THE DEATH PENALTY AND THE FIFTH AMENDMENT

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ABSTRACT

Recent developments have given new hope to those seeking constitutional abolition of the death penalty. But some supporters of the death penalty continue to argue, as they have since Furman v. Georgia, that the death penalty must be constitutional because the Fifth Amendment explicitly contemplates it. The appeal of this argument is obvious, but its strength is largely superficial, and is also mostly irrelevant to the claims being made against the constitutionality of capital punishment. At most, the references to the death penalty in the Fifth Amendment may reflect a founding era assumption that it was constitutionally permissible at that time. But they do not amount to a constitutional authorization; if capital punishment violates another constitutional provision, it is unconstitutional. And once that point is conceded, the Fifth Amendment Argument does very little work. There might be good arguments for the constitutionality of the death penalty, but the Fifth Amendment is not among them.

INTRODUCTION

Can the Supreme Court find unconstitutional something that the text of the Constitution “contemplates”? If the Bill of Rights mentions a punishment, does that make it a “permissible legislative choice” immune to independent constitutional challenges? The dueling opinions in Glossip v. Gross have brought renewed attention to the constitutionality of the death penalty. In a dissent joined by Justice Ginsburg, Justice Breyer identified “three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in

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application, and (3) unconscionably long delays,” which led him to conclude “that the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishment.’”\(^5\) This marked the first time that two members of the current Court have announced a belief that the death penalty is likely unconstitutional “in and of itself,” and it has justifiably been treated as a significant development.\(^6\)

In a concurrence that was blistering even by his own standards, Justice Scalia (joined by Justice Thomas) wrote that the dissent was full of “gobbledy-gook,” and that “not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible.”\(^7\) The basis for the Court’s continued acceptance of capital punishment, Justice Scalia wrote, was the Fifth Amendment:

The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly contemplates. The Fifth Amendment provides that “[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury,” and that no person shall be “deprived of life . . . without due process of law.”\(^8\)

Announcing his concurrence, Justice Scalia made the point even more strongly, saying that “the death penalty is approved by the Constitution.”\(^9\) He and many others have made some version of this point—the Fifth Amendment Argument, for simplicity’s sake\(^10\)—many times before.\(^11\) Perhaps the Argument is best understood as a simple rhetorical move, or a

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\(^5\) Glossip, 135 S.Ct. at 2755-56 (Breyer, J., dissenting).
\(^6\) See supra note 4 and sources cited therein.
\(^7\) Glossip, 135 S.Ct. at 2747 (Scalia, J., concurring). A few months later, Justice Scalia said he “wouldn’t be surprised” if the Court were to find the death penalty unconstitutional. Debra Cassens Weis, Scalia Says He ‘Wouldn’t Be Surprised’ if SCOTUS Overturns the Death Penalty, ABA JOURNAL, Sept. 24, 2015.
\(^8\) Id.
\(^9\) Glossip v. Gross, Opinion Announcement – June 29, 2015 (Part 4) Oyez, https://www.oyez.org/cases/2014/14-7955 (last visited Oct 10, 2015) (“Unlike opposite sex marriage, the death penalty is approved by the Constitution. You’re all familiar with the provision, ‘No person shall be deprived of life, liberty, or property without due process.’ Another provision requires a grand jury indictment for all capital crimes, that is, all crimes involving the death penalty. Nonetheless, these two justices now propose to take the issue of capital punishment entirely away from the people on the basis of nothing but their own policy preferences.”).
\(^10\) Substantially the same arguments can be made regarding the Fourteenth Amendment, which provides “nor shall any state deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. But since the Fifth Amendment is more commonly invoked—perhaps because of its proximity in time and text to the Eighth—it is the more natural referent here.
\(^11\) See infra Section I.
suggestion that the death penalty is constitutional “in principle” so long as it
does not run afoul of other constitutional prohibitions. Though it might
render the Argument more persuasive, this narrow reading would not
account for the way it is actually used—as a response to other constitutional
arguments—not the respect it is accorded: Even critics of capital
punishment have described it as a “devastating problem.”

It is nothing of the sort. The Fifth Amendment contains prohibitions, not
powers, and there is no reason to suppose that they somehow nullify other
constitutional prohibitions—most importantly, the ban on cruel and unusual
punishment. The real target of the Fifth Amendment Argument can only
be the Court’s longstanding Eighth Amendment doctrine, which is not
limited to whether the Framers thought that the death penalty was
unconstitutional at the time. Unless and until that doctrine changes, the
Argument itself carries no weight.

