

**JUSTICE SCALIA’S EIGHTH AMENDMENT
JURISPRUDENCE: THE FAILURE OF SAKE-OF-
ARGUMENT ORIGINALISM**

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INTRODUCTION

In his penultimate Term on the Supreme Court, Justice Scalia identified the case that “has caused more mischief to our juris-

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prudence, to our federal system, and to our society than any other.”¹ Few would guess the culprit: *Trop v. Dulles*.² To the extent that *Trop* can claim any fame, it is for Chief Justice Warren’s pronouncement that, “The [Eighth] Amendment must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society.”³

One need not be well versed in theories of constitutional interpretation to understand why such a statement provoked Justice Scalia. The statement is a candid assertion of what has become known as living constitutionalism—the *bête noire* of Justice Scalia’s originalism.⁴ According to a narrative embraced by Justice Scalia and other originalists, the idea expressed in that disreputable sentence has given rise to sundry decisions that have mutilated the constitutional fabric of the republic.⁵ For example, during the oral argument in the 2013 challenge to California’s constitutional amendment foreclosing same-sex marriage, Justice Scalia inquired, “[w]hen did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868[?]”⁶ Counsel for petitioner, evoking the spirit of *Trop v. Dulles*, responded, “There’s no specific date in time. This is an evolutionary cycle.”⁷

The case in which Justice Scalia pronounced his indictment of *Trop* exemplifies, in his view, the mischief that arises when one adopts the view that “evolving standards,” rather than the text’s fixed original meaning, are paramount in judicial interpretations of the Constitution. Justice Scalia leveled his charge

1. *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring).

2. 356 U.S. 86 (1958).

3. *Id.* at 101 (emphasis added); see also U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

4. For other illustrations of living constitutionalism, see *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 443 (1934) (the “great clauses of the Constitution” should not be “confined to the interpretation which the [F]ramers, with the conditions and outlook of their time, would have placed upon them”); *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (“[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”).

5. See *infra* note 339.

6. Transcript of Oral Argument at 38, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144).

7. *Id.* at 40.

against *Trop* in response to Justice Breyer's dissenting opinion in the 2015 case of *Glossip v. Gross*, which involved a challenge to Oklahoma's execution protocol.⁸ Justice Breyer there emerged as the most recent in a line of Justices who have called into question the constitutionality of the death penalty.⁹ Intellectual contortions are required to make this argument, according to Justice Scalia, for "[i]t is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*."¹⁰ To achieve this impossible feat, Justice Breyer, like others before him, is obliged to acknowledge *Trop* as the inspiration for his constitutional jurisprudence. Thus emboldened, Justice Breyer writes, "[the] 'claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail.'"¹¹

It was in the course of his response to this argument that an exasperated Justice Scalia condemned *Trop* in the sweeping terms that introduced this Article.¹² The sentence immediately preceding this indictment is also worthy of close attention:

If we were to travel down the path that Justice Breyer sets out for us and once again consider the constitutionality of the death penalty, I would ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled.¹³

Implicit in this sentence is the remarkable concession that Justice Scalia tolerated *Trop* and the cases that followed it for the 28 years he had served on the Supreme Court, despite the fact that those cases severed the Eighth Amendment from what Jus-

8. 135 S. Ct. 2726, 2731 (2015).

9. See, e.g., *Baze v. Rees*, 553 U.S. 35, 71 (2008) (Stevens, J., concurring); *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 232 (Marshall, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 241–42 (1972) (Douglas, J., concurring); *id.* at 263 (Brennan, J. concurring); *id.* at 329 (Marshall, J. concurring).

10. *Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring); see also U.S. CONST. amend. V ("No person shall be held to answer for a capital crime . . . unless on a presentment or indictment of a Grand Jury . . .").

11. *Glossip*, 135 S.Ct. at 2755 (Breyer, J., dissenting) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)).

12. See *id.* at 2749 (Scalia, J. concurring).

13. *Id.*

tice Scalia viewed as its original meaning. If *Trop* really had “caused more mischief to our jurisprudence, to our federal system, and to our society than any other,”¹⁴ surely Justice Scalia should have stated his intention, or at least his willingness, to overrule the decision long ago, not only for its effect on Eighth Amendment jurisprudence but also for the symbolic value of reaffirming a commitment to the Constitution’s original meaning. Why was Justice Scalia willing to apply *Trop* for nearly three decades, and what had he come to learn by 2015 that prompted him, at least contingently,¹⁵ to call for *Trop*’s reconsideration?

In answering this puzzle, we confront what Professor Nelson Lund has called in a recent consideration of Justice Scalia’s jurisprudence, “the dilemma of constitutional originalism.”¹⁶ At this late date in the American republic, precisely how is a judge in our common law tradition, of which Justice Scalia considered himself a member, to follow the original meaning of the Constitution, to which Justice Scalia professed allegiance? As Lund writes, “The tension between the doctrine of *stare decisis* and the principle of originalism became acute in the wake of the Warren Court’s creation of a large number of precedents that disregarded both the original meaning of the Constitution and boatloads of existing precedent.”¹⁷ Lund then illustrates the difficulty by considering a line of cases “that does not involve a provocative political issue,” that is, the dormant commerce clause.¹⁸ He demonstrates that Justice Scalia’s commitment to originalism was diluted by an eclectic deference to precedent.¹⁹

This Article analyzes the tension between originalism and precedent in a politically and morally fraught context: the

14. *Id.*

15. The quotation from *Glossip* suggests that Justice Scalia would still not be willing to reconsider *Trop*, unless Justice Breyer pressed the issue of the constitutionality of the death penalty.

16. Nelson Lund, *Antonin Scalia and the Dilemma of Constitutional Originalism*, PERSPECTIVES IN POLITICAL SCIENCE (George Mason Univ. Legal Studies Research Paper Series, LS 16–36, forthcoming). He is not the first to make this observation or even to use this terminology. See, e.g., Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 133 (1991).

17. Lund, *supra* note 16, at 10–11.

18. *Id.* at 11.

19. *Id.* at 13–14.

Eighth Amendment. By the time Justice Scalia joined the Supreme Court in 1987, the jurisprudence in this area, particularly with respect to the death penalty, had swollen into a thicket of precedents. And in an important sense, all of these precedents claimed *Trop* as their distant, or not-so-distant, ancestor. How is an originalist to reconcile the conflicting demands of the Constitution on the one hand and these precedents on the other? Justice Scalia's contention that the Eighth Amendment forecloses only those modes of punishment considered cruel and unusual in 1791 complicates the question. Consider that punishment practices in 1791 were often barbaric when viewed from the predominant modern perspective. When confronted with the choice between the original meaning of the Constitution and a clearly erroneous precedent that better aligns the Constitution with the moral tenor of the times, which is an originalist judge to choose?

Academics critical of originalism as an interpretative methodology have long focused on the inability of originalism to account for, let alone justify, deeply entrenched, but dubiously originalist precedents, such as the *Legal Tender Cases*,²⁰ *International Shoe Company v. Washington*,²¹ a litany of New Deal cases,²² and, most significantly, *Brown v. Board of Education*.²³ Justice Scalia's willingness to defer to these precedents highlighted, for these scholars, the opportunism of his originalism, the way it provided "rule of law" cover for the promotion of a conservative political agenda.²⁴ Curiously, several scholars

20. 79 U.S. (12 Wall.) 457 (1871); see also Kenneth Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367. But see Robert Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017, 1022 (2008) (arguing that, under the original meaning of the Coinage Clauses, the Court reached the correct result, albeit through flawed reasoning).

21. 326 U.S. 310 (1945); see also Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 25–27 (2007).

22. See Thomas Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 523 (1995).

23. 347 U.S. 483 (1943); see also Pamela S. Karlan, *What Can Brown@ Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009) ("because *Brown* has become the crown jewel of the *United States Reports*, every constitutional theory must claim *Brown* for itself"). But see Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (providing an originalist defense of *Brown*).

24. See Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 398 (2000) (arguing that Justice Scalia's originalism would require *Brown's* reversal). For a defense of Justice Scalia's blend of originalism and

sympathetic to an originalist methodology have also criticized Justice Scalia's jurisprudence in this regard. Nelson Lund and Randy Barnett have attacked what they regard as his inconsistency in stridently adhering to the Constitution's meaning in some cases and then humbly deferring to nonoriginalist precedents in others—with scarcely an explanation of why some precedents deserve respect and others should be overruled.²⁵

In a lecture delivered in 1988, Justice Scalia invited precisely this criticism, by implying that (in an Eighth Amendment context) he was only a “faint-hearted originalist.”²⁶ This concession would become, over the next three decades, Exhibit A in any prosecution of Justice Scalia for inconsistency and hypocrisy.²⁷ Seldom noted, however, is that after making this concession, Justice Scalia seemed to withdraw or, at a minimum, qualify it. At least in Justice Scalia's own mind, he was not so much a “faint-hearted originalist” as a judge who ordinarily could reconcile the demands of the Constitution with even unprincipled nonoriginalist decisions, such as *Trop*. He wrote:

The vast majority of my dissents from nonoriginalist thinking (and I hope at least some of those dissents will be majorities) will, I am sure, be able to be framed in the terms that, even if the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred.²⁸

In other words, Justice Scalia argued that, at least in the context of the Eighth Amendment, he often could accept even the grotesquely nonoriginalist *Trop* as good law (that is, he could accept for the sake of argument that the Eighth Amendment has evolutionary content) and still prevail in upholding the Constitution's meaning. Thus, he suggested that he was a “pure-

precedent, see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

25. See Lund, *supra* note 16; Randy Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CIN. L. REV. 7 (2006).

26. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

27. See, e.g., Richard A. Posner & Eric J. Seagall, *Faux Originalism*, 20 GREEN BAG 2D 109, 112–13 (2016); Chemerinsky, *supra* note 24, at 389–99; Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1062–63 (1990).

28. Scalia, *supra* note 26, at 864 (emphasis added).

originalist[[]-accepting-for-the-sake-of-argument-evolutionary-content."²⁹

This Article is the first to use this framework to consider Justice Scalia's Eighth Amendment jurisprudence. Justice Scalia anticipated that his opinions would be framed as arguments in the alternative: first, that the Eighth Amendment, properly understood, did not foreclose a punishment; and, in the alternative, that even if nonoriginalist precedents were followed, the result would be the same, because there was "inadequate indication that any evolution in social attitudes has occurred."³⁰ "Sake-of-argument originalism" was Justice Scalia's ingenious solution to the "dilemma of constitutional originalism," at least in the area of the Eighth Amendment. The dilemma could be resolved by seamlessly reconciling originalism and precedent. Given this Article's title, there is no spoiler alert needed before announcing that this solution failed—both objectively and by Justice Scalia's own estimation. This Article illustrates why and what lessons might be drawn, particularly for those sympathetic to an originalist methodology.

The starting point, in Part I, is a closer look at *Trop v. Dulles*. Justice Scalia's sake-of-argument originalism is premised on his ability to apply *Trop* as if it were an ordinary precedent, but even a cursory reading of Chief Justice Warren's plurality opinion hints at grave difficulties with this project. It is not simply that Chief Justice Warren's opinion invited judges to update the meaning of the Eighth Amendment to align it with evolving standards of decency; the even more startling aspect of the opinion is how unconstrained Chief Justice Warren was in ascertaining those standards of decency. Among other criteria, Chief Justice Warren unabashedly drew upon his own moral sentiments in discerning civilized standards. *Trop* thus encouraged judges, particularly of the "heroic" cast, to promote justice as they understood it.

Part II is a close reading of Justice Scalia's essay *Originalism: The Lesser Evil*, in which the project of sake-of-argument originalism is outlined. The essay forthrightly acknowledges the foremost difficulty with principled originalism: the risk that the Constitution's original meaning will conflict with long-

29. *Id.*

30. *Id.*

established precedent and contemporary moral attitudes. Although Justice Scalia would eventually become renowned, or vilified, as our nation's preeminent originalist, his attitude towards originalism in the essay is in fact opaque. At times, he endorses it enthusiastically, and yet the very title is not what one would expect from an unabashed partisan of originalism. Indeed, at various points, *Originalism* suggests an impatience and even contempt for pure originalism. It is the sort of "theory" one expects from academics who are ignorant of the compromises demanded of men and women in the arena of political life. At the end of the essay, Justice Scalia nonetheless manages to convey that he will carry the banner of originalism proudly, notwithstanding these demands. He will be able, he asserts, to reconcile nonoriginalist precedents, including *Trop*, with originalism.

And yet the basis of his confidence was unclear. Part III considers how sake-of-argument originalism played out in the context of many of Justice Scalia's Eighth Amendment cases. Although Justice Scalia at times insinuates that he is a "pure originalist" and only a nonoriginalist "for the sake of argument," many of his opinions have the opposite character. Justice Scalia hoists the originalist flag (sketching the argument under the Amendment's original meaning), but then devotes the bulk of his argument to an analysis of nonoriginalist precedents. In some cases, Justice Scalia boldly proclaims that these precedents should be reconsidered or overturned, but in others, he humbly follows even those precedents he identifies as erroneously decided.

As explored in Part IV and the Conclusion, Justice Scalia's hopeful expectation that he could achieve originalist results through sake-of-argument originalism was overwhelmingly disappointed. One problem is that his strategy presumes that there has not been a meaningful "evolution in social attitudes" with respect to punishment since 1791. The deeper problem with Justice Scalia's hopeful expectation is that a fair reading of *Trop* suggests that it is not enough for the community's "social attitudes" to remain durable or be reflected in contemporary legislation. The relevant question is whether the attitudes of the legal elites who purport to divine these "social attitudes" remain durable and mirror the attitudes of society at large. *Trop* was an invitation to the sort of judicial adventurism that sub-

sequent case law could never stifle. A careful reading of Chief Justice Warren's opinion, as well as Justice Frankfurter's vitriolic dissent, should have indicated that, from an originalist perspective, any line of cases that begins with *Trop* will not end well.

I. *TROP V. DULLES*: EVOLVING STANDARDS OF DECENCY

Who was this Albert Trop that Justice Scalia faults, at least indirectly, for corrupting the American republic? An Army private stationed in Casablanca in 1944, Trop was sentenced to the stockade for a breach of discipline.³¹ He escaped and, along with a companion, wandered along a road toward Rabat.³² Not the hardiest of souls, Trop reported that "[t]he going was tough. We had no money to speak of, . . . and we were getting cold and hungry."³³ So he returned to the stockade.³⁴ Trop's "desertion" lasted less than a day.³⁵

At a distance of several decades, Trop's escapade seems almost comic. Yet in the throes of what was, in the words of the U.S. government defending its harsh punishment of another World War II deserter, "a desperate struggle with a power which had come dangerously close to enslaving mankind,"³⁶ Trop's crimes were of the utmost seriousness. A general court martial sentenced him to three years of hard labor.³⁷ And Trop should have considered himself lucky. Eddie Slovik, the other deserter just referenced, who also escaped from his unit and also haplessly turned himself in almost immediately thereafter, was executed in January 1945, shortly after Trop's desertion.³⁸

Trop served his prison term and, in 1952, applied for a passport.³⁹ The State Department rejected his application, finding

31. *Trop v. Dulles*, 356 U.S. 86, 87 (1958) (plurality opinion).

32. *Id.*

33. *Id.* at 88.

34. *Id.*

35. *Id.* at 87.

36. Letter from V.M. McElroy, Clerk of Court, U.S. Army Judiciary, to Maurice Lepavsky, Adjutant, Jewish War Veterans of the United States (Sept. 9, 1974), <https://catalog.archives.gov/id/6231405> [<https://perma.cc/49X9-PSAK>] (image 4).

37. *Trop*, 356 U.S. at 88 (plurality opinion).

38. Fred L. Borch III, *Shot by Firing Squad: The Trial and Execution of Pvt. Eddie Slovik*, *ARMY LAW.*, Mar. 2012, at 5, 5.

39. *Trop*, 356 U.S. at 88 (plurality opinion).

that he had lost his citizenship, pursuant to a Civil War statute, upon his conviction for desertion.⁴⁰ Trop filed suit seeking a declaration that he was still a citizen.⁴¹ It does not appear that he initially raised an Eighth Amendment objection to the deprivation of his citizenship. The reason was self-evident: if it was not “cruel and unusual” to execute Eddie Slovik, how could it be “cruel and unusual” to strip Albert Trop of his citizenship? Trop quite sensibly based his argument on statutory grounds. A district court denied his petition, and a divided panel of the Second Circuit affirmed.⁴²

In the Supreme Court, Trop challenged the constitutionality of that decision on two grounds: first, that Congress lacked the power to impose the punishment of denationalization; and second, assuming that Congress possessed such a power, that the imposition of denationalization as a punishment in his case violated the Eighth Amendment.⁴³ Trop’s first argument was

40. *Id.*

41. *Id.*

42. Trop v. Dulles, 239 F.2d 527, 528, 530 (2d Cir. 1956). Writing for the majority, Judge Learned Hand rejected Trop’s statutory argument that because he did not desert to an enemy (he merely ambled away), the Civil War statute was inapplicable. *Id.* at 529. Such a distinction—desertion to enemy versus desertion *simpliciter*—was, Judge Hand observed, absent from the text of the statute. *Id.* Judge Hand also held that Trop’s Eighth Amendment argument was procedurally barred, because it was not raised below. *Id.* at 529–30.

Chief Judge Clark dissented in a short opinion that was later adopted by reference in Chief Justice Warren’s Supreme Court opinion. See Trop, 356 U.S. at 101 n.33 (plurality opinion) (incorporating Trop, 239 F.2d at 530 (Clark, C.J., dissenting)). Especially given that Chief Judge Clark was the principal author of the Federal Rules of Civil Procedure of 1938, see Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976), his treatment of the procedural issue was spare and unpersuasive. He wrote: “It is unfair to the capable and experienced lawyer who presented this appeal to hold that he did not present this argument.” Trop, 239 F.2d at 530 (Clark, C.J., dissenting). Procedural defaults often cause “unfairness,” although the hardship is generally ascribed to the aggrieved party, not the appellate litigator. Furthermore, Chief Judge Clark devoted exactly four sentences to the substance of Trop’s appeal, incorporating by reference the “masterful analysis of expatriation legislation set forth in Comment, The Expatriation Act of 1954, 64 Yale L.J. 1164, 1189–99 [(1955)].” *Id.* Chief Judge Clark wrote that he “doubt[ed] if I can add” to the arguments raised in this student note, but he nonetheless *did* add that “[i]n my faith, the American concept of man’s dignity does not comport with making even those we would punish completely ‘stateless.’” *Id.* Chief Judge Clark’s invocation of “man’s dignity” prefigured the breathless moralism of Chief Justice Warren’s opinion.

43. Trop, 356 U.S. at 94, 99 (plurality opinion).

arguably foreclosed by *Perez v. Brownwell*,⁴⁴ in which the Court held that Congress possessed the power, under its authority to maintain relations with a foreign power, to strip an American of citizenship.⁴⁵ Yet *Perez* and *Trop* could be distinguished on the basis of whether the petitioner in each case had actually inserted himself into the affairs of a foreign power: *Perez* had unlawfully voted in a foreign election,⁴⁶ but *Trop* had *not* deserted to a foreign country. Five Justices held that the source of the Congressional power to impose denationalization in *Trop's* case must be located in a different constitutional power, the only viable candidate being the power to maintain the military forces.⁴⁷ And Chief Justice's Warren's plurality opinion (which was joined by three other Justices) and Justice Brennan's solitary concurring opinion coalesced around the argument that denationalization bears no rational relationship to the power to maintain the military forces.⁴⁸

This argument is, on its face, dubious. A dissenting Justice Frankfurter pointed out that desertion, especially in wartime, is a grave problem, and he neatly posed the question: "Can it be said that there is no rational nexus between refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship?"⁴⁹ In any event, it is sufficient here to note that five Justices held that Congress did not have the power to strip *Trop* of citizenship. There consequently was no need to address *Trop's* remaining Eighth Amendment argument that denationalization was "cruel and unusual punishment," and Chief Justice Warren's fateful ruminations on that topic were unnecessary to the resolution of the case.

44. 356 U.S. 44 (1958). *Perez* was decided on the same day as *Trop*.

45. *Id.* at 62.

46. *Id.* at 46.

47. *Trop*, 356 U.S. at 106–07 (Brennan J., concurring); *id.* at 120–22 (Frankfurter, J., joined by Burton, Clark, and Harlan, JJ., dissenting).

48. *See id.* at 97–98 (plurality opinion of Warren, C.J., joined by Black, Douglas, and Whittaker, JJ.); *id.* at 105 (Brennan, J., concurring).

49. *Id.* at 121–22 (Frankfurter, J., dissenting). A Harvard Law Review student note restated Justice Frankfurter's question in a way that left no doubt as to its sympathy with his position: "[I]n the light of the strong national interest in maintaining military discipline in time of war, it is questionable whether congressional selection of the expatriation sanction as a means to that objective can be deemed so unreasonable as to be constitutionally invalid." Note, *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 170 (1958).

