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State Resistance Of *Kennedy V. Louisiana* (2008) And The Future Of Capital Punishment

Kate Shutz

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Abstract

The legal landscape of capital punishment in the United States is undergoing a structural transformation. Since 2023, six states, including Florida, Tennessee, Idaho, Oklahoma, Arkansas, and Alabama, have enacted statutes authorizing the death penalty for non-homicide sexual offenses against children, directly challenging the U.S. Supreme Court's ruling in *Kennedy v. Louisiana* (2008). This case held that the Eighth Amendment prohibits capital punishment in cases where the offense did not result in the victim's death. This article examines the constitutionality of capital punishment statutes and analyzes whether the legislative actions of these few states can transform the trajectory of the national "evolving standards of decency" test, a doctrine that ensures punishment is applied in accordance with contemporary society's views. It also evaluates how a more originalist Supreme Court may exercise independent judgment on the proportionality of capital punishment for non-homicide crimes. This article ultimately argues that the survival of the *Kennedy* precedent depends on one question: whether the Supreme Court continues to treat the Eighth Amendment as an instrument for protecting human dignity that restricts the death penalty's applicability, or whether it yields to expanding state legislative discretion. The current trajectory suggests that the categorical limits of capital punishment are more vulnerable to revision than they have been in nearly half a century.

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I. Introduction

In 2008, the U.S. Supreme Court confronted a question that would alter the trajectory of Eighth Amendment jurisprudence: Does the Cruel and Unusual Punishment Clause bar the imposition of the death penalty upon perpetrators of child rape? The Eighth Amendment states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] The Eighth Amendment prohibits the federal government from imposing unreasonably severe punishments or bail amounts on those accused or convicted of crimes.[2] In this respect, the landmark U.S. Supreme Court case, *Kennedy v. Louisiana* (2008), found that a state cannot impose the death penalty for the rape of a child when the crime did not result in the victim's death. In a narrow five-to-four decision, the majority opinion voiced by Justice Kennedy reasoned that the application of the death penalty in such a case would constitute a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause. This decision built upon the precedents of proportionality and "evolving standards of decency" established in *Coker v. Georgia* (1977) and *Atkins v. Virginia* (2002).

However, the constitutional protection against disproportionate punishment, as set by *Kennedy*, is fragile. Since 2023, several states, namely Florida, Tennessee, Idaho, Oklahoma, Arkansas, and Alabama, have sought to broaden the applicability of the death penalty by passing legislation that allows capital punishment for perpetrators of child rape.[3] Florida began this wave of *Kennedy* backlash, passing a bill that permits the death penalty for the non-homicide rape of a child under twelve.[4]

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[1] U.S. Const. amend. VIII
[2] Bryan A. Stevenson & John F. Stinneford, *Interpretation: The Eighth Amendment,* National Constitution Center, https://constitutioncenter.org/the-constitution/amendments/amendment-viii/clauses/103 (last visited Apr. 19, 2026).
[3] *Death Penalty for Child Sexual Abuse that Does Not Result in Death*, Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/background/crimes-punishable-by-death/death-penalty-for-child-sexual-abuse-that-does-not-result-in-death (last visited Apr 3, 2026).
[4] Alexandra L. Klein, *Kennedy v. Louisiana and the Future of the Eighth Amendment,* 52, Pepperdine L. Rev. 293 (2015).

These legislative actions pose an increasingly poignant risk to the Eighth Amendment and its protections against cruel and unusual punishments by demonstrating an emerging trend among states of expanding the categories of capital punishment, specifically to include child rape. These states' actions also threaten the Supreme Court's longstanding, evolving standards of decency framework by indicating a movement in the opposite direction of limiting the scope of capital punishment.[5] This legislation is compounded by the originalist nature of the current Court, which has shown a trend of interpreting the Constitution as it was understood at the time of adoption, prioritizing history and tradition in its decisions. The current legislative trend of states expanding the death penalty suggests the fragility of the protections enshrined within the Eighth Amendment surrounding the issue of capital punishment.[6] With the continued establishment of state legislation that expands capital punishment in direct violation of the *Kennedy* precedent, the protections of dignity and proportional punishment provided under the Eighth Amendment will become more vulnerable to eventual collapse than they have been in the last half-century.

This article examines the evolving landscape of death penalty legislation across the states. It also examines whether *Kennedy v. Louisiana* (2008) will survive in light of this ongoing legislation and the current originalist court's jurisprudence. Part II traces the doctrinal lineage of the modern reduction of capital punishment from *Coker* to *Atkins*, culminating in *Kennedy*. It will also highlight the reasoning behind Justice Alito's influential dissent in response to the *Kennedy* majority's decision, which supports the growing trend of expanded capital punishment eligibility at the state level. Part III provides an expansive overview of current state legislation expanding the death penalty to crimes of child rape and sexual assault. Part IV will assess the

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[5] William W. Berry III, *Eighth Amendment Stare Decisis*, 98 S. CAL. L.REV, 255 (2024).
[6] Meghan J. Ryan, *The Death of the Evolving Standards of Decency,* 51, FLA. ST. U. L. REV. 255 (2024).

possibility that a nationwide state legislative transformation can alter the federal constitution. It will apply the evolving standards of decency test and the court's originalist philosophy to determine whether a new national consensus is forming, thereby prompting the U.S. Supreme Court to overturn *Kennedy*. Part V considers the consequences of overturning *Kennedy*, particularly in expanding the categorical applications of the death penalty to crimes and groups of individuals for which it has been previously restricted by precedent. Part VI concludes with an examination of the *Kennedy* precedent's survivability and the implications for the future of the Eighth Amendment.