To be clear, the inverse argument would be equally faulty. The
weakness of the Fifth Amendment Argument does not mean that the death
penalty is unconstitutional, let alone “categorically” so, only that the
“constitutional defects” Justice Breyer identifies cannot be dismissed out of
hand. Glossip, along with other developments in law and practice, have
made the continuing constitutionality of capital punishment a pressing
question. That question should be answered without the distraction of the
Fifth Amendment.

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12 Sanford Levinson, Wrong But Legal?, 236 NATION 248, 248 (1983) (“Any textualist comes up with a devastating problem in regard to the death penalty: both the Fifth and Fourteenth Amendments specifically acknowledge the possibility of a death penalty. They require only that due process of law be followed before a person can be deprived of life.”).
13 See infra Section II.A.
14 See infra Section II.B.
15 See infra Section II.C.
16 Notably, some state courts have directly confronted the issue and held the death penalty to be cruel and unusual punishment despite references to capital punishment in their state constitutions. See, e.g., State v. Santiago, 318 Conn. 1, 52 (2015) (“[I]ncidental references to the death penalty in a state constitution merely acknowledge that the penalty was in use at the time of drafting; they do not forever enshrine the death penalty’s constitutional status as standards of decency continue to evolve.”); People v. Anderson, 6 Cal. 628, 637 (1972) (“We perceive no possible conflict or repugnance between those provisions and the cruel or unusual punishment clause ..., for none of the incidental references to the death penalty purport to give its existence constitutional stature. They do no more than recognize its existence at the time of their adoption.”).
17 See, e.g., The Slow Demise of Capital Punishment, N.Y. TIMES, Dec. 29, 2013, at A18 (“Public support for the death penalty — an important factor in the Supreme Court’s consideration of its constitutionality — is at its lowest level in four decades, and 40 percent of people surveyed by Gallup say they do not believe it is administered fairly.”); see also James Gibson & Corrinna Barrett Lain, Death Penalty Drugs and the International Moral Marketplace, 103 GEO. L.J. 1215 (2015).
I. THE FIFTH AMENDMENT ARGUMENT

Although it comes in slightly different variations, the basic thrust of the Fifth Amendment Argument is that the text of the Amendment insulates the death penalty against constitutional challenge. The strongest form of the argument is that because the text of the Amendment refers to the death penalty, capital punishment must be constitutionally permissible. Justice Scalia made this argument in Glossip (“It is impossible to hold unconstitutional that which the Constitution explicitly contemplates.”), as well as in Baze v. Rees, where he wrote that “the very text of the document recognizes that the death penalty is a permissible legislative choice.” Chief Justice Burger took the same tack in Furman v. Georgia, arguing that “the explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment.”

A slightly different form of the Argument makes the potentially more modest claim that the text of the Fifth Amendment shows that the Framers believed that the death penalty was constitutional. As the joint opinion in Gregg v. Georgia put it, “It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.” Other Justices have echoed this view, and as a matter of historical fact it is incontestable that the Framers believed the death penalty could constitutionally be administered at that time. Depending on one’s version of originalism, the Framers-thought-it argument could be more or less identical to the Constitution-says-it-now argument, but in practice most

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18 Baze v. Rees, 553 U.S. 35, 87-88 (2008) (Scalia, J., concurring). The United States had argued as much in its brief. See Baze v. Rees, 2007 WL 4351595 (U.S.), 10-11 (Brief of U.S. as Amicus Curiae supporting respondents) (“The starting point for any analysis of petitioners’ Eighth Amendment claim is that capital punishment is itself constitutional. It is constitutional not only in the sense that the Court’s cases have upheld the death penalty, but also in the sense that the Constitution expressly contemplates capital punishment. The Fifth Amendment ‘contemplate[s] the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases.’”) (citing Gregg v. Georgia, 428 U.S. 153, 177 (1976) (Stewart, Powell, Stevens Joint Op)).


21 Roberts v. Louisiana, 428 U.S. 325, 350-51 (1976) (White, J., dissenting) (“It is plain enough that the Constitution drafted by the Framers expressly made room for the death penalty. The Fifth Amendment provides ….”).
originalists do not think that the Constitution’s meaning is set based solely on original expected applications.  

