CRUEL AND UNUSUAL PUNISHMENT AND THE EIGHTH AMENDMENT AS A MANDATE FOR HUMAN DIGNITY: ANOTHER LOOK AT ORIGINAL INTENT

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Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?¹

I. INTRODUCTION

The Supreme Court has recently afforded death penalty opponents a new, if meager, victory in its declaration that the execution of the mentally retarded is unconstitutional.² Then in a public dissent from a denial of a request for a stay of execution, three justices urged the Court to revisit the constitutionality of executing juveniles.³ The fact that the Court’s activity in this regard has come by way of challenges to the application of the death penalty in a particular way (as inflicted on the mentally retarded or the young) should come as no surprise to those who have followed the judicial response to capital punishment chal-

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³ See Patterson v. Texas, 123 S.Ct. 24 (2002) (mem.). Dissenting from denial of certiorari were Stevens and Ginsburg, with whom Breyer joined. The dissenting justices urged reconsideration of Stanford v. Kentucky, 492 U.S. 361 (1989), in which the Court determined by a five to four vote that executing individuals sixteen or seventeen years of age is not an affront to the Eighth Amendment. In Thompson v. Oklahoma, 487 U.S. 815 (1988), the Court did determine that executing individuals under the age of sixteen is a violation of the Eighth Amendment.
challenges. *Gregg v. Georgia*, in which the Court upheld capital punishment and refused to hold that it is per se "cruel and unusual punishment," marked the beginning of the Supreme Court's course to make the death penalty, as leading death penalty critic Hugo Bedau has said, "uninteresting." Any serious scrutiny of capital punishment under the Eighth Amendment's "cruel and unusual punishments clause" stalled after *Gregg* effectively ended the debate that began in *Furman v. Georgia* just four years prior—the death penalty is not unconstitutional per se. *Gregg* may have brought a certain order out of the disorder that followed *Furman*, but the *Gregg* court's order was dissatisfying to total abolitionists. However, the recent assaults on the death penalty as appropriate criminal punishment perhaps merit a second look at a totally substantive constitutional approach to death penalty abolition.

This Article will examine the originalist approach to interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause and conclude that restricting the meaning of the Clause to the historical moment contemporary with ratification does an injustice to the truly "original intent" of the Framers that the Constitution was to serve American posterity in a truly meaningful way. I should clearly state that the purpose of this

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4. 428 U.S. 153 (1976). The Court held that the imposition of the death penalty for the crime of murder under Georgia's newly restructured sentencing laws did not violate the Eighth and Fourteenth Amendments.


6. 408 U.S. 238 (1972). The Court held that the imposition of the death penalty as administered under Georgia's discretionary sentencing standards violated the Eighth and Fourteenth Amendments. The decision effectively established a nationwide moratorium on the penalty until the Supreme Court finally gave its imprimatur to the death penalty under a revised sentencing scheme in *Gregg v. Georgia* in 1976.

7. There has been pro-abolition activity outside the Court; namely, the American Bar Association has recommended a moratorium on the death penalty, see ABA House of Delegates Recommendation (Feb. 3, 1997), available at http://www.abanet.org/lrr/rec107.html (visited January 14, 2004). In January, 2000, Illinois Governor George Ryan declared a statewide moratorium on executions. This decision was based on a concern that innocent people are being executed. Then in a staggering move less than 48 hours before he was to leave office, Governor Ryan commuted all 167 of Illinois' existing death sentences to prison sentences. *See* Jodi Wilgoren, *Citing Issue of Fairness Governor Clears Out Death Row in Illinois*, N.Y. Times, Jan. 12, 2003, at 1. The efforts are not without opposition, however. Florida is in fact considering revising its death penalty law to make it more resistant to legal challenge by changing the more lenient "or" in "cruel or unusual punishment," to the more difficult "and" after the federal model. *See* Dana Canedy, *Linking Cruel to Unusual with an 'And'*, N.Y. Times, Oct. 13, 2002, at 22.
piece is not to construct an argument that will persuade the current Supreme Court that the death penalty should be prohibited as unconstitutional per se. I was asked while preparing this article why I felt compelled to address this rather clichéd constitutional topic when the Court has consistently rejected per se attacks on the death penalty. Indeed, the makeup of the current Court does not appear to be fertile ground for the planting of a seed that would eventually grow into the termination of death as acceptable penal recourse in the United States. But, while the make-up of the Court changes, the fundamental import of the Constitution does not. In the face of a modest revival of hope for abolition, the illumination of constitutional principle relevant to the death penalty is my aim. As Justice Brennan has stated of his own particular, to some seemingly futile, persistent indictment of the death penalty, “when a justice perceives an interpretation of the text to have departed so far from its essential meaning that justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path. . . . [T]his type of dissent constitutes a statement by the judge as an individual: ‘Here I draw the line.’” And so it is here that I draw my line as to the constitutional position of the death penalty in contemporary American society.

Accordingly, the idea behind this article is not proof that the death penalty is or is not “cruel and unusual punishment” in twenty-first-century America (though I believe that it is); instead, this piece is an attempt to demonstrate that one can seriously consider the Fifth and Eighth Amendments to the United States Constitution and conclude that the death penalty is “cruel and unusual” and, therefore, unconstitutional, without doing violence to the “original intent” of the Framers. In constructing this argument, I will address the proposition of the Fifth Amendment’s apparent approval of capital punishment and conclude that the Fifth is not an insurmountable hindrance to per se unconstitutionality of the death penalty under the Eighth. I will briefly examine the English and American history of the death penalty,

8. William J. Brennan, Jr., In Defense of Dissents, 37 Hastings L.J. 427, 437 (1986). Indeed, Justice Brennan’s magnificently eloquent condemnations of the death penalty may not have convinced a majority of the American Court that the death penalty is unconstitutional per se, but his jurisprudence in this regard has been at the forefront of the international abolition movement. See infra notes 105-140 and accompanying text, discussing South Africa’s judicial abolition of the death penalty.
explore a comparative analogy of the constitutional position of the death penalty with that of slavery, and briefly look at the international abolitionist perspective via the development of South African constitutional jurisprudence regarding the death penalty.

II. AN INTRODUCTION TO THE ORIGINALISM ARGUMENT AND THE EIGHTH AMENDMENT

In 1977, leading death penalty abolitionist Hugo Bedau wrote that “until fifteen years ago, save for a few mavericks, no one gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law. . . . save for a few eccentrics and visionaries [the death penalty] was taken for granted by all men . . . as a bulwark of social order.”9 Likewise, critic Steven Levinson considered it a “devastating problem” that “both the Fifth and Eighth Amendments specifically acknowledge the possibility of a death penalty.” “They require,” he remarked, “only that due process of law be followed before a person can be deprived of life.”10 It is, of course, unquestionable that the death penalty existed in the colonies and in the fledgling United States, before and after the ratification of the Bill of Rights. Thus the phrase “cruel and unusual” has for many taken on a particular content, which is to say that it has been endowed with definition contemporary with the framing, as though those definitions “stood in the text” of the Constitution.11 Thus, proponents, and some opponents, of the death penalty have concluded that whatever the phrase “cruel and unusual” meant, it was not engineered to apply to the death penalty, unless the penalty was accompanied by torture or the like. Death penalty proponent Raoul Berger, for instance, is convinced that the death penalty cannot be unconstitutional because the words “cruel and unusual” were borrowed from the English Bill of Rights of 1689, and the British government continued to punish a “crowded catalogue of offenses” by death in England and in the colonies for a

11. Id.
long period after 1689.\textsuperscript{12} The logic continues that the Framers, as Englishmen, accepted the death penalty and did not intend to displace it by the Eighth Amendment; in fact, their wholesale acceptance meant that they necessarily meant to exclude it from possible per se constitutional illegitimacy. The argument is not new, and its variations are circuitous, but in general it always includes the basic proposition that the Cruel and Unusual Punishments Clause specifically excludes death from its strictures because the Constitution also includes the Fifth Amendment's reference to "capital" crimes and that "no person" can be deprived of "life, liberty, or property without due process of law."\textsuperscript{13} Thus, searching for a foundation for the constitutionality of capital punishment, proponents divine that since the two amendments were passed contemporaneously, the Eighth Amendment cannot possibly apply to death per se. This sort of interpretive "originalism" seeks to tie the meaning of the cruel and unusual punishments clause to only those forms of punishment that the Framers would necessarily have viewed as prohibited by the Clause at the time,\textsuperscript{14} or at least, to limit those punishments declared unconstitutional to those that can be congruously juxtaposed against a very brief list of disfavored punishments drawn from English and American penal history of the sixteenth and seventeenth centuries.\textsuperscript{15}

I would contend, however, that this approach fails to grasp the true genius of the Eighth Amendment, which is that its very construction invites successive generations of Americans (and the Court as arbiter and defender of their rights) to pose the inquiry of what constitutes a cruel and unusual punishment against a paradigm of modernity, not bound by reference to a fixed historical point. Nevertheless, the history of capital punishment in the United States has been long and arduous, and proponents of the ultimate penalty point to its historic entrenchment as justification for its perpetuation. Even abolitionists like the late Chief


\textsuperscript{13} U.S. CONST. amend. V.

