

Oklahoma Law Review

Volume 59 | Number 4

2006

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Recommended Citation

Harry F. Tepker Jr., *Tradition & the Abolition of Capital Punishment for Juvenile Crime*, 59 OKLA. L. REV. 809 (2006),

<https://digitalcommons.law.ou.edu/olr/vol59/iss4/3>

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TRADITION & THE ABOLITION OF CAPITAL PUNISHMENT FOR JUVENILE CRIME

HARRY F. TEPKER*

In March of 2005, the U.S. Supreme Court announced its decision in *Roper v. Simmons*.¹ The case arose from the brutal, horrific, and depraved murder of a defenseless elderly woman.² The Court reviewed the case and its prior decision in *Stanford v. Kentucky*.³ A bare majority of the Court held that the constitutional ban of “cruel and unusual punishments” barred execution of offenders who were under the age of eighteen when their crimes were committed. The opinion of the Court, written by Justice Kennedy, made three basic points.

First, there is a national “consensus” for the conclusion that the juvenile death penalty offends “evolving standards of decency.”⁴ A majority of states do not allow such executions.⁵ In states where such executions are possible, they are extremely rare.⁶ And there is consistency in the “trend” toward abolition of the practice.⁷ Second, this consensus reflects a view that juveniles, like the mentally retarded, are “categorically less culpable than the

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1. 543 U.S. 551 (2005).
2. Justice O’Connor’s description of the facts in her dissenting opinion were undisputed: Christopher Simmons’ murder of Shirley Crook was premeditated, wanton, and cruel in the extreme. Well before he committed this crime, Simmons declared that he wanted to kill someone. On several occasions, he discussed with two friends (ages 15 and 16) his plan to burglarize a house and to murder the victim by tying the victim up and pushing him from a bridge. Simmons said they could “get away with it” because they were minors. In accord with this plan, Simmons and his 15-year-old accomplice broke into Mrs. Crook’s home in the middle of the night, forced her from her bed, bound her, and drove her to a state park. There, they walked her to a railroad trestle spanning a river, “hog-tied” her with electrical cable, bound her face completely with duct tape, and pushed her, still alive, from the trestle. She drowned in the water below.
Id. at 600 (O’Connor, J., dissenting) (citation omitted).
3. 492 U.S. 361 (1989) (plurality opinion).
4. *Roper*, 543 U.S. at 563.
5. *Id.* at 564.
6. *Id.* at 564-65.
7. *Id.* at 566.

average criminal.”⁸ Finally, the overwhelming weight of international opinion against the juvenile death penalty confirms the Court’s own determination that the penalty is disproportionate punishment for offenders under the age of eighteen.⁹

Justice Scalia dissented.¹⁰ In many ways, it is a joy to teach constitutional law while he serves on the Court. He writes so well and his arguments, particularly in dissents, are always thought-provoking and forceful. But he often serves his cause badly by being too forceful for his own reputation. His dissent in *Roper* was particularly vehement and personal in tone. He decried his colleague Kennedy’s opinion as “a mockery,” “implausible,” resting “on the flimsiest of grounds,” “indefensible,” “sophistry,” and undemocratic.¹¹ In rationale and result, Scalia claimed that the decision was a “usurpation of the role of moral arbiter,” based only on “the subjective views of five Members of this Court and like-minded foreigners.”¹² He even condemned Justice O’Connor’s analysis — in dissent — as both unpredictable and undemocratic because she endorsed almost all of the majority’s methodology even as she also reached Scalia’s conclusion.¹³

As if on cue, a tsunami of denunciation followed. George F. Will assailed Justice Kennedy as “a would-be legislator, a dilettante sociologist and a free-lance moralist, disguised as a judge.”¹⁴ Bruce Fein wrote that Justice Kennedy was guilty of preposterous sermonizing, a “squeamish moral conscience,” “foolish” beliefs, insufficient horror of brutal murders, an obtuse insistence on relying on the “opinion of the world community,” “fuzzy” and “undisciplined” thinking, and — perhaps worst of all — “repudiat[ing] Scalia in all his moods and tenses.”¹⁵ Phyllis Schlafly and Oklahoma’s own U.S. Senator Tom Coburn suggested that Justice Kennedy’s invocation of foreign legal authority is grounds for impeachment, because his research methods don’t meet the standards of “good behavior” prescribed for judges by the Constitution.¹⁶

8. *Id.* at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

9. *Id.* at 578.

10. *Id.* at 607 (Scalia, J., dissenting).

11. *Id.* at 608, 616 n.8, 626-27.

12. *Id.* at 608, 615.

13. *Id.* at 616 n.8.

14. George F. Will, *Wrong on All Counts*, WASH. POST, Mar. 6, 2005, at B7.

15. Bruce Fein, *The Lesson of Justice Kennedy*, LICHFIELD GROUP, Mar. 5, 2005, <http://www.theichfieldgroup.com/pubs/2005/03/kennedy/>.

16. Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3.

On New Year's Day 2006, an associate justice of the Alabama Supreme Court condemned his colleagues for complying with *Roper*.¹⁷ He advocated judicial disobedience of a decision he characterized as an act of blatant judicial tyranny because, he claimed, the Justices based their ruling not on the original intent or actual language of the United States Constitution but on foreign law, including United Nations treaties.¹⁸

The assault on the judiciary eventually turned from witty barbs and fair comment to something darker and more foreboding. At a Washington, D.C. conference, Dr. Edwin Viera offered a recommendation to conservative activists, quoting Stalin: "No man, no problem."¹⁹ Presumably, Viera too was committed only to impeachment and removal, not something more violent. Yet, when so-called conservatives start quoting the darkest words of Joseph Stalin about appropriate political tactics, we all should dare to question what is truly conservative.

One would have thought from all this uproar that the decision in *Roper v. Simmons* signaled judicial tyranny, an end to democracy, an almost apocalyptic cultural civil war, an unprecedented violation of the Constitution, and a triumph of partisan injudicious will. But this case was not *Bush v. Gore*.²⁰ Nor was it like a recent string of decisions based on imagined and manufactured "penumbras" of state sovereign immunity that cut deeply into Congress's chosen machinery of civil rights enforcement and labor law regulation.²¹ Nor did the decision resemble problematic judicial enforcement of unenumerated individual rights, as in cases like *Roe v. Wade*.²² *Roper* instead focused on an explicit command and limitation of constitutional text traceable back in law to principles existing before the Constitution.