Whatever its precise form, the Fifth Amendment Argument seems to have a broad and deep influence. Not only is it deployed as a rejoinder to abolition, it also serves as the fulcrum for other pro-death penalty arguments. Perhaps most importantly, it appears uncredited in cases (including Glossip itself) involving Eighth Amendment challenges to methods of execution. Rejecting one such challenge in Baze v. Rees, Chief Justice Roberts framed the case—and thereby effectively decided it—as follows: “[W]e begin with the principle … that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out.”

This argument has become a standby response to methods-of-execution challenges. It is problematic for many reasons, not least of which is the way in which it decontextualizes the inquiry—as if there were such a thing as “capital punishment” separate from the means of carrying it out. (Similarly, one could grant Justice Scalia’s argument that the death penalty is not “categorically impermissible” while maintaining that the conditions for its constitutional use are not currently satisfied and perhaps never will be.) One supposes that if the death penalty were uniformly practiced by lowering people into molten lead, or if the only drugs available for lethal injection caused searing pain, the Court would take note of that context. It simply does not follow—let alone “necessarily”—that a constitutional “means” currently exists to carry out every constitutional end.

For present purposes, however, the primary puzzle is where the Baze Court gets its major premise: the “principle … that capital punishment is constitutional.” It says that this was “settled by Gregg,” but that is unsatisfying. It is true that Gregg upheld the constitutionality of the death penalty, and remains the law of the land. But no one (presumably including the Baze majority) would interpret Gregg as pre-settling all future constitutional challenges to the death penalty. Gregg did not even involve a challenge to methods of execution, and it hardly seems satisfying to reject

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22 See infra notes 62-69 and accompanying text.
24 See, e.g., Baze v. Rees, 553 U.S. 35, 73 (2008) (Alito, J., concurring) (“[W]e proceed on the assumption that the death penalty is constitutional.”); see Berry III, supra note 19, at 449-50 (“These constitutional provisions plainly allow for the possibility that federal and state governments may choose to use capital punishment. . . .”).
27 Gregg v. Georgia, 428 U.S. 153, 176 (1976) (considering “whether the sentence of
a constitutional challenge by invoking another case that did not reach the issue. Notably, Justice Stevens joined the joint opinion in Gregg (including that portion citing the Fifth Amendment), but dissented in Baze. As he explained in the latter opinion: “[T]he guarantees of procedural fairness contained in the Fifth and Fourteenth Amendments do not resolve the substantive questions relating to the separate limitations imposed by the Eighth Amendment.”

It seems that the underlying supposition behind the “principle” cited in Baze is some version of the Fifth Amendment Argument. Indeed, the joint opinion in Gregg itself appears to rest there: “It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. . . . The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases.” As a statement about the original expected application of the Fifth and Eighth Amendments, this is right as far as it goes. The Fifth Amendment Argument, however, attempts to translate that historical observation into something like a categorical protection for the contemporary death penalty.

Its appearance in Gregg illustrates that the Fifth Amendment Argument is significant not only for what it says about the constitutionality of capital punishment, but for its role as a lodestar in debates about constitutional interpretation. As a matter of interpretive methodology, the Fifth Amendment Argument has had particular appeal to originalists and textualists, and has sometimes been trumpeted as demonstrating the power of those methods to deliver clear constitutional results. It is thus used not only as an argument against abolition of the death penalty, but for originalism.

In Originalism: The Lesser Evil, Justice Scalia pointed to the Fifth Amendment Argument as his primary example for the point that, to an originalist, “for the vast majority of questions the answer is clear.” As Justice Powell said in Furman, “there cannot be the slightest doubt that [the Framers of the Constitution] intended no absolute bar on the Government’s authority to impose the death penalty.” And, as Powell did, those who invoke the Fifth Amendment Argument often note simultaneously that the same Congress that proposed the Eighth Amendment’s prohibition on “cruel and unusual punishment” also passed legislation making several death for the crime of murder is a per se violation of the Eighth and Fourteenth Amendments to the Constitution.”}

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31 Furman v. Georgia, 408 U.S. 238, 419-21 (1972) (Powell, J., dissenting)
offenses punishable by death.\textsuperscript{32}

The role of the Fifth Amendment Argument in the interpretive debates—both as a product and a piece of supporting evidence—is a testament to its apparent strength. Even those who are skeptical of the death penalty have sometimes conceded the power of the Argument. Justice Blackmun himself wrote, seemingly in reference to the Fifth Amendment, that “the Constitution appears to permit [] the penalty of death.”\textsuperscript{33} Scholars, including those critical of the death penalty, have sometimes made the same concession.\textsuperscript{34}

