THE DEATH PENALTY DEBATE:

Comparing the United States Supreme Court's Interpretation of the Eighth Amendment to that of the California Supreme Court and a Prediction of the Supreme Court's Ruling in Glossip v. Gross

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INTRODUCTION

The United States has long grappled with the constitutionality of capital punishment. The flip-flopping history of the country's stance on the death penalty indicates that this issue not only has several underlying components, but also that it has never been and never will be a non-controversial societal problem.

As society progressed and technology advanced, the death penalty did not become obsolete but instead became even more complex. Methods of execution that the early Americans relied on, such as hanging and the firing squad, were displaced by drugs and other technological advancements. And with these new methods came increasing judicial and public scrutiny.

This paper traces the history of the United States Supreme Court's application of the Eighth Amendment to the death penalty and compares

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this to the California Supreme Court's application of the California Constitution to capital punishment. This paper will also discuss how the current shortage of lethal-injection drugs has prompted states to turn to other methods of execution, such as using a controversial drug in their lethal-injection protocol. One such case currently before the United States Supreme Court, *Glossip v. Gross,* addresses this issue. This paper will predict how the United States Supreme Court will apply the federal constitution's "cruel and unusual punishment" prohibition to this pending case.

I. THE UNITED STATES SUPREME COURT'S INTERPRETATION OF THE EIGHTH AMENDMENT

A. A BRIEF HISTORY: DOCUMENTING THE COURT'S VARIOUS OPINIONS REGARDING CAPITAL PUNISHMENT

American society instituted the death penalty as early as 1608, and American views regarding lethal punishment have greatly fluctuated ever since.[1] The mid-twentieth century saw a substantial fluctuation in the public's perception of the death penalty. While the death penalty gained traction and support from 1920 to 1940, this movement was quickly quelled by a counteracting decrease in public support for capital punishment in the 1950s.[2]

The 1960s featured new challenges to the death penalty's seemingly unbridled discretion. Until this time, the Fifth, Eighth, and Fourteenth Amendments had been interpreted as allowing the death penalty.[3] This wave of new analysis began by addressing the absolute discretion given to sentencing juries,[4] a trend that continued until *Furman v. Georgia* in

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[1] *History of the Death Penalty,* Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const (last accessed Feb. 27, 2015).

[2] *Id.*

[3] *Id.*

[4] *See* United States v. Jackson, 390 U.S. 570 (1968) (holding that the death penalty provision of the Federal Kidnapping Act, which states that the defendant shall be punished by death if the kidnapped person has not been liberated unharmed and if the verdict of the jury should so recommend, is unconstitutional because it tends to discourage of the defendant's assertion of his Fifth Amendment right to plead not

1972. However, amid the increasing scrutiny of the death penalty and the meager number of executions that actually took place in the mid-twentieth century, the federal government expanded the list of death-eligible federal offenses. A series of airplane bombings and hijackings in the late 1950s led Congress to establish such crimes as capital offenses, and killings by explosives became capital crimes in 1970.[5] Therefore, although the list of capital crimes was increasing, the era of the Civil Rights Movement spurred litigation that somewhat restricted jurors' discretion in death penalty cases.

Then in 1972, the United States Supreme Court released an unprecedented yet divided five-person majority judgment in *Furman v. Georgia*[6] that invalidated every existing capital statute and verdict.[7] The fact that each justice wrote a separate opinion, and that no justice signed more than one opinion,[8] highlighted American society's reluctance and ability to reach a resolution, a trend that is unlikely to change any time soon. In *Furman,* the justices agreed that the current death-penalty administration was unconstitutional but that this may not be the case for death sentences imposed under different procedures.[9]

Many states responded by ratifying new capital statutes, beginning just five months after the *Furman* decision was published.[10] When rewriting their statutes, states focused on reining in discretion from the jury and even the judge. The Supreme Court reviewed the constitutionality of

guilty and to deter exercise of the Sixth Amendment right to a jury trial); Witherspoon v. Illinois, 391 U.S. 510 (1968) (a juror cannot be prevented from serving on a jury for a death penalty case simply because he has indicated he had reservations about the death penalty).

5 Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role,* 26 Fordham Urb. L.J. 347, 371 (1999).

6 Furman v. Georgia, 408 U.S. 238 (1972).

7 James S. Liebman, *Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963–2000,* 107 Colum. L. Rev. 1, 7–8 (2007).

8 *Id.*

9 *Id.* at 8 (however, while the justices did agree that the current system was unconstitutional, they could not agree on the basis for which it was unconstitutional. Justice Douglas believed the process was discriminatory while Justice White thought the death decisions were "arbitrarily infrequent.").

10 *Introduction to the Death Penalty,* Death Penalty Information Center (last accessed February 27, 2015), *available at* http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const (Florida rewrote its death penalty statute just five months after *Furman*).

these new statutes in the 1976 decisions known as the *Gregg* decisions. The Court not only upheld the constitutionality of these new laws but also retreated from its finding in *Furman*. As applied under these new statutes, the Court held that the death penalty was constitutional under the Eighth Amendment.[11]

In *Gregg,* the United States Supreme Court held that although the Eighth Amendment does not prohibit the death penalty, criminal sanctions must "accord with the dignity of man, which is the basic concept underlying the Eighth Amendment."[12] Thus the punishment for any particular crime cannot be excessive. Whether a punishment is excessive depends on two factors: first, the punishment cannot involve the unnecessary and wanton infliction of pain, and second, the punishment cannot be grossly out of proportion to the crime's severity.[13]

Chief Justice Burger's *Gregg* Court took the opportunity to review the history of the "cruel and unusual punishment" clause in the Eighth Amendment. The earliest cases involving Eighth Amendment claims did not focus on whether or not the death penalty itself was constitutional, but instead determined whether certain methods of execution violated the Amendment.[14] The Court recognized that the Eighth Amendment has "been interpreted in a flexible and dynamic manner" and that it has not "been regarded as a static concept," principles that the Court still adheres to today.[15] Chief Justice Warren had famously stated that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[16]

This idea of interpreting the Eighth Amendment in relation to societal maturation is reflected in the flurry of cases that immediately followed *Gregg.* The fact that the Court wavered and overruled its own precedent several times indicates that societal opinion toward the death penalty also evolves over time. For example, the Court has overturned itself several

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11 *Id.* (*See also* Gregg v. Georgia, 428 U.S. 153 (1976)).

12 *Gregg, supra* note 11 at 173.

13 *Id.*

14 *Id.* at 170 (citing Wilkerson v. Utah, 99 U.S. 130, 136 (1879); *In re* Kemmier, 136 U.S. 436, 447 (1890); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947)).

15 *Id.* at 171, 173.

16 *Id.* at 173 (citing Trop v. Dulles, 336 U.S. 86, 101 (1958)).

times in regard to whether a mentally ill person can be executed in the United States, ultimately determining that executing a mentally ill prisoner violates the Eighth Amendment.[17] Although the United States Supreme Court has not issued as many death penalty-related opinions in the last few years, the concept of interpreting the Eighth Amendment in the context of ever-changing societal norms would undoubtedly still hold.