Still, the opinion of Justice Kennedy left a lot to be desired. One liberal journalist told Jeffrey Rosen of *The New Republic* and George Washington University that "ever since Justice Anthony Kennedy . . . styled himself a judicial statesman, he has become insufferable, out of control, and 'deserves to be slapped.'"²³ While a defense of *Roper* also may prove equally

17. Tom Parker, *Alabama Justices Surrender to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2005, at 4B.

18. *Id.*

19. Milbank, *supra* note 16 ("The full Stalin quote . . . is 'Death solves all problems: no man, no problem.'").

20. 531 U.S. 98 (2000).

21. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 665 (1999) (Stevens, J., dissenting) (criticizing *Alden* as a "judge-made doctrine of sovereign immunity . . . defined only by the present majority's perception of constitutional penumbras rather than constitutional text").

22. 410 U.S. 113 (1973).

23. Jeffrey Rosen, *Court Outsourcing: Juvenile Logic*, NEW REPUBLIC, Mar. 21, 2005, at

insufferable, I hope to respond to criticism that focused on the way the majority explained and justified its ruling. Academic and professional reaction tended to the view, as expressed by another law professor about another Kennedy opinion, that *Roper* “should be celebrated by all who stand against the endless campaign” for vengeance and retribution in the form of capital punishment — even against children and adolescents.²⁴ “But in the main, the actual opinion . . . is not satisfying as a matter of constitutional interpretation.”²⁵

Because Justice Scalia’s dissenting opinion represents the most comprehensive attack on the *Roper* decision, his arguments define the issues best — and most influentially.

To tone down the debate, this article asks the appropriate questions in this way:

(1) Does the judicial decision to abolish the juvenile death penalty reflect a principled fidelity to the Constitution, its text, history, and original meaning?

(2) Is the abolition of the juvenile death penalty consistent with a careful, candid assessment of our nation’s traditions and “evolving standards of decency”?

(3) Does the nearly universal international condemnation of government killing as punishment for child-committed crimes matter, when judges decide what is “cruel and unusual punishment”?

This article’s answer to all three questions is yes — emphatically yes.²⁶

11, available at <http://www.tnr.com/doc.mhtml?pt=0A6ssnI6gzXGUvo7IevhDx%3D%3D>.

24. JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 184 (2005) (discussing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

25. *Id.*

26. The constitutionality of the death penalty imposed for juvenile crime has been the subject of much scholarly attention since the decisions of the U.S. Supreme Court in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion), and *Stanford v. Kentucky*, 543 U.S. 551 (2005).

For arguments in favor of the *Roper* result, see Jeffrey Fagan & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, 95 J. CRIM. L. & CRIMINOLOGY 427 (2005) (addressing statistical evidence reflecting juveniles’ lesser culpability and greater risk of wrongful execution); Richard Heisler, *The Kids Are Alright: Roper v. Simmons and the Juvenile Death Penalty After Atkins v. Virginia*, 34 SW. U.L. REV. 25 (2004) (predicting that *Stanford* will be overruled because the rationale of the Court in abolishing executions of the mentally retarded); Kim A. Lechner, *Reflections on the Juvenile Death Penalty: Contravention of Precedent and Public Opinion*, 15 IN PUB. INTEREST 113 (1996-1997) (arguing that the death penalty does not reduce juvenile crime); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005) (criticizing the constitutional jurisprudence articulating the “proportionality” requirement of the Eighth Amendment); Suzanne D. Strater, *The Juvenile Death Penalty: In the Best Interests of the Child?*, 26 LOY. U. CHI. L.J. 147 (1995) (arguing that the juvenile death penalty is inconsistent

I. A Written Constitution and An Evolving Doctrine

In articles and public speeches, Justice Scalia argues against the idea of a living, evolving constitution.²⁷ He is characteristically witty in his attacks. To Scalia, one either believes in law, including a fixed, written constitution, or

with the state's *parens patriae* duty to protect children by considering their best interests); Victor L. Strieb, *Executing Juvenile Offenders: The Ultimate Denial of Juvenile Justice*, 14 STAN. L. & POL'Y REV. 121, 121 (2003) (predicting the demise of the "centuries-old American practice of punishing the acts of children with death"); Audra M. Bogdanski, Comment, *Relying on Atkins v. Virginia as Precedent to Find the Juvenile Death Penalty Unconstitutional: Perpetuating Bad Precedent?*, 87 MARQ. L. REV. 603 (2004) (arguing that the statute count is an inadequate approach to finding a national consensus); Lucy C. Ferguson, Comment, *The Implications of Developmental Cognitive Research on "Evolving Standards of Decency" and the Imposition of the Death Penalty on Juveniles*, 54 AM. U. L. REV. 441 (2004) (arguing in favor of abolition of juvenile capital punishment based on evolving standards of decency); Bryan Graff, Comment, *Executing Juvenile Offenders: A Reexamination of Stanford v. Kentucky in Light of Atkins v. Virginia*, 20 GA. ST. U. L. REV. 485 (2003) (arguing the execution of juvenile offenders violates the Eighth Amendment); Mirah A. Horowitz, Note, *Kids Who Kill: A Critique of How the American Legal System Deals with Juveniles Who Commit Homicide*, LAW & CONTEMP. PROBS., Summer 2000, at 133, 135 (arguing for abolition of the juvenile death penalty, with emphasis on data showing "juveniles on death row have a disproportionate number of social and psychological problems, including unstable and abusive family backgrounds, drug and alcohol addiction at a very young age, mental illness and brain damage"); S. Starling Marshall, Comment, *"Predictive Justice"?: Simmons v. Roper and the Possible End of the Juvenile Death Penalty*, 72 FORDHAM L. REV. 2889 (2004) (arguing for a broader assessment of national traditions, rather than a statute count, to expound the Cruel and Unusual Punishments Clause); Edmund P. Power, Article, *Too Young to Die: The Juvenile Death Penalty After Atkins v. Virginia*, 15 CAP. DEF. J. 93 (2002) (arguing that executing juvenile offenders is unconstitutional); Nicole A. Saharsky, Note, *Consistency as a Constitutional Value: A Comparative Look at Age in Abortion and Death Penalty Jurisprudence*, 85 MINN. L. REV. 1119 (2001) (arguing the juvenile death penalty is unconstitutional); Michael J. Spillane, Comment, *The Execution of Juvenile Offenders: Constitutional and International Law Objections*, 60 UMKCL. REV. 113 (1991) (arguing that execution of persons for crime committed under age eighteen violates customary international law incorporated in constitutional and federal common law); Lawrence A. Vanore, Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 762 (1986) (arguing "the inherent immaturity and irresponsibility of youth, as recognized in the law, renders a death penalty for minors excessive in every case").

