TEXTUALISM AND THE EIGHTH AMENDMENT

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Thank you for the generous invitation to be part of the Laurence Silberman Distinguished Judicial Lecture Series. Judge Silberman was my administrative law professor at Georgetown over thirty years ago. Unfortunately, at that time I had neither an appreciation for the value of judicial clerkships nor an understanding of the privilege of being taught by one of the lions of the D.C. Circuit. I'm sorry that Judge Silberman isn't with us to comment on my remarks—no doubt he would have had opinions to offer.

My topic today is textualism and the Eighth Amendment. In 2015 Justice Elena Kagan returned to Harvard Law School to give the Antonin Scalia Lecture. While engaging with now-Dean John Manning about interpreting statutes and Justice Scalia's profound influence on that task, Justice Kagan quipped: "We're all textualists now."[1] Supreme Court decisions since have tracked that observation.

For example, in *Kennedy v. Bremerton School District*[2] the Court put the nail in the coffin of the *Lemon* test, which Justice Scalia had likened to "some ghoul in a late-night horror movie."[3] In abrogating that three-part test, the Court returned to the text, history, and tradition of the First Amendment's Establishment Clause. So too with the Second Amendment. In *New York State Rifle & Pistol Association v. Bruen*, the Court rejected the two-step approach that had been applied by many lower courts, including our own Third Circuit.[4] Writing for the Court, Justice Thomas concluded that the first step of the lower court test—whether the "challenged law regulates activity falling outside the scope of the right as originally understood"[5]—was consistent with *Heller*'s emphasis on the text of the Second Amendment "as informed by history."[6] But the second step—means-end scrutiny—was "one step too many."[7]

As with these constitutional decisions, the Supreme Court has focused on text in statutory interpretation cases. Take two recent decisions. In *Niz-Chavez v. Garland*, the Court decided an

* Remarks of Judge Hardiman for the Laurence Silberman Distinguished Judicial Lecture Series, Harvard Law School, October 18, 2023.

[1] Harvard Law School, The Antonin Scalia Lecture Series: A dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015).

[2] 142 S. Ct. 2407, 2419 (2022).

[3] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

[4] 142 S. Ct. 2111, 2126 (2022).

[5] *Id.* at 2126 (quoting Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019)).

[6] *Id.* at 2127.

[7] *Id.*

important immigration case arising under Title 8.[8] The case involved a notice to appear in immigration court and the decision turned on the word "a." Writing for the Court, Justice Gorsuch held that the notice had to be in a single document, "not a mishmash of pieces with some assembly required."[9] Justice Kavanaugh, joined by the Chief Justice and Justice Alito, dissented because he thought the majority was too literal.[10]

Six weeks later, the Court decided a case that turned on the word "so" in the Computer Fraud and Abuse Act.[11] In *Van Buren v. United States*, a police officer was convicted of violating the Act when he ran a license-plate search on a law enforcement database in exchange for money.[12] Everyone agreed that Van Buren violated policy by obtaining the information for an illicit purpose. But the Court held that Van Buren did not "access to obtain or alter information in the computer that [he] is not entitled *so* to obtain or alter."[13] Justice Thomas read the text differently and his dissent was joined by the Chief Justice and Justice Alito.[14]

Some scholars have viewed these opinions as hyper-literal.[15] Regardless of whether that criticism is apt, these cases show how seriously today's Supreme Court engages with the text of the law at issue.

The Court's reliance on textualism and originalism in recent years is hard to square with its Eighth Amendment jurisprudence. As my colleague and then-Chief Judge Brooks Smith wrote for the en banc Third Circuit two years ago: "the Supreme Court's Eighth Amendment jurisprudence has abjured constitutional interpretation in favor of challenges based on Court-created prophylactic rules."[16]

The Supreme Court's 2012 decision in *Miller v. Alabama* illustrates Judge Smith's point. In that case, the Court held unconstitutional mandatory life sentences without the possibility of parole for juvenile offenders.[17] In doing so, the Court applied "the evolving standards of decency that mark the progress of a maturing society."[18] That test has two serious problems: its provenance is illegitimate, and its application empowers judges to exercise unbounded discretion.