These cases following *Gregg* were not only varied in their outcomes but also in their scope. They addressed a wide span of issues regarding the application of the death penalty, including but not limited to the crimes to which the death penalty can be applied, whether the death of the victim was necessary in order to impose the death penalty, the age of the defendant, and the defendant's mental capacity.

1. The Court's Focus on Disproportionality and Whether the Nature of the Defendant's Crime Warrants Capital Punishment

In *Woodson v. North Carolina,* decided the same year as *Gregg,* the Court held that the mandatory imposition of the death penalty in first-degree murder cases violated the Eighth and Fourteenth Amendments.[18] The Court reasoned that such mandatory sentencing was unconstitutional because it prevented the jury from considering the personalized circumstances and characteristics of the defendant.[19] This 5–4 judgment, announced in a plurality opinion written by Justice Stewart, fractured the Court and resulted in numerous concurring and dissenting opinions. Only Justices Powell and Stevens voted with the majority without writing a separate opinion.[20] Justice Brennan concurred in the judgment as did Justice Marshall, who expressed his view that the death penalty should always be considered cruel and unusual punishment under the Eighth Amendment.[21]

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[17] *See* Ford v. Wainwright, 477 U.S. 399 (1986) at 410 (holding that it is unconstitutional to execute an insane person); Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that the execution of people with mental retardation did not violate the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (finding that executing mentally ill prisoners violates the Eighth Amendment's prohibition of cruel and unusual punishment).

[18] Woodson v. North Carolina, 428 U.S. 280 (1976).

[19] *Id.* at 304.

[20] *Id.* at 282.

[21] *Id.*

Justice White wrote a dissenting opinion, which was joined by Chief Justice Burger and Justice Rehnquist, in which he rejected the argument that the death penalty violated the Eighth Amendment in every circumstance and that the North Carolina statute at issue would not result in the death penalty being arbitrarily imposed so as to render the statute void.[22] Justice Blackmun also penned his own dissenting opinion, as did the more conservative Justice Rehnquist.[23] Justice Rehnquist's opinion contained several reasons for his dissent, including that there was no basis for the plurality's conclusion that a mandatory death sentence for a particular crime was unduly harsh and rigid and that there was no basis in the plurality's conclusion that there must be "particularized consideration of relevant aspects of the character and record of each convicted defendant."[24]

The Court released another death penalty opinion the following year that also limited the scope of capital punishment, this time focusing on the crime of rape. In *Coker v. Georgia,* in a 7–2 judgment without a majority opinion, the Court held that the Eighth Amendment prohibits the imposition of the death penalty in a case where an adult woman is raped but not killed.[25] Justice White wrote the plurality opinion that Justices Stewart, Blackmun, and Stevens joined; this opinion "expressed the view that the Eighth Amendment barred not only punishments that were barbaric but also those that were excessive in relation to the crime committed" and therefore, the death penalty was an excessive punishment for the crime of rape because it did not involve the death of another.[26]

Justice Brennan, one of the more liberal justices on the bench at the time, concurred in this judgment but argued that the death penalty was cruel and unusual punishment in all circumstances.[27] Justice Marshall joined Brennan's concurrence. Justice Powell wrote his own concurring opinion in which he concluded that the Court was correct in holding that the death penalty was excessive in this particular situation because there were no facts of brutality or lasting injury, but that the plurality opinion

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22 *Id.*

23 *Id.*

24 *Id.*

25 Coker v. Georgia, 433 U.S. 584 (1977).

26 *Id.* at 586.

27 *Id.*

went too far in holding that the death penalty was *always* necessarily a disproportionate penalty for rape.[28] Justice Powell's concurrence demonstrated his well-recognized role on the Court as the pivotal vote, although he did tend to vote conservatively on criminal law issues.[29]

Chief Justice Burger wrote the dissenting opinion, joined by Justice Rehnquist, where he argued that rape is not a minor crime and not too far removed from murder in terms of heinousness.[30] This dissent also pointed out that the plurality opinion questioned the constitutionality of statutes that imposed the death penalty for crimes that might not result in immediate death, such as treason, kidnapping, and airplane hijacking.[31]

After the Court held that the death penalty could not be imposed for a rape conviction, it continued its analysis of death-eligible crimes and concluded that a defendant convicted of ordinary murder is ineligible for capital punishment in *Godfrey v. Georgia*.[32] In yet another judgment without a majority opinion, the Court invalidated a provision of the Georgia Code that allowed a defendant to be sentenced to death after a finding that his offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," finding that this provision violated the cruel and unusual punishment prohibition of the Eighth Amendment because it was too vague.[33] Specifically, the Court held that "there is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' "[34]

Justice Stewart wrote the plurality opinion, just four years after penning the plurality opinion in *Woodson*.[35] Justices Blackmun, Powell, and

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28 *Id.*

29 *Retired Justice Lewis Powell Dies at 90,* The Washington Post, *available at* http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/powell082698.htm (last accessed April 15, 2015).

30 *Coker, supra* note 25 at 586.

31 *Id.*

32 Godfrey v. Georgia, 446 U.S. 20 (1980).

33 *Id.* at 422.

34 *Id.* at 428–29.

35 *Id.* at 422 (citing *Woodson, supra* note 18).

Stevens joined Stewart's plurality opinion.[36] Justice Marshall, joined by Justice Brennan, wrote a concurring opinion in which he reiterated his view that the death penalty is always cruel and unusual punishment. Chief Justice Burger wrote a dissenting opinion arguing that because the defendant himself said his crime was "heinous," this is sufficient to warrant the imposition of the death sentence.[37] He also argued that the plurality's opinion has created the onerous task of forcing courts to decide on a "case by case" basis whether a defendant's conduct is egregious enough to deserve capital punishment.[38] Justice White wrote a rather passionate dissenting opinion that Justice Rehnquist joined.[39] It is interesting to note that Justice White strongly dissented here but wrote the plurality opinion in *Coker,* in which the Court held that the death penalty for rape was excessive.[40]

Finally, in 1986, Chief Justice Rehnquist's Court decided to expand the scope of capital punishment by ruling that it does not violate the Eighth Amendment to sentence to death a defendant who was a major participant in the commission of a felony that resulted in a death.[41] The Court held 5-4 in *Tison v. Arizona* that the imposition of the death penalty for a felony murder conviction is not cruel and unusual punishment if the defendant had "major participation in the felony and [showed] reckless indifference to human life."[42]

Expansion of the death penalty's scope under the Rehnquist Court is not surprising, given that Justice Rehnquist had been a consistent advocate for the death penalty throughout his time on the Court. Additionally, Justice Powell was still on the Court and Justice Scalia had since joined. Justices Powell, Rehnquist, Scalia, and White joined Justice O'Connor's majority opinion, which argued that the facts of this case (in which defendants brought "an arsenal of lethal weapons" into Arizona State Prison and

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36 *Id*.

37 *Id*. at 442.

38 *Id*. at 443.