For arguments in favor of *Stanford* and executions for juvenile crime, see Jeffrey M. Banks, Note, In Re *Stanford: Do Evolving Standards of Decency Under Eighth Amendment Jurisprudence Render Capital Punishment Inapposite for Juvenile Offenders?*, 48 S.D. L. REV. 327 (2003) (defending *Stanford*); Warren M. Kato, Comment, *The Juvenile Death Penalty*, 18 J. JUV. L. 112 (1997) (arguing for the execution of juvenile offenders and for overruling *Thompson*).

27. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861-62 (1989).

believes in a fallacy — or something worse.²⁸ He urges interpretation based on original meaning, and nothing but original meaning. Every part of the Constitution is fixed, immutable, and unchangeable except by amendment.²⁹

No one doubts, of course, that this methodology is correct for unambiguous terms — age limits for public office, length of terms, methods of electing presidents (in most elections, anyway).³⁰ But other provisions are different. The real controversy focuses on the open-ended phrases, the clauses with “evolutionary content.”

A. *The Text*

The Cruel and Unusual Punishment Clause of the Eighth Amendment is one such controversial clause; the words are ambiguous. During the debates on the Constitution, prior to ratification and the subsequent drafting of a Bill of Rights, Noah Webster, an advocate of a national constitution and author of America’s first great dictionary, stated the common sense of the problem: “[U]nless you can, in every possible instance, previously define the words *excessive* and *unusual* — if you leave the discretion of Congress to define them on occasion, any restriction of their power by a general indefinite expression, is a nullity — mere *formal nonsense*.”³¹

The apparent meaning of the text is at odds with what some scholars hold as prevalent understandings of the clause’s language at the time of ratification. The clause does not refer to torture or barbaric or “sanguinary” punishments — but those punishments seem to be what the founders had in mind.³² Nor does the clause plainly state the principle that punishment should fit the crime — though that is the meaning of the phrase as interpreted by English Courts in England’s Bill of Rights.³³ The word “cruel” connotes not “extreme” punishments, but “harsh,” “inhumane” methods of criminal sanction that offend an unspecified moral sense.³⁴ The word “unusual” seems

28. *Id.*

29. *Id.*

30. *See, e.g.*, U.S. CONST. art. I, § 2, cls. 1-2; *id.* art. II, § 1, cls. 1-2, 4.

31. Noah Webster, *Reply to the Pennsylvania Minority: “America,”* DAILY ADVERTISER (N.Y.), Dec. 31, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 553, 559 (Bernard Bailyn ed., 1993).

32. Raoul Berger, *The Cruel and Unusual Punishments Clause*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING, 303, 303-04 (Eugene Hickok ed., 1991); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 231 (1999); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted*, 57 CAL. L. REV. 839, 842 (1969).

33. For a recent summary of Eighth Amendment doctrine as a “jurisprudential train wreck,” see Benjamin Wittes, *What is “Cruel and Unusual”?*, POL’Y REV., Dec. 2005-Jan. 2006, at 15, 15.

34. *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 342 (4th

to refer to punishments that are “rare,” “freakishly rare,” “unheard of,” or at least not common or ordinary.³⁵ The words negate any idea that the framers intended a fixed meaning: what is “unusual” refers to infrequency at a point in time — and times change. It seems reasonable to conclude America wanted the federal government to be confined to humane and ordinary punishments, not harsh and rare criminal sanctions.

B. Origins and Original Meaning

The framers understood the ambiguities and the potential for change when Congress included the “cruel and unusual” clause in the Bill of Rights. One Representative Smith of South Carolina objected to the words “nor cruel and unusual punishments” on grounds that “the import of them [is] too indefinite.”³⁶ Representative Livermore of New Hampshire agreed. Livermore thought “[t]he clause seems to express a great deal of humanity,” but he also worried that “it seems to have no meaning in it.”³⁷ He offered a prophecy — the clause’s meaning might change: “No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?”³⁸ We know little of how the House as a whole reacted to the warnings

ed. 2000) (defining “cruel” as “[d]isposed to inflict pain or suffering” or “[c]ausing suffering”); POCKET OXFORD DICTIONARY OF CURRENT ENGLISH 203 (Della Thompson ed., 8th ed. 1992) (defining “cruel” as “causing pain or suffering, esp. deliberately” or “harsh, severe”); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 321 (Laurence Urdang ed., college ed. 1968) (defining “cruel” as “willfully or knowingly causing pain or distress to others,” or “enjoying the pain or distress of others,” or “rigid; stern; unrelentingly severe”); WEBSTER’S NEW COLLEGIATE DICTIONARY 273 (1976) (defining “cruel” as “disposed to inflict pain or suffering” or “devoid of humane feelings” or “causing or conducive to injury, grief, or pain” or “unrelieved by leniency”).

35. See, e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 34, at 1505 (defining “unusual” as “[n]ot usual, common, or ordinary”); POCKET OXFORD DICTIONARY OF CURRENT ENGLISH, *supra* note 34, at 1010 (defining “unusual” as “remarkable”); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 34, at 1442 (defining “unusual” as “not usual, common, or ordinary; . . . exceptional”); WEBSTER’S NEW COLLEGIATE DICTIONARY, *supra* note 34, at 1284 (defining “unusual” as “uncommon” or “rare”).

36. 1 ANNALS OF CONG. 782 (Joseph Gales ed., 1834) (statement of Rep. Smith), *quoted in* Granucci, *supra* note 32, at 842. The House debate was also discussed in *Weems v. United States*, 217 U.S. 349, 368-69 (1910), and *Furman v. Georgia*, 408 U.S. 238, 243-45, 262-63 (1972).

37. 1 ANNALS OF CONG. 782 (Joseph Gales ed., 1834) (statement of Rep. Livermore), *quoted in* Granucci, *supra* note 32, at 842.

38. *Id.* at 782-83, *quoted in* Granucci, *supra* note 32, at 842.

of Representatives Smith and Livermore. But a “considerable majority” of the House approved the clause.³⁹ Moreover, we do not know whether Congress approved the language because of the indefinite meaning, or despite it.

