Florida State University Law Review

Volume 51 | Issue 2 Article 1

2024

The Death of the Evolving Standards of Decency

Meghan J. Ryan
Southern Methodist University Dedman School of Law

THE DEATH OF THE EVOLVING STANDARDS OF DECENCY

MEGHAN J. RYAN*

ABSTRACT

The Eighth Amendment Punishments Clause is in jeopardy. The constitutionality of punishments is usually judged according to the "evolving standards of decency that mark the progress of a maturing society." And in evaluating these standards, the Court has traditionally looked to changing societal views on punishment. This is a living constitution approach to interpretation, and the Eighth Amendment is the only area of law in which the Court has consistently and explicitly applied such an approach. But a living constitution approach is diametrically opposed to the current Court's focus on originalism. This is the first originalist Court in history, and the Court has not been shy about wielding its originalist wand. Further, the current Court is quite willing to set aside decades worth of entrenched precedent, as it did in Dobbs*—its recent abortion decision. The Court's originalist approach, paired with its disrespect for precedent, puts the Eighth Amendment living constitution approach examining the evolving standards of decency on very shaky ground. Even though the Court has long adhered to this test, a willingness to set aside precedent and put an originalist approach in its place seems to be in the works. Such a turn toward originalism would push us back to the barbaric punishments available at the time of the Founding and reverse current Eighth Amendment bans that prevent states from executing juveniles and intellectually disabled people. Such a death of the evolving standards of decency would also render the Eighth Amendment a dead letter.*

* Co-Director, Tsai Center for Law, Science and Innovation; Gerald Ford Research Fellow, Altshuler Distinguished Teaching Professor, and Professor of Law, SMU Dedman School of Law. Orcid: 0000-0002-2200-6281. I thank Daniel Harawa, Corinna Lain, Eric Berger, Will Berry, Kathryn Miller, Rachel Lopez, Alex Klein, Cara Drina, Katie Kronick, Jenia Turner, Orin Kerr, John Stinneford, and Don Dripps for their comments and discussion on this Article. I also thank Jacob Fishman for his research assistance, the *Florida State University Law Review* for its excellent editorial support, and the Glenn Portman Faculty Research Fund for financial support.

INTRODUCTION

The Eighth Amendment landscape is going up in smoke. While Court-watchers focus on other important issues—such as abortion and gun rights—the U.S. Supreme Court is setting the stage to eradicate more than fifty years of case law protecting criminal defendants from brutal and excessive punishments. The Eighth Amendment "evolving standards of decency" (ESD) test,[1] to which the Court has long been faithful, is based on a living constitution approach, rather than an originalist one,[2] and is thus on the chopping block for this new originalist Court.

As with other provisions of the Constitution, the Cruel and Unusual Punishments Clause of the Eighth Amendment is quite vague and ripe for interpretation.[3] The debates surrounding the drafting and ratification of the Amendment provide scant evidence on the meaning and scope of the Clause, although supporters of the Amendment indicated that it would certainly bar torturous punishments.[4] A deeper dive into the roots of the Amendment dredges up questions about whether the Amendment's progenitors were meant to bar excessive punishments or merely particular modes of punishments, but the drafters and ratifiers of the Constitution seem to have focused primarily on barbarous methods of punishment.[5] The early Court was inconsistent in how it

1. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

2. *See infra* Section I.C.

3. *See* U.S. CONST. amend. VIII (providing that "cruel and unusual punishments [shall not be] inflicted").

4. *See* 1 ANNALS OF CONG. 754 (1789) (Joseph Gales ed., 1834) (reporting comments from the debates on the Amendment); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111, 468 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter DEBATES] (reporting comments on debates surrounding ratification of the Amendment); *infra* Section I.A.

5. *See* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 202 (1955); Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1065 (2004); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 840-42 (1969); Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 673-74 (2004); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only*

interpreted the prohibition on cruel and unusual punishments, but it tended to look closely at the language of the Punishments Clause and fluctuated on whether a punishment must be both cruel and unusual to be prohibited.[6] The Court was consistent, though, in determining that the Eighth Amendment certainly prohibits torture.[7]

It was not until 1958 that the Court, in *Trop v. Dulles*,[8] adopted a decisive approach to the Eighth Amendment. There, the Court explained that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[9] In determining what the existing standards of decency are, the Court has traditionally applied a two-step approach. First, it has looked to jurisdictions' legislation and judges' and jurors' actual sentencing decisions to find a consensus on particular punishment practices.[10] It has then consulted its own independent judgment, focusing primarily on the traditional purposes of punishment, to determine whether the punishment practice is acceptable.[11] Since *Trop*, the Court has consistently applied this ESD test in Eighth Amendment Punishments Clause cases.[12]

The ESD approach, which surveys changes in societal values, amounts to a living constitution approach to constitutional interpretation.[13] In most areas of law, the Court has applied a patchwork of interpretive approaches, but only where the Eighth Amendment is concerned has the Court remained faithful to the idea of a living Constitution.[14] In fact, the Court has gone even further, suggesting that the Amendment evolves in only one direction—toward more humane punishments—making it a "one-way ratchet."[15]

Punishments That Are Both Cruel and *Unusual?*, 87 WASH. U. L. REV. 567, 579 n.66 (2010) (noting scholars' view that the prohibition on cruel and unusual punishments barred excessive punishments).

6. *See infra* Section I.A.

7. *See infra* Section I.A.

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

9. *Id.* at 101 (plurality opinion).

10. *See* Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 85-88 (2010) (setting forth the ESD test); Ryan, *supra* note 5, at 586-91 (same).

11. *See* Ryan, *supra* note 10, at 87-88 ("Finally, the Court most often draws on its own independent judgment to determine whether the objective indicia of contemporary values conform with its own views.").

12. *See infra* Section I.B.

13. *See infra* Section I.C.

14. *See infra* Section I.C.

15. *See* Meghan J. Ryan, *Framing Individualized Sentencing for Politics and the Constitution*, 58 AM. CRIM. L. REV. 1747, 1763 (2021) ("The Eighth Amendment is generally considered a 'one-way ratchet,' meaning that once a punishment reaches the status of unconstitutionality under the Eighth Amendment, there is no going back on that determination." (footnote omitted)).

In recent cases, the Court has strayed from its traditional ESD approach, though.[16] In its 2005 case of *Baze v. Rees*,[17] the Justices—in splintered opinions—abandoned the two-step ESD test and instead adopted an approach focused on the risk of pain involved in a punishment practice and the availability of possible alternatives.[18] Although the Court briefly returned to the ESD and the traditional two-step analysis in a couple of cases, it then once again departed from this approach in its 2015 case of *Glossip v. Gross*.[19] There, the Court not only adhered to the *Baze* Court's new approach, but it also more clearly rejected the ESD by suggesting that the death penalty could not become unconstitutional with changing societal views.[20] It further stated that, regardless of the array of execution techniques available, at least one must be considered constitutional.[21] This means that, if only torturous means are available to carry out capital punishment, then a torturous technique must be constitutional. Since *Glossip*, the Court has referenced the ESD only one time,[22] and, in its 2019 case of *Bucklew v. Precythe*,[23] the Court took a final turn to originalism, concluding that the inmate's argument that the punishment was unconstitutional was doomed to fail because "[i]t [was] inconsistent with the original and historical understanding of the Eighth Amendment."[24] After these cases, the viability of the ESD is in question.

Even outside the Eighth Amendment, originalism has been surging in the Court. Although the Court has historically applied a patchwork of constitutional approaches, as the Court has become more conservative, it has converged on the methodology of originalism.[25] Indeed, the

16. *See infra* Part II.

17. 553 U.S. 35 (2008).

18. *See id.* at 50-52 (plurality opinion) (explaining that "to prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment' " and noting that any "proffered alternatives must effectively address a 'substantial risk of serious harm' " and "must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain" (citations omitted)); *id.* at 67 (Alito, J., concurring) ("In order to show that a modification of a lethal injection protocol is required by the Eighth Amendment, a prisoner must demonstrate that the modification would '*significantly* reduce a *substantial* risk of *severe* pain.' " (citation omitted)); *id.* at 107-08 (Breyer, J., concurring in the judgment) ("I agree that the relevant factors—the 'degree of risk,' the 'magnitude of pain,' and the 'availability of alternatives'—are interrelated and each must be considered."); *id.* at 114 (Ginsburg, J., dissenting) ("I would vacate and remand with instructions to consider whether Kentucky's omission of . . . safeguards poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain.").

19. 576 U.S. 863 (2015).

20. *See id.* at 869 ("[I]t is settled that capital punishment is constitutional . . . .").

21. *See id.* (suggesting that, "because it is settled that capital punishment is constitutional, it necessarily follows that there must be a constitutional means of carrying it out" (internal quotations and alterations omitted)).

22. *See infra* Section II.C.

23. 139 S. Ct. 1112 (2019).

24. *Id.* at 1126.

25. *See infra* Section III.A.

most recent Supreme Court term was the most originalist in history, with the Court deciding prominent cases, such as *Dobbs v. Jackson Women's Health Organization*[26] and *New York State Rifle & Pistol Ass'n v. Bruen*,[27] on originalist grounds. For the first time ever, a majority of the Justices are originalists, and their decisions clearly reflect this. Even the liberal Justices on the Court have recognized that they are playing in an originalists' sandbox and have adapted to speak the same language.[28]

Not only is this Court an originalist one, but it also has shown a willingness to overturn entrenched precedent.[29] The *Dobbs* case, in particular, demonstrates how the Court is willing to overturn years of deeply rooted precedent that does not match the originalists' views of what the law should be.[30] This disrespect for precedent could result in the Court disregarding large swaths of Eighth Amendment jurisprudence.

The Court's dramatic turn toward originalism and its ready willingness to disregard entrenched precedent leave the Eighth Amendment's ESD in question. While the Court's movement away from the ESD in *Baze*, *Glossip*, and *Bucklew* may have at first seemed like an adaptation for only cases focused on punishment technique, it now seems that the Court may have instead begun the process of disregarding the ESD approach entirely. Pushing aside the ESD would leave the Court with a clear path to embrace originalism in this area that has long been based on living constitutionalism. It could spell a return to primitive punishments and would likely leave the Eighth Amendment a mere shell of what it has become.[31] Rulings such that it is unconstitutional to execute intellectually disabled[32] or "insane"[33] people would be cast aside, and extreme punishments such as the sentence of life in prison without the possibility of parole for minor offenses such as a

---

26. 597 U.S. 215 (2022).

27. 597 U.S. 1 (2022).

28. *See infra* Section III.A.

29. *See infra* Section III.B.

30. *See infra* Section III.A.

31. *See infra* Part IV. As this Article was undergoing the editing process, advocates seized the moment and began arguing that, indeed, the Court's ESD approach should be abandoned in favor of a more historical approach. *See, e.g.*, Brief of Idaho, Montana and 18 Other States as Amici Curiae in Support of Petitioner at 29, City of Grants Pass v. Johnson, 144 S. Ct. 679 (2023) (No. 23-175) ("It is long overdue for the Court to remove the evolving standards of decency test from its Eighth Amendment jurisprudence.").

32. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that . . . the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

33. *See Ford*, 477 U.S. at 417 ("Today we have explicitly recognized in our law a principle that has long resided there. It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.").

parking ticket[34] could be back on the table. Ultimately, narrowing the Amendment in this way would return the vast majority of punishment questions to the states, leaving the Eighth Amendment as a dead letter.

This Article explores how the Supreme Court's turn toward originalism and its ready disregard of precedent could dramatically shape Eighth Amendment jurisprudence. Part I details the history of the Eighth Amendment and early case law interpreting the Punishments Clause. It also lays out the Court's ESD test in Eighth Amendment cases and explains that this is the one area in which the Court has, at least traditionally, clearly adopted a living constitution approach to interpretation. Part II shows how the Court's recent decisions in *Baze*, *Glossip*, and *Bucklew* exhibit a departure from the Court's traditional ESD approach and instead take a turn toward originalism. Part III explains that the Court's turn toward originalism is even broader, as showcased in cases such as *Dobbs* and *Bruen*. Moreover, the current Court has shown a willingness to set aside precedent. These two developments at the Court put the ESD on very shaky ground. Part IV describes how the Court's turn away from the ESD and toward originalism might shape the Eighth Amendment, pushing us back into a time of more barbaric punishments. Embracing an originalist approach as the Justices seem to envision would significantly narrow the Amendment and generally leave no check on the states' punishments determinations. This would leave the Punishments Clause a dead letter.

I. THE EIGHTH AMENDMENT AND ITS JURISPRUDENCE

The Eighth Amendment is vague and has a sparse history, which led the early Court to vacillate in its interpretations of the prohibition on cruel and unusual punishments. But, in the 1950s, the Court settled on an evolving approach to the Amendment and has, for more than fifty years, consistently adhered to this approach, which recognizes the living, breathing nature of the prohibition.

A. The Roots of the Eighth Amendment

The Eighth Amendment provides that "cruel and unusual punishments [shall not be] inflicted."[35] Unlike some other constitutional pro

34. *See* Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980) ("This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent if a legislature made overtime parking a felony punishable by life imprisonment." (citation omitted)).

35. U.S. CONST. amend. VIII.

visions—such as Article II's requirement that presidents must be at least thirty-five years old[36]—the Eighth Amendment's language is quite vague and open to interpretation.

The drafting history of the Amendment sheds little light on its meaning.[37] The Amendment was adopted with minimal debate in 1789,[38] and just two congressmen commented on its adoption.[39] Representative Samuel Livermore of New Hampshire questioned whether punishments such as hanging, whipping, and cutting off an offender's ears would be prohibited under the Amendment because of these practices' cruelty.[40] And Representative William Smith of South Carolina criticized the "indefinite[ness]" of the language used in the Amendment.[41] Comments made during state ratifying conventions provide little additional insight. Patrick Henry of Virginia referred to the "interdiction of cruel punishments" as a "sacred right" because our ancestors "would not admit of tortures, or cruel and barbarous punishment[s]."[42] George Mason of Virginia explained that the Amendment most certainly prohibited torture.[43] Abraham Holmes of Massachusetts opined that racks and gibbets should be prohibited under the Amendment,[44] and Virginia's Governor Randolph opposed ratifying the Amendment because legislative majorities and independent judges would be "enough to prevent such oppressive practices," and only corruption could lead to unduly cruel punishments.[45]

Information surrounding the Amendment's drafting and ratification provides only scant guidance in determining whether certain punishments are indeed unconstitutional, but some commentators have suggested that looking at events leading up to the drafting provides further instruction. The text of the Eighth Amendment was ripped from the 1776 Virginia Declaration of Rights,[46] and that language was imported from Article 10 of the English Bill of Rights.[47] There is

---

36. *See* U.S. CONST. art. II, § 1 ("No Person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years . . . .").

37. For a more detailed history of the Eighth Amendment's adoption, see Ryan, *supra* note 5, at 573-80.

38. *See* 1 ANNALS OF CONG. 754 (1789) (Joseph Gales ed., 1834); Ryan, *supra* note 5, at 573.

39. *See* 1 ANNALS OF CONG. 754 (1789) (Joseph Gales ed., 1834); Ryan, *supra* note 5, at 573.

40. *See* 1 ANNALS OF CONG. 754 (1789) (Joseph Gales ed., 1834); Ryan, *supra* note 5, at 573.

41. 1 ANNALS OF CONG. 754 (1789) (Joseph Gales ed., 1834).

42. 3 DEBATES, *supra* note 4, at 447, 462.

43. *See id.* at 452.

44. *See* 2 DEBATES, *supra* note 4, at 109-11.

45. 3 DEBATES, *supra* note 4, at 468.

46. *See* RUTLAND, *supra* note 5, at 202; Granucci, *supra* note 5, at 840.