And yet there are also those who question the Argument. In the same opinion in which he acknowledged that “the Constitution appears to permit [] the penalty of death,” Justice Blackmun also penned his famous declaration: “From this day forward, I no longer shall tinker with the machinery of death.”\textsuperscript{35} How can these statements be reconciled? How could he refuse to engage with a machinery that the Constitution “appears to permit”\textsuperscript{36} Blackmun provides an answer:

Although most of the public seems to desire, and the Constitution appears to permit, the penalty of death, it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all.\textsuperscript{36}

Justice Blackmun’s conclusion might well be beyond dispute, despite the qualifiers regarding public and textual support. But it is surely beyond dispute if the phrase “and the Constitution appears to permit”\textsuperscript{37} has no real weight—apparent public support for the death penalty cannot constitutionalize the death penalty if it cannot be applied consistently and

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\textsuperscript{32} Id.; see also Baze v. Rees, 553 U.S. 35, 87-88 (2008) (Scalia, J., concurring).


\textsuperscript{34} Corinna Barrett Lain, \textit{Furman Fundamentals}, 82 \textit{WASH. L. REV.} 1, 11-12 (2007) (“The Constitution’s text clearly assumes the death penalty’s legitimacy, and the Framers did as well.”); \textit{id.} (“[N]either the text nor the original understanding of the Constitution supported \textit{Furman’s} ruling.”); Levinson, \textit{supra} note 11; cf. John Hart Ely, \textit{Interclausal Immunity}, 87 \textit{VA. L. REV.} 1185, 1187 (2001) (“Since 1964 [the Supreme Court] has been going back and forth, invariably with dissents, on the question whether capital punishment should be held to violate the Eighth Amendment’s Cruel and Unusual Punishment Clause, despite the fact that the Fifth Amendment, ratified at the same time, appears explicitly to assume the existence of the death penalty no fewer than three times.”).


\textsuperscript{36} \textit{id.} at 1147.

\textsuperscript{37} Public support—or lack thereof—for a penalty is a factor in Eighth Amendment analysis, but it is not dispositive. \textit{See} Atkins v. Virginia, 536 U.S. 304, 307 (2002) (“The consensus reflected in [public] deliberations informs our answer to the question presented by this case: whether such executions are ‘cruel and unusual punishments’ prohibited by the Eighth Amendment to the Federal Constitution.”).
rationally. In other words, Justice Blackmun might be right even if the Fifth Amendment Argument is correct.\(^{38}\) He is certainly right if it is not.

**II. THE FLAWS OF THE FIFTH AMENDMENT ARGUMENT**

Despite its prevalence, longevity, and apparent influence, the Fifth Amendment Argument is deeply flawed. The relevant text of the Fifth Amendment contains prohibitions on the use of capital punishment, not a grant of government power.\(^{39}\) And even if it did, it would still be subject to other constitutional limitations, including the Eighth Amendment.\(^{40}\) For the Argument to have any real power, the Court would first have to overturn decades of Eighth Amendment jurisprudence. The Fifth Amendment argument has no purchase on that issue, and therefore provides no guidance with regard to the relevant constitutional questions.

**A. The Fifth Amendment Contains Prohibitions, Not Powers**

On its face, the text of the Fifth Amendment contains three prohibitions on the use of capital punishment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.\(^{41}\)

The Fifth Amendment Argument, however, is not used in cases involving these three rights—to a grand jury, to due process, and against double jeopardy. As noted above, it is instead used as a rejoinder to *other* constitutional arguments, most notably those derived from the Eighth Amendment.

In other words, the Fifth Amendment Argument takes a list of rights against government to be evidence of a government power and then

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\(^{38}\) As noted below, *even if* the Fifth Amendment is read as a textual approval of the death penalty, it might still be trumped by other constitutional guarantees.

\(^{39}\) See *infra*, Section II.A.

\(^{40}\) See *infra*, Section II.B.

