analysis.⁹⁹ In *Harmelin*, the state court had imposed a mandatory sentence of life without parole for possession of more than 650 grams (the actual amount was 672 grams) of cocaine.¹⁰⁰ Five Justices, including Justice Kennedy, upheld the constitutionality of the sentence, rejecting the application of an individualized consideration requirement from the line of capital cases.¹⁰¹ Justice Kennedy's concurrence, joined by two other Justices, was essential to the five-Justice majority.¹⁰² However, the three concurring Justices did not join Justice Scalia's section on divorcing proportionality from the constitutional analysis in noncapital cases.¹⁰³ This meant that there were seven Justices accepting proportionality as part of the meaning of the Eighth Amendment.¹⁰⁴

Even though he was relatively new to the Court, Justice Kennedy's concurring opinion was a clear declaration that proportionality was an Eighth Amendment concept.¹⁰⁵ While Justice Scalia accepted that the Eighth Amendment provided for a proportionality guarantee in capital cases,¹⁰⁶ Justice Kennedy took the broader position that precedent in capital cases led to the conclusion that there is a proportionality principle in the Eighth Amendment for even noncapital cases.¹⁰⁷ The significance of preserving this position is made clearer in Justice White's dissent, in which he points out that, if there is no proportionality principle in noncapital cases, then "much of this court's capital penalty jurisprudence will rest on quicksand."¹⁰⁸ Thus, while *Harmelin* is not a capital case, its alliance of Justices, with a strong position by Justice Kennedy,

97. 501 U.S. 957 (1991).

98. *Graham*, 130 S. Ct. 2011; *Kennedy*, 554 U.S. 407.

99. 501 U.S. at 959–61.

100. *Id.* at 959.

101. *Id.* at 996 (Kennedy, J., concurring).

102. *Id.*

103. *Id.* at 994–96. Only Chief Justice Rehnquist joined Justice Scalia in this part of the opinion. *Id.* at 961.

104. The four dissenting Justices all agreed with Justice Kennedy that there is a "proportionality component" to the Eighth Amendment. *Id.* at 1013, 1027 (White, J., dissenting) ("Not only is it undeniable that our cases have construed the Eighth Amendment to embody a proportionality component, but it is also evident that none of the Court's cases suggest that such a construction is impermissible.").

105. *See id.* at 997–1001.

106. *Id.* at 994.

107. *Id.* at 997 ("The Eighth Amendment proportionality principle also applies to noncapital sentences.").

108. *Id.* at 1018.

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firmly recognized a proportionality principle in the Eighth Amendment.¹⁰⁹ This unequivocal acceptance of proportionality also carries great importance for preserving this principle in capital cases. In fact, in the majority opinion in *Atkins*, Justice Stevens cited Justice Kennedy's *Harmelin* concurrence for the proportionality principle.¹¹⁰

After *Harmelin*, three death penalty cases came before the Court that required a proportionality analysis.¹¹¹ Justice Kennedy's role evolved from joining the majority opinion in the first case to authoring the majority opinions in the second and third cases.¹¹² The first of the cases was *Atkins* in 2002.¹¹³ Justice Kennedy was part of a six-Justice majority in an opinion authored by Justice Stevens.¹¹⁴ As noted earlier, the Court held that the death penalty was unconstitutional if the defendant was of a demonstrated low-intellectual functioning (at a particular level of mental retardation).¹¹⁵ The majority applied the two-prong test, finding that both the national consensus and the Court's own judgment led to the conclusion that executions of members of this class of individuals is unconstitutional.¹¹⁶ Although only three Justices dissented, there were two dissenting opinions.¹¹⁷ The dissenting opinions are important to understanding the intensity of the opposition to aspects of the two-prong test. Both Chief Justice Rehnquist and Justice Scalia argued that the only factors that should be assessed are legislative enactments and jury sentencings.¹¹⁸ They further contended that the majority misapplied those factors in the case at hand.¹¹⁹ Justice Scalia specifically rejected the consideration of the consistency of the trend in state legislative changes.¹²⁰ Both Chief Justice Rehnquist and Justice Scalia especially objected to the Court's references to professional and religious organizations, opinion polls, and international views.¹²¹ Perhaps Justice Scalia's strongest argument in opposition, however, was to the second prong of the test,

109. See *supra* note 104 and accompanying text.

110. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

111. *Id.*; *Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

112. See *Simmons*, 543 U.S. 551; *Kennedy*, 554 U.S. 407.

113. 536 U.S. 304.