39 *Id*. at 444.

40 *Coker, supra* note 25 at 586.

41 Tison v. Arizona, 481 U.S. 137 (1986) (thus qualifying the United State Supreme Court's ruling in *Enmund v. Florida,* 458 U.S. 782 (1982), in which the Court held it unconstitutional to impose the death penalty on a defendant who is a minor participant in a felony and did not kill or intend to kill).

42 *Id*. at 138.

gave them to two convicted murderers in furtherance of a prison-break scheme) support the conclusion that the death penalty was not disproportionate to the defendants' crimes because defendants committed acts that were likely to result in the taking of an innocent life and showed reckless indifference to the value of human life.[43] Justice Brennan wrote a dissent, joined by Justices Marshall, Blackmun, and Stevens.

In 2008, the Court circled back to the issue of imposing a death sentence for a rape conviction, this time focusing on child rape. Although there were dissenters in *Coker* who advocated that the death penalty should not necessarily be forbidden for a rape conviction,[44] the Court in *Kennedy v. Louisiana* held that it is unconstitutional under the Eighth Amendment to sentence to death a defendant for a child-rape conviction in which the victim did not die because this sentence is a disproportionate punishment.[45]

In a 5–4 decision, the Court reasoned that there is a distinction between intentional first-degree murder and non-homicidal crimes; although these non-homicidal crimes, including child rape, are devastating and harmful, "in terms of moral depravity and of the injury to the person and to the public, they cannot compare to murder in their severity and irrevocability."[46] The majority stated that this opinion is only limited to crimes against people and that this case is not intended to address crimes against the State such as treason, espionage, and terrorism.[47] Justice Kennedy authored the majority opinion and was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

Justice Alito filed a dissenting opinion, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, where he argued that such policy arguments are not pertinent to whether the death penalty constitutes cruel and unusual punishment for this crime and that holding "that the Eighth Amendment does not categorically prohibit the death penalty for the rape of a young child would not 'extend' or 'expand' the death penalty."[48] The dissent in *Kennedy* made it very clear that the conservative justices on the

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43 *Id.* at 151, 152.

44 *Coker, supra* note 25.

45 Kennedy v. Louisiana, 554 U.S. 407 (2008).

46 *Id.* at 412.

47 *Id.* at 437.

48 *Id.* at 462, 465.

Court would embrace an expansion of the death penalty and did not construe the "cruel and unusual punishment" provision as a necessarily prohibitive check on capital punishment.

2. How Personal Factors Such as Mental Retardation and Defendant's Age Affect the Court's Application of the Eighth Amendment to the Death Penalty

The following cases represent areas of death-penalty law that have proven to be inconsistently applied by the Court and remain controversial today. The first major United States Supreme Court case addressing the execution of mentally ill prisoners was *Ford v. Wainwright* in 1986. In *Ford,* Chief Justice Burger's Court held that executing mentally ill defendants violated the cruel-and-unusual punishment prohibition of the Eighth Amendment.[49] This case, which largely focused on Florida's procedures for determining whether a defendant is insane, splintered the Court. Justice Marshall wrote the Court's opinion and was joined by Justices Brennan, Blackmun, and Stevens.[50] Justice Powell, concurring in part and concurring in the judgment, wrote his own opinion to which Justice O'Connor joined in part.[51] Justice O'Connor also wrote a dissent in part, which Justice White joined, in which she shared Justice Rehnquist's view that "the Eighth Amendment does not create a substantive right not to be executed while insane."[52] Justice O'Connor's concurrence in part and dissent in part reflected her position on the court as a moderate conservative.[53] Justice Rehnquist, joined by Chief Justice Burger, wrote his own dissent.[54]

This issue proved to be so controversial that just three years later, the United States Supreme Court granted certiorari to another case addressing the application of the death penalty to the mentally ill and overturned *Ford*. In *Penry v. Lynaugh,* Justice O'Connor writing for the Court held that the Eighth Amendment does not categorically prohibit capital punishment

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[49] *Ford,* supra note 17.

[50] *Id*. at 401.

[51] *Id*. at 418.

[52] *Id*. at 427.

[53] *Sandra Day O'Connor,* The Oyez Project at IIT Chicago-Kent College of Law (last accessed April 21, 2015), *available at* http://www.oyez.org/justices/sandra_day_oconnor.

[54] *Ford, supra* note 17 at 431.

for mentally ill criminals but that a mentally ill defendant is entitled to jury instructions that instruct as to the mitigating effects of mental retardation.[55] However, this expansion of the death penalty did not last long.

Atkins v. Virginia, decided in 2002, effectively overturned *Penry* and is the current law.[56] As Justice Scalia wrote in his dissent, this "decision is the pinnacle of [the Court's] Eighth Amendment death-is-different jurisprudence.[57] In *Atkins,* the Court categorically held that the Eighth Amendment prohibits imposing the death penalty on a mentally ill defendant and that the "Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender."[58] The Court reasoned that there is no deterrent effect for such offenders and that these defendants' reduced capacity heightens the risk of a wrongful execution.[59] Justice Stevens wrote the Court's opinion and was joined by Justices Kennedy, Souter, Ginsburg, and Breyer.[60] Justice O'Connor, the author of the Court's opinion in *Penry,* also joined Justice Stevens' opinion.[61]

The Court's conservative justices wrote two separate dissents: Chief Justice Rehnquist wrote a dissent that Justices Scalia and Thomas joined and Justice Scalia also wrote his own impassioned dissent that Chief Justice Rehnquist and Justice Thomas joined.[62] Scalia's dissent reiterated the standards for determining whether a punishment is cruel and unusual under the Eighth Amendment ("modes or acts of punishment that had been cruel and unusual at the time that the Bill of Rights was adopted, and modes of punishment that are inconsistent with modern standards of decency") and argued that executing the mildly mentally retarded did not fall under either of those categories.[63]

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55 Penry v. Lynaugh, 492 U.S. 302, 328, 339 (1989).

56 *Atkins, supra* note 17.

57 *Id.* at 337.

58 *Id.* at 321.

59 *Id.* at 319–20 (for example, mentally ill offenders are more likely to give false confessions, may be less able to give meaningful assistance to their attorney, are generally poor witnesses, and their demeanor may provide a false impression of their lack of remorse).

60 *Id.* at 306.

61 *Id.*

62 *Id.*

63 *Id.* at 339–40.