47. *See* Chemerinsky, *supra* note 5, at 1064-65; Granucci, *supra* note 5, at 840; Rumann, *supra* note 5, at 673-74.

disagreement about what Article 10 was intended to prohibit, but most commentators conclude that it was either to prevent a recurrence of the cruel methods used during the Bloody Assize of 1685 or, perhaps more likely, to prevent the severe and illegal punishments employed in the wake of the Popish Plot of 1678 and 1679.[48] The Bloody Assize refers to the treason trials that followed when King James II defeated his nephew, the Duke of Monmouth, at the Battle of Sedgemoor after Monmouth's advance and proclamation that he was King.[49] When captured and convicted, the rebels were hanged, cut down while still alive, disemboweled (and their bowels burnt before them), beheaded, and then finally quartered.[50] Puritan pamphleteers made these egregious methods of punishment well known around the same time the parallel provision of the English Bill of Rights was drafted, perhaps suggesting that these events animated Article 10.[51] Another series of happenings accepted as shedding light on Article 10's meaning relate to the Popish Plot. This refers to the events surrounding Titus Oates's false proclamation under oath that there was a plan to assassinate King Charles II, which resulted in fifteen innocent persons being wrongly convicted and executed.[52] Once the truth came to light, Oates was sentenced to life imprisonment, whippings, quarterly pillorying, defrocking, and a 2,000-mark fine.[53] Although the House of Lords rejected Oates's petition for release of judgment, fourteen Lords dissented, characterizing the sentence as "barbarous, inhuman, and unchristian," and arguing that there was "no precedent[] to warrant the punishments of whipping and committing to prison for life, for the crime of perjury."[54] The dissenters also explained that these judgments not only were "contrary to law and ancient practice," but they were also contrary to Article 10 of the English Bill of Rights.[55] Based on this, most experts believe that Article 10's prohibition of cruel and unusual punishments actually

48. *See* Ryan, *supra* note 5, at 575-76. Professor Donald Dripps reaches back even further, linking the Article to the Star Chamber's practices before its abolition in 1641. *See generally* Donald A. Dripps, *The "Cruel and Unusual" Legacy of the Star Chamber*, 1 J. AM. CONST. HIST. 139, 143 (2023) (arguing that the Article, as well as the Punishments Clause, "incorporates an *anti-discretion* norm that traces back to the 1689 Bill of Rights and its prohibition of Star Chamber lawlessness").

49. *See* Granucci, *supra* note 5, at 853.

50. *See id.* at 854.

51. *See id.*

52. *See The Second Trial of Titus Oates, D.D. at the King's Bench, for Perjury: 1 James II. A.D. 1685, reprinted in* 10 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1227, 1316-17, 1320 (1811) [hereinafter *The Trial of Titus Oates*]; Granucci, *supra* note 5, at 857.

53. *The Trial of Titus Oates*, *supra* note 52, at 1316-17; Granucci, *supra* note 5, at 858.

54. *The Trial of Titus Oates*, *supra* note 52, at 1325; Granucci, *supra* note 5, at 858.

55. *See The Trial of Titus Oates*, *supra* note 52, at 1325; Granucci, *supra* note 5, at 858. The House of Commons later concurred with the dissenters. *See* Granucci, *supra* note 5, at 858.

prohibited cruel and *illegal* punishments. This is thought to include torturous punishments, as well as those deemed excessive in light of common practice.[56]

Despite this dive into English history, most commentators believe that the drafters of the Virginia Bill of Rights—from which the Eighth Amendment derived—misunderstood this English history and instead understood the prohibition on cruel and unusual punishments to ban barbarous methods of punishments.[57] The commentators apparently reached this conclusion from the scant drafting and ratification history surrounding the Eighth Amendment, as well as from writings at the time condemning torturous punishment methods.[58]

The Court has wavered as to how to interpret the Eighth Amendment prohibition. Its earliest cases seem to hew closely to the text of the Amendment by independently analyzing whether a punishment was cruel and whether it was unusual.[59] In its 1866 case of *Pervear v. Massachusetts*,[60] for example, the Court indicated that the punishment of a fifty-dollar fine and three months' imprisonment at hard labor for the Massachusetts crime of illegally maintaining and selling intoxicating liquors did not violate the Eighth Amendment because the punishment was not unusual.[61] The Court has been inconsistent, though, in concluding whether both characteristics must be present before a punishment is deemed unconstitutional.[62] In contrast to the Court's suggestion in *Pervear* that a punishment must be both cruel and unusual to be prohibited, in the 1878 case of *Wilkerson v. Utah*,[63] the Court indicated that a punishment need not be both cruel and unusual to fall under the prohibition.[64] There, where the Court was confronting the constitutionality of shooting as a method of execution, it stated that "it is safe to affirm that punishments of torture . . . are forbidden by that

56. *See* Ryan, *supra* note 5, at 579 n.66 (explaining that most scholars view the prohibition as prohibiting excessive punishments).

57. *See id.* at 579.

58. *See id.* at 579-80; *supra* text accompanying notes 37-45 (relating the drafting and ratification history).

59. *See* Ryan, *supra* note 5, at 580.

60. 72 U.S. 475 (1866).

61. *See id.* at 479-80; Ryan, *supra* note 5, at 581; *see also In re* Kemmler, 136 U.S. 436, 447 (1890) (suggesting that unusualness of a punishment is not enough to run afoul of the Eighth Amendment prohibition). Note, however, that this constituted dictum, as the Court had not yet incorporated the Eighth Amendment into the Fourteenth Amendment's Due Process Clause at this point in time. *See* Ryan, *supra* note 5, at 581 & n.78 ("It was not until the year 1962 that the Court held, although only implicitly, that the Fourteenth Amendment incorporated the Eighth Amendment, thus making the Eighth Amendment enforceable against the states.").

62. *See* Ryan, *supra* note 5, at 580-83.

63. 99 U.S. 130 (1878).

64. *See* Ryan, *supra* note 5, at 582 (explaining that the *Wilkerson* Court "seemed to adopt the position that a punishment need not be both cruel and unusual to be prohibited").

emendment [sic] to the Constitution."[65] The Court determined that shooting as a method of execution does not fall within that category but indicated that, if it did, it would be unconstitutional even if it were common.[66] In making an attempt to define torture, the Court stated that it involved instances in which "terror, pain, or disgrace were . . . superadded" for particularly atrocious crimes.[67] The Court referenced a number of examples pointed out by Blackstone's *Commentaries*, including "where the prisoner was drawn or dragged to the place of execution, in treason; . . . where he was embowelled alive, beheaded, and quartered, in high treason[;] . . . public dissection in murder[;] and burning alive in treason committed by a female."[68] The Court in *In re Kemmler* chimed in twelve years later, suggesting that "[p]unishments . . . [that] involve torture or a lingering death" are unconstitutional and indicating that such punishments involve "something inhuman and barbarous."[69] Indeed, one constant thread in these early cases is that the Amendment certainly prohibits torture.

Aside from this early agreement that torturous punishments are unconstitutional, the Court consistently acknowledged the difficulty in determining what exactly the vague language of the Amendment prohibits.[70] The *Wilkerson* Court said that "[d]ifficulty would attend the effort to define with exactness the extent of the [Eighth Amendment Punishments Clause]," and the Court repeated this language in *In re Kemmler*.[71]

The Court added another dimension to these early Eighth Amendment discussions in its 1910 case of *Weems v. United States*.[72] There, the Court examined the constitutionality of fifteen years of "cadena"—essentially imprisonment at hard and painful labor—for the offense of falsifying a public and official document.[73] The *Weems* Court explained once again that "[w]hat constitutes a cruel and unusual punishment

65. *Wilkerson*, 99 U.S. at 136.

66. *See id.* at 135-37 ("Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual, within the meaning of the eighth amendment to the Constitution, which is not pretended by the counsel of the prisoner.").

67. *Id.* at 135.

68. *Id.*

69. *In re* Kemmler, 136 U.S. 436, 447 (1890). The Court further suggested that "the mere extinguishment of life" was not enough to run afoul of the Amendment. *Id.*

70. *See Wilkerson*, 99 U.S. at 135-36 ("Difficulty would attend the effort to define with exactness the extent of the [Eighth Amendment Punishments Clause] . . . .").

71. *In re Kemmler*, 136 U.S. at 447 (quoting *Wilkerson*, 99 U.S. at 135-36).

72. 217 U.S. 349 (1910).

73. *See id.* at 357-58, 366 ("He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain."). The petitioner was also sentenced to pay a fine. *See id.* at 358.

has not been exactly decided."[74] In finding the punishment at issue unconstitutional, though, the Court emphasized that the Clause must be interpreted in an evolving manner.[75] It explained:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[76]

This idea that the meaning of a constitutional provision might change with time foreshadowed what was to come in Eighth Amendment jurisprudence, but it was not until nearly fifty years later that the Court consistently relied on such a view.[77] Instead, this discussion in *Weems* seemed to fall into one of the many approaches the Court took in attempting to discern the elusive meaning of the Eighth Amendment.

The early Court's inconsistency in Eighth Amendment approaches was perhaps in part a product of the limited number of cases the Court decided on the topic. The amount of time the Court would spend analyzing the Eighth Amendment expanded, though, when the Court indicated in *Louisiana ex rel. Francis v. Resweber*[78] that the Punishments Clause was incorporated into the Fourteenth Amendment Due Process Clause such that it now also applied to state actors.[79] In this case coming out of Louisiana, the *Resweber* Court reacted to the unusual event where a state-sanctioned electrocution did not actually kill the petitioner; thus, the state was moving forward with a second

74. *Id.* at 368.

75. *Id.* at 373.

76. *Id.*

77. *See infra* Section I.B (describing the ESD test).

78. 329 U.S. 459 (1947).

79. *See id.* at 463 (plurality opinion) ("Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner."). Although the Court indicated in *Resweber* that the Eighth Amendment is incorporated, it did not actually base an Eighth Amendment decision on incorporation until it decided *Robinson v. California* in 1962. *See* Robinson v. California, 370 U.S. 660, 667 (1962) ("We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.").

execution date.[80] In response to the petitioner's Eighth Amendment claim, the Court explained that "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."[81] It then suggested that, because "[t]here [was] no purpose to inflict unnecessary pain," such an accident does not translate into the second execution being unconstitutionally cruel.[82]

B. The Evolving Standards of Decency Test

The Court struggled for nearly a century to find a consistent approach to its Eighth Amendment jurisprudence. The year 1958 marked a turning point, though, when the Court settled on an approach in *Trop v. Dulles*.[83] In that case, a U.S. army private was sentenced "to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge" for his crime of desertion during wartime.[84] But when he applied for a passport several years later, he learned that "he had [also] lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion."[85] The petitioner challenged this denationalization as a violation of the Eighth Amendment.[86] In examining the issue, a plurality of the Court acknowledged the disarray in Eighth Amendment jurisprudence up to that point.[87] Then, after summarizing the English and early U.S. history surrounding the Amendment's drafting, the plurality concluded that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[88] Pointing to precedent, the Court explained that "the words of the Amendment are not precise,"[89] and, importantly, "their scope is not static."[90] Instead, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[91] After setting this foundation, the Court concluded that the punishment of denationalization was indeed

80. *See Resweber*, 329 U.S. at 460-61.

81. *Id.* at 464.

82. *Id.*

83. 356 U.S. 86 (1958).

84. *See id.* at 87-88 (plurality opinion).

85. *See id.* at 88.

86. *See id.*

87. *See id.* at 99 ("The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court.").

88. *Id.* at 100.

89. *Id.*

90. *See id.* at 100-01.

91. *Id.* at 101.

unconstitutional.[92] The plurality explained that it is "more primitive than torture," as the individual "has lost the right to have rights."[93] And, from a comparative perspective, it is unusual, as "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."[94]

Since *Trop* was decided, the Court has repeatedly explained that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[95] For example, in the famous 1972 case of *Furman v. Georgia*,[96] where the Court confronted the constitutionality of the death penalty as it had been implemented up until that point in time, each of the Justices agreed with the idea that the meaning of the Amendment changes over time. Even though the Court was terribly fractured in the case such that there was only a one-paragraph opinion stating the Court's holding, consensus existed on this point of evolving meaning. In his concurrence, Justice Douglas repeated the words of *Trop* and also noted that *Trop* was not the first Supreme Court decision describing the progressive nature of the Amendment.[97] He pointed to the *Weems* opinion, where the Court explained that the Amendment's meaning should not be fixed in time.[98] Justice Brennan's concurrence also quoted the "evolving standards of decency" language from *Trop*.[99] Justice Marshall's concurrence quoted the same language, and Justice Marshall emphasized that the evolving meaning of the prohibition is "[p]erhaps the most important principle in analyzing 'cruel and unusual' punishment questions."[100] Even Justice Burger's dissent acknowledged that the Eighth Amendment's application changes as society changes.[101] Justice Blackmun in dissent was of the same view, stating: "The Court has recognized, and I certainly subscribe to the proposition, that the Cruel and Unusual Punishments Clause 'may acquire meaning as public opinion becomes enlightened by a humane justice.' "[102] And Justice

92. *Id.* at 102-03 ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. . . . In this country the Eighth Amendment forbids that to be done.").

93. *Id.* at 101-02.

94. *Id.* at 102.

95. *Id.* at 101.

96. 408 U.S. 238 (1972) (per curiam).

97. *See id.* at 241-42 (Douglas, J., concurring).

98. *See id.* at 264 (Brennan, J., concurring) (quoting Weems v. United States, 217 U.S. 349, 373, 377-78 (1910)); *see also Weems*, 217 U.S. at 373 ("Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.").

99. *See Furman*, 408 U.S. at 269 (Brennan, J., concurring).

100. *Id.* at 329 (Marshall, J., concurring).

101. *See id.* at 382 (Burger, J., dissenting) ("The standard itself remains the same, but its applicability must change as the basic mores of society change.").

102. *Id.* at 409 (Blackmun, J., dissenting) (quoting *Weems*, 217 U.S. at 378).

Powell, in dissent, stated that it is a "long-accepted view that concepts embodied in the Eighth and Fourteenth Amendments evolve."[103] Justice Rehnquist agreed with Justice Burger's and Justice Powell's assessments.[104] Only Justice White was fairly silent on this issue, but his opinion suggested that he agreed with the view as well.[105]

The Court has relied on this ESD approach in case after case under the Eighth Amendment.[106] In attempting to assess the current standards in a particular case and thus determine whether a punishment is unconstitutionally cruel and unusual, the Court has taken a two-step approach. First, it examines whether a national consensus has formed against the punishment.[107] In scrutinizing this, the Court looks primarily to legislation—how many jurisdictions have adopted or rejected a particular practice—and actual sentencing—the frequency with which sentencers impose the punishment in individual cases.[108] After determining whether there is a national consensus against the practice, the Court turns to its own independent judgment to determine whether, in the Court's view, the practice comports with the existing standards of decency.[109] The Court's conclusions in each of these steps have never been inconsistent: If the Court finds a national consensus exists against a practice, then the Court's independent judgment

103. *Id.* at 434 (Powell, J., dissenting).

104. *See id.* at 409 (Blackmun, J., dissenting); *id.* at 434 (Powell, J., dissenting).

105. *See id.* at 312 (White, J., concurring) (seemingly acknowledging that the meaning of the Amendment changes over time in response to varying circumstances).

106. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 8 (1992) ("[T]he Eighth Amendment's prohibition of cruel and unusual punishments 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,' and so admits of few absolute limitations." (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)))); Ford v. Wainwright, 477 U.S. 399, 406 (1986) ("Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the 'evolving standards of decency that mark the progress of a maturing society.' " (quoting *Trop*, 356 U.S. at 101)).

107. *See* Ryan, *supra* note 5, at 586 ("In determining whether a practice comports with the 'evolving standards of decency,' the Court has looked to certain objective indicia of contemporary values."); Ryan, *supra* note 10, at 85-86 ("[T]he Court first examines certain objective indicia of contemporary values.").

108. *See* Graham v. Florida, 560 U.S. 48, 62 (2010) ("Actual sentencing practices are an important part of the Court's inquiry into consensus."); Ryan, *supra* note 5, at 586 ("The Court has stated that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.' " (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002))).