\textsuperscript{14} I think it bears noting that there was also a contemporaneous abolition movement. Notably, Dr. Benjamin Rush gave lectures on the topic at the home of none other than Benjamin Franklin. Franklin became an advocate of reform, as did the then Attorney General, William Bradford. \textit{See THE DEATH PENALTY IN AMERICA} 7-8 (Hugo Adam Bedau, ed., 1967).

\textsuperscript{15} Bedau, \textit{supra} note 5, at 106.
Justice Earl Warren could be caught up in the antiquity of the whole thing. In *Trop v. Dulles* he wrote,

> Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.\(^\text{16}\)

Thus, in order to most adequately discern the basic purpose of the Eighth Amendment's Cruel and Unusual Punishments Clause, and it must have been included to serve an actual purpose, we must briefly visit the history of criminal punishment in the United States.

III. AN HISTORIC CULTURE OF DEATH

The beginning of the death penalty in America dates back to the arrival of the colonists, who brought with them a certain morbid heritage as Englishmen. English law first recognized the impact of crime on society at large, necessitating a governmental punishment of criminals.\(^\text{17}\) In 1500, there were eight capital crimes in the form of treason, petty treason (the killing of a husband by his wife), murder, larceny, robbery, burglary, rape and arson.\(^\text{18}\) The Tudors and Stuarts were experts in the proliferation of death, and by 1688 there were nearly fifty crimes for which the ultimate penalty was applicable.\(^\text{19}\) The Hanoverians were not better; George II added thirty-six more capital crimes, and George III added sixty more.\(^\text{20}\) Particularly notable with regard to the English antecedents of American penal law is the Bloody Assizes. This "reign of terror" that existed partially during both the reigns of the Stuart kings Charles II and James II saw capital punishment wielded with a vengeance to silence political dissidents. Irving Brant, in an account of the Bloody Assizes wrote:

> Nobody knows how many hundreds of men, innocent or of unproved guilt, Jeffreys [the Lord Chief Justice at the time] sent to their deaths in the pseudo trials that followed Monmouth's feeble and stupid attempt to seize the throne. When the ordeal ended, scores had been executed and 1,260 were await-


\(^{17}\) See Furman v. Georgia, 408 U.S. 238, 333 (1972).

\(^{18}\) Id. at 334.

\(^{19}\) Id.

\(^{20}\) Id.
ing the hangman in three counties. To be absent from home during the uprising was evidence of guilt. Mere death was considered much too mild for the villagers and farmers rounded up in these raids. The directions to a high sheriff were to provide an ax, a cleaver, a furnace or cauldron to boil their heads and quarters, and soil to boil therewith, half a bushel to each traitor, and tar to tar them with, and a sufficient number of spears and poles to fix their heads and quarters' along the highways. One could have crossed a good part of northern England by their guidance.\textsuperscript{21}

Measured by this horrific gauge, penal law in the colonies was far less despairing. As Bedau has written, had Blackstone made this sort of comparison, as he compared England and continental Europe, it would have been "somewhat less than flattering to the mother country."\textsuperscript{22} It is true, of course, that the American colonies had no uniform criminal law, some colonies having crafted more severe penal codes than others. But there was in the colonies a more prevailing spirit of temperance in punishment. South Jersey, for instance, did not prescribe the death penalty until nearly forty-five years after its charter.\textsuperscript{23} William Penn specifically limited the prescription of the death penalty in Pennsylvania to the crimes of treason and murder.\textsuperscript{24} These promising beginnings would, however, be overridden when the British government required the adoption of a far more severe criminal code.\textsuperscript{25} Massachusetts—starting out as the Massachusetts Bay Colony originally with the Capitall Lawes of New-England, which hosted a plethora of crimes based on adaptations of the Old Testament—had only nine recognized capital crimes by 1785.\textsuperscript{26}

Even when broader and more severe penal codes were operative, there was still a general distinction between the colonies and Britain in that, though the codes waxed medieval on paper, there was an abiding reluctance in implementation.\textsuperscript{27} The methods of implementation, too, were markedly different. If in England drawing and quartering and equally heinous methods of

\textsuperscript{21} Quoted in Furman, 408 U.S at 254 (Douglas, J., concurring).
\textsuperscript{22} The Death Penalty in America, supra note 14, at 5.
\textsuperscript{23} Id. at 6.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 6-7.
execution were standard practice, hanging was the preferred method for colonial justice, though slaves and Indians were sometimes burnt.\(^{28}\) Even the victims of the infamous Salem witch trials were hanged, not burnt at the stake, as was the traditional practice across the Atlantic.\(^{29}\) The foregoing notwithstanding, by the Revolution, all murders and most homicides in the colonies were automatically punishable by death.\(^{30}\)

IV. CONSTITUTIONAL DEVELOPMENTS

Originally, conviction of a capital crime was an automatic death sentence, since the law provided no alternative punishment.\(^{31}\) However, state law changed significantly as legislatures began to reject the automatic death penalty scheme in the early nineteenth century. American juries were gradually given the authority to make binding "recommendations" for death or life imprisonment.\(^{32}\) Some jurisdictions, however, allowed a jury recommendation to serve only as that, a recommendation, with the judge as the final arbiter of punishment.\(^{33}\) In either situation, courts gave little or no guidance on how to make the choice between life imprisonment and death. This new system remained unchanged until 1972.\(^{34}\)

Legal attacks in the 1960s focused on the manner in which the death penalty operated in practice. Although allowing the jury discretion in the death sentence was arguably less severe than the old model of automatic death, it also allowed death to be handed out in an arbitrary and discriminatory manner because the jury was given no guidance in the imposition of death.\(^{35}\) The fate of the prisoner was the total caprice of those in the jury box; and it is was not always certain, indeed it still is not, that

\(^{28}\) Id. at 24.

\(^{29}\) Id.

\(^{30}\) The Death Penalty in America, supra note 14, at 4.


\(^{32}\) Id. at 5-6.

\(^{33}\) Id. at 6.

\(^{34}\) See Furman, 408 U.S. 238 (1972).

\(^{35}\) A consequence of this lack of standards was that the defendant and his lawyer also had no guidance as to what the jury would consider worthy of the death penalty.
such decisions were not based upon extrajudicial factors. As reflected in the case law briefly recounted below, the arbitrary and discriminatory manner in which the death penalty was inflicted became the primary focus of judicial criticism in the following years.

A. THE TEMPORARY HALT OF THE DEATH PENALTY AND ITS REINSTATEMENT

The imposition of the death penalty was temporarily halted when the Supreme Court decided the landmark case of Furman v. Georgia in 1972. In the longest written opinion in the Court’s history, the high Court ruled five to four that the death penalty as applied by many states was unconstitutional. Though the justices agreed that the death penalty was unconstitutional, they could not reach a consensus as to the reasoning. Two of the justices, Brennan and Marshall, found that the death penalty was per se unconstitutional because it served no legitimate deterrent or retributional purpose and violated “evolving standards of decency.” Several other justices, comprising the swing votes, decided that the random infliction of the death penalty under the unguided discretion schemes, along with racial discrimination in implementation, violated the Eighth Amendment.