As with its analysis of cases pertaining to the defendant's mental capacity, the United States Supreme Court has wavered in its analyses of capital cases in which the defendant is a minor. The first case to address this particular issue is *Thompson v. Oklahoma,* decided in 1988. There, the Court held that the execution of an offender who committed his crime when he was fifteen years old or younger is unconstitutional under the Eighth Amendment.[64] The majority concluded that imposing the death penalty on minors under the age of sixteen has not made, or cannot be expected to make, "any measureable contribution to the goals that capital punishment is intended to achieve. It is, therefore, nothing more than purposeless and needless imposition of pain and suffering."[65]

Justice Stevens, the same justice who wrote the *Atkins* opinion that held it was unconstitutional to sentence a mentally ill defendant to death, wrote the plurality opinion and was joined by Justices Brennan, Marshall, and Blackmun.[66] Justice O'Connor, who had wavered in her stance on categorically prohibiting imposing the death penalty on the mentally ill, wrote an opinion concurring in the judgment in which she appeared not to rule out ever executing a minor but agreed that in this particular case, the death sentence was unconstitutional.[67]

Justice Scalia, joined by Chief Justice Rehnquist and Justice White, wrote a dissent in which he referred to the plurality opinion as a "loose cannon."[68] He also vehemently argued that there is no "plausible basis" for answering the question as to whether "there is a national consensus that no criminal so much as one day under 16, after individuated consideration of his circumstances, including the overcoming of a presumption that he should not be tried as an adult, can possibly be deemed mature and responsible enough to be punished with death for any crime."[69] Justice Kennedy did not participate in this decision.[70]

64 Thompson v. Okla., 487 U.S. 815, 838 (1988).
65 *Id.* (citing *Coker, supra* note 25 at 592).
66 *Id.* at 818.
67 *Id.* at 848–49.
68 *Id.* at 878.
69 *Id.* at 859.
70 *Id.* at 818.

Just one year later, Justice Scalia wrote the plurality opinion in *Stanford v. Kentucky* in which the Court reached a contrary conclusion with respect to juvenile offenders older than 15. In *Stanford,* the Court held that executing an offender who committed a crime at the age of 16 or 17 does not constitute cruel and unusual punishment under the Eighth Amendment.[71] Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy joined Scalia's opinion.[72] Justice O'Connor wrote her own concurring opinion and Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, wrote the dissent.[73]

The Court revisited this issue in the 2005 case *Roper v. Simmons*. There, the Court not only overruled *Stanford* but also broadened the scope of the Eighth Amendment's prohibition on cruel and unusual punishment when it held that it is unconstitutional to sentence to death a defendant under the age of 18.[74] Justice Kennedy wrote the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer.[75] Kennedy argued that "capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution" but that juvenile offenders cannot be classified among the worst offenders for three reasons: a juvenile's lack of maturity, the greater susceptibility of juveniles to negative influences and outside pressures, and the transitory nature of a juvenile's character when compared with that of an adult.[76] Justice Kennedy concluded that these reasons, along with evolving standards of decency and the fact that all other countries have forbidden the juvenile death penalty, compelled the Court to hold that executing a minor constitutes disproportionate punishment under the Eighth Amendment.[77]

Justice Stevens wrote a concurring opinion that Justice Ginsburg joined.[78] Justice O'Connor wrote a dissenting opinion where she expressed her view that the majority's decision was not justified by the objective

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71 Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

72 *Id.* at 364.

73 *Id.*

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

75 *Id.* at 555.

76 *Id.* at 568–70.

77 *Id.* at 575.

78 *Id.* at 555.

evidence of contemporary societal values.[79] Although Justice O'Connor had voted in the majority in *Thompson v. Oklahoma,* where the Court prohibited executing anyone under 16, her dissent in *Roper* is not surprising because she had always appeared hesitant to prohibit categorically the imposition of the death penalty on minors.[80] Justice Scalia adhered to his conservative values and wrote a dissenting opinion, joined by Chief Justice Rehnquist and Justice Thomas.[81]

Roper is still controlling today; pursuant to the Eighth Amendment, minors who commit crimes are immune from execution. It is unlikely that this will change any time soon. The Court's analysis in *Thompson, Stanford,* and *Roper* indicates that it relies very heavily on the national consensus regarding the application of the death penalty when reaching its conclusions. Today, it is highly improbable that a majority of the nation would condone executing a juvenile no matter how atrocious the crime.

B. HOW THE SUPREME COURT HAS INTERPRETED THE EIGHTH AMENDMENT AS IT PERTAINS TO CAPITAL PUNISHMENT METHODS

Despite the seemingly constant publicity and infamous nature of death penalty cases, "the Supreme Court has never invalidated a State's chosen method of execution."[82] The Court ruled on the legality of execution methods as early as 1879, when it held in *Wilkerson v. Utah* that an execution by firing squad does not violate the Eighth Amendment.[83]

As technology progressed, the Court began facing more challenges to the constitutionality of various execution methods. One of the more formative cases in which the United States Supreme Court addressed an execution method in relation to the Eighth Amendment was *Louisiana ex rel. Francis v. Resweber,* where Chief Justice Fred Vinson's Court held that attempting a second electrocution after the first failed does not violate the Eighth Amendment.[84] There, the defendant had been prepared

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79 *Id.*

80 *See Thompson, supra* note 64 at 848–49.

81 *Roper, supra* note 74 at 555.

82 Workman v. Bredesen, 486 F.3d 896, 899 (6th Cir. 2007) (refusing to invalidate the three-drug protocol used by Tennessee and twenty-nine other jurisdictions).

83 Wilkerson v. Utah, 99 U.S. 130 (1879).

84 Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

for execution in the electric chair, but when the executioner flipped the switch, there was a mechanical difficulty and the defendant did not die.[85] Defendant argued that he had already undergone the psychological strain of preparing for electrocution and having to suffer through it again would constitute cruel and unusual punishment.[86] The Court disagreed. It reasoned that the Eighth Amendment protects against "cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution."[87] The Court added that just because the defendant had already been subjected to a current of electricity does not make his successful execution more "cruel."[88] This broad, permissive holding in *Resweber* helps explain why no execution method has ever been deemed impermissible by the Court.

Then, in 1985, the Court refused to grant certiorari for a petitioner who claimed that execution by electrocution was unconstitutional.[89] This was true to form for Chief Justice Burger's Court, which was regarded as being dramatically conservative in the area of criminal law.[90] Justices Brennan and Marshall dissented, stating that the "Eighth Amendment forbids inhuman and barbarous methods of execution that go at all beyond the mere extinguishment of life and cause torture or a lingering death."[91] The two justices argue that empirical evidence and eyewitness testimony demonstrate that death by electrocution is extremely violent and "inflicts pain and indignities far beyond the mere extinguishment of life."[92]

Electrocution became a rather obsolete method soon after the *Glass* decision and states began turning to lethal drugs as their primary execution

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85 *Id.* at 460.

86 *Id.* at 464.

87 *Id.*

88 *Id.*

89 Glass v. Louisiana, 471 U.S. 1080 (1985).

90 *Biographies of the Robes: Warren Earl Burger,* Public Broadcasting Service, *available at* http://www.pbs.org/wnet/supremecourt/rights/robes_burger.html (last accessed April 22, 2015).

91 *Glass, supra* note 89 at 1084 (citing *In re* Kemmler, 136 U.S. 436, 447 (1890)).