Perhaps it is jarring to our civic and professional faith to read the following:

The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents, which we uncritically exalt, were imitative, deficient, and irrationally selective. In the glorious act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles — or for some of them. That task was executed in a disordered fashion that verged on ineptness.⁴⁰

The requirement of proportionality was not often discussed, despite Blackstone and other English authorities.⁴¹ But Congress had derived the text of the “cruel and unusual” clause from George Mason’s Declaration of Rights in the Virginia Constitution, which, in turn was a verbatim copy of the prohibition contained in the English Bill of Rights of 1689.⁴² The words trace back to England — a foreign jurisdiction after 1776 — and back through the traditions cherished by Western civilization to the Old Testament.⁴³

And so, the prohibition against cruel and unusual punishments cannot be interpreted without careful regard for this nation’s traditions and sense of decency. Americans adopted the clause, in all its ambiguity and idealism, because it “seems to express a great deal of humanity.”⁴⁴

A candid Justice Scalia is hard pressed to deny the Eighth Amendment has “evolutionary content,” despite his indignation and contrary suggestions in

39. *Id.* at 783.

40. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 411 (1968); *see also* Granucci, *supra* note 32, at 840 (“[S]ubsequent formulations, often adopted without debate, indicate that the cruel and unusual punishments clause was considered constitutional ‘boilerplate.’”).

41. Granucci, *supra* note 32, at 839.

42. *Id.* at 840.

43. LEVY, *supra* note 40, at 410; Granucci, *supra* note 32, at 844-46 (arguing that the constitutional ban on excessive punishment can be traced to the Old Testament and other elements of Western traditions, including “the long standing principle of English law that the punishment should fit the crime” (quoting AM. BAR FOUND., *SOURCES OF OUR LIBERTIES* 236 (Richard L. Perry ed., 1959))). *See generally* Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 *BUFF. L. REV.* 783 (1975).

44. 1 *ANNALS OF CONG.* 782 (Joseph Gales ed., 1834) (statement of Rep. Livermore).

Roper.⁴⁵ In a characteristically thoughtful law review article advocating “originalism” as the least dangerous of interpretive methods, Scalia allows that some punishments permitted by previous text and contemporaneous practices are now unconstitutional.⁴⁶ He further confesses that “in a crunch,” he too might “prove a faint-hearted originalist.”⁴⁷ Sensibly, he admits: “I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.”⁴⁸ Justice Scalia here admits that the choice is not between strict textualism-formalism-originalism-or-what-have-you and unrepentant nonoriginalism. The debate is instead *among* those who know that a particular constitutional provision has “an evolutionary content.” In Justice Scalia’s words, he is vigilant for those occasions when “even if the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred.”⁴⁹ Here we can find the core issue between Justice Scalia and some of his colleagues. In an equal protection context, Justice Scalia offered the following explanation:

[I]n my view the function of this Court is to *preserve* our society's values . . . , not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede — and indeed ought to be crafted *so as to reflect* — those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.⁵⁰

45. When Scalia discusses the Eighth Amendment, he is more candid than his *Roper* footnote mourning the mistaken turn away from original understanding in prior Eighth Amendment cases. See Scalia, *supra* note 27, at 861-62, 864.

46. *Id.* at 861.

47. *Id.* at 864.

48. *Id.* Hopefully, his confession extends to branding and the formally sanctioned removal of various other body parts — all punishments known in 1791, and even mentioned explicitly in the text. See *id.* at 861. But all forms of corporal/physical punishment (except the death penalty) disappeared in the early years of the republic. See John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1732 (1999) (stating that corporal punishment completely disappeared in the United States between 1820 and 1970).

49. Scalia, *supra* note 27, at 864.

50. *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

And so the issue narrows. It is not whether doctrine evolves, but how — and how much.⁵¹

C. Precedent

The Justices have been consistent in rejecting the view that the Eighth Amendment is a fixed, immutable provision, and have been so for almost a century before *Roper*.⁵² Two undeniable elements of doctrine, well-established before *Roper*, deserve emphasis. First, in Justice O'Connor's words:

It is by now beyond serious dispute that the Eighth Amendment's prohibition of "cruel and unusual punishments" is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions — like the execution of children under the age of seven — that civilized society had already repudiated in 1791.⁵³

Second, the Eighth Amendment poses a different interpretive problem, as Justice O'Connor also explained: "[B]ecause '[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man,' the Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"⁵⁴

Justice Scalia admits he hates this phrase, "evolving standards of decency."⁵⁵ He detests it, ridicules it, and pretends it is but a recent notion; but it is deeply rooted in the doctrine of the Eighth Amendment (his own plurality opinion in *Stanford v. Kentucky* excepted). Still, his own personal, subjective, individual view is no basis — no legitimate basis — for overturning established doctrine.

51. *Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., concurring).

52. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976) (plurality opinion) (Stewart, Powell, & Stevens, JJ.); *Weems v. United States*, 217 U.S. 349, 378 (1910) (expanding the clause beyond its original meaning to ban disproportionate punishment); *O'Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting) ("The whole inhibition is against that which is excessive . . ."); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 13-14 (1980); Note, *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 (1910).

53. *Roper*, 543 U.S. at 589 (O'Connor, J., dissenting).

54. *Id.* (second alteration in original) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

55. Scalia, *supra* note 27, at 862.

II. Tradition, Consensus, Realities, and Judicial Care

Justice Kennedy's approach is easily caricatured. For that, he probably has only himself to blame. As Justice Scalia says: "Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."⁵⁶ Likewise, it is difficult to accept Justice Kennedy's finding of a "definite trend" against the juvenile death penalty, based on the changed views of five states in the last fifteen years since *Stanford* was decided.⁵⁷ These facts barely demonstrate a fad. But there are other, additional reasons why the Justices put an end to the juvenile death penalty.

There are two ideas lurking behind the Scalia-Kennedy clash. One is what counts in Eighth Amendment cases, the other is what counts in the judicial search for tradition, which reflects Edmund Burke's argument that peoples and societies "will not look forward to posterity, who never look backward to their ancestors."⁵⁸ Evidence of tradition can serve many purposes, but whether the judicial function is conservative or the cause is alleged to be liberal, the Justices must

immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and . . . in the thought and the vision of the philosophers and the poets. The Justices will then be fit to extract "fundamental presuppositions" from their deepest selves, but in fact from the evolving morality of our tradition.⁵⁹

A. Method

There is no agreed method and there is considerable criticism that any method is no more likely to yield rules of law than historical research, political theory, or philosophical speculation. Justice Scalia has argued that only specific traditions will do; general values gleaned from traditions will not

56. *Roper*, 543 U.S. at 609 (Scalia, J., dissenting).