Thus, the basis for the Furman ruling of unconstitutionality was procedural, and the total abolition that some of the justices had eagerly sought was not to be. The Court refused to engage,

36. See McCleskey v. Kemp, 481 U.S. 279 (1987) (discussing the statistical indications that race is a factor in capital sentencing); Current Controversies, supra note 31, at 6.
37. 408 U.S. 238 (1972).
38. More than 200 pages constitute the per curiam decision, with nine individual opinions by the justices.
39. Furman, 408 U.S. at 269-82, 327-30. The concept of “evolving standards of decency” had first been propounded by Chief Justice Warren in Trop v. Dulles, 356 U.S. 86 (1958), a non-capital case in which the Court decided that penal expatriation was a violation of the Cruel and Unusual Punishments Clause.
40. Id. at 240-57 (Douglas J., concurring), 306-10 (Stewart, J., concurring), 310-14 (White, J., concurring).
41. Even Justice Douglas, who wrote the more modest and restrained opinion that would speak for the Court, wrote to Brennan, “I hope total abolition is what we accomplished.” For the consensus building behind the Furman decision, see Kim Isaac Eisler, A Justice for All: William J. Brennan, Jr., and the Decisions that Transformed America 245 (1993).
as a whole,\textsuperscript{42} in a substantive analysis of the death penalty itself as being cruel and unusual. Because the U.S. Constitution recognizes the death penalty in the assurance that "no person shall be deprived of life . . . without due process of law," the death penalty could not be invalidated as per se unconstitutional. The result was that the states could restore the death penalty by passing new capital punishment laws that limited and directed jury discretion so that the discriminatory and arbitrary effects in the death penalty's implementation were alleviated.

Following the Supreme Court's decision in \textit{Furman}, thirty-four states and the federal government enacted new death penalty laws with the goal of satisfying the effects described as unconstitutional by the Court.\textsuperscript{43} The new death penalty laws took two forms. Several states returned to mandatory death penalty categories of capital offenses, allegedly solving the problem of unguided jury discretion by eliminating discretion completely. These automatic death penalty schemes were later struck down as unconstitutional under the Eighth Amendment.\textsuperscript{44} Second, the vast majority of states enacted guided discretion statutes, which required that the jury find aggravating circumstances and make a recommendation that the death penalty be imposed.\textsuperscript{45} At the penalty trial, the judge or jury would weigh the aggravating factors against the mitigating factors concerning the criminal or the crime and then determine whether the death penalty was an appropriate punishment.\textsuperscript{46}

In 1976, in \textit{Gregg v. Georgia} and companion cases from four other states, the Supreme Court in a seven to two vote\textsuperscript{47} found

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\item \textsuperscript{42} See the concurring opinions of Justices Brennan and Marshall in \textit{Furman}, 408 U.S. at 305 (Brennan, J., concurring), 370 (Marshall, J., concurring).
\item \textsuperscript{43} See Jan Gorecki, \textit{Capital Punishment: Criminal Law and Social Evolution} 15 (1983).
\item \textsuperscript{44} In Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976), the Court invalidated mandatory death sentences and created the concept of "individualized sentencing." Relying on the Eighth Amendment, the Court held that mandatory sentences were inconsistent with contemporary ideas regarding punishment and were cruel and unusual and that aggravated and mitigating circumstances must be considered in each case. See \textit{Woodson}, 428 U.S. at 302-03; \textit{Roberts}, 428 U.S. at 333-34.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Recently, in Ring v. Arizona, 536 U.S. 584, (2002), on Sixth Amendment grounds, the Supreme Court held that a jury, not a judge, must make the determination as to these aggravating factors.
\item \textsuperscript{47} Justices Brennan and Marshall persisted in their view that the death penalty is in all cases cruel and unusual punishment. They continued to dissent from the
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that the statutes implemented to guide jurors rendered the use of the death penalty once again constitutional. The Court's plurality decision rejected the argument that the death penalty was in all circumstances unconstitutional via the Eighth Amendment. Justice Stewart, writing for the plurality, stated that a punishment was constitutional if it comported with "evolving standards of human decency," as these values were reflected in "contemporary public attitudes" and with the Eighth's concept of the "dignity of man." The death penalty satisfied the first test because public opinion as reflected in the reenactment of the death penalty by state legislatures after Furman showed that the punishment did not violate evolving standards of decency. Further, the death penalty did not violate the "dignity of man" because it served legitimate retributive and deterrent purposes.

B. CALLINS AND TWO COMPETING CONSTITUTIONAL COMMANDS

The decision in Gregg stopped far short of resolving all problems associated with the death penalty. Nearly twenty years later, Justice Blackmun, in his dissenting opinion in Callins v. Collins, famously declared "From this day forward, I no longer shall tinker with the machinery of death." Justice Blackmun argued that the Court's efforts to reconcile the two conflicting constitutional requirements, individual sentencing and consistency in application, in the imposition of the death penalty had failed. In recognition of this, Blackmun concluded that "the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to

denial of certiorari in death penalty cases after Gregg on this basis by making the following statement: "Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments (citations omitted), we would grant certiorari and vacate the death sentences in these cases." Quoted in Michael Mello, Against the Death Penalty: The Relentless Dissents of Justices Brennan and Marshall 168 (1996).

48. See Gregg, 428 U.S. at 198.
49. Id. at 179-80.
50. Id. at 172-73.
51. Id. at 179-90.
52. Id. at 184-87.
53. 510 U.S. 1141(1994) (mem.).
54. Callins, 114 S.Ct. at 1130 (Blackmun, J., dissenting).
harmonize them." Justice Blackmun argued that the incompatible constitutional demands of the right to individuality and the right to consistency each have their foundation in liberal political theory and in the language and spirit of the American constitutional tradition. The right to consistency was "the constitutional goal of eliminating arbitrariness and discrimination from the administration of death," which is a basic component of due process. In other words, the death penalty should be administered by objective standards rather than by whim or caprice to avoid the violation of this right. In contrast, the right to individualized sentencing in capital punishment is a direct right flowing from the aspiration of individual freedom, which Blackmun described as "an equally essential component of fundamental fairness." Thus, individualized sentencing insures that the state should only punish criminals in relation to their individual culpability and moral responsibility.

Justices Blackmun and Scalia agreed that these two constitutional rights are in direct conflict with one another, but the two are wildly divergent when it comes to the logical solution to the problem. Blackmun best characterized the irreconcilable nature of the conflict when he argued that "[e]xperience has shown that the consistency and rationality promised in Furman are inversely related to the fairness owed the individual when considering a sentence of death. A step towards consistency is a step away from fairness." In Blackmun's opinion, it is impossible to reconcile the two constitutional commands. According to Justice Blackmun, the only way to resolve these incompatible ideals is by prohibiting the use of the death penalty, at least temporarily. While Justice Blackmun appeared to concede that the death penalty cannot be per se unconstitutional because it is explicitly mentioned in the context of the Fifth Amendment due process clause, he argued that the death penalty "as currently administered" violated the core values of the Constitution.

55. Id. at 1137.
56. See generally id. at 1128-38.
57. Id. at 1129.
58. Id.
59. Id. at 1132. In Furman, 408 U.S. 238, the Supreme Court held that the death penalty, as it was then administered, violated the Constitution because of the lack of constraints on the discretion of sentencing juries.
60. Callins, 114 S.Ct. at 1132.
61. Id. at 1138.
On the other hand, Justice Scalia, in a concurrence written explicitly to take issue with Justice Blackmun's reasoning, rejected the conclusion that the death penalty should be prohibited. According to Scalia, the answer was to overrule the prior decisions mandating the right to individualized sentencing in capital punishment cases. This right was a judicially created right, not one grounded in the text of the Constitution. In contrast, capital punishment is explicitly in the Constitution, as the Fifth Amendment says that no person "shall be deprived of life . . . without due process of law." Therefore, Scalia argued that capital punishment and textualism should take priority over judicially created fundamental rights.

