Changing Against the Times: *Against an Originalist Cruel and Unusual Jurisprudence*

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ABSTRACT

After interpreting the Cruel and Unusual Clause of the Eighth Amendment in a decidedly nonoriginalist fashion for a century, the Supreme Court has recently introduced a new, purportedly originalist jurisprudence specific to method-of-execution challenges. This new analysis, focusing on readily available alternative methods of execution to those methods challenged under the Clause, facially appears to guarantee the constitutionality of capital punishment going forward. Even conceding that this "alternative-methods" analysis is indeed originalist in nature (it is not), originalism should be rejected within the context of the Court's Cruel and Unusual jurisprudence. By originalists' own criteria, their theory ought to be accepted in light of the supposedly superior results that theory's wholesale adoption would offer. In the context of the Clause, however, the costs of doing so are far too great for these benefits to be compelling.

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INTRODUCTION

Writing for the Supreme Court, Justice Neil Gorsuch announced in *Bucklew v. Precythe*[1] that a proper analysis of a challenge to a state's chosen method of execution under the Eighth Amendment's Cruel and Unusual Clause begins by "examin[ing] the original and historical understanding of the Eighth Amendment."[2] That is, the proper analysis is explicitly originalist in nature.

But the issue in *Bucklew* was so divorced from the context of the Eighth Amendment's adoption in 1791 that viewing it through an originalist lens presents an at least facial incoherence. Namely, at issue was whether a single-drug lethal injection protocol using an overwhelming dose of a sedative (pentobarbital) carried an unconstitutional risk of unnecessary pain as applied to a convict suffering from a rare blood vessel disease when compared to a proposed alternative method of execution of using nitrogen gas to induce lethal hypoxia.[3] Why should we imagine whether someone over two centuries in the past would consider the lethal injection of the *Bucklew* challenger a cruel and unusual punishment when that person would have no context for many of the issue's components (e.g., injections, blood vessel disorders, and nitrogen gas)?

With this paper, I aim to show that this facial incoherence speaks to a deeper—perhaps fundamental—incompatibility with originalism and analyzing punishments under the Cruel and Unusual Clause ("the Clause"). In Part I, I provide brief overviews of the Court's Cruel and Unusual jurisprudence and of originalism as a theory of constitutional interpretation. In Part II, I demonstrate that the Court's jurisprudence—up to and including *Bucklew*—has never been consistently originalist; indeed, much of the Court's jurisprudence is explicitly nonoriginalist in character. Finally, in Part III, I argue that we should prefer a Cruel and Unusual jurisprudence free of originalist influence.

Although this paper does not make any arguments regarding originalism as an overarching theory of constitutional interpretation, my arguments have obvious implications for originalism's viability. If my argument that originalism should be rejected in the context of the Eighth Amendment is correct, it would seem to follow that originalism cannot coherently be applied to other constitutional issues

1. 139 S. Ct. 1112 (2019).
2. *See id.* at 1122.
3. *Id.* at 1121–22.

either.[4] Nevertheless, this paper targets originalism only to the extent it applies to applications of the Clause.

I. HISTORICAL OVERVIEW

Before we can see why originalist analyses of punishments under the Clause are undesirable, we must first establish the contexts of both the Court's Eighth Amendment jurisprudence and originalism.

A. A Brief Sketch of the Court's Death Penalty Jurisprudence

The Supreme Court's modern Cruel and Unusual jurisprudence generally splits into two eras. The first is the Court's longstanding and explicitly nonoriginalist "evolving standards" jurisprudence, and the second begins with *Baze v. Rees*,[5] in which a plurality of the Court rejected the applicability of the "evolving standards" analysis to method-of-execution challenges.[6]

1. Evolving Standards of Decency

For over a century now, the Court has interpreted the Clause as having an evolutionary character. In *Weems v. United States*, the Court noted that the Clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice."[7] The Court reinforced its interpretation of the Clause almost fifty years later in *Trop v. Dulles*: the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[8] Since then, the evolving-standards analysis has been "[t]he keystone of modern Eighth Amendment jurisprudence."[9]

With *Furman v. Georgia*, the Court—really more a scattered majority of Justices—confirmed the centrality of this analysis even in the capital punishment context.[10] In light of that analysis, a majority of the Justices determined that the death penalty (as it then existed) was no longer constitutionally permissible.[11]

Furman's major effect—the unconstitutionality of the death penalty as it then existed—was short-lived. The Court quickly retreated with its opinions in several

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4. *See* John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 995 (2019) ("The duel over the Eighth Amendment's meaning and proper interpretation can itself be seen as framing the debate about how to read the U.S. Constitution as a whole." (footnote omitted)).

5. 553 U.S. 35 (2008).

6. When looking at the entirety of the Court's jurisprudence, there are of course additional periods of historical interest that predate those discussed in this paper. Indeed, the *Baze* era cases reference the analysis of some of those prior periods. *See, e.g.*, Baze, 553 U.S. at 48 (citing Wilkerson v. Utah, 99 U.S. 130 (1879)). However, this paper confines its scope to the most recent two jurisprudential eras.

7. 217 U.S. 349, 378 (1910).

8. 356 U.S. 86, 101 (1958).

9. *See* Ian P. Farrell, *Enlightened Originalism*, 54 HOUS. L. REV. 569, 630 (2017).

10. *See, e.g.*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *id.* at 269–70 (Brennan, J., concurring).

11. *See* John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49. AM. CRIM. L. REV. 1913, 1913 (2012).

cases, such as *Gregg v. Georgia*, in which the Court clarified that capital punishment is constitutionally permissible in at least some circumstances.[12] However, although *Gregg* effectively overruled *Furman*, it nevertheless maintained the evolving-standards analysis: the Court confirmed that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment" through a two-pronged analysis in which the Court looks to both "objective indicia that reflect the public attitude toward a given sanction" and its own "subjective" moral judgment regarding "the dignity of man."[13]

The evolving-standards analysis has since remained controlling in the Court's Cruel and Unusual jurisprudence. Citing evolving standards, the Court has precluded executions for insane defendants,[14] intellectually disabled defendants,[15] and defendants who acted without the intent or result of homicide,[16] and it has precluded life-without-parole (LWOP) sentences for juvenile offenders.[17] The result of these continuing restrictions under the evolving-standards analysis is that the Constitution will only permit executions in cases of first-degree murder or crimes like terrorism and espionage that are committed against the state.[18] Unsurprisingly, the nonoriginalist character of the evolving-standards analyses in these cases continually stoked the ire of originalist Justices, eventually coming to a head in *Baze*.[19]

2. Baze's *Sea Change*

In *Baze*, the Court offered a new approach in tackling Eighth Amendment method-of-execution challenges in the first such challenge it had heard in over sixty years.[20] What initially appeared as a hopeful chance for a second *Furman* wound up cementing the unassailability of capital punishment's constitutionality.[21]

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12. *See* 428 U.S. 153, 154 (1976).

13. *Id.* at 173.