114. *Id.* at 305.

115. *Id.* at 321.

116. *Id.* For a discussion of the application of the two-prong test in *Atkins*, see Lynn Entzeroth, *Constitutional Prohibition on the Execution of the Mentally Retarded Criminal Defendant*, 38 TULSA L. REV. 299, 320–23 (2002) (describing the application of both prongs and discussing the criticisms in the dissents); Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PENN. J. CON. L. 155, 181–82 (2008) (describing the use of the two prongs and noting the Court's reliance on the "consistency of the direction of change" in state laws to prohibit the execution of the mentally retarded).

117. *Atkins*, 536 U.S. 304; *id.* at 324 (Rehnquist, C.J., dissenting); *id.* at 344–45 (Scalia, J., dissenting).

118. *Id.* at 324 (Rehnquist, C.J., dissenting); *id.* at 344–45 (Scalia, J., dissenting).

119. *Id.* at 339–51 (Scalia, J., dissenting); *id.* at 324–28 (Rehnquist, C.J., dissenting).

120. *Id.* at 344–45 (Scalia, J., dissenting).

121. *Id.* at 328 (Rehnquist, C.J., dissenting); *id.* at 347–48 (Scalia, J., dissenting).

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the Court's own judgment. The second prong lacks validity, in his view, because it usurps the national consensus.¹²²

In the face of this harsh criticism of the two-prong test, Justice Kennedy more than rose to the occasion in taking on the task of writing the majority opinion in the 2005 case of *Simmons*.¹²³ His opinion represents a strong respect for stare decisis and a willingness to preserve the two-prong test in the face of strong opposition.¹²⁴ As noted earlier, the Court held that the death penalty was unconstitutional for those who were under eighteen at the time of their crimes.¹²⁵ The 5–4 opinion defends the two-prong test.¹²⁶ In this case, the dissenters¹²⁷ disagreed with the Court's findings on the categorical bar, and again levied a forceful attack on the second prong of the test.¹²⁸ Writing for the three-Justice dissent, Justice Scalia referred to the analysis of the Court's own judgment as an "usurpation of the role of moral arbiter"¹²⁹ He strongly contended that it is the role of the legislatures to make these determinations.¹³⁰ Justice Kennedy took the issue on directly. He noted that there was language in the plurality opinion in *Stanford v. Kentucky*,¹³¹ (a prior decision upholding the execution of sixteen- and seventeen-year olds) indicating that the Court's independent judgment was not pertinent.¹³² Justice Kennedy then clearly stated that the *Stanford* position is inconsistent with precedent and that the position is inconsistent with the Court's more recent decision in *Atkins*.¹³³ Justice Kennedy also thoroughly applied the second prong, carefully looking at the psychological information about juveniles and analyzing whether juvenile executions serve deterrence or retribution purposes.¹³⁴

122. See *id.* at 348–49 (Scalia, J., dissenting).

123. *Roper v. Simmons*, 543 U.S. 551 (2005). For a discussion on the application of the two-prong test in *Simmons*, see Jordan Steiker, *United States: Roper v. Simmons*, 4 INT'L J. CONST. L. 163, 165–67 (2006) (discussing the refinement of the two-prong test, including the consideration of abolitionist states in the first prong and the relationship of the second prong to the first); Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisdiction: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 786–88 (2009) (commenting on the two-prong test in *Simmons*, *Atkins*, and *Kennedy*, and noting an increased emphasis by the Court on the role of the second prong).

124. See *Simmons*, 543 U.S. 551.

125. *Id.* at 578–79.

126. See *id.*

127. Justice Scalia wrote a dissenting opinion with Chief Justice Rehnquist and Justice Thomas joining him. *Id.* at 607 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). Justice O'Connor wrote a separate dissent. *Id.* at 587 (O'Connor, J., dissenting).

128. See *id.* at 593–94 (O'Connor, J., dissenting); *id.* at 615–22 (Scalia, J., dissenting).

129. *Id.* at 615 (Scalia, J., dissenting).

130. *Id.* at 616.