II. Judicial Precedent: From Coker to Kennedy

A. Coker v. Georgia (1977): Establishing Proportionality

The first major Supreme Court precedent regarding the constitutionality of non-homicide capital punishment was in *Coker v. Georgia* in 1977. The case responded to the question of whether the application of the death penalty was disproportionate for the rape of an adult woman, which the Eighth Amendment prohibits. In a decision of plurality, the Court found that capital punishment was "grossly disproportionate" for the crime of rape, as it did not involve homicide.[7] The Court also noted that there was no national consensus on this matter at the time, as Georgia was the only state that authorized the death penalty for the rape of an adult woman. Thus, the Court found broad societal disapproval of such punishment.[8]

Despite its clear constitutional decision to bar the death penalty for the rape of an adult woman, the *Coker* decision left unclear the constitutionality of capital punishment when the victim is a child.[9] This lack of clarity led many states to view the decision as limiting capital

[7] *Coker v. Georgia*, Oyez, https://www.oyez.org/cases/1976/75-5444 (last visited Apr 3, 2026).
[8] *Id.*
[9] Rosemary Ardman, Child Rape and The Death Penalty, 2, Idaho L. Rev. 61 (2025)

punishment to homicide offenses. Meanwhile, others, including Louisiana, Montana, South Carolina, Oklahoma, Georgia, and Texas, enacted statutes authorizing the death penalty for sexual assault against minors, viewing the *Coker* decision as solely applying to adult victims.[10]

B. *Atkins v. Virginia (2002) and the Evolving Standards of Decency*

The methodological framework that would govern *Kennedy* crystallized in *Atkins v. Virginia* (2002). This case challenged the constitutionality of applying capital punishment to those who have an intellectual disability. In a majority decision, the Court held that the execution of intellectually disabled individuals constitutes "cruel and unusual punishments" under the Eighth Amendment.[11] The Court expressed concern that the motives of retribution and deterrence, which underpin the use of the death penalty, did not apply to mentally impaired offenders.[12]

Atkins relied heavily on a methodological framework that the Court would increasingly rely on in its capital punishment decisions: the evolving standards of decency test (ESD). This test arose from *Trop v. Dulles* (1958), a case in which the Court stated that its decisions would reflect the preferences of an evolving society and that capital punishment would progress in one direction, toward humane punishments.[13] As the voice of the majority opinion in *Trop*, Chief Justice Warren articulated this framework, writing that the Eighth Amendment should uphold the dignity of man and "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[14] The ESD has two frameworks: one in which the Court objectively assesses the national consensus through an objective indicia analysis, and another in

[10] *supra* note 3.
[11] *Atkins v. Virginia*, Oyez, https://www.oyez.org/cases/2001/00-8452 (last visited Apr 3, 2026).
[12] *Id.*
[13] Ryan, *supra* note 6 at 257.
[14] *Trop v. Dulles*, Oyez, https://www.oyez.org/cases/1956/70 (last visited Apr 3, 2026).

which it applies its own judicial independence to the decision.[15] A national consensus may be defined as the Court's evaluation of whether a punishment practice coincides with evolving societal values.[16] In *Atkins*, the Court applied both the objective test of finding a national consensus on the issue, in which there was a consensus against executing the intellectually disabled, and the subjective test of determining that none of the purposes of punishment would be served by executing these individuals.[17]

A critical facet of the ESD is its emphasis on a "'one way ratchet,'" or, as outlined by Chief Justice Warren in *Trop*, the development of ESD in one direction, toward more humane punishments.[18] When the Court categorically prohibits a punishment practice, no subsequent state legislature can re-adopt said practice, as that action would go against the meaning of the ESD test. Therefore, a national consensus cannot form in favor of a punishment practice previously banned by the U.S. Supreme Court.[19] If the ESD moved in both directions, the whole doctrine would break down, thereby dismantling codified constitutional protections of proportional punishment and human dignity and inverting the entire Eighth Amendment.[20]

The U.S. Supreme Court must also abide by stare decisis, a foundational legal doctrine that guides justices to defer to precedent when making decisions, assuming the binding nature of a prior decision, except in cases of correcting an incorrect decision.[21] The Eighth Amendment has its own unique stare decisis doctrine, one that moves in the progressive direction of more humane punishment practices.[22] The meaning of the Eighth Amendment changes over time as it expands to bar punishments that were once constitutional but are now considered draconian.[23] In