14. *See* Ford v. Wainwright, 477 U.S. 399, 408–10 (1986).

15. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

16. *See* Enmund v. Florida, 458 U.S. 782, 789–93 (1982).

17. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding mandatory LWOP sentences for juveniles convicted of homicide unconstitutional); Graham v. Florida, 560 U.S 48, 82 (2010) (holding LWOP sentences for juvenile offenders convicted of crimes other than homicide unconstitutional).

18. Bessler, *supra* note 11, at 1928.

19. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 308 (1976) (Rehnquist, J., dissenting) ("As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment . . . was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights.").

20. The Court's most recent method-of-execution case before *Baze* was *Louisiana ex rel. Francis v. Resweber*, in which the Court held that the Eighth Amendment permitted Louisiana, which had failed to execute a prisoner using the electric chair, to subject that prisoner to a second attempt using the same method of execution. 329 U.S. 459, 463–64 (1947).

21. *See* Bessler, *supra* note 11, at 1917 ("The closest the U.S. Supreme Court has come to reassessing the death penalty's constitutionality as a whole came in 2008 in *Baze v. Rees*. . . . [E]xecutions around the country were temporarily halted pending a ruling . . . ." (footnotes omitted)); Nadia N. Sawicki, *There Must be a Means – The Backward Jurisprudence of* Baze v. Rees, 12 U. PA. J.

Guiding the analysis in this case was Chief Justice Roberts's starting proposition "that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out."[22] Following this proposition—and in an apparent effort to ensure that states electing to continue executing prisoners remain capable of doing so[23]—the *Baze* plurality established a new standard for method-of-execution challenges, which requires prisoners to show that a challenged method presents a "substantial" or "objectively intolerable" risk of serious harm by presenting an alternative method that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[24]

Thus, in making "the availability of alternative[]" methods of execution central to the method-of-execution analysis under the Clause, the *Baze* plurality abandoned the evolving-standards analysis.[25] Indeed, the phrase "evolving standards" does not appear once in Roberts's plurality opinion,[26] and Justice Ginsburg outlined the incompatibility of the "feasible alternative" standard with the Court's long-established "evolving standards" analysis.[27] The incompatibility is evident: by the *Baze* standard's terms, even if a method of execution presents a substantial or objectively intolerable risk of serious harm—and even if society's evolving standards condemned the punishment in light of that risk—the method would nevertheless not violate the Clause so long as no superior alternative existed.[28] Seven years later, a majority of the Court gave *Baze*'s method-of-execution standard the full force of law in *Glossip v. Gross* and used that standard to reject a challenge to Oklahoma's three-drug lethal injection protocol on the basis that the challenging prisoners did not identify viable alternative drugs that Oklahoma might instead use for its executions.[29]

The Court doubled-down on the acceptance of *Baze*'s alternative-methods analysis in *Bucklew*, using it to deny a prisoner's as-applied challenge to Missouri's lethal injection protocol.[30] Justice Gorsuch's majority opinion proclaimed that *Baze* and *Glossip* also advanced "the original and historical understanding of the Eighth Amendment," which sees the Clause as prohibiting only

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CONST. L. 1407, 1415 (2010) ("[T]he Supreme Court's holding about alternative procedures in *Baze* effectively preserves the constitutionality of capital punishment as a general practice.").

22. Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion) (citation omitted).

23. *See* Sawicki, *supra* note 21, at 1414.

24. *Baze*, 553 U.S. at 50–52. Using this standard, the plurality held that two Kentucky prisoners had failed to challenge Kentucky's three-drug lethal injection protocol in favor of several alternatives because they could not show the proposed alternatives actually reduced a substantial risk of pain by comparison and could not show that at least one proposed method was feasible. *See id.* at 56–59.

25. While *Baze* did not mark the end of the Court's use of evolving standards, *see, e.g.*, Graham v. Florida, 560 U.S 48, 58 (2010) (invoking the evolving-standards analysis), its complete departure from it is no less remarkable.

26. *See generally* Baze v. Rees, 553 U.S. 35 (2008) (plurality opinion).

27. *See id.* at 115–16 (Ginsburg, J., dissenting).

28. *See* Sawicki, *supra* note 21, at 1410.

29. *See* 135 S. Ct. 2726, 2737–38 (2015). Like the *Baze* plurality, the *Glossip* majority opinion is devoid of any reference to the evolving-standards analysis. *See generally id.*

30. *See* 139 S. Ct. 1112, 1125–26 (2019).

those punishments that "'superadd[]' pain well beyond what's needed to effectuate a death sentence," and noted that identifying such punishments requires "a comparison with available alternatives."[31]

As in *Baze* and *Glossip*, the majority opinion never once references the Court's evolving-standards analysis.[32] And, in perhaps a sign of defeat over the persistence of the alternative-methods analysis in the method-of-execution context, neither do any of the dissenting Justices.[33] *Bucklew*, at least facially, appears to foreclose the applicability of the evolving-standards analysis for capital punishment going forward.[34] This is especially true now that Justice Kennedy—one of the Court's frequent opinion-writers in its recent evolving-standards cases[35]—has been replaced by the originalist Justice Brett Kavanaugh, suggesting there might no longer be five votes on the Court in support of applying the evolving-standards analysis to any issues at all under the Clause.

B. A Comparably Brief Sketch of Originalism

Once thought dead, originalism has enjoyed a resurgence in the last forty-odd years, so much so that some see it as "now the prevailing approach to constitutional interpretation."[36] To a certain extent, there is not much resistance to originalism as a base proposition. It is the rare scholar who declares that the original meaning of the Constitution's text has no bearing whatsoever on its proper application.[37] What originalists' opponents instead object to is the proposition that original meaning should be the controlling (or, as some originalists see it, the only) consideration, and it is this milder form of opposition with which this paper aligns for the purposes of interpreting and applying the Clause.

In order to launch an attack on originalism, though, some initial establishing work is required. Advancing an argument about originalism generally requires making sweeping generalizations. There are many, many different genres of originalist interpretation[38]; in order to have an easily comprehensible target that is more or less representative of many originalists' actual views, some subtleties will naturally be glossed over.

In broad strokes, originalism is perhaps best understood in contrast to the central conceit of nonoriginalism: courts are not required to "interpret the Constitution in accordance with its original meaning, even when that meaning is

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31. *Id*. at 1126–27.

32. *See generally id*.

33. *See generally, e.g*., *id*. at 1136–45 (Breyer, J., dissenting).

34. *See* Bessler, *supra* note 4, at 1075–76.

35. *See generally, e.g*., Graham v. Florida, 560 U.S. 48 (2010) (majority opinion written by Justice Kennedy); Kennedy v. Louisiana, 554 U.S. 407 (2008) (same); Roper v. Simmons, 543 U.S. 551 (2005) (same).

36. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999).

37. *See* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 24–25 (2009).