In turning to the Eighth Amendment,⁵⁰ the *Trop* Court was painting on a nearly blank canvas. In its only significant prior Eighth Amendment case, *Weems v. United States*,⁵¹ decided in 1910, the Court intimated that it was open to a broader interpretation of the Eighth Amendment than might be inferred from the text alone. The text of that Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁵² The Amendment, by its plain terms, imposes three limitations: (1) with respect to bail, it cannot be excessive; (2) with respect to fines, they cannot be excessive; and (3) with respect to punishment, it cannot be cruel and unusual. Prohibitions (1) and (2), on *excessive* fines and bail, arguably embody a proportionality principle: the fine or bail must be measured relative to the culpability of the offense. The third restriction speaks more broadly of all “punishment,” but a necessary logical inference is that the “not excessive” restriction in (1) and (2) does not apply. By its plain language, the third limitation, prohibiting “cruel and unusual punishments,” is broader in scope than (1) and (2), but it does not embody a proportionality principle. The phrase simply prohibits punishments that are “cruel and unusual,” that is, barbaric *and* bizarre. It is important to note the conjunctive nature of the prohibition. Even punishments that are cruel comply with the Amendment if they are not also unusual, and vice versa. This analysis might yield the meaning of the Amendment if that meaning were appropriately gleaned through a concededly narrow focus on the text.

Of course, it is possible that “cruel and unusual” was a term of art, and that the original meaning is thus more complex than could be derived from such a narrowly textual analysis.⁵³ The Court reached this conclusion in *Weems*, which discerned a constitutional prohibition against punishments that are dispro-

50. Chief Justice Warren first addressed the question of whether denationalization constituted “punishment,” or was merely the non-penal consequence of a court martial conviction. He concluded the former, over the persuasive objections of a dissenting Justice Frankfurter. *Compare Trop*, 356 U.S. at 99–100 (plurality opinion), *with id.* at 124 (Frankfurter, J., dissenting).

51. 217 U.S. 349 (1910).

52. U.S. CONST. amend. VIII.

53. See Samuel L. Bray, “Necessary and Proper” and “Cruel and Unusual”: *Hendriks in the Constitution*, 102 VA. L. REV. 687, 689 (2016).

portionate to the offense of conviction.⁵⁴ In *Weems*, a Philippine court, having convicted a customs official of falsifying a public document, imposed a sentence of fifteen years of *cadena temporal*—that is, the offender was to be chained around his ankles and wrists for the entirety of his prison term.⁵⁵ After a haphazard survey of the historical materials surrounding the drafting of the Eighth Amendment, the *Weems* Court struck down the sentence.⁵⁶ There is some language in the opinion suggesting that the punishment was unconstitutional because of its barbarity.⁵⁷ But there is far more sweeping language indicating that the punishment was invalid because it was not proportioned to the offense.⁵⁸

Weems proved to have little influence on the development of the law until *Trop v. Dulles*. The Eighth Amendment portion of Chief Justice Warren's *Trop* opinion draws upon the historical findings of the *Weems* Court and at least begins on a curiously originalist note:

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta.⁵⁹

54. See *Weems*, 217 U.S. at 380–81.

55. *Id.* at 357–58, 364.

56. *Id.* at 371–73, 382.

57. *Id.* at 366 ("No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. 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.").

58. *Id.* at 367 ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense."). As to whether proportionality should be measured from the perspective of 1791 or from that of contemporary society, the Court's answer was the latter: "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." *Id.* at 373.

59. *Trop v. Dulles*, 356 U.S. 86, 99–100 (1958) (plurality opinion) (footnotes omitted).

So far, there is little with which Justice Scalia would disagree.⁶⁰ At this point, however, Chief Justice Warren veers off the originalist rails. He announces that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁶¹ It is unclear what is intended by this airy proclamation, nor is its meaning inferable from either the English Declaration of Rights or the Magna Carta.⁶² After then discussing *Weems* at some length, Chief Justice Warren writes that the Amendment’s meaning “is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁶³

Let us assume that this statement of the law is correct. What would one expect to follow in a judicial opinion? Presumably, Chief Justice Warren needs to identify where one looks to find those “standards.” Then we can ask whether those identified standards pose any impediment to denationalization as a criminal punishment.

If these were indeed our expectations, they are immediately disappointed. After invoking the idea that the relevant criterion is the “standards . . . of a maturing society,” Chief Justice Warren announces, “We believe . . . that use of denationalization as a punishment is barred by the Eighth Amendment.”⁶⁴ In the next two paragraphs, Chief Justice Warren unburdens himself of his own moral intuitions. He observes that banishment “is a form of punishment more primitive than torture, for it de-

60. In *Harmelin v. Michigan*, 501 U.S. 957 (1991), Justice Scalia also identified the origins of the Eighth Amendment in the English Declaration of Rights and the Magna Carta. *Id.* at 967. That the “cruel and unusual punishment” language comes from the English Declaration of Rights is incontestable, but the assertion that the Amendment also derives from the Magna Carta, with which there is no linguistic overlap, is doubtful. See Craig S. Lerner, *Does the Magna Carta Embody a Proportionality Principle?*, 25 GEO. MASON. U. C.R.L.J. 271, 299 (2015).

61. *Trop*, 356 U.S. at 100 (plurality opinion).

62. If what is intended is that punishment should be proportioned to an offense, then that principle is appreciated (and applied) by small children and animals. Indeed, the law of contracts, which is premised on an ability to anticipate the future and forge voluntary, binding agreements in consequence, seems to reflect more robustly human abilities than does the criminal law principle of proportionality. If what is intended is that, given “the dignity of man,” one should not torture human beings, it is not clear that animals do not also possess a dignity that is outraged when they are tortured. There is nothing distinctively human about the dignity that renders immoral the torture of a sentient and intelligent being.

63. *Trop*, 356 U.S. at 101 (plurality opinion).

64. *Id.* at 101 (emphasis added).

stroys for the individual the political existence that was centuries in the development.”⁶⁵ Chief Justice Warren also quotes approvingly from the dissenting opinion in the Second Circuit, in which Chief Judge Clark had written: “*In my faith*, the American concept of man’s dignity does not comport with making even those we would punish completely ‘stateless’”⁶⁶ Apparently, the first clue to the “standards of a maturing society” is the moral sense or “faith” of an Article III judge.

The second clue to the “standards of a maturing society” is to be found, as Chief Justice Warren holds, in the attitudes that prevail throughout the world. He writes, “The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”⁶⁷ Chief Justice Warren finds support for this proposition in two studies produced by the United Nations, two academic treatises on international law, and a student note from the Yale Law Journal, which, quoting Chief Judge Clark, he describes as a “masterful” analysis of international attitudes.⁶⁸ So far, it would not appear that Chief Justice Warren has devoted any attention to *American* attitudes, but earlier in the opinion he had offered this assurance:

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.⁶⁹

Apparently, the reason that capital punishment does not run afoul of the constitutional prohibition against cruelty is not that it is explicitly contemplated by the Constitution,⁷⁰ but that it is still “widely accepted” in America, despite what Chief Justice

65. *Id.*

66. *Id.* at 101 n.33 (emphasis added) (quoting *Trop v. Dulles*, 239 F.2d 527, 530 (2d Cir. 1956) (Clark, C.J., dissenting)).

67. *Id.* at 102.

68. *Id.* at 101 n.33 (quoting *Trop*, 239 F.2d at 530 (Clark, C.J., dissenting) (citing Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1189–99 (1955))); see *id.* at 101–03.

69. *Id.* at 99.

70. See U.S. CONST. amend. V (“No person shall be held to answer for a capital . . . crime . . .”).

Warren suggests, forebodingly, are “forceful” counterarguments.⁷¹

Chief Justice Warren’s arguments in this section are risible. His assertion that “only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion”⁷² is wrong: the very U.N. document he cites collects materials from dozens of nations and shows that several countries had entire sections in their constitutions or relevant laws that provide mechanisms for stripping persons of citizenship. The grounds for this punishment are broad and often encompass military desertion. The Argentine Constitution of 1949 provides: “An Argentine national by birth shall lose his citizenship if he . . . [d]eserts from the Argentine armed forces”⁷³ New Zealand’s law, as of 1948, authorized the stripping of citizenship if a naturalized person “[h]as shown himself by act or speech to be disloyal or disaffected towards His Majesty”;⁷⁴ and Thailand’s law, as of 1952, authorized the revocation of nationality for “any act contrary to public well-being.”⁷⁵ Notwithstanding the “masterful” Yale Law Journal student note, there is no basis for Chief Justice Warren’s assertion that there was “virtual unanimity” in the international community opposed to stripping persons of citizenship.

Furthermore, one would think that the starting point of any assessment of “civilized standards” is a consideration of *American* standards. Chief Justice Warren’s recognition that “our history” does not support the abolition of the death penalty (whatever the trends might be in the rest of the world) is perhaps an acknowledgment of the primacy, or at least the relevance, of American attitudes. Any honest assessment of “our history” renders preposterous the assertion that stripping a person of citizenship for desertion is contrary to our traditions. As the Supreme Court observed in 1885, military desertion, “[f]rom the very year of the Declaration of Independence,” has always been treated as a capital offense, “the only qualification

71. *Trop*, 356 U.S. at 99 (plurality opinion).

72. *Id.* at 103 (citing U.N. OFFICE OF LEGAL AFFAIRS, LAWS CONCERNING NATIONALITY, at 379, 461, U.N. Doc. ST/LEG/SER.B/4/, U.N. Sales No. 1954. V.1. (1954)).

73. U.N. OFFICE OF LEGAL AFFAIRS, *supra* note 72, at 2.

74. *Id.* at 346.

75. *Id.* at 457.

being that since 1830 the punishment of death cannot be awarded in time of peace.”⁷⁶ On March 3, 1865, Congress passed an act providing that all military deserters are “deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship.”⁷⁷ The penalties specified in the 1865 law were extended in 1912 to persons who “avoid any draft into the military or naval service.”⁷⁸ There were many cases of military desertion during World War I, and all of those persons were deemed to have forfeited their rights of citizenship.⁷⁹ On March 5, 1924, President Coolidge restored the citizenship of some of those deserters, but “unless (or until), pardoned,” such persons were deemed to have “forfeit[ed] their rights of citizenship.”⁸⁰ As the book cited by Chief Justice Warren⁸¹ observes, World War I deserters “assumed the risk of becoming stateless persons, and a large number of them automatically became such under the operation of the laws of the United States.”⁸² If “our history” forecloses the argument that the death penalty is unconstitutional, as Chief Justice Warren concedes, it is impossible to see how “our history” does not operate in a similar fashion with respect to the punishment of denationalization.

A dissenting Justice Frankfurter acerbically criticized the majority’s miscellaneous arguments. With respect to Chief Justice Warren’s “faith” that banishment is a form of torture worse than death itself, Justice Frankfurter asked, “[i]s constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?”⁸³ (The answer, apparently, is yes.) Justice Frankfurter also drew attention both to flaws in the majority’s method for discerning the attitudes of “civilized nations” and to the fact that denationalization was an historically recognized punishment within the United States.⁸⁴

76. *Kurtz v. Moffitt*, 115 U.S. 487, 501 (1885).

77. Act of Mar. 3, 1865, ch. 79, § 21, 13 Stat. 487, 490 (1865).

78. Act of Aug. 22, 1912, ch. 336, § 1998, 37 Stat. 356, 356 (1912).

79. CATHERYN SECKLER-HUDSON, *STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES* 148 (Kraus Reprint Co. 1971) (1934).

80. *Id.* at 148–49.

81. See *Trop v. Dulles*, 356 U.S. 86, 102 n.35 (1958) (citing CATHERYN SECKLER-HUDSON, *STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES* (1934)).

82. SECKLER-HUDSON, *supra* note 79, at 149.

83. *Trop*, 356 U.S. at 125 (Frankfurter, J., dissenting).

84. *Id.* at 126.

Justice Frankfurter concluded by accusing the majority of departing from its appropriate “judicial function.”⁸⁵

Justice Frankfurter’s dissenting opinion in *Trop* should have put the world on notice that Chief Justice Warren’s opinion heralded a brave new world in Eighth Amendment jurisprudence. Henceforth, the touchstone of constitutionality would be “evolving standards of decency.” And in discerning those “standards of decency,” the criteria are so open-ended that the judicial power is immeasurably extended. Recall that Chief Justice Warren drew on four sources: his own moral intuitions (his “faith”), the opinions of the “civilized nations of the world” (as reflected in U.N. documents), academic literature (including law review student notes), and, last and perhaps least of all, “widely accepted” American practice. Chief Justice Warren’s plurality opinion in *Trop* reflects the view that the Constitution’s meaning is not frozen in time, but evolves with the moral intuitions of the community, as discerned by Supreme Court Justices. We now turn to the originalism, or varieties of originalism, that Justice Scalia espoused as a response to the living constitutionalism of *Trop v. Dulles*—a response that promised to infuse the law with more stability and legitimacy.

II. VARIETIES OF ORIGINALISM

As a jurist, Antonin Scalia is remembered in large part for his embrace of originalism as a theory of constitutional interpretation. But he was a professor for over a decade before joining the Court of Appeals for the District of Columbia Circuit, and his scholarship barely hinted at the theory of originalism he would later expound. His academic work in the 1970s and early 1980s focused on administrative law topics.⁸⁶ Other scholars, such as Robert Bork and Raoul Berger, were touting originalism as a more direct challenge to living constitutionalism than the more incremental, less theoretical approaches adopted by some Republican-appointed members of the Court, such as Chief Jus-

85. *Id.* at 127.

86. See, e.g., Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

tices Burger and Rehnquist.⁸⁷ Justice Scalia prudently avoided taking sides in this contentious debate⁸⁸ and consequently sailed through two Senate confirmations without a single dissenting vote.⁸⁹ Yet in 1989, just two years after he was ensconced on the Supreme Court, Justice Scalia published two essays—*The Rule of Law as a Law of Rules* and *Originalism: The Lesser Evil*—that divulged his thinking on constitutional interpretation and the craft of judging.⁹⁰ In the debate between originalism on the one hand and incrementalism on the other, he apparently sided with the former.

Justice Scalia introduces both essays with reflections on the majesty of being a judge. Justice Scalia begins *Originalism* by approvingly quoting Chief Justice Taft's comment: "I love judges, and I love courts. They are my ideals, that typify on earth what we shall meet hereafter in heaven under a just God."⁹¹ *The Rule of Law* also opens with a grandiose depiction of the art of judging. Justice Scalia describes the practice of King Louis IX of France, who each Sunday invited litigants to present their suits to him personally, under an oak tree, where

87. See Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1047 (2006) ("Chief Justice Rehnquist, although an occasional adherent to originalism, is more fairly characterized as a pragmatist who took into account a variety of arguments resolving a case."); Stephanos Bibas, *The Rehnquist Court's Fifth Amendment Incrementalism*, 74 GEO. WASH. L. REV. 1078, 1078 (2006) ("The Burger and especially Rehnquist Courts chipped away at . . . expansive interpretations of individual rights without offering satisfying constitutional theories in support."); Richard A. Epstein, *The Federalism Decisions of Justice Rehnquist and O'Connor: Is Half a Loaf Enough?*, 58 STAN. L. REV. 1793, 1794 (2006) (arguing that Justices Rehnquist and O'Connor "should have pushed harder and moved farther than they ultimately did" in rolling back precedents in three areas: "the scope of the Commerce Clause, dual sovereignty and the Tenth Amendment, and the doctrine of sovereign immunity"); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1358 (2002) ("[T]he Rehnquist Court . . . created exceptions to[] and 'reinterpreted' [Warren Court] precedents."); Lund, *supra* note 16, at 8–9.

88. When questioned by Senators about how much weight he would assign to precedent, Justice Scalia exhaled airy generalities. See *infra* text accompanying notes 388–389.

89. See 132 CONG. REC. 23,813 (1986); 128 CONG. REC. 19,630 (1982).

90. Scalia, *supra* note 26; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

91. Scalia, *supra* note 26, at 849 (quoting Alphaeus Thomas Mason, *William Howard Taft*, in 3 THE JUSTICES OF THE SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 2103, 2105 (L. Friedman & F. Israel eds., 1980)).

he would dispense perfect justice on a case-by-case basis.⁹² As Justice Scalia observes, King Louis was a judge in the “Solomonic” sense, unconstrained by external law and guided only by an internal compass of right and wrong.⁹³

Yet Justice Scalia rejects this ideal. Quoting Thomas Paine, Justice Scalia writes that in a democracy, “the law is king.”⁹⁴ By this he intends that the judge is not authorized to follow his or her personal beliefs, but must enforce the popular will, as reflected in the laws. The judge in this sense is more akin to a humble pedant or bureaucrat than Louis IX or Solomon, let alone God in the heavens. The remainder of *Rule of Law* highlights the need for formal rules that trammel judges into narrow lines of reasoning. *Originalism* is an application of this principle to constitutional interpretation. For Justice Scalia, one of the principal benefits of originalism is the constraint it imposes on judges. Unlike a living constitutionalist judge, who in each case promotes those values that, in the words of Professor Owen Fiss, “give our society an identity and inner coherence,” an originalist judge, in Justice Scalia’s view, has the more mundane task of discerning the original meaning of the constitutional text and then deferentially applying it.⁹⁵ The judge, in Fiss’s model, is heroic: he throws off the chains of law and precedent (mere “responsibility-mitigation mechanisms”) and promotes justice.⁹⁶ By contrast, it is perhaps better that the judge, in Justice Scalia’s model, have no opinion as to what justice requires, let alone interest in pursuing it, as such an inclination could tempt the judge to violate his judicial duty. At least as a judge, one should not have the slightest concern whether Karl Marx or John Locke, Immanuel Kant or Jeremy Bentham, provides a better account of the proper ordering of human affairs.⁹⁷

It is surprising, then, that Justice Scalia should have introduced both essays with such majestic depictions of the art of

92. Scalia, *supra* note 90, at 1175–76.

93. *Id.* at 1176.

94. *Id.* (quoting THOMAS PAINE, COMMON SENSE (1776), reprinted in COMMON SENSE AND OTHER POLITICAL WRITINGS 3, 32 (Nelson F Adkins ed., Liberal Arts Press 1953)).

95. Scalia, *supra* note 26, at 853.

96. See Paul W. Kahn, *Owen Fiss: Heroism in the Law*, 58 U. MIAMI L. REV. 103, 104 (2003).

97. See Scalia, *supra* note 26, at 855.

judging. Soaring rhetoric can enlarge a judge's sense of his own importance and inflame the passion to do extralegal justice. Yet Justice Scalia depicts the originalist judge in this counter-intuitively heroic light. The first move in this direction is to dispel any suggestion that the task of an originalist judge is easy. The living constitutionalist, in Justice Scalia's account, merely puts a finger to the wind or searches his own moral intuitions; how hard is that? The originalist judge must sift through reams of historical information and often do so in a political maelstrom. Justice Scalia cites the example of a challenge to the independent counsel statute: with the eyes of the nation upon the Court, Justice Scalia generated a thirty-eight-page dissent in just two months.⁹⁸ The originalist judge must have a resolve and alacrity that one does not associate with a mere pedant (or law professor).

The originalist judge is also heroic precisely in the ability to resist temptation and *not* abuse his or her enormous power. As one author has suggested, the originalist judge can be likened to a Cincinnatus or George Washington.⁹⁹ With the opportunity to become a dictator, such men laid down their arms and deferred to the republic.¹⁰⁰ This, as Shakespeare reminds us, is true virtue: "O, it is excellent/ To have a giant's strength, but it is tyrannous/ To use it like a giant."¹⁰¹

If in one sense the originalist judge is a humble and deferential giant, there is another sense in which heroism consists precisely of a willingness to resist democratic impulses and thereby defend the republic. In *A Matter of Interpretation*, written in 1997, Justice Scalia invokes his dissenting opinion in *Maryland v. Craig*¹⁰² as an example.¹⁰³ The majority in that case held that the Sixth Amendment's Confrontation Clause does not necessarily prohibit the state from allowing minors to testify by

98. *See id.* at 860–61.

99. Daniel R. Suhr, *Judicial Cincinnati: The Humble Heroism of Originalist Justices*, 5 FIU L. REV. 155, 156 (2009).

100. *Id.*

101. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 2, ll. 107–09 (N.W. Bawcutt ed., Oxford Univ. Press 1991) (1623).

102. 497 U.S. 836 (1990).

103. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 43 (Amy Guttmann ed., 1997).

closed-circuit television in a prosecution for child abuse.¹⁰⁴ To Justice Scalia, however, the balance struck in 1791 between defendants' rights and solicitude for witnesses—to allow confrontation “[i]n all criminal prosecutions”—was still binding on the courts.¹⁰⁵ Justice Scalia had no doubt that many people were “happy and pleased” with the Court’s opinion in *Maryland v. Craig*,¹⁰⁶ but a heroic judge must resist the temptation to win plaudits. Still greater heroism is on display when the originalist judge resists the temptation to indulge personal preferences and instead applies the law. An illustrative example is Justice Scalia’s decision in the flag-burning case.¹⁰⁷ Despite a personal aversion to the “bearded, sandal-wearing weirdos” who burned the flag, Justice Scalia recognized that “[i]f you play by the old way, you often have to reach decisions you don’t enjoy.”¹⁰⁸ It takes something like a heroic resolve to defy one’s own opinions and steadfastly follow the law.

But are there limits to the heroism expected of an originalist judge? Justice Scalia’s elusive discussion of precedent in *Originalism* suggests that there are. He writes: “In its undiluted form, . . . [originalism] is medicine that seems too strong to swallow.”¹⁰⁹ One might think that Justice Scalia is gesturing to the possibility that the Constitution’s original meaning could point in a direction that is perceived as morally indefensible, either by contemporary society or by the judge himself, but that is not the line of argument Justice Scalia pursues. Instead, he writes: “[A]lmost every originalist would adulterate [originalism] with the doctrine of *stare decisis*—so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that [*Marbury*] got the meaning of the Constitution wrong.”¹¹⁰ Justice Scalia’s suggestion that the originalist Professor Berger might demonstrate that *Marbury* was wrongly decided is tantamount to an insinuation that the originalist enterprise, at least when undertaken by an academ-

104. *Craig*, 497 U.S. at 857.