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[15] Ryan, *supra* note 6 at 268.
[16] Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J., 303 (2013).
[17] Berry, *supra* note 5 at 274-275.
[18] Ryan, *supra* note 6 at 257.
[19] *Id.* at 276.
[20] Berry, *supra* note 5.
[21] *Id.* at 258.
[22] *Id.* at 260.
[23] *Id.*

this regard, state legislation allowing engagement with barred punishment is unconstitutional and violates the doctrinal purpose of the ESD.[24]

Atkins prominently established the Court's use of the evolving standards of decency test in its decisions on capital punishment cases. However, it marked a transition in the Court's measure of the "national indicia" of a national majority.[25] After *Atkins*, the Court no longer relied on counting the states for a simple majority to achieve national consensus, as fewer than half the states were against imposing the death penalty on the intellectually impaired at the time.[26] The Court instead relied on an evaluation of punishment practices in the context of decency standards in modern society.[27] This language commits the Court to a dynamic interpretive approach in which evidence of societal values is paramount in decisions.

Atkins established the methodological framework for the Supreme Court's Eighth Amendment jurisprudence, especially by strengthening the trend of using ESD to direct punishment in a more humane direction. If categorical cases such as *Atkins*, which represent landmarks in the development of Eighth Amendment jurisprudence, are challenged, jurisprudence could be reshaped, and the protections it now provides could be forever lost.[28] If the predominant state legislative trend authorized, rather than banned, particular punishment practices, the same ESD framework could be used to expand the permissible scope of capital punishment.

C. *Kennedy V. Louisiana (2008): The Homicide Constraint*

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[24] *Id*. at 269.
[25] Joanna H. D'Avella, *Death Row for Child Rape - Cruel and Unusual Punishment under the Roper-Atkins Evolving Standards of Decency Framework*, 92 Columbia L.Rev, 130 (2007).
[26] *Id*.
[27] Farrell, *supra* note 16.
[28] Klein, *supra* note 4 at 365.

The 2008 landmark Supreme Court case *Kennedy v. Louisiana* (2008) stands as a vital symbol of Eighth Amendment jurisprudence, narrowing the scope and applicability of the death penalty.[29] Justices on the *Kennedy* case were faced with the question: Does a state's imposition of capital punishment on perpetrators of child rape violate the Eighth Amendment's protection against cruel and unusual punishment? This case responded to a Louisiana court finding Patrick Kennedy guilty of raping his eight-year-old stepdaughter, after which he was sentenced to death. The Louisiana Supreme Court affirmed the use of capital punishment in this case, arguing that in *Coker*, the U.S. Supreme Court had struck down the use of capital punishment for the rape of an adult woman, but did not extend that ban to the rape of a child. After testing the national consensus, the Louisiana Supreme Court determined that this punishment was justified by the fact that five other states had adopted similar laws. The Court also found that this punishment was proportionate, given that children are uniquely vulnerable.[30]

The U.S. Supreme Court disagreed. Writing for a five-justice majority, Chief Justice Kennedy determined that the Eighth Amendment prevents states from imposing capital punishment for the rape of a child in which the crime did not result in the victim's death. Applying the death penalty to such cases would violate the Eighth Amendment's protections against cruel and unusual punishment.[31] Justice Kennedy argued that the clause has been interpreted to ensure proportionality between crime and punishment. Under this ideology of the court, death is an excessive punishment for the rape of a child who does not lose their life.[32] This punishment also violated the national consensus on this issue, as Justice Kennedy notes that five states cannot constitute a nationwide agreement.[33]

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[29] Klein, *supra* note 4.
[30] *Kennedy v. Louisiana*, Oyez, https://www.oyez.org/cases/2007/07-343 (last visited Apr 3, 2026).
[31] *Id*.
[32] Ardman, *supra* note 9 at 161.
[33] Kennedy, *supra* note 30.

Kennedy represents the U.S. Supreme Court's most recent decision in applying the ESD to prohibit capital punishment for non-homicide offenses.[34] Using the ESD's first standard of objective analysis, the Court found national consensus against applying the death penalty in such cases, as only six states authorized it and no individual had been executed for raping a child since 1964.[35] Applying the ESD's second standard of subjective analysis, independent judgment, the Court found that capital punishment is a disproportionate punishment for non-homicide crimes, as the punishment function of retribution would be over-served.[36]

The Court's decision to use the ESD's independent decision function played a paramount role in the *Kennedy* decision. The majority Justices first argued that child rape occurs more than first-degree murder, so the expansion of capital punishment into this realm would produce a greater number of arbitrary death sentences.[37] Additionally, the number of reported child sexual assault and rape cases may decrease, as children may be reluctant to testify against perpetrators, who are often acquaintances and family members, if they may be put to death.[38] Furthermore, imposing the death penalty in these cases would not deter the crime from occurring in the first place. Rather, it might inhibit deterrence by removing an incentive for rapists not to kill their victims, as they would face no greater punishment for doing so and could eliminate the only witness to their crime.[39]

The precedent set by *Kennedy* established a categorical framework that clearly delineates the constitutional boundary of capital punishment: homicide offenses. It is a vital linchpin to the Eighth Amendment in its clarification that non-homicide crimes should not result in the death

[34] Klein, *supra* note 4 at 302-303.
[35] *Id*. at 305-306.
[36] *Id*. at 307.
[37] *Id*.
[38] *Id*. at 308.
[39] D'Avella, *supra* note 25 at 153.

penalty. However, this constraint on the death penalty's limits would later become the target of contradictory state legislation.