\(^{41}\) U.S. CONST., amend V
insulates that power against other constitutional provisions. This kind of reading, it should be said, was the nightmare of those Federalists who worried that a Bill of Rights might be misinterpreted as giving the government power to do things not expressly forbidden.\textsuperscript{42} Part of their solution—the Ninth Amendment—is discussed in more detail below.\textsuperscript{43}

To this textual argument, the most obvious rejoinder is what Justice Brennan called the “narrow textual response”: The “amendment does not, after all, declare that the right of the Congress to punish capitally shall be inviolable; it merely requires that when and if death is a possible punishment, the defendant shall enjoy certain procedural safeguards, such as indictment by a grand jury and, of course, due process.”\textsuperscript{44} The reason for including those prohibitions—or any prohibition—is the fear of a potential wrong. And in that sense, the Fifth Amendment “contemplates” the death penalty as a possible punishment, but only insomuch as it seeks to \textit{limit} that possibility.\textsuperscript{45}

The Fifth Amendment Argument instead transforms the textual prohibitions (i.e., “If not \textit{Y} then not \textit{X}”) into conditional grants of power (i.e., “If \textit{Y} then \textit{X}”). This requires something of a leap, since none of the three relevant passages in the Amendment can legitimately be rephrased as such:

1) “No person shall …. unless on a presentment or indictment of a grand jury, …” \textarrow{} No \textit{X} (death penalty) unless \textit{Y} (presentment or indictment) \textarrow{} If no \textit{Y} then no \textit{X}.

If no \textit{Y} then no \textit{X} \neq If \textit{Y} then \textit{X}

\textsuperscript{42} See \textsc{The Federalist} No. 84, at 304-05 (Alexander Hamilton) (David Wootton ed., 2003) (“[B]ills of rights . . . are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted. . . . [I]t would furnish, to men disposed to usurp, a plausible pretense for claiming . . . power.”); see also \textsc{Akhil Reed Amar}, \textsc{America’s Constitution} 328 (2005) (“In 1787 and 1788, Federalists had repeatedly warned that a bill of rights, if incautiously drafted, might actually weaken certain protections in the original Constitution by unintentionally expanding federal powers and restricting implicit rights.”).

\textsuperscript{43} See infra notes 51-52 and accompanying text.

\textsuperscript{44} William J. Brennan, Jr., \textit{Constitutional Adjudication and the Death Penalty: A View from the Court}, 100 \textsc{Harv. L. Rev.} 313, 323-24 (1986).

\textsuperscript{45} Bruce Ledewitz, \textit{Judicial Conscience and Natural Rights: A Reply to Professor Jaffa} 10 \textsc{U. Puget Sound L. Rev.} 449, 459 (1994) (“The Fifth Amendment represents a limitation on capital punishment, in that it was not to be carried out in the future as it had been in the past. One could hardly call the due process clause an endorsement of capital punishment. It acknowledges that capital punishment was a prevailing practice, but this recognition is similar to the recognition accorded slavery.”).
2) “nor shall … twice put in jeopardy” —> No X (death penalty)
if Y (double jeopardy) —> If Y then no X.
If Y then no X ≠ If no Y then X

3) “nor be deprived … without” —> No X (death penalty)
without Y (due process) —> If no Y then no X.
If no Y then no X ≠ If Y then X

As a straightforward matter of logic, then, it is wrong to say that the text of the Fifth Amendment establishes the constitutionality of the death penalty.

But perhaps this answer to the Fifth Amendment Argument commits the very sin it alleges, by oversimplifying the text and thereby distorting its meaning. After all, the three supposed prohibitions all contain language that might be read as conditional—especially “unless,” but also “without,” and even “twice,” which could arguably be read to imply that it is permissible to be “put in jeopardy of life or limb,” but only once. Perhaps those should be read as the only conditions to capital punishment’s use, or—what basically comes to the same thing—an exclusive list of rules against it.

As a matter of linguistic use, it is true that prohibitions can sometimes be read as conditional approvals. If I tell my son, “No dessert unless you eat your vegetables,” he might reasonably understand me to be saying that he can get dessert if he proves that he’s eaten his vegetables.

But not all prohibitions are implied approvals, nor are all conditions implied to be exclusive. If I tell my son, “Don’t pull the cat’s tail,” I have not thereby given him permission to pull its ears and whiskers. If my syllabus says, “No person shall receive an A in this course without participating regularly in class,” then it should be clear that regular class participation is necessary but not sufficient for an A.

What if a student disputed my reading of the syllabus, and said that her regular participation in class entitles her to an A? As in any other such case, the supposed ambiguity would be resolved by reference to context and background—it is simply unreasonable to assume that class participation is the sole condition for earning an “A.” Nor does that conclusion change if the syllabus, like the Fifth Amendment, contains three supposed preconditions: class attendance, timely completion of assignments, and respect for other students, for example. The obvious reason for including those rules—whether in a syllabus or a Bill of Rights—is that they refer to actions that are especially important to prohibit, perhaps because they are particularly likely or especially harmful. The text of the Fifth Amendment, then, should draw our attention to particular problems (double jeopardy and denial of due process, for example), not blind us to the possibility of others.