131. 492 U.S. 361, 377 (1989).

132. *Simmons*, 543 U.S. at 563 (citing *Stanford*, 492 U.S. at 377).

133. *Id.* at 574–75.

134. *Id.* at 568–73.

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Moreover, building on the references to international views in *Atkins*, Justice Kennedy wrote a final section in the text of the opinion.¹³⁵ This, too, is a strong statement by Justice Kennedy that the international status of a practice is not irrelevant to the considerations of a case.¹³⁶ Again, this position demonstrates his willingness to take on a controversial, difficult issue without hesitation. In this case, the dissenters strongly protested the references to foreign and international law.¹³⁷ Justice Kennedy carefully explained that international opinion does not control the interpretation of the Eighth Amendment, but “does provide respected and significant confirmation for our own conclusions.”¹³⁸ He again turned to precedent, noting that international views were identified in three prior categorical bar cases in addition to *Atkins*.¹³⁹ The significance is Justice Kennedy’s willingness to directly confront an issue and to rationally put it in perspective. As he states at the end of *Simmons*: “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”¹⁴⁰

In *Kennedy v. Louisiana*, in 2008, Justice Kennedy further confirmed his role as a strong voice for continuity and preservation of the two-prong test for categorical bars under the Eighth Amendment.¹⁴¹ This case was highly controversial. The crime was a brutal rape of a child and Louisiana authorized the death penalty for such a crime.¹⁴² By a 5–4 majority, the Court held that the death

135. *Id.* at 575–79.

136. *See id.*

137. *See id.* at 629 (Scalia, J., dissenting). “‘Acknowledgment’ of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*—which is surely what it parades as today.” *Id.*

138. *Id.* at 578. It is also worth noting that, while dissenting on the categorical bar issue, Justice O’Connor chose to support Justice Kennedy’s view of the relevance of foreign and international law in her dissent. As she notes, “this Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries.” *Id.* at 605 (O’Connor, J., dissenting). Her statement is especially strong support for the general relevance of international views because in this particular case, where she finds no national consensus, the views would not have been confirmatory. *See id.*

139. *Id.* at 575–76 (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977)).

140. *Id.* at 578. For further discussion about the role of international and comparative sources, see Ruth Bader Ginsburg, “A Decent Respect for the Opinions of [Human]kind”: *The Value of a Comparative Perspective in Constitutional Adjudication*, 99 AM. SOC’Y INT’L L. PROC. 351 (2005) (commenting on the importance and utility of international and foreign law sources in constitutional cases); Steiker, *supra* note 123, at 167–69 (noting an increased role for international norms in constitutional cases). For an interesting comparison of references to other states’ decisions with references to foreign decisions, see Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 171–72 (2006) (proposing a framework for the appropriate use of other states’ or foreign law).

141. *See* 554 U.S. 407 (2008).

142. *Id.* at 413–16.

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penalty was unconstitutional for this crime.¹⁴³ As in *Simmons*, Justice Kennedy authored the decision, writing a thoughtful and well-reasoned opinion.¹⁴⁴ Again, in *Graham v. Florida*, in 2010, Justice Kennedy authored a decision utilizing the two-prong test.¹⁴⁵ This time, it was in a noncapital case involving a sentence of life without parole for a juvenile offender.¹⁴⁶ The Court held the life without the possibility of parole (LWOP) sentence unconstitutional, using similar reasoning to that in *Simmons*.¹⁴⁷

It is the *Kennedy* decision, though, that especially demonstrates the intellectual integrity and respect for stare decisis that epitomizes Justice Kennedy's approach in the Eighth Amendment cases.¹⁴⁸ The four-Justice dissent, authored by Justice Alito, took issue with the findings under both prongs.¹⁴⁹ It is the preservation of the test itself, however, and not the specific application that is particularly illustrative of Justice Kennedy's adherence to precedent and continuity. Although Justice Alito focused more on the application than on the validity of the test, his dissection of both prongs in essence greatly reduces the test from distinguishing among types of crimes.¹⁵⁰ Despite the especially

143. *Id.* at 418.

144. *See Kennedy*, 554 U.S. 407; *see also Simmons*, 503 U.S. 551.

145. 130 S. Ct. 2011, 2030 (2010).

146. *Id.* at 2017–18.