38. *Id*. at 4. Indeed, Berman posits that there may be dozens of distinct categories of originalism. *See id*. at 14–15; *see also Farrell*, *supra* note 9, at 603 ("Originalism . . . is more accurately understood as a family of more-or-less related theories rather than a single, unified, coherent theory.").

discoverable."[39] Or, to put it a different way, "facts that occur after ratification or amendment can properly bear—constitutively, not just evidentially—on how courts should interpret the Constitution."[40] As a general school of thought, originalism is the complete rejection of these ideas. Beyond that, however, it becomes too varied to coherently discuss and dissect it all at once.

That caveat given, this paper is primarily concerned with public-meaning originalism, the originalist theory that appears most well-represented in legal thought generally and especially on the Supreme Court. For the public-meaning originalist, the meaning of a given law—including (and especially) the Constitution—"was fixed at its ratification and the judge's job is to discern and apply that meaning to the people's cases and controversies"[41] by determining how the general public contemporaneous to some law's enactment would have understood its terms.[42]

In a sense, then, Justice Antonin Scalia's theory of constitutional interpretation serves as this paper's aim. Scalia makes for an apt figurehead for public-meaning originalism for two reasons: first, because he is already the school of thought's unofficial figurehead; and second, because his thoughts on originalism provided a major inspiration for those of Justice Gorsuch, who wrote the majority opinion in *Bucklew*.[43]

The public-meaning originalist views capital punishment under the Clause (for one example) as legitimate today because it was publicly understood to be legitimate at the time of the Eighth Amendment's ratification.[44] Indeed, as Justice Scalia has noted, "[h]istorically, the Eighth Amendment was understood to bar only those punishments that added 'terror, pain, or disgrace' to an otherwise permissible capital sentence."[45]

Thus, the only punishments that *will* so violate the Clause going forward are those "deliberately designed to inflict pain. That never changes" because those are the kinds of punishments the Clause referred to at ratification.[46] For the originalist, then, something like the evolving-standards analysis is derided as a "vacant concept" with no place in constitutional adjudication.[47]

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39. Berman, *supra* note 37, at 24.

40. *Id*.

41. NEIL M. GORSUCH, *Originalism and the Constitution, in* A REPUBLIC, IF YOU CAN KEEP IT 108, 118 (2019).

42. *See, e.g*., *id*. at 110, 118.

43. *See id*. at 106.

44. A common argument to this end is that "the Constitution explicitly *contemplates*" capital punishment given particular language in the Fifth Amendment, such as that no person shall be "deprived of life . . . without due process of law." *See, e.g*., Glossip v. Gross, 135 S. Ct. 2726, 2747 (2015) (Scalia, J. concurring). For an argument that the Fifth Amendment's contemplation of capital punishment is unproblematic for the constitutional abolition of the death penalty under the Eighth Amendment, see generally Joseph Blocher, *The Death Penalty and the Fifth Amendment*, 111 NW. U. L. REV. 275 (2016).

45. *See Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring) (quoting Baze v. Rees, 553 U.S. 35, 96 (2008) (Thomas, J., concurring)).

46. *See* GORSUCH, *supra* note 41, at 111.

47. *See* J. Richard Broughton, *The Death Penalty and Justice Scalia's Lines*, 50 AKRON. L. REV. 203, 208 (2016).

Originalists advance many arguments about the benefits of their interpretive methodology; the following are some of the most common. The first major alleged benefit of originalism is that it produces clear, objective results.[48] All one needs to do is determine what some provision meant—as understood by the public at the time of its adoption—and apply that meaning to the present challenge. There is no need for judicial decisionmakers to fret over their own subjective tastes as compared to those of the present public, which introduces unnecessary ambiguities and difficulties in adjudicating legal issues.[49]

Another purported benefit is that originalism shores up the legitimacy of the judiciary branch by constraining judges to values that have received sufficient democratic endorsement, whereas nonoriginalism is anti-democratic insofar as it allows the values of unelected judges to trump those that the People have endorsed.[50] This benefit stems from two interrelated arguments. The first is "the majoritarian argument," that "it is impermissible to override the policy preferences of contemporary majorities *unless* in furtherance of the will of past (super) majorities."[51] Thus, by not flouting the will of contemporary majorities by ruling on issues that could instead be left to the democratic process, judges taking an originalist approach promote democracy by leaving as many issues to the People as possible. On the same note we have "the argument from popular sovereignty," which "insists that proper respect for democratic self-governance requires that courts give effect to embedded constitutional norms, interpreted in accordance with the understandings of the enacting (super) majorities."[52]

Finally, perhaps the most powerful benefit of originalism—as originalists are all too happy to point out—is that there is no clear contender for its throne as an overarching interpretive methodology. Originalism, even if unideal, is a superior alternative to having no coherent interpretive methodology at all.[53]

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48. *See, e.g.*, Blocher, *supra* note 44, at 281; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

49. Indeed, originalists claim that indulging in nonoriginalism leads to outright incoherence. *See Glossip*, 135 S. Ct. at 2749 (Scalia, J., concurring) (arguing that the evolving-standards analysis "has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind").

50. *See* Scalia, *supra* note 48, at 854; *see also* Glossip, 135 S. Ct. at 2750 (Scalia, J., concurring) ("The Framers disagreed bitterly over [capital punishment]. For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide."); Broughton, *supra* note 47, at 206–07 ("When the judiciary expands the sphere of constitutional protection for rights, it necessarily restricts the sphere of permissible political action. . . . Some things, good or not, are simply not the business of judges in a constitutional republic. So it was, in Scalia's view, with capital punishment.").

51. Berman, *supra* note 37, at 70.

52. *Id.*

53. *See* GORSUCH, *supra* note 41, at 110–11 ("If I cannot convince you that originalism is the *proper* interpretive theory for our Constitution, I hope to convince you (to borrow from Churchill) that originalism is the worst form of constitutional interpretation, except for all the others."); Scalia, *supra* note 48, at 862–63 (arguing that "[t]he practical defects of originalism . . . [are] less severe" than "the impossibility of achieving any consensus of what, precisely, is to replace original meaning, once that is abandoned").