92 *Id.* at 1086.

method.[93] The increase in popularity of this method resulted in an increase of prisoners' challenges to the method's constitutionality. The Court in *Baze v. Rees,* in a plurality opinion written by Chief Justice Roberts and joined by Justices Kennedy and Alito, denied petitioner's argument that Kentucky's lethal-injection protocol is unconstitutional under the Eighth Amendment because there is a risk that these protocols may not be properly followed and would thus result in significant pain.[94]

The Court explained that just "because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of objectively intolerable risk of harm that qualifies as cruel and unusual;" therefore, an "isolated mishap" does not violate the Eighth Amendment because it does not suggest cruelty or that the procedure produces a substantial risk of serious harm.[95] The plurality opinion also denied petitioner's proffered alternative lethal-injection procedure because a petitioner cannot challenge a state's already-approved execution method just by presenting a slightly safer alternative.[96] *Baze* made it even more difficult for prisoners on death row to succeed in bringing an Eighth Amendment claim.

III. HOW THE CALIFORNIA SUPREME COURT HAS APPLIED THE CALIFORNIA CONSTITUTION TO CAPITAL PUNISHMENT

The California Supreme Court established early in its existence high standards for proving that the death penalty is unconstitutional. In *People v. Oppenheimer* in 1909, the Court held that using execution methods "ordinarily adopted by civilized people, such as hanging, shooting, or electricity, is neither a cruel nor unusual punishment, unless perhaps it be so disproportionate to the offense for which it is inflicted as to meet the disapproval and condemnation of the conscience and reason of men generally,

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93 *Methods of Execution,* Death Penalty Information Center (last accessed April 21, 2015), *available* at http://www.deathpenaltyinfo.org/methods-execution; *see also* Baze v. Rees, 553 U.S. 35, 42 (2008).

94 *Baze, supra* note 93 at 41.

95 *Id*. at 50.

96 *Id*. at 51 (reasoning that this would lead to a slippery slope in which courts would have to determine the best execution practices).

as to shock the moral sense of the people."[97] When considering the culture and historical time period in which the Court decided *Oppenheimer,* the court's holding and the public support for the death penalty becomes clearer: California was a new state battling outlaws and overrun with new settlers and gold miners. Hanging outlaws was not abnormal for California citizens. In the years following, the California Supreme Court adhered to its conclusion in *Oppenheimer* and routinely denied petitioners' claims that the death penalty was unconstitutional under the California and United States Constitutions.[98]

One of the most distinctive California Supreme Court decisions that analyzes "cruel and unusual punishment" in relation to the death penalty was *People v. Anderson* in 1972, decided earlier in the same year that the United States Supreme Court released its *Furman* decision.[99] Until then, the California Supreme Court had focused on justifications for sustaining the death penalty and had relied heavily on the fact that much of the California population had witnessed executions and encouraged them as a form of "vigilante justice."[100] *Anderson* constituted an unprecedented liberal shift of the Court.

In *Anderson,* the California Supreme Court held that the death penalty constitutes cruel or unusual punishment under article I, section 6 of the California Constitution; therefore, the Court did not need to address the legality of the death penalty under the United States Constitution.[101] While it is likely that the California Supreme Court would have come to the same conclusion when analyzing capital punishment under the U.S. Constitution's Eighth Amendment, the Court's reliance on the California Constitution insulated its judgment from federal review.

It is instructive to note that article I, section 6, of the California Constitution, unlike the Eighth Amendment to the United States

97 People v. Oppenheimer, 156 Cal. 773, 737 (1909).

98 *See, e.g.,* People v. Quicke, 71 Cal.2d 502 (1969); People v. Thomas, 65 Cal.2d 698 (1967); People v. Bashor, 48 Cal.2d 763 (1957); *In re* Wells, 35 Cal.2d 889 (1950); People v. Lazarus, 207 Cal. 507 (1929).

99 *Furman, supra* note 6; People v. Anderson, 6 Cal. 3d 628 (1972).

100 *Id.* at 642.

101 *Id.* at 633–34.

Constitution, prohibits the infliction of cruel *or* unusual punishments.[102] However, the California Supreme Court stated that the "cruel *or* unusual punishment" provision in the California Constitution serves the same purpose as the Eighth Amendment in the United States Constitution.[103] The *Anderson* Court recognized that it had historically been interpreting constitutional claims to the death penalty on the basis of whether a punishment was cruel *and* unusual and determined that it must analyze the issue under the "cruel or unusual punishment" standard.[104]

The Court emphasized that in deciding that capital punishment is cruel in the constitutional sense, it did not concentrate only on the "mere extinguishment of life" or on a particular method of execution because the United States Supreme Court had already determined that these are not unconstitutional.[105] Instead, it focused on "the total impact of capital punishment, from the pronouncement of the judgment of death through the execution itself, both on the individual and on the society which sanctions its use."[106] The Court considered the "degrading and brutalizing" psychological effects of impending execution on a prisoner, the lengthy imprisonment before execution, the evolving standards of decency on which enforcement of the Constitution relies, and the steady decrease in executions in California over the last few decades.[107]

Justice McComb was the sole dissenter in *Anderson*.[108] He argued that the death penalty deters people from committing violent crimes that result in the deaths of innocent people.[109] It appears that the California population agreed with Justice McComb's views. Nine months after the California Supreme Court decided *Anderson,* California voters passed Proposition 17 in November 1972, which amended the California Constitution to declare that the death penalty is neither cruel nor unusual

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[102] *Id.* at 634 (opposed to cruel *and* unusual punishment under the Eighth Amendment of the U.S. Constitution).

[103] *Id.* at 640.

[104] *Id.* at 645.

[105] *Id.* at 645–46.

[106] *Id.* at 646.

[107] *Id.* at 648–50.

[108] *Id.* at 657.

[109] *Id.* at 658.

punishment.[110] Capital punishment was constitutional again in California — but only on terms passing muster under the federal constitution.

This changed just four years later in December of 1976, an important year for death-penalty litigation and a year in which the California Supreme Court's and United States Supreme Court's rulings intersected. As discussed earlier, the United States Supreme Court released its series of *Gregg* decisions in July 1976, where it held that while capital punishment does not violate the Eighth Amendment of the U.S. Constitution in all circumstances, some states' death-penalty laws were unconstitutional.[111] In December of 1976, the California Supreme Court piggybacked off *Gregg* and unanimously held in *Rockwell v. Superior Court* that California's capital punishment law violated the United States Constitution.[112]

In *Rockwell,* the Court quoted *Gregg* when it recognized that death-penalty laws are unconstitutional under the Eighth Amendment of the federal constitution if they make the death penalty mandatory and do not give the judge or jury absolute discretion in choosing life or death.[113] The laws must also provide standards for the sentencing authority so it can consider the particularized circumstances of the crime and defendant.[114] The California Supreme Court, after engaging in analysis of several United States Supreme Court decisions, ultimately found that California's death-penalty laws violated the Eighth Amendment because they required that death be a mandatory punishment for first-degree murder and did not allow for evidence of mitigating circumstances, therefore resulting in the arbitrary imposition of the death penalty.[115]

Yet again, this prohibition on capital punishment in California did not last long. The California Legislature rewrote the California death penalty law in 1977, specifically allowing mitigating evidence and adding the possible sentence of life in prison without parole, therefore effectively

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[110] *California,* Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/california-1 (last accessed April 26, 2015).