V. CONSTITUTIONAL ASPIRATION AS ANOTHER APPROACH TO ORIGINAL INTENT

Justice Scalia seizes on the originalist argument in Callins, demonstrating, once again, its central thrust, that the Framers explicitly accepted the efficacy of death as punishment and enshrined it in the Constitution. They lived with the death penalty and they intended its continuation as long as the condemned was afforded due process. This is the conclusion Justice Scalia and others believe is dictated by history. Merely concluding, however, that the death penalty existed prior to and at the time of the Framing says little about what this fact might mean in terms of constitutional interpretation. As Justice Brennan has admonished "[o]ur inquiry does not begin with the judgment of history, though the actual operation of a practice viewed in retrospect may help to assess its workings with respect to constitutional limitations. . . Rather inquiry must commence with iden-

62. Id. at 1128.
63. U.S. Const. amend. V.
64. See Callins, 114 S.Ct. at 1128. In a typically vitriolic concurrence, Justice Scalia lambasted Justice Blackmun's assertions that the death penalty violates the Eighth Amendment, because Scalia believes there is no "textual or historical support" for this "intellectual, moral, and personal" perception of the Constitution. Concluding that the Constitution is not an intellectual and moral document is as inexplicable to me as is Justice Scalia's conclusion that the convictions of a majority of modern Americans that the death penalty is contrary to the principles of their democratic society would not be a basis for invalidating the death penalty under the Eighth Amendment, while their institutionalized vengeance apparently is a perfectly acceptable support for the death penalty's continuation.
tification of the constitutional limitations implicated by a challenged governmental practice."

So, we must consider that the Bill of Rights came some 100 years after the Bloody Assizes, and as our historiography has shown, the more horrendous kinds of punishment concomitant with the Stuarts were virtually non-existent at the time of the Founding. Naturally the Framers would have marked with disapprobation forms of punishment that included burying alive, drawing and quartering, tearing asunder, or breaking on the wheel. These concepts were alien blights that might have been part of their English heritage but that were not a part of their colonial reality. Surely neither they nor we must measure a punishment by such a barbarous plumb line in order to conclude that it is barred from sanction by the Eighth Amendment. That the Constitution might speak to the institution of the death penalty by providing procedural safeguards if the punishment were to be assigned is no indication that the Founders intended to remove it from substantive constitutional scrutiny.

Support for this theory can be found in the anti-slavery philosophy of the Civil War era. At the time, pro-slavers drew much from the fact that the Constitution, at least implicitly they reasoned, supported slavery by acknowledging it and accommodating it. Surely the argument can be made that, since slavery was part of the environment of the Founding, the Constitution was indeed intended as a pro-slavery document, meant to sanction and preserve slavery. It is not unreasonable for a reader to contemplate the three-fifths clause or the provisions regarding fugitive slaves and to determine that the Constitution was indeed a pro-slavery document and that a Thirteenth Amendment was indeed necessary to make slavery unconstitutional in the United States. This line of reasoning, however, has a converse that is perhaps more appealing and certainly more morally sound than the

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66. See section III, supra.
67. Nowhere is this argument given more powerful voice than in Scott v. Sanford, 60 U.S. 393 (1856), more infamously known as the Dred Scott case. There, the Court, through Chief Justice Roger Taney, used an "originalism" argument to declare, among other abysmal proclamations, that slaves could never be citizens under the Constitution. Id. at 403-06.
68. Indeed, these arguments were not the exclusive property of pro-slavers. William Lloyd Garrison, a radical abolitionist, viewed the Constitution as "a covenant with death, and an agreement with hell." See 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, EARLY YEARS, 1817-1849 41 (Philip S. Foner, ed., 1950).
more obvious approach. Frederick Douglass, for instance, concluded that slavery had always lacked authority under the Constitution, reasoning that the Framers fully expected the eventual abolition of slavery and that they purposely excluded any words that would legitimize the institution. Likewise, Abraham Lincoln maintained that slavery was only provided for in the Constitution by “covert language” and that the Founders “expected and intended the institution of slavery to come to an end.” Both views are plausible; of course, we know that the Thirteenth Amendment resolved the slavery controversy.

But at obvious common issue in the slavery and death penalty debates is the problem of ascertaining the meaning of the Constitution. The radical political abolitionists maintained that even if custom or history had established or preserved slavery, the Constitution’s positive law of liberty and equality could most certainly displace it. For support, the abolitionists looked to Virginia’s Declaration of Rights, which stated “[t]hat all men are by nature equally free and independent. . .” In the same way, Virginia’s Declaration of Rights, as precursor to the federal Bill of Rights, can lend support to abolition of the death penalty on substantive grounds. Virginia’s Declaration of Rights sheds considerable light on the interpretation of the social contract theory paramount in the Founders’ thinking. If one believes, as I do, that the Declaration of Independence was the precursor and foundation of the Constitution, it could certainly be argued that Jefferson’s inalienable rights, obviously restatements of Locke’s theory, might be treated in the same way that Locke himself would have treated them. That is to say, Locke believed that while one might be endowed with inalienable rights, he could forfeit those rights; such was the price of governmental stability. Virginia’s Declaration, however, reveals that there was among the Founders a very different concept of Locke’s inaliena-

71. See U.S. CONST. amend. XIII (abolishing slavery).
73. In fact John Locke defined political power as “a right of making laws with penalties of death.” TWO TREASURIES OF GOVERNMENT (1690)(Peter Laslett, ed., 2d ed. 1963), quoted in BEDAU, DEATH IS DIFFERENT, supra note 5, at 93.
ble rights. The Virginia Declaration states that "all men . . . have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact deprive or divest their posterity, namely the enjoyment of life and liberty." These were the themes of the Declaration of Independence as drafted by Jefferson, a Virginia native. These were the aspirations that the Founders enshrined in the Bill of Rights. It, for me, is of no moment that the same draftsmen of the Eighth Amendment enacted the Act of April 30, 1790, which cataloged a number of offenses for which the perpetrator could incur the ultimate penalty of death. Even if this is to be read as evincing the Framers' understanding that death penalties had not been barred by the Eighth Amendment, this goes only to the practical and pragmatic understanding of the way the Constitution operated at the moment. Of course, looking to the paramount goal of union, the Framers in their end-conscious ambiguity did not provide us with an answer. They were not merely concerned with creating a government and laying down static concepts for its immediate maintenance, but also with the elucidation of principles that would be applicable to generations of citizens to come. This is undoubtedly what Justice Brennan recognized when he wrote, "[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs." The phrase "cruel and unusual punishments" was used, then, with the awareness that it is ambiguous and open to interpretation. It is no wonder that the Framers did

74. Id.
75. 1 Stat. 115, authorizing the death penalty for murder, forgery of public securities, robbery, and rape.
76. Berger, supra note 12, at 132.
78. See Leonard W. Levy, Original Intent and the Framers' Constitution 349 (1988). "When the Framers were ambiguous or vague, the likely reason is that they meant to be. They intended their ambiguity and vagueness to be pregnant with meaning for unborn generations, rather than be restricted to whatever meaning then existed. We must look for the purpose they sought to achieve in a clause, not in their application of it. We must look for the principle implicit in their text, not for something to be revealed in an analysis of their practices. . . Thus, when the Framers left a crucial term wide open, as in . . . 'cruel and unusual punishment,' they probably chose words deliberatively, leaving room for the widest possible interpretation."
not undertake to address and rectify every conceivable and debatable social and moral ill. As Gordon Wood has put it succinctly, "Reconciling the new Constitution with popular principles was not easy. There is little doubt that on its face the Constitution violated much of the conventional popular thinking of late eighteenth-century America." But, the Framers in their measured ambiguity stepped beyond the immediate bounds of the Founding and contemplated a continuing Republic with egalitarian principles that would not only survive, but also thrive and mature. If a majority of James Madison’s contemporaries would vote for death to their citizenry, the validity of the constitutional aspirations for a nation of emerging dignity and human respect are not thwarted. The sometimes inapposite practical immediacy of the Constitution can be separated from the enduring aspiration. As we have seen, the Framers would compromise on the issue of slavery within the very text of the Constitution, yet we need not, and I would contend should not, view this compromise as their unreserved support for the institution. A contemporary movement that restricts the full reach of the Constitution at a given moment in time does no damage to the transcendental validity of the Constitution to future generations who might realize it to its fullest working potential.