Note that many of these arguments in favor of originalism are consequentialist by nature: we should accept originalism, the originalist says, because doing so will lead us to enjoying these various benefits (clear answers, furthering democracy, and so on).[54]

II. ORIGINALIST INCOMPATIBILITY

Despite the originalist's arguments for its superiority over nonoriginalism, the Court has never—even with *Baze* and its progeny (as will be argued)—committed to a fully originalist view of the Clause. That the evolving-standards analysis is at least facially incompatible with originalism is relatively obvious. The very nature of the analysis rejects that the publicly understood meaning of the Clause puts a threshold on what punishments a court is permitted to hold as violative of the Constitution.[55]

A. Potential Reconciliations

That said, there are at least some ways that an originalist could theoretically accept the evolving-standards analysis. One way would be if there were historical evidence that either the Framers intended or the general public understood the Clause as having a sort of evolutionary character (that is, that punishments might later be interpreted as cruel and unusual that were not so interpreted in 1787). Though originalism generally is (properly) seen as an interpretive methodology that significantly constrains judicial power, the constraints it imposes for a given legal provision depend on how narrowly that provision was publicly understood to be. Therefore, it is "possible that the original understanding or intent of a provision was to delegate to future interpreters the power to concretize underdeterminate meaning . . . in a continually changing or evolving fashion."[56]

So, if the historical evidence is in accord, judges can indeed have an evolving interpretive license, even under an originalist model.[57] However—and if the common rejection of the evolving-standards analysis is any indication—the ratifying public does not appear to have understood the Clause in this way.[58] Thus, this

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54. *See, e.g.*, GORSUCH, *supra* note 41, at 106 ("I began to see what happens to ordinary people in real cases, to the rule of law, and to the role of the judge when courts abandon [originalism] in favor of 'evolving' the law in ways they think preferable. . . . [T]hey threaten the legitimacy of the judicial enterprise . . . ."). Mitchell Berman refers to originalist theories so grounded as "soft originalism." *See* Berman, *supra* note 37, at 6. There are indeed "hard originalist" theories that put forward premises that, if correct, lead ineluctably to accepting originalism as a mode of constitutional interpretation. *See id.* Because these "hard" theories are more rarely reflected in academic legal discourse and are much less frequently invoked by originalist Justices, this paper confines itself to soft originalism.

55. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring) ("Ours would indeed be a simple task were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century.").

56. Berman, *supra* note 37, at 30.

57. *Id.* at 31.

58. *See, e.g.*, Scalia, *supra* note 48, at 861–62 (proclaiming ignorance of any historical evidence that the public at the time of framing understood Cruel and Unusual Clause to have an evolving character).

potential reconciliation between the Court's Cruel and Unusual jurisprudence appears foreclosed.

The other primary potential reconciliation is to take a view of originalism that requires interpreting constitutional provisions at a high enough level of abstraction that the evolving-standards analysis could be understood as fitting into the Clause's original meaning. According to this "enlightened originalism" school of thought, "we do not find the original meaning of terms such as . . . 'cruel and unusual punishment' . . . by looking to any original public meaning. . . . Rather, we have become more enlightened as to the full ramifications—the true meaning—of" these terms.[59] Indeed, the enlightened originalist views the evolving-standards analysis as enlightened originalism in practice and, therefore, itself originalist. The analysis hinges not on the changing *meaning* of 'cruel and unusual' in the Clause, but rather society's changing *understanding* of the morally objective values of "cruel" and "unusual."[60]

This potential reconciliation is unproblematic for this paper because enlightened originalism is itself irreconcilable with the sort of originalism that Justices like Scalia and Gorsuch espouse in their capital punishment opinions.[61] Enlightened originalism is functionally not originalism at all, but rather living constitutionalism, so much so that enlightened originalism will often produce the same results as living constitutionalism, and from an arguably negligibly distinct theoretical framework.[62] To the extent this characterization holds, the fact that the evolving-standards analysis is consistent with enlightened originalism is no help to public-meaning originalists.[63]

But there is admittedly disagreement about whether the ratifying public indeed understood the Clause as having an evolutionary character. *See* Shannon D. Gilreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. JEFFERSON L. REV. 559, 563 (2003) (arguing the Eighth Amendment's "very construction invites successive generations of Americans (and the Court as arbiter and defender of their rights) to pose the inquiry of what constitutes a cruel and unusual punishment against a paradigm of modernity, not bound by reference to a fixed historical point").

59. Farrell, *supra* note 9, at 569.

60. *See id*. at 574.

61. Indeed, enlightened originalism is perhaps most clearly seen in Justice Kennedy's opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *See* Farrell, *supra* note 9, at 570.

62. *See id*. at 580–81 ("The results of applying enlightened originalism to particular constitutional questions . . . track closely with various versions of living constitutionalism. Indeed, I suggest that enlightened originalism more accurately captures the attitudes of many living constitutionalists than the notion that the meaning of the Constitution has changed."); *see also* Peter J. Smith, *How Different are Originalism and Non-Originalism*, 62 HASTINGS L.J. 707, 707 (2010) (arguing that, where originalists interpret constitutional provisions "at a very high level of generality . . . then there is no obvious distinction, at least in practice and possibly in theory, between . . . originalism and non-originalism").

63. This same argument holds for other versions of originalism proposing to conduct the interpretive analysis at greater levels of abstraction than one typically finds in public-meaning originalism. Insofar as these purportedly originalist theories advocate for this course of interpretive action, they are not really originalism at all. *See* Berman, *supra* note 37, at 29–30 (explaining that the "interpretive methodology [of originalism] requires meaning to be rendered at the level of generality originally intended or publicly understood").

No more ink need be spilled on this point: the evolving-standards analysis is evidently nonoriginalist in nature—at least, it is inconsistent with the version of originalism with which this paper is concerned—because it posits that prior public understandings of "cruel and unusual" can be rendered legally wrong.[64] Thus, to the extent that originalists like Gorsuch promote originalism in capital punishment cases, they do so against the weight of decades of case law—a significant opposing force with a great deal of momentum behind it.

B. The Nonoriginalism of the Alternative-Methods Analysis

By contrast, *Baze* and its progeny appear an originalist triumph in the Court's capital punishment jurisprudence. As outlined above, *Baze*'s alternative-methods analysis is incompatible with the nonoriginalist evolving-standards analysis,[65] and—while that opinion is not clearly originalist in nature[66]—it is also compelling on originalist grounds insofar as it "effectively preserves the constitutionality of capital punishment as a general practice" since any given method of execution will only violate the Clause if there exists another feasible alternative method.[67] Though *Baze* and its progeny are primarily concerned with the constitutionality of methods of execution rather than of execution itself, the standard they provide eliminates the possibility of a *Furman*-esque de facto constitutional ban on executions through disapproving of all available means of carrying it out.

Further adding to the alternative-methods analysis's originalist bona fides is Gorsuch's proclamation in *Bucklew* that "*Baze* and *Glossip* rest" on "the original and historical understanding of the Eighth Amendment" given that a punishment is only cruel and unusual under the Clause in comparison to other punishments.[68] Even if one concedes Gorsuch's point about the comparative nature of "cruel and unusual," though, the alternative-methods analysis actually conflicts with a thoroughgoing originalist interpretation of the Clause.

If the analysis is justified on originalist grounds, it is certainly odd that it first appears in *Baze*, a 2008 opinion.[69] Gorsuch's historical evidence that the Framers included the Clause out of concern for the use of heinous punishments like public dissection[70] lends some support to his position that the Clause was inspired by comparisons between acceptable and unacceptable punishments, but it falls short

64. *See* Farrell, *supra* note 9, at 631.

65. For instance, the alternative-methods analysis would approve of an execution method—at least in the absence of any viable alternatives—even if the method contravened the views of the public and the Court's own subjective moral judgment, the two prongs of the evolving-standards analysis. *See* Glossip v. Gross, 135 S. Ct. 2726, 2795 (2015) (Sotomayor, J., dissenting).