D. *The Dissent: Justice Samuel Alito's Challenge*

Justice Alito wrote the dissent in the contentious *Kennedy* decision, providing the foundation for future state legislative defiance. The dissent advanced three interlocking arguments that continue to gain traction in the post-*Kennedy* legislative debate.

Justice Alito first challenged the claim that no national consensus had been reached. Justice Alito argued that state laws punishing child rape with the death penalty reflect an increasing social concern about child sex offenses sweeping the nation.[40] The majority decision to ban child rape as a permissible crime to be punished with the death penalty would prevent states from developing a national consensus in this area, as he argued a trend in that direction was already forming.[41]

Secondly, Justice Alito argued that many states did not adopt the death penalty for child rape, not because they opposed it, but because they misread *Coker* to believe that the precedent had prevented such legislation.[42] In this light, the Court had caused the majority consensus it had found by creating ambiguity in its Eighth Amendment decisions, thereby preventing state legislatures from passing laws that actually represent their evolving standards of decency.[43]

Building off the concern that the Court suppressed the true national consensus, Justice Alito thirdly argued that the Court became a "super-legislature" as it substituted its independent moral judgments for the opinions of the democratic legislatures.[44] Additionally, the Court's

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[40] Klein, *supra* note 4 at 348.
[41] *Id*.
[42] *Id*. at 309.
[43] *Id*. at 309, 353-354.
[44] *Id*. at 313.

concerns for the victim's impact were deemed "policy arguments" unfit for a judicial decision.[45] Justice Alito asserted that this role acted as an overreach of the Court's power and that it was inconsistent with the fundamental understanding of the Eighth Amendment. These arguments, particularly Justice Alito's third, resonate powerfully with the methodological commitments of the current U.S. Supreme Court's originalist majority.

III. State Legislative Defiance: A Case-by-Case Analysis

Between 2023 and 2026, six states enacted formal legislation in direct opposition to the *Kennedy* decision. Each statute reflects particular state political contexts, yet they all share common structural features: authorization of capital punishment for defined categories of child sexual abuse, explicit or implicit knowledge of the Kennedy constraint, and drafting designed to maximize the prospects of Supreme Court review. The following sections analyze each statute, culminating in a cumulative examination of their constitutional significance.

A. Florida House Bill 1297 (2023)

Florida enacted House Bill 1297 in May 2023, becoming the first state since *Kennedy* to authorize capital punishment for child sexual battery. The statute amends Florida's death penalty provisions to permit the imposition of capital punishment for the sexual battery of a child under twelve if two "aggravating factors" specific to sexual crime are found.[46] The bill passed with bipartisan support after Florida Governor Ron DeSantis encouraged lawmakers to adopt capital punishment for such crimes.[47] At a news conference, DeSantis criticized the Court's *Kennedy* decision as wrongly decided and asserted the current Supreme Court would not uphold such a

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[45] *Id*. at 310.
[46] H.B. 1297, Reg. Sess. (Fla. 2023).
[47] Klein, *supra* note 4 at 322.

ruling, so Florida will find ways to use the death penalty for the worst offenders.[48] Furthermore, DeSantis explicitly stated that Florida's new statute will challenge the *Kennedy* precedent and that the U.S. Supreme Court will uphold Florida's law.[49] Florida prosecutors first sought capital punishment for sexual battery of a child under twelve on December 12, 2023; however, in February 2024, the defendant pleaded guilty and was sentenced to life in prison without parole.[50]

Florida's 2023 legislation is notable for its deliberate strategy to test the constitutional boundaries established by the Court in *Kennedy v. Louisiana* (2008). The statute indicated a legislative finding that child rape warrants a punishment reserved for the worst crimes: capital punishment. As of early 2026, the Florida Supreme Court has not yet ruled on the constitutionality of this bill, and no person has yet been sentenced to death under this amendment.

B. Tennessee Code of Law Title 39 (2024)

In 2024, Tennessee passed a law extending capital punishment to the rape and aggravated rape of a child under thirteen, even when no homicide occurs.[51] The law took effect on July 1, 2024, and individuals convicted under this new legislation could be sentenced to death, life imprisonment without parole, or life imprisonment with parole.[52] Tennessee's legislation reflects another example of direct state opposition to the federal precedent set by *Kennedy*, encouraging the U.S. Supreme Court to reconsider *Kennedy* in the future.

C. Idaho House Bill 380 (2025)

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[48] *supra* note 3.
[49] *Id*.
[50] *Id*.
[51] TENN. CODE ANN. § 39-13-522 (2024).
[52] *supra* note 3.