147. *Id.* at 2030; *see also Simmons*, 503 U.S. 551. For further discussion of *Graham* and its potential impact in other juvenile sentencing cases, see Mary Berkheiser, *Death Is Not So Different After All: Graham v. Florida and the Court's 'Kids Are Different' Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1 (2011). In the most recent term, the Court decided *Miller v. Alabama*, 132 S. Ct. 2455 (2012), holding that a mandatory LWOP sentence for a juvenile who commits homicide is unconstitutional. *Id.* at 2463. This holding, however, is narrower than the holding in *Graham*. In *Miller*, the court found the mandatory aspect of the penalty in conflict with the Court's line of death penalty cases that invalidated mandatory death sentences and required individualized consideration. *Id.*; *see also Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976). The *Miller* holding stops short of finding a categorical bar to imposing LWOP on juveniles who commit homicides. *Id.* at 2468–69. Nevertheless, the opinion reaffirms the applicability of Eighth Amendment proportionality analysis to non-death penalty cases and the special status of juveniles as warranting a different analysis from adult culpability. *Id.* Although Justice Kennedy did not author the majority opinion, he joined the majority opinion of Justice Kagan, again demonstrating his consistency in applying Eighth Amendment principles. *See id.* at 2460.

148. 554 U.S. 407.

149. *See id.* at 447–70 (Alito, J., dissenting). In particular, the dissenting Justices claim that the majority's primary reliance on the fact that the large majority of states do not have statutes permitting capital punishment for the rape of a child is not indicative of a true national consensus because it is a "highly unreliable indicator." *Id.* at 448. The dissent argued that, because many states interpreted the dicta in *Coker* to prohibit capital punishment for all rape, not just rape of an adult, they were discouraged from enacting legislation that reflected their true view in support of capital punishment for rape of a child. *Id.* at 449. Justice Alito's dissent also attacks the majority's use of the second prong of the analysis, the court's own judgment. *Id.* at 464–65. His dissent argues, in part, that the majority's fear that the potential unreliability of child victim testimony leading to an unwarranted imposition of the death penalty is unwarranted because this risk is not unique to capital cases and not all rape cases will hinge on such evidence. *Id.*

150. *See id.* at 447–70 (Alito, J., dissenting). Note that Justice Alito refuses to accept that a non-homicide crime is less severe than a homicide crime. *Id.* at 466–69. As difficult as it may be, the Eighth Amendment requires distinctions among very serious, depraved crimes. *Id.* He also does not appear to deal with

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disturbing facts of the case, Justice Kennedy painstakingly applied the test, which restricted what punishments states may constitutionally impose.¹⁵¹

One of the points that Justice Kennedy makes in the course of the *Kennedy* decision is that the Eighth Amendment imposes a restriction on extending the death penalty.¹⁵² He drew upon statements in earlier case law that the Eighth Amendment imposes a narrowing requirement, such that “the death penalty is reserved for a narrow category of crimes and offenders.”¹⁵³ Justice Kennedy relied upon prior case law and the meaning of “evolving standards of decency,” an overarching interpretive tool in Eighth Amendment analysis.¹⁵⁴ He stated: “Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime.”¹⁵⁵

This observation by Justice Kennedy is particularly salient because this was the first case in which the two-prong test was argued as applying to constitutionalize an expansion of the death penalty.¹⁵⁶ In all the other categorical bar cases, the argument proposed to restrict the reach of the death penalty.¹⁵⁷ Justice Kennedy insightfully recognized that the Eighth Amendment is a restriction on what the federal government and the states may do.¹⁵⁸ As such, there should be hesitation in using it to expand what the states may do.¹⁵⁹

retribution and deterrence theories, which have been the underpinnings of the second prong in all the prior cases. *See id.* at 447–70.

151. *Id.* at 412 (“The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States . . .”). For further discussion of the two-prong test in *Kennedy*, see Sarah Frances Cable, *An Unanswered Question in Kennedy v. Louisiana: How Should the Supreme Court Determine the Constitutionality of the Death Penalty for Espionage?*, 70 LA. L. REV. 995, 1005–21 (2010) (describing the application of the two-prong test in *Kennedy* and discussing the test’s applicability to non-homicide crimes against the state, such as espionage); Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1387–99 (2011) (providing an overview of the development and application of the two-prong test in *Atkins*, *Simmons*, and *Kennedy*). For a critique of the two-prong test, see John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 961–77 (2011) (arguing that the core of proportionality is retributive and calls for an analysis of “prior practice” rather than national consensus and the Court’s own judgment; finding the new approach would reach the same result in some cases, such as in *Kennedy*, but not in others).