It is not necessary, then, to perceive the Fifth Amendment’s recognition of “capital” crimes, etcetera, as a constitutional validation of the death penalty. It is more logical to view the applicable portions of the Fifth Amendment as an insurance policy that capital punishment, not being immediately removed by the Constitution, would be carried out in as fair a way as possible. As Bruce Ledewitz has stated,

The Fifth Amendment no more turns the Constitution into a pro death penalty document than the fugitive slave provision turns the Constitution into a proslavery document. The Fifth Amendment represents a limitation on capital punishment, in that it was not to be carried out in the future as it had been in the past. One could hardly call the due process clause an endorsement of capital punishment. It acknowledges that capital punishment was a prevailing practice, but this recognition is similar to the recognition accorded slavery. The genuine prin-

80. See supra text accompanying note 67.
principle of the Constitution is "life," just as surely as it is "equality."81

Thus, while the Fifth Amendment's juxtaposition against the Eighth is testament that the Constitution did not immediately destroy all anathema institutions, its remarkable bedrock principles of liberty, equality and respect for human worth are, in the least, weapons for a future generation to do just that. As Justice Brennan has stated: "[the Fifth Amendment] does not, after all, declare that the right of the Congress to punish capital shall be inviolable; it merely requires that when and if death is a possible punishment, the defendant shall enjoy certain procedural safeguards. . .what one can fairly say is that they sought to ensure that if there was capital punishment, the process by which the accused was to be convicted would be especially reliable."82 And, as Michael Perry has succinctly stated: "The ratifiers' expectation that reliance on the death penalty would persist into the future and their decision, given that expectation, to regulate imposition of the penalty do not constitute a decision to authorize reliance on the death penalty, to constitutionalize the death penalty—in that sense, they do not constitute a decision to exempt the death penalty from possible prohibition by the Eighth Amendment."83 Viewing the interaction of the Fifth and Eighth Amendments in this way, with the Fifth Amendment as a structure to deal with the practical rather than the ideal, leaves room for the promises of the Declaration to be realized, recognized in their fullness, if not by the Framers' generation, then by the posterity to which and for which the Declaration and Constitution were directly written. If the Constitution dealt with the pragmatic concerns of construction and maintenance of a fledgling government, thereby turning a practical phrase toward an immediate problem, it certainly did not displace by its practicality the ideals of the Declaration.

It is inescapable, I think, that the Constitution was not considered by the Framers to be a replacement for the Declaration

of Independence or even a completely separate construct, but rather to be the implementation of the Declaration's ideals in government. In fact, these ideals, given voice in the egalitarian formula of the Declaration, would, less than a century into the nation's life, result in the most fundamental schism a nation can face: civil war. In the so-called *Cornerstone* speech given by Alexander Hamilton Stephens, vice-president of the Confederacy, this truth was clearly stated in the context of the slavery question.

The prevailing ideas entertained by him [referring to Thomas Jefferson] and by most of the leading statesmen of the time of the formation of the old constitution, were that the enslavement of the African was in violation of the laws of nature; that it was wrong in principle, socially, morally, and politically. It was an evil they knew not well how to deal with but the general opinion of the men of that day was, that somehow or other, in the order of Providence, the institution would be evanescent and pass away. This idea, though not incorporated in the Constitution, was the prevailing idea at the time. This is recognition, tacit at least, that the aspirations we find given voice in the Declaration were, though not explicitly mentioned, part of the fabric of the Constitution. The Framers, Stephens intimates, may have by their relative inaction secured slavery's existence in the moment, but the underlying aspirations of the Constitution fully contemplated its eventual demise. In sum, their momentary accommodation of slavery was not a constitutionalization of it.

We have of course made the analogy between slavery and the death penalty. We can equally say that by including the Cruel and Unusual Punishments Clause the Framers were at least contemplating that the death penalty itself might be substantively unconstitutional. It, like slavery, was a well-established social institution that would not be immediately displaced by the Consti-

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84. *See The Spirit of the Constitution: Five Conversations* 60 (Robert A. Goldwin and Robert A. Licht, eds., 1990). "After Article VII of the Constitution, the last article of the original, unamended Constitution, the Constitution reads 'done in Convention, by the unanimous consent of the States present, the Seventeenth day of September in the year of our Lord one thousand seven hundred and eighty seven, and of the Independence of the United States of America the twelfth.' In other words the United States began in 1776. Right in the Constitution itself the framers asserted a connection between the Declaration of Independence and the Constitution."

tution. Yet, the Framers, already virtually free of the most horrific English punishments, provided this amazing clause that would invite consecutive generations to visit the issue again and again; and perhaps, to bring corporal punishment in line with the underlying precept of the Constitution, the basis without which none of the Constitution’s pronouncements about the “good” government can make any sense—that the United States is to have a government whose every action is to be judged against the Declaration’s, through its continuation in the Constitution, exposition of human worth and dignity.

Mr. Stephens recognized that the Constitution from its very inception was incompatible with an institution that did not recognize the equal worth of all human beings. He also, implicitly at least, recognized the true miracle of the Constitution in that its operation is not trapped in a fixed historical moment so that its application to modernity can only be a repetition of its working in history. The Constitution, he recognized, could serve as the basis for a declaration that slavery was constitutionally illegitimate in the Union at the very moment in which he spoke, even if it had failed to do so in the Founding generation. If the Constitution contemplated and spoke to an institution so seemingly incompatible with the Declaration’s mandates, it did so, as Mr. Stephens points out, because such accommodation was necessary for formulation of the Union. Significantly, however, at the same time, the Framers included within the Constitution the means for eventually bringing even this institution in line with constitutional aspiration; this was the necessitating truth that spurred the South to secession.

Like slavery, capital punishment, by the very inclusion of the Cruel and Unusual Clause, is marked for future visitation with a measure of disapproval that serves as the seed for its eventual obliteration. In fact, there is some evidence that the Eighth Amendment was regarded and criticized even at the time of the framing as an invitation for future abolition. During the ratification debates, Representative Livermore of New Hampshire criticized the proposal that would become the Eighth Amendment: “[I]t is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but we are in the future to be prevented from inflicting these punishments because
they are cruel?" Mr. Livermore was at least tacitly recognizing that the Eighth Amendment could find fuller application at an undetermined time in the future. It is interesting that no one rose to meet his challenges, and that the amendment passed in its present form. In short, if the death penalty did not find its immediate demise in the Constitution, it certainly did not find its foundation there.

Of course, there is the argument that this proposition could serve to invalidate any punishment, for surely, every punishment has as its end the curtailing of liberty; every punishment is an affront to human dignity. Surely we cannot read the Declaration and Constitution as invalidating every form of penal sanction. Again, Justice Brennan reminds us that death as a punishment is in a singular category. Its finality and enormity are unparalleled. It stands out as not just a curtailment of liberty but as the ultimate expression of governmental oppression of human dignity. This proposition can be further illuminated, I think, in the prevailing views among the Framers about the significance of power structure in their new government. The Constitution was predominantly a document by which the Founders not only set up the government, but immediately placed structures on its power. Like much of the Constitution, the Cruel and Unusual Punishments Clause can be seen as a guard against the abuse of power these men feared most. "Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts." As Weems points out, these were "practical and sagacious [men]. . . and it must have come to them

86. 1 Annals of Cong. 754 (J. Gales ed. 1789), quoted in Furman, 408 U.S. at 283 (1972) (Brennan, J., concurring).
87. This is an international argument. South Africa's Attorney General has argued that all punishment is an impairment of human dignity, noting the restriction of movement and expression concomitant with a prison sentence are severe infringements of dignity. See S. v. Makwanyane and Another, 1995(6) BCLR 665, 722.
89. "Death is truly an awesome punishment. The calculated killing of a human being by the state involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident . . . a prisoner remains a member of the human family." Furman, 408 U.S. at 290-91 (Brennan, J., concurring).
that there could be excesses of cruelty by laws other than those which inflicted bodily pain or mutilation. . . . We cannot think that the possibilities of a coercive cruelty being exercised through the forms of punishment was overlooked."91 Indeed, we cannot overlook the possibility that the death penalty itself, in any form, is an exercise of cruelty.