105. *Id.* at 860–861 (Scalia, J., dissenting).

106. Scalia, *supra* note 103, at 44.

107. *Texas v. Johnson*, 491 U.S. 397 (1989).

108. Suhr, *supra* note 99, at 170 (quoting Bryan Whitson, *Justice Antonin Scalia: The Case for a “Dead Constitution,”* WM. & MARY NEWS (Mar. 21, 2004)).

109. Scalia, *supra* note 26, at 861.

110. *Id.*

ic, can wander into absurdity. In fact, Berger had never, to my knowledge, questioned *Marbury*. A far more relevant case that Berger *had* questioned was *Trop v. Dulles*.¹¹¹ Would abandoning *Trop* be medicine “too bitter to swallow”? At least in *Originalism*, Justice Scalia provides no answer.

Instead, Justice Scalia takes the argument in a different direction: “But *stare decisis* alone is not enough to prevent originalism from being what many would consider too bitter a pill.”¹¹² Here, the “bitter pill” is not that originalism will call into question a well-entrenched precedent; the risk is that originalism will generate a result that “many” perceive as indefensible and no nonoriginalist precedent will allow a convenient escape. Justice Scalia poses precisely this difficulty in an Eighth Amendment context:

What if some state should enact a law providing for public lashing, or branding of the right hand, as punishment for criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and *even though no prior Supreme Court decision has specifically disapproved them*, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge.¹¹³

The punishment of flogging—“unequivocally” prevalent in America in 1791—raises an acute problem for an originalist. It is doubtful that “any federal judge” would sustain such a practice today, but how could an originalist judge rationalize this result? One solution would be to hold that the original meaning of the Eighth Amendment embodies an evolving content. Justice Scalia raises this possibility only to refute it: there is “no historical evidence,” he writes, to support this interpretation.¹¹⁴ At a minimum, this suggests that Justice Scalia was conversant and in agreement with the argument made by Professor Berger in *Death Penalties* to the effect that the Eighth Amendment was intended simply to foreclose those modes of punishment prohibited in 1791.¹¹⁵ Only a “faint-hearted originalist,” Justice

111. RAOUL BERGER, *DEATH PENALTIES* 116–22 (1982).

112. Scalia, *supra* note 26, at 861.

113. *Id.* (emphasis added).

114. *Id.* at 862.

115. BERGER, *supra* note 111.

Scalia mocks, could fail to acknowledge this evidence, and he adds that “there is really no difference between the faint-hearted originalist and the moderate nonoriginalist, except that the former finds it comforting to make up (out of whole cloth) an original evolutionary intent, and the latter thinks that superfluous.”¹¹⁶

After this scornful criticism of faint-hearted originalism, the essay takes a remarkable turn. Justice Scalia writes that “in a crunch,” he would “prove a faint-hearted originalist[:] I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.”¹¹⁷ This concession is effectively a self-accusation that Justice Scalia is no different from a “moderate nonoriginalist” except that he is inclined to “make up (out of whole cloth) an original evolutionary intent.”¹¹⁸ As to why he is faint-hearted, Justice Scalia gives no indication. Is it because a judicial holding affirming flogging would bring the courts into disrepute? Or is it because Justice Scalia could not, in good conscience, affirm a punishment he does not regard as moral?

Justice Scalia’s initial attempt to evade these questions is to wish the problem away as inconceivable: “I cannot imagine such a case[] [involving flogging] arising.”¹¹⁹ However, the return of corporal punishment has been imagined and even advocated just two years ago in the pages of the *New York Times*.¹²⁰ And why is flogging cruel and unusual, but not lifetime solitary incarceration in supermax prisons—a punishment that did not exist in 1791? But these pedantic quibbles do not impress Justice Scalia. He “conclude[s] this largely theoretical talk on a note of reality.”¹²¹ His final answer to the problem of flogging is as follows:

The vast majority of my dissents from nonoriginalist thinking (and I hope at least some of those dissents will be majorities) will, I am sure, be able to be framed in the terms that,

116. Scalia, *supra* note 26, at 862.

117. *Id.* at 864.

118. *Id.* at 862.

119. *Id.* at 864.

120. Ross Douthat, Opinion, *Crime and Different Punishments*, N.Y. TIMES (Apr. 22, 2017), <https://www.nytimes.com/2017/04/22/opinion/sunday/crime-and-different-punishments.html> [<https://nyti.ms/2p7oOdB>].

121. Scalia, *supra* note 26, at 864.

even if the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred.¹²²

Justice Scalia's response to the self-accusation of faint-heartedness is to characterize himself as a "pure-originalist[]-accepting-for-the-sake-of-argument-evolutionary-content."¹²³ Judges of this category accept "for the sake of argument" that the Constitution has an "evolutionary content," but then defeat nonoriginalists on their own ground, through a demonstration that no such "evolution in social attitudes" has occurred. It is not clear on what basis the sake-of-argument originalist will prevail on this claim. How will such a judge canvass the "social attitudes" of the country and confirm that they have not changed since 1791? We turn to Justice Scalia's Eighth Amendment cases for answers.

III. JUSTICE SCALIA'S EIGHTH AMENDMENT OPINIONS

This review of Justice Scalia's Eighth Amendment cases—more specifically, those that interpret the meaning of "cruel and unusual punishments"¹²⁴—divides his jurisprudence into three parts. In the first part, which corresponds to his first four

122. *Id.*

123. *Id.*

124. This Article does not consider the "Excessive Bail" and "Excessive Fines" Clauses of the Eighth Amendment. Nor does this Article consider cases that applied the "Cruel and Unusual Punishments" Clause as a limitation on abusive prison conditions. For a provocative originalist attempt to interpret the Eighth Amendment prohibition of "cruel and unusual punishments" in tandem with the Thirteenth Amendment's sanction of "slavery" as "a punishment for crime," see Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983 (2009). Howe observes that prisoners after 1865, particularly in the South, were treated in extraordinarily inhumane ways, often involving the use of shackles, whips, and attack dogs. *Id.* at 1010. According to Howe, the "history of the treatment of southern prisoners in the century after 1865 supports the conclusion that the original public meaning for the Thirteenth Amendment was to permit slavery as a punishment for crime despite the main prohibition on slavery." *Id.* at 1018. And this in turn has implications for the Eighth Amendment, as "the slavery-as-punishment clause confounds the efforts of the broad originalist to justify protections afforded convicts under the Eighth Amendment today." *Id.* at 1026. This would include any limitation on whipping inmates, a result Justice Scalia would likely regard as "too bitter" to accept. Compare Scalia, *supra* note 26, at 861, with Barnett, *supra* note 25, at 13 (arguing that we should not "shrink[] in practice from the implications of a theory").

years on the Court, Justice Scalia only hinted at an originalist understanding of the Eighth Amendment. In the second part, Justice Scalia's opinion in *Harmelin v. Michigan*, he comprehensively laid out his originalist understanding of the Eighth Amendment. In the third part, which corresponds to the remainder of Justice Scalia's years on the Court, he drew upon *Harmelin* in disputes about the Eighth Amendment's meaning.¹²⁵

As will be shown below, Justice Scalia's opinions are generally characterized by a mix of faint-hearted and sake-of-argument originalism. To the extent that there are brash proclamations of heroic originalism, it is unclear whether such rhetoric is driving the reasoning or merely decorating it. In addition, Justice Scalia's treatment of nonoriginalist precedents seems at times unprincipled. Some decisions are not accorded precedential weight while others, equally erroneous from an originalist perspective, are humbly followed. In his final decade on the Court, Justice Scalia seemed to recognize that *Trop* had opened a Pandora's Box, because judges felt liberated to read their own moral perceptions into the Amendment. His final words on the Eighth Amendment were an admission that sake-of-argument originalism had failed.

A. *Pre-Harmelin Cases*

This section divides Justice Scalia's pre-*Harmelin* cases into three topic categories: victim impact statements, the juvenile death penalty, and sentencing discretion in capital cases.

1. *Victim Impact Statements*

In his early years on the Court, Justice Scalia heard three cases that considered whether a victim impact statement ("VIS") could be introduced in capital sentencing hearings.¹²⁶ Defendants in these cases argued that a VIS violated the Eighth Amendment because it put before the jury facts, such as the exemplary character of the victims and the anguish caused their children and parents, that did not necessarily reflect on the defendant's moral culpability. In *Booth v. Maryland*, a bare

125. See, e.g., *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring).

126. See *Payne v. Tennessee*, 501 U.S. 808 (1991); *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987).

majority credited this argument and overturned a capital sentence.¹²⁷

A naïve textualist-originalist might react with incredulity: how is the introduction of a VIS “cruel and unusual *punishment*?” The *Booth* majority never quotes or even refers to the phrase “cruel and unusual punishment” in its legal analysis. Instead, the opinion links together a series of recent precedents to construct the argument that “death is a punishment different from all other sanctions”;¹²⁸ the manner in which that sentence is imposed must be “suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action”;¹²⁹ in particular, the exclusive focus should be on factors that bear on the defendant’s “personal responsibility and moral guilt”;¹³⁰ whether the victim was of sterling character or not, at least if unknown to the defendant, is irrelevant when assessing the defendant’s culpability—consequently, the introduction of the VIS violated the Eighth Amendment.¹³¹

Booth presented Justice Scalia with an opportunity during his first year on the Court to opine on the Eighth Amendment. However, *Booth* was argued late in a Term that spanned 160 cases, or more than twice the current docket.¹³² Only four briefs were filed, and none referenced the Eighth Amendment’s original meaning.¹³³ Unsurprisingly, Justice Scalia’s dissenting opinion is light on anything resembling originalist analysis. In fact, it begins by quoting the same precedents relied upon by the majority, to the effect that death is a “punishment different

127. *Booth*, 482 U.S. at 504–05, 509.

128. *Id.* at 509 n.12 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976)).

129. *Id.* at 502 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)).

130. *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

131. *Id.* at 505, 509.

132. See *Federal Judicial Caseloads, 1789–2016*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015> [<https://perma.cc/QP3T-ZJLH>] (last visited Nov. 29, 2018).

133. In addition to petitioner’s brief (only 11 pages long), see Brief of Petitioner-Appellant, *Booth v. Maryland*, 482 U.S. 496 (1987) (No. 86-5020), 1988 WL 1026294, and the government’s response, there were amicus briefs filed by the NAACP and a victims’ rights organization. See Brief of NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae Supporting Petitioner, *Booth v. Maryland*, 482 U.S. 496 (1987) (No. 86-5020), 1986 WL 727592; Brief of Stephanie Roper Foundation, Inc. as Amicus Curiae Supporting Respondent, *Booth v. Maryland*, 482 U.S. 496 (1987) (No. 86-5020), 1987 WL 880565.

from all other sanctions" (*Woodson*) and considerations not pertaining to "the defendant's personal responsibility and moral guilty" are irrelevant in capital sentencing proceedings (*Enmund*).¹³⁴ Justice Scalia then argues that "[i]t seems to me, however—and, I think, most of mankind—that the amount of harm one causes does bear upon the extent of [the offender's] 'personal responsibility.'"¹³⁵ Justice Scalia implicitly accepts, for the sake of argument, that the community's evolving notions of "enlightened policy" are owed judicial deference. However, he denies that most people today agree with the premise articulated by the majority—that a crime's harm, if unanticipated, should not be reflected in a capital offender's punishment.

Justice Scalia then observes that the criminal law is rife with cases in which punishment is calibrated to actual harm, irrespective of the offender's "moral guilt" (e.g., the reckless driver versus the equally reckless driver who causes a death).¹³⁶ This is even true in the context of capital punishment, Justice Scalia argues, citing the recent decision in *Tison v. Arizona*.¹³⁷ In that case, decided just months before *Booth*, two brothers had helped their father escape from prison and the trio had then kidnapped a married couple on a desert road.¹³⁸ Because the father had murdered the couple, the sons were held to be eligible for the death penalty, notwithstanding the fact that at the time of the murder the sons were collecting water.¹³⁹ As Justice Scalia observes, had the father shown mercy, the sons would not face the death penalty: "The difference between life and

134. *Booth*, 482 U.S. at 519 (Scalia, J., dissenting) (quoting *Woodson*, 428 U.S. at 303 and *Enmund*, 458 U.S. at 801).

135. *Id.* (emphasis added).

136. *Id.*

137. 481 U.S. 137 (1987). Justice Scalia failed to cite another precedent that also demonstrated that, even in capital sentencing proceedings, factors unrelated to "moral guilt" have been held admissible. In *Jurek v. Texas*, 428 U.S. 262 (1976), the Court held that the likelihood of recidivism is an admissible aggravating factor in Texas's capital sentencing scheme. *Id.* at 272–74. This factor, unrelated to moral guilt, but justified on utilitarian grounds, was not foreclosed by the Eighth Amendment. See Richard S. Murphy, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1321–22 (1988).

138. *Tison*, 481 U.S. at 140–41.

139. *Id.* at 141, 143–46.

death for these two defendants was thus a matter 'wholly unrelated to the[ir] blameworthiness.'"¹⁴⁰

To this point, his opinion has not hinted at an originalist understanding of the Eighth Amendment. When Justice Scalia purports to "sum[]" up his argument, however, he writes that the majority's position—that capital punishment can be imposed only for "moral guilt" irrespective of actual harm—"does not exist, neither in the text of the Constitution, nor in the historic practices, nor even in the opinions of this Court."¹⁴¹ But Justice Scalia had not yet himself addressed the "text of the Constitution" or any "historic practices."¹⁴² His argument had accepted the Court's precedents and attempted to demonstrate that they were inconsistent with, or at a minimum did not dictate, the majority's result. Perhaps Justice Scalia's statement that the "text" is contrary to the majority opinion is tantamount to his hoisting the originalist flag and proclaiming that the already burgeoning capital punishment case law was flawed from the start. Such a foundational argument was unnecessary, for "not even the opinions of this Court" justify the result in *Booth*.¹⁴³

Yet "the opinions of th[e] Court" were murkier than Justice Scalia acknowledged. Justice Scalia quotes *Enmund* in the first sentence of the opinion, to the effect that only considerations of "personal responsibility and moral guilt" are admissible in capital proceedings.¹⁴⁴ In the very next sentence, he truncates that quote, writing that for most of mankind "the amount of harm one causes does bear upon the extent of [one's] 'personal re-

140. *Booth*, 482 U.S. at 519–20 (Scalia, J., dissenting) (alteration in original) (quoting *id.* at 504 (majority opinion)).

141. *Id.* at 520.

142. *Id.*

143. Justice Scalia then appends the observation that "recent years have seen an outpouring of popular concern for what has become known as 'victims' rights.'" *Id.* "Many citizens," Justice Scalia argues, have come to regard a criminal trial "in which a parade of witnesses" testify to the defendant's lamentable upbringing, but none speak to the victims' suffering, as unjust. *Id.* Neither the parties nor amici made this argument; it would seem to have been Justice Scalia's invention. It is intelligible, however, as a reflection of his "sake of argument" originalism: even if we assume that contemporary standards of enlightened policy are relevant in constitutional decision-making, Justice Scalia argues that the majority opinion has not correctly identified those standards.

144. *Booth*, 482 U.S. at 519 (emphasis added) (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

sponsibility.”¹⁴⁵ This is true, of course, but “most of mankind” would probably regard the amount of harm one causes as an imperfect proxy for *the moral guilt* one should bear.¹⁴⁶ Justice Scalia is on solid ground when he observes that the criminal law—for utilitarian reasons—regularly proportions punishment to “the amount of harm,”¹⁴⁷ irrespective of moral guilt. Philosophically minded observers have long lamented this feature of the law,¹⁴⁸ and the Court’s precedents had seemingly held that in the capital context a more precise proportionality of punishment to *moral guilt* was required.¹⁴⁹ In any event, the quoted language in *Enmund* pointed in that direction, although the result in *Tison* seemed to indicate that that principle was subject to qualification.¹⁵⁰

Two years later, in *South Carolina v. Gathers*, the Court reconsidered the admissibility of victim-related information in a

145. *Id.*

146. For example, if I were to ask a colleague to come to my house to help me fix a water heater, and if, on the way to my house, that colleague were struck head-on by an eighteen-wheeler, I would regard myself as responsible for his death, but neither I nor a court of law would assign any “moral guilt.” (His widow might disagree.)

147. *Booth*, 482 U.S. at 519 (Scalia, J., dissenting).

148. See, e.g., LARRY ALEXANDER & KIMBLERY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* (2009).

149. See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982); *Woodson v. North Carolina*, 428 U.S. 280 (1976). The introduction of victim impact statements raises the possibility of distinctions in capital sentencings being drawn among morally identical defendants. For example, if A murders his boss (a devoted husband and father) and B murders his boss (a serial philanderer), most people would say that A and B bear identical “moral guilt,” at the very least if the personal characteristics of the victims were unknown to them.

150. The *Tison* opinion, authored by Justice O’Connor, is opaque on whether the sons anticipated, and thereby ratified, the murder committed by their father. At times, the majority opinion suggests that the two sons were merely negligent and are eligible for the death penalty regardless of whether they appreciated the mortal risks they created. *Tison v. Arizona*, 481 U.S. 137, 152 (1987) (the defendants “could have foreseen that lethal force might be used” (emphasis added)). At other times, the opinion suggests that the sons are only eligible for the death penalty because they displayed the depravity associated with a conscious disregard for life. See *id.* at 157–58 (referring to “the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death” (emphasis added)). Justice Scalia’s argument that *Tison* endorses the consideration of factors unrelated to moral guilt (subjectively unanticipated harms) is consistent with the former reading, but not the latter. See Joshua D. Greenberg, *Is Payne Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 IND. L.J. 1349, 1377–78 (2000).

capital sentencing hearing.¹⁵¹ In his brief dissenting opinion, Justice Scalia engaged in a full-throated declaration of his intention to overrule *Booth*, even saying that to adhere to such a precedent would be “a violation of my oath.”¹⁵² Precedent, Justice Scalia argued, is entitled to some weight, but “the freshness of error” weighs in favor of overruling an erroneous decision.¹⁵³ This is, he writes, “particularly true with respect to a decision such as *Booth*, which is in that line of cases purporting to reflect ‘evolving standards of decency’ applicable to capital punishment.”¹⁵⁴ *Gathers* is the first Justice Scalia opinion to quote the notorious phrase from *Trop*, and the implication is that that the entire line of cases is of corrupt pedigree. This may be correct, but in *Booth* Justice Scalia had been content to prowl around in these precedents without calling for, or even inviting briefing on, their invalidation. Justice Scalia concludes his *Gathers* opinion by lumping together all the species of argument at his disposal:

Booth has not even an arguable basis in the common-law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that present society, through its laws or the actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility.¹⁵⁵

This is a neat illustration of sake-of-argument originalism. According to Justice Scalia, the Eighth Amendment, properly understood, is defined by the “common-law background” and does not invite an inquiry into evolving standards of decency, but even if it did invite such an inquiry, there is no evidence that contemporary society has “set its face against considering the harm caused by criminal acts in assessing responsibility.”

151. In his closing argument, the prosecutor referred to religious items that were in the victim’s possession at the time of the offense. The fact that the defendant had scattered these items on the ground related to “the circumstances of the crime” and were appropriately the subject of comment. *South Carolina v. Gathers*, 490 U.S. 805, 811 (1989). However, the Court held that the content of those items and what they reflected about the victim’s character (that he was a man of faith) were not relevant to the “circumstances of the crime.” *Id.* at 811–12. According to the majority, the prosecutor’s statement was “indistinguishable in any relevant respect from that in *Booth*.” *Id.* at 811.

152. *Id.* at 825 (Scalia, J., dissenting).

153. *Id.* at 824.

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

155. *Id.* at 825.

As in his *Booth* dissent, the originalist argument is announced, but not sketched in detail. It is hard to know what Justice Scalia means when he refers to “the common-law background.” None of the seven briefs filed in this case mentioned the common law or provided historical background to the adoption of the Eighth Amendment. He may be alluding to a point made by Justice Black in *Williams v. New York*,¹⁵⁶ that “both before and since the American colonies became a nation,” judges in capital sentencing proceedings were provided “the fullest information possible concerning the defendant’s life and characteristics.”¹⁵⁷ Yet *Williams* did not suggest that full information concerning the crime’s impact on the victim’s family was ventilated at the sentencing hearing. In fact, as Justice Stevens observed in a later case, “[v]ictim impact’ evidence . . . was unheard of when *Williams* was decided.”¹⁵⁸

Even more significantly for an originalist such as Justice Scalia, victim impact statements did not exist at the time of the Eighth Amendment’s adoption. Overwhelmingly, death sentences were mandatory upon conviction for designated crimes; the judge exercised no discretion after a guilty verdict for a capital offense.¹⁵⁹ Victim impact statements were twentieth-century innovations designed to balance the mitigating factors introduced by the defense in newly minted capital sentencing proceedings.¹⁶⁰ It could be argued that in the early years of the republic, criminal prosecutions were ordinarily directed by the victim or the victim’s kin, who would expound, as the opportunity arose and evidentiary rules permitted, on the crime’s impact.¹⁶¹ Suffice it to say, it would have been helpful to know what Justice Scalia contemplated by “the common-law background,” although, as already indicated, at this point in his

156. 337 U.S. 241 (1949).

157. *Id.* at 246–47.

158. *Payne v. Tennessee*, 501 U.S. 808, 857 (1991) (Stevens, J., dissenting).