The "evolving standards of decency" first appeared in *Trop v. Dulles*, a 1958 decision offering an especially weak justification for the Court to abandon the Eighth Amendment's

[8] 141 S. Ct. 1474, 1479 (2021).

[9] *Id.* at 1480.

[10] *Id.* at 1491 (Kavanaugh, J., dissenting) (arguing that, although "a good textualist is not a literalist,'" the majority "relie[d] heavily on literal meaning." (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 24 (1997))).

[11] 18 U.S.C. §1030(e)(6).

[12] 141 S. Ct. 1648, 1653 (2021).

[13] 18 U.S.C. § 1030(e)(6) (emphasis added).

[14] *Van Buren*, 141 S. Ct at 1662 (Thomas, J. dissenting).

[15] *See, e.g.*, Kevin Tobia et. al., *Progressive Textualism*, 110 GEO. L.J. 1437, 1447 (2022) ("Neither ordinary people nor professional linguists reduce sentences to tiny words such as 'a' or 'so' as have recent Supreme Court opinions."); Bill Watson, *Literalism in Statutory Interpretation: What Is It and What Is Wrong with It?*, 2021 U. ILL. L. REV. ONLINE 218, 229–30 (2021) ("[T]he majority opinions in *Bostock*, and to a lesser extent in *Niz-Chavez*, were literalistic.").

[16] United States v. Grant, 9 F.4th 186, 197 (3d Cir. 2021) (en banc).

[17] Miller v. Alabama, 567 U.S. 460, 469 (2012).

[18] *Id.* at 469 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

text.[19] A careful examination of *Trop* shows that "the evolving standards of decency" test is "bad wine of recent vintage."[20]

In 1944, American Private Albert Trop escaped from the stockade while deployed abroad, but the United States Army quickly captured him.[21] A court martial convicted Trop of desertion, dishonorably discharged him, and sentenced him to three years' hard labor and salary forfeiture. Eight years later, Trop was denied a United States passport because, by statute, desertion forfeited his citizenship.[22]

Trop sued, and the district court entered judgment against him.[23] The Second Circuit, with Judge Learned Hand writing, affirmed the district court. Chief Judge Clark dissented, contending that Trop's Eighth Amendment right to be free from cruel and unusual punishment was violated.[24] In the majority opinion, Judge Hand explicitly refused to address the Eighth Amendment argument because it had not been raised at oral argument or in the proceedings below.[25] According to Judge Hand, the closest Trop came to arguing the point was a passing reference that expatriation violates due process.[26]

Chief Judge Clark's dissent was just two paragraphs. In lieu of judicial reasoning, he "merely incorporate[d] by reference" an unsigned student law review comment because he "doubt[ed] if [he] c[ould] add to the persuasive arguments there made."[27] The comment argued that expatriation constituted cruel and unusual punishment, and Chief Judge Clark apparently found the argument so persuasive that a mere citation sufficed to justify his dissent.[28]

Trop appealed. In a 4-1-4 decision, the Supreme Court reversed the Second Circuit.[29] Writing for the plurality, Chief Justice Earl Warren began by referencing a companion case, *Perez v. Brownell*,[30] and stated that the principles espoused there essentially decided *Trop*.[31] The Chief Justice explained that the national government lacks the power to deprive Americans of citizenship involuntarily, though citizens may expatriate themselves voluntarily.[32] After just three paragraphs, Chief Justice Warren concluded: "On this ground alone the judgment in this case should be reversed."[33] Though that was enough to decide the case, he did not end his opinion there. Instead, he turned to the unrelated Eighth Amendment question. In doing so, Chief Justice Warren waxed historical: "The Court recognized in [*Weems v. United States*, 217 U.S. 349 (1910)] that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from *the evolving standards of decency that mark*