If we accept this as a rational depiction of the way in which the Framers related to their government, we can see that capital punishment fits neatly into the paradigm elucidated in Weems—that the Framers were above all concerned with the government's oppressive capacity over the human condition. Death as punishment is unique in its exemplification of unfettered power in that it is the only form of punishment that has as its end the total obliteration of the object of punishment. It is the realization of the very thing against which the Framers strove to provide a defense.92 If we look at the Cruel and Unusual Clause in the historical context we have explored, we must come to the conclusion that the Clause was necessarily aimed at prohibiting more that breaking on the wheel and its equivalents. Otherwise it was mere surplusage from the moment it was penned. It is much more constitutionally pure to see the Cruel and Unusual Clause as one of the main constitutional strictures directed at the concern of an unchecked government's ability to oppress its citizens. As Hugo Bedau has indicated, taking into consideration the philosophy coming out of the enlightenment, we can see that "the heart of cruelty" is "total activity smashing total passivity."93 This realization is at the heart of the constitutional gauge by which capital punishment must be measured; it points out that regardless of method and regardless of the "amount" of due process afforded the condemned, death as punishment is inescapably the awesome power of the state directed, crushingly, upon the criminal.

Justice Brennan recognized this principle when he wrote in Furman:

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91. Id. at 372-73.
92. Historical execution, including that of English history, was not just punishment, but an unabashed show of force and subjugation to the convicted and to the multitudes that flocked to public executions. See Austin Sarat, When the State Kills: Capital Punishment and the American Condition 66-67 (2001).
93. Bedau, supra note 9, at 168.
In the United States, as in other nations in the western world, the struggle about [capital punishment] has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, belief in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century . . . It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime.94

Here Justice Brennan taps into what I believe is the essence of the Clause, and that is that the Framers were concerned and called us all to be concerned that the power we invest in our government, through the social contract, to punish us as citizens, does not translate into a power by our government to dehumanize us.

It is appropriate, then, to look at the Eighth Amendment not as a proscription of procedure but as a mandate for recognition and protection of human dignity, as the concept was inherent in the philosophical genesis of the Bill of Rights as a continuation of the promises of the Declaration, most significantly that "all men are created equal. . . and are endowed by their Creator with certain inalienable Rights. . . among these Life. . ."95 This philosophy of human dignity is the underlying basis for the equality and liberty that is the overarching command of the Constitution. During the course of the debate in the Massachusetts ratifying convention in 1788, Fisher Ames, a leading Federalist, remarked in his defense of the new Constitution that "legislators have at length condescended to speak the language of philosophy; and if we adopt it, we shall demonstrate to the sneering world, who deride liberty because they have lost it, that the principles of our government are as free as the spirit of our people."96 It is thus evidenced that the Constitution was not merely a document intended to create a government of the moment, but a concerted effort to embody in the Nation's founding certain transcendent principles of human dignity and liberty. There was an understanding that whatever might come to pass with regard to the structure of the government, in whatever imperfect form it might be made manifest, there were, for the pur-

94. Furman, 408 U.S. at 296 (Brennan, J., concurring).
95. Declaration of Independence para. 2 (U.S. 1776).
96. Quoted in To Form a More Perfect Union, the Critical Ideas of the Constitution 138 (Herman Belz, et al., eds. 1992).
pose of striving toward a more perfect government, inherent and natural rights that were essentially concomitant with humanity. These individual rights "cannot be taken away, or even suspended. They are not merely concessions extracted from, and limitations imposed on, preexisting established government, in the tradition of Magna Charta and subsequent English bills, rather, they are freedoms and entitlements of all men, every where, antecedent and superior to government. They do not de-

rise from any constitution; they antecede all constitutions."97 In light of its origins then, the Eighth Amendment can most reason-

ably be understood as a bulwark safeguarding the equal human dignity of those singled out for punishment with those who pos-

sess the power to punish, thus placing capital offenders on par with those they have wronged and with those whose charge it is to mete out some punishment. Therefore, Justice Brennan, though he would discuss its procedural implications, would have invalidated the death penalty based solely on the fact that "the deliberate extinguishment of human life by the state is uniquely degrading to human dignity."98 He believed that the purpose of the Cruel and Unusual Clause was to prohibit punishments that were "uncivilized and inhuman" and "that any state punishment must treat its members with respect for their intrinsic worth as human beings."99 In sum, punishment must "comport with human dignity."

This realization puts to rest all of those who would justify the death penalty through a search for more "humane" ways to inflict death. If a method can be found, they might argue, that does not disturb the body and inflicts no pain, then it cannot be "cruel" punishment.100 But Justice Brennan recognized that any punishment that has as its aim the annihilation of the prisoner cannot comport with human dignity, regardless of method or procedure, because it necessarily is a denial of that person's inherent worth. Cruelty is indeed the "smashing of the weak by the strong, either peacefully, civilly, or noisily, bloodily."101


99. Id. at 193.


This of course brings us to the core question of the humanitarian argument: Is the death penalty necessarily a cruel assault on fundamental human dignity? Since a simultaneous reading of the Constitution’s Fifth and Eighth Amendments does not present a structural bar to per se condemnation of the death penalty, answering this question might ironically put the Court in a position of a moral, philosophical adjudication. But this sort of inquiry would be wholly consistent with the Framers’ position regarding cruel and unusual punishment.

As I have examined, Jefferson’s reformulation of Locke’s theory in the Declaration of Independence is a statement of the natural rights philosophy that served as the Framers’ philosophical underpinning for their democratic experiment. As I have also noted, Locke’s own conception of the right to life was a belief that the right could be forfeited or transferred to government by means of the social contract. Of course the primary basis for most natural law is the primacy of human life as a moral absolute, but Locke’s qualification for those who have harmed society is also a familiar refrain of the natural rights tradition. The philosophy of St. Thomas Aquinas is paradigmatic in this regard. Aquinas, whose philosophy predates Locke and doubtlessly served as its foundation, allowed for a sort of “sinner” exception for the man who has harmed society to forfeit his right to life. Aquinas states it this way:

If a man is a danger to the community, threatening it with some wrongdoing of his, then his execution for the healing and preservation of the general good is to be commended. In doing wrong men depart from the order laid down by reason, falling away from their human dignity in which they are by nature free and exist for their own sake into the subject state of animals that must serve the needs of others. So it becomes justifiable to kill a malefactor as one would kill an animal.  

But, the Aquinas-Locke view was not unanimous. Cesare Beccaria, for example, certainly advocated the abolition of death as punishment, and his influence was felt among the Founders. Likewise, Aquinas’ view does not dominate natural law theory today. The imminent natural rights philosopher Germain Grisez

has examined Aquinas’ position on capital punishment as outlined in the above passage and found it flawed. Grizez concluded that human life can never be rightly taken by the state.\textsuperscript{104} Consequently, it is evident that natural law need not make such an exception to the inviolability of life as a paramount moral precept. As I have explained, there is evidence that the Bill of Rights had its origin in a natural rights interpretive ethic that specifically eschewed the Aquinas-Locke view in this regard and affirmed the absolute inalienability of life. Perhaps this is because Aquinas’ support of capital punishment supposes that the state’s right to punish offense by death is rooted in his belief that a ruler somehow shared in divine providence by virtue of his being the ruler. Even a mean historian can quickly ascertain that this is a supposition in which the Framers were not content to indulge. For the Framers, who felt that their own dignity had been compromised by an unjust regime, the inherent dignity of the individual would become the ideal to which all else must conform.