57. *Id.* at 565 (majority opinion). Justice Kennedy reports, "Five States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years — four through legislative enactments and one through judicial decision." *Id.* The judicial decision is *State v. Furman*, 858 P.2d 1092 (Wash. 1993) (en banc). Consistent with his questionable view that tradition is based only on a statute count, i.e., the actions of legislatures (and perhaps because state court interpretations are not binding precedent), Justice Scalia reduces the relevant number to four. *Roper*, 543 U.S. at 609 (Scalia, J., dissenting).

58. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790), reprinted in 2 SELECT WORKS OF EDMUND BURKE 121 (Francis Canavan ed., Liberty Fund 1999).

59. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 236 (1962).

do.⁶⁰ Scalia's focus is on "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."⁶¹ Scalia explained:

Because . . . general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. . . . Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best . . . , a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.⁶²

It is a methodology designed to tame the judicial search for "evolving standards of decency."

B. Tradition in Eighth Amendment Analysis

In *Roper*, Justice Scalia cares only about statutes. Indeed, it seems he relies on a count of state statutes and nothing else. The technique is designed to ensure deference to democratic decisions, but it is wholly isolated from a real assessment of what is "cruel" and what is "unusual." In Scalia's analysis, what states permit — and what they theoretically might do — is all that counts. It matters not whether they have made an explicit decision or an implicit one.⁶³ It matters not whether they actually use the power that they explicitly or implicitly preserve. It matters not what states actually do — or what juries do. It matters not that some states bar the death penalty for all, because those states' thinking is not specific and targeted to the line-drawing based on age in the administration of the death penalty. At various points, Justice Scalia argues that a reliance on evidence other than the statute count is "absurd," "implausible," contrary to logic, and based on "the flimsiest of grounds."⁶⁴ But he does not examine the whole story:

60. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (upholding a California statute providing that a child born to a married woman is conclusively presumed to be a child of the marriage, and the genetic father has no visitation or other parental rights under the Fourteenth Amendment's Due Process Clause). Though only one other member of the court — Chief Justice William Rehnquist — joined this view when written, *id.* at 112, it is fair to say that many Eighth Amendment cases — including Scalia's own plurality opinion in *Stanford v. Kentucky* — exemplify a specific tradition test.

61. *Id.* at 128 n.6.

62. *Id.*

63. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 875-77 (1988) (Scalia, J., dissenting) (rejecting Justice O'Connor's concurring opinion, which held that persons committing crimes under age sixteen ought not to be executed unless the legislature has explicitly set an age limit on capital punishment allowing such executions).

64. *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

- In a majority of states, juvenile executions could not happen — even before *Roper*.⁶⁵

- A total of 58.6% of the American population lives in jurisdictions where such executions could not occur — before *Roper*.⁶⁶ Even in a nation committed to federalism and the rights of small states to enact different laws, the population data helps to show why the punishments at issue were highly “unusual.”

- A majority of the states (with a death penalty) that made explicit statutory choices for a minimum age, chose age eighteen.⁶⁷

- In the states where such executions could happen — they were rare before *Roper*. Twenty-four of one thousand executions since the resumption of the death penalty after *Gregg v. Georgia*⁶⁸ were for crimes committed by persons under age eighteen.⁶⁹ None were of persons committing crimes under age sixteen,⁷⁰ though Justice Scalia was unpersuaded by that fact in *Thompson v. Oklahoma*.⁷¹

Here we must pause to consider what counts in Justice Scalia’s “objective” statute count. He would not count a state that abolishes the death penalty, because we know nothing about the age limit.⁷² He would count a state that permits execution for juvenile crime, even if the state has not set a minimum age by statute, and even if the state has not in fact ever executed an offender for juvenile crime.⁷³ Apparently, what the state might do counts more than what the state does.

What accounts for Scalia’s approach? If it is logic, it is a strange version. Almost all states provide for the extension of adult criminal jurisdiction to fifteen-, sixteen-, or seventeen-year-olds.⁷⁴ That choice says absolutely nothing about the justice of the death penalty,⁷⁵ but is a choice that counts for Justice Scalia when a comprehensive abolition does not. The states may

65. *Id.* at 564 (majority opinion).

66. *See id.* app. A at 580-81; CENSUS BUREAU, U.S. DEP’T OF COMMERCE, TBL. NO. PHC-T-2, RANKING TABLES FOR STATES: POPULATION IN 2000 AND POPULATION CHANGE FROM 1990 TO 2000 tbl.1 (2001), <http://www.census.gov/population/cen2000/phc-t2/tab01.pdf>.

67. *Roper*, 543 U.S. app. A at 579-80.

68. 428 U.S. 153 (1976) (reinstating the use of the death penalty after finding capital punishment permissible under the Constitution).

69. *See Roper*, 543 U.S. at 615 (Scalia, J., dissenting).

70. *Id.* at 561 (majority opinion) (stating that “the last execution of an offender for a crime committed under the age of 16 had been carried out in 1948”).

71. 487 U.S. 815, 859 (1988) (Scalia, J., dissenting).

72. *Roper*, 543 U.S. at 610-11 (Scalia, J., dissenting).

73. *Id.* at 609.

74. *Id.* at 611 n.2.

75. *Thompson v. Oklahoma*, 487 U.S. 815, 850 (1988) (O’Connor, J., concurring).

extend adult jurisdiction because the juvenile justice system isn't effective. The states surely understand that if an offender is prosecuted in the juvenile system, jurisdiction — and a sentence — ends at eighteen.⁷⁶ To avoid the obvious injustice of a two-, three-, or four-year sentence for murder, the states extend jurisdiction — whether or not they retain a death penalty. Yet Scalia often dares to use the word “sophistry” to punctuate disagreements with his colleagues.

Law, logic, constitutional text, and original understanding do not command this view of history or tradition. It is Justice Scalia who is subjective and unpersuasive. He claims to look for “adequate indication” that society’s views have evolved, but in fact, he passes over much of the evidence essential to making that judgment. He is emphatic, vehement, hard in his rhetoric, and spiteful in his tone; he fails to show, however, that he is doing anything except setting a high bar: no tradition informs and illuminates until it is nearly universal, impossibly specific, and a subject of nearly unanimous consent.