109. *See* Ryan, *supra* note 5, at 589 ("[T]he Court has to some extent drawn on its own independent judgment to determine whether the objective indicia of contemporary values are consistent with the Court's own views."); Ryan, *supra* note 10, at 87-88 ("[T]he Court most often draws on its own independent judgment to determine whether the objective indicia of contemporary values conform with its own views.").

confirms that assessment.[110] If the Court determines that there is no national consensus, then the Court's independent judgment confirms that assessment as well.[111]

Again, the Court has regularly invoked the ESD language, and, in some cases, the consequences of such an approach are significant. One such example involved the constitutionality of executing intellectually disabled individuals. In 1989, in *Penry v. Lynaugh*,[112] the Court assessed the existing standards of decency to determine whether the practice violated the Eighth Amendment.[113] The Court found that just two states had banned the practice and that this figure, "even when added to the 14 States that ha[d] rejected capital punishment completely, d[id] not provide sufficient evidence . . . of a national consensus."[114] Accordingly, the practice remained constitutional.[115] Thirteen years later, though, in *Atkins v. Virginia*,[116] the Court determined that the standards of decency had evolved such that executing intellectually disabled persons had become unconstitutional.[117] The Court explained that, since *Penry* had been decided, sixteen additional states, as well as the federal government, had banned the practice, another state had adopted a bill banning it, and similar bills had passed in at least one house in at least two other state legislatures.[118] Further, the Court's own independent judgment

110. *See* Ryan, *supra* note 5, at 591 ("Although the Court claims to consult its own judgment to determine whether it agrees with the conclusion it reaches by reviewing the objective indicia of contemporary values, the Court has never found its independent judgment to compel a conclusion different from that it reached based on the objective indicia.").

111. *See id.*

112. 492 U.S. 302 (1989), *superseded by* Atkins v. Virginia, 536 U.S. 304 (2002).

113. *See id.* at 333-40 (applying the two-step ESD test).

114. *Id.* at 334.

115. *See id.* at 334, 340 ("[M]ental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone."). A majority of the Justices determined that their independent judgment on the punishment did not require a different result. *See id.* at 340 (O'Connor, J.); *id.* at 351 (Scalia, J., concurring in part and dissenting in part) (asserting that the independent judgment analysis "has no place in [the Court's] Eighth Amendment jurisprudence").

116. 536 U.S. 304 (2002).

117. *See id.* at 321 (concluding that executing intellectually disabled persons violates the Eighth Amendment).

118. *See id.* at 314-15. The Court explained that "[i]t [was] not so much the number of these States that [was] significant, but the consistency of the direction of change." *Id.* at 315.

agreed with this emerging consensus among jurisdictions against the practice.[119] Accordingly, the Court determined, the practice had become uncommon and unconstitutional.[120]

A similar phenomenon happened with the practice of executing juveniles. In 1989, in *Stanford v. Kentucky*,[121] the Court held that the Eighth Amendment did not prohibit executing sixteen- and seventeen-year-old offenders.[122] It observed that twenty-two of thirty-seven death penalty states permitted executing sixteen-year-old offenders, and twenty-five of them permitted executing seventeen-year-old offenders.[123] Sixteen years later, though, in *Roper v. Simmons*,[124] the Court found that the standards of decency had evolved to now prohibit executing juvenile offenders.[125] The Court explained that thirty states now prohibited executing juvenile offenders, which included eighteen states explicitly prohibiting the practice and twelve states that rejected the death penalty altogether.[126] Additionally, the Court explained that, since the Court decided *Stanford*, only six states had actually executed juvenile offenders and, in the ten years preceding *Roper*, only three had done so.[127] Further, five of the states that had

119. *See id.* at 321 ("Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal." (internal quotations omitted)).

120. *See id.* ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude . . . that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

121. 492 U.S. 361 (1989), *superseded by* Roper v. Simmons, 543 U.S 551 (2005).

122. *See id.* at 380 ("We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.").

123. *See id.* at 370 ("Of the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders."). As with *Penry*, which the Court decided the very same day, the Justices were splintered on the role and outcome of an independent judgment analysis. *See supra* note 115. A majority of the Justices concluded either that their independent judgment confirmed that there was no consensus on the impermissibility of executing juveniles or that the Justices' independent judgment was irrelevant. *See id.* at 377 (Scalia, J.) ("We also reject petitioners' argument that we should invalidate capital punishment of 16- and 17-year-old offenders on the ground that it fails to serve the legitimate goals of penology."); *id.* at 382 (O'Connor, J., concurring in part and concurring in the judgment) (stating that the "Court does have a constitutional obligation to conduct proportionality analysis" but determining that such an analysis does not support a finding of unconstitutionality in the case).

124. 543 U.S 551 (2005).

125. *See id.* at 567-68 ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

126. *See id.* at 564 ("[I]n this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.").

127. *See id.* at 564-65 ("Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so . . . .").

authorized the juvenile death penalty at the time of *Stanford* had since abandoned it.[128] The Court then determined that its independent judgment confirmed this national consensus.[129] Finally, the Court explained that no other country in the world continued to sanction the practice.[130]

It is worth noting that, in these cases, the Court did not suggest that it had decided the earlier cases—*Penry* and *Stanford*—incorrectly.[131] In other contexts, the Court would say that it had overruled the previous case,[132] but in these cases it instead stated that the prior case was "no longer controlling."[133] Here, changing facts and views on the punishment between the time the earlier cases and later cases were decided required a new constitutional conclusion. These cases should make clear, then, that the Court has fully embraced the evolving nature of the Eighth Amendment.

The Court's adoption of this principle that the meaning of the Eighth Amendment evolves as time marches forward is not limited to just death penalty cases. Not only has the Court embraced this fundamental principle in death penalty cases such as *Furman*, but the Court has also relied on the ESD in non-death penalty and even prison-conditions cases. For example, in *Graham v. Florida*,[134] the Court turned to the ESD in holding that the sentence of life without the possibility of parole for non-homicide juvenile offenders is unconstitutional.[135] The Court cited *Trop* and explained that "[t]he standard itself remains the same, but its applicability must change as the basic mores of society change."[136] Although thirty-nine jurisdictions permitted the sentence

128. *See id.* at 565 ("Five States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years . . . .").

129. *See id.* at 570-72 (concluding that neither retribution nor deterrence justify the practice of executing juveniles).

130. *See id.* at 575 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.").

131. *See* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 875 & n.167 (2007).

132. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) ("We now overrule those decisions . . . .").

133. *Roper*, 543 U.S. at 574.

134. 560 U.S. 48 (2010).

135. *See id.* at 58. Prior to *Graham*, the Court did not regularly mention the ESD in its non-death penalty, term-of-years cases. It was well understood that the Court would apply different tests in the death penalty and term-of-years contexts. *See id.* at 59 ("The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences . . . . The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty."). But, in *Graham*, the Court suggested that the selection of the appropriate test should not be based on whether capital punishment was at issue but instead on the way in which the appellant framed the argument for the Court. *See id.* at 61-62.

136. *Id.* at 58 (quoting Kennedy v. Louisiana, 554 U.S. 407, 419 (2008)).

for juvenile nonhomicide offenders at least in some circumstances, the Court emphasized that "an examination of actual sentencing practices in jurisdictions where the sentence in question [was] permitted by statute disclose[d] a consensus against its use."[137] Further, the Court's own judgment confirmed the unconstitutionality of the punishment.[138] In *Farmer v. Brennan*,[139] a prison-conditions case, the Court indicated that allowing for the "gratuitous[] . . . beating or rape of one prisoner by another [not only] serve[d] no legitimate penological objectiv[e]," but it also failed to "square[] with [the ESD]."[140] And in *Estelle v. Gamble*,[141] another prison-conditions case, the Court explained that it has "held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.' "[142] Overall, then, the Court has consistently adhered to the evolving nature of the Eighth Amendment.

C. *Originalism v. A Living Constitution*

Unlike in other areas of constitutional law, the Court's ESD approach adopts the theory of a living Constitution. While there is an overwhelming number of approaches to constitutional interpretation and numerous variations on individual approaches,[143] commentators often focus on two dueling classes of interpretation: originalism and living constitutionalism.[144] Because of the various permutations on

137. *Id.* at 62. Only 109 juvenile offenders across the country were serving life-without-parole sentences for nonhomicide offenses. *See id.* at 62-63.

138. *See id.* at 74 (stating that the inadequacy of penological theory in justifying the punishment; "the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual").

139. 511 U.S. 825 (1994).

140. *Id.* at 833 (internal quotations omitted).

141. 429 U.S. 97 (1976).

142. *Id.* at 102 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

143. *See* James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 671 (2012) ("Indeed, Mitchell Berman has distinguished seventy-two varieties of originalism in his tour de force *Originalism Is Bunk*."); *see also* LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 41 (2019) ("At the same time that originalism has had tremendous success, it is also facing a possible fracturing. Originalists disagree on a lot."); Jack M. Balkin, *Why Are Americans Originalist?*, *in* LAW, SOCIETY AND COMMUNITY: SOCIAL-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL 309, 322 (Richard Nobles & David Schiff eds., 2014) (explaining that originalism "has split into a vast array of conflicting and inconsistent versions" and that "[t]here are multiple schools and flavours of originalism").

144. *See, e.g.*, Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 565 (2012) ("Simply put, most constitutional interpreters are considered either originalists or living constitutionalists (or nonoriginalists) in some form."); Miguel Schor, *Foreword: Contextualizing the Debate Between Originalism and the Living Constitution*, 59 DRAKE L. REV. 961, 962 (2011) ("The debate between originalism and the living constitution has spawned controversy and a considerable literature."); Lawrence B. Solum, Essay, *Originalism Versus*

even these two approaches, it is impossible to fully encapsulate them. But, generally, originalism is a method of constitutional interpretation that directs the interpreter to consult the history surrounding the drafting and ratification of the Constitution to better understand the meaning of particular constitutional provisions.[145] An early approach to originalism directed the interpreter to examine, for example, the debates surrounding the drafting of the Constitution and its amendments to search for what the drafters intended in writing the words at issue in the Constitution.[146] More recently, many originalists look instead to the Constitution's "original public meaning"—the meanings of the words as they were broadly understood at the time of ratification.[147] Many constitutional interpreters find this historical approach dissatisfying, though, and, in contrast to originalism's turn toward history, they believe that the meaning of the Constitution should not be

Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 NW. U. L. REV. 1243, 1244 (2019) ("This Essay explores the conceptual structure of the great debate about 'originalism' and 'living constitutionalism.' "); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (setting forth the dichotomy between originalism and nonoriginalism).

145. Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 12 (Grant Huscroft & Bradley W. Miller eds., 2011) ("First, almost all originalists agree that the linguistic meaning of each constitutional provision was fixed at the time that provision was adopted. Second, originalists agree that our constitutional practice both is (albeit imperfectly) and should be committed to the principle that the original meaning of the Constitution constrains judicial practice." (emphases omitted)). Some commentators argue that, where state action is at issue, originalists should consult the time that the Fourteenth Amendment was drafted and ratified rather than when the first ten amendments were drafted and ratified. *See, e.g.*, Jamal Greene, Essay, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 982 (2012) ("This Essay's premise—that originalists devote insufficient attention to the Fourteenth Amendment—will seem obvious to some, but it is sure to baffle others.").

146. *See* Solum, *supra* note 145, at 12 ("[T]he mainstream of originalist theory began with an emphasis on the original intentions of the framers . . . .").

147. *See id.* This shift in originalism from intent to public meaning is why, for example, we have seen a recent explosion in applying the discipline of corpus linguistics. *See* Matthew Jennejohn et al., *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767, 769 (2021) (stating that corpus linguistics—"[a] new method for the interpretation of legal texts, such as constitutions, statutes, and regulations[—]is spreading through the U.S. judiciary"); Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 278 (2021) ("In recent opinions, judges on various state supreme courts and federal courts of appeals have accepted the invitation to bring corpus linguistic analysis to bear in the interpretation of legal language.").

frozen in time.[148] Instead, they believe that the Constitution is a living, breathing document that must evolve as society evolves.[149] This is a living constitution approach to constitutional interpretation.

In many areas of constitutional law, the Court has historically applied a patchwork of approaches to constitutional interpretation problems.[150] For example, when the Court examined the proper procedures for grand jury proceedings in *United States v. Williams*,[151] it relied on a number of approaches. There, the Court engaged in textual, historical, doctrinal, *and* prudential analyses in concluding that exculpatory evidence need not be presented to the grand jury.[152] It described how the grand jury is "[r]ooted in long centuries of Anglo-American history,"[153] highlighted its "functional independence"[154] and "operational separateness from its constituting court,"[155] explained that "[i]mposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with th[e] system,"[156] and pointed out that the Court's precedent ran contrary to the

148. *See, e.g.*, James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1539 (2011) ("The Constitution, properly understood, is not frozen in time and inextricably linked to the concrete expectations of the framers or ratifiers."); Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of [Human]kind": The Value of A Comparative Perspective in Constitutional Adjudication*, 99 AM. SOC'Y INT'L L. PROC. 351, 355 (2005) ("U.S. jurists honor the framers' intent 'to create a more perfect Union,' I believe, if they read our Constitution as belonging to a global twenty-first century, not as fixed forever by eighteenth-century understandings.").

149. *See* Solum, *supra* note 144, at 1271 ("Living constitutionalism is united by the idea of constitutional change . . . ."). A significant criticism of this approach is that it involves no methodology and thus does not constrain judges in any meaningful way.

150. Further, individual Justices are often inconsistent in the interpretation methods they employ, and they regularly jump between different methods. Even the late Justice Scalia—the godfather of originalism—characterized himself as only a "faint-hearted originalist." Scalia, *supra* note 144, at 864 ("I hasten to confess that in a crunch I may prove a faint-hearted originalist."); *see* Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595, 595 (2007) ("Supporters and opponents of originalism alike credit [Justice Scalia] as the contemporary Godfather of the originalist movement."). *But see* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), https://nymag.com/news/features/antonin-scalia-2013-10/ [https://perma.cc/A8TR-46PT] (reporting that, in response to the interviewer's question to Justice Scalia about "how fainthearted" of an originalist he is, Justice Scalia stated: "I described myself as that a long time ago. I repudiate that").

151. 504 U.S. 36 (1992).

152. *See id.* at 37-38, 55 (affirming the Tenth Circuit's decision). The Court phrased the question as "whether a district court may dismiss an otherwise valid indictment because the Government failed to disclose to the grand jury 'substantial exculpatory evidence' in its possession." *Id.* at 37-38.

153. *Id.* at 47 (quoting Hannah v. Larche, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in the result)).

154. *Id.* at 48 ("The grand jury's functional independence from the Judicial branch is evident both in the scope of its power to investigate criminal wrongdoing and in the manner in which that power is exercised.").

155. *Id.* at 49-50 ("Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure.").

156. *Id.* at 52.

idea that a Court could require such exculpatory evidence be presented before a grand jury issued an indictment.[157] Such an approach is often called "constitutional pluralism" and falls under the living constitutionalism umbrella.[158]

Eighth Amendment jurisprudence is unique in that it quite explicitly adopts a living constitution approach.[159] Indeed, the Court's repeated references to the "evolving standards of decency that mark the progress of a maturing society"[160] point to a constitutional amendment that is a living, breathing, changing provision. Appropriately, then, the Court's methodology of consulting society's views on a punishment—through assessing its legislation and jury determinations—responds to these changing facts on the ground.[161] The Court's refusal to declare earlier cases such as *Penry* and *Stanford* as overruled, and assertions that these cases were instead a response to changing times that require a new understanding of the constitutional rule, cement this evolving view.[162] While other areas of jurisprudence may have adopted specific consistent tests, such as the "viability" and "undue

157. *See id.* at 54 ("We accepted Justice Nelson's description in *Costello v. United States*, where we held that '[i]t would run counter to the whole history of the grand jury institution' to permit an indictment to be challenged 'on the ground that there was inadequate or incompetent evidence before the grand jury.' " (alteration in original) (quoting 350 U.S. 359, 363-64 (1956))).