VI. SOUTH AFRICA AND THE CULTURE OF RIGHTS

This idea that punishment in any form must be measured against the transcendent principal of human dignity has been the instigating revelation at the forefront of the abolition movement in much of the free world. Virtually every advanced democratic nation on the globe has abolished the institution because it, by its very nature, is the antithesis of a free society.\textsuperscript{105} The discussion of the path to abolition in these many nations would be long and painstaking, for abolition has not always come without contention.\textsuperscript{106} For the purposes of an explication of the constitutional aspiration of human dignity as the driving force behind abolition, we can confine our inquiry to one paradigm case from the high court of South Africa. Of course it should be noted that many who engage in serious inquiry regarding the death penalty would find the changes in South Africa to have no bearing on

\textsuperscript{104} Germain G. Grizez, Toward a Consistent Natural-Law Ethics of Killing, 15 AM. J. JURIS. 64, 66 (1970).


\textsuperscript{106} For a discussion of the abolition movement in Europe see The Death Penalty: Abolition in Europe (Council of Europe Publishing 1999).
America's approach to penal law.\textsuperscript{107} That sort of response, however, misses the point that I have expounded about the Constitution being more than a set of "rules" by which our government was established. The Constitution was also a philosophical statement about the relation of humanity to its governmental structures, as Paine's words show, built upon truths that were considered transcendent and antecedent to government.\textsuperscript{108} Moreover, these truths that the Framers enshrined in our Constitution, by their very nature, are not reserved to any particular people or to any particular moment in time. If this is the case, the recognition of these principles by fellow democracies is of paramount importance to the question. These other states can serve as gauges for the verity of the transcendent nature of the principles. As Justice Brennan has stated,

As Americans we adapt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity—liberty and justice for all individuals—will continue to inspire and guide us because they form the core of our Constitution. The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit inheres in the aspirations not only of all Americans, but of all the people throughout the world who yearn for dignity and freedom.\textsuperscript{109}

And so from Justice Brennan's observation we turn to the Constitutional Court of South Africa and its 1995 decision declaring the death penalty, in all forms, unconstitutional in the Republic of South Africa.\textsuperscript{110} \textit{Makwanyane} was watershed in the world abolition movement; prior to the decision, South Africa was a world leader in executions, many motivated by a desire to silence politi-

\textsuperscript{107} This view has had its place in the Supreme Court. In a memo concerning \textit{Ford v. Wainwright}, a case in which the Court barred the execution of persons insane at the time of execution, Justice Lewis Powell wrote to Justice Marshall, "I would prefer not to refer to 'international standards'... especially when more certain sources of authority are available." "I have the same negative reaction to relying on 'speculative' sources such as these when we have the common law, adopted by the Eighth Amendment of the Constitution, and numerous decisions of state courts and legislatures." 85-5542, 6-5-86, Container 397, Folder 12, Papers of Thurgood Marshall, Manuscript Division, Library of Congress, \textit{quoted in Mello, supra} note 47, at 178.

\textsuperscript{108} \textit{See supra} note 97.


\textsuperscript{110} S. v. Makwanyane and Another, 1995 (6) BCLR 665.
cal dissent.\textsuperscript{111} South Africa's high court found itself facing largely the same structural predicament that the United States Supreme Court has grappled with regarding the Constitution's recognition of capital punishment. South Africa's constitution\textsuperscript{112} included section 11(2), which prohibited "cruel, inhuman or degrading treatment or punishment," but did not necessarily include the death penalty within the ambit of the clause.\textsuperscript{113} Much like our Fifth Amendment's due process clause, the South African constitution also contained language enunciating a right to life, with a separate clause limiting rights where "a clear and convincing case" justified restriction.\textsuperscript{114} With no precedent directly on point and few constitutional decisions from which to extract legal principles, the court began an examination of the punishment that public sentiment appeared to support.\textsuperscript{115}

South Africa's decision is, thus, particularly interesting because the court was faced with the same sort of structural stumbling blocks that are often seen as problematic for the abolition argument in the United States. The court began by acknowledging the inherent difficulty in interpreting a constitution with two seemingly conflicting provisions. President Chaskalson began by forthrightly stating: "It would no doubt have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty, or that it is permissible in circumstances sanctioned by law. This, however, was not done and it has been left to this Court to decide whether the penalty is consistent with the provisions of the Constitution."\textsuperscript{116} Unfortunately for the high courts of South Africa and the United States, no such courtesy was done them by the framers of their

\begin{itemize}
\item \textsuperscript{111} Makwanyane, 1995 (6) BCLR at 750.
\item \textsuperscript{112} Makwanyane was determined under an interim constitution, Act 200 of 1993. However, the language of South Africa's permanent Constitution, Act 108 of 1996, is substantially the same with regard to punishment. Accordingly, Criminal Law Amendment Act No. 105 of 1997 reflected the Court's invalidation of the death penalty.
\item \textsuperscript{113} S. Afr. Const. ch.3, § 11(2); Makwanyane, 1995 (6) BCLR at 703.
\item \textsuperscript{114} S. Afr. Const. ch.3, § 9, 33.
\item \textsuperscript{115} Makwanyane, 1995 (6) BCLR at 703. The President of the Court, Arthur Chaskalson, assumed in the opinion that many South Africans favored the use of the death penalty in certain circumstances. The South African court also faced an unusual situation in that the representative of the South African government acknowledged that the death penalty should be declared unconstitutional in South Africa. The Attorney General of Witwatersrand, independent of the government, however, disagreed. Id. at 677.
\item \textsuperscript{116} Makwanyane, 1995 (6) BCLR at 675.
\end{itemize}
respective constitutions. In light of this failure, the South African court proceeded to take a purposive approach in order to give meaning to the South African cruel and inhuman punishments clause,\textsuperscript{117} seeking, as they said, to give “expression to the underlying values of the Constitution.”\textsuperscript{118}

South Africa’s high court recognized that life is the paramount fundamental human right.\textsuperscript{119} The \textit{Makwanyane} court echoes Paine in that the right to life is transcendent of government.\textsuperscript{120} Life, Judge O’Regan admonished, is “antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them.”\textsuperscript{121} Early in his opinion, President Chakalson recognized that death is a cruel and inhuman punishment because it necessarily “involved, by its very nature, a denial of the executed person’s humanity,” and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.”\textsuperscript{122} The process of interpretation resulting in the court’s ultimate conclusion required a two-pronged approach that led the Court to conclude that the death penalty violated certain constitutional rights and that these violations could not be justified as necessary under the constitution’s limitations clause. The judges were guided in this by section 35(1) of South Africa’s constitution, which sets out a principle of interpretation that should be implicit in our own: “In interpreting the provision of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the right entrenched in this Chapter, and may have regard

\textsuperscript{117} \textit{Makwanyane}, 1995 (6) BCLR at 676. This “generous” and “purposive” approach had already been established by the court in \textit{S. v. Zuma}, 1995 (2) SA 642, 650-653 (CC).

\textsuperscript{118} \textit{Makwanyane}, 1995 (6) BCLR at 676.

\textsuperscript{119} South Africa’s modern constitution contains an explicit guarantee of a right to life. The United States Constitution contains no such express provision. However, the natural rights tradition and the Declaration of Independence that predate the Constitution gave a place of pinnacle importance to the right to life. See Michael P. Zuckert, \textit{Thomas Jefferson on Nature and Natural Rights}, in \textit{The Framers and Fundamental Rights} 157 (Robert A. Licht, ed. 1991).

\textsuperscript{120} See \textit{Makwanyane}, 1995 (6) BCLR at 777 (O’Regan, J., concurring). “The Right to Life is, in one sense, antecedent to all other rights in the Constitution.”

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.} at 682 (quoting \textit{Furman v. Georgia}, 408 U.S. 238, 290 (1972) (Brennan, J., concurring)).
to comparable foreign case law.” The Court also relied on the underlying values of the constitution and the state’s need to set an example in protecting human rights.