C. The Tradition of Juvenile Justice

The law says children, adolescents, and juveniles are different, and they must be treated and judged differently. Lewis F. Powell, in a dissenting opinion from a denial of certiorari in his last days on the bench, pushed the Court to give more categorical protection against capital punishment of juveniles based on the nation’s traditions of juvenile justice.⁷⁷ A judicial conservative reluctant to invent broad principles to restrict legislatures, he knew the truth of our nation’s traditions of restraint in juvenile justice and the fact that these cases deal with a “chronological immaturity . . . compounded by ‘serious emotional problems, . . . a neglectful, sometimes even violent, family background, . . . [and] mental and emotional development . . . at a level several years below his chronological age.’”⁷⁸ For Powell, there was no doubt of “the relevance of this information to a juvenile defendant’s culpability.”⁷⁹ Further, even before *Roper* or *Thompson*, Powell believed “[t]he Constitution require[d] that a capital-sentencing system reflect this difference in criminal responsibility between children and adults.”⁸⁰

76. Nicole M. Romine, Note, *A Compromised Solution: Balancing the Constitutional Consequences and the Practical Benefits of Using Juvenile Adjudications for Sentence Enhancement Purposes*, 45 WASHBURN L.J. 113, 128 n.152 (2005) (listing various jurisdictions where the juvenile court’s jurisdiction, and a sentence, ends at age eighteen).

77. *Burger v. Kemp*, 483 U.S. 776, 822 (1987) (Powell, J., dissenting).

78. *Id.* (alteration in original).

79. *Id.*

80. *Id.*

It would seem obvious to recognize the law's view that children and juveniles are different than adults. Still, it is important to highlight the ways in which the law reflects this conclusion — its categorical conclusion — that “[c]hildren have a very special place in life.”⁸¹ The law holds that children and juveniles are less mature, more impulsive, more self-destructive, and less culpable than adults.

Examples of society's decision to treat children differently include limitations on youths' right to vote, contract, sue or be sued, dispose of property by will, marry, accept employment, purchase liquor, and drive vehicles.⁸² As a matter of law, people generally are not fully responsible until age eighteen, which is the most common age of majority established in American law for noncriminal purposes.⁸³ Moreover, the Twenty-Sixth Amendment establishes the right to vote at age eighteen.⁸⁴ Additionally, children and adolescents are considered too immature to judge the criminal responsibility of accused criminals, and therefore cannot serve on juries, yet might be put to death for crime based on their supposed supreme “responsibility.”⁸⁵ Lastly, the development of separate juvenile justice systems in every state was a manifest decision that the young are different, and the law must show restraint in their punishment, treatment, and rehabilitation.⁸⁶ Whatever the weaknesses of our ineffective, unfunded, and uncertain juvenile justice systems, the underlying facts of difference between childhood and adulthood have never been undermined in law.⁸⁷

81. *Eddings v. Oklahoma*, 455 U.S. 104, 116 n.12 (1982) (alteration in original) (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)).

82. *See generally, e.g.*, FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* (1982).

83. E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 222 (4th ed. 2004).

84. U.S. CONST. amend. XXVI.

85. *See Schall v. Martin*, 467 U.S. 253, 265 (1984) (“Children, by definition, are not assumed to have the capacity to take care of themselves.”). As a result of this capacity assumption, the actions of adolescents “cannot be judged by the more exacting standards of maturity.” *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion).

86. *See Eddings*, 455 U.S. at 116 n.12; *In re Gault*, 387 U.S. 1, 15-16 (1967).

87. *See, e.g.*, Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 *STAN. L. REV.* 1187 (1970). All states now set the jurisdictional age limit for their juvenile courts no lower than age sixteen. *See* SAMUEL M. DAVIS, *RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM* app. B (2d ed. 1994). For further discussion of the motivation for treating adolescents differently under the law, see THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME* 41 (1967) (“Adolescents everywhere, from every walk of life, are often dangerous to themselves and to others.”); FRANKLIN E. ZIMRING, *TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME* 7 (1978), *quoted in Eddings*, 455 U.S. at 115 n.11 (“[A]dolescents, particularly in the early and middle

In *Eddings v. Oklahoma*, the Court summarized the traditions of the law:

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.⁸⁸

In *Thompson v. Oklahoma*, the plurality stressed that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”⁸⁹

Justice Scalia ridicules all of this, but he does not quite deny it. Indeed, he seems to admit the facts, but holds that it is not evidence of tradition or consensus, or even proof that the punishment at issue is “unusual.”⁹⁰ It only means political majorities and juries are doing their jobs.⁹¹

D. Unacceptable Likelihoods and the Judicial Role

There is no doubt that juries often do their job, perhaps more often than not. Nevertheless, these realities are often lost in a single case. Why? The answer is rage, indignation, and horror at the brutalities of certain cases. To justify a death sentence, the prosecution must provoke rage. Sometimes the horror is aggravated improperly by prosecutorial conduct; sometimes it is an authentic and reasonable response to the appalling nature of murder. Too often, however, it is permitted by bad defense lawyers who fail to make arguments about youth and background.

Prior to *Thompson*, the Court said youth is important, but imposed no age limits and no procedural limits to insure juries gave careful consideration to youth as a mitigating factor.⁹² Rage and passion, by human nature, make rational, sensitive, and careful assessment of extenuating and mitigating factors difficult, if not impossible. “[W]hen a life is at stake, emotionalism often infects the conduct of the trial itself.”⁹³

teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. . . . [Y]outh crime as such is not exclusively the offender’s fault . . .”).

88. *Eddings*, 455 U.S. at 115-16 (footnotes omitted).

89. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion).

90. *Roper v. Simmons*, 543 U.S. 551, 608-09 (2005) (Scalia, J., dissenting).

91. *Id.* at 609, 616.

92. *Eddings*, 455 U.S. at 115-16, 117.

93. *State v. Maloney*, 464 P.2d 793, 803 (Ariz. 1970) (reversing the death sentence of a

The only effective means of preventing juvenile executions is an enforceable principle of restraint, such as a minimum age.⁹⁴ This was — and is — a proper concern and function for courts. The search for principles of humanity in the Eighth Amendment must be, at least in part, a judicial search. When Madison proposed the Bill of Rights, he expressed hope that “independent tribunals of justice w[ould] consider themselves in a peculiar manner the guardians of those rights.”⁹⁵ In this, he was inspired by his friend, Thomas Jefferson. Madison had expressed doubts whether the “paper barriers” of declared rights would be effective in a republic.⁹⁶ Jefferson, writing in Paris during the early days of the French Revolution, replied that Madison overlooked the legal check that a bill of rights would place in an independent judiciary, which, Jefferson continued, would be unaffected by “the frenzy of . . . fellow-citizens bidding what is wrong.”⁹⁷

The Madison-Jefferson correspondence — so central to the birth of the Bill of Rights — is an early expression of the original understanding, hope, and trust that the courts’ “essential quality is detachment, founded on independence.”⁹⁸ Throughout our history and the achievements and failures of our legal system:

fifteen-year-old convicted of murder.).