66. For example, while Chief Justice Roberts recounts some of the history of capital punishment, he appears only to use that history for context rather than as a guide for the analysis, and he used "the middle of the nineteenth century" as his starting point rather than starting at or before the ratification of the Eighth Amendment. *See* Baze v. Rees, 553 U.S. 35, 41–46 (2008) (plurality opinion).

67. *See* Sawicki, *supra* note 21, at 1415.

68. Bucklew v. Precythe, 139 S. Ct. 1112, 1126–27 (2019).

69. *See* Bessler, *supra* note 4, at 1070.

70. *See Bucklew*, 139 S. Ct. at 1123.

of proving that the general public understood that the Clause's effect was to bar punishments only if they were unsatisfactory in light of available alternatives. Justice Sotomayor pointed out this problem in her *Bucklew* dissent,[71] and the point is difficult for the originalist to surmount. After all, nowhere in the Clause, let alone the entirety of the Eighth Amendment, does the text provide that the alternative-methods analysis is the proper form of challenging a method of execution.[72]

Even if we can only view a punishment as cruel or unusual by reference to other punishments,[73] that proposition does not lead to the further conclusion that the comparison will only result in the cruelty or unusualness of a punishment where a competing punishment is feasible and readily implemented. To take the *Bucklew* challenge as an example: the ease with which Missouri could implement nitrogen hypoxia as a method of execution would not have any effect on the risk of unnecessary pain that Bucklew would suffer from the state's lethal-injection protocol. The Clause's text does not suggest anything to the contrary, and it is at best questionable that the general public in 1791 would have understood the Clause in that way.

In response to this idea, the originalist might seek refuge in the distinction between interpretation and construction—that is, the difference between discerning what the Clause means and applying that meaning to new facts.[74] Because the Clause's text is "rather abstract," applying it to specific factual circumstances requires judges to construct more concrete rules stemming from the Clause's base principles.[75] After all, the Eighth Amendment's language provides little that is truly concrete, and its open-endedness could, on first blush, allow for the alternative-methods analysis as a specific application of the Eighth's more abstract meaning.

Thus, because what constitutes "cruel and unusual punishment" is based on comparisons between forms of punishment, at least as the Clause was (allegedly) publicly understood when adopted, the alternative-methods analysis falls under the Clause's original meaning as a more concrete application of that guiding principle in the context of challenging specific methods of execution. In other words, the *meaning* of "cruel and unusual" is comparative in nature, but *applying* that meaning to method-of-execution challenges permissibly allows the use of the alternative-methods analysis since it furthers such comparisons.

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71. *See id.* at 1145 (Sotomayor, J., dissenting) ("[T]here is no sound basis in the Constitution for requiring condemned inmates to identify an available means for their own executions.").

72. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

73. This is Gorsuch's position in *Bucklew*, 139 S. Ct. at 1125, and he points out in support of this position that the Court also compared challenged methods of execution to those unquestionably banned by the Clause, *see id.* at 1123–24 (citing *In re* Kemmler, 136 U.S. 536 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878)).

74. *See* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 264 (2005).

75. *See id.* at 263–64.

But this potential defense leaves untouched what is objectionable about the alternative-methods analysis from an originalist perspective. There is simply a disconnect between there being some character of comparison inherent in the meaning of "cruel and unusual"—which is all that the Court's historical evidence in its alternative-method cases can establish—and an execution method's only becoming cruel and unusual in comparison to an *available alternative* rather than in comparison to, say, a *theoretical alternative* (which that same historical evidence does not foreclose as a possibility).[76] There is no clear, logical connection between the purportedly comparative nature of "cruel and unusual" and the requirement that method-of-execution challengers present alternative methods that not only remove a risk of pain inherent in an existing method, but are also feasible and readily implemented.[77] To put the point in originalist terms, the alternative-methods analysis violates the constraint principle, the idea that constructions of law are to be constrained by that law's interpreted fixed historical meaning.[78] The interpretation–construction distinction therefore cannot salvage the alternative-methods analysis's (lack of) originalist merit.

C. The Precedent Problem

In light of the above arguments, the Court's Cruel and Unusual jurisprudence is wholly nonoriginalist in nature, even under the more recent *Baze* regime. Insofar as originalists demand that their methodology instead control, they call for the overruling of at least a century's worth of Supreme Court precedent, something that cuts against the jurisprudential consistency that adopting originalism purportedly affords given that it conflicts with another rule-of-law furthering mechanism in stare decisis.[79] Indeed, this problem of generally reconciling precedent and originalism is "the single biggest challenge" originalists face."[80] But the originalist might still coherently argue for a thoroughgoing originalist Cruel and Unusual jurisprudence.

The originalist is not left without recourse despite the wholly nonoriginalist nature of the Court's Cruel and Unusual jurisprudence (*Baze* and its progeny included) because precedent in and of itself is not the end-all-be-all to any given constitutional dispute.[81] Given the conflict between an originalist Clause and the

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76. *See, e.g.*, *Bucklew*, 139 S. Ct. at 1123–24 (recounting historical evidence purportedly relevant to understanding the Clause's original meaning).

77. As proposed above, for example, the Clause's purportedly comparative nature could also allow for comparisons to execution methods that, while not *readily* implementable, are at least still *possible* to implement. That is, without more in the way of historical evidence or steps in the argument (whether a priori or stemming from that missing evidence), the Clause mandating a comparative analysis does not provide the requirement that the comparison be made to an alternative method that could be put in place more or less immediately.

78. *See, e.g.*, Ian Bartrum, *Two Dogmas of Originalism*, 7 WASH. U. JURIS. REV. 157, 175–76 (2015).

79. *See* Barnett, *supra* note 74, at 259–60.

80. *Id.* at 258.

81. *See* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (plurality opinion) ("We have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents . . . .").

Court's precedent, the thoroughgoing originalist is left with two obvious solutions, each involving a significant sacrifice. The originalist can either reject a truly originalist interpretation of the Clause in order to maintain consistency with this substantial history of conflicting precedent, with precedent assumed to be inherently valuable and thus originalism's conflict with it reduced to a reductio ad absurdum; or the originalist can do the inverse, viewing precedent as not all that important—at least, not when compared to maintaining a consistently originalist Cruel and Unusual jurisprudence—and reject precedent entirely.[82] "There are difficulties with each of these options."[83]

1. Option 1: Rejecting Precedent

The difficulty with rejecting precedent in favor of originalism, again, is the detrimental effect to the overall rule of law, something that originalists tout as one of the prime benefits of their interpretive methodology. While landmark cases like *Trop* and *Gregg* might not be correctly decided when viewed through an originalist lens, they are certainly seen as having been correctly decided vis-à-vis their considerable social or cultural impacts.[84] To spell out the problem more fully, originalists cut against one of the key justifications for their interpretive methodology in advancing an interpretation of the Clause wholly inconsistent with the Court's existing Cruel and Unusual jurisprudence. As covered in Section 1.B, one of originalism's purported advantages is that (when adopted wholesale) its adoption will result in an overall more consistent and predictable jurisprudence, thus adding a great deal of stability to the law. But adopting originalism in this way would, in many doctrinal areas—including and especially under the Clause—cause the annihilation of decades, even centuries, of case law, a massive upset that somewhat (if not entirely) negates this touted benefit. The precedent problem is so powerful that several prominent originalists have bowed before it, allowing their interpretive commitments to bend—perhaps even break—in light of the jurisprudential chaos that might ensue should they fully pursue their methodology.[85]

Of course, the counter here is that an originalist Cruel and Unusual jurisprudence implemented from the start would have avoided this problem. It is in a sense unfair to blame originalists' advocacy to do away with the evolving-standards analysis[86] for the jurisprudential unrest that realizing their proposal

82. *See* Barnett, *supra* note 74, at 259.