159. *See Miller v. Alabama*, 567 U.S. 460, 506 (2012) (Thomas, J., dissenting) (“[I]n the early days of the Republic, each crime generally had a defined punishment” (quoting *United States v. Grayson*, 438 U.S. 41, 45 (1978))). It should be added that executive clemency was commonplace in the eighteenth and nineteenth centuries. *See infra* note 285.

160. *Cf. Payne*, 501 U.S. at 821–22.

161. *See Douglas E. Beloof and Paul G. Cassell, The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 484–493 (2005).

tenure on the Court, he was an avowed originalist operating without any ammunition (at least not any supplied by the parties).

Another two years later, in *Payne v. Tennessee*, the Court overturned *Booth* in an opinion by Chief Justice Rehnquist. Justice Scalia's concurring opinion responds to Justice Marshall's dissenting opinion, which chastised the majority for contravening the doctrine of stare decisis.¹⁶² Justice Scalia's opinion turns Justice Marshall's own prior attacks on stare decisis against him, observing that, as Justice Marshall himself had written, the doctrine cannot amount to an "imprisonment of reason."¹⁶³ At some point, a case is so badly reasoned that it loses its authority as a precedent to be humbly followed. Justice Scalia then adds: "If there was ever a case that defied reason, it was *Booth v. Maryland*, imposing a constitutional rule that had absolutely no basis in constitutional text, in historical practice, or in logic."¹⁶⁴ It is perilous to infer a theory of stare decisis from a spare sentence, and it was not incumbent upon Justice Scalia to articulate such a theory. But one conclusion that might be drawn is that, for Justice Scalia, constitutional decisions that are clearly erroneous—that have "absolutely no basis in the constitutional text, in historical practice, or in logic"—are not entitled to precedential weight. And yet if that principle invalidates *Booth*, why does it not also invalidate the equally erroneous and foundational *Trop*? Is it simply that *Trop* was not quite so "fresh"?

Payne generated negative attention in the academy,¹⁶⁵ and Justice Stevens's hostility to the decision did not abate,¹⁶⁶ even in his retirement.¹⁶⁷ In part, the criticism focused on the fact that the majority had, in the words of Justice Stevens, steered

162. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

163. *Id.* at 833–34 (Scalia, J., concurring).

164. *Id.* (citation omitted).

165. See Michael Vitiello, *Payne v. Tennessee: A "Stunning Ipse Dixit,"* 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 167 & n.14 (1994) (collecting articles).

166. See *Kelly v. California*, 555 U.S. 1020, 1020–26 (2008) (Stevens, J., respecting the denial of the petitions for writs of certiorari).

167. See Hon. John Paul Stevens, *A Conversation with the Honorable John Paul Stevens*, Alliance for Justice at The George Washington University Law School (May 19, 2015), <https://www.afj.org/multimedia/videos/content/a-conversation-with-the-honorable-john-paul-stevens> [<https://perma.cc/3TJW-UEH6>].

the Court in a “sharp retreat from precedent.”¹⁶⁸ Justice Stevens is here referring not just to *Booth* and *Gathers*, but a line of cases which, in his reading, mandated exclusive consideration of factors implicating “moral guilt” in capital sentencing proceedings, and which therefore foreclosed the use of a VIS in such cases. Justice Scalia’s answer to this objection seems to have been: first, through a modest review of the precedents, Justice Scalia demonstrated that the cases did not in fact foreclose the introduction of a VIS in capital sentencing proceedings; and second, through immodest claims about the Eighth Amendment’s original meaning, Justice Scalia argued (or at least intimated) that the entire line of precedents was, from an originalist perspective, wrongly decided. However, to the extent that Justice Scalia was modest, he was not altogether persuasive, as the precedents themselves were ambiguous and confused. To the extent that he was immodest, he failed to articulate the originalist argument with sufficient clarity to promote confidence in his conclusion.

2. Juvenile Death Penalty

Prior to his full articulation of a theory of the Eighth Amendment in *Harmelin*, Justice Scalia heard two cases involving the constitutionality of capital punishment when imposed on juvenile offenders. Justice Scalia’s dissenting opinion in *Thompson v. Oklahoma*¹⁶⁹ and his majority opinion in *Stanford v. Kentucky*¹⁷⁰ are a mix of faint-hearted and sake-of-argument originalism. Both cases call into question Justice Scalia’s commitment to the Eighth Amendment’s original meaning, as he understands it, and both cases raise further questions about Justice Scalia’s ability to construe *Trop* and its progeny in a way that promotes the rule of law.

In *Thompson*, the fifteen-year-old defendant raised his youth as a mitigating factor at the sentencing hearing, but the jury

168. *Kelly*, 555 U.S. at 1024 (Stevens, J., respecting the denial of the petitions for writs of certiorari). Assuming Justice Stevens is right, it is nonetheless difficult to state the reliance interest implicated by *Booth* and *Gathers* in a way that generates any concern that their reversal undermines rule of law values. Should the Court have taken account of the reliance interest of those contemplating premeditated murder of upstanding citizens?

169. 487 U.S. 815 (1988).

170. 492 U.S. 361 (1989).

and judge, both exercising discretion, nonetheless imposed the death penalty.¹⁷¹ Citing *Trop*, Justice Stevens' plurality opinion surveys laws, practices, and opinions around the United States and the rest of the world; makes its own independent assessment; and concludes that, as a categorical matter, the execution of a fifteen-year-old offends "civilized standards of decency."¹⁷²

Justice Scalia's response begins with a perplexing concession not directly relevant to the case at hand: he admits that if the issue posed was whether a fifteen-year-old could be executed in a mandatory sentencing scheme, which denied the judge the opportunity to consider the defendant's "maturity and moral responsibility," he would accept the "conclusion that such a practice is opposed by a national consensus, sufficiently uniform and of sufficiently long standing, to render it cruel and unusual punishment within the meaning of the Eighth Amendment."¹⁷³ Justice Scalia even writes that he would be willing to overturn a death sentence imposed on an offender younger than age sixteen if the law did not provide that the offender enjoyed a "rebuttable presumption that he is not mature and responsible enough to be punished as an adult."¹⁷⁴

These concessions are inconsistent with the common law infancy defense, which Justice Scalia himself summarizes later in the opinion, according to which a fifteen-year-old was conclusively presumed to be a responsible adult.¹⁷⁵ In 1791, a mandatory death penalty upon a murder conviction was commonplace.¹⁷⁶ If the Eighth Amendment foreclosed only practices deemed barbaric in 1791, there could be no impediment to a *mandatory* death sentence when imposed on a fifteen-year-old. Justice Scalia's opening statement in *Thompson* rejects this position; indeed, Justice Scalia writes that a fifteen-year-old is entitled not only to an individualized sentencing, but also to a presumption of incapacity.¹⁷⁷ This may reflect contemporary "standards of decency" with respect to juvenile responsibility, but neither of these concessions has any basis in the law of

171. 487 U.S. at 819–21 (plurality opinion).

172. *Id.* at 821–38.

173. *Id.* at 859 (Scalia, J., dissenting).

174. *Id.*

175. *Id.* at 864.

176. See *supra* at text accompanying note 159.

177. 487 U.S. at 859 (Scalia, J., dissenting).

1791. The inescapable conclusion is that Justice Scalia has repudiated his own originalist interpretation of the Eighth Amendment with regard to juvenile criminal responsibility.¹⁷⁸

None of this was relevant to Thompson's case, because he was, consistent with binding precedent, allowed to argue youth as a mitigating factor in an individualized sentencing hearing.¹⁷⁹ Why, then, does Justice Scalia introduce the opinion with nonoriginalist dicta that undermine the originalist methodology he celebrates? The passage in *Thompson* foreshadows equally inexplicable dicta in the originalist opinion in *Heller v. District of Columbia*.¹⁸⁰ In that case, Justice Scalia, writing for the Court, struck down Washington, D.C.'s prohibition of handgun ownership on Second Amendment grounds.¹⁸¹ And yet, having decided the issue presented, Justice Scalia larded the opinion with dicta that "nothing in our opinion should be taken to cast doubt" on a variety of modern regulations on handgun ownership¹⁸²—regulations that have little or no basis in the practices of 1791. The dicta provoked accusations of hypocrisy from those sympathetic to Justice Scalia's originalism,¹⁸³ as well as those skeptical of it.¹⁸⁴ What makes this language in *Heller* and *Thompson* so perplexing is that it was unnecessary to resolve the cases. One of the supposedly great advantages that originalist judges have (when compared to originalist academics) is that they are only required to opine on "cases or controversies."¹⁸⁵ They can, therefore, put on their Article III blinders

178. See Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 AM. U. L. REV. 1577, 1584–85 (2018) ("When America's most famous originalist confronts the common law infancy defense in all its barbarity he is apparently driven into the camp of 'living constitutionalism.'").

179. See 487 U.S. at 862 (Scalia, J., dissenting) (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

180. 554 U.S. 570 (2008).

181. *Id.* at 635.

182. *Id.* at 626.

183. See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 U.C.L.A. L. REV. 1343, 1356–68 (2009); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?* 32 HARV. J.L. & PUB. POL'Y 695, 728–35 (2009).

184. See Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1191 & n.27 (2015) (collecting articles).

185. See Barrett, *supra* note 25, at 1929–30 ("The Justices not only lack any obligation to work systematically through the United States Reports looking for errors; the 'case or controversy' requirement prevents them from doing so.").

and avoid the hypotheticals that might otherwise embarrass the principled originalist scholar.

When Justice Scalia turns to the facts presented in *Thompson*, he castigates the majority for disregarding the original meaning of the Eighth Amendment: "The plurality does not attempt to maintain that [the Eighth Amendment] was originally understood to prohibit capital punishment for crimes committed by persons under the age of 16."¹⁸⁶ However, Justice Scalia had just pages earlier acknowledged that he too would be unwilling to accept the Eighth Amendment's "original meaning" if the death sentence had been imposed mandatorily.¹⁸⁷ Justice Scalia proceeds to summarize the common law on juvenile responsibility, as if that common law (which permitted mandatory capital punishment on fifteen-year-olds) resolved the case.¹⁸⁸ This is the flag-hoisting originalist part of the opinion: how can the execution of a fifteen-year-old be unconstitutional when, Justice Scalia observes, the "historical practice," consistent with the common law, had been to countenance such executions?¹⁸⁹ In short, the original meaning of the Eighth Amendment does not foreclose Thompson's execution (at least if at sentencing he was allowed to argue his youth as a mitigating factor).

Justice Scalia then moves to the nonoriginalist precedents, for the sake of argument. The transition is marked when he writes that "[n]ecessarily, therefore, the plurality seeks to rest its holding on . . . 'evolving standards of decency.'"¹⁹⁰ The remainder of the opinion contests the plurality's claim that those standards have in fact evolved to the point that the execution of a fifteen-year-old is categorically regarded as uncivilized.¹⁹¹ A crucial step in Justice Scalia's argument is his claim that those "standards" are to be discerned from what he calls "objective signs," and "[t]he most reliable objective signs consist of the legislation that the society has enacted."¹⁹² Justice Scalia adds that the opinions of other nations, as well as the personal opinions of the Justices, are not relevant in an assessment of "*this* socie-

186. 487 U.S. 815, 864 (1988).

187. *Id.* at 859.

188. *Id.* at 864.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 865.

ty[’s]’ consensus.¹⁹³ Having set these ground rules, Justice Scalia mounts a plausible response to the plurality’s claim that contemporary standards categorically foreclose the execution of a fifteen-year-old.¹⁹⁴

But is Justice Scalia true to the precedents in his narrowly circumscribed definition of “standards”? The issue proved crucial in *Stanford v. Kentucky*, in which the Court upheld the execution of a seventeen-year-old. Justice Scalia’s majority opinion begins with the originalist argument that such a punishment could not be unconstitutional, as it is not contrary to those modes of punishment that were prevalent in 1791.¹⁹⁵ Although Justice Scalia embellishes his argument with citations to Blackstone and Hale,¹⁹⁶ these authors endorsed punishments he would refuse to uphold as constitutional, such as flogging and the mandatory death penalty for fifteen-year-olds.¹⁹⁷ It is therefore unclear how much weight can fairly be assigned to their authority.¹⁹⁸

Justice Scalia then engages the dissenters on their own non-originalist ground. Even assuming that “evolving standards of decency” govern the case, Justice Scalia reasons that there is no American consensus foreclosing the imposition of the death penalty on seventeen-year-olds.¹⁹⁹ On the question of how to discern those “standards,” Justice Scalia offers this gloss on *Trop*: “When this Court cast loose from the historical moorings consisting of the original application of the Eighth Amend-

193. *Id.* at 868 n.4.

194. He observes that under the laws of the federal government and almost half the states, no bar exists to the execution of a fifteen-year-old. To the extent that jury decisions are also relevant, which Justice Scalia reluctantly allows, he adds that five different states have imposed death sentences on fifteen-year-olds from 1984 to 1986. *Id.* at 868–69.

195. *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989).

196. *Id.*

197. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *23–24; 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 24–29 (London, E. Rider 1800) (1736)).

198. At oral argument in *Thompson v. Oklahoma*, the counsel for Oklahoma invoked the authority of Blackstone, only to be rebuked by Justice Marshall. “I would say that our educational system and our government and everything else has sure progressed from Blackstone,” said Justice Marshall, to which counsel responded, “Well, yes, your Honor.” Transcript of Oral Argument at 32, *Thompson*, 487 U.S. 815 (No. 86-6169); see also Harry F. Tepker, *Thompson v. Oklahoma and the Judicial Search for Constitutional Tradition*, 38 OHIO N.U. L.J. 465 (2012).

199. *Thompson*, 492 U.S. at 377.

ment, it did not embark rudderless upon a wide-open sea. Rather, it limited the Amendment's extension to those practices contrary to the 'evolving standards of decency'²⁰⁰ Chief Justice Warren had not italicized "standards" in *Trop*. Justice Scalia, by this stylistic interpolation, presumably intended to buttress his argument that *Trop* did not authorize the Justices to act as, what he calls, "a committee of philosopher-kings"; rather they should defer to the "demonstrable current standards of our citizens," as evidenced by enacted laws.²⁰¹ This may be sound policy, and it certainly reflects Justice Scalia's own preference for firm rules that cabin judges' discretion and promote clarity and predictability; it is unclear, however, where in *Trop* Justice Scalia discerned this principle.

The crucial paragraphs of Chief Justice Warren's plurality opinion in *Trop* venture into precisely the kind of "wide-open sea" where philosopher-kings roam. For the proposition that evolving standards now regard denationalization as uncivilized, Chief Justice Warren did not cite a single American law, regulation, or even public opinion poll.²⁰² Indeed, he did not respond to Justice Frankfurter's strident invocations of American law and historical practice.²⁰³ Instead, Chief Justice Warren pronounced (quoting Chief Judge Clark): "*In my faith*, the American concept of man's dignity does not comport with making even those we would punish completely 'stateless.'"²⁰⁴ To the extent that any external validation of Chief Justice Warren's "faith," can be discerned, it is in the opinions of the "civilized nations of the world," in which he claims to find a "virtual unanimity" opposed to the punishment of statelessness.²⁰⁵ If *Trop* is regarded as controlling precedent, it invites Justices to consider their own opinions, as well as those of academics, broadly defined, and the international community, in discerning contemporary "standards." Alternatively put, Justice Scalia's claim that only, or preeminently, American *laws* are rele-

200. *Id.* at 378–79 (alteration in original) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

201. *Id.* at 379.

202. See *Trop*, 356 U.S. at 101–04 (plurality opinion).

203. *Id.*; see also *id.* at 114–28 (Frankfurter, J., dissenting).

204. *Id.* at 101 n.33 (plurality opinion) (emphasis added) (quoting *Trop v. Dulles*, 239 F.2d 527, 530 (2d Cir. 1956) (Clark, C.J., dissenting)).

205. *Id.* at 102.

vant in arriving at contemporary standards is not faithful to *Trop* itself.

It is true that several of the cases that followed *Trop* purported to provide guidance for judges in discerning contemporary standards, emphasizing the importance of “objective” factors.²⁰⁶ In *Stanford*, Justice Scalia deploys these precedents to channel the Court’s discretion.²⁰⁷ He writes, “[F]irst’ among the ‘objective indicia that reflect the public attitudes toward a given sanction’ are statutes passed by society’s elected representatives.”²⁰⁸ Justice Scalia’s quotation from *McCleskey* omits what immediately follows the quoted sentence: “We also have been guided by the sentencing decisions of juries, because they are ‘a significant and reliable objective index of contemporary values.’ Most of our recent decisions as to the constitutionality of the death penalty for a particular crime have rested on such an examination of contemporary values.”²⁰⁹ The first sentence draws attention to jury verdicts, the significance of which Justice Scalia often downplayed.²¹⁰ The second sentence hints at what “most of the recent decisions” have looked to, and the answers range far and wide. For example, in *Enmund*, cited approvingly by Justice Scalia, Justice White indeed drew attention to the fact that only eight jurisdictions authorized the death penalty for robbery,²¹¹ but contrary to Justice Scalia’s implication, Justice White’s reasoning extended beyond that:

Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, *it is for us ultimately to judge* whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.²¹²

206. See *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); see also *Penry v. Lynaugh* 492 U.S. 302, 331 (1989).

207. *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989).

208. *Id.* at 370 (alteration in original) (quoting *McCleskey*, 481 U.S. at 300).

209. *McCleskey*, 481 U.S. at 300 (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)) (citing, *inter alia*, *Enmund v. Florida*, 458 U.S. 782, 789–96 (1982)).

210. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 868–69 (1988) (Scalia, J., dissenting).

211. *Stanford*, 492 U.S. at 371 (citing *Enmund*, 458 U.S. at 792).

212. *Enmund*, 458 U.S. at 797 (emphasis added).

Justice White then explained why, *in his opinion*, the death penalty was not merited when the offender's crime was robbery (even if an accomplice committed murder).²¹³ He also cited, as support, the "climate of international opinion" and H. L. A. Hart's *Punishment and Responsibility*.²¹⁴ If Chief Justice Warren, in *Trop*, could summon wisdom from a student note in the Yale Law Journal, Justice White cannot be faulted for his reliance on H. L. A. Hart.

3. Sentencing Discretion in Capital Cases

Furman v. Georgia, decided in 1972, only fifteen years before Justice Scalia joined the Court, inaugurated the era of death penalty jurisprudence. *Furman* was a 5–4 decision with every Justice writing separately.²¹⁵ Despite post hoc efforts to derive something remotely akin to a rule of law in that 118-page collection of opinions, *Furman's* message was, in the words of one of the most insightful scholars to study it, "indecipherable."²¹⁶ What the vast majority of Americans did decipher from *Furman* was inchoate hostility to the death penalty, and the result was a sustained outpouring of denunciation of the Court and the enactment of thirty-five new death penalty statutes.²¹⁷ A majority of these statutes moved in the direction of a "mandatory" death penalty, but a substantial minority of states adopted sentencing hearings with specified standards (or "aggravating factors") that would warrant the imposition of a death sentence.²¹⁸

213. *Id.*

214. *Id.* at 796 n.22 (quoting *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977)); *id.* at 798 (quoting H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 162 (1968)).

215. The case presented two capital cases from Georgia and a third from Texas. *Furman v. Georgia*, 408 U.S. 238, 238 n.* (1972). A per curiam order, supported by five Justices, invalidated the death sentences under the Eighth Amendment. In separate opinions, two Justices (Brennan and Marshall) advocated abolition, while another three (Douglas, Stewart, and White) claimed only to reject the death penalty as it was administered. Effectively, the decision struck down death penalty statutes in thirty-nine states, the District of Columbia, and the federal government, though Rhode Island's completely discretionless capital sentencing scheme survived another four years. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 362 & n.22 (1995).

216. See Scott W. Howe, *Furman's Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 441 (2007).

217. *Id.* at 443.

218. *Id.* at 443–44.

The diversity of legislative responses to *Furman* is evidence that no one was sure what the Court expected, but the Court—or at least some Justices—picked up on the public’s anger. In *Gregg v. Georgia*, a three-Justice plurality purported to synthesize *Furman* and upheld certain death penalty statutes.²¹⁹ Their opinion explained, “[W]here discretion is afforded a sentencing body [in capital cases] that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”²²⁰ In this inventive reconstruction, the opinions of Justices Stewart and White in *Furman* emerged as crucial. According to Justice Stewart’s opinion, when the death penalty, as administered, is “wantonly and freakishly imposed” it violates the Eighth Amendment: “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and usual.”²²¹

When viewed through the prism of *Gregg*, the principle of consistency emerged, it was said, as the mandate of *Furman*.²²² And yet the same year *Gregg* was decided, the Court also held, in *Woodson v. North Carolina* that mandatory capital punishment for specified categories of murder violated the Eighth Amendment.²²³ This was baffling in that mandatory death penalty statutes seemed the most straightforward way to achieve consistency and to avoid disparities based on invidious characteristics, such as race.²²⁴ But the *Woodson* Court held that the offender in a capital case was constitutionally entitled to an individualized assessment of his character and culpability.²²⁵ Following *Woodson*, the Court held in *Lockett v. Ohio*²²⁶ that States could not limit the kinds of mitigating evidence a sentencing body could consider. So at the time Justice Scalia joined the Court there were two lines of cases: one line, supposedly originating in *Furman*, had invalidated unfocused sentencing deci-

219. 428 U.S. 153, 168–76 (1976) (plurality opinion).

220. *Id.* at 189.

221. *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring); see also *id.* at 313 (White, J., concurring). I confess myself unenlightened by this legendary *bon mot*. Yes, lightning is rare and often lethal; however, unless wielded by Zeus, how is lightning punishment?