[19] *See* 356 U.S. 86, 101 (1958) (plurality opinion).
[20] *Cf.* TRW Inc. v. Andrews, 534 U.S. 19, 37 (2001) (Scalia, J., concurring in judgment).
[21] *See Trop*, 356 U.S. at 87.
[22] *Id.* at 88.
[23] *Id.*
[24] Trop v. Dulles, 239 F.2d 527, 530 (2d Cir. 1956) (Clark, C.J., dissenting).
[25] *Id.* at 529–30.
[26] *Id.* at 530.
[27] *Id.* (Clark, C.J., dissenting) (citing Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1189–99 (1955)).
[28] *See id.*; see also Comment, *supra* note 27 at 1178–82.
[29] *Trop*, 356 U.S. at 91.
[30] 356 U.S. 44 (1958).
[31] *Trop*, 356 U.S. at 91–92.
[32] *Id.* at 92–93.
[33] *Id.* at 93.

the progress of a maturing society."[34] With this dictum—involving an issue the Second Circuit explicitly refused to address and that was unnecessary to the decision in *Trop*—the Supreme Court planted a seed that has sprouted into controlling Eighth Amendment law some sixty-five years later.

The "evolving standards of decency" became the law of the land against substantial odds. The phrase went unmentioned in the Supreme Court for ten years after *Trop*, until it surfaced in a footnote in a death-penalty case.[35] And it was then quoted only in passing in seven death-penalty cases in the 1970s.[36]

Nearly two decades after its introduction in *Trop*, the phrase was mentioned for the first time in a non-capital case, *Estelle v. Gamble*.[37] There, Gamble claimed the prison failed to provide him adequate medical care in violation of the Eighth Amendment.[38] The district court dismissed the case for failure to state a claim, but the Fifth Circuit reversed.[39] The Supreme Court reversed the Fifth Circuit and ruled against Gamble on the facts as pleaded.[40] Yet Justice Thurgood Marshall, writing for the Court, discussed the evolving constitutional law in this area and wrote: "we have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'"[41] With that statement, the Court first established the evolving standards of decency *as a constitutional test*.

While Justice Marshall accurately quoted *Trop*, it was not, as he suggested, the Court's holding. Recall that Chief Justice Warren stated that the Eighth Amendment must "draw its meaning" from the evolving standards of decency; he did not establish a new, "evolving" constitutional test.[42] So the Court in *Estelle v. Gamble* elevated *Trop*'s dicta to a constitutional test.

The test lay dormant for years, until it reappeared as a standard bearer for the view that the Constitution's meaning changes over time. That process began during the 1980s. The test was first mentioned in several dissents in death penalty cases[43] before it appeared in a 1987 majority opinion written by Justice Powell.[44] Two years later, Justice O'Connor's majority opinion in *Penry v. Lynaugh* used the standard again, but there the Court held that executing a man with

[34] *Id.* at 100–01 (emphasis added).

[35] Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968).

[36] McGautha v. California, 402 U.S. 183, 202 (1971); Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); McLamore v. South Carolina, 409 U.S. 934, 936 (1972) (Douglas, J., dissenting from denial of certiorari); Sellars v. Beto, 409 U.S. 968, 970–71 (1972) (Douglas, J., dissenting); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (plurality opinion).

[37] 429 U.S. 97, 102 (1976).

[38] *Id.* at 101–02.

[39] Gamble v. Estelle, 516 F.2d 937 (5th Cir. 1975).

[40] *Gamble*, 429 U.S. at 107–08.

[41] *Id.* at 102 (quoting Trop, 356 U.S. at 101).

[42] *Trop*, 356 U.S. at 100–03.