[111] *Gregg, supra* note 11 (holding that North Carolina and Louisiana's death penalty laws were unconstitutional).

[112] Rockwell v. Superior Court, 18 Cal.3d 420 (1976).

[113] *Id.* at 428.

[114] *Id.*

[115] *Id.* at 445.

re-enacting the death penalty statute.[116] Proposition 7 superseded the 1977 death penalty statute in November of 1978, and is California's current death-penalty statute.[117]

California Penal Code section 3604(a) constitutes the death-penalty statute for California:

> The punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections.[118]

The prisoner has the choice between lethal gas and lethal injection. However, although they have the right to choose their execution method, in making this choice the inmates effectively waive their right to claim that the method is unconstitutional.[119]

Although the California Supreme Court has not yet ruled on cases alleging the unconstitutionality of California's execution methods, U.S. District Courts in California have addressed such claims. In 2006, U.S. District Court Judge Jeremy Fogel held in *Morales v. Tilton* that California's procedures for execution by lethal injection violated the Eighth Amendment of the United States Constitution.[120] Judge Fogel found that California's protocol was unreliable, lacked transparency, and contained serious deficiencies.[121] These deficiencies included inconsistent and unreliable screening of execution team members, a lack of meaningful training, supervision, and oversight of the execution team, inconsistent and unreliable recordkeeping, improper mixing preparation and administration of sodium thiopental by the execution team, and inadequate lighting,

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116 *History of Capital Punishment in California,* California Department of Corrections and Rehabilitation, *available at* http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html (last accessed April 22, 2015).

117 *Id.*

118 Cal. Pen. Code §3604(a).

119 Stewart v. Lagrand, 526 U.S. 115 (1999).

120 Morales v. Tilton, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006).

121 *Id.* at 979–80, 81.

overcrowded conditions, and poorly designed facilities where the execution team works.[122]

Judge Fogel's *Morales* opinion resulted in a de facto moratorium on capital punishment in California because no licensed medical professional would perform the procedure.[123] This injunction was lifted in August 2010 when the California Department of Corrections and Rehabilitation adopted newly approved regulations, but California has still not executed a prisoner since 2006.[124]

However, in 2014, another District Court judge imposed a second moratorium on the death penalty in California. In *Jones v. Chappell,* Judge Cormac J. Carney held that California's death penalty administration violated the cruel and unusual punishment provision of the Eighth Amendment because it "is so plagued by inordinate and unpredictable delay that the death sentence is actually carried out against only a trivial few of those sentenced to death."[125] Therefore, the system is arbitrary in that many are sentenced to death but only a few are actually executed and such a system constitutes arbitrarily inflicting the ultimate punishment of death.[126]

The fact that California has been subject to two separate moratoriums on capital punishment just ten years apart for two completely different reasons demonstrates that the death penalty in California is on tenuous grounds. One federal court in California has even ruled an execution method to be unconstitutional.[127] While the United States Supreme Court has yet to do so, this may change in the upcoming year or so.

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122 *Id*. at 979–80.

123 *A Timeline of the Death Penalty in California,* Stanford Progressive, *available at* http://web.stanford.edu/group/progressive/cgi-bin/?p=1773 (last accessed April 23, 2015).

124 *California's Lethal Injection Protocol Deemed Invalid by State Court,* Prison Legal News, *available at* https://www.prisonlegalnews.org/news/2014/jun/5/californias-lethal-injection-protocol-deemed-invalid-state-court (last accessed April 22, 2015).

125 Jones v. Chappell, 31 F. Supp. 3d 1050, 1062 (C.D. Cal. 2014).

126 *Id*. at 1063 (noting that "arbitrariness in execution is still arbitrary, regardless of when in the process the arbitrariness arises").

127 It should be noted that this ruling was "as applied" and not "facial." It held lethal injections in California to be unconstitutional because of the way in which they were administered.

IV. THE NATIONAL DEBATE REIGNITED: HOW THE UNITED STATES SUPREME COURT WILL APPLY THE EIGHTH AMENDMENT IN *GLOSSIP V. GROSS* TO STATES' NEWLY PROPOSED EXECUTION METHODS AMID A LETHAL DRUG SHORTAGE

For at least a year, states have been unable to procure pentobarbital for their executions. Pentobarbital is one drug in the typical three-drug cocktail used in lethal injections.[128] This shortage has forced states to turn to other similar drugs as a substitute. In April of 2014, Oklahoma used midazolam, which is a sedative, and two other drugs to execute Clayton Lockett.[129] This three-drug combination had never been used in Oklahoma before and the execution went horribly wrong; Lockett regained consciousness during the procedure, tried to sit up, and then died of a massive heart attack.[130]

This is not the first botched execution since states have substituted other drugs for pentobarbital. In Ohio, a prisoner took twenty-five minutes to die and was gasping for breath after he was given an untested cocktail containing midazolam.[131]

The Supreme Court of the United States has finally decided to consider the issue of states' substituting drugs for the originally approved three-drug cocktail upheld in *Baze*.[132] On January 23, 2015, the Supreme Court granted certiorari to hear the appeal of three death-row inmates in Oklahoma who are challenging the state's new three-drug protocol.[133]

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128 *States Scramble to Deal With Shortages of Execution Drugs,* National Public Radio, *available at* http://www.npr.org/2015/03/11/392375383/states-scramble-to-deal-with-shortages-of-execution-drugs (last accessed April 26, 2015).

129 *Oklahoma Execution: What Went Wrong and What Happens Now*?, NBC News, *available at* http://www.nbcnews.com/storyline/lethal-injection/oklahoma-execution-what-went-wrong-what-happens-now-n93556 [hereinafter *Oklahoma Execution*] (last accessed April 26, 2015).

130 *Id.*

131 *Id.*

132 *Baze, supra* note 93 (holding that a popular three-drug lethal injection method is constitutional).

133 *Court To Rule on Lethal-Injection Protocol,* Supreme Court of the United States Blog, *available at* http://www.scotusblog.com/2015/01/court-to-rule-on-lethal-injection-protocols/ [hereinafter *Court To Rule*] (last accessed April 25, 2015).

Earlier that week, the Court had voted 5–4 to grant delays in four inmates' executions and denied a stay to one inmate, who was executed later that same night. The three remaining inmates bring the case currently before the Court.[134]

On April 29, 2015, the Supreme Court heard oral arguments in *Glossip v. Gross*. This case presents the following question: whether it is constitutional for a state to carry out an execution using a three-drug protocol where there is a well-established scientific consensus that the first drug has no pain-relieving properties and cannot reliably produce deep, coma-like unconsciousness and it is undisputable that there is a substantial risk of pain and suffering from the administration of the next two drugs when a prisoner is conscious.[135]

A. A STEP-BY-STEP ANALYSIS OF THE *BAZE* PLURALITY OPINION, CONCURRENCES, AND DISSENTS

The *Baze* Court upheld lethal injection in a 7–2 plurality opinion written by Chief Justice Roberts and joined by Justices Kennedy and Alito.[136] The plurality opinion emphasized that the Court has never invalidated a state's chosen procedure for carrying out an execution and that "simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual."[137] The plurality also denied several of the petitioner's claims that Kentucky's use of sodium thiopental is cruelly inhumane.[138]

Justice Alito wrote his own concurring opinion in which he states that *Baze* demonstrates the high standard for modifying lethal injection

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134 *Id.*

135 Glossip v. Gross, Supreme Court of the United States Blog, *available at* http://www.scotusblog.com/case-files/cases/glossip-v-gross/ [hereinafter Glossip] (last accessed April 24, 2015).