158. Solum, *supra* note 144, at 1271 ("*Constitutional Pluralism*: This is the view that law is a complex argumentative practice with plural forms of constitutional argument."). As with originalism, commentators have proposed and judges have applied a variety of living constitution methodologies. *See id.* at 1271-75. Among them are "[m]oral [r]eadings," "[c]ommon [l]aw [c]onstitutionalism," "[p]opular [c]onstitutionalism," and "[e]xtranational [c]onstitutionalism." *Id.* at 1271.

159. Ryan, *supra* note 10, at 123 ("In confronting Punishments Clause cases over the last two centuries, the Court has emphasized that the meaning of the Punishments Clause may change with time and thus embraced the notion of a 'living Constitution.' ").

160. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

161. The Court's references to the views of the *world* community are more controversial, *compare* Roper v. Simmons, 543 U.S. 551, 575 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."), *with id.* at 624 (Scalia, J., dissenting) ("More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."), as is the Court's suggestions that the opinions of religious and professional organizations might be relevant, *compare* Atkins v. Virginia, 536 U.S. 304, 316-17 n.21 (2002) (referencing the opinions of professional and religious organizations, the world community, and those reflected in polls), *with id.* at 322 (Rehnquist, J., dissenting) ("The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism . . . .").

162. *See supra* text accompanying notes 131-33.

burden" standards that endured for more than fifty years in the abortion context,[163] only in Eighth Amendment cases has the Court so clearly and consistently adopted a living constitution approach.[164]

By adopting the ESD methodology under the Eighth Amendment, the Court has actually gone further than adopting a living constitution approach; it has instead indicated that the standards of decency can evolve in only one direction—toward more humane punishments. This has in large part made the Eighth Amendment a "one-way-ratchet."[165] Because the Court looks at the unusualness of a practice by examining whether a national consensus has formed against it,[166] if the Court has deemed a punishment unconstitutional, jurisdictions cannot adopt the practice and therefore a national consensus cannot form in favor of the practice.[167] As one Justice[168] explained in oral arguments in *Atkins*:

> [L]ogically it has to be a one-way ratchet. Logically it has to be because a consensus cannot be manifested. States cannot constitutionally pass any laws allowing [for example] the execution of the mentally retarded once [the Court determines] it's unconstitutional. That is the end of it. [The Court] will never be able to go back because there will never be any legislation that can reflect a changed consensus.[169]

---

163. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 879-80 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (stating that "*Roe*'s essential holding . . . recogni[zes] . . . the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State" and then applying the "undue burden" standard); Roe v. Wade, 410 U.S. 113, 163 (1973), *overruled by Dobbs*, 597 U.S. 215 (2022) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability."); *see Dobbs*, 597 U.S. at 414 (2022) (Breyer, J., dissenting) ("*Roe* has stood for fifty years. *Casey*, a precedent about precedent specifically confirming *Roe*, has stood for thirty.").

164. Only the Court's substantive due process jurisprudence comes close. *See* Ryan, *supra* note 144, at 561-62 (noting parallels between substantive due process and Punishments Clause jurisprudence).

165. *See* Transcript of Oral Argument at 10, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452) (noting that the Eighth Amendment is a "one-way ratchet"); Ryan, *supra* note 15, at 1763. *But see* Harmelin v. Michigan, 501 U.S. 957, 990 (1991) (Scalia, J.) ("The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.").

166. *See* Ryan, *supra* note 10, at 120 ("The Court's examination of state legislative action is a fair estimation of whether a punishment is unusual within the United States.").

167. Ryan, *supra* note 15, at 1763 ("The Eighth Amendment is generally considered a 'one-way ratchet,' meaning that once a punishment reaches the status of unconstitutionality under the Eighth Amendment, there is no going back on that determination." (footnote omitted)).

168. "The identity of the Justice who made this statement is unknown because the identities of the inquiring Justices are not recorded and the responding attorney did not answer the Justice by name." Ryan, *supra* note 131, at 870 n.141.

169. *See* Transcript of Oral Argument, *supra* note 165, at 10; *see also* Ryan, *supra* note 15, at 1763 ("The Eighth Amendment is generally considered a 'one-way ratchet,' meaning that once a punishment reaches the status of unconstitutionality under the Eighth Amendment, there is no going back on that determination.").

One might go even further and suggest that legislation should not be adopted once evidence demonstrates that there is a consensus against a practice even if the Court has not yet clearly stated that the practice is unconstitutional.[170] So, for example, one might argue that electrocution is an unconstitutional method of execution even though the Court has not explicitly said that it is unconstitutional because the vast majority of jurisdictions employ lethal injection for capital punishments, only 163 people have been electrocuted since 1976, and the method was not available at the time of the Founding.[171] Regardless of when exactly the consensus garners constitutional meaning, though, the Court has long insisted that the meaning of the Eighth Amendment evolves with time.

II. THE RECENT ORIGINALIST OVERLAY

In recent Eighth Amendment cases, the Court has strayed somewhat from its traditional ESD approach. With a nod to the ESD methodology, the Court has provided an originalist overlay, not surprisingly shifting the doctrine in a more conservative direction. This shift is especially prominent in capital cases.

A. The Baze v. Rees *Shift in Eighth Amendment Doctrine*

In the 2005 case of *Baze v. Rees*[172]—a case questioning the appropriateness of the then-traditional three-drug protocol for lethal injection—the Justices splintered in their views on the case. All of them implicitly agreed to buck the established approach to determining the constitutionality of punishments under the Eighth Amendment, though, and instead focused their analyses on the degree of risk posed by the protocol, the extent of pain at issue, and the availability of possible alternatives.[173] It was somewhat surprising that a majority of the Justices signed on to such an approach, as this was an entirely new analysis in the Eighth Amendment death penalty context.[174] The

170. *See* Meghan J. Ryan, *Turning Back to Electrocution—Reversing the Eighth Amendment Ratchet?*, CONCURRING OPINIONS (May 25, 2014) (on file with author).

171. *See Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution [https://perma.cc/2KDU-NA9E] (last visited Feb. 6, 2024); *see also, e.g.*, Glossip v. Gross, 576 U.S. 863, 977 (2015) (Sotomayor, J., dissenting) (discussing a possible devolution to the firing squad).

172. 553 U.S. 35 (2008).

173. *See id.* at 50 (plurality opinion) (focusing on the "substantial risk of serious harm" and available alternatives); *id.* at 114 (Ginsburg, J., dissenting) ("I would vacate and remand with instructions to consider whether Kentucky's omission of those safeguards poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain."); *see also supra* note 18 (providing additional detail on which standards the particular Justices endorsed).

174. *See* William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403, 420 (2017) ("The [*Baze*] Court rejected th[e] [constitutional] claim [at

Justices' points of disagreement were only in the degree of risk that mattered for an Eighth Amendment claim[175] and, importantly, whether the ESD were even relevant anymore.[176]

Justice Roberts, who was joined by Justices Kennedy and Alito, did not explicitly mention the ESD language that the Court had previously reiterated in case after case.[177] The opinion did, however, detail the evolution of capital punishment from the middle of the nineteenth century, when hanging was the primary method of execution, to the now-common method of lethal injection.[178] It also alluded to the state-counting methodology of the ESD approach by noting that, "[o]f the[] 36 States [adopting lethal injection], at least 30 . . . use[d] the same combination of three drugs in their lethal injection protocols."[179] In his legal analysis, though, Justice Roberts abandoned a straightforward ESD approach focusing on state-counting and the Court's independent judgement. Instead, Justice Roberts seemingly threw out the notion that a punishment can become unconstitutional as time passes. He asserted that the Court had clearly established in *Gregg v. Georgia*[180] that capital punishment is constitutional and indicated that this was settled, unmovable law.[181] Further, Justice Roberts stated that, because capital punishment is constitutional, there must be a constitutional way of carrying out executions.[182]

Despite his nod to the binding ESD test, Justice Roberts's suggestion that the rule of *Gregg* is firm is at odds with embracing the evolving nature of the Eighth Amendment. Pursuant to the ESD approach, stare decisis does not apply in the Eighth Amendment context the same way as it does in other areas of law.[183] The ESD's approach of relying on changing external facts—such as states' adoption or abandonment of particular sentencing laws—suggests that the ESD rationale, rather than particular Eighth Amendment case outcomes,

---

issue], but in doing so it strayed from its traditional Eighth Amendment framework of assessing dignity and the evolving standards of decency and instead focused on the potential pain imposed by the punishment.").

175. *See, e.g.*, *Baze*, 553 U.S. at 114 (Ginsburg, J., dissenting) (focusing on "an untoward, readily avoidable risk").

176. *See infra* text accompanying notes 177-93.

177. *See generally Baze*, 553 U.S. 35 (Roberts, J.) (failing to explicitly mention the ESD).

178. *See id.* at 41-44.

179. *Id.* at 44.

180. 428 U.S. 153 (1976).

181. *See Baze*, 553 U.S. at 47 (Roberts, J.) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.").

182. *See id.* ("It necessarily follows that there must be a means of carrying it out.").

183. *See* Ryan, *supra* note 131, at 848 ("[P]recedent plays a unique role in Eighth Amendment death penalty jurisprudence. Instead of applying the specific outcomes of Eighth Amendment death penalty cases, lower courts should continuously reapply the Supreme Court's reasoning in these types of cases.").

should be controlling.[184] This means that, while *Gregg* did indeed determine that capital punishment as applied in that case was not unconstitutional,[185] *Gregg* did not, and could not, settle the matter for all of eternity. Instead, because facts external to the case—facts such as the sentencing statutes and practices in individual jurisdictions—regularly change, the constitutionality of the punishment could change as well, because what is deemed constitutionally "cruel and unusual" depends upon the "evolving standards of decency that mark the progress of a maturing society."[186]

In addition to subtly upending the ESD approach, Justice Roberts's analysis seems to reject the roots of the Eighth Amendment. Although perhaps the most fundamental rule of the Eighth Amendment is that torture is unconstitutional,[187] Justice Roberts suggested that, even if only torturous methods of capital punishment are available, one of them must be constitutional because capital punishment itself is constitutional.[188] This simply cannot be correct.

Although only Justice Kennedy and Justice Alito signed onto Justice Roberts's analysis in *Baze*, this abandonment of the ESD was adopted by a majority of the Justices. Perhaps not surprisingly, both Justice Thomas and Justice Scalia authored concurring opinions focused on the original understanding of the Punishments Clause and thereby rejected the idea that the meaning of the Clause evolves. Justice Thomas explained that the "Court's cases have repeatedly taken the view that the Framers intended to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment."[189] And he interpreted those decisions to argue that "the Eighth Amendment is aimed at methods of execution purposely designed to inflict pain."[190] Justice Thomas also pointed out that the majority's half-hearted attempt to acknowledge the ESD but simultaneously invent an entirely new approach to capital cases resulted in a "standard . . . find[ing] no support in the original understanding of the Cruel and Unusual Punishments Clause or in [the Court's]

184. *See id.* at 872 ("To reflect the ever-changing nature of the evolving standards of decency, as well as the Court's unique treatment of death penalty cases, lower courts should apply Supreme Court rationale as precedent instead of Supreme Court outcomes in Eighth Amendment death penalty cases.").

185. *Gregg*, 428 U.S. at 169 (plurality opinion) ("We now hold that the punishment of death does not invariably violate the Constitution.").

186. Trop v. Dulles, 356 U.S. 86, 99, 101 (1958) (plurality opinion).

187. *See supra* text accompanying notes 56-58, 63-70.

188. *See* Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out." (citation omitted)).

189. *Id.* at 99 (Thomas, J., concurring in the judgment). Justice Scalia signed onto this concurrence.

190. *Id.*

previous method-of-execution cases."[191] Justice Scalia similarly embraced a historical approach and rejected the ESD.[192] Focusing on the allegation that capital punishment, rather than the particular lethal injection protocol at issue, might be unconstitutional, he asserted that it would be absurd to find the death penalty unconstitutional when it is explicitly mentioned in the Constitution.[193]

A minority of the Justices in *Baze* referenced the ESD, but even some of these Justices did not adhere to the traditional methodology of assessing the current indicia of decency through state-counting and applying the Court's independent judgment.[194] Pushing back against the conservative Justices' disregard of precedent, Justice Ginsburg (who was joined by Justice Souter) dissented, explaining that of course "[t]he Eighth Amendment . . . 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' "[195] Thus, she concluded, any relevance of the cases the majority cited to support its result "[was] thus dimmed by the passage of time."[196] But Justice Ginsburg applied a somewhat similar—just less burdensome—approach, focusing on whether the execution protocol "create[d] an untoward, readily avoidable risk of inflicting severe and unnecessary pain."[197]

Justice Stevens's concurrence in *Baze* focused on the constitutionality of capital punishment rather than the constitutionality of the lethal injection protocol at issue in the case, but he stayed truer to the existing ESD methodology. Justice Stevens suggested that the ESD approach indicates that perhaps the death penalty itself is unconstitutional because capital defendants now have fewer procedural

---

191. *Id.* at 94.

192. *See id.* at 93 (Scalia, J., concurring in the judgment).

193. *See id.* Justice Scalia explained:

> I take no position on the desirability of the death penalty, except to say that its value is eminently debatable and the subject of deeply, indeed passionately, held views—which means, to me, that it is preeminently not a matter to be resolved here. And especially not when it is explicitly permitted by the Constitution.

Id.

194. *See supra* text accompanying notes 107-11 (describing the Court's two-step approach).

195. *Baze*, 553 U.S. at 115-16 (Ginsburg, J., dissenting) (quoting Atkins v. Virginia, 536 U.S. 304, 311-12 (2002)).

196. *Id.* at 116.

197. *Id.* at 123. Justice Ginsburg conceded, though, that she "agree[d] with . . . the plurality that the degree of risk, magnitude of pain, and availability of alternatives must be considered." *Id.* at 116. She explained that she "part[ed] ways with the plurality, however, to the extent its 'substantial risk' test sets a fixed threshold for the first factor." *Id.* Instead, according to Justice Ginsburg, "[t]he three factors are interrelated; a strong showing on one reduces the importance of the others." *Id.*

safeguards than when the Court upheld capital punishment in *Gregg*.[198] Accordingly, numerous factors—such as the death qualified jury's bias, risk of error in capital cases, discriminatory application of capital punishment, and irrevocable nature of the punishment—now color whether capital punishment can still be considered just.[199] Somewhat ironically, though, Justice Stevens pointed out that the Court had found capital punishment to be constitutional in *Gregg* and its progeny, and, acknowledging the importance of precedent, he concluded that the death penalty—as well as the lethal injection protocol at issue in the case—was constitutionally valid.[200]

Although at least some of the Justices acknowledged the ESD, not a single Justice applied the traditional ESD approach of state-counting and independent judgment to the lethal-injection protocol at issue in *Baze*. Instead, the Justices' approach examining the "degree of risk, magnitude of pain, and availability of alternatives"[201] was entirely new in the death penalty context.[202] The Court had, however, followed similar reasoning in the Eighth Amendment prison-conditions context. In transitioning into such an analysis in *Baze*, Justice Roberts first explained that the "Court ha[d] never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."[203] He cited *Wilkerson v. Utah*[204] and *In re Kemmler*[205] as the relevant precedents for this proposition.[206] In *Wilkerson*, the court upheld death by firing squad because it was not torturous.[207] As for *In re Kemmler*, Justice Roberts explained that,

198. *Id.* at 84 (Stevens, J., concurring in the judgment) ("Ironically, . . . more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders.").

199. *Id.* at 84-85.

200. *See id.* at 87.

201. *Id.* at 116 (Ginsburg, J., dissenting); *see id.* at 49-50 (plurality opinion) ("[T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.' " (quoting Farmer v. Brennan, 511 U.S. 825, 842, 846, 846 n.9 (1994))).

202. *See* Berry & Ryan, *supra* note 174, at 420 (explaining that the *Baze* Court "strayed from its traditional Eighth Amendment framework").

203. *Baze*, 553 U.S. at 48.