[43] *See, e.g.*, California v. Ramos, 463 U.S. 992, 1028 (1983) (Marshall, J., dissenting); Gray v. Lucas, 463 U.S. 1237, 1244 (1983) (Marshall, J., dissenting from denial of certiorari); Autry v. McKaskle, 465 U.S. 1090, 1091 (1984) (Brennan, J., dissenting from denial of certiorari); Wainwright v. Witt, 469 U.S. 412, 461 (1985) (Brennan, J., dissenting).

[44] McCleskey v. Kemp, 481 U.S. 279, 300 (1987).

mental disabilities did *not* violate the Eighth Amendment.[45] *Penry* was overruled in 2002 in *Atkins v. Virginia*, which held there was a national consensus against executing the mentally disabled.[46] Writing for the Court in *Atkins*, Justice Stevens cited *Trop* and the evolving standards of decency.[47]

In 2005, the Court decided *Roper v. Simmons*, where a 5-4 decision effectively overruled a 1989 decision (*Stanford v. Kentucky*), which had rejected the proposition that the Constitution bars capital punishment for juvenile offenders.[48] In *Roper*, 17-year-old Christopher Simmons said he and his co-conspirators could "get away with" murder because they were minors.[49] The Supreme Court, Justice Kennedy writing, reasoned that *Thompson v. Oklahoma*'s logic, proscribing the death penalty for those younger than 16, applied with equal force to those under 18.[50] Justice Kennedy also noted that the United States was the only country that permitted juvenile executions.[51] Justice Stevens (joined by Justice Ginsburg) concurred, venturing that our Constitution changes sometimes.[52]

Justice O'Connor dissented. As did Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas. Significant for our purposes, Justice O'Connor accepted the premise that the Eighth Amendment is not static and must draw its meaning from the evolving standards of decency.[53] Justice Scalia rejected that premise. Instead, he cited Federalist 78, where Hamilton insisted that the judiciary, bound by "strict rules and precedents," "ha[s] neither FORCE nor WILL but merely judgment."[54] Justice Scalia then wrote, in his typically understated way: "What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*."[55]

With this evolving understanding in mind, the Court applied the test in earnest. In 2008, in a 5-4 decision, the Court decided *Kennedy v. Louisiana*, which held unconstitutional a Louisiana statute that provided for the death penalty for a defendant who rapes a child when the crime neither resulted in, nor was intended to, result in death.[56] Writing for the Court, Justice Kennedy started with the proportionality principle mentioned by the Court in its 1910 decision

[45] 492 U.S. 302, 330–31, 340 (1989).

[46] 536 U.S. 304, 316–17 (2002).

[47] *Id.* at 311–12. In his *Atkins* dissent, Justice Scalia cited *Trop*'s language not because he believed it was a proper analytical tool, but to argue that even applying that standard, there was no consensus against the practice because 18 states (or 47% of the death penalty states) permitted the execution of the mentally disabled. *Id.* at 341–43 (Scalia, J., dissenting).

[48] 543 U.S. 551, 574 (2005) (abrogating 492 U.S. 361, 109 (1989)).

[49] *Id.* at 556.

[50] *Id.* at 570–71.

[51] *Id.* at 575.

[52] *Id.* at 587 (Stevens, J., concurring).

[53] *See id.* at 594, 604 (O'Connor, J., dissenting). In *Roper*, Justice O'Connor also criticized the Missouri Supreme Court's failure to follow *Stanford*, which she called clear error. *Id*. at 593–94. She also noted that since *Stanford*, six states had executed people under 18. *Id*. at 595. And there was no genuine national consensus on this matter as there were over 70 juveniles on death row in 12 states. *Id*. at 596.

[54] *Id.* at 607 (Scalia, J., dissenting) (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961)).

[55] *Id.* at 608.