222. See Howe, *supra* note 216, at 441–43.

223. 428 U.S. 280, 305 (1976) (plurality opinion).

224. See Howe, *supra* note 216, at 437.

225. 428 U.S. at 303–04.

226. 438 U.S. 586 (1978).

sionmaking in capital cases (the concern being capricious death sentences); the other line, originating in *Woodson*, had invalidated focused sentencing decisionmaking in capital cases (the concern being death sentences being imposed without an opportunity for mercy).²²⁷ How would Justice Scalia traverse these inconsistent precedents while also remaining faithful to the Eighth Amendment's original meaning?

*Walton v. Arizona*²²⁸ is the most significant of the pre-*Harmelin* cases that posed such a question. The petitioner raised two Eighth Amendment challenges: first, he argued that Arizona's death penalty statute inadequately channeled the sentencer's assessment of aggravating factors (in violation of *Furman*); and second, he argued that the statute inappropriately narrowed the sentencer's assessment of mitigating factors (in violation of *Woodson-Lockett*).²²⁹ Justice Scalia joined Justice White's plurality opinion rejecting the *Furman* challenge, but with respect to the *Woodson* challenge, he contributed a concurring opinion, with ruminations on the emerging death penalty jurisprudence and the value of precedent in constitutional cases.²³⁰

Justice Scalia devotes the first part of his opinion to a survey of the *Furman* and *Woodson-Lockett* lines of cases, ridiculing Justice Blackmun's suggestion that there is "perhaps . . . an inherent tension" between the two lines of precedent as "rather like saying that there was perhaps an inherent tension between the Allies and Axis Powers in World War II."²³¹ It is a clever line, but the claim that the *Furman-Gregg* and the *Woodson-Lockett* lines of cases are as violently incompatible as Winston Churchill and Adolph Hitler is overstated. Many academic commentators have argued that when consistency and individuation are

227. See Howe, *supra* note 216, at 437.

228. 497 U.S. 639 (1990); see also *Penry v. Lynaugh*, 492 U.S. 302 (1989).

229. 497 U.S. at 647, 649–50 (opinion of White, J.).

230. Walton also raised a Sixth Amendment argument that he was entitled to a jury determination of the aggravating factors that needed to be proven before a death sentence could be imposed. The majority opinion rejecting this argument is a brief recapitulation of precedents. See *id.* at 647–49. Justice Scalia concurred in this portion of the opinion. Justice Stevens dissented in a strikingly originalist opinion. See *id.* at 710 (Stevens, J., dissenting) ("If this question had been posed in 1791, when the Sixth Amendment became law, the answer would have been clear."). Years later, Justice Scalia would change his mind on the Sixth Amendment issue. See *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

231. *Walton*, 497 U.S. at 664 (Scalia, J., concurring in part and concurring in the judgment).

construed as guiding principles and not binding legal rules “the contradiction evaporates.”²³² In any event, Justice Scalia concludes Part I of the opinion with the observation that States are struggling to comply with the Court’s contradictory commands. It is time, he writes, “to reexamine our efforts in this area and to measure them against the text” of the Constitution.²³³

This sounds like a segue into foundational reflections. Part II of the opinion indeed begins by quoting the Eighth Amendment, but any expectations of a textual and originalist opinion are then dispelled. Justice Scalia writes that the *Furman* line of cases—rejecting the “wanton and freakish” death sentences that result from unchanneled jury decisionmaking as “cruel and unusual”—is “probably not what was meant by an ‘unusual punishment.’”²³⁴ Justice Scalia explains that, “as far as I can discern (this is not the occasion to explore the subject) . . . the text did not originally prohibit a form of punishment that is rarely imposed, as opposed to a form of punishment that is not traditional.”²³⁵ Justice Scalia adds, however, that, “the phrase can bear the former meaning,” so he is “willing to adhere to the precedent.”²³⁶ By contrast, “[t]he *Woodson-Lockett* line of cases . . . is another matter,”²³⁷ that is, it is indisputably unconstitutional.

Justice Scalia’s argument is problematic on several levels. Preliminarily, let us note that if “this is not the occasion to explore the subject,”²³⁸ why did Justice Scalia raise it at all? None of the parties did. Yet again a case came before the Court with not even an allusion in the briefs to the Eighth Amendment’s original meaning. Justice Scalia could have ducked the ques-

232. Mary Sigler, *Contradiction, Coherence, and Capital Discretion in the Supreme Court’s Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1170 (2003) (“Because principles inform, but do not inevitably determine, legal outcomes, competing principles can coexist within the decision-making process.”); see also Srikanth Srinivasan, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347, 1355 (1995) (arguing that Justice Scalia overstates the tension).

233. *Walton*, 497 U.S. at 669 (Scalia, J., concurring in part and concurring in the judgment).

234. *Id.* at 670.

235. *Id.*

236. *Id.* at 670–71.

237. *Id.* at 671.

238. *Id.* at 670.

tion of *Woodson's* constitutionality, as Justice White did, but he seemed to go out of the way to opine on the issue, without any assistance from the parties. Justice Scalia's originalist arguments are at best allusive. There is his suggestion that the *Furman* line is less contrary to the Eighth Amendment than the *Woodson* line because mandatory death sentences were once commonplace in America.²³⁹ Implicit is the claim that the Eighth Amendment derives its meaning from the modes and practices that existed in 1791. But as already noted, Justice Scalia had, with respect to fifteen-year-olds, conceded that an individualized determination in capital sentencing proceedings is constitutionally required.²⁴⁰ This concession was apparently based on his observation that contemporary standards presume such an individualized determination. Arguably, however, contemporary standards require an opportunity for sentencing discretion and mercy in capital cases *even for adults*. If *Trop* is to be accorded precedential weight, then the *Woodson* line of cases is potentially as harmonious with the Eighth Amendment as the *Furman* line.²⁴¹

The deeper problem with Justice Scalia's argument is that, assuming the Eighth Amendment derives its meaning from the modes and practices that existed in 1791, *Furman* is indefensible, as the aforementioned Professor Raoul Berger had argued.²⁴² (Curiously, not once in any of his Eighth Amendment opinions does Justice Scalia cite or acknowledge Berger's book on the Eighth Amendment.) There can be no doubt that, had Justice Scalia been on the Court in 1972, he would have been among the dissenters in *Furman*.²⁴³ Even Justice Powell, no textualist or originalist, made the Scalia-esque observation that it is impossible for capital punishment to be unconstitutional when it is mentioned in the Constitution itself.²⁴⁴ And Justice Rehnquist's unusually strident dissenting opinion adumbrates Justice Scalia's late dissents in death penalty cases, invoking

239. *Id.* at 671.

240. See *supra* at text accompanying notes 173–174.

241. Justice Stevens made this argument. See *Walton*, 497 U.S. at 718 (Stevens, J., dissenting).

242. BERGER, *supra* note 111, at 127–30.

243. Any doubts on this matter were laid to rest in *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (*Furman* has “no proper foundation in the Constitution”).

244. *Furman v. Georgia*, 408 U.S. 238, 418–20 (1972) (Powell, J., dissenting).

The Federalist Papers and accusing the majority of judicial fiat.²⁴⁵ Apart from the fact that consistency does not seem to have been a motivating factor for most members of the *Furman* or *Gregg* Courts,²⁴⁶ and the fact that consistency, shorn of other objectives, can promote cruelty,²⁴⁷ the short response to Justice Scalia's suggestion that *Furman's* mythical consistency rationale has "some basis" in the Eighth Amendment is that this suggestion is simply wrong, at least from a textualist and originalist perspective. As Professor Scott Howe has observed, "a consistency mandate does not comport with the language of the Eighth Amendment. The prohibition on cruel and unusual punishments implies substantive limits on decisional standards rather than merely a requirement of regularity."²⁴⁸

These difficulties aside, one might infer from *Walton* that Justice Scalia is articulating, or at least hinting at, a theory of originalism and *stare decisis* according to which the original meaning of the Constitution includes a judicial power to overturn demonstrably erroneous precedent. In other words, *Furman* may be wrong, but *Woodson* is demonstrably wrong, and so the latter, if not the former, deserves to be overruled. But this is *not* what Justice Scalia is arguing:

Despite the fact that I think *Woodson* and *Lockett* find no proper basis, *they have some claim to my adherence because of the doctrine of stare decisis*. I do not reject the claim lightly, but I must reject it here. My initial and fundamental problem . . . is not that *Lockett* and *Woodson* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*.²⁴⁹

The "fundamental" reason Justice Scalia puts forth for overturning *Lockett* and *Woodson* is not that they are demonstrably erroneous, but that they conflict with the probably erroneous

245. *Id.* at 466–68 (Rehnquist, J., dissenting).

246. As Scott Howe observes, the fact that the *Gregg* Court invalidated mandatory death sentence upends any notion that consistency was somehow what the Court sought to promote. Howe, *supra* note 216, at 436.

247. See Daniel D. Polsby, *The Death of Capital Punishment?: Furman v. Georgia*, 1972 SUP. CT. REV. 1, 27 (asking whether "a punishment imposed under a system of unmitigated harshness would be less cruel" than one "institutionalizing avenues of mercy").

248. Howe, *supra* note 216, at 436.

249. *Walton v. Arizona*, 497 U.S. 639, 672–73 (1990) (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

Furman. Were it not for this conflict, Justice Scalia suggests that he would continue to follow these precedents because even precedents with “no basis” in the Constitution nonetheless “have some claim to my adherence.”²⁵⁰ The word “some” is freighted with ambiguity, and two interpretations are possible. The first, advanced by the late Professor Steven Gey two years after *Walton* was decided, attributes originalist zeal to Justice Scalia. Gey argued that Justice Scalia’s gratuitous resort to first principles in his *Walton* concurrence and his observation that *Furman* was “probably wrongly decided” hinted at his real objective: the eventual sweeping away of *Furman* and the entirety of the Court’s (nonoriginalist) death penalty jurisprudence.²⁵¹ The second interpretation attributes more humility to Justice Scalia. His willingness to follow *Furman*, or at least his reconstruction of *Furman*, and his statement that he would even be willing to follow *Woodson*, absent its conflict with other precedents, reflects far more caution in overturning precedent than Gey allows. Time would tell which of these two interpretations was correct.

B. *Harmelin v. Michigan*

Four years after he joined the Supreme Court, Justice Scalia composed what purports to be his originalist understanding of the Eighth Amendment. In subsequent years, Justice Scalia and other like-minded Justices would cite his opinion in *Harmelin v. Michigan* to promote that originalist position. And yet the opinion is not, in fact, an exercise of pure originalism; it is better characterized as a medley of faint-hearted originalism and sake-of-argument originalism.

Before turning to *Harmelin*, we should recognize the difficulty Justice Scalia faced in being an originalist in 1991. As he observed decades later, in his early years on the Court, the parties and amici seldom provided historical arguments to assist an originalist Justice in crafting the kind of opinion he avowed as his ideal.²⁵² There was also a dearth of academic literature for Justices to draw upon. It is true that the *Weems* and *Trop* Courts

250. *Id.* at 672 (emphasis added).

251. See Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. L. REV. 67, 94–96 (1992).

252. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 401–02 (2012).

did provide historical justifications for their interpretations of the Eighth Amendment.²⁵³ However, it was also fair to say, as Anthony Granucci did in 1969, that the historical origins of the Eighth Amendment had “never been adequately investigated.”²⁵⁴ In a short law review article, Granucci tried to remedy this deficiency. His article concluded that the English Declaration of Rights was enacted with two purposes: first, to prohibit punishments not authorized by statute, and second, to prohibit disproportionate punishments.²⁵⁵ Although Granucci supported the first conclusion with a review of the history behind the provision’s enactment, his support for the second conclusion consisted of a couple of older cases and a few sections from the Magna Carta.²⁵⁶ Granucci also argued that the American Framers, through an erroneous reading of Blackstone, misconstrued the meaning of the English Declaration of Rights; in his account, they understood that the prohibition on “cruel and unusual punishments” foreclosed only tortuous, but not excessive or disproportionate, punishments.²⁵⁷

Over the next two decades, the twenty-eight-page Granucci article became a legal Rorschach Test: everyone saw something different in it, either to embrace, criticize, or ignore. In their *Furman* and *Gregg* opinions, Justices Brennan and Stewart approvingly cited the Granucci article, but glossed over his argument that the Framers had not intended the Eighth Amendment to embody a proportionality principle.²⁵⁸ Meanwhile, the Solicitor General of the United States, defending the death penalty in *Gregg*, emphasized Granucci’s argument that the Eng-

253. See *Trop v. Dulles*, 356 U.S. 86, 99–102 (1958) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 368–73 (1910).

254. Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted”: *The Original Meaning*, 57 CAL. L. REV. 839, 839 (1969).

255. *Id.* at 860.

256. *Id.* at 852–860, 844–852; see also Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 45 (2000) (noting the scant evidence Granucci adduces to support his second conclusion).

257. See Granucci, *supra* note 254, at 865 (referring to “the American doctrine that the words ‘cruel and unusual punishment’ proscribed not excessive but tortuous punishments”).

258. *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (plurality opinion).

lish Declaration of Rights was primarily designed only to foreclose punishments outlawed by statute.²⁵⁹

Then, in 1982, Professor Raoul Berger published *Death Penalties*, which not only challenged the *Weems-Trop* line of cases, but also devoted nearly a chapter to a criticism of Granucci's article.²⁶⁰ Berger identified sundry gaps, logical and historical, in Granucci's conclusion that the alternative rationale for the English Declaration of Rights was to embody a proportionality principle.²⁶¹ However, Berger *sub silentio* adopted Granucci's conclusion that the Framers had misconstrued the English Declaration of Rights and intended the Eighth Amendment solely to foreclose "tortuous" punishments.²⁶² Although the briefs in *Harmelin* provided an originalist with almost no material assistance, Justice Scalia could draw upon the work of Granucci and Berger.

Harmelin involved a life without parole sentence, imposed mandatorily in a scheme that deprived the sentencer of any discretion, given the offense of conviction (drug trafficking).²⁶³ Yet again, the precedents were inconsistent, one line holding that the Eighth Amendment embodied a proportionality principle in capital and noncapital cases and another line holding that proportionality review applied only in the capital context. The latter position was set forth in *Rummel v. Estelle*,²⁶⁴ in which the Court upheld a life with parole sentence imposed on a recidivist nonviolent offender. The Court held that, outside the death penalty context, any non-barbaric punishment that was legislatively ordained satisfied the Eighth Amendment.²⁶⁵ The Court did add, albeit in a qualifying footnote, that a proportionality principle could be invoked in an extreme case, if, for example, overtime parking was punished by life imprisonment.²⁶⁶ The former position originated in *Solem v. Helm*.²⁶⁷ Overturning a life without parole sentence imposed on a recid-

259. Brief for the United States as Amicus Curiae at 20–21, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-C237), 1976 WL 178718.

260. BERGER, *supra* note 111, at 29–43.

261. *Id.*

262. *Id.* at 44–49.

263. *Harmelin v. Michigan*, 501 U.S. 957, 961–62 (1991) (opinion of Scalia, J.).

264. 445 U.S. 263 (1980).

265. *Id.* at 272, 274.

266. *Id.* at 274 n.11.

267. 463 U.S. 277 (1983).

ivist nonviolent offender, the *Solem* Court suggested that the Eighth Amendment's proportionality principle applied in both capital and noncapital cases.²⁶⁸

Justice Scalia's opinion in *Harmelin* comprises four parts. Part I begins not on a strident originalist note, but by highlighting the "apparent tension" between *Solem* and *Rummel*.²⁶⁹ After observing that "the doctrine of *stare decisis* is less rigid in its application to constitutional precedents," Justice Scalia announces his intention to overrule *Solem* as "simply wrong[:] the Eighth Amendment contains no proportionality guarantee."²⁷⁰ The remainder of the first part of Justice Scalia's opinion, by far the longest, is his originalist Eighth Amendment manifesto. His exploration of the English and American primary sources and secondary literature culminates in his conclusion that neither the English Declaration of Rights nor the Eighth Amendment embodies a proportionality principle.²⁷¹ Although Justice Scalia at various points concedes there are plausibly held contrary views,²⁷² he overlooks important evidence. In his defense, much of this material was mined, cataloged, and analyzed in later scholarship far more comprehensive than that of Granucci and Berger; in this regard, one should principally note the work of Professor John Stinneford.²⁷³ But the point here is not so much to critique Justice Scalia's originalist argument as to focus on the question of what role his originalism plays in driving the opinion.

Part II of Justice Scalia's *Harmelin* opinion is curiously devoted to arguing that the Framers acted wisely in not including a proportionality requirement, strengthening his resolve to overrule *Solem*.²⁷⁴ A proportionality requirement is imprudent, Jus-

268. *Id.* at 288–89.

269. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (opinion of Scalia, J.).

270. *Id.*

271. *Id.* at 974.

272. See, e.g., *id.* at 967–68 (acknowledging a disagreement among historians).

273. See John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. (2017); John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531 (2014); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).

274. 501 U.S. at 985 (opinion of Scalia, J.) ("There was good reason for that choice [not to embody a proportionality principle in the Eighth Amendment]—a reason that reinforces the necessity of overruling *Solem*."). One might wonder

tice Scalia argues, because it is impossible to compare the gravity of disparate offenses. In a footnote he addresses Justice White's objection that the absence of a proportionality requirement would mean that there is no constitutional bar to a life prison sentence as a punishment for overtime parking. Justice Scalia retorts that this is only a problem for those who think the Constitution must foreclose every unjust law.²⁷⁵ This is a fair point, but at odds with what Justice Scalia had conceded in *Originalism: The Lesser Evil*. There, when the question posed was whether he would, as a judge, countenance flogging, he had written that he would be prepared to disregard the original meaning of the Constitution, as he understood it, to overturn the sentence.²⁷⁶ By contrast, this footnote in *Harmelin* espouses the pure or heroic originalism that trumpets the original meaning, and holds it binding, even if it conflicts with contemporary moral sentiment.

Part III of Justice Scalia's opinion is a survey of the relevant nonoriginalist precedents. Justice Scalia argues that the Court has read the Eighth Amendment to require proportional punishment only in the death penalty context.²⁷⁷ He acknowledges that *Weems* could be read to stand either for a prohibition of barbaric punishments or for a requirement of proportionality, but that the precedents declined to pursue the latter reading except in capital cases.²⁷⁸ According to Justice Scalia, "*Rummel* treated this line of authority as an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law."²⁷⁹ He adds: "We would leave it there, but will not extend it further."²⁸⁰

why Justice Scalia thinks it appropriate to spend an entire part of the opinion on the argument that the Framers of the Eighth Amendment acted wisely in omitting a proportionality requirement. Cf. *Kansas v. Marsh*, 548 U.S. 163, 186 (2006) (Scalia, J., concurring) ("As a general rule, I do not think it appropriate for judges to heap either praise or censure upon a legislative measure that comes before them . . ."). In any event, Justice Scalia's praise of the Eighth Amendment's omission of a proportionality requirement is an implicit criticism of the many state constitutions that include such a requirement. See, e.g., N.H. CONST. art. XVIII ("All penalties ought to be proportioned to the nature of the offense.").

275. *Harmelin*, 501 U.S. at 986 n.11 (opinion of Scalia, J.).

276. See *supra* at text accompanying note 118.

277. See *Harmelin*, 501 U.S. at 994–95 (opinion of Scalia, J.).

278. See *id.* at 992–94.

279. *Id.* at 994. This is not entirely accurate, given that *Rummel* indicated that extreme disproportionality (life imprisonment for overtime parking) could be

The “we” in Part III barely avoided being an “I.” Only one other member of the Court joined this part of the opinion: Chief Justice Rehnquist.²⁸¹ Part III doubtless appealed to Chief Justice Rehnquist. It was consistent with his general approach of narrowly reading rather than overturning Warren and Burger Court precedents with which he disagreed.²⁸² But the holding of Part III is, for a principled originalist, puzzling. Justice Scalia’s tolerance of proportionality in capital cases in Part III is inconsistent with the originalist portion of the argument (Part I), where he had emphasized that there was no basis for a proportionality requirement in the Eighth Amendment.²⁸³ Part II added that the Framers had acted prudently in not including a proportionality requirement.²⁸⁴ Then in Part III, Justice Scalia announces that, all that notwithstanding, he is willing to accept proportionality review in capital cases.

Part IV, which was joined not only by Chief Justice Rehnquist but also by Justices O’Connor, Kennedy, and Souter, addresses the mandatory nature of Hamelin’s sentence and encapsulates the disjointed quality of Justice Scalia’s opinion. It begins with originalist fanfare, citing the “text and history of the Eighth Amendment,” and arguing that, given the history, “mandatory penalties may be cruel, but they are not unusual.”²⁸⁵ Yet Justice Scalia then concedes that the Court has required individualized sentencings in the capital context. Although these precedents have no basis in the Constitution, Justice Scalia is prepared to follow them: “We have drawn the line of required individualized sentencing at capital cases, and

unconstitutional even outside that capital context. See *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).

280. *Harmelin*, 501 U.S. at 994 (opinion of Scalia, J.).

281. *Id.* at 961.

282. See *supra* at note 87.

283. See generally *Harmelin*, 501 U.S. at 966–75 (opinion of Scalia, J.).

284. See *id.* at 985.

285. *Id.* at 994–95. Justices Scalia and Thomas often observe that “mandatory” death penalties were commonplace in the eighteenth and nineteenth centuries, yet they gloss over the fact that mandatorily imposed death sentences were regularly commuted through executive clemency. See STUART BANNER, *THE DEATH PENALTY, AN AMERICAN HISTORY* 54 (2002). Given that the practice of executive clemency has withered, see Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL’Y 833, 851–56 (2016), one might question the mechanical conclusion that mandatory death sentences remain consistent with the original meaning of the Eighth Amendment.

see no basis for extending it further.”²⁸⁶ Accordingly, the reason Justice Scalia rejects Harmelin’s challenge to the mandatory nature of his sentence is not that it fails on originalist grounds, but that it is not supported by the Court’s precedents.