204. 99 U.S. 130 (1878).

205. 136 U.S. 436 (1890).

206. *See Baze*, 553 U.S. at 48.

207. *See Wilkerson*, 99 U.S. at 135-36 ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as [public dissection and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that emendment [sic] to the Constitution."); *see also Baze*, 553 U.S. at 48 (Roberts, J.) ("In *Wilkerson v. Utah*, we upheld a sentence to death by firing squad imposed by a territorial court, rejecting the argument that such a sentence constituted cruel and unusual punishment."). The Court did not define what constitutes a "punishment[] of torture," but it did refer to several examples: "where the prisoner was drawn or dragged to

although the Court did not reach the Eighth Amendment issue in that case because the Amendment was not yet incorporated at the time, the *In re Kemmler* Court also indicated that whether the punishment constituted torture was a relevant question.[208] The Court did not consider the method of execution in *In re Kemmler*—electrocution—torturous, but instead found it to be a more humane way to carry out a death sentence.[209]

Providing a somewhat more rigorous review than just this baseline of torture, Justice Roberts then turned to the prison-conditions cases to establish an entirely new approach to death penalty cases such as *Baze*.[210] He relied on *Helling v. McKinney*[211] and *Farmer v. Brennan*[212]—cases that were civil rights actions against prison officials for allowing unjust conditions of confinement for inmates.[213] In *Helling*, the Court determined that the inmate respondent had sufficiently stated a claim that prison officials had, "with deliberate indifference, exposed him to levels of [environmental tobacco smoke (ETS)] that pose[d] an unreasonable risk of serious damage to his future health."[214] To establish such a claim, the inmate would have to show that he was "exposed to unreasonably high levels of ETS."[215] This included an examination of the risk of harm, as well as whether society tolerates such a risk.[216] In *Farmer*, the Court reiterated that "[a] prison official's deliberate indifference to a substantial risk of serious harm to an inmate

---

the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason"; "also . . . public dissection in murder, and burning alive in treason committed by a female." *Wilkerson*, 99 U.S. at 135-36.

208. *See Baze*, 553 U.S. at 48-49 (stating that, in *In re Kemmler*, the Court "rejected an opportunity to incorporate the Eighth Amendment against the States in a challenge to the first execution by electrocution, to be carried out by the State of New York" but explaining that, "[i]n passing over that question, . . . we observed [that] '[p]unishments are cruel when they involve torture or a lingering death' " (quoting *In re Kemmler*, 136 U.S. at 447)).

209. *See id.* (Roberts, J.); *see also In re Kemmler*, 136 U.S. at 447-49 (refusing to find that the New York Court of Appeals "committed an error so gross as to amount in law to a denial by the State of due process of law" because the law requiring that executions be carried out by electrocution "was passed in the effort to devise a more humane method of reaching the result").

210. *See* Berry & Ryan, *supra* note 174, at 418 ("In recent years, though, the Court has strayed from these core Eighth Amendment principles in examining the constitutionality of punishment techniques.").

211. 509 U.S. 25 (1993).

212. 511 U.S. 825 (1994).

213. *See Helling*, 509 U.S. at 28 (explaining that the inmate filed a civil rights complaint based on his exposure to second-hand smoke while imprisoned); *Farmer*, 511 U.S. at 829 ("The dispute before us stems from a civil suit brought by petitioner . . . alleging that . . . federal prison officials[] violated the Eighth Amendment by their deliberate indifference to petitioner's safety.").

214. *Helling*, 509 U.S. at 35.

215. *Id.*

216. *See id.* at 36 (explaining that the inquiry "also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk" (emphasis omitted)).

violates the Eighth Amendment."[217] In addressing a transsexual inmate's claim that prison officials' practice of housing her with the general population where she was at an increased risk of sexual violence violated the Eighth Amendment, the Court explained that this "deliberate indifference" standard meant that the official must have "know[n] of and disregard[ed] an excessive risk to inmate health or safety."[218] This knowledge requirement was necessary because the Eighth Amendment prohibits cruel and unusual punishments, not "conditions," and prison conditions do not become punishment unless prison officials are aware of the risks.[219] The *Baze* Court seemed to overlook the "deliberate indifference" requirement but relied on *Helling*'s and *Farmer*'s focus on the unreasonable or substantial risk of serious harm to establish the new *Baze* standard focused on whether the inmate had established a "demonstrated risk of severe pain."[220]

Although the *Baze* Court's reliance on this new test was a significant departure for the Court, applying the prison-conditions line of cases may make some sense. After all, *Baze* was actually not a method-of-execution case.[221] The *method* of execution was lethal injection, and it was instead the lethal injection protocol—the *technique* for carrying out this method—that was at issue in *Baze*.[222] Similarly, in prison-conditions cases, the type and method of punishment is incarceration, and one might classify the particular conditions of punishment—at least those that are known—as the punishment technique. In that sense, perhaps the prison-conditions cases provide the proper test for analyzing the constitutionality of a punishment technique.

It is worth noting, however, that, unlike in *Baze*, the prison-conditions cases of *Helling* and *Farmer* referenced the importance of the ESD under the Eighth Amendment.[223] In *Helling*, the Court explained that there was a question of "whether society considers the risk that the prisoner complained of to be so grave that it violate[d] contemporary standards of decency to expose anyone unwillingly to such a risk."[224] And in *Farmer*, the Court explained that "gratuitously

217. *Farmer*, 511 U.S. at 828 (internal quotations omitted).

218. *Id.* at 837; *see id.* at 829-32 (relating the factual background of the case).

219. *See id.* at 837 ("This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.' ").

220. Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion); *see supra* notes 214-18.

221. *See* Berry & Ryan, *supra* note 174, at 411-12 & n.55 (noting that *Baze* was a case about punishment technique, not punishment method).

222. *See id.* at 407 (defining "the *technique* of punishment" as "the manner in which the state administers the punishment, such as by a three-drug cocktail of sodium thiopental, pancuronium bromide, and potassium chloride").

223. *See Farmer*, 511 U.S. at 833-34; Helling v. McKinney, 509 U.S. 25, 32 (1993) ("Contemporary standards of decency require [that prison conditions are subject to Eighth Amendment scrutiny].").

224. *Helling*, 509 U.S. at 36 (emphasis omitted).

allowing the beating or rape of one prisoner by another . . . [did not] square[] with evolving standards of decency."[225] Thus, even if it were legitimate to stray from the ESD methodology in capital cases and instead adopt a new test based on prison-conditions cases, the Court still abandoned the foundation of the Eighth Amendment in failing to clearly recognize the evolving nature of the Amendment.

B. Eighth Amendment Instability and a Further Turn Toward Originalism

In the immediate years after *Baze*, the Court returned to applying its ESD jurisprudence in capital and even life-without-parole cases. In the 2008 case of *Kennedy v. Louisiana*,[226] for example, the Court determined that the ESD required a constitutional prohibition of imposing capital punishment for the offense of child rape.[227] And in the 2010 case of *Graham v. Florida*,[228] the Court held that the ESD indicated that the punishment of life-without-parole may not be imposed for juvenile non-homicide offenses.[229] This return to the ESD would not last, though.

In 2015, the Court once again retreated from the ESD and took another turn toward originalism in *Glossip v. Gross*.[230] *Glossip* was another case about a punishment technique.[231] In addressing the constitutionality of the lethal-injection protocol at issue, the Court began its analysis by stating that "[t]he death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights."[232] Although the Court then briefly traced the evolution of lethal injection—from hanging, to firing squad, to electrocution, to gas, and finally to lethal injection—it soon moved on to a more originalist analysis.[233] Citing Justice Roberts's reasoning in *Baze* and indicating it was controlling, the Court explained that *Gregg* cemented the constitutionality of capital punishment and that "it necessarily follows

225. *Farmer*, 511 U.S. at 833-34 (internal quotations and citations omitted).

226. 554 U.S. 407 (2008).

227. *See id.* at 446-47 (citing the ESD and the Court's "repeated, consistent rulings" in determining that "resort to the penalty must be reserved for the worst of crimes" and may not be imposed for the crime of child rape).

228. 560 U.S. 48 (2010).

229. *See id.* at 58 ("To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.' " (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976))); *see also, e.g.*, Miller v. Alabama, 567 U.S. 460, 465, 469 (2012) (striking down mandatory life-without-parole sentences for juvenile offenders).

230. 576 U.S. 863, 869 (2015).

231. *See supra* text accompanying note 222 (differentiating a punishment technique from a punishment method).

232. *Glossip*, 576 U.S. at 867.

233. *See id.* at 867-69.

that there must be a constitutional means of carrying it out."[234] Of course, the notion that capital punishment will remain constitutional just because it was once determined to be so under the Eighth Amendment is contrary to the ESD. It is not surprising, then, that the *Glossip* Court did not reference the ESD in its opinion. Beyond being at odds with the ESD, the Court's suggestions that *Gregg* cemented the constitutionality of capital punishment and that the constitutionality of a punishment necessarily means there currently exists a constitutional way to carry it out[235] were *not* propositions to which a majority of the *Baze* Justices explicitly subscribed.[236] But the *Glossip* Court gave precedential power to these assertions.[237] After focusing on this establishment of capital punishment by at least some means, the Court went on to fully adopt the *Baze* standard of assessing whether the technique for imposing lethal injection poses a "substantial risk of serious harm."[238] The Court even added a requirement that the "prisoner[] must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain,"[239] making it even more difficult for an inmate to challenge the execution technique.

By abandoning the ESD and establishing an unchanging status of constitutionality with respect to capital punishment, the *Glossip* Court revealed a further turn toward originalism under the Eighth Amendment. Not surprisingly, Justice Scalia and Justice Thomas embraced originalism even more explicitly in their concurrences, indicating that, historically and thus today, a punishment violates the Eighth Amend-

234. *Id.* at 869 (alterations omitted) (quoting Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion)) ("Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.' " (alterations in original) (quoting *Baze*, 553 U.S. at 47)).

235. *See id.*

236. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' " (alteration in original) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))).

237. *See Glossip*, 576 U.S. at 869 (citing *Baze* for this proposition).

238. *Id.* at 877.

239. *Id.* (second alteration in original) (quoting *Baze*, 553 U.S. at 52); *see id.* at 949 (Sotomayor, J., dissenting) (referencing the "wholly novel requirement of proving the availability of an alternative means for their own executions"); *see also* Berry & Ryan, *supra* note 174, at 422 (noting that this was a new requirement).

ment only if it includes "added 'terror, pain, or disgrace.' "[240] Only Justices Breyer, Sotomayor, Ginsburg, and Kagan held onto any shreds of the ESD in their dissents.[241]

C. *Originalism and the Near-Disappearance of the Evolving Standards of Decency*

Since *Glossip*, the Court has referenced the ESD in just one Eighth Amendment case. In *Moore v. Texas*,[242] the Court laid out the foundation of the Amendment by stating: "To enforce the Constitution's protection of human dignity, we look to the evolving standards of decency that mark the progress of a maturing society, recognizing that the Eighth Amendment is not fastened to the obsolete."[243] Any other references to the ESD now live in concurrences and dissents.

At the same time the Court has retreated from the ESD, the Court has continued to infuse its Eighth Amendment analyses with threads of originalism. For example, the Court forged ahead with originalism in its 2019 case of *Bucklew v. Precythe*,[244] which examined a death-row inmate's claim that the state's lethal injection protocol using only pentobarbital violated the Eighth Amendment.[245] There, the Court repeated the conclusion that capital punishment is constitutional, adding that the Fifth Amendment enshrines the practice in its command that "[n]o person shall . . . be deprived of life . . . without due process of law."[246] And the Court went even further in its move toward originalism. In analyzing Bucklew's case, the Court explained that, not only did the *Baze* and *Glossip* precedents foreclose his claim, but "Mr. Bucklew's argument fail[ed] for another independent reason: It [was] inconsistent with the original and historical understanding of the Eighth

240. *Glossip*, 576 U.S. at 894 (Scalia, J., concurring) (quoting *Baze*, 553 U.S. at 96 (Thomas, J., concurring in the judgment)) ("Historically, the Eighth Amendment was understood to bar only those punishments that added 'terror, pain, or disgrace' to an otherwise permissible capital sentence." (quoting *Baze*, 553 U.S. at 96 (Thomas, J., concurring in the judgment))); *id.* at 899-900 (Thomas, J., concurring) ("Because petitioners make no allegation that Oklahoma adopted its lethal injection protocol 'to add elements of terror, pain, or disgrace to the death penalty,' they have no valid claim." (quoting *Baze*, 553 U.S. at 107 (Thomas, J., concurring in the judgment))).

241. *See id.* at 938-46 (Breyer, J., dissenting) (paraphrasing the ESD approach); *id.* at 974 (Sotomayor, J., dissenting) (briefly referencing the ESD). Justices Ginsburg, Breyer, and Kagan signed onto Justice Sotomayor's dissent. *See id.* at 949.

242. 581 U.S. 1 (2017).

243. *Id.* at 12 (internal quotations and alterations omitted).

244. 139 S. Ct. 1112 (2019).

245. *See id.* at 1121 ("[H]is main claim . . . was that he would experience pain during the period after the pentobarbital started to take effect but before it rendered him fully unconscious.").

246. U.S. CONST. amend. V; *Bucklew*, 139 S. Ct. at 1122 ("[T]he Fifth Amendment, added to the Constitution at the same time as the Eighth, expressly contemplates that a defendant may be tried for a 'capital' crime and 'deprived of life' as a penalty, so long as proper procedures are followed.").

Amendment on which *Baze* and *Glossip* rest."[247] The Court thus found an originalist approach to the Eighth Amendment determinative: An argument that is based on an evolving understanding of the Amendment—on the "evolving standards of decency that mark the progress of a maturing society"[248]—would no longer succeed so long as the punishment was understood to be constitutional at the time the Amendment was ratified. This could be a final farewell to the ESD.

III. THE RISE OF ORIGINALISM, THE FALL OF PRECEDENT

Even outside the Eighth Amendment, originalism has been surging in the Court. Although the methodology took root more than fifty years ago,[249] only now is a majority of the Justices loyally originalist.[250] Not only are most of the Justices now originalists, but the Justices have shown their willingness to dispense with important and long-standing precedents. This leaves the ESD on very shaky ground.

A. Originalism Rules at the Court

Historically, the Justices applied a patchwork of constitutional interpretation approaches in cases.[251] Certain Justices occasionally decided cases based on the Founders' intentions or other legal history, but such a historical approach was not the only one.[252] Over time, originalism developed and grew as a reaction to progressive cases such as *Roe v. Wade*.[253] Originalism truly took root as a method of constitutional interpretation in the 1980s, and Justice Scalia began applying the approach at the Court.[254] Later, Justice Thomas joined him, and the Court continued to become more conservative.[255]

---

247. *Bucklew*, 139 S. Ct. at 1126; *see also id.* at 1123 (suggesting that whether a method of execution is "cruel and unusual" should depend on how "a reader at the time of the Eighth Amendment's adoption would have understood these words").

248. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

249. *See* Balkin, *supra* note 143, at 320-21.

250. The true extent of this loyalty remains to be seen.

251. *See* FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 92 (2013) (noting that even the Warren Court occasionally resorted to originalism).

252. *See id.*

253. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); *see* CROSS, *supra* note 251, at 98 ("Originalism truly emerged as a conservative priority in the Reagan era, as a response to [such decisions].").

254. *See* CROSS, *supra* note 251, at 98; Balkin, *supra* note 143, at 320-21 (explaining that "contemporary conservative originalism is the result of conservative political mobilizations that began in the late 1960s and early 1970s and came to fruition with the election of Ronald Reagan in 1980" and that, "as conservatives won elections, they began to control the federal courts . . . [and] gained a conservative majority on the United States Supreme Court").

255. Even the Rehnquist Court, which has been considered to depend more heavily on originalism than previous courts, did not heavily rely on originalism. *See* CROSS, *supra* note 251, at 101-02.