94. In some cases, the brutal nature of the crime - or perhaps the inflammatory nature of the evidence - will often be enough to prevent “a reasoned *moral* response to the defendant’s background, character, and crime.” *Sumner v. Shuman*, 483 U.S. 66, 76 n.5 (1987) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)). In such tragic cases, “mere sympathy or emotion,” *Brown*, 479 U.S. at 545, will all too frequently govern the outcome of the sentencing proceeding. When the facts respecting moral guilt of condemned children and adolescents are collected, as they have been by Amici American Society for Adolescent Psychiatry and American Orthopsychiatric Association, there is good reason to condemn the sensitivity, the objectivity, the fairness, and the justice of a case-by-case assessment of youth as a mitigating circumstance - particularly when the crimes are the most horrifying. When a murder is particularly brutal, the reality is that the undeniable tradition of more careful, more sensitive consideration of youthful offenders cannot be vindicated except by means of a minimum chronological age.

95. 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1834) (statement of Rep. Madison).

96. *Id.* at 455.

97. HORACE, *Odes Book III, Ode III*, in THE ODES AND EPODES 179 (C.E. Bennett trans., 1939). Jefferson’s actual language was a Latin phrase, “*civium ardor prava jubentium*”—a phrase from the Roman poet, Horace. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), reprinted in THOMAS JEFFERSON, WRITINGS 942-43 (Merrill D. Peterson ed., 1984); see also THE FEDERALIST NO. 49, at 276 (James Madison) (J.R. Pole ed., 2005) (expressing the view that the reason of the public, not passions, should guide government).

98. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion) (Stewart, Powell & Stevens, J.J.) (quoting *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)).

It took no violent stretching of democratic theory to suppose an expectation on the part of the people that, in employing the criminal sanction, the political branches would abide the judge's sense of what was mete and decent in the way of procedure, just as they abided the discretion of the jury. And, if the supposition concerning popular expectations should prove wrong, then the justification of the judicial function was that criminal procedure . . . raised questions of elemental justice to the individual, not of social policy.⁹⁹

When fundamental rights such as those secured by the Bill of Rights are endangered by rage, passion, bias, or emotion, one of the principal challenges of constitutional interpretation is to develop rules that do not “leave the utmost latitude for evasion.”¹⁰⁰ The Supreme Court has found it proper to draw such lines to protect constitutional values in other contexts. For example, in the First Amendment context, the federal courts searched for “qualitative formula[e], hard, conventional, difficult to evade” in defense of expressive liberty.¹⁰¹ A minimum chronological age — one consistent with the nation's broader traditions of juvenile justice — is but a means to an end of reducing excessive, rare, freakish, and unjust punishment.¹⁰²

III. A Decent Judicial Respect for the Opinion of Mankind

A strong case for abolition of the juvenile death penalty rests on American traditions, the Constitution's original values, and the Supreme Court's distinctive role in this democratic republic. But because Justice Kennedy also referred to international patterns of justice, the opinion has been ridiculed, condemned, and misunderstood.

99. ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 32 (1978).

100. *THE FEDERALIST* NO. 84, at 452, 456 (Alexander Hamilton) (J.R. Pole ed., 2005)

101. Letter from Learned Hand to Zechariah Chafee, Jr., (Jan. 2, 1921), *reprinted in* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *STAN. L. REV.* 719, 770 app. (1975); *see also* *Ballew v. Georgia*, 435 U.S. 223 (1978) (drawing a line between five-person and six-person juries for purposes of unanimity requirement); *Baldwin v. New York*, 399 U.S. 66 (1970) (drawing a line between imprisonment for more than six months and imprisonment for less than six months in determining right to jury trial); *Bloom v. Illinois*, 391 U.S. 194 (1968) (drawing a line between criminal contempts which must be tried to jury and those when need not be so tried, based on states' line-drawing, for similarly punished crimes).

102. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (arguing states may “narrow the class of death-eligible defendants in order to decrease “the danger of arbitrary and discriminatory imposition of the death penalty”).

Justice Scalia must deny, totally and completely, that international standards are relevant, because they are, if nothing else, clear and unambiguous. Justice Kennedy concluded that the “determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”¹⁰³ At least, it is proof that the practice is “unusual.”¹⁰⁴

There are many factors weighing against the objection to international law as irrelevant and immaterial. Some factors deserve mention because they might not be remembered in a judicial opinion or legal brief. First, the cruel and unusual clause was borrowed verbatim from England’s bill of rights.¹⁰⁵ Second, the history of the idea traces through the history of western civilization.¹⁰⁶ Third, the Declaration of Independence — the document announcing America’s separation from the old world — acknowledged a duty to maintain a “decent Respect to the Opinions of Mankind.”¹⁰⁷ Fourth, the text of the Constitution permits, or even requires, Congress to create jurisdictions and laws to punish “Offenses against the Law of Nations.”¹⁰⁸

If there is a judicial conservatism that still respects precedent, there are many precedents that use foreign authority for purposes other than interpreting treaties and enforcing commercial agreements. For example, in the early years of the republic, the great Chief Justice John Marshall admitted and proclaimed the moral injustice of slavery, but ordered a return of a cargo of 280 Africans to Spanish and Portuguese consuls, because:

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part¹⁰⁹

103. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

104. For the most part, Justice Scalia does not deny the facts in Kennedy’s argument, only their relevance. *Roper*, 543 U.S. at 608-09 (Scalia, J., dissenting). In fact, some countries apparently do execute persons for crimes under age eighteen (though not necessarily persons classified by law as minors): Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen, all countries otherwise classified as among “the usual suspects” when human rights violations are reported. Dana Mulhauser, *Price of Progress*, NEW REPUBLIC, Mar. 2, 2005, <http://www.tnr.com/doc/print.mhtml?i=w050228&s=mulhauser030205>.