The student would be on stronger ground if she insisted that the syllabus
tacitly promises that an A is possible “in principle,” so long as the listed conditions are satisfied along with whatever other conditions (a strong exam, for example) are required. Likewise, the Fifth Amendment Argument is most defensible when it is used to suggest that the death penalty is constitutional in the abstract. But the same thing that makes it defensible—total dissociation from reality—also renders it ineffective against the kinds of arguments raised by Justice Breyer in Glossip. The only way for the Argument to answer those criticisms is to treat the constitutional text as giving the government something like a death penalty power.

But, of course, there are especially good reasons not to infer governmental powers from the prohibitions in the Bill of Rights, whose very function is to limit governmental power. Put another way, compliance with one prohibition in the Bill of Rights is not a sufficient basis for government to do the thing that the right would otherwise have prohibited. If the government has a power—or, as the Fifth Amendment Argument suggests, something like a right—to execute its citizens, it must derive from somewhere other than the Fifth Amendment.

B. The Fifth Amendment Argument’s Prohibitions Are Not Exclusive

The Fifth Amendment Argument is typically used to shut down other constitutional claims, especially those derived from the Eighth Amendment. This it cannot do. (As explained in more detail in the following section, it is also a poor vehicle for interpreting the Eighth Amendment, especially given longstanding doctrine.)

The most obvious reason why the Fifth Amendment Argument cannot trump the Eighth is that their prohibitions are cumulative with one another. Complying with one set of prohibitions does not give the

46 Glossip, 135 S.Ct. at 2755-56 (Breyer, J., dissenting) (pointing to “(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays”).

47 See infra Section II.C.


49 The symmetry with the previous section of the Essay may be apparent, and logically speaking the two sections are almost identical: Generally, saying that X is an exclusive list of prohibitions is the same as saying that complying those prohibitions means one is entitled to act. Here, the matter is slightly complicated by the fact that the federal government, at least, has no default power to act, whether with regard to capital punishment or anything else—it can only do so pursuant to an enumerated power. Whether or not one considers the enumerated power rule to be a prohibition, condition, or something else entirely, abolitionists and anti-abolitionists generally seem to agree that it does not present a major obstacle to capital punishment. Of course, the federal death penalty can present particular problems, especially when it is sought in states that do not themselves have the death penalty. United States v. Fell, 571 F.3d 264, 282 (2d Cir. 2009) (Calabresi,
government license to violate another, any more than—according to another list of ten prohibitions—declining to bear false witness against one’s neighbors gives license to covet their spouses. Likewise, providing a capital defendant with Due Process does not permit the government to discriminate against him on the basis of race.50 Why, then, would it permit imposition of cruel and unusual punishment?

The Fifth Amendment itself all but demonstrates that its list of prohibitions is neither a grant of power nor an exclusive list. It could not seriously be argued that complying with one of the Fifth Amendment’s conditions obviates the need to comply with others—providing a grand jury does not enable double jeopardy, for example. Clearly, the three conditions are cumulative with each other. To show that the Fifth Amendment is the exclusive list, one must build a wall around the Amendment and say that its rules are the only ones that matter to the constitutionality of capital punishment, or at the very least that a holistic reading of the Bill of Rights would privilege the power supposedly implied by the Fifth Amendment over, for example, the prohibitions listed in the Eighth. It is hard to imagine how this is possible.

One move would be to say that, as in other areas of textual interpretation, the specific must control the general, and so we must read the Fifth Amendment’s specific list of prohibitions as displacing the Eighth’s more general prohibition. This canon does not make much sense in the context of constitutional rights, though. It would lead to particularly bizarre results here, because it would suggest that the death penalty might be subject to constitutional abolition on Eighth Amendment grounds but for the fact that another provision in the Bill of Rights imposes additional restrictions on it. Without some evidence to the contrary, prohibitions—or rights, which are the same thing in this context—tend to be cumulative, rather than alternative.

This is not simply a matter of logic, but of constitutional text. As Will Baude has pointed out, the Ninth Amendment flatly rules out the use of the Fifth Amendment to block consideration of the Eighth.51 The Ninth Amendment indicates that the entire Bill of Rights—let alone any particular

J., dissenting from denial of rehearing en banc).