152. 554 U.S. at 446–47 (“The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application.”).

153. *Id.* at 437 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (internal quotation marks omitted).

154. *Id.* at 435.

155. *Id.*

156. *See id.* at 413.

157. *See id.* at 420–21.

158. *See id.* at 412.

159. *See id.* at 435.

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Another reason why preserving the two-prong test, especially the second prong, is significant, is that it is crucial to the constitutional structure. The dissenters' objections to the "Court's own judgment" prong is misplaced, especially because of their desire to rely only on the national consensus. The Eighth Amendment, like the other provisions of the Bill of Rights, was designed to restrict the federal government, and as incorporated through the Fourteenth Amendment, the states. The will of the majority, national consensus, will be represented in what Congress and the state legislatures pass as laws. It would be ironic if the Eighth Amendment, as a restriction on the majority's will, was to be defined exclusively by the majority's preference.¹⁶⁰ If anything, the second prong of the test is the most valid part. A version of the "Court's own judgment" is used every time the Court interprets what is a "reasonable" search or seizure, what is a "coercive" interrogation, and many other standards within the Bill of Rights. Thus, the "Court's own judgment" is well within interpretive methodology in the Court's opinions. The Court is not being whimsical. In any of these interpretive situations, as Justice Kennedy noted in *Kennedy*, there is "text, history, meaning, and purpose" that guides the Court's interpretation.¹⁶¹

The guiding factors in the Eighth Amendment context are the dignity of the individual and whether the penalty is excessive. If the punishment is not necessary to serve a legitimate purpose of punishment, then it is excessive. It is the Court's "judgment" whether these purposes are met, but the Court is not free to redefine or to personally create the factors guiding this interpretation. The judgment must be anchored in the Eighth Amendment. The second prong in this context, while perhaps it could be labeled better, is firmly anchored in the connection between purposes of punishment and excessive or disproportionate penalties. It is this analysis that Justice Kennedy has recognized, defended, and applied in the categorical bar cases.

VI. CONCLUDING OBSERVATIONS

It is important to recognize the significance of Justice Kennedy's role in the categorical bar cases to constitutional interpretation. Where the results of the individual cases are emotionally charged and factually disturbing, it is even more crucial to follow and apply a constitutional analysis that is consistent from case to case. Justice Kennedy has provided vital leadership in one of the most controversial areas of law—those cases that limit the states' authority to impose the death penalty on a class of offenders or for a particular crime. The Eighth

160. See Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455 (1996) (asserting that the Court's evolving standards of decency test requires an assessment of factors beyond just national consensus in order to ensure that the Eighth Amendment properly serves as a restriction on the dictates of the majority).

161. 554 U.S. at 421.

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Amendment's two-prong test for determining the constitutionality of such categorical bars has been developed over forty years of jurisprudence. Justice Kennedy's powerful opinions using and defending this test provide consistency and integrity to the Court's decisions in this area. This is not to say that it is an easy test to apply and, most certainly, there can be disagreements about the application of each prong to particular facts. What is noteworthy, however, is that Justice Kennedy and those joining him in the majority have resisted attempts to dismantle the test in order to achieve a different result. The test may not be perfect, but it does take into account two important aspects of assessing the meaning of the Eighth Amendment today in light of "evolving standards of decency."¹⁶² The first is the assessment of the view of contemporary society through examination of legislative enactments and actual sentences. The second is through evaluating whether, regardless of the legislative bodies, the punishment is consistent with the fundamental core of the Eighth Amendment that a penalty should not be disproportionate.¹⁶³ The reliability and intellectual integrity of the analysis reverberate through Justice Kennedy's jurisprudence and reflect a meaningful contribution to the work of the Court and to the continuing interpretation of the U.S. Constitution.

162. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

163. See *Kennedy*, 554 U.S. at 421; *Atkins v. Virginia*, 536 U.S. 304, 312–13 (2002).