The U.S. Supreme Court has long vacillated in terms of its composition, but the Court has been heading down the road of conservativism for some time. For example, the Court became more conservative when Justice Scalia replaced the retiring Justice Burger in 1986.[256] And in 1991, Justice Thurgood Marshall, the first African American on the Court and a supporter of liberal outcomes, retired for health reasons and was replaced with Justice Thomas, a staunch conservative.[257] Additionally, although Justice Blackmun was appointed by a Republican president, he became markedly more liberal over the course of his tenure.[258] The same could be said for Justices Souter and Stevens.[259] But, in 2016, something unprecedented happened. That March, President Obama nominated Merrick Garland to fill the seat of Justice Scalia, who had recently passed away.[260] Senate Majority Leader Mitch McConnell refused to consider the nomination, though. He explained that he intended to adhere to the "Biden Rule" of delaying the nomination until after the newly elected president—whether that be Donald Trump or Hillary Clinton—was sworn in the following February.[261]

256. *See How Scalia Compared with Other Justices*, N.Y. TIMES (Feb. 14, 2016), https://www.nytimes.com/interactive/2016/02/14/us/supreme-court-justice-ideology-scalia.html [https://perma.cc/X3BV-LVJQ] (charting the liberal and conservative tendencies of the Justices). Technically, President Reagan nominated Associate Justice William Rehnquist to replace Chief Justice Burger, and he nominated Antonin Scalia to replace Justice Rehnquist as an Associate Justice on the Court. *See* Jon Margolis, *Chief Justice Burger Resigns: Rehnquist Nominated as Successor*, CHI. TRIB., June 18, 1986, at 1.

257. *See* Maureen Dowd, *The Supreme Court; Conservative Black Judge, Clarence Thomas, Is Named to Marshall's Court Seat*, N.Y. TIMES, July 2, 1991, at A1 ("But Judge Thomas, who has risen in Republican ranks as an advocate of bootstrap conservatism, would present a striking change from Justice Marshall, a civil rights pioneer and an anchor of the Court's declining liberal faction.").

258. *See* Joan Biskupic, *Justice Blackmun Dies, Leaving Rights Legacy*, WASH. POST, Mar. 5, 1999, at A1 ("[Justice] Blackmun was appointed both to an appeals court and to the Supreme Court by Republican presidents. But by the time he retired, he was the most liberal member of the bench.").

259. *See* Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html [https://perma.cc/GK9W-UT2D] ("John Paul Stevens['s] . . . 35 years on the United States Supreme Court transformed him, improbably, from a Republican antitrust lawyer into the outspoken leader of the court's liberal wing . . . ."); Jeffrey Rosen, *The Stealth Justice*, N.Y. TIMES, May 2, 2009, at A21 ("When he was nominated for the court by George H. W. Bush in 1990, Judge Souter was sold as a confirmable stealth candidate who would prove to be a reliable conservative; instead, he soon emerged as an unapologetic liberal.").

260. *See* Michael D. Shear et al., *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html [https://perma.cc/D88A-6LDX] ("President Obama on Wednesday nominated Merrick B. Garland to be the nation's 113th Supreme Court justice, choosing a centrist appellate judge who could reshape the court for a generation and become the face of a bitter election-year confirmation struggle.").

261. Mitch McConnell, *McConnell on Supreme Court Nomination*, U.S. SENATE (Mar. 16, 2016), https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-on-supreme-court-nomination [https://perma.cc/JK9Z-RTL3] ("As Chairman Grassley and I declared weeks ago, and reiterated personally to President Obama, the Senate will continue to observe the Biden Rule so that the American people have a voice in this momentous decision.").

McConnell stated that "[t]he next justice could fundamentally alter the direction of the Supreme Court and have a profound impact on our country, so of course the American people should have a say in the Court's direction."[262] There was no such "Biden Rule," however.[263] Joe Biden—who was, at the time, the Vice President of the United States—had in 1992 argued the merits of delaying considering Supreme Court nominees until after a presidential election.[264] Importantly, though, there was no one up for consideration at the time he made the speech, and he argued to delay until after the election, not until after the new president had taken office.[265] Regardless, for the first time in history, the Senate Majority Leader declined to bring a Supreme Court nominee to a vote.[266] Justice Scalia's position remained vacant until newly elected Donald Trump nominated Neil Gorsuch in the spring of 2017, and the Senate promptly confirmed the nominee.[267] Instead of a Supreme Court Justice appointed by a Democratic president, then, the vacant seat was filled by a Republican president.[268] Donald Trump also persuaded Justice Kennedy—a longtime swing vote on the Court—to

---

262. *Id.*

263. *See* C. Eugene Emery Jr., *In Context: The 'Biden Rule' on Supreme Court Nominations in an Election Year*, POLITIFACT (Mar. 17, 2016), https://www.politifact.com/article/2016/mar/17/context-biden-rule-supreme-court-nominations/ [https://perma.cc/3H2K-TKRB] (explaining that Senator Biden "didn't argue for a delay until the next president began his term, as McConnell is doing" but instead "said the nomination process should be put off until after the election, which was on Nov. 3, 1992").

264. *See* Julie Hirschfeld Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, N.Y. TIMES (Feb. 22, 2016), https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html [https://perma.cc/DR9J-HSSC] ("[I]n a speech on the Senate floor in June 1992, Mr. Biden, then the chairman of the Judiciary Committee, said there should be a different standard for a Supreme Court vacancy 'that would occur in the full throes of an election year.' ").

265. *See id.*

266. *See* Robin Bradley Kar & Jason Mazzone, Essay, *The Garland Affair: What History and the Constitution* Really *Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 62 (2016) ("A careful examination of the entire historical record shows that . . . the Senate Republicans' plan not to consider any Obama nominee . . . is unprecedented in the history of Supreme Court appointments."). Professor Neil Siegel disagreed that the move was "unprecedented," but agreed that it was exceedingly rare. *See* Mark Walsh, *Senate Hold on Merrick Garland Nomination Is Unprecedented, Almost*, ABA J. (May 1, 2016, 2:30 AM), https://www.abajournal.com/magazine/article/senate_hold_on_merrick_garland_nomination_is_unprecedented_almost [https://perma.cc/NBD5-SL8H] ("Neil S. Siegel, a professor of law and political science at Duke University, with an eye toward U.S. political history, would amend the description of 'unprecedented.' ").

267. *See* Elana Schor, *Senate Confirms Gorsuch to Supreme Court*, POLITICO (Apr. 7, 2017, 1:22 PM), https://www.politico.com/story/2017/04/senate-confirms-gorsuch-to-supreme-court-237005 [https://perma.cc/KMY5-G2QL] ("Gorsuch, who will be sworn in as soon as Monday, will bring the Supreme Court to its full complement of nine justices for the first time since the February 2016 death of Justice Antonin Scalia.").

268. *See* Geoffrey R. Stone, *Sorry, Neil Gorsuch. The Supreme Court Vacancy Was Already Filled*, TIME (Feb. 1, 2017, 1:40 AM), https://time.com/4656196/scotus-neil-gorsuch-geoffrey-stone/ [https://perma.cc/5TXP-2DJY] (arguing that Senate Republicans' refusal to confirm or consider Judge Garland's nomination "was nothing less than a dishonorable and dishonest effort to steal this seat on the Supreme Court for the right wing").

retire and replaced him with Brett Kavanaugh.[269] This move shifted the balance on the Court, as Kavanaugh has proved to be a significantly more reliable conservative vote than Justice Kennedy was.[270] Then, on September 18, 2020, Justice Ruth Ginsburg, who was nominated by President Clinton and was well known as an "[a]rchitect of the legal fight for women's rights in the 1970s,"[271] passed away while Trump was in office.[272] Trump then nominated Amy Coney Barrett, a staunch conservative, to replace her, and the Senate confirmed the nomination.[273] This dramatically shifted the future of the Court, ceding a Democratically appointed seat to one appointed by a Republican president. The Court had been skewing more conservative in recent years, but this shift has left the Court much more conservative than it was just a few years ago. There are now six reliable conservative votes on the Court.[274] And, not only are these votes regularly conservative, but they are often couched in originalism.[275]

Originalism is now a majority approach on the Court. Indeed, the most recent Supreme Court term "was the most originalist in American history."[276] For example, the Court decided *Dobbs v. Jackson*

---

269. *See* DAVID ENRICH, DARK TOWERS: DEUTSCHE BANK, DONALD TRUMP, AND AN EPIC TRAIL OF DESTRUCTION 337 (2020) ("Trump's flattery [toward Justice Kennedy and his family] was part of a coordinated White House charm offensive designed to persuade the aging justice—for years, the court's pivotal swing vote—that it was safe to retire, even with an unpredictable man in the Oval Office.").

270. *See* Tessa Berenson, *Inside Brett Kavanaugh's First Term on the Supreme Court*, TIME (June 28, 2019, 11:46 AM), https://time.com/longform/brett-kavanaugh-supreme-court-first-term/ [https://perma.cc/DJ2N-VQ23] ("A close look at Kavanaugh's voting this term reveals that he is more reliably conservative than Kennedy, helping push the court right since his confirmation.").

271. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies At 87*, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/JC5S-GBLQ].

272. *See id.* ("Ginsburg's death gives Republicans the chance to tighten their grip on the court with another appointment by President Trump so conservatives would have 6-3 majority.").

273. *See* Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM) https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court [https://perma.cc/AS4Y-PSKS] ("The Senate has voted 52-48 to confirm Judge Amy Coney Barrett to the Supreme Court, just about a week before Election Day and 30 days after she was nominated by President Trump to fill the seat of the late Justice Ruth Bader Ginsburg.").

274. *See* Margaret Talbot, *Amy Coney Barrett's Long Game*, NEW YORKER (Feb. 7, 2022), https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game [https://perma.cc/7AHJ-CVHU] ("[Barrett's] arrival gave the conservative wing of the Court a 6-3 supermajority—an imbalance that won't be altered by the recent news that one of the three liberal Justices, Stephen Breyer, is retiring.").

275. *See id.* ("Most originalists are conservatives, and most conservative jurists and legal scholars are originalists.").

276. Erwin Chemerinsky, *Chemerinsky: Originalism Has Taken Over the Supreme Court*, ABA J. (Sept. 6, 2022, 8:00 AM), https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court [https://perma.cc/5692-PXMB] ("The U.S. Supreme Court term that ended on June 30 was the most originalist in American history.").

Women's Health Organization,[277] which, relying on "history and tradition,"[278] overturned *Roe v. Wade*[279] and held that there is no constitutional right to abortion.[280] In *New York State Rifle & Pistol Ass'n v. Bruen*,[281] the Court also flaunted its originalism in striking down a New York law that required a showing of "proper cause" before the government issued a license to carry a firearm in public.[282] The Court's entrenchment of originalism has been blatant, and the media has plastered headlines such as "America Gets First Taste of an Originalist Supreme Court,"[283] "Originalism Run Amok at the Supreme Court,"[284] and "Supreme Court Embraces Originalism In 'Momentous' Term"[285] across newspapers and television screens. The national legal director at the ACLU, David Cole, has explained that, "[o]ver the history of the United States Supreme Court, about six justices have taken the view that the Constitution should be interpreted as solely as it was understood at the time that it was adopted . . . [and it] [j]ust so happens that five of the six are on the Court today."[286] Certainly, there is disagreement about whether this Court reached the correct results in *Dobbs*, *Bruen*, and other cases it has decided—even on originalist grounds—

277. 597 U.S. 215 (2022).

278. *Id.* at 231.

279. 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215; *see Dobbs*, 597 U.S. at 292 ("We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.").

280. *Dobbs*, 597 U.S. at 292 ("We therefore hold that the Constitution does not confer a right to abortion.").

281. 597 U.S. 1 (2022).

282. *Id.* at 17 (explaining that, to uphold the law, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation" and that "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command" (internal quotations omitted)).

283. Kelsey Reichmann, *America Gets First Taste of an Originalist Supreme Court*, COURTHOUSE NEWS SERV. (July 1, 2022), https://www.courthousenews.com/america-gets-first-taste-of-an-originalist-supreme-court/ [https://perma.cc/WDJ6-SRXC].

284. Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN CTR. FOR JUST. (June 28, 2022), https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court [https://perma.cc/B4UV-AJEU].

285. Jimmy Hoover, *Supreme Court Embraces Originalism in 'Momentous' Term*, LAW360 (July 1, 2022, 9:58 PM), https://www.law360.com/articles/1508127/supreme-court-embraces-originalism-in-momentous-term [https://perma.cc/VEH2-EMSF].

286. Reichmann, *supra* note 283; *cf.* Ilan Wurman, *What Is Originalism? Did It Underpin the Supreme Court's Ruling on Abortion and Guns? Debunking the Myths*, CONVERSATION (July 8, 2022, 8:17 AM), https://theconversation.com/what-is-originalism-did-it-underpin-the-supreme-courts-ruling-on-abortion-and-guns-debunking-the-myths-186440 [https://perma.cc/8LSU-HJQ8] (identifying Justices Thomas, Gorsuch, Kavanaugh, and Barrett as "self-proclaimed originalists"; classifying Justice Alito as a "practical originalist"; grouping Justice Roberts with Justice Alito; and also noting that Justice Jackson "proclaims to be bound by the original public meaning of the text but" insists that it "sometimes require[s] dynamic interpretation").

and many believe the Court's approach is merely a fig leaf for political decisionmaking.[287] But a majority of the Court, it seems, has expressed intention to decide cases on its versions of originalist reasoning.

Moving beyond the headlines and digging deeper into the Court's recent cases such as *Dobbs* and *Bruen* paints a somewhat more complex picture. There is no denying that today's Court has relied heavily on "history and tradition"—a key aspect of originalism.[288] After careful analysis, Professors Randy Barnett and Larry Solum have described *Bruen* as "a thoroughly originalist opinion."[289] But *Dobbs* is a bit more complicated. Barnett and Solum suggest that Justice Alito's opinion applies "Conservative Constitutional Pluralist reasoning to reach an arguably originalist result."[290] Regardless of the particular labeling of the Justices' approaches in individual cases, though, the headlines have captured the gist of the Court's direction: The Court has been turning increasingly more toward trying to interpret individual rights as the historical evidence suggests they were understood at the time of the Founding.[291]

Even the more liberal Justices have been thinking about their work in originalist terms. During Elena Kagan's confirmation proceedings back in 2010, for example, the jurist famously remarked that "we are

287. *See, e.g.*, Noah Feldman, *Supreme Court 'Originalists' Are Flying a False Flag*, BLOOMBERG (July 17, 2022, 8:00 AM), https://www.bloomberg.com/opinion/articles/2022-07-17/supreme-court-s-conservative-originalists-are-flying-a-false-flag [https://perma.cc/KHM2-R3SH] ("Now that the conservative majority has won its greatest victories in many years, it emerges that the banner of originalism that the conservative legal movement has long carried was a false flag. The court's latest decisions have failed to achieve the purposes that originalism was designed to fulfill."); William M. Treanor, *Why This "Originalist" Supreme Court Would Disappoint the Founders*, SLATE (July 19, 2022, 5:34 PM), https://slate.com/news-and-politics/2022/07/originalist-supreme-court-would-disappoint-founders.html [https://perma.cc/RQ6P-WD82] ("Last month, the Supreme Court relied on its view of the Constitution's original meaning in its landmark decisions involving abortion rights, gun rights, and religious freedom. None of these decisions, however, was actually consistent with originalism."); Waldman, *supra* note 284 (arguing that *Bruen* and *Dobbs* "distort[] history").

288. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 234, 241-50 (2022) (examining whether a right to abortion is "rooted in our Nation's history and tradition"); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022) ("Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." (internal quotations omitted)); *see also* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 435 (2023) ("In [*Dobbs*, *Bruen*, and *Kennedy*], the constitutional concepts of history and tradition have played important roles in the reasoning of the Supreme Court.").

289. Barnett & Solum, *supra* note 288, at 472.

290. *Id.* at 492.