50 Cf. Baze v. Rees, 553 U.S. 35, 86 n.19 (2008) (Stevens, J., concurring) (“[T]he guarantees of procedural fairness contained in the Fifth and Fourteenth Amendments do not resolve the substantive questions relating to the separate limitations imposed by the Eighth Amendment.”).

51 William Baude, Is the Death Penalty Unconstitutional?, N.Y. TIMES, July 7, 2015, http://www.nytimes.com/2015/07/07/opinion/is-the-death-penalty-unconstitutional.html (arguing that Scalia’s invocation of the Fifth Amendment Argument in Glossip “ignores the lesson of another constitutional amendment, the Ninth, which is designed to stop precisely the sort of inference that Justice Scalia is making here”).
provision of it—cannot be read as an exclusive list. The Ninth Amendment therefore confirms what the Fifth itself suggests: Compliance with the Fifth Amendment does not provide the death penalty a safe harbor against constitutional challenges, including those derived from the Eighth Amendment. \[52\]

**C. The Fifth Amendment Does Not Trump the Eighth**

The standard form of the Fifth Amendment Argument is anti-abolitionist—a response to those who argue that the death penalty is unconstitutional, usually on Eighth Amendment grounds. But sometimes, as in *Glossip*, the target of the argument is not only abolition, but the whole structure of contemporary Eighth Amendment jurisprudence.

In *Glossip*, Justice Scalia accused Justice Breyer of “contort[ing] the constitutional text” by ignoring the “troubling detail” that “[h]istorically, the Eighth Amendment was understood to bar only those punishment that added ‘terror, pain, or disgrace’ to an otherwise permissible capital sentence.” \[53\] But this claim about the original meaning is contestable at best, \[54\] and—more importantly—there simply is no strong textual argument based in the “constitutional text” of the Fifth Amendment, for all the reasons given above. The argument should therefore be unconvincing even to those who take an originalist or textualist approach to the Eighth Amendment, \[55\] and largely irrelevant to those who do not.

But it is the Court’s own longstanding Eighth Amendment doctrine, not Justice Breyer’s dissent, that rejects this supposed historical understanding. The heart of the Fifth Amendment Argument therefore seems to be an attack on the “evolving standards of decency” that have animated Eighth

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\[52\] Because the Fifth Amendment does not *mandate* the persistence of capital punishment, there would be no intra-textual absurdity if the Eighth Amendment were to forbid it. This makes it unlike, say, other potential absurdities in the constitutional text, such as the Vice President presiding over his own impeachment trial. *See, e.g.*, Joel K. Goldstein, *Can the Vice President Preside at his Own Impeachment Trial? A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849 (2000).

\[53\] *Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring) (quoting Baze v. Rees, 553 U.S. 35, 96 (Thomas, J., concurring in judgment)).


\[55\] John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 541-42 (2014) (“These provisions [of the Fifth Amendment] obviously assume the existence of capital punishment, and one could argue, as Justice Scalia does, that they are evidence that the founding generation did not consider the death penalty to be ‘cruel and unusual.’ But at no point do they or any other part of the constitutional text ‘explicitly sanction’ the death penalty.”) (internal citations omitted).
Amendment doctrine for decades. As the Supreme Court put it in *Trop v. Dulles*, the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." This does not mean that the Justices’ own "evolving" moral views determine the analysis, only that the original expected applications do not control.

So long as *Trop* is the law, the Fifth Amendment Argument against constitutional abolition is a non-starter. Jurisprudentially speaking, *Trop* is Justice Scalia’s true target, as he makes clear later in the opinion:

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. *That case has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind.*

That extraordinary series of superlatives—and its nomination of *Trop* as the single worst precedent in the Supreme Court Reports—has not received the attention it deserves. It is an invitation to tear up the foundations of existing Eighth Amendment jurisprudence. If and only if the Court does so, the Fifth Amendment Argument might become significant.

For present purposes, the question is whether the Fifth Amendment has any role in the underlying debate over "evolving standards of decency." Two roles are possible: First, as part of the argument against *Trop* and in favor of a "historical understanding" approach to the Eighth Amendment (i.e., that the "evolving standards" approach is wrong), and second, as a way of filling the post-*Trop* jurisprudential void (i.e., that the death penalty was constitutional on the "historical understanding").