83. *Id.*

84. *See id.* at 259–60; *see also id.* at 260 ("[I]f one had to choose between original meaning and *Brown* [*v. Bd. of Educ.*, 347 U.S. 483 (1954)], most would choose *Brown*.").

85. *See, e.g.*, Scalia, *supra* note 48, at 862. Scalia actually went much further, suggesting that most originalists (including himself) would allow their interpretive methodologies to acquiesce to even some *social* changes, not simply precedential opinions. *See id.* at 861.

86. *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring) (arguing that the evolving-standards analysis "has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind").

would effect because originalists were not the ones to get the Court off-track (so to speak) with the evolving-standards analysis in the first place.

That said, jurisprudential consistency is jurisprudential consistency. Even if we concede that originalism is indeed the optimal interpretive methodology in securing consistent results, that benefit only cuts in favor of endorsing a purely originalist Cruel and Unusual jurisprudence if that jurisprudence's consistency after the point of originalist adoption would outweigh the jurisprudential whiplash of first throwing out the existing, wholly nonoriginalist Cruel and Unusual line of cases. Given the longstanding status of the existing jurisprudence, it is far from clear that the future consistency would be sufficiently beneficial to warrant this seismic shift.

Thoroughgoing originalists have another potent counter to the precedent problem, which is that their interpretive opponents are on no better footing. As with originalists, many nonoriginalists are largely only committed to those precedents that they themselves prefer—it is not as if living constitutionalists have a reputation for being stare decisis sticklers.[87]

Indeed, nonoriginalists are arguably on worse footing on this score. Not only are they wishy-washy in their commitments to established constitutional decisions, they also lack a commitment—from the originalist's perspective, anyway—to "the written Constitution *as enacted*."[88] Thus, while originalists might be noncommittal to stare decisis, their opponents are noncommittal to stare decisis *and* to the Constitution itself, hence originalists' claim that their methodology results in a more consistent jurisprudence.

The originalist could also worm out of the precedent problem by endorsing an originalist view that would not be so radical in application as to wipe away the entirety of the Court's Cruel and Unusual jurisprudence. This counter depends on exploiting the interpretation–construction distinction discussed in Section II.B., *supra*. To summarize again briefly, there is a distinction between *interpreting* constitutional provisions (discerning what those provisions mean) and *constructing* those provisions (applying those provisions to concrete circumstances).[89] Where the constitutional provisions governing a given precedent are rather abstract in nature, as is the case with the Clause, this distinction can allow the originalist to reconcile many of these cases with an originalist *interpretation* of those provisions by cognizing those cases as stemming from judge-created rules—*constructions* of those provisions—in order to apply those provisions to specific circumstances.[90]

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87. *See* Barnett, *supra* note 74, at 261–62 (providing that nonoriginalists "are every bit as reluctant . . . as originalists . . . to openly reject certain hallowed precedents"); *see also* GORSUCH, *supra* note 41, at 114 ("A living constitutionalist, no less than an originalist, must decide when to abide and when to discard judicial precedents with which he may disagree. And, of course, getting your theory of precedent right is important . . . . But it also runs orthogonal to our current discussion [or originalism].").

88. Barnett, *supra* note 74, at 262.

89. *Id*.

90. *Id*. at 265–66. Indeed, originalists often invoke the difference between interpretation and construction in order to counter another common criticism of originalism—that it requires employing meanings of constitutional provisions that are impractical for the modern world. *See* GORSUCH, *supra* note 41, at 111.

But this gets back to the same issues discussed above: the alternative-methods and (especially) evolving-standards analyses are both nonoriginalist in nature, at least when considering a truly originalist reading of the Clause. The only hope the originalist has to reconcile the Court's Cruel and Unusual jurisprudence with an originalist interpretation of the Clause is to interpret the already rather abstract Clause at an even greater level of abstraction, something that threatens to push the originalist into the originalism-in-name-only methodology of enlightened originalism.

Finally, another counter originalists might employ—especially in light of their opponents' faint-hearted adherence to stare decisis—is to argue that stare decisis is not particularly worthy of endorsing in the first place. After all, if originalists are correct that the Clause is only correctly interpreted in light of how it was publicly understood at the time of its adoption, then to endorse precedents relying on a different conception of the Clause (say, one that views it as having an explicitly evolutionary character) is to endorse the Court's decisions over the Constitution itself.[91]

We recognize in other contexts that no other sources of law can override the Constitution. For example, "a legislative expression that violates the Constitution *cannot*—repeat, *cannot*—properly be given effect in an adjudication."[92] Insofar as a "court's job is to figure out the true meaning of the Constitution, not the meaning ascribed to the Constitution by the legislative or executive departments," that same duty should require the true meaning of the Constitution to also supersede the meaning that the judicial department has up to that point ascribed to it (assuming that the two are in conflict).[93] Indeed, where stare decisis demands that judicially ascribed meanings control even when they conflict with the Constitution's true meaning, the practice is arguably unconstitutional.[94]

Notably, this argument is not exclusive to originalists. So long as a theory of constitutional interpretation presumes there to be "objective right answers to constitutional questions" and "ascribes supreme legal status to the Constitution"—both of which are consistent with the evolving-standards analysis—this resolution is available to any such theorists facing the precedent problem.[95] Given nonoriginalists' similarly loose commitment to precedent, this makes the argument all the stronger for the originalist. If nonoriginalists reject this argument, they do away with their own ability to justify departing from precedents they consider undesirable.[96] Even with all these counters, though, the precedent problem still presents a nettlesome stumbling block to adopting a thoroughgoing originalist

91. *See* Gary Lawson, *Stare Decisis and Constitutional Meaning: Panel II –The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994).
92. *Id*. at 26.
93. *See id*. at 27.
94. *Id*. at 24.
95. *See id*. at 32.
96. *See id*.

Cruel and Unusual jurisprudence given the sheer momentum of the Court's century-old existing jurisprudence.