136 *Baze, supra* note 93 at 41.

137 *Id.* at 48, 50.

138 *Id.* at 53–56 (dismissing claim that there is a substantial risk of suffocation when there is an insufficient dose of sodium thiopental; petitioners did not establish a substantial risk of harm related to the IV lines; there is no excessive wait time to establish the IV).

protocol.[139] He wrote: "In order to show that a modification of a lethal injection protocol is required by the Eighth Amendment, a prisoner must demonstrate that the modification would '*significantly* reduce a *substantial* risk of *severe* pain.' Showing merely that a modification would result in some reduction in risk is insufficient."[140]

Justice Stevens wrote his own concurrence as well.[141] He predicted that instead of settling the death penalty debate once and for all as the Court intended to do with this opinion, *Baze* would actually incite more debate about the constitutionality of the three-drug protocol.[142] Although he voted with the plurality, his concurrence seemed hesitant. Justice Stevens is no longer on the Court, however, so his opinion in *Baze* is inconsequential for the purposes of predicting the Court's decision in *Glossip*.

Justice Scalia wrote a concurrence that Justice Thomas joined.[143] This concurrence was, essentially, a response to Justice Stevens' relatively liberal concurrence; Justice Scalia argued that Justice Stevens' conclusions are not supported by the available data and strongly advocated that the death penalty serves a retributive purpose.[144]

Justice Thomas also wrote a concurrence that Justice Scalia joined.[145] His concurrence specifically addressed the constitutionality of a method of execution and wrote that "in my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain . . . ."[146] Therefore, in Justice Thomas' view, there is an extremely narrow standard for determining that an execution method is unconstitutional.

Justice Thomas conceded that not all methods of execution are constitutional, but the unconstitutional methods he listed so clearly constitute "cruel and unusual punishment" that his concession is not necessarily meaningful.[147] For example, he noted that burning at the stake is an

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139 *Id.* at 67.

140 *Id.*

141 *Id.* at 72.

142 *Id.*

143 *Id.* at 87.

144 *Id.* at 89, 90.

145 *Id.* at 94.

146 *Id.*

147 *Id.* at 95–96 (noting that former methods of burning at the stake, gibbeting, public dissection, emboweling alive, beheading, and quartering are clearly unconstitutionally cruel).

unconstitutional method of execution because, unlike hanging, it was "always painful and burned the body . . . . [I]t was considered 'a form of super-capital punishment, worse than death itself.'"[148] Gibbeting, where the prisoner was hung in an iron cage and his body would decay in public, was another unduly painful method.[149] Justice Thomas wrote that these methods violated the Eighth Amendment because they were purposely designed to inflict more pain and suffering than was necessary to cause death.[150] His concurrence ended with a recapitulation of his conservative argument: "In short, I reject as both unprecedented and unworkable any standard that would require the courts to weigh the relative advantages and disadvantages of different methods of execution or of different procedures for implementing a given method of execution."[151]

Justice Breyer wrote the last concurring opinion, in which he agreed with Justice Ginsburg that the relevant factors in assessing an execution method consist of "the degree of risk," "the magnitude of pain," and "availability of alternatives," and are all interrelated.[152] Justice Breyer appeared highly skeptical of petitioner's reports alleging that the lethal injection method may produce unnecessary suffering. He referred to the study as possibly being "seriously flawed" and noted that the research "casts a shadow of uncertainty upon the ready availability of some of the alternatives to lethal injection methods."[153] Thus, Justice Breyer's concurrence focused heavily on the studies and research supporting petitioner's claims.

Justice Ginsburg wrote the sole dissent, which Justice Souter joined.[154] A staunch liberal, she was unconvinced that inmates were adequately anesthetized by the first drug in the three-drug protocol.[155] She proposed that although the Court has addressed and preserved various methods of execution in the past, there is still "no clear standard for determining the constitutionality of a method of execution."[156]

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148 *Id.* at 95.
149 *Id.*
150 *Id.* at 96.
151 *Id.* at 106.
152 *Id.* at 107–08.
153 *Id.* at 109, 111.
154 *Id.* at 113.
155 *Id.* at 114.
156 *Id.* at 115.

B. A PREDICTION OF THE UNITED STATES SUPREME COURT'S *GLOSSIP V. GROSS* OPINION

The Court's composition has changed since *Baze,* but only slightly. Chief Justice Roberts, author of the *Baze* plurality, is still on the Court and will hear the *Glossip* case. The current Court has been called the "most conservative" Supreme Court in generations.[157] Republican Justices Scalia and Thomas, who both wrote strongly-worded conservative concurrences in *Baze,* remain on the Court. Justice Alito, a conservative who joined the *Baze* plurality and wrote his own concurrence, still holds his seat on the Court. Justice Breyer is also still on the Court and, although he wrote a concurring opinion in *Baze,* he is generally considered more liberal.

The only two justices who heard *Baze* and are no longer on the Court are Justices Souter and Stevens. Justice Souter joined Justice Ginsburg's dissent in *Baze* and was difficult to classify as either conservative or liberal.[158] Justice Stevens, too, avoided political labels but seemed to become a voice of moderation when the Court became more conservative with the appointments of Justice Alito and Chief Justice Roberts.[159]

Justices Kagan and Sotomayor have since replaced Justices Stevens and Souter. Justice Sotomayor replaced Justice Souter and many believe that her views mostly align with her predecessor's although she identifies as an independent.[160] Justice Kagan succeeded Justice Stevens. This also is not a marked ideological change because, although Justice Kagan is a steadfast liberal, Justice Stevens was often considered a leader of the liberals during his time on the Court.[161]

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157 *John Roberts,* Forbes, *available at* http://www.forbes.com/profile/john-roberts/) (last accessed April 26, 2015).

158 *David H. Souter,* The Oyez Project at IIT Chicago-Kent College of Law, *available at* http://www.oyez.org/justices/david_h_souter (last accessed April 24, 2015).

159 *John Paul Stevens,* The Oyez Project at IIT Chicago-Kent College of Law, *available at* http://www.oyez.org/justices/john_paul_stevens (last accessed April 26, 2015).

160 *Sotomayor Confirmed By Senate, 68–31,* The New York Times, *available at* http://www.nytimes.com/2009/08/07/us/politics/07confirm.html (last accessed April 26, 2015).