In March 2025, Idaho passed a bill authorizing the death penalty as punishment for aggravated lewd conduct with a child under twelve without a homicide needing to occur.[53] This new policy is extremely broad, with "aggravated lewd conduct" being defined as "any lewd or lascivious act or acts on or with the body of any part or member thereof."[54] To apply the death penalty, the jury must find at least three aggravating conditions, including the defendant's "'position of trust,'" use of "'force or coercion,'" and sexual penetration "'however slight.'"[55] The broad coverage of this bill raises concern that if the U.S. Supreme Court overturned *Kennedy*, Idaho could widely apply the death penalty using its independent measures of proportionality. Idaho's statute demonstrates an implicit attempt to appeal the current Court's interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause to expand the categorical boundaries of capital punishment.

D. Oklahoma Senate Bill 599 (2025)

Oklahoma Senate Bill 599, enacted in 2025, authorizes capital punishment for the rape of a child under fourteen for first-time offenses.[56] Oklahoma state law had already required individuals previously convicted of child rape to be eligible for capital punishment.[57] As Oklahoma was one of the states that had previously authorized the death penalty for child rape before *Kennedy*, this reenactment of such legislation represents a reassertion of state legislative judgment. Oklahoma's rejection of perceived judicial overreach aligns with the current Court's originalist behavior and preferences, posing a risk to the future of the *Kennedy* precedent and Eighth Amendment protections.

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[53] H.B. 380, 68th Leg., 1st Reg. Sess. (Idaho 2025).
[54] *Id*.
[55] Ardman, *supra* note 9 at 176.
[56] S. 599, 60th Leg., 1st Reg. Sess. (Okla. 2025).
[57] *supra* note 3.

E. Arkansas Act 662 (2025)

In March 2025, Arkansas enacted legislation under Act 662 that permits the imposition of the death penalty for capital rape of a child thirteen years or younger.[58] Any adult convicted would face either the death penalty or life in prison without parole.[59] This state legislation illustrates another unconstitutional state action: expanding the applicability of capital punishment, furthering the state legislative attempt to challenge the precedent set by *Kennedy*.

F. Alabama Child Predator Death Penalty Act (2026)

Most recently, as of January 2026, Alabama enacted the Child Predator Death Penalty Act, which expands the categories of capital offenses against children, including first-degree rape, first-degree sodomy, and sexual torture, which are all punishable by death if committed against children under twelve years old.[60] Alabama's legislation demonstrates the evolving nature of state legislation in expanding the boundaries of capital punishment beyond what is constitutionally acceptable under the *Kennedy* precedent and the Eighth Amendment. Should states continue to enact formal legislation expanding the horizons of the death penalty, the federal landscape of capital punishment jurisprudence would be inextricably altered.

While only these six states have passed legislation expanding the application of the death penalty to perpetrators of child rape and sexual battery, since 2025, several additional states have proposed legislation to expand their application of capital punishment. These states include Kentucky, Mississippi, Missouri, South Carolina, Texas, and Virginia.[61] These states are leading the charge in a national trend of states pushing death penalty-centered legislation to eventually bring a case to the U.S. Supreme Court to overturn *Kennedy v. Louisiana* (2008). While only six

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[58] S. 375, 95th Leg., 1st Ref. Sess. (Ark. 2025).
[59] *supra* note 3.
[60] S.B. 17, Reg. Sess. (Ala. 2026)
[61] *supra* note 3.

states have enacted formal legislation, the growing number of representatives pushing for such legislation may begin to constitute the national consensus the Court will use to overturn *Kennedy*.

IV. Can State Legislation Shift the Constitutional Landscape?

A. Is a New National Consensus Forming?

A central question regarding the survivability of the *Kennedy* precedent is whether six states' legislative enactments constitute a meaningful shift in the national consensus. The Court's objective indicia analysis of society's changing standards makes the Eighth Amendment's meaning dependent on state legislative action. The more states that support expanding the death penalty to perpetrators of child rape, the more this first ESD test would support the constitutionality of the states' legislation.[62] As in previous capital punishment cases, such as *Atkins*, the Court found a national consensus against executing the intellectually disabled based on eighteen states having enacted such prohibitions, representing a majority trend, even though fewer than half the states were explicitly opposed to imposing the death penalty on such individuals.[63] Similarly, in *Roper v. Simmons* (2005), the Court used the ESD to find that the national consensus had evolved to prohibit the execution of juveniles, after extracting evidence that thirty states already prohibited this punishment type.[64]

Applying these benchmark capital punishment cases to the current situation of states' implementation of capital punishment for child rape, six states' legislation appears unlikely to satisfy the Court's requirement for society's changing standards of decency, at least as it has been historically applied. A post-*Kennedy* Court reviewing the issue would observe that the

[62] Farrell, *supra* note 16.
[63] D'Avella, *supra* note 25.
[64] Ryan, *supra* note 6 at 270.

overwhelming majority of states with capital punishment still do not authorize the death penalty for non-homicide child rape, that no individual has been sent to death row for this offense, and that no execution for such an offense has been carried out. Under the traditional consensus analysis, these facts would support, rather than undermine, the *Kennedy* holding.