291. This generalization is, of course, subject to numerous caveats. For example, commentators have argued that the Court skews historical evidence such that its interpretations are not in fact originalist but are instead purely political decisions.

all originalists."[292] It is unlikely that Justice Kagan was indicating approval of the traditional view of originalism that suggests the meaning of the Constitution is set in the stone as of the time of ratification. Instead, she seemed to be suggesting that it is generally unrefuted that judges abide by the text of the Constitution—at least where the text is clear.[293] For example, there is little dispute about the meaning of the Constitution's command that no person "shall . . . be eligible to [the] Office [of President] who shall not have attained to the Age of thirty five Years."[294] As to the meaning of this provision, it seems even the most liberal Justices could be called originalists.[295] Where judges vary, though, and where the theory of originalism really matters, is in interpreting more ambiguous or abstract language, such as, for example, what constitutes "cruel and unusual punishments."[296] Does this provision of the Eighth Amendment prohibit only those practices that were prohibited at the time of ratification? Does it also prohibit some new innovations in punishment? And does it prohibit practices that were once accepted but, over time, have become unacceptable?

When President Biden nominated now-Justice Jackson in 2022,[297] Justice Jackson went even further than Justice Kagan in statements made during her confirmation proceedings. She explained: "I believe that the Constitution is fixed in its meaning. I believe that it's appropriate to look at the original intent, original public meaning, of the words when one is trying to assess because, again, that's a limitation on my authority to import my own policy . . . ."[298] While Justice Jackson is almost certainly not an originalist in the mold of Justice Scalia or

---

292. *We Are All Originalists*, C-SPAN, at 3:05 (June 29, 2010), https://www.c-span.org/video/?c4910015/user-clip-originalists [https://perma.cc/HW3S-L6PB] (user-created clip excerpted from Kagan Confirmation Hearing, Day 2, Part 1). I should note that I think commentators' suggestions that Justice Kagan was either misrepresenting herself or embraces originalism as it is applied by the more conservative Justices are incorrect.

293. *See* Wurman, *supra* note 286 (stating that Justice Kagan "meant that all justices take the text of the Constitution more seriously than they used to").

294. U.S. CONST. art. II, § 1, cl. 5. However, in the wake of *Dobbs* and states such as Georgia passing laws stating that fetuses are persons, H.R. 481 § 3, 155th Gen. Assemb., Reg. Sess. (Ga. 2019) (defining a "[n]atural person" as "any human being including an unborn child . . . at any stage of development who is carried in the womb"), the understanding of whether we begin a counting of years after someone was born, or, rather, at the time of conception, could become an issue. *Cf.* Eric Segall (@espinsegall), TWITTER (July 20, 2022, 4:46 PM), https://twitter.com/espinsegall/status/1549858374606622722 [https://perma.cc/6RKA-EXTB] (predicting that, under the new the Georgia law, "all hell is going to break loose in areas having nothing to do with abortion").

295. Or perhaps, more appropriately, "textualists."

296. U.S. CONST. amend. VIII.

297. Justice Ketanji Brown Jackson was appointed to replace Justice Stephen Breyer in 2022. *See* Annie Karni, *Ketanji Brown Jackson Becomes First Black Female Supreme Court Justice*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/us/politics/ketanji-brown-jackson-sworn-in-supreme-court.html [https://perma.cc/SP9V-LL7G].

298. *Jackson Confirmation Hearing, Day 2 Part 4*, C-SPAN, at 7:20 (Mar. 22, 2022) [hereinafter *Jackson Confirmation Hearing*], https://www.c-span.org/video/?518342-13/jackson-confirmation-hearing-day-2-part-4 [https://perma.cc/EQ59-BL6L].

Justice Thomas, her statement could be interpreted as disclaiming a living constitution approach.[299] Justice Jackson did explain, however, that "there are times when . . . looking at those words [is] not enough to tell you what they actually mean," so "[y]ou look at them in the context of history, you look at the structure of the Constitution, you look at the circumstances that you're dealing with in comparison to what those words meant at the time that they were adopted."[300] Although Justice Jackson allows for room to interpret the meaning of the text in light of current circumstances, her statements do seem to acknowledge that, with an originalist-held Court, all of the Justices are now playing in an originalists' sandbox.

B. Disregarding Precedent

At the same time the Court has made a dramatic turn toward originalism, the Justices also seem ready to undermine, or even directly overrule, precedent. In the 2020 case of *Ramos v. Louisiana*,[301] this disregard of precedent was on display, hinting at what might come of many progressive Warren Court opinions.[302] In *Ramos*, the Court overturned the 1972 case of *Apodaca v. Oregon*,[303] which determined that guilty verdicts need not be unanimous.[304] In the case, three Justices in the majority—Justices Gorsuch, Breyer, and even Ginsburg—reasoned how *Apodaca* was not actually binding precedent.[305] Even though *Apodaca*'s outcome and reasoning had been followed by courts for nearly fifty years, the decision hinged on Justice Powell's fifth vote

299. *See id.*; *see also* Randy E. Barnett, *Ketanji Brown Jackson and the Triumph of Originalism*, WALL ST. J. (Mar. 24, 2022, 6:38 PM), https://www.wsj.com/articles/ketanji-brown-jackson-and-the-triumph-of-originalism-public-meaning-testimony-hearing-supreme-court-11648151063 [https://perma.cc/CFX7-LHJB] (stating that "Judge Jackson expressly disclaimed 'living constitutionalism' "); Mark Joseph Stern, *Ketanji Brown Jackson's Shrewd Tactic to Win Conservative Praise*, SLATE (Mar. 22, 2022, 6:03 PM), https://slate.com/news-and-politics/2022/03/ketanji-brown-jackson-originalism-textualism-conservative.html [https://perma.cc/D6JV-35XQ].

300. *Jackson Confirmation Hearing*, *supra* note 298, at 7:42.

301. 140 S. Ct. 1390 (2020). Some readers might consider it odd to focus on *Ramos* in discussing the Court's retreat from the doctrine of stare decisis. After all, the decision, which requires a unanimous verdict to convict, is a boon to criminal defendants. In contrast, this Article expresses concern about how the Court's retreat from stare decisis could harm criminal defendants. Despite these opposing outcomes, though, the Court's retreat from stare decisis is consistent—or perhaps even gaining momentum—which could significantly impact the procedures and substance of the criminal justice system.

302. And Justice Amy Coney Barrett had not even yet replaced Justice Ginsburg on the Court at the time the Court issued this opinion. *See* Sprunt, *supra* note 273 ("The Senate has voted 52-48 to confirm Judge Amy Coney Barrett to the Supreme Court, just about a week before Election Day and 30 days after she was nominated by President Trump to fill the seat of the late Justice Ruth Bader Ginsburg.").

303. 406 U.S. 404 (1972), *abrogated by Ramos*, 140 S. Ct. 1390.

304. *See generally id.*

305. *See Ramos*, 140 S. Ct. at 1402-04 (Gorsuch, J.) (arguing why stare decisis does not apply).

that supported a dual-track approach to incorporation.[306] In overturning the decision, the *Ramos* majority explained that the Court had repeatedly rejected such an approach[307] and "that a single Justice writing only for himself has the authority to bind th[e] Court to propositions it has already rejected" is "a new and dubious proposition."[308] And the majority went further, saying that, "[e]ven if [the Court] accepted the premise that *Apodaca* established a precedent, no one on the Court . . . [was] prepared to say it was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true."[309] Even Justice Sotomayor, who conceded the importance of stare decisis in her concurrence, explained that "[t]he force of *stare decisis* is at its nadir in cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections."[310] Justice Kavanaugh, who also voted in favor of overruling *Apodaca*, went into greater depth on his view of stare decisis in his concurrence. He identified three factors he deemed important in determining whether it is appropriate to overturn a case involving constitutional law: (1) whether the prior decision was "grievously or egregiously wrong,"[311] (2) whether "the prior decision caused significant negative jurisprudential or real-world consequences,"[312] and (3) whether "overruling the prior decision unduly upset reliance interests."[313] In examining these factors, Justice Kavanaugh determined that *Apodaca* was egregiously wrong because originalism required a different result."[314] Similarly voting to overrule *Apodaca*, Justice Thomas explained that he did not feel the pull of stare decisis in *Ramos* because he adhered to his long-held view that incorporation questions should be rooted in the

306. *See id.* at 1397-98; *id.* at 1425 (Alito, J., dissenting) ("Nearly a half century ago in *Apodaca v. Oregon*, the Court held that the Sixth Amendment permits non-unanimous verdicts in state criminal trials, and in all the years since then, no Justice has even hinted that *Apodaca* should be reconsidered." (citation omitted)).

307. *See id.* at 1398 (majority opinion) (stating that the Court had long rejected dual-track incorporation and that the Court had reiterated the point numerous times).

308. *Id.* at 1402.

309. *Id.* at 1404-05.

310. *Id.* at 1409 (Sotomayor, J., concurring) (alterations in original) (quoting Alleyne v. United States, 570 U.S. 99, 116 n.5 (2013)).

311. *Id.* at 1414 (Kavanaugh, J., concurring in part).

312. *Id.* at 1415.

313. *Id.*

314. *Id.* at 1416 ("*Apodaca* is egregiously wrong. The original meaning and this Court's precedents establish that the Sixth Amendment requires a unanimous jury . . . . [and] establish that the Fourteenth Amendment incorporates the Sixth Amendment jury trial right against the States." (citations omitted)). Justice Kavanaugh provided some additional reasoning to justify overruling *Apodaca*, explaining that that allowing convictions or non-unanimous verdicts allowed some people to be convicted who otherwise would not be, the practice had racist origins, and "overruling Apodaca would not unduly upset reliance interests." *See id.* at 1417-19.

Privileges and Immunities Clause rather than the Due Process Clause.[315] Under this reasoning, broad swaths of constitutional law are ripe for overruling.

Today's Court is even more originalist than the *Ramos* Court[316] and seems even more ready to overrule deeply rooted precedent that may be in tension with the Justices' originalist views. The conservative Court has already caused upheaval in various areas of constitutional law, but perhaps the case in which the Justices showed the most significant disregard of precedent is the infamous majority decision in *Dobbs*.[317] The Court's decision in this case overturned the 1973 case of *Roe*[318] and the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[319]—two cases holding that women have a limited right to abortion under the Fourteenth Amendment.[320] The *Dobbs* majority applied a historical approach, concluding that the Constitution does not protect a right to abortion because "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973," when the Court decided *Roe*.[321] Additionally, the Court determined that stare decisis did not require adhering to *Roe*, *Casey*, or the "more than 20 cases reaffirming or applying the constitutional right to abortion."[322] Instead, the majority emphasized that "*stare decisis* is not an inexorable command . . . and [that] it 'is at its weakest when we interpret the Constitution.' "[323] The Court then highlighted other decisions in which it had overruled precedents, including *Brown v. Board of Education*,[324] which

315. *See id.* at 1424-25 (Thomas, J., concurring in the judgment) ("[B]ecause all of the opinions in *Apodaca* addressed the Due Process Clause, its Fourteenth Amendment ruling does not bind us because the proper question here is the scope of the Privileges or Immunities Clause.").

316. *See supra* note 302 (noting that Justice Barrett replaced Justice Ginsburg on the Court in the fall of 2020).

317. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling *Casey* and *Roe*).

318. 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215.

319. 505 U.S. 833 (1992), *overruled by Dobbs*, 597 U.S. 215.

320. *See Dobbs*, 597 U.S. at 231 ("We hold that *Roe* and *Casey* must be overruled.").

321. *Id.* at 250; *see also id.* at 372 (Breyer, J., dissenting) ("The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again."). The Court said that "[t]he inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions." *Id.* at 250 (majority opinion).

322. *Id.* at 387 (Breyer, J., dissenting). As the dissent notes, the majority's discussion of history here is somewhat suspect because, as the majority concedes, abortion was generally criminal only after the fetus had "quicken[ed]." *See id.* at 242-50 (majority opinion); *id.* at 371 (Breyer, J., dissenting) ("Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before 'quickening'—the point when the fetus moved in the womb.").

323. *Id.* at 264 (majority opinion) (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

324. 347 U.S. 483 (1954).

struck down the "separate but equal" doctrine;[325] *West Coast Hotel Co. v. Parrish*,[326] which upheld minimum wage laws;[327] and *West Virginia Board of Education v. Barnette*,[328] which held that public schools students could not be forced to salute the American flag.[329] As even Justice Roberts pointed out in his concurrence, though, these other decisions do not actually "provide[] a template" for overruling *Roe* and *Casey* and are, in fact, quite different in that they were unanimous, decided shortly after the previous precedential opinion was issued, or were "part of a sea change in th[e] Court's interpretation of the Constitution."[330] Finally, the Court pointed to five factors that justified overruling the abortion decisions: (1) "the nature of th[e] error[s]" in *Roe* and *Casey*, (2) the lack of quality in these decisions' reasoning, (3) the lack of "workability" of the rules they laid out, (4) their "disruptive effect on other areas of the law," and (5) the lack of "concrete reliance" on these decisions.[331] Primarily, though, the Court focused on its view that *Roe* and *Casey* were "egregiously wrong and deeply damaging."[332]

Justices Breyer, Sotomayor, and Kagan's dissent in *Dobbs* attacked the majority for "revers[ing] course . . . for one reason and one reason only: because the composition of th[e] Court ha[d] changed."[333] As they explained, "[t]he Court depart[ed] from its obligation to faithfully and impartially apply the law."[334] The dissenters stated that, "[i]n the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* 'egregiously wrong.' "[335] They then cautioned: "That rule could equally spell the end of any precedent with

325. *See id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."); *see also Dobbs*, 597 U.S. at 264-65.

326. 300 U.S. 379 (1937).

327. *See id.* at 398-99 (determining that the state "legislature was entitled to adopt measures to reduce the evils of the 'sweating system' " and protect workers through minimum wage requirements and concluding that such measures could not "be regarded as arbitrary or capricious"); *see also Dobbs*, 597 U.S. at 265.

328. 319 U.S. 624 (1943).

329. *See id.* at 642 ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."); *see also Dobbs*, 597 U.S. at 265.

330. *Dobbs*, 597 U.S. at 358 (Roberts, J., concurring in the judgment); *see also id.* at 389 (Breyer, J., dissenting) ("The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does . . . .").

331. *Id.* at 268 (majority opinion).

332. *Id.*; *see also id.* at 294 ("Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket."); *id.* at 390 (Breyer, J., dissenting) ("In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* 'egregiously wrong.' ").

333. *Id.* at 364 (Breyer, J., dissenting).

334. *Id.* Notably, the dissenters say that they "dissent," rather than that they "respectfully dissent," which is the language ordinarily used. *Id.*

335. *Id.* at 390.

which a bare majority of the . . . Court disagrees."[336] "Power, not reason," the dissenters alleged, "is the new currency of th[e] Court's decisionmaking."[337] In the Eighth Amendment context, at least, the dissenters' prophecy may very well prove correct. The Court's willingness to disregard deeply rooted precedent, along with its adherence to originalism, which is at odds with the ESD, may result in the eradication of broad swaths of Eighth Amendment jurisprudence.

IV. A LOST EIGHTH AMENDMENT

The Court's dramatic turn toward originalism, paired with its ready willingness to disregard entrenched precedent, leaves the Eighth Amendment's ESD in question. The ESD methodology, to which the Court has generally remained loyal since the 1958 case of *Trop*, adopted a living constitution approach.[338] This is diametrically opposed to the Court's new steadfast reliance on originalism.[339] While the Court's movement away from the ESD in cases such as *Baze*, *Glossip*, and *Bucklew*[340] may have at first seemed like just a new approach in cases involving punishment techniques, or ways of carrying out methods of punishment, they perhaps now have greater significance. It seems the Court has been silently discarding the ESD in favor of a new originalist approach to the Eighth Amendment. While as recently as just a couple of years ago, it was almost unthinkable to imagine that the Court would overturn decades of consistent ESD jurisprudence,[341] the Court's recent blatant disregard of precedent in cases such as *Dobbs*[342] makes the possibility that the Court will overrule or abandon large swaths of Eighth Amendment precedents much more likely.