A brief coda: A little more than a decade later, in *Ewing v. California*,²⁸⁷ the Court considered a challenge to a twenty-five-years to life sentence for a recidivist nonviolent offender. In his concurring opinion, Justice Scalia cited his *Harmelin* opinion for the proposition that the Eighth Amendment does not embody a proportionality principle.²⁸⁸ But he added that, “I might nonetheless accept the contrary holding of *Solem v. Helm*—that the Eighth Amendment contains a narrow proportionality principle—if I felt I could intelligently apply it.”²⁸⁹ Thus, the reason Justice Scalia voted to overturn *Solem* was not that it was contrary to the Constitution, as he laid out in Part I of his *Harmelin* opinion, but that it was judicially impracticable, as he laid out in Part II. So we are left with the question: what purpose was served by the originalist Part I?

C. *The Post-Harmelin Cases*

This section divides Justice Scalia’s post-*Harmelin* cases into five topic categories: sentencing discretion in capital cases, the death penalty and the mentally retarded, the juvenile death penalty, significant cases in which Justice Scalia was silent, and execution protocol cases.

1. *Sentencing Discretion in Capital Cases Revisited*

For many years, the Court struggled to reconcile the *Furman* and *Woodson-Lockett* lines of cases, precedents that pointed in conflicting directions on the question of sentencing discretion in capital cases. On the one hand, *Furman* required channeled discretion, at least with respect to aggravating factors; on the other hand *Woodson-Lockett* required unfettered discretion, at least with respect to mitigating factors.²⁹⁰ Justice Scalia consist-

286. *Harmelin*, 501 U.S. at 996.

287. 538 U.S. 11 (2003).

288. *Id.* at 31 (Scalia, J., concurring).

289. *Id.*

290. *See supra* at text accompanying notes 222–227.

ently argued, as he had in *Walton v. Arizona*,²⁹¹ that he would resolve the tension by overturning the cases arising from *Woodson*.²⁹² For example, dissenting in *Tennard v. Dretke*,²⁹³ Justice Scalia wrote:

I have previously expressed my view that [the] ‘right’ to unchanneled sentencer discretion has no basis in the Constitution I have also said that the Court’s decisions establishing this right do not deserve *stare decisis* effect, because requiring unchanneled discretion . . . cannot rationally be reconciled with our earlier decisions requiring canalized discretion²⁹⁴

Here, exactly as in *Walton v. Arizona*, we are confronted with a passage that undermines Justice Scalia’s reputation as an originalist. The first sentence restates his position that the Eighth Amendment does not require the sentencer (either a judge or jury) to have unfettered discretion to confer mercy in capital cases. Yet the second sentence suggests that Justice Scalia’s refusal to follow the *Woodson* line of cases is not because it conflicts with the Constitution, but because it conflicts with another line of cases: the progeny of *Furman*.

291. 497 U.S. 639, 672–73 (1990) (Scalia, J., concurring in part and concurring in the judgment).

292. See, e.g., *Ayers v. Belmontes*, 549 U.S. 7, 24 (2006) (Scalia, J., concurring) (“I adhere to my view that limiting a jury’s discretion to consider all mitigating evidence does not violate the Eighth Amendment.”); *Smith v. Texas*, 543 U.S. 37, 49 (2004) (Scalia, J., dissenting) (citing his *Walton* opinion); *Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (Scalia, J., concurring) (“I continue to adhere to my view that the Eighth Amendment does not, in any event, require that sentencing juries be given discretion to consider mitigating evidence. Petitioner’s argument ‘that the jury at the selection phase must both have discretion to make an individualized determination and have that discretion limited and channeled,’ . . . perfectly describes the incompatibility between the *Lockett-Eddings* requirement and the holding of *Furman v. Georgia* . . . that the sentencer’s discretion must be constrained to avoid arbitrary or freakish imposition of the death penalty.” (quoting *id.* at 275 (majority opinion)); *Johnson v. Texas*, 509 U.S. 350, 373 (1993) (Scalia, J., concurring) (“In my view the *Lockett-Eddings* principle that the sentencer must be allowed to consider ‘all relevant mitigating evidence’ is quite incompatible with the *Furman* principle that the sentencer’s discretion must be channeled.”); *Sochor v. Florida*, 504 U.S. 527, 554 (1992) (Scalia, J., concurring in part and dissenting in part) (“It has been my view that the Eighth Amendment does not require any consideration of mitigating evidence . . . a view I am increasingly confirmed in, as the byzantine complexity of the death penalty jurisprudence we are annually accreting becomes more and more apparent.”).

293. 542 U.S. 274 (2004).

294. *Id.* at 293 (Scalia, J., dissenting).

As was discussed above,²⁹⁵ Professor Gey speculated that *Walton* was just the first step in a more ambitious plan. Justice Scalia's ultimate goal, Gey argued, was to return to "first principles," overturn both *Furman* and *Woodson*, and end the Court's micromanagement of capital cases.²⁹⁶ Professor Gey's prediction seemed reasonable, given Justice Scalia's rhetoric and professed commitment to originalism, but it proved to be mistaken. Although Justice Scalia repeatedly hinted (and eventually stated) that he regarded *Furman* as wrongly decided, at no point did he invite its reconsideration. Illustrative is *Callins v. Collins*,²⁹⁷ in which Justices Scalia and Blackmun engaged in a revealing exchange on the question of how to resolve the conflict between *Furman* and *Woodson*.

Unlike Justice Scalia, Justice Blackmun regarded both lines of cases as sound and rooted in the Constitution. According to Justice Blackmun, the *Woodson* progeny is, of the two, even more firmly settled in our moral universe: it is hard to imagine, given our contemporary standards of decency, that a capital punishment scheme would generate a death sentence automatically and mandatorily, without affording a sentencer the possibility of extending mercy.²⁹⁸ However, Justice Blackmun reasons that because of an inevitable "arbitrariness inherent in the sentencer's discretion to afford mercy," it is impossible simultaneously to achieve the directives of both the *Furman* and *Woodson* lines of cases.²⁹⁹ The only way to reconcile the conflict between the two is to jettison the death penalty altogether.³⁰⁰

To Justice Blackmun's position, Justice Scalia tartly responds, "Surely a different conclusion commends itself—to wit, that *at least one* of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong."³⁰¹ The phrase "at least one" is Justice

295. See *supra* at text accompanying note 251.

296. See Gey, *supra* note 251, at 94–96.

297. 510 U.S. 1141 (1994).

298. See *id.* at 1150 (Blackmun, J., dissenting from the denial of certiorari) ("I believe the *Woodson-Lockett* line of cases to be fundamentally sound and rooted in American standards of decency that have evolved over time.").

299. *Id.* at 1153.

300. *Id.* at 1159 (the "death penalty, as currently administered, is unconstitutional").

301. *Id.* at 1141 (Scalia, J. concurring in the denial of certiorari) (emphasis added).

Scalia's hint that he regards both lines as wrong. And yet, if we assume *Trop* is good law, Justice Blackmun's argument is plausible, notwithstanding the Constitutional text's apparent endorsement of capital punishment. The reasoning would be as follows. There must have been an element of randomness, freakishness, and barbarity in the administration of capital punishment in 1791. However, given our evolved moral sensibilities, we demand greater consistency and confidence in the accuracy and fairness of our criminal justice system, at a minimum when the punishment is death. The Eighth Amendment requires courts to prohibit any punishment that would flout those evolved standards. To the extent that the death penalty as currently administered cannot comply with our moral expectations, it is unconstitutional.

Of course, this argument is premised on *Trop*, and Justice Scalia, in his brief opinion in *Callins*, suggests that he rejects this decision. He writes, "Convictions in opposition to the death penalty are often passionate and deeply held. There would be no excuse for reading them into a Constitution that does not contain them, *even if they represented the convictions of a majority of Americans.*"³⁰² This is a ringing endorsement of principled originalism, akin to others we have already seen in Justice Scalia's opinions. Yet on other occasions Justice Scalia indicated a willingness to jettison pure originalism and defer to the evolved "convictions of a majority of Americans." We must therefore wonder whether such statements in *Callins* are seriously intended or are rhetorical fireworks.

Indeed, in 2002, Justice Scalia dropped the façade that he regarded *Furman* as only "probably not what was meant by [the Eighth Amendment]." ³⁰³ In *Ring v. Arizona*, the Court revisited the Sixth Amendment question that had been first posed in *Walton*, and it held that the Constitution precludes a judge from finding facts that render a defendant eligible for the death penalty: such aggravating factors must be found, as a threshold matter, by the jury. In his concurring opinion, Justice Scalia wrote that the *Furman* line of cases "has no proper foundation in the Constitution" and that *Furman* "erroneously abridged"

302. *Id.* at 1142 (emphasis added).

303. *Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

the States' freedom to design procedures for imposing the death penalty.³⁰⁴ Thus, Justice Scalia argued, there is no constitutional requirement that States specify aggravating factors that must be found before the death penalty is imposed.³⁰⁵ Nonetheless, given that the States *had* designated aggravating factors, Justice Scalia assented to the majority's conclusion that the Sixth Amendment requires a jury to find that these factors are present in each individual case.³⁰⁶

In light of Justice Scalia's forthright opinion in *Ring*, we can say that Professor Gey's 1992 article proved in one sense correct. The qualifier in *Walton* that *Furman* was "probably" wrongly decided belied Justice Scalia's deepest thinking on the issue.³⁰⁷ To the extent that *Furman* required States to channel a sentencer's discretion in imposing death, it has "no proper foundation in the Constitution."³⁰⁸ Yet in another sense Gey was proven wrong. At no point, either in *Ring* or in any case afterwards, did Justice Scalia suggest that he was prepared to revisit *Furman* or its progeny, despite the fact that these cases "erroneously abridged" the States' ability to craft capital sentencing procedures.³⁰⁹

2. *The Death Penalty and the Mentally Retarded*

In *Atkins v. Virginia*, the Court revisited the issue, explored thirteen years earlier in *Penry v. Lynaugh*, of capital punishment for mentally retarded offenders. In *Penry*, a narrow majority had held that mentally retarded defendants were eligible for capital punishment (provided the jury was instructed that it could consider the defendant's mental deficiency as a mitigating factor).³¹⁰ In *Atkins*, Justice Stevens secured the votes of four other Justices to overturn *Penry*.³¹¹

Justice Scalia's dissent is characterized by sake-of-argument originalism, but he embellishes his opinion with heroic originalist flourishes. Justice Scalia begins by waving the

304. *Ring v. Arizona*, 536 U.S. 584, 610–11 (2002) (Scalia, J., concurring).

305. *Id.* at 611.

306. *Id.* at 611–13.

307. See Gey, *supra* note 251, at 101–02.

308. *Ring*, 536 U.S. at 610.

309. See *id.* at 611.

310. 492 U.S. 302, 340 (1992).

311. See 536 U.S. 304, 304 (2002).

originalist flag. He describes the majority opinion as the “pinnacle of our Eighth Amendment death-is-different jurisprudence,” which, he adds, “find[s] no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes”³¹² According to Justice Scalia, the majority “makes no pretense that execution of the mildly mentally retarded would have been considered ‘cruel and unusual’ in 1791,” for at that time only the “*severely or profoundly* mentally retarded, commonly known as ‘idiots,’” were exempt from the criminal law.³¹³ Justice Scalia argues that the common law, which the Eighth Amendment reflected, excused only those offenders with IQs of 25 or below.³¹⁴ To buttress his argument, Justice Scalia cites a medical treatise from 1838, which itself recounts the 1834 murder trial of a cognitively disabled servant.³¹⁵

However, that medical treatise concludes its narrative by observing that “to mete [punishment] out to [this offender] . . . was manifestly contrary to the principles of natural justice.”³¹⁶ Indeed many contemporary Americans would likely regard the execution of an individual with an IQ of 26 as a violation of “natural justice.” Would Justice Scalia, as a judge, affirm a death sentence on such an offender, as he implies was permitted at common law and, therefore, by the Constitution? Or would this be an instance, such as flogging, in which the punishment practices of 1791 would prove “too bitter to swallow?”³¹⁷

Justice Scalia’s originalism peters out after a mere two paragraphs. Apparently claiming victory on originalist grounds, he girds for battle on nonoriginalist terrain. He writes that the majority “is left to argue . . . that execution of the mildly retarded is inconsistent with . . . ‘evolving standards of decency.’”³¹⁸ At great length, he engages the majority on the question of those

312. *Id.* at 337 (Scalia, J. dissenting).

313. *Id.* at 340.

314. *Id.*

315. *Id.* at 341 (citing ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 65, 87–92 (Winfred Overholser ed., Harvard Univ. Press 1962) (1838)).

316. RAY, *supra* note 315, at 92.

317. See *supra* Part II at text accompanying notes 112–113.

318. *Perry*, 536 U.S. at 341 (Scalia, J. dissenting) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

"standards of decency." Justice Scalia points to the large number of states that have retained laws that authorize the death penalty for the mildly mentally retarded, and he criticizes the majority's "[f]eeble" attempt to "fabricate" a consensus to the contrary, which includes gestures to nebulous entities such as "the so-called world community."³¹⁹ Justice Scalia demonstrates that, as of 2002, American "standards of decency" had not converged on a prohibition of capital punishment for the mildly mentally retarded, at least if "standards" are to be gleaned from the legislative enactments of the States.³²⁰ He also effectively observes that short-term trends should not be taken as evidence of enduring shifts, as opinions about punishment are apt to cycle over time.³²¹ Justice Scalia complains that the majority was "cavalier about the evidence of consensus," and indulged its own "feelings" and "intuition."³²² However fair a criticism, the majority was following the methods of Chief Justice Warren himself, whose *Trop* opinion surveyed international practices and the author's own moral sense.³²³

In his concluding remarks, Justice Scalia returns to pure originalism. Drawing upon the original meaning of the Eighth Amendment, as sketched by his *Harmelin* opinion, he announces that the Eighth Amendment forecloses only "always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew."³²⁴ If this is true and dictates the result in *Atkins*, the question arises: why had Justice Scalia just spent several pages disputing the question of our current standards of decency? Justice Scalia carps that the Court's decision in *Atkins*, in line with its "death-is-different jurisprudence[,] . . . adds one more to the long list of substantive and procedural requirements," and "[n]one of these requirements existed when the Eighth Amendment was adopted."³²⁵ One might be more sympathetic with Justice Scalia's criticism on this point had he not

319. *Id.* at 347.

320. *See id.* at 342.

321. *See id.* at 345.

322. *Id.* at 348.

323. *See Trop*, 356 U.S. at 101–02 (plurality opinion).

324. *Penry*, 536 U.S. at 349 (Scalia, J., dissenting).

325. *Id.* at 352–53.

himself acquiesced in this very “death-is-different” jurisprudence in *Harmelin*, despite his originalist reservations.³²⁶

3. *Juvenile Death Penalty: Rhetorical Escalation*

Three years after *Atkins* was decided, the Court revisited the question of the death penalty for juvenile offenders, last considered in *Stanford v. Kentucky*. Justice Kennedy’s majority opinion in *Roper v. Simmons*³²⁷ embarks on a tour of the “evolving standards of decency” and concludes that those standards foreclosed the execution of even the most heinous of murderers, aged seventeen years, eleven months.³²⁸ Justice Scalia’s dissenting opinion reflects his mounting exasperation with his colleagues and with the entire enterprise of discerning “evolving standards.” As we shall see, his dissatisfaction with this line of cases, which he nonetheless continues to apply, results in rhetorical excesses.

Justice Scalia’s dissent begins by denouncing the unjudicial character of the majority opinion, suggesting that Alexander Hamilton would be flummoxed and outraged had he witnessed Justice Kennedy’s performance.³²⁹ Justice Scalia adds that the majority arrives at its result by adverting “not to the original meaning of the Eighth Amendment, but to ‘the evolving standards of decency,’” a line of cases that he calls “modern” and “mistaken.”³³⁰ Yet again, Justice Scalia opens an Eighth Amendment opinion with a celebration of originalism and, yet again, we are obliged to wonder what work originalism is doing in his opinion.³³¹ Our skepticism is aroused when Justice Scalia relegates to a footnote his summary of the common law infancy defense, which he argues the Eighth Amendment reflected.³³² It is, after all, not ordinary judicial practice to bury crucial links in an argument inside a footnote.

326. See *supra* Part III.B (acquiescing in proportionality review of capital cases) at text accompanying notes 277–278.

327. 543 U.S. 551 (2005).

328. See *id.* at 578–79.

329. See *id.* at 607–08 (Scalia, J., dissenting).

330. *Id.* at 608.

331. For an attempt to determine the extent to which originalism drove the result of Justice Scalia’s (and the Court’s) Fourth Amendment decisions, see Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Originalism in the Career of Justice Scalia*, HASTINGS L.J. (forthcoming 2018).

332. *Roper*, 543 U.S. at 609 n.1 (Scalia, J., dissenting).

In that footnote Justice Scalia observes that Simmons would lose under the common law infancy defense (and therewith the Amendment's original meaning). Citing Hale and Blackstone, Justice Scalia writes: "At the time the Eighth Amendment was adopted, the death penalty could theoretically be imposed for the crime of a 7-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of 14."³³³ Justice Scalia's short statement of the common law infancy defense, which he purports to embrace, would seem designed to render the common law contemptible to a modern observer.³³⁴ Justice Stevens called attention to this footnote and challenged Justice Scalia that surely neither he nor contemporary standards would tolerate the execution of a seven-year-old child.³³⁵ Justice Scalia did not respond. Given his willingness to update the common law infancy defense—to afford fifteen-year-olds a guaranteed discretionary sentencing in capital cases and even a presumption of incapacity³³⁶—we may assume he would also not permit the execution of a seven-year-old. What, then, is the point of the citation to Hale and Blackstone, other than to envelop the opinion in an aura of historical learning?

The bulk of Justice Scalia's dissent engages the majority on the nonoriginalist ground of whether "contemporary standards" foreclose the death penalty for juveniles. Justice Scalia's criticisms, although powerful, are at times overstated. For example, in calculating the number of states that foreclose the death penalty for juveniles Justice Scalia argues that one should not include states that altogether prohibit capital punishment: "Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car."³³⁷ It is a clever, but flawed, line. Justice Scalia's way of counting would be akin to asking what percentage of Americans drink wine, and then excluding religious groups that don't drink alcohol at all.

333. *Id.*

334. For a more elaborate and sympathetic treatment of the common law infancy defense, see Lerner, *supra* note 178.

335. See *Roper*, 543 U.S. at 587 (Stevens, J., concurring).

336. See *supra* at text accompanying notes 173–174.

337. *Roper*, 543 U.S. at 610–11 (Scalia, J., dissenting).

Although Justice Scalia's opinion is overwhelmingly non-originalist—for it concedes, at least for the sake of argument, that the case turns on contemporary standards—originalist denunciations of this entire enterprise are sprinkled throughout. In the middle of the opinion—again in a footnote—he disparages Justice O'Connor's suggestion that the Eighth Amendment, thanks to its "special character," "draws its meaning directly from the maturing values of a civilized society."³³⁸ Justice Scalia responds:

Nothing in the text reflects such a distinctive character—and we have certainly applied the "maturing values" rationale to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 571–573 (2003); *United States v. Virginia*, 518 U.S. 515, 532–534 (1996); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847–850 (1992).³³⁹

The above-cited cases constitute a sort of Cerberus in Justice Scalia's judicial mythology, a triple-headed monster spawned by the idea that the Constitution embodies "maturing values." This line in *Roper* foreshadows his accusation, one decade later, that *Trop* has "caused more mischief to our jurisprudence" than any other case in the United States Reports.³⁴⁰

4. Silence

In several important Eighth Amendment cases in recent years what was most striking from Justice Scalia was something unaccustomed: silence.

In two cases, *Hall v. Florida*³⁴¹ and *Kennedy v. Louisiana*,³⁴² Justice Scalia joined dissenting opinions by Justice Alito that emit not a whiff of originalism. In *Hall*, which extended the rule of *Atkins v. Virginia* to mentally retarded offenders whose IQs are greater than 70, Justice Alito wrote in dissent that "[u]nder this Court's modern Eighth Amendment precedents, whether a punishment is 'cruel and unusual' depends on currently pre-

338. See *id.* at 627 n.9 (internal quotation marks omitted).

339. *Id.*

340. *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring).

341. 572 U.S. 701 (2014).