As to the former, even holding aside the issue of *stare decisis*, there are well-recognized problems with strictly defining "cruel and unusual" punishment according to the historical understanding. Indeed, it was

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56 *Trop v. Dulles*, 356 U.S. 86 (1958) (holding that denationalization violates the Eighth Amendment’s prohibition on cruel and unusual punishment); *See also* *Weems v. United States*, 217 U.S. 349, 378 (1910) (noting that the cruel and unusual punishments clause "is progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice").

57 356 U.S. at 100-01.

58 *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.”).

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

60 Stinneford, *supra* note 54, at 1765 (2008) (“Some punishments that were acceptable at the end of the eighteenth century seem so harsh by modern standards that it is hard to
precisely those difficulties that once led Justice Scalia to draw limits to his own originalist commitments, declaring himself a “faint-hearted originalist” who could not imagine “upholding a statute that imposes the punishment of flogging.”

Whatever one’s position on Eighth Amendment originalism, the Fifth Amendment Argument does not answer these challenges, especially not the moral ones. The Fifth Amendment Argument is an assertion about what the Framers believed, not why those beliefs should matter. Accordingly, Trop is an obstacle to the Fifth Amendment Argument, but the Fifth Amendment Argument has very little to say about the rightness of Trop. In order for the Argument to matter, the Court would have to first reject the “evolving standards of decency” and embrace an especially strict originalist approach to cruel and unusual punishment that it has consistently rejected.

Even if the Court were to pursue an originalist Eighth Amendment, it is not clear that the Fifth Amendment Argument would prove all that much about whether capital punishment is “cruel and unusual.” To be sure, as an historical matter, it is clear that the great majority of the founders thought the death penalty an appropriate means for the enforcement of some laws at the time. The same people who proposed and ratified the Eighth Amendment also proposed and ratified the Fifth, including its references to the death penalty. They also, perhaps more relevantly, proposed and passed capital legislation.

But this (undoubtedly accurately) observation about founding-era
penological thinking cannot be translated directly into constitutional law, even if one is an originalist.\textsuperscript{64} As a constitutional matter, few even among committed originalists find this sort of “original expectation” persuasive.\textsuperscript{65} Rather, most originalists have come to recognize a difference between original expected applications (i.e., what the Framers thought about whether the Eighth Amendment prohibited capital punishment in the late 1700s) and original meaning or understanding (i.e., what the Framers thought “cruel and unusual” punishment meant, and whether it could someday extend to capital punishment).\textsuperscript{66} For most originalists, it is the latter that control.\textsuperscript{67}

The division between original expected application and original meaning is particularly stark in the context of the Eighth Amendment. As Justice Brennan put it:

We can thus infer that the Framers recognized the existence of what was then a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishments Clause. Nor is there any indication in the debates on the Clause that a special exception was to be made for death.\textsuperscript{68}

\textsuperscript{64} In response to a similar critique leveled by Ronald Dworkin twenty years ago, Justice Scalia seems almost to concede this point, though he continues to invoke the Fifth Amendment Argument. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS & THE LAW 144-46 (Amy Gutmann ed., 1997) (“Professor Dworkin is therefore close to correct in saying that the textual evidence I cite for the constitutionality of capital punishment (namely, the specific mention of it in several portions of the Bill of Rights) ought to be ‘irrelevant’ to me. To be entirely correct, he should have said ‘superfluous.’ Surely the same point can be proved by textual evidence, even though (as far as my philosophy is concerned) it need not be. I adduced the textual evidence only to demonstrate that thoroughgoing constitutional evolutionists will be no more deterred by text than by theory.”).

\textsuperscript{65} Id. at 144 (rejecting reliance on “concrete expectations of the lawgivers”).

\textsuperscript{66} See JACK M. Balkin, LIVING ORIGINALISM 6 (2011) (“Constitutional interpretations are not limited to applications specifically intended or expected by the framers and adopters of the constitutional text. . . . The Eighth Amendment’s prohibitions on ‘cruel and unusual punishments’ ban punishments that are cruel and unusual as judged by contemporary application of these concepts and principles, not by how people living in 1791 would have applied them.”).

\textsuperscript{67} See, e.g., Lawrence Rosenthal, Originalism in Practice, 87 IND. L.J. 1183, 1209 (2012) (“Most originalists draw a distinction between the original meaning of constitutional text and its originally intended applications, arguing that only the former is interpretively binding.”); Steven