While we do not yet have a clear indication of how exactly each current Justice will interpret the Eighth Amendment, the Court's analysis in *Bucklew* may provide some insight. There, Justice Gorsuch authored the majority opinion, which suggests that the Amendment's language should be interpreted "as a reader at the time of the Eighth Amendment's adoption would have understood those words."[343]

---

336. *Id.*

337. *Id.* at 414.

338. *See supra* Section I.C.

339. *See supra* Section I.C.

340. *See supra* Part II (explaining the Court's movement away from the ESD in these cases).

341. *See* Ryan, *supra* note 15, at 1763 ("[I]t seems unlikely that the Court will upend the already existing Eighth Amendment categorical rules about unconstitutional punishments. . . . [P]erhaps the most referenced statement on Eighth Amendment jurisprudence is that '[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " (fourth alteration in original) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))).

342. *See supra* Section III.B.

343. Bucklew v. Precythe, 139 S. Ct. 1112, 1123 (2019). This is certainly an originalist interpretation.

Delving deeper, the Court stated that cruelty at that time was understood as "pleased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting," or "disposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness."[344] "Unusual" was understood as "long fallen out of use."[345] In translating these meanings into an examination of the execution technique at issue in *Bucklew*, the Court indicated that the Eighth Amendment prohibits "long disused (unusual) forms of punishment that intensif[y] the sentence of death with a (cruel) 'superadd[ition]' of 'terror, pain, or disgrace.' "[346] Although signing onto the majority opinion, Justice Thomas emphasized in his concurrence that he believes the punishment would be unconstitutional only if it *deliberately* superadded terror, pain, or disgrace.[347] This was the view that both he and Justice Scalia espoused in *Glossip*.[348] Regardless of whether deliberateness is required, though, the narrow test of superadded terror, pain, or disgrace would drastically limit the viability of an Eighth Amendment challenge to any emerging punishment technique.

The Court's view of the Eighth Amendment is likely even narrower when looking beyond specific execution techniques. Importantly, the

---

344. *Id.* (first quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773); and then quoting 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (alterations omitted)).

345. *Id.* Among other sources, the Court cites Professor John Stinneford's work for the meaning of "unusual," but the Court does not seem to adopt Stinneford's idea that the constitutionality of punishment practices can evolve and change over time. *See* John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 537 (2014) (explaining that "the original meaning of the Cruel and Unusual Punishments Clause . . . incorporates the doctrine of 'desuetude[,]' . . . [which] is the idea that a legally authorized practice loses its authority when it falls out of usage long enough that a 'negative custom' of non-usage has replaced it").

346. *Bucklew*, 139 S. Ct. at 1124 (second alteration in original) (quoting Baze v. Rees, 553 U.S. 35, 48 (2008) (plurality opinion)). The Court added that, to establish unconstitutionality, a prisoner would have to "show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Id.* at 1125. It is unclear how exactly this requirement flows from the original meaning of the Clause, though.

347. *See id.* at 1134-35 (Thomas, J., concurring) ("I adhere to my view that 'a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain.' " (quoting *Baze*, 553 U.S. at 94 (Thomas, J., concurring in the judgment))). The majority opinion in *Bucklew* could arguably also include such an intent element. The Court there explained that it had never struck down a state's method of execution because, "[f]ar from seeking to superadd terror, pain, or disgrace to their executions, the States have sought more nearly the opposite." *See id.* at 1124 (majority opinion). The Court repeated this sentiment in its 2020 per curiam opinion of *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020). The Court's idea of a state *seeking* to superadd terror, pain, or disgrace could very well suggest intention to do so.

348. *See* Glossip v. Gross, 576 U.S. 863, 899 (2015) (Thomas, J., concurring) (stating that "the Eighth Amendment . . . prohibits only those 'method[s] of execution' that are 'deliberately designed to inflict pain.' " (second alteration in original) (quoting *Baze*, 553 U.S. at 94 (Thomas, J., concurring in the judgment))).

Court's path away from the ESD and existing precedent could lead us to an originalist world in which only particular methods of punishment could be found unconstitutional. Again, the particulars of the Justices' originalist views are not yet entirely known, but the late Justice Scalia—the "Godfather" of originalism[349]—asserted in *Harmelin v. Michigan*[350] that "what evidence exists from debates at the state ratifying conventions that prompted the Bill of Rights as well as the floor debates in the First Congress which proposed it 'confirm[s] the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment.' "[351] Similarly, in *Graham v. Florida*,[352] Justice Thomas asserted that "[i]t is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous '*methods* of punishment'—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted."[353] The primary examples of such prohibited methods are the rack and the stake.[354] While Justice Thomas may remain something of an outlier on the Court, and the current originalist Justices have seemed to stray from Justice Scalia's approach in other contexts,[355] it would not be surprising for the originalist Justices to adopt this narrow view of the Amendment.

---

349. Jacob, *supra* note 150, at 595 ("Justice Antonin Scalia is widely recognized as the preeminent judicial proponent of the 'original meaning,' textualist approach to interpreting the United States Constitution. Supporters and opponents of originalism alike credit him as the contemporary Godfather of the originalist movement."); *see* Eric Berger, *Where Did Nino Go?*, DORF ON LAW (Oct. 9, 2023), https://www.dorfonlaw.org/2023/10/where-did-nino-go.html [https://perma.cc/9XJZ-4MRC] ("In conservative legal circles, Justice Scalia is not just an icon; he is *the* icon."). Although Justice Scalia is considered the godfather of originalism, there is good reason to believe that the conservative Justices on the Court are not exactly in Justice Scalia's mold. *See* Berger, *supra* ("And yet, given his iconic status, today's conservative Justices follow Justice Scalia less than one might expect. Methodologically, the Court today seems to depart from Scalia's stated preferences. . . . Substantively, today's conservatives are also pushing against Justice Scalia's stated preferences in some important areas.").

350. 501 U.S. 957 (1991).

351. *Id.* at 979 (alteration in original) (quoting Granucci, *supra* note 5, at 842).

352. 560 U.S. 48 (2010).

353. *Id.* at 99 (Thomas, J., dissenting) (quoting *Harmelin*, 501 U.S. at 979 (Scalia, J.)).

354. *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1123 (2019) (noting that "early commentators . . . described the Eighth Amendment as ruling out" such practices); *Harmelin*, 501 U.S. at 981 (Scalia, J.) (quoting James Bayard, who stated that "[t]he prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion" (quoting JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840))).

355. *See* Berger, *supra* note 349 (noting that the current conservative Justices have departed from Scalia in numerous ways).

Although good arguments can be made that the Punishments Clause has historically required proportionality of punishments,[356] originalist Justices have long disputed this.[357]

An Eighth Amendment approach focused on only methods of punishment would result in a loss of the gross disproportionality standard that the Court has applied in several cases examining challenges to harsh prison terms.[358] In *Solem v. Helm*,[359] for example, the Court found that a life sentence without the possibility of parole was a significantly disproportionate sentence for the crime of uttering a "no account" check in the amount of $100, even though the respondent was a habitual offender.[360] This rendered the punishment unconstitutional under the Eighth Amendment.[361] Nullifying this proportionality standard would narrow the scope of the Eighth Amendment prohibition on cruel and unusual punishments and likely leave prison terms untouched.

If only particular methods are deemed unconstitutional, then other existing case law would also be in doubt. For example, because they do not relate to particular punishment methods, prohibitions on executing juveniles[362] and intellectually disabled persons[363] would likely

356. *See, e.g.*, Michael J. Zydney Mannheimer, Harmelin*'s Faulty Originalism*, 14 NEV. L.J. 522, 540 (2014) (arguing that, in *Harmelin*, "Justice Scalia offered evidence that is, at best, ambiguous as to whether the Cruel and Unusual Punishments Clause was understood in 1791 to encompass a principle that demanded proportionality" and asserting that, "[m]ore importantly, the weight of the evidence supports the notion that the Clause did encompass some requirement of proportionality, though not necessarily between crime gravity and punishment severity"); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 907 (2011) (arguing for "the legitimacy of proportionality review by demonstrating that the Cruel and Unusual Punishments Clause was originally understood to prohibit excessive punishments").

357. *See, e.g.*, *Graham*, 560 U.S. at 99 (Thomas, J., dissenting) ("[T]here is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing."); *Harmelin*, 501 U.S. at 964 (Scalia, J.) ("[W]e have addressed . . . the question . . . with particular attention to the background of the Eighth Amendment . . . and to the understanding of the Eighth Amendment before the end of the 19th century . . . . We conclude from this examination that . . . the Eighth Amendment contains no proportionality guarantee.").

358. *See, e.g.*, Ewing v. California, 538 U.S. 11, 30-31 (2003) (plurality opinion) ("We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments.").

359. 463 U.S. 277 (1983).

360. *Id.* at 277, 303 ("We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.").

361. *See id.*

362. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

363. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that [executing intellectually disabled persons] is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986))).

disappear.[364] Similarly, life-without-parole sentences for juveniles who had not committed homicide offenses[365] or had suffered the mandatory imposition of the sentence[366] would likely no longer be considered unconstitutional. And other rules, such as that someone may not constitutionally be punished for being a drug addict,[367] would likely fall as well. In other words, this approach would erase more than a half-century of Eighth Amendment jurisprudence and leave the constitutional prohibition a mere shell of itself.

Such an originalist focus on the Amendment could also suggest that punishments acceptable at the time of the Founding would be grandfathered in; their status of constitutionality would be unmovable. The Court's assertion that the death penalty cannot be unconstitutional is a prime example.[368] This would mean the elimination of the one-way ratchet[369]: once a punishment is deemed constitutional, it could ordinarily not then become unconstitutional because the evolving views of society would be irrelevant. In addition to the forever-constitutional nature of the death penalty, punishments such as ear-cropping, splitting noses, and branding foreheads would remain constitutional.[370]

The Court has suggested that the meaning of the Eighth Amendment is not entirely static under this originalist approach, though.

---

364. While the prohibition on executing "insane" persons might similarly be in question, the Court's holding in *Ford v. Wainwright* indicates that this rule has a historical pedigree that might shield it from the Court's potential slash-and-burn approach to Eighth Amendment ESD jurisprudence. 477 U.S. at 401 ("For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.").

365. *See* Graham v. Florida, 560 U.S. 48, 82 (2010) ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.").

366. *See* Miller v. Alabama, 567 U.S. 460, 465 (2012) ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' ").

367. *See* Robinson v. California, 370 U.S. 660, 666-67 (1962) (holding that it is unconstitutional to punish someone for his narcotics addiction).

368. *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019) ("The Constitution allows capital punishment. In fact, death was 'the standard penalty for all serious crimes' at the time of the founding." (quoting STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 23 (2002))); Glossip v. Gross, 576 U.S. 863, 881 (2015) ("But we have time and again reaffirmed that capital punishment is not *per se* unconstitutional.").

369. *See supra* text accompanying notes 168-69 (describing the one-way ratchet).

370. *See* William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 327 (1986) ("[D]uring colonial times, pillorying, branding, and cropping and nailing of the ears were practiced in this country. Thus, if we were to turn blindly to history for answers to troubling constitutional questions, we would have to conclude that these practices would withstand challenge under the cruel and unusual clause . . . ." (footnote omitted)); David A.J. Richards, *Constitutional Interpretation, History, and the Death Penalty: A Book Review*, 71 CALIF. L. REV. 1372, 1394 (1983) (reviewing RAOUL BERGER, DEATH PENALTIES (1982)) (referring to "punishments acceptable in 1791, including, . . . branding the forehead, splitting noses, and cropping ears"). Whether states would actually employ these archaic punishments is another question.

Instead, its views seem to leave room for punishment innovation. In addition to emphasizing the constitutionality of a punishment such as the death penalty if it was acceptable at the Founding,[371] the Court has repeatedly highlighted that it has never struck down a method of execution that evolved after that time period.[372] And the Court has implied that it will not do so.[373] Thus, if yet a new method of punishment comes into existence, courts would then have to determine whether it is unconstitutional.[374] With punishment innovations, of course, there is not an easy answer from the time of the Founding as to whether the punishment is constitutionally acceptable. Judges would presumably look to whether the punishment superadds terror, pain, or disgrace.[375] And once the Court finds a new punishment to be constitutional, it has suggested that this determination should endure in perpetuity. In this originalist world, then, death by electrocution, lethal gas, and lethal injection, to name a few, could permanently remain constitutional. This would mean that, not only has the Court eliminated the one-way ratchet that moved in the direction of more enlightened punishment, but it has replaced this ESD ratchet with an umbrella of constitutionality that shelters an ever-growing arsenal of punishments.

All of this amounts to significantly narrowing the Eighth Amendment's protection. Accepting primitive punishment practices in use at the time of the Founding, welcoming new ways to carry out these punishments, and prohibiting only methods of punishment that superadd terror, pain, and disgrace would wipe out decades of Eighth Amendment rulings. And, in the near term, it would likely leave the Amendment as limiting only sadistic new lethal injection protocols and prison conditions.[376] In the long term, the Amendment could also lead the

371. *See, e.g.*, *Bucklew*, 139 S. Ct. at 1122 ("The Constitution allows capital punishment. In fact, death was the standard penalty for all serious crimes at the time of the founding." (internal quotations omitted)); *Glossip*, 576 U.S. at 881 ("But we have time and again reaffirmed that capital punishment is not *per se* unconstitutional."); *see also supra* note 368 and accompanying text.

372. *See, e.g.*, *Bucklew*, 139 S. Ct. at 1124 ("This Court has yet to hold that a State's method of execution qualifies as cruel and unusual . . . ."); *Glossip*, 576 U.S. at 869 ("While methods of execution have changed over the years, '[t]his Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.' " (alteration in original) (quoting Baze v. Rees, 553 U.S. 35, 48 (2008) (plurality opinion))); *see also, e.g.*, *Bucklew*, 139 S. Ct. at 1135 (Thomas, J., dissenting) ("Contrary to Justice Breyer's suggestion, my view does not render the Eighth Amendment 'a static prohibition' proscribing only 'the same things that it proscribed in the 18th century.' " (quoting *Bucklew*, 139 S. Ct. at 1144 (Breyer, J., dissenting))).

373. *See, e.g.*, *Bucklew*, 139 S. Ct. at 1124-26 (using the Court's failure to strike down any method of execution as evidence for upholding the challenged execution technique); *Glossip*, 576 U.S. at 869, 893 (same).

374. *See Bucklew*, 139 S. Ct. at 1125 (asking how, once one "accept[s] the possibility that a State might try to carry out an execution in an impermissibly cruel and unusual manner, . . . a court [can] determine when a State has crossed the line").

375. *See supra* text accompanying notes 343-48.

376. For one view on how the Court should reconfigure its Eighth Amendment analysis, see generally Kathryn E. Miller, *No Sense of Decency*, 98 WASH. L. REV. 115 (2023).

Court to potentially strike down other new methods of execution. But, assuming a new Court does not resurrect the Amendment as it has long been interpreted, the constitutional limitation on cruel and unusual punishments would largely fade away. In sum, the Court's rejection of the ESD, along with its embrace of originalism and disregard of precedent, would have the effect of returning most punishment questions to the individual states—a move lauded in *Dobbs* and other decisions by this originalist, precedent-defying Court.[377]

CONCLUSION

The Eighth Amendment is on the road to extinction. This originalist Court has no qualms about stripping down entrenched precedent and planting an originalist framework in its place. Considering the evolving nature of the Court's traditional Punishments Clause jurisprudence and the fact that it is a living constitution approach to interpretation, the Court is likely to swing its axe in this direction. But pushing back Eighth Amendment law to the time of the Founding as the originalist Justices likely envision will be detrimental to criminal defendants. More brutal methods of punishment could become commonplace, and categories of vulnerable persons—such as juveniles and intellectually disabled persons—would no longer be protected by the Amendment. Instead, the acceptability of punishments would be left to the political process, rendering the constitutional protections once offered by the Eighth Amendment virtually dead.

377. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) ("Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").