105. Bill of Rights, 1689, 1 W. & M. 69, c. 36, § 1 (Eng.).

106. Granucci, *supra* note 32, at 844-46.

107. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

108. U.S. CONST. art. I, § 8, cl. 10.

109. *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825) (Marshall, C.J.).

Over a decade later, Marshall's close friend and colleague Justice Joseph Story spoke for a Court holding that kidnapped Africans on the schooner *Amistad* enjoyed rights of self-defense and could not be punished as mutineers or pirates based on "eternal principles of justice and international law."¹¹⁰

In any case, it is Justice O'Connor, not Justice Scalia, who offers an authoritative and reliable description of the past judicial use of international authority in an Eighth Amendment case:

Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. This inquiry reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society. Obviously, American law is distinctive in many respects, not least where the specific provisions of our Constitution and the history of its exposition so dictate. But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement--expressed in international law or in the domestic laws of individual countries--that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.¹¹¹

When considering international opinion — and deciding whether to consider it — American judges need to remember the common sense and prudence of the matter in light of our nation's boast to be leader of the free world and its frequent efforts to chastise other nations that trample basic principles of human dignity. "We preach freedom around the world," President Kennedy said, "and we mean it"¹¹² But as an unprecedented amici brief on behalf of Nobel Peace Prize winners argued in *Roper*,

110. *The Amistad*, 40 U.S. (15 Pet.) 518, 595 (1841).

111. *Roper v. Simmons*, 543 U.S. 551, 604-05 (2005) (O'Connor, J., dissenting) (citations omitted).

112. President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm>.

By continuing to execute child offenders in violation of international norms, the United States is not just leaving itself open to charges of hypocrisy, but also is endangering the rights of many around the world. Countries whose human rights records are criticized by the United States have no incentive to improve their records when the United States fails to meet the most fundamental, base-line standards.¹¹³

Responding to those who grumble about the relevance of foreign law within America, the Nobel laureates added: “Norms of international law, such as the prohibitions on genocide, slavery and torture, are not merely ‘foreign moods, fads, or fashions’ that we are seeking to ‘impose on Americans.’ They protect human dignity across all of our national frontiers.”¹¹⁴ It is an objective that coincides with the origins and original values of the Eighth Amendment.

Conclusion

According to notes of Justice Harry Blackmun, during the court conference on *Thompson v. Oklahoma*, both Justices O’Connor and Scalia stated that they personally oppose the juvenile death penalty, and Justice O’Connor said she’d vote against the death penalty if she was a legislator.¹¹⁵ Despite cynicism and heated rhetoric, particularly among politicians, this is not a debate over good and evil, good faith, or patriotism.

It is a debate — an honest one — about judicial role.

As many commentators have noted, “strict construction” and “judicial conservatism” now reflect a constitutional “fundamentalism” pressing the theory of “originalism.”¹¹⁶ Justice Scalia is a voice on the Court for those who seek to restore a “constitution-in-exile,” to move back toward the Constitution of 1789, 1791, or 1868.¹¹⁷ Often, theirs is a virtue of consistency. But there

113. Brief for President James Earl Carter, Jr., et al. as Amici Curiae Supporting Respondent at 29, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636446.

114. *Id.* (footnote omitted) (quoting *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting)).

115. Harry A. Blackmun, *Thompson v. Oklahoma*: Case File (unpublished working papers, on file with Library of Congress).

116. See, e.g., Eric R. Claeys, Raich *and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791 (2005); G. Edward White, *Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1089, 1144, 1149, 1180-82 (2005).

117. See James Boyle, *A Nondelegation Doctrine for the Digital Age?*, 50 DUKE L.J. 5, 15 n.35 (2005) (citing Scalia’s majority opinion in *Printz v. United States*, 521 U.S. 898 (1997), as an attempt to restore a portion of the “Constitution-in-exile”); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 50-51 (2005) (noting that Scalia and Thomas oppose Kennedy’s “living constitution”). For an introduction to the concept of the “Constitution-in-

is another view of judicial restraint — a tradition-bound vision more like the conservatism of Burke, articulated by Robert Bork.

Judge Bork often denied that he embraced a rigid or doctrinaire originalism. And many agree that the most one can expect from looking to original understanding is an underlying premise or a first principle.¹¹⁸ Judge Bork put an edge to that argument in a concurring opinion that responded to an opinion by Judge Scalia on libel and the First Amendment, when both men served on the D.C. Circuit.¹¹⁹ Bork defended one of William Brennan's great cases, *New York Times v. Sullivan*:

Judges given stewardship of a constitutional provision . . . whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges--and certainly no office for a philosophy of judging--if the boundaries of every constitutional provision were self-evident. They are not. . . . [I]t is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application.

. . . .
We must never hesitate to apply old values to new circumstances The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty.¹²⁰

The meaning and potential of this approach are revealed in the fact that Justice Brennan joined a plurality opinion by Justice Stevens that quoted this passage, shortly after the Senate rejected Judge Bork's nomination to the

exile," see Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, Winter 1995, at 83 (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)), available at <http://www.cato.org/pubs/regulation/reg18n1/reg18n1-readings.html>.

118. Even Justice Scalia would agree with this proposition. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (stating Scalia's preference for general principles in light of his preference for originalism).

119. *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc).

120. *Id.* at 995-96 (Bork, J., concurring). Judge Bork included much of his *Ollman* analysis in his book. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 167-69 (1990).

Supreme Court.¹²¹ The case addressed an issue of paramount concern to Justice Brennan: the meaning of the Cruel and Unusual Punishment Clause of the Eighth Amendment as applied to capital punishment of juveniles.¹²²

A justice whose passion is to resurrect a nineteenth-century version of constitutional law, who desires to turn back on history without memory of sins and crimes for which this country paid dearly, who promises to pretend that we can figure out what men of the eighteenth and nineteenth century thought about future constitutional issues, is not a conservative. Such a judge is not a “strict constructionist” when enforcing — or refusing to enforce — a constitutional limitation with an undeniable evolutionary content. He or she is a radical — ready and willing to turn a blind eye toward the meaning of our nation’s change and growth, to detest our nation’s growing, maturing, evolving standards of liberty, equality, and decency. Whether he or she intends it, a judge so committed and so dedicated does not merely preserve values; he or she revises them. It is another form of constitutional “backsliding” that does violence to our country’s very real constitutional progress and to our country’s very real claim to be in the vanguard of the fight for human rights.

121. *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (plurality opinion).

122. *Id.*