However, the reality of the consensus-forming may be more dynamic than the traditional analysis suggests. The ESD's objective indicia analysis is not completely objective. The Court has broad discretion in determining how many states are required to form a consensus. This flexibility provides an opportunity for Justices to apply their own personal values to their decision in such cases.[65] Beyond the six state-enacted statutes, at least six additional death penalty states have considered capital rape legislation since 2025.[66] If these additional efforts succeed, the legislative count could shift meaningfully, presenting the Supreme Court with a picture of a faster-moving trend than any it has encountered in prior categorical cases. The Court may apply the ESD's objective test to argue for the existence of a trend of an expanded death penalty, thereby exercising its subjective analysis of a consensus.

A Court that is receptive to reconsideration of *Kennedy* might also manipulate the framing of this issue. It could first count the national majority as only the twenty-seven out of fifty states that retain the death penalty, using that as the relevant denominator. Through this lens, if twelve out of the twenty-seven states authorize the death penalty for child rape, a significant majority will be on its way to being reached, and a trend will be demonstrated. The Court could secondly emphasize the swiftness with which states have enacted this legislation, with statutes advancing in rapid succession since 2023 and the trend continuing into 2026. This legislation suggests that public opinion is rapidly shifting to favor expanded capital punishment.

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[65] Farrell, *supra* note 16.
[66] *supra* note 3.

With the states' growing death penalty legislation, it is evident that the Court plays a vital role in determining the future of capital punishment as outlined by *Kennedy*, and, more broadly, the Eighth Amendment. A Court that is receptive to the overturn of *Kennedy* would demonstrate one that significantly departs from the established jurisprudential methodology in following the ESD. But as the current Court has demonstrated in its originalist approach, this situation may become increasingly likely.

B. *The Role of an Originalist Court*

Whether the current U.S. Supreme Court continues to uphold the two-prong ESD test established by *Trop* will determine the future of the *Kennedy* precedent and the protections under the Eighth Amendment. The ESD test is based on a living constitution approach, rather than an originalist approach to judicial interpretation.[67] The living constitution is a legal interpretive approach that holds that the U.S. Constitution can evolve without formal amendments and should be understood in the context of modern society.[68] Under the ESD, the Court considers changing societal views on punishment, with the Eighth Amendment being the only area in which it applies this approach.[69]

Contrary to the living constitutionalism embodied in the ESD, the current Court more broadly embraces originalism. Originalism is a legal interpretive approach that emphasizes consulting the history of the Constitution's drafting and ratification to understand the meaning of certain provisions. In other words, this approach focuses on interpreting the Constitution in its original context rather than in the context of modern society.[70] The current makeup of the Court

[67] Ryan, *supra* note 6 at 256.
[68] Tyler Biscontini, *Living Constitution,* EBSCO (April 3, 2026, at 5:25 ET), https://www.ebsco.com/research-starters/law/living-constitution.
[69] Ryan, *supra* note 6 at 255.
[70] *Id*. at 273.

has demonstrated a move away from making decisions based on the evolving standards of decency; rather, it has chosen to emphasize history and tradition in its interpretive theory.

The last case in which the ESD was cited favorably by the majority in a Court decision was *Moore v. Texas* (2017), in which the Court affirmed that Texas's application of nonclinical factors when assessing a claim of mental impairment under *Atkins* violated the Eighth Amendment.[71][72] Voicing the majority opinion, Justice Ginsburg wrote that the Court reached its decision using the evolving standards of decency test to protect human dignity.[73] While the current Court has not explicitly repudiated the ESD test, it is quietly sweeping it aside in a process of "stealth overruling."[74] "Stealth overruling" refers to the Court's actions of limiting the reach of Eighth Amendment precedent by ignoring it and exploring new directions, all the while not expressly rejecting the ESD.[75]

The current Court's decision in *City of Grants Pass, Oregon v. Johnson* (2024) is the key indicator of this change. The case concerns whether the city of Grants Pass violated the Eighth Amendment by imposing civil and criminal penalties for violating restrictions on camping in public places.[76] Writing for the majority, Justice Gorsuch focused on the origins of the Cruel and Unusual Punishments Clause and concluded that the city's sanctions did not constitute cruel or unusual punishment.[77] The Court reached its decision in this case solely by relying on tradition and history, without mentioning *Trop* or the ESD.

Another indicator of *Kennedy*'s fragility under the current originalist Court is its willingness to flout stare decisis to overrule well-established precedents, such as *Dobbs v. Jackson Women's Health Organization* (2022). The majority decision reached in *Dobbs*, as

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[71] *Moore v. Texas*, Oyez, https://www.oyez.org/cases/2016/15-797 (last visited Apr 19, 2026).
[72] Jeffery Wald, *Has SCOTUS Evolved Beyond the Evolving Standards of Decency?*, Vol. 99, No. 2, Florida Bar. J, (2025).
[73] *Id*.
[74] Klein, *supra* note 4 at 339-340.
[75] *Id*.
[76] *City of Grants Pass v. Johnson*, Oyez, https://www.oyez.org/cases/2023/23-175 (last visited Apr 19, 2026).
[77] Wald, *supra* note 72.

authored by Justice Alito, was that the Constitution does not mention abortion, as it is an issue not deeply rooted in the nation's history.[78] Additionally, to overturn a precedent, one of five criteria must be met: the democratic process was obstructed, the original decision lacked grounding in the constitution, the tests established were not "workable," the precedent distorted the law in other realms, or overruling the precedent would not upend reliance interests.[79] *Dobbs* especially mirrors *Kennedy*'s vulnerability, as the reasoning the Court relied on to overturn *Dobbs* may apply with equal force to *Kennedy*.[80] In light of the recent *Dobbs* decision, the current Supreme Court may use the same reasoning to overturn *Kennedy* if the opportunity arises.