[56] 554 U.S. 407, 413 (2008).

in *Weems*.[57] He then cited *Trop* for the proposition that the Eighth Amendment draws meaning from the evolving standards of decency and noted that social standards embody variable moral judgments.[58]

In 2010, the Court held unconstitutional a life-without-parole sentence for a man who committed armed burglary five weeks before his eighteenth birthday.[59] Justice Kennedy began his legal analysis by quoting *Trop*'s evolving standards of decency.[60]

In 2012, the Court issued yet another 5-4 opinion, this time with Justice Kagan writing. In *Miller v. Alabama*, the Court held that mandatory life sentences without the possibility of parole violated the Eighth Amendment rights of two 14-year-old offenders whom the states had tried as adults and convicted of murder.[61] Justice Kagan began her legal analysis by quoting *Trop*, and she reiterated the primacy of the evolving standards of decency that mark the progress of a maturing society.[62] She reasoned that the case "implicate[d] two strands of precedent" about "proportionate punishment."[63] The confluence of those two lines suggested that mandatory life without the possibility of parole for juveniles violated the Eighth Amendment.[64] But she concluded that the Court's decision mandated only a certain *process* (*i.e.*, consider the offender's youth) before imposing a particular penalty.[65]

And in 2014, the Court issued another 5-4 Eighth Amendment decision in *Hall v. Florida*.[66] In his opinion for the Court, Justice Kennedy again began by referencing the evolving standards of decency.[67] The opinion focused on IQ-score social science. Among other considerations, it emphasized that experts recognize the test's imprecision. Noting that intellectual disability is a condition, not a number, Justice Kennedy wrote that "[a] State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability."[68]

Such is the history of the evolving standards of decency test. It is marked by an illegitimate pedigree and the substitution of judicial preferences about penological policy for the will of the People.[69]

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[57] *Id.* at 419 (citing Weems v. United States, 217 U.S. 349, 367 (1910)).

[58] *Id.* (citing 356 U.S. 86, 101).

[59] Graham v. Florida, 560 U.S. 48 (2010).

[60] *Id.* at 58. (quoting 356 U.S. 86, 101).

[61] 567 U.S. at 465–66, 468 (2012). In *Miller*, one murder involved the shooting of a video store proprietor during a robbery in which defendant Jackson was a co-conspirator. *Id.* at 465–66. The second murder was particularly heinous, with Miller beating a man with a baseball bat while proclaiming: "I am God, I've come to take your life." *Id.* at 468. Miller and his co-conspirators returned to burn down the victim's trailer. *Id.*

[62] *Id.* at 469–70 (quoting 356 U.S. 86, 101).

[63] *Id.* at 470.

[64] *Id.*

[65] *Id.* at 483.

[66] 572 U.S. 701 (2014).

[67] *Id.* at 708 (quoting 356 U.S. 86, 101); *see also id.* at 708–09 (discussing policy rationales).

[68] *Id.* at 723.

[69] *E.g.*, *Graham*, 560 U.S. at 67.

II

The cases just discussed produced vigorous dissents. The three separate dissents in *Miller*—the case about mandatory life imprisonment without parole for minors—illustrate well the strong disagreements among the justices in this area.

Chief Justice Roberts noted that although the case presented "grave and challenging questions of morality and social policy," the majority did not characterize life without the possibility of parole for juveniles as "unusual."[70] He then observed that some 2,500 prisoners were serving life without parole for murders committed before age 18.[71] Noting that it was not unusual for murderers to receive that sentence,[72] the Chief Justice wrote: "[D]ecency is not the same as leniency. A decent society protects the innocent from violence."[73] And "[t]o say that a sentence may be considered unusual *because* so many legislatures approve it stands precedent on its head."[74] He criticized the majority for invalidating laws of "dozens of [state] legislatures and Congress."[75] The Chief Justice concluded with a warning: "This process has no discernible end point."[76]

In dissent, Justice Thomas wrote that the lines of precedent that the majority relied on did not adhere to the original understanding of the Cruel and Unusual Punishments Clause.[77] Based on that understanding, the Clause does not have a proportionality principle.[78] Justice Thomas concluded by explaining the Court was trying to shift from "'merely' divining the societal consensus of today to shaping the societal consensus of tomorrow."[79]

Justice Alito also dissented. He quoted *Trop*'s evolving language and argued that it was problematic from the start.[80] Justice Alito asked: "Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so . . . ?"[81] He concluded by stating the Court's "Eighth Amendment cases are no longer tied to any objective indicia of society's standards."[82]

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[70] *Miller*, 567 U.S. at 493 (Roberts, C.J., dissenting).