2. Option 2: Rejecting Originalism

But momentum is not conterminous with rightness, which brings us to the flip-side of originalists' dilemma between wholeheartedly endorsing their own interpretive methodology versus following established precedents. The difficulties of abandoning precedent now established, the problem with rejecting originalism is that to do so entails rejecting "the normative argument on its behalf"—namely, to "put[] judges above the Constitution they are supposed to be following, not making."[97] After all, "if the normative case for originalism is compelling, then it provides a normative argument for rejecting" whatever precedent conflicts with its demands.[98]

And therein lies the key: the normative case for originalism is *not* compelling. At least, it is not compelling enough in the context of the Court's Cruel and Unusual jurisprudence.

III. THE ADVANTAGES OF REJECTING ORIGINALISM

A. Originalism's Anormative Smokescreen

Proceeding to a discussion about originalism's normative appeal might seem paradoxical. After all, one of the chief benefits originalists invoke in favor of their interpretive theory is that they rely far less on normative claims than their nonoriginalist counterparts. Gorsuch himself has claimed that, despite the many differences one finds throughout the various schools of originalist thought, all originalists "are at least constrained by the same *value-neutral* methodology and the same closed record of historical evidence."[99] In this way, the "normative case for origi nalism"[100] might be that originalism is, in fact, relatively norm-free—even *anormative*—insofar as originalists claim that they advance no normative ideas whatsoever in their interpretive methodology.

Mitchell Berman aptly describes this conception of originalism as "pernicious."[101] The argument that originalists as such do not inherently endorse or promote any favored norms—instead only stumping for "objective" decision-making and adjudication—is merely a smokescreen, one that Berman posits "threatens to undermine the judiciary's unique and essential role in our system of government."[102]

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97. Barnett, *supra* note 74, at 259.

98. *Id.*

99. *See* GORSUCH, *supra* note 41, at 112 (emphasis added); *see also id.* at 123 ("Notice that originalism can describe a judge's goal in interpretation without reference to any value judgments or subjective preferences.").

100. Barnett, *supra* note 74, at 259.

101. Berman, *supra* note 37, at 8.

102. *Id.*

For there are at least two major respects in which originalism is clearly and explicitly normative. The first is that, even if originalism "demands that judges leave their own normative reasoning at the courtroom door," it nevertheless requires them to "defer . . . to the moral beliefs of a generation long dead."[103] The originalist might complain that, at best, this is originalism advancing a set of norms by default, but the fact remains that norms are being advanced, entailing that originalists cannot coherently call their methodology anormative.[104]

The second respect in which originalism is a normative theory is seen in the justifications originalists use to argue for the superiority of their theory. At least for so-called soft originalists, originalism ought to be followed because doing so will, on the whole, result in a better state of affairs. Particularly (as covered above), it will produce a clearer, more consistent overall jurisprudence[105]; it will better promote democracy vis-à-vis leaving democratically established values untouched[106]; and it will result in an easily comprehensible means of adjudicating legal claims given the lack of any serious competing overarching theory of constitutional interpretation.[107]

Insofar as originalists employ these justifications, they at least implicitly claim that these values—consistency, deference to democracy, and conceptually simple rules of interpretation—are worth endorsing and that (on a more meta level) we should decide what theory of constitutional interpretation to endorse in a consequentialist fashion. We should endorse that theory that results in the best overall state of affairs, the one with the greatest ratio of benefits to costs, and originalists claim their theory fits that bill.

Within the context of the Clause, then, the normative case for originalism is that originalism better promotes these values than nonoriginalism and that originalism's superior promotion outweighs the drawbacks of its failure to promote other relevant, competing values at the same time. Thus, for originalism to be truly worthy of endorsing, this balance must actually hold. It does not.

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103. *See* Farrell, *supra* note 9, at 583.

104. *Cf.* Charles R. Kesler, *Thinking About Originalism*, 31 HARV. J.L. & PUB. POL'Y 1121, 1127 (2008) ("[E]ven if a[n originalist] judge could consistently and conscientiously steer clear of [normative] considerations, the larger, political case for originalism cannot be made without them. For why continue to enforce the rules of a game that has been exposed as fixed, flawed, and fraudulent from the very beginning?"); Smith, *supra* note 62, at 735 ("One can be forgiven for questioning originalism's neutrality, for example, when originalists contend that the Constitution's ostensibly broad, rights-granting provisions in fact carry narrow, determinate meanings . . . ."); Lee J. Strang, *Originalism and Legitimacy*, 11 KAN. J.L. & PUB. POL'Y 657, 658 (2001) ("Conservatives assume (rightfully so) that the values enshrined in the Constitution by the ratifiers are more to their liking." (footnote omitted)); *id.* at 659 ("The array of normative standards advanced by originalists is stunning. Stability of jurisprudence, rule of law virtues, separation of powers (reducing judicial discretion and increasing the sway of popular voices), protection of minority rights, democratic theory or popular sovereignty, and equality, are advanced to show that adherence to the meaning of the text as ratified is moral and legitimate (or at least more so than nonoriginalism).").

105. *See, e.g.*, Scalia, *supra* note 48, at 863.

106. *See, e.g.*, *id.* at 854–55.

107. *See, e.g.*, GORSUCH, *supra* note 41, at 110–11.

B. Originalism's Normative Failings

In his non-judicial writing, Gorsuch lays down the challenge to the nonoriginalist: "[W]hat persuasive explanation is there for the . . . suggestion that we should *only sometimes* adhere to the original public meaning of the Constitution's written text? For my part, I can think of none."[108]

If we were to apply the Clause in a consistently originalist manner, we would have to permit many punishments that are undoubtedly unacceptable by our contemporary standards. Prisoners would have no complaint against monstrous punishments like "public flogging, pillorying, or even mutilation," nor could they succeed on a challenge against a death sentence for counterfeiting.[109] While it might be possible, even under a thoroughgoing originalist analysis, for these sorts of punishments to become cruel and unusual,[110] it is far from clear that an originalist Cruel and Unusual jurisprudence would indeed reject them. The Court's nonoriginalist jurisprudence, by contrast, has obviously rejected these punishments, making it the more compelling option, especially where the choice is to be grounded in consequentialist thinking. By only allowing for the possibility of constitutionally prohibiting these punishments, the originalist jurisprudence likewise allows for the possibility of permitting them. Retaining the capacity to never allow a government to institute these punishments is surely one compelling reason to reject an originalist interpretation of the Clause.

Tellingly, an unbendingly originalist approach to the Clause appears too much for even ardent originalists. Scalia, for example, confessed a certain amount of faint-heartedness here, admitting that even he would have found punishments like public lashing unconstitutional.[111] Perhaps the extremity of such an approach to the Clause helps to explain why the Court has never committed to a purely originalist approach in its Cruel and Unusual jurisprudence.[112] Seemingly few (originalists included) would argue that the framing generation was simply *wrong*

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108. *Id.* at 119.

109. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1742 (2008); *see also* Farrell, *supra* note 9, at 579 ("[A]t the time the Eighth Amendment was ratified, public lashings and branding the hands of thieves were considered appropriate.").

110. For example, it is unlikely that flogging would become widespread should the Court fully abandon nonoriginalism.

111. *See* Scalia, *supra* note 48, at 861 ("Even if it could be demonstrated unequivocally that [public lashings or branding of the right hand] were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge."); *see also id.* ("In [originalism's] undiluted form, at least, it is medicine that seems too strong to swallow."). Some commentators have expressed doubts about Scalia's true commitment to his originalist methodology, so the originalist might complain that Scalia is not a fair example to use for this point. *See, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13–14 (2006). However, insofar as Scalia suggests—rightly, I assume—that *no* originalist judge would uphold these punishments as permissible under the Clause, the complaint would not get the originalist very far.

112. *See supra* Part II.

that these punishments were acceptable because "[t]hey didn't fully understand what levels and kinds of punishment were appropriate, and what constituted unjustified cruelty."[113] Yet, insofar as many originalists employ consequentialist arguments to justify their methodology,[114] the thoroughgoing originalist is committed to the position that the gains of originalism outweigh the costs of rendering such barbarous punishments acceptable under our Constitution. I doubt that they do.

To be fair to thoroughgoing originalists, they do not necessarily dispute the *moral* wrongness of these punishments. However, their methodology does entail that these punishments must be—in absence of legislation to the contrary—constitutionally permissible.

To be fairer still, at least some originalists have disputed that a commitment to originalism would actually require permitting such punishments. On this view, originalism does not require accepting as legitimate all practices contemporaneous to a text's enactment. For example, some originalists propose that fidelity to the original meaning of the Clause does not entail fidelity to punishments contemporaneous to the Clause's enactment. Simply because the general public practiced punishments like ear-cropping contemporaneously to ratification does not necessarily mean those practices are consistent with the Clause's meaning.[115] But that argument undermines the originalist's argument for the constitutionality of capital punishment, which is that the framing generation did not consider executions cruel and unusual. Originalists thus threaten their own position regarding the death penalty in rejecting the same argument structure for (e.g.) ear-cropping.[116]

To that point, there are indeed compelling reasons to constitutionally prohibit capital punishment altogether that originalism (unless it gives in to the above pitfall) cannot accept, thus providing another normative point against an originalist Cruel and Unusual jurisprudence. The problems with the death penalty—particularly with its administration—are well-documented and oft-cited by death penalty abolitionists whenever the propriety of capital punishment arises. Justice Breyer's dissenting opinion in *Glossip* provides perhaps the most commonly cited problems: "(1) serious unreliability, (2) arbitrariness in application, and

113. *See* Farrell, *supra* note 9, at 579.

114. *See supra* note 54 and accompanying text.

115. *See, e.g.*, Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 570, 573 (1998).

116. *See id.* at 573–74. Additionally, Greenberg and Litman point out that prominent originalists, like Scalia, reject their distinction between fidelity to original meaning and original practices, further weakening this argument's ability to fight back against the critiques launched in this Part (given its lack of general acceptance among originalists). *See id.* This originalist argument also smacks of the higher levels of abstraction used in enlightened originalism, which (as covered above) is functionally closer to living constitutionalism than this paper's targeted originalist genres. *See supra* notes 61–63 and accompanying text.

(3) unconscionably long delays."[117] Under a nonoriginalist jurisprudence, these problems can be avoided via constitutional abolition.[118] An originalist jurisprudence, on the other hand, cannot coherently factor these issues into its view on the constitutionality of capital punishment.[119]

Admittedly, these are not particularly inventive reasons to reject an originalist reading of the Clause; originalists frequently combat the critique that originalism "leads to bad results."[120] But, given the explicitly consequentialist arguments in favor of originalism, these competing consequentialist arguments against it require surmounting if originalism is to offer an acceptable approach to the Clause. If the advantages of originalism—providing allegedly optimal promotion of democratic values, leading to a consistent jurisprudence, and so on—do not outweigh the cost of inflicting monstrous punishments on prisoners, then these consequentialist justifications for originalism fail. Given the strong chance of an originalist jurisprudence permitting, say, executing intellectually disabled defendants,[121] originalism's potential to allow the infliction of *monstrous* punishments is quite real. In light of both (what seems to me) the large cost of indulging such monstrosities and the fact that originalists themselves seem unable to consistently adhere to the demands of their methodology under the Clause—something that undermines at least one of originalism's major justifications, that it promotes a consistent jurisprudence—the balance does not appear in the originalist's favor.

Indeed, the faintheartedness that originalists have shown in interpreting and applying the Clause subject their interpretive methodology—at least in this context—to many of the same objections from which originalists claim nonoriginalism suffers. For one, far from providing predictably consistent and purportedly objective results, it now appears that originalist applications of the Clause are just as ad hoc as nonoriginalism's own applications.[122] Assuming that an originalist reading of the Clause would allow punishments like flogging, originalists like Scalia (and, if he is correct, all others) would be resorting to something extra-constitutional—most likely their subjectively determined value sets—in deciding to the contrary.

In doing so, these originalists would decide the issue in a decidedly nonoriginalist fashion, thereby inviting the same kind of incoherent, anti-democratic results

117. Glossip v. Gross, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting).

118. This is not to say that a nonoriginalist jurisprudence will necessarily require abolition, just that this option is at least a possibility under such a regime (in contrast to an originalist one).

119. *See Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring) (complaining that Breyer's dissent is "full of . . . gobbledy-gook" and that "not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible").

120. *See* GORSUCH, *supra* note 41, at 114.

121. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 337–54 (2002) (Scalia, J., dissenting) (rejecting, in light of the Clause's original meaning, that executing intellectually disabled defendants violates the Clause).

122. *See* Scalia, *supra* note 48, at 863.

into their legal thought as they claim follow from nonoriginalist methodologies.[123] And, by deviating from what even they recognize as the demands of their interpretive methodology, originalists concede that—at least sometimes—values outside of the original meaning of the Constitution's text are co-equal with (perhaps even superior to) original meaning.[124]

CONCLUSION

The entirety of the modern Court's Cruel and Unusual jurisprudence is incompatible with a truly originalist application of the Eighth Amendment, and the majority of that jurisprudence is directly opposed to it. Insofar as originalists like Justice Gorsuch advocate for an originalist approach to the Clause, they advocate for a position against the great weight of precedent and to which originalists themselves, given the faint-heartedness they show to the logical consequences of a truly originalist cruel-and-unusual analysis, cannot genuinely commit. Further, because of the undesirableness of those logical consequences—namely, the loss of constitutional protection against barbaric punishments—we should prefer that the Court continue down its nonoriginalist path.

123. *See, e.g.*, *Glossip*, 135 S. Ct. at 2749–50 (Scalia, J., concurring); GORSUCH, *supra* note 41, at 110–11; Scalia, *supra* note 48, at 862–63.

124. *See* Berman, *supra* note 37, at 36.