Thus, an originalist Court that grounds its decisions in constitutional history and tradition and has no problem overturning time-tested precedent poses a uniquely dangerous threat to the survival of the *Kennedy* precedent. Although the Court has not expressly renounced the evolving standards of decency test, it has demonstrated its willingness to silently abandon its methodology by turning to traditionalism rather than responding to society's changing needs.[81] And, while courts that have relied upon the ESD in the past have overturned precedent, the current Court overturns precedent to return to an original interpretation of the Constitution: one that does not account for unique societal needs not imagined during the Founding era. When combined, these facets of the current Supreme Court may result in the reversal of *Kennedy v. Louisiana* (2008) and the revocation of protections against capital punishment that have been in place for half a century.

V. The Future of *Kennedy*

[78] Dobbs v. Jackson Women's Health Organization, Oyez, https://www.oyez.org/cases/2021/19-1392 (last visited Apr 3, 2026).
[79] Id.
[80] Klein, *supra* note 4 at 343.
[81] *Id*. at 339-340.

A. The Consequences of Overturning Kennedy

The consequences of overturning *Kennedy* would be significant and multidimensional. It would immediately validate the existing state statutes expanding the death penalty and extend the opportunity for additional states to pass legislation on applying capital punishment to perpetrators of child sexual assault. Beyond confirming state legislative actions, overturning *Kennedy* would have multiple other consequences.

One dimension of the consequences of overturning *Kennedy* is the impact this decision would have on victims of sexual assault. Firstly, the number of reported child rape and sexual battery cases may decrease, as children may be put in the position of having to testify in a case that could lead to the death of a family member.[82] For juvenile victims, ninety-three percent know their abuser, and thirty-four percent of abusers are the victim's family member (RAINN). The prevalence of child victims knowing or being related to their abuser leads to rape and sexual battery cases being underreported, an issue the Court factored into their 2008 *Kennedy* decision.[83] If capital punishment is expanded to include perpetrators of child sexual assault, the number of cases reported may further decrease, which would hamper the law's deterrence function.[84]

Furthermore, expanding the death penalty to include perpetrators of child rape and sexual assault may remove an incentive for abusers not to kill their victims, as the punishment for murder would be equal to that of the sexual battery.[85] Perpetrators would not only face no greater punishment for killing their victims, but in doing so, they would also remove the only witness to

[82] *Id*. at 308.
[83] *Id*.
[84] *Id*.
[85] D'Avella, *supra* note 25 at 153.

their crime.[86] Thus, the law's deterrence function would not be served, as perpetrators of these crimes may believe they are likely to get away with their crimes, further endangering victims.

A second dimension of the consequences of overturning *Kennedy* is the likely increase in arbitrary death sentences handed to defendants. An arbitrary punishment is one that is imposed on some individuals, but not others, with no reasoning behind the differing application of the punishment.[87] As applied to capital punishment, factors other than the severity of the crime and guilt of the defendant may impact the imposition of death sentences: race, geography, gender, access to counsel, and jury misperceptions.[88] Furthermore, the current system of capital punishment across states unevenly applies the death penalty to individuals based on a mix of these factors, rather than to the few individuals guilty of the worst crimes or who have the longest criminal records.[89] The expansion of crimes eligible for capital punishment to perpetrators of child sexual assault and battery would largely increase the rate of arbitrary punishments, which would further weaken the Eighth Amendment's protections against cruel punishment. If more individuals are handed the death sentence, there will be more opportunities for this punishment to be applied disproportionately on individuals because of their race, geographical location, and socioeconomic status.

A third dimension of consequences that would arise if *Kennedy* is overturned is the expansion of death penalty eligibility to apply to vulnerable groups previously protected from this punishment, such as juveniles and the intellectually disabled. In 2002, the Supreme Court applied the ESD test to bar the imposition of capital punishment on mentally impaired individuals.[90] Then, in 2005, the Supreme Court used the ESD to ban the execution of minors

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[86] *Id.*
[87] *Arbitrariness*, Death Policy Information Center (April 3, 2026, at 5:25 ET), https://deathpenaltyinfo.org/policy-issues/policy/arbitrariness
[88] *Legally Irrelevant Factors Impact Death Sentencing,* Death Policy Information Center (April 3, 2026, at 5:25 ET), https://deathpenaltyinfo.org/policyissues/policy/arbitrariness/evidence-of-arbitrariness
[89] *supra* note 87.
[90] *supra* note 11.