[71] *Id.* at 493–94.

[72] *See id.* at 494.

[73] *Id.* at 495.

[74] *Id.* at 497.

[75] *Id.* at 498.

[76] *Id.* at 501.

[77] *Id.* at 502–03 (Thomas, J., dissenting).

[78] *Id.* at 503–04. As Justice Thomas recognized in dissent, *id.* at 507, the Court had declined extending the individualized sentencing rule beyond the death penalty context some twenty years prior: "There can be no serious contention . . . that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'" Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (citing Chapman v. United States, 500 U.S. 453, 467 (1991)).

[79] *Miller*, 567 U.S. at 509.

[80] *Id.* at 510 (Alito, J., dissenting).

[81] *Id.*

[82] *Id.* at 514.

These dissents show how the Court has strayed far from the text and original meaning of the Eighth Amendment. And they also show that the Court has applied the evolving standards of decency inconsistently.[83]

Will the Court return to the text and original public meaning of the Eighth Amendment as it has done with the First and Second Amendments and statutory cases? It's hard to say. Two years ago, the Court in *Jones v. Mississippi* held that the Eighth Amendment doesn't require the sentencing court to find that a minor is permanently incorrigible before imposing a life-without-parole sentence.[84] And the Court did so without mentioning the evolving standards of decency test. Justice Sotomayor filed a dissent, and, perhaps notably, she broke from the traditional practice of dissenting "respectfully."[85] Justice Sotomayor lamented that the Court "gut[ted]"[86] its previous precedents *Miller v. Alabama* and *Montgomery v. Louisiana*.[87] Justice Thomas agreed with Justice Sotomayor that the Court effectively overruled past precedent, criticizing the majority for what he called its "strained reading of *Montgomery*" and its failure to admit that the decision is "irreconcilable with *Miller*."[88] But Justice Thomas concurred in the judgment of the Court because he would have rejected *Montgomery*.[89] Justice Sotomayor responded by opining that Justice Thomas "seek[s] to relitigate old Eighth Amendment battles based on arguments this Court has previously (and often) rejected."[90] So though Justice Thomas returned to first principles in his concurrence, he stood alone in that regard.

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The story of the evolving standards of decency test—from its questionable creation in *Trop v. Dulles*, through a decade of dormancy, its recurrence in death penalty cases, and its recent transformation into the law of the land—has created more problems than it has solved. Its inscrutable standards require judges to eschew the law as written in favor of their own moral sentiments. The only constant is that more and more laws adopted by the People's representatives have been nullified. And the People have no practical way to reverse this contrived ratchet.

If the Supreme Court continues to apply "the evolving standards of decency" test, what will be the next stop on this runaway train of elastic constitutionalism? As Chief Justice Roberts cautioned over a decade ago: there is "no discernable end point."[91]

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[83] *See, e.g.*, John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENT'G REP. 87, 88–89 (2010) (delineating the current test's erosion); *id.* at 89–90 (applying the original meaning to come to consistent results with a stable test).

[84] 141 S. Ct. 1307, 1319 (2021).

[85] *Id.* at 1328 (Sotomayor, J., dissenting) ("I dissent").

[86] *Id.*

[87] *Id.*

[88] *Id.* at 1323 (Thomas, J. concurring).

[89] *Id.* at 1328.

[90] *Id.* at 1336 n.4.

[91] *Miller*, 567 U.S. at 501 (Roberts, C.J., dissenting).