161 *Elena Kagan Confirmed as Supreme Court Justice,* CBS News, *available a*t http://www.cbsnews.com/news/elena-kagan-confirmed-as-supreme-court-justice (last accessed April 26, 2015).

Therefore, the current Court that will hear *Glossip* is predominately conservative, and seven out of the nine current members participated in the *Baze* opinion. Out of these seven members, six voted with the plurality with only Justice Ginsburg dissenting.[162]

As mentioned earlier, the predominant question to be presented in *Glossip* is whether it is constitutional for a state to carry out an execution using a three-drug protocol where there is a well-established scientific consensus that the first drug has no pain-relieving properties and cannot reliably produce deep, coma-like unconsciousness and it is undisputable that there is a substantial risk of pain and suffering from the administration of the next two drugs when a prisoner is conscious.[163] Although this is a slightly different question than that presented in *Baze,* both cases address the legality of a lethal-injection method. *Glossip,* however, is being decided in a different context because there is currently a shortage of the already-approved pentobarbital; this could mean that the Court may have to engage in an analysis of available alternative methods.

It may be a foreshadowing of the Court's decision that they denied one of the petitioner's requests to grant a delay of his execution.[164] It can be argued that, after the Court read the parties' briefs and still decided to allow the execution, this may be a sign that it does not think the lethal-injection method is unconstitutional. But others can also argue that simply because the Court did not grant a stay does not bear any indication of their ruling on the merits of the case.

The fact that the Court is laden with conservatives will likely be the determining factor in deciding *Glossip* and will probably result in an outcome similar to that of *Baze's*. Chief Justice Roberts will most likely vote that Oklahoma's use of midazolam in their drug cocktail is not unconstitutional even if it does cause the inmate pain; he wrote in *Baze* that simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual.[165] Therefore, he might argue in *Glossip* that this risk of pain from the midazolam

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162 *Baze, supra* note 93 at 113.

163 *Glossip, supra* note 134.

164 *Court To Rule, supra* note 132.

165 *Baze, supra* note 93 at 48, 50.

does not necessarily establish the "objectively intolerable risk of harm" that petitioners must prove.

There is hardly any doubt that Justices Scalia and Thomas will vote that the use of midazolam does not violate the Eighth Amendment. The use of this drug, likely to be held comparable to that of pentobarbital, definitely does not meet Justice Thomas' high standards of "cruel and unusual punishment" and in no way compares to the methods that he would deem unconstitutional (i.e. burning alive and decomposing in public). Justice Thomas will likely argue that the use of this new drug is not substituted solely for the purpose of "inflict[ing] more pain and suffering than was necessary to cause death" and therefore is constitutional.[166] Justice Scalia, whose *Baze* concurrence was mostly a rebuttal to Justice Stevens' concurrence, will certainly vote that the method is constitutional. There has not been one United States Supreme Court case that he has heard where he voted that the death penalty was unconstitutional.[167]

Justice Alito will also likely vote that Oklahoma's new method is constitutional. His concurrence in *Baze* highlighted the extremely high standard he applies for proving a violation of the Eighth Amendment.[168]

Justice Kennedy did not write a concurrence in *Baze* but voted with the plurality. He has been an inconsistent vote in the Supreme Court's death penalty cases: he voted with the majority in *Stanford v. Kentucky* to uphold the death penalty for juveniles but then voted with the majority in *Roper v. Simmons,* which overturned *Stanford*.[169] He also wrote the opinion of the Court in *Kennedy v. Louisiana,* where the Court struck down the execution of a child rapist. Therefore, his vote in *Glossip* is not as clearcut.

Justice Ginsburg will just as likely vote to remand the case, continuing the stay of execution. Her dissent in *Baze* indicated that she was highly

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166 *Id*. at 96.

167 *See, e.g.,* Thompson, *supra* note 64 (where he dissented in the Court's ruling that juveniles 15 years or younger could not be executed); *Stanford, supra* note 71 (where he wrote the opinion holding that 16-year-olds could be given the death penalty); Roper, *supra* note 74 (dissenting where the Court overturned *Stanford* and held that minors cannot be executed); *Atkins, supra* note 17 (dissenting when the Court ruled that mentally ill offenders cannot be executed).

168 *It's All Right With Sam,* The New York Times, *available at* http://www.nytimes.com/2015/01/08/opinion/its-all-right-with-samuel-alito.html (last accessed April 27, 2015).

169 *Stanford, supra* note 71; *Roper, supra* note 74.

skeptical of the humaneness of the pentobarbital, so this wariness will probably transfer to *Glossip*. This is especially true because the new drug, midazolam, has only been used a few times, and one of the executions in which it was used went horribly wrong.[170]

Justices Kagan and Sotomayor's votes are more dubious. Although Justice Kagan is liberal, she has expressed before that she has no reservations about ruling that the death penalty is constitutional.[171] Justice Sotomayor, a self-identified Independent, led the dissent in the Supreme Court opinion that denied the *Glossip* petitoner's request for his execution to be delayed.[172] She was joined by Justices Ginsburg, Breyer, and Kagan.[173] In this dissent, all four justices appeared skeptical about the effects of the untested drug midazolam.[174]

Justice Breyer wrote a concurring opinion in *Baze* where he focused mostly on the reliability and credibility of the studies in that case.[175] He seemed distrustful of the reports that alleged the lethal-injection drugs were inhumane. Because *Glossip* relies heavily on reports that allege the use of the new drug midazolam leads to an inhumane death, Breyer's analysis in *Glossip* will likely mirror that of his in *Baze*.

The fact that Justices Sotomayor, Ginsburg, Breyer, and Kagan were proponents of halting one petitioner's execution does not necessarily mean that they will find Oklahoma's new drug protocol unconstitutional. But it does suggest that the *Glossip* opinion may be slightly different than *Baze* in that more justices will find that the Oklahoma drug protocol is unconstitutional.

To conclude, because the California Supreme Court no longer has an independent state constitutional basis on which to suspend the death penalty, a ruling in *Glossip* upholding the use of midazolam in lethal

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170 *Oklahoma Execution, supra* note 128.

171 *Statements of Elena Kagan on the Death Penalty,* Texas Moratorium Network, *available at* http://www.texasmoratorium.org/archives/1287 (last accessed April 26, 2015).

172 *Sotomayor Leads Dissent in Oklahoma Death Case,* The National Law Journal, *available at* http://www.nationallawjournal.com/id=1202716150323/Oklahoma-Asks-Supreme-Court-to-Delay-Scheduled-Executions (last accessed April 26, 2015).

173 *Id.*

174 *Id.*

175 *Baze, supra* note 93 at 109.

injections will likely lead to the resumption of executions in California absent an adoption of an initiative amendment to the California Constitution abolishing the death penalty. Although California voters have previously rejected such initiatives, the recent approval of Proposition 47[176] has indicated that a liberal movement is sweeping the state. An initiative completely abolishing the death penalty may be in California's near future.

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[176] *California Proposition 47,* Ballotpedia.org, *available at* http://ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_(2014) (last accessed June 27, 2015).