under capital punishment.[91] If the current originalist court, as demonstrated by cases such as *Grants Pass* (2024) and *Dobbs* (2022), continues to disregard previous Courts' loyalty to the ESD and instead makes decisions based on the Constitution's original meaning, the forms of punishment deemed constitutional could increase.[92] The potential for this expansion of punishment hinges on the Court's interpretation of the Eighth Amendment's Punishments Clause.[93] The current Court's position on the Eighth Amendment is visible in cases such as *Graham v. Florida* (2010), in which Justice Thomas argued that the Cruel and Unusual Punishments Clause prohibits what were deemed torturous methods of punishment at the time of the Bill of Rights' adoption.[94][95] In addition to this narrow view of the Eighth Amendment's protections against punishment methods, originalist Justices also challenge the proportionality of punishments.[96] In *Graham*, Justice Thomas contended that the Cruel and Unusual Punishments Clause does not contain language indicating that punishments must be proportionate.[97][98] In light of these originalist arguments, if Justices begin to view only some punishment methods as unconstitutional, case law protecting vulnerable groups such as juveniles and the intellectually impaired may dissolve.[99] Therefore, if *Kennedy* is overturned, Eighth Amendment jurisprudence that has been building for over half a century would likely disintegrate.[100]

VI. Conclusion

This article sought to answer the question of whether the stability of the Eighth Amendment will be upheld in the midst of increasing state legislation attempting to overturn

[91] *Roper v. Simmons*, Oyez, https://www.oyez.org/cases/2004/03-633 (last visited Apr 3, 2026).
[92] Ryan, *supra* note 6.
[93] *Id*. at 301.
[94] *Graham v. Florida*, Oyez, https://www.oyez.org/cases/2009/08-7412 (last visited Apr 19, 2026).
[95] Ryan, *supra* note 6 at 300.
[96] *Id*. at 301.
[97] *supra* note 94.
[98] Ryan, *supra* note 6 at 301.
[99] *Id*. at 301-302.
[100] *Id*. at 302.

Kennedy by imposing capital punishment on perpetrators of child rape and sexual assault. After a thorough analysis of the evidence, it is evident that the current limits to capital punishment as provided by the Cruel and Unusual Punishments Clause are extremely vulnerable to expansion. Legislation in death penalty states such as Florida, Tennessee, Idaho, Oklahoma, Arkansas, and Alabama challenges the Supreme Court's ruling in *Kennedy v. Louisiana* (2008) to repeal this federal precedent. However, as this article has argued, the future of *Kennedy* and Eighth Amendment protections does not rest with the states, but with an originalist Supreme Court.

If a case to overturn *Kennedy* is brought before the Supreme Court, the Court may take several routes in handing down its decision. The Court has demonstrated the behavioral trend of ignoring the ESD in favor of an originalist interpretation and disregarding precedent in its decision-making. Therefore, one route the Court may take in deciding on a potential *Kennedy* overturning case is to disregard the emerging national consensus on the issue of capital punishment for child sexual battery. The Court could, however, overturn *Kennedy* because the Justices do not find a provision against child rape in the Constitution as it was developed at the time of the Founding. The Court may also disregard the standard of proportional punishment in this decision, finding that the Constitution does not mention a standard of proportionality; thus, the death penalty for child rape and sexual assault cannot be disproportionate. In this regard, the Court may overturn *Kennedy* on the basis of its independent, originalist judgment.

Conversely, the Court may apply the first test of the ESD, finding that a national consensus has formed among death penalty states in favor of the punishment, as justification for its decision to overturn *Kennedy*. If the Court were to use the ESD to determine a growing national trend in support of the death penalty for perpetrators of child rape and sexual assault, the "'one way ratchet'" of the ESD would be decimated.[101] Rather than moving in one direction to

[101] *Id*. at 257.

promote more humane punishment practices, this decision would mark a new era for the ESD, moving in both directions by dismantling proportional punishment and the constitutional protections guaranteed under the Eighth Amendment. A decision such as this would upend the Eighth Amendment and endanger the vitality of the Cruel and Unusual Punishments Clause. Even so, this outcome is very unlikely. The Court's ignorance of the ESD in prior cases demonstrates the unlikelihood that it will reverse its originalist ideology to use the ESD as a justification for overturning *Kennedy*.

The ongoing state legislation expanding the death penalty eligibility to apply to perpetrators of child rape and sexual assault may provide the ideal catalyst for the Supreme Court to overturn *Kennedy v. Louisiana* (2008). Rather than utilize the argument that there is a growing national consensus among states with capital punishment to expand its application to non-homicide crimes, the Court would more likely use the opportunity of the case to exert its originalist ideology. If such an event were to occur, the Court could reduce punishment restrictions that protect individual rights under the Eighth Amendment, instead widening these categories to reflect what it sees in the context of the Founding era. The United States may be on the precipice of entering an era in which the Court's disregard for precedent and originalist ideology will lead to an inevitable loss of time-tested individual protections.