In order to clearly set the relationship between foreign law and its own domestic jurisprudence, the Court was careful to construe the constitution with due regard to South Africa’s history, legal system and cultural traditions. The long ignored values of African citizens played an important part in the court’s interpretive ethic; as noted by Justice Mokgoro, though there was a shortage of precedent, “upholding human rights due to the repressive nature of the past legal order,” the indigenous values of the South African people were an equally persuasive and appropriate starting point in the court’s search for principles “of society based on freedom and equality.” The principle of *ubuntu*, which translates as “humaneness,” “personhood,” and “morality” is given great regard in the opinions.

Accordingly, the court focused on the inviolability of the right to life, rejecting arguments that those convicted of murder effectively abrogate their rights to life and dignity. In a forthright statement aimed at the heart of the death penalty, Judge O’Regan further stated “The purpose of the death penalty is to kill convicted criminals. Its very purpose lies in the deprivation of existence. Its inevitable result is the denial of human life. It is hard to see how this methodical and deliberate destruction of life by the Government can be anything other than a breach of the right to life.” The court further recognized that the fundamental purpose of a constitution was to secure the right to life and other inalienable rights from governmental intrusion.

Although a few democratic nations retained the use of the death penalty, international and foreign treatment of the issue overwhelmingly pointed toward a global aspiration of abolition. In his opinion, President Chaskalson noted that, presently, “capital punishment has been abolished as a penalty for murder...

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125. *Id.* at 770 (Mokgoro, J., concurring). Mokgoro was pointed in distinguishing these “enduring values” from the “fluctuating public opinion” that the Attorney General had introduced regarding society’s apparent approval of the penalty.
126. *Id.* at 771.
127. *Id.* at 752 (Langa, J., concurring).
128. *Id.* at 779.
129. *Id.* at 777.
almost half the countries of the world, including the democracies of Europe and our neighboring countries Namibia, Mozambique, and Angola. In spite of the international trend of abolition, the court also addressed the democracies that had retained the death penalty, in particular, the United States. Persuading the court that the United States model should not be followed was the long history of arbitrary imposition in the United States. President Chaskalson noted the heated debate between United States Supreme Court justices with regard to the extraordinarily high standards of procedural fairness now required in American courts to avoid arbitrary decisions, and concluded that retentionist countries had continued use of the death penalty at the expense of procedural safeguards. Continued imposition of the death penalty in the face of racial discrimination in the United States raised the possibility that innocent people would be executed and many victims would receive insufficient legal representation, which were unacceptable compromises to the South African court. In this way, the court distinguished the decisions of retentionist countries while going on to consider the language in those decisions regarding fundamental rights. Further, the court recognized that the international principles on which they relied were reflected in the “spirit” of South Africa’s constitution; thus, the need for the State to set an example in protecting human rights heavily affected the decision of the court. Justice Langa pointed out that the State had undervalued human life in South Africa’s recent past and now had a duty to set a moral example for the people by “recognizing the value of every human life.” One way to fulfill this obligation was to dispose of punishments that “did not testify to a high regard to the dignity of the person.” Taking these things into consideration, the court ultimately concluded that South Africa’s Constitution did not legitimize capital punishment.

130. Id. at 685.
131. Id. at 694.
132. Id. at 695.
133. Id.
134. Most noticeably, the dicta of Justice Brennan in Furman v. Georgia was cited approvingly throughout the Makwanyane opinion. See, e.g., Makwanyane, 1995 (6) BCLR at 734, 772, 778.
135. Id. at 750 (Langa, J., concurring).
136. Id. at 751.
Following a resolution of the first issue with the conclusion that the death penalty violates enumerated constitutional protections as well as the “spirit” of the constitution, the court moved to the second step of the analysis, which was determining whether the infringement could be justified under the limitation clause. The clause provides that fundamental rights may be limited by laws as long as they are reasonable, “justifiable in an open and democratic society based on freedom and equality,” and do not “negate the essential content of the right” at issue.\textsuperscript{137} Furthermore, before the government can limit several rights, including the right to dignity and the prohibition on cruel, inhuman and degrading punishment, these infringements must be “necessary” to be justified under the clause.\textsuperscript{138}

In considering the limitation clause, the court rejected the argument that the death penalty was “reasonable and necessary” due to its deterrent effect. Instead, Chaskalson proclaimed that in the “long run, more lives may be saved through the inculcation of a rights culture, than through the execution of murderers.”\textsuperscript{139} Prevention and retribution were also rejected as bases rendering the death penalty necessary, with the conclusion that life imprisonment was an equally effective means of preventing crimes and a fitting punishment.\textsuperscript{140} Therefore, the death penalty was not a “necessary” limitation on the right to human dignity and the prohibition on cruel and inhuman punishment, because there were other more effective methods of punishment available. According to the court, the death penalty had also failed under the second step of the analysis, and as such, could not be tolerated under the new Constitution of South Africa.

 VII. CONCLUSION

Grappling with a constitution much like our own, the South African court chose a prevailing rights-based constitutional ethic of life and dignity over a restrictive original intent construction, demonstrating that in the face of a limitation or due process clause the death penalty can be reasonably and ethically declared per se unconstitutional in keeping with an elevation of the philosophical aspirations of the constitutional instrument over a static

\textsuperscript{138} Id.
\textsuperscript{139} Id. at 716.
\textsuperscript{140} Id. at 717.
textualism. South Africa’s approach is an interpretive ethic consistent with a constitution of inalienable rights; it amplifies my belief that originalism, to the extent that the term implies a reference to what the Framers intended the Constitution to accomplish, cuts two ways.141 In the case of the United States, it can be used to restrict the Constitution to the static, relegating the Constitution to an arcane document whose relevance to modern issues will prove fleeting, or it can be used to interpret the Constitution to give recognition to what the Framers “originally” intended the Constitution to accomplish—the assurance of fundamental and inalienable rights and the construction of a vehicle by which these rights could be recognized, ever more fully, by a growing, evolving American society. If the Court has made any concession in this area it is that the Court has recognized that a punishment can be stricken as cruel and unusual if it offends society’s “evolving standards of decency.”142 The alternative is, of course, quite dismal. It leaves us with the conclusion that the Constitution, shrine of our liberty, is a document that was imperfect from the moment of its initiation, that it condoned in its inception institutions like slavery and the death penalty that are completely antithetical to its bedrock principles of life, dignity and equality; its meaning is lost rather than enhanced by its deliberate ambiguity.143 Surely the Constitution as the culmination of a revolution for independence and as a fulfillment of the Declaration must be more than this. I think a purer vision of the

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141. The South African court also faced an originalism argument from the Witwatersrand Attorney General. He argued that had the framers of the South African constitution wished to declare it unconstitutional, they would have explicitly done so; and, in such absence, it was for Parliament, not the courts to decide the fate of the death penalty. See id. at 677.


143. One need not embrace the originalist approach of, say, Justice Scalia to fall into this thinking. Justice Thurgood Marshall, in whose corner I am most happy and honored to stand with regard to many issues, held a similar view of the Constitution. He stated: “[T]he government the Framers devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today. When contemporary Americans cite ‘The Constitution,’ they invoke a concept vastly different from what the framers barely began to construct two centuries ago.” Thurgood Marshall, Commentary, Reflections on the Bicentennial of the United States Constitution, 101 Harv. L. Rev. 1, 2 (1987). Unlike Marshall, I would say that the contemporary American cites a Constitution whose fundamental tenets are today more fully realized and vouchsafed, but not a Constitution that is principally different from the Framers’ vision.
Constitution is to see it as a mechanism to guide Americans in the resolution of current societal conflicts. In this way, the "original intent" of the Framers to establish a government of rights and equality is insured a continued vitality. One can conclude, then, that the Fifth Amendment's recognition of the death penalty need not be read to exclude the death penalty from constitutional scrutiny under the Eighth Amendment. The Eighth Amendment's Cruel and Unusual Punishments Clause can thus be used as a device to bring America's penal system in line with the overarching aspirations of life and dignity that abound in our Constitution as they are recognized by a persuasive majority of the world's liberal democracies. Such a recognition of these transcendent principles would herald a truly "originalist" interpretive ethic.