342. 554 U.S. 407 (2008).

vailing societal norms.”³⁴³ This is obviously a correct statement of the case law, and it is notable that Justice Scalia did not bother to add a separate dissenting opinion criticizing these precedents. Likewise, in *Kennedy*, Justice Scalia joined Justice Alito’s opinion, which dissented from the majority’s conclusion that the death penalty is categorically disproportionate for the rape of a child.³⁴⁴ The focus of Justice Alito’s opinion is whether there is a “national consensus” that forecloses the death penalty with respect to such an offense.³⁴⁵

In two cases involving juvenile offenders, *Graham v. Florida*³⁴⁶ and *Miller v. Alabama*, Justice Scalia joined dissenting opinions by Justice Thomas. Here, one might think that Justice Scalia was relieved of making a truly originalist argument because his like-minded colleague did so for him. But Justice Thomas’s dissenting opinion in *Graham*, overturning a life without parole sentence for a nonhomicide offense, resembles Justice Scalia’s sake-of-argument originalism. It begins with a perfunctory statement of the Eighth Amendment’s original meaning (citing Justice Scalia’s *Harmelin* opinion).³⁴⁷ The bulk of the opinion is then an elaborate survey of the laws and practices of the States, which disprove the majority’s claim that national standards of decency foreclose *Graham*’s sentence.³⁴⁸

In *Miller*, the Court invalidated a life without parole sentence imposed on a juvenile when the trial judge had no discretion, given the offense of conviction, to impose a lesser punishment.³⁴⁹ Justice Thomas’s dissenting opinion begins, as had so many by Justice Scalia, by arguing that the Eighth Amendment merely prohibits methods of punishment deemed barbaric at common law; and whether an acceptable punishment is imposed mandatorily or after an individualized sentencing is of no constitutional significance.³⁵⁰ Justice Thomas adds that, even if one regarded this distinction as relevant, American law in

343. 572 U.S. at 725–26 (Alito, J., dissenting).

344. 554 U.S. at 447 (Alito, J., dissenting).

345. *See id.* at 447–70.

346. 560 U.S. 48 (2010).

347. *Id.* at 98–100 (Thomas, J., dissenting) (citing *Harmelin v. Michigan*, 501 U.S. 957, 975–85, 990–94 (opinion of Scalia, J.)).

348. *See id.* at 106–15.

349. 567 U.S. 460, 489 (2012).

350. *Id.* at 506 (Thomas, J., dissenting).

1791 reveals a *preference* for mandatory punishment, for “each crime generally had a defined punishment.”³⁵¹

Yet the issue in *Miller* was not mandatory life without parole simpliciter, but mandatory life without parole *when imposed on a juvenile*. On this issue, Justice Thomas’s originalist treatment is spare. He devotes three sentences to *juvenile* punishment from an originalist perspective, and this discussion is not only buried in a footnote but also itself cites a footnote (from Justice Scalia’s dissenting opinion in *Roper*).³⁵² As both of those footnotes suggest, at common law a rebuttable presumption of incapacity expired upon one’s fifteenth birthday, and one was then treated in the criminal law as an adult.³⁵³ Justice Scalia had acknowledged decades ago that he would not follow this approach with respect to capital punishment: he would insist that a fifteen-year-old be accorded an individualized sentencing in a capital case, and even enjoy a rebuttable presumption of incapacity.³⁵⁴ Such a requirement arises not from the common law, but from a modern consensus, and surely a modern consensus can also evolve with respect to juvenile life without parole. If it does, the common law should presumably be updated in this regard as well.

5. Execution Protocols

In two cases in the last decade of Justice Scalia’s life, *Baze v. Rees* and *Glossip v. Gross*, the Court considered challenges to the constitutionality of the three-drug execution protocol that many states have adopted. In both cases, Justice Scalia joined the concurring opinions of Justice Thomas, who concluded that the original meaning of the Eighth Amendment was to foreclose only those punishments that are “deliberately designed to inflict pain.”³⁵⁵ In both cases, Justice Scalia wrote separately to address opinions by other Justices (Stevens in *Baze*, Breyer in

351. *Id.*

352. *Id.* at 504 n.2 (citing *Roper v. Simmons*, 543 U.S. 551, 609 n.1 (2005) (Scalia, J., dissenting)).

353. See Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years*, 86 TUL. L. REV. 309, 316–17 (2011).

354. See *Thompson v. Oklahoma*, 487 U.S. 815, 859 (1988) (Scalia, J., dissenting); *supra* Part III.A.2 (discussing the dissent).

355. *Baze v. Rees*, 553 U.S. 35, 94 (2008) (Thomas, J., concurring); see also *Glossip v. Gross*, 135 S. Ct. 2726, 2750 (2015) (Thomas, J., concurring).

Glossip), who suggested that capital punishment in any form might be unconstitutional.³⁵⁶

In *Baze*, Justice Scalia's response to Justice Stevens invokes, as relevant in determining the Eighth Amendment's original meaning, the Crime Bill of 1790, which was enacted by the same Congress that passed the Bill of Rights.³⁵⁷ That law "made several offenses punishable by death," which, Justice Scalia argues, forecloses the argument that the same Congress that passed the Eighth Amendment regarded capital punishment as unconstitutional.³⁵⁸ Yet the 1790 law did much more than endorse the death penalty; it even provided for the dissection of the corpses of executed murderers.³⁵⁹ Furthermore, it provided for public whipping, "not exceeding thirty-nine stripes," for those guilty of perjury and embezzlement.³⁶⁰ Given Justice Scalia's stated view that whipping is today unconstitutional, one may be skeptical of his claim that the 1790 law dictates what kinds of punishments are permitted by the Eighth Amendment.³⁶¹

In *Baze*, Justice Scalia also laments that "[t]here is simply no legal authority for the proposition that the imposition of death as a criminal penalty is unconstitutional other than the opinions in *Furman v. Georgia* . . . which established a nationwide moratorium on capital punishment."³⁶² To the extent that this is true, we should recall that Justice Scalia himself had once written that the opinions of Justices Stewart and White in *Furman* are "arguably supported by [the] text."³⁶³ Although he immediately added in that case that he regarded *Furman* as "probably"

356. See *Glossip*, 135 S. Ct. at 2746 (Scalia, J., concurring); *Baze*, 553 U.S. at 87 (Scalia, J., concurring).

357. *Baze*, 553 U.S. at 88 (Scalia, J., concurring) (citing An Act for the Punishment of certain Crimes against the United States, ch. 9, 1 Stat. 112 (1790)).

358. *Id.*

359. An Act for the Punishment of certain Crimes against the United States, ch. 9, § 4, 1 Stat. at 113. The section was passed over the objection of Rep. Michael J. Stone of Maryland that it was cruel. See David P. Currie, *Constitution in Congress: Substantive Issues in the First Congress*, 61 U. CHI. L. REV. 775, 830–31 (1994).

360. An Act for the Punishment of certain Crimes against the United States, ch. 9, §§ 15, 16, 1 Stat. at 115–16.

361. See John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUD. 297, 306 (2013).

362. *Baze*, 553 U.S. at 88 (Scalia, J., concurring) (citation omitted).

363. *Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment).

wrong,³⁶⁴ and he later clarified that he thought it was certainly wrong,³⁶⁵ Justice Scalia had nonetheless followed it all the years he was on the Court and had never invited its reconsideration. Justice Scalia is thus faulting Justice Stevens for following a case that Justice Scalia himself had been willing to apply for over two decades.

In both *Baze* and *Glossip*, Justice Scalia's indignation soars to new levels.³⁶⁶ Painstakingly, he corrects each of Justice Breyer's errors in *Glossip*, which (in Justice Scalia's estimation) have been made and corrected before on many occasions. Justice Scalia denies that capital punishment has been shown to have no deterrent effect; he rejects the idea that erroneous convictions, assuming they even exist, constitute "cruel and unusual punishment"; he faults his colleagues for reading their own preferences into the Constitution; and he ridicules the claim that long delays before execution, preeminently the result of obstructionist judges such as Justice Breyer, render capital punishment unconstitutional.³⁶⁷ Yet with respect to one argument, Justice Scalia does not directly engage Justice Breyer on the merits. As to whether retribution supports the death penalty in some cases, Justice Scalia announces that such moral arguments are "far above the judiciary's pay grade."³⁶⁸

The rhetorical difficulty for Justice Scalia is that, with respect to punishment, the most interesting arguments are necessarily moral. According to the "two millennia of Christian teaching" to which Justice Scalia ascribes, "retribution is a proper purpose (*indeed, the principal purpose*) of criminal punishment."³⁶⁹ Is there a retributive—a moral—case for capital punishment? Consider this argument by Walter Berns:

364. *Id.*

365. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (*Furman* has "no proper foundation in the Constitution").

366. *Glossip v. Gross*, 135 S. Ct. 2726, 2746–47 (2015) (Scalia, J., concurring) ("Welcome to Groundhog Day"; Justice Breyer's arguments are larded with "internal contradictions and (it must be said) gobbledy-gook"; Justice Breyer's arguments are "devoid of any meaningful legal argument"); see also *Baze*, 553 U.S. at 87–93 (Scalia, J., concurring).

367. *Glossip*, 135 S. Ct. at 2747–49.

368. *Id.* at 2748.

369. Antonin Scalia, *God's Justice and Ours*, *FIRST THINGS*, May 2002, at 17, 20 (emphasis added).

Capital punishment . . . serves to remind us of the majesty of the moral order that is embodied in our law and of the terrible consequences of its breach. The law must not be understood to be merely [a] statute that we enact or repeal at our will and obey or disobey at our convenience, especially not the criminal law The criminal law must possess a dignity far beyond that possessed by mere statutory enactment or utilitarian and self-interested calculations, the most powerful means we have to give it that dignity is to impose the ultimate penalty. The criminal law must be made awful, by which I mean, awe-inspiring, or commanding “profound respect or reverential fear.”³⁷⁰

Such a forceful argument for the moral necessity of the death penalty is unavailable to Justice Scalia. Whatever his views as a man and as a citizen, as a Justice, Antonin Scalia insisted that he “take[s] no position on the desirability of the death penalty.”³⁷¹

This position is consistent with raising doubts about abolitionist arguments about deterrence. However, when it comes to retributive arguments, which he views as the “principal” arguments with respect to punishment, Justice Scalia generates the following:

Perhaps Justice Breyer is more forgiving—or more enlightened—than those who, like Kant, believe that death is the only just punishment for taking a life. I would not presume to tell parents whose life has been forever altered by the brutal murder of a child that life imprisonment is punishment enough.³⁷²

The first sentence is more a sarcastic jest than a reasoned argument. Justice Scalia cannot actually expound the Kantian position, which he likens elsewhere to the position of the Book of Exodus,³⁷³ for this would be above a judge’s humble pay grade.

370. WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 172–73 (1979).

371. *Baze*, 553 U.S. at 93 (Scalia, J., concurring); see also *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring) (“The American people have determined that the good to be derived from capital punishment—in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes—outweighs the risk of error. It is no proper part of the business of this Court, or its Justices, to second-guess that judgment”); Scalia, *supra* note 369, at 17 (“[M]y views on the morality of the death penalty have nothing to do with how I vote as a judge”).

372. *Glossip*, 135 S. Ct. at 2748 (Scalia, J., concurring).

373. See *Morgan v. Illinois*, 504 U.S. 719, 752 (1992) (Scalia, J., dissenting).

By contrast, Justices Stevens and Breyer, in their candid willingness to draw upon their moral intuitions, are judges in the heroic mode: they regard the death penalty, at least in its modern incarnation, as unjust, and they are prepared to strike it down. As the second sentence in the passage above suggests, Justice Scalia is open to retributive arguments in favor of the death penalty, and his elaborate descriptions of grotesque murders³⁷⁴ serve as an implicit argument that a moral principle of proportionality could support capital punishment for certain crimes.³⁷⁵ Yet his judicial humility forecloses a statement of this crucial moral argument. Consequently, his response to the heroic Justice Breyer is constrained to sounding notes of exasperation.

IV. RECONCILING ORIGINALISM AND PRECEDENT

Scholars have proposed a range of methods to reconcile originalist interpretive methodology with the background judicial norm of *stare decisis*.³⁷⁶ The most straightforward solution

374. See, e.g., *Glossip*, 135 S. Ct. at 2746 (Scalia, J., concurring) (“Petitioners, sentenced to die for the crimes they committed (including . . . raping and murdering an 11-month-old baby”); *Roper v. Simmons*, 543 U.S. 551, 618 (2005) (Scalia, J., dissenting) (“[Defendant] then broke into the home of an innocent woman, bound her with duct tape and electrical wire, and threw her off a bridge alive and conscious.”); *Atkins v. Virginia*, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting) (“[Defendant] ordered [the victim] out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.”); *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring) (referring to separate case of eleven-year-old girl “raped by four men and killed by stuffing her panties down her throat” (citing *McCullum v. North Carolina*, No. 93-7200, *cert. denied*, 512 U.S. 1254 (1994))); *Stanford v. Kentucky*, 492 U.S. 361, 365 (1989) (“[Petitioner and accomplice] repeatedly raped and sodomized [the victim] after their commission of a robbery . . . [and then] shot her pointblank in the face and then in the back of her head.”); *Thompson v. Oklahoma*, 487 U.S. 815, 859–61 (1987) (Scalia, J., dissenting) (providing “a fuller account” of defendant’s crimes).

375. See Gey, *supra* note 251, at 121–22.

376. For many “living” or “new” originalists, nonoriginalist precedent does not pose a serious intellectual challenge. See, e.g., Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 821 (arguing that his “framework originalism” accommodates foundational nonoriginalist precedents, such as *Brown* and the New Deal cases, far more easily than the old and rigid originalism Justice Scalia advocated).

is to disregard precedent.³⁷⁷ Justice Scalia attributed this position, not altogether fairly, to his colleague Justice Thomas.³⁷⁸ Other scholars argue that the Founders contemplated some version of *stare decisis*,³⁷⁹ and that therefore an originalist Justice should defer to precedent, at least when the precedent is not clearly erroneous,³⁸⁰ is very old,³⁸¹ is itself an originalist precedent,³⁸² is entrenched,³⁸³ or is one that does not impair the democratic process.³⁸⁴

377. See Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007); Michael Stokes Paulsen, *The Intrinsic Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

378. See KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 281–82 (2004) (quoting Justice Scalia as saying that Justice Thomas “does not believe in *stare decisis*, period”). A fairer summary of Justice Thomas’s position might be that he is prepared to reconsider clearly erroneous precedents, however old. See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 538 (Thomas, J. concurring) (stating willingness to reconsider *Calder v. Bull*, 3 U.S. (3 Dall.) 398 (1798), because he had “never been convinced of the soundness” of limitation of *ex post facto* clause to criminal cases). But as discussed above, his treatment of the Eighth Amendment and juvenile criminal culpability can hardly be described as rigorously originalist. See *supra* Part III.C.4.

379. See John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 828 (2009) (“[G]iven the absence of an alternative source of law and its conformity with the history, the argument for treating precedent as a matter of common law is compelling.”); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1863–66 (2012) (“*Stare decisis* might simply be a recognized common law doctrine Having (allegedly) been in effect at the time of the Founding, . . . it therefore continues to be in effect today.”); see also JACK M. BALKIN, *LIVING ORIGINALISM* 121 (2011) (“[A] common law style system of precedents was entirely foreseeable and indeed is implicit in the constitutional framework of a country with a common law tradition.”). But see Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (“[I]t is debatable whether the doctrine of *stare decisis* can be reconciled with popular sovereignty-based originalism. *Stare decisis* is rooted in preconstitutional English common law and flourished in a milieu that presupposed parliamentary sovereignty and the authority of political actors to correct all errors of judicial review.”).

380. See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1, 19 (2001) (“The same courts that recognized a presumption against overruling permissible past constructions of ‘doubtful’ provisions also acknowledged the need to overrule constructions that went beyond the range of ambiguity.”).

381. See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 268 (2005) (discussing the “liquidating” role of early precedents).

382. See Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729 (2010).

383. See McGinnis & Rappaport, *supra* note 379, at 825, 835 (arguing that the “original meaning of the Constitution embraces at least some precedent” and that

This Article has tried to understand why the originalist Justice Scalia followed the nonoriginalist *Trop v. Dulles* for nearly three decades, despite the harm he thought this precedent had done to Eighth Amendment jurisprudence and to the American republic.³⁸⁵ The previous section surveyed many of his Eighth Amendment opinions and found a variety of statements and assumptions about the weight of precedent when balanced against the Constitution's original meaning. On the one hand, there are opinions festooned with brash assertions about the frailty of precedent in constitutional cases. When in this frame of mind, Justice Scalia was disposed to overrule or eviscerate precedents (*Payne*, *Woodson*, *Lockett*, *Solem*) that he viewed as inconsistent with the Eighth Amendment's original meaning. On the other hand, there are opinions humbly invoking *stare decisis*, professing deference even to foundational precedents that Justice Scalia at times intimates, and at other times outright states, were wrongly decided (*Trop* and *Furman*). Was there a rhyme and reason to Justice Scalia's methods?

In a recent article sympathetic to Justice Scalia's approach, Judge (formerly Professor) Amy Barrett argues that Justice Scalia was not as unprincipled as his critics have asserted in his harmonization of originalism and *stare decisis*.³⁸⁶ Even Judge Barrett, however, acknowledges that Justice Scalia never articulated a "theory" to explain which precedents were entitled to deference and which were not.³⁸⁷ The absence of a theory, perhaps even the contempt for a "theory" and the preference for something like prudence or practical wisdom, characterized Justice Scalia's utterances and writings over the decades. When questioned in his confirmation hearings as to whether he would reconsider long-settled precedents, he responded that

even originalist judges should defer to precedent "in three specific situations: when following precedent would avoid enormous costs, when a precedent is entrenched, and when following precedent would correct failures in the supermajoritarian enactment process").

384. See Lash, *supra* note 379, at 1442 ("The cost of judicial error increases with the severity of the intrusion into the democratic process, and this accordingly increases the need for strong pragmatic justifications if precedent is to control.").

385. See *Glossip v. Gross*, 135 S.Ct. 2726, 2749 (2015) (Scalia, J., concurring) (referring to *Trop* as the case that "has caused more mischief to our jurisprudence, to our federal system, and to our society than any other").

386. See Barrett, *supra* note 24, at 1922.

387. See *id.* at 1928.

he “strongly believe[d]” in stare decisis and that some precedents were “so woven in the fabric of the law” that they are “too late to correct.”³⁸⁸ He continued: “There are some things that are done, and when they are done, they are done and you move on.”³⁸⁹ Those with an academic or theoretical cast of mind might point out that this begs the question as to which precedents you move on from and which you do not, and to this Justice Scalia regularly resorted to the assurance, “I am not a nut.”³⁹⁰ In 1997, Laurence Tribe invited Justice Scalia to elaborate, observing that the seemingly capricious invocation of stare decisis invites the objection that a professed originalist jurist is simply “importing [his] own views and values.”³⁹¹ Justice Scalia responded that stare decisis challenged any theory of interpretation, but that he “attempt[ed] to constrain [his] own use of the doctrine by consistent rules.”³⁹²

Yet what were those “rules?” In Judge Barrett’s account, Justice Scalia regarded the Court’s Eighth Amendment jurisprudence as flawed in two respects: first, it looked to “evolving standards of decency”; and second, it required that a punishment be proportionate to the gravity of the offense.³⁹³ According to Judge Barrett, the standard that Justice Scalia used to distinguish those nonoriginalist precedents that he was willing to follow from others that he was prepared to ignore was whether a precedent could be “intelligently appl[ied].”³⁹⁴ There is a certain logic to this position. To the extent that stare decisis is valuable, it is in large part because it promotes stability, but if a precedent is so ambiguous that its application is uncertain, then stare decisis does not render judicial decisions predictable. Nevertheless, the “intelligent application” principle, both in general and specifically as Judge Barrett construes it with regard to the Eighth Amendment, can be criticized. Consider two lines of precedent: one that forecloses executions on even-

388. Jason J. Czarnezki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 181 (2007).

389. *Id.*

390. See, e.g., Adam Liptak, *In Re Scalia the Outspoken v. Scalia the Reserved*, THE N.Y. TIMES (May 2, 2004), <https://www.nytimes.com/2004/05/02/us/in-re-scalia-the-outspoken-v-scalia-the-reserved.html> [<https://nyti.ms/2DTszur>].

391. Scalia, *supra* note 103, at 140.

392. *Id.*

393. Barrett, *supra* note 24, at 1936–37.

394. *Id.* at 1937.

numbered days of the month and another that forecloses executions that are unjust. The “intelligent application” principle could be understood to uphold the first precedent, but not the second, as the first can be algorithmically applied and the second is hopelessly ambiguous.

With respect to the Eighth Amendment, moreover, the “intelligent application” rule arguably leads one to the opposite conclusion reached by Judge Barrett (and Justice Scalia). *Trop* is said to foreclose punishments contrary to “evolving standards of decency”; *Solem* is said to foreclose punishments that are disproportionate to the offense’s seriousness.³⁹⁵ It is unclear why the former holding is easier to “intelligently apply” than the latter. For several decades, European courts have, more or less intelligently, applied a “proportionality principle” in the criminal and noncriminal context.³⁹⁶ The *Trop* “evolving standards of decency” test can only be regarded as easier to “intelligently apply” because Justice Scalia read it, through the prism of later cases, to narrow judicial decision-making to a consideration of legislative enactments. Yet as has been observed above, this is not true to Chief Justice Warren’s *Trop* opinion, which gathered “standards of decency” from a variety of sources, including the unknowable bosom of Chief Justice Warren’s own moral intuitions.³⁹⁷ By contrast, Justice Powell’s *Solem* opinion carefully sketched a framework for proportionality analysis—that is, from intra- and inter-jurisdictional analyses of how roughly similar offenses are punished.³⁹⁸ In *Harmelin*, Justice Scalia rejected Justice Powell’s approach as having “no conceivable relevance to the Eighth Amendment.”³⁹⁹ Yet the same

395. See *supra* at text accompanying notes 266–268.

396. See Richard G. Singer, *Proportionate Thoughts About Proportionality*, 8 OHIO ST. J. CRIM. L. 217, 218–21 (2010).

397. See *supra* at text accompanying notes 64–70.

398. See *Solem v. Helm*, 463 U.S. 277 (1983). Justice Powell first compared Helm’s offense (habitual offender passing a forged \$100 check) to other South Dakota offenses that generated the imposed life sentence (e.g., treason, first-degree manslaughter, first-degree arson, kidnapping). *Id.* at 298. He plausibly concluded that Helm’s offense differed markedly in its gravity. *Id.* at 299. Justice Powell then observed that no other jurisdiction would impose a life sentence on Helm for the same or comparable offense. *Id.* at 299–300. One may fairly question whether his opinion has any basis in the Constitution, but Justice Powell’s claim that his analysis turned on “objective” factors—that is, factors one could “intelligently apply”—is defensible.

399. *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (opinion of Scalia, J.).

objection could be leveled against the use of legislative enactments to identify our evolved standards of decency, a technique that Justice Scalia endorsed.⁴⁰⁰

Judge Barrett concedes that Justice Scalia exposed himself to the charge of being a “faint-hearted” originalist by his willingness to engage in this *Trop*-based project.⁴⁰¹ But she argues that he acceded to nonoriginalist precedents only because “the results in the cases were the same as those he would have reached under his preferred reasoning.”⁴⁰² This is the core idea of sake-of-argument originalism, but the project was problematic from its inception. To be sure, there is a quality evoking nobility in agreeing to fight your enemies on terrain favorable to them, but as Robert E. Lee learned, conceding Cemetery Ridge to George Meade was not a sound plan. Why was Justice Scalia hopeful that he could prevail in achieving originalist results by conceding *Trop* and then construing the Eighth Amendment in light of contemporary standards of decency? Perhaps Justice Scalia’s confidence reflected his belief that popular views about punishment were not only markedly different from those held by legal elites, but also more in line with those that prevailed two hundred years ago. In several opinions, not just in the Eighth Amendment context, Justice Scalia depicted his elite contemporaries as out-of-touch with popular opinion.⁴⁰³ In *Kansas v. Marsh*, he mocked the “sanctimon[y]” of critics of the American death penalty, adding that the abolition of capital punishment in Europe was engineered “in spite of popular opinion rather than because of it.”⁴⁰⁴ If contemporary

400. See *Thompson v. Oklahoma*, 487 U.S. 815, 865 (1988).

401. Barrett, *supra* note 24, at 1921.

402. *Id.* at 1937.

403. See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“[T]he Court has taken sides in the culture war.”); *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“[T]his most illiberal Court . . . has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society’s law-trained elite) into our Basic Law”); *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn.”).

404. 548 U.S. 163, 187 n.3 (2006) (Scalia, J., concurring) (quoting Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 931–932 (2006)).

standards were construed in light of legislative enactments, then elites would be hard-pressed to read their own progressive attitudes towards punishment—such as, hostility to the death penalty—into the Eighth Amendment. This belief may have contributed to Justice Scalia’s confidence that “contemporary standards” of decency, honestly assessed by a review of enacted laws, would frustrate the legal elite’s ambition to deploy the Eighth Amendment to transform American punishment practices.

As sketched in this Article, however, Justice Scalia at times somewhat overstated his case when identifying contemporary standards. In *Roper v. Simmons*, for example, he pruned his review of the legislative enactments to bolster the conclusion that most Americans continue to regard capital punishment for seventeen-year-old offenders as morally legitimate.⁴⁰⁵ One can also question his insistence that legislatively possible punishments, rather than sentences actually imposed by juries, better reflect contemporary attitudes; after all, laws often remain on the books after they cease to reflect popular sentiment.⁴⁰⁶ Furthermore, no confidence was warranted that judges would limit themselves to a consideration of legislative enactments when identifying contemporary standards and would eschew any reference to their own moral intuitions. This was not Chief Justice Warren’s approach in *Trop*, and Justice Scalia himself suggested that a judge, including an appellate judge, cannot abdicate his own moral judgment when imposing a legally prescribed punishment, at least if the punishment is death.⁴⁰⁷

405. See, e.g., *supra* text accompanying note 337.

406. For example, the Parisian law prohibiting women from wearing pants was not repealed until 2013. See Devorah Lauter, *Women in Paris finally allowed to wear trousers*, TELEGRAPH (Feb. 3, 2013, 3:32 PM), <https://www.telegraph.co.uk/news/worldnews/europe/france/9845545/Women-in-Paris-finally-allowed-to-wear-trousers.html> [http://perma.cc/77J9-NLPR]. There are examples closer to home: Delaware did not formally abolish the whipping post until 1971. See Harry Thernal, *The end of Delaware’s infamous whipping post*, DEL. ONLINE (June 30, 2017, 1:15 PM), <https://www.delawareonline.com/story/opinion/columnists/harry-thermal/2017/06/30/end-delawares-infamous-whipping-post/443020001/> [https://perma.cc/HQR6-B5KR]. It is a lingering question whether the decline in executions over the past decade reflects a genuine change in popular attitudes towards the death penalty or if it is simply a testament to the byzantine obstacles thrown up by legal elites.

407. In an essay written in 2002, Scalia explained that if the official Catholic position flatly opposed the death penalty, he would resign, for he could then not

The final, deepest difficulty with sake-of-argument originalism is the claim or assumption that popular sentiments about punishment have not drifted away from the views predominant in 1791, and are unlikely to continue to drift, especially in the face of the hostile elite opinion Justice Scalia identified.

One reason sake-of-argument originalism may have appealed to Justice Scalia, at least in his early years on the Court, was that originalism as a judicial philosophy posed substantial practical difficulties. When Justice Scalia drafted his *Harmelin* opinion, which argued that the original meaning of the Eighth Amendment does not contemplate a proportionality principle, there was a dearth of academic scholarship to draw upon, and the parties and *amici* provided no help whatsoever.⁴⁰⁸ Justice Scalia and others have argued that originalism is a more realistic judicial enterprise today, as scholarship and briefs are apt to provide material for originalist judges.⁴⁰⁹ Some have even suggested that historical research will coalesce around certain understandings with the advent of computer-generated analyses.⁴¹⁰ In the area of the Eighth Amendment, this convergence of opinion is not imminent. Although there are still scholars who adhere to Justice Scalia's (no proportionality requirement) understanding of the Eighth Amendment's original meaning, some recent research has raised doubts about this view.⁴¹¹ Justice Scalia was made aware of this scholarship in briefs filed in his last decade on the Court,⁴¹² but he never addressed it or indicated that he was open to a reconsideration of his *Harmelin* opinion, which he continued to cite for the proposition that the

uphold, as judge, what the law requires. See Scalia, *supra* note 369, at 17–18 (“With the death penalty . . . I am part of the criminal-law machinery that imposes death—which extends from the indictment . . . to rejection of the last appeal.”).

408. See SCALIA & GARNER, *supra* note 252, at 401–02.

409. *Id.* at 402; see also Randy E. Barnett & Evan D. Berdick, The Letter and the Spirit: A Unified Theory of Originalism 28–30 (Jan. 17, 2018) (unpublished manuscript) (on file with Georgetown Library), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3018&context=facpub> [<https://perma.cc/WD6Y-KHSV>].

410. See Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1228–30 (2017).

411. Consider particularly the work of John Stinneford. See *supra* note 273.

412. See, e.g., Brief of Center on the Administration of Criminal Law as Amicus Curiae Supporting Petitioners at 9–18, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) (citing the work of Professor John Stinneford).

“proportionality” view of the Eighth Amendment has “long been discredited.”⁴¹³

Should Justice Scalia, as an avowed originalist, have been prepared to reconsider and overturn his own originalist precedent, in the light of new historical research? Professor Lee Strang has argued that judicial opinions that are framed as originalist are entitled to more respect than opinions that are unabashedly nonoriginalist.⁴¹⁴ Under this rule, *Harmelin*, as the good-faith articulation of the Eighth Amendment’s original meaning, even if mistaken, would be entitled to deference. By contrast, *Booth v. Maryland*, as the patchwork of nonoriginalist claims about the Eighth Amendment, would not. One might provisionally speculate that this is a “rule,” albeit unarticulated, that guided Justice Scalia’s decision-making. He was willing to overturn *Booth*, not only because it “defied reason,” but also because it “had absolutely no basis in the constitutional text, in historical practice, or in logic.”⁴¹⁵ Likewise, this would explain why Justice Scalia was prepared to follow *Furman*, which he once suggested arguably had some basis in the constitutional text.⁴¹⁶ Unless a precedent was demonstrably non-originalist and egregiously wrongly decided, Justice Scalia was prepared to tolerate it.

Stated thus, Justice Scalia’s position seems quite cautious, but even this formulation does not capture the timidity of his stance towards precedent, at least in some cases. In several opinions, Justice Scalia suggested that demonstrably non-originalist and wrongly decided cases *may* be entitled to deference. In *Walton*, Justice Scalia had written that although “*Woodson* and *Lockett* find no proper basis in the Constitution, they have some claim to my adherence because of the doctrine of *stare decisis*.”⁴¹⁷ Similarly, on the foundational question of whether the Eighth Amendment embodies a proportionality

413. Justice Scalia joined Justice Thomas’s concurrence in *Glossip v. Gross*, which cited Justice Scalia’s *Harmelin* for this proposition. See 135 S. Ct. 2726, 2751 (2015) (Thomas, J., concurring) (citing *Harmelin v. Michigan*, 510 U.S. 957, 966 (1991) (opinion of Scalia, J.)).

414. See Strang, *supra* note 382, at 1762–65.

415. *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

416. *Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment) (arguing that *Furman* was “arguably supported by the text” of the Eighth Amendment).

417. *Id.* at 672.

principle, Justice Scalia held in *Harmelin* that "*Solem* [is] simply wrong. The Eighth Amendment contains no proportionality guarantee."⁴¹⁸ Yet a decade later in *Ewing v. California*, he added that: "I might nonetheless accept the contrary holding of *Solem v. Helm*—that the Eighth Amendment contains a narrow proportionality principle—if I felt I could intelligently apply it."⁴¹⁹ So perhaps the "rule" that emerges is: demonstrably non-originalist and egregiously wrongly decided cases are entitled to respect, provided they can be intelligently applied. Yet even this does not reflect the unarticulated rule upon which Justice Scalia operated. Recall that although a proportionality principle was impossible to "intelligently apply," in addition to being nonoriginalist and "simply wrong," Justice Scalia was nonetheless willing to apply it, at least in capital cases.⁴²⁰

Justice Scalia's reputation as an originalist, which he cultivated in many of his extra-judicial statements, was thus only partly realized in his judicial opinions. Justice Scalia presented himself as a new sort of Justice, uniquely (until Justice Thomas's arrival) devoted to originalist principles.⁴²¹ His exoteric teaching—as a principled originalist—earned him renown and notoriety, outstripping the accolades and opprobrium piled upon, for example, Chief Justice Rehnquist.⁴²² And yet a close reading of Justice Scalia's Eighth Amendment cases raises doubts about his deepest thinking on the matter.⁴²³

The deference Justice Scalia displayed in his attitude toward precedent, and his caution in deploying originalism in overturning cases he regarded as wrongly decided, perhaps point

418. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (opinion of Scalia, J.).

419. 538 U.S. 11, 31 (2006) (Scalia, J., concurring).

420. *Harmelin*, 501 U.S. at 994 (opinion of Scalia, J.) (arguing that under the Court's precedents, proportionality had been required only in death penalty cases: "We would leave it there, but will not extend it further.").

421. See Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL'Y 871, 872 (2008) ("Twenty years ago, when I joined the Supreme Court, I was the only originalist among its numbers.").

422. See *Bibas*, *supra* note 87, at 1089 ("Though scholars worship theoretical purity and mock inconsistencies, courts rightly give weight to stable, practical compromises. Chief Justice Rehnquist deserves measured praise, certainly more than he has received, for guiding this process.").

423. This Article focuses on Eighth Amendment cases, but similar questions about Justice Scalia's originalism can be raised in other contexts. See, e.g., Lund, *supra* note 183, at 1356 (Second Amendment); Rosenthal, *supra* note 331 (Fourth Amendment).

to a temperamental conservatism on his part. Several scholars, most notably Professor Thomas Merrill, have argued that conservatives should be wary of originalism, precisely because of its revolutionary potential to destabilize settled law and expectations.⁴²⁴ According to Merrill, “[a] Court that tried to resolve [constitutional] issues solely in accordance with the text and original understanding would have much less ‘stuff’ to go on,” which would render “the outcome less predictable.”⁴²⁵ Merrill adds that “precedent is more accessible to lawyers and judges than evidence of original understanding,” the ascertainment of which is outside “the skill set of . . . most lawyers and judges.”⁴²⁶

Whatever plausibility Merrill’s argument possesses in the abstract, it has proven incorrect in the context of the Eighth Amendment. It was perhaps a dawning awareness of this reality that prompted Justice Scalia to reconsider his approach to these cases. It is not simply that the accumulating precedents are so ambiguous and conflicting that any claim that they provide predictability was rendered implausible.⁴²⁷ It is that the precedents themselves—and their foundational precedent, *Trop v. Dulles*—authorized jurists to engage in inquiries for which their training rendered them at least as ill-prepared as for an historical inquiry into the legal practices and understandings that prevailed in 1789, 1791, or 1868. Reading Eighth Amendment cases over the past decade suggests that legal expertise is but a fraction of a judge’s job description. Also required is a familiarity with pharmacology, criminology, statistics, and—most galling for Justice Scalia—moral philosophy.⁴²⁸ The length of so many recent Eighth Amendment opinions is testament not so much to the contradictory nature of the precedents, but to the substance of those precedents, which invite reflections on

424. See Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 273–74 (2005).

425. *Id.* at 278

426. *Id.* at 279, 281.

427. Cf. Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 678–79 (1995).

428. See *Glossip v. Gross*, 135 S. Ct. 2726, 2748 (2015) (Scalia, J., concurring) (“If only Aristotle, Aquinas, and Hume knew that moral philosophy could be so neatly distilled into a pocket-sized, *vade mecum* ‘system of metrics.’ Of course it cannot: Egregiousness is a moral judgment susceptible of few hard-and-fast rules.”).

matters far and wide. And this takes us back to *Trop v. Dulles*. When Chief Justice Warren invoked “my faith” in invalidating the denationalization of Albert Trop,⁴²⁹ the trajectory of the future cases should have been apparent. *Trop v. Dulles*, as conceived and as now construed by a majority of Justices, presupposes a far-reaching inquiry into the morality of punishment. That such a precedent would promote the virtues associated with stare decisis was, and ever will be, fanciful.

V. CONCLUSION: ORIGINALISM'S PROSPECTS

In his *Originalism* essay, Justice Scalia wrote:

The vast majority of my dissents from nonoriginalist thinking (*and I hope at least some of those dissents will be majorities*) will, I am sure, be able to be framed in the terms that, even if the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred.⁴³⁰

Justice Scalia's hope that he would be writing Eighth Amendment majority opinions was largely disappointed. In the last decade of his life, he was in the minority in most of the major Eighth Amendment cases.⁴³¹ Indeed, over his three decades on the Court, Eighth Amendment law had evolved further and further from what he regarded as its original meaning. It is not inconceivable, Justice Scalia observed, that the Court will soon invalidate capital punishment itself.⁴³² His statement in *Glossip* that he was prepared to reconsider *Trop* must be read as his concession that he had failed to achieve originalist results by assuming, for the sake of argument, that the Eighth Amendment has an evolving content.⁴³³ Not coincidentally, in an interview in 2013, Justice Scalia suggested he was prepared to

429. See *Trop v. Dulles*, 356 U.S. 86, 101 n.33 (1958) (plurality opinion) (quoting *Trop v. Dulles*, 239 F.2d 527, 530 (2d. Cir. 1956) (Clark, C.J., dissenting)).

430. Scalia, *supra* note 26, at 864 (emphasis added).

431. See, e.g., *Hall v. Florida*, 572 U.S. 701 (2014); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2011); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

432. *Justice Scalia: "Wouldn't surprise me" if death penalty struck down*, CBS NEWS (Oct. 20, 2015, 9:31 PM), <https://www.cbsnews.com/news/justice-scalia-wouldnt-surprise-me-if-death-penalty-struck-down/> [https://perma.cc/4SM7-9UH5].

433. *Glossip*, 135 S. Ct. at 2749 (Scalia, J., concurring).

embrace a stouter adherence to the Eighth Amendment's original meaning, even if that meant upholding a law that permitted flogging.⁴³⁴

It is hard to know what Justice Scalia intended by these pronouncements, especially the latter (regarding flogging), given its jocular, off-the-cuff context. If he was truly prepared to reverse the "abandon[ment] [of] the historical understanding of the Eighth Amendment, beginning with *Trop*,"⁴³⁵ that would mean a willingness to reconsider much of the Court's Eighth Amendment jurisprudence. This would have been a substantial undertaking in 1990, when Justice Scalia wrote that *Furman* was "probably" wrong,⁴³⁶ but an enormous shovel is needed to bury the mountain of precedents that exists today. If, however, Justice Scalia indeed invited reconsideration of *Trop*, he would also have been well advised to reconsider the original meaning of the Eighth Amendment he espoused in *Harmelin*. Recent research, particularly that of Professor Stinneford, might undercut Justice Scalia's confidence that the Eighth Amendment's original meaning was simply to foreclose those modes of punishment deemed barbaric in 1791. Perhaps the original meaning of the Eighth Amendment not only includes a proportionality principle, but also prohibits any punishment that is contrary to long usage, even if that punishment existed in 1791.⁴³⁷ At least in the scholarship of Professor Stinneford, the Eighth Amendment's original meaning emerges as more flexible and morally nuanced than the Eighth Amendment described by Justice Scalia.

We will never know what Justice Scalia's intentions really were,⁴³⁸ and as for a comprehensive rethinking of Eighth

434. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/> [<https://perma.cc/V5PG-862U>] ("[W]hat I would say now is, yes, if a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional.").

435. *Glossip*, 135 S. Ct. at 2749 (Scalia, J., concurring).

436. *Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment).

437. See Stinneford, *The Original Meaning of "Cruel"*, *supra* note 273; Stinneford, *The Original Meaning of "Unusual"*, *supra* note 273.

438. Justice Scalia's final Eighth Amendment opinion perhaps suggests that he remained wedded to a more cautious approach. In *Kansas v. Carr*, 136 S. Ct. 633, 642–43 (2016), Justice Scalia (writing for the Court) held that the Eighth Amendment does not require judges in capital sentencings to instruct juries that mitigating factors need not be proven beyond a reasonable doubt. *Id.* at 642. He added

Amendment case law, that now seems extraordinarily unlikely. There is likely only one Justice (Thomas) who might have an inclination to pursue such an agenda.⁴³⁹ But if we are to play a game of “what if,” we might well ask whether, in 2015, Justice Scalia questioned the soundness of the Eighth Amendment jurisprudence he planned way back in 1988. Instead of sake-of-argument originalism and faint-hearted originalism, might it not have been better simply to make the case for the Amendment’s original meaning? This would mean braving accusations of moral obtuseness,⁴⁴⁰ but to such accusations Justice Scalia could have responded that his was a truly principled—and constitutional—position.⁴⁴¹ His final sentence in *Glossip*, which was almost his last word on the Eighth Amendment, may hint at this, when he observes that it is not he, but his opponents who “reject[] the Enlightenment.”⁴⁴² Such a principled originalism, heroic to the point of being quixotic, would have failed as resoundingly as his faint-hearted and sake-of-argument originalism, but at least there would have been the benefit of “going down with guns blazing and flag flying.”⁴⁴³

Justice Scalia was open to such flamboyant gestures. Most conspicuously, his stated willingness to overturn *Miranda v. Arizona*,⁴⁴⁴ notwithstanding its entrenched nature in our legal and popular culture, illustrates an inclination to eschew incrementalism and “upset[] the apple cart” when he perceived a

that “[i]n any event, our case law does not require capital sentencing courts ‘to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt.’” *Id.* (quoting *State v. Gleason*, 329 P.3d 1102, 1148 (Kan. 2014)). It would thus seem that Justice Scalia was still willing to apply, if only for the sake of argument, the capital sentencing precedents (“our case law”) that he regarded as foundationally flawed.

439. It is perhaps too early to speculate about Justices Gorsuch and Kavanaugh.

440. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., concurring) (implying that under Scalia’s reading, the Eighth Amendment “would impose no impediment to the execution of 7-year-old children today”).

441. *Cf.* Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 281, 281 (Roy P. Basler et al. eds., 1953) (observing that he had taken an oath to “preserve, protect, and defend the Constitution,” which trumps his “abstract” views on “moral question[s]”).

442. *Glossip v. Gross*, 135 S. Ct. 2726, 2750 (2015) (Scalia, J., concurring).

443. *Cf.* LEO STRAUSS, NATURAL RIGHT AND HISTORY 318 (1971).

444. 384 U.S. 436 (1966); *see also* *Dickerson v. United States*, 530 U.S. 428, 441 (2000) (Scalia, J., dissenting) (stating that *Miranda* is a “preposterous” reading of the Constitution).

precedent, however foundational, as monstrously flawed.⁴⁴⁵ However, the likelihood that five Justices will adopt such a heroic strategy in the context of the Eighth Amendment is an asymptotic approximation of zero. The sort of person who survives the presidential nomination and Senate confirmation processes is certain to be more prudent.⁴⁴⁶ References to the language of the Eighth Amendment will continue to adorn judicial opinions (along with equally decorative citations to Hale and Blackstone). But the Eighth Amendment today stands for a prohibition against punishments in conflict with evolving standards of a mature society, as ascertained by legal elites. And as for the original meaning of this updated *Trop*-infused Eighth Amendment, James Madison is a less relevant guide than Earl Warren.

445. See Bibas, *supra* note 87, at 1089.

446. See Lund, *supra* note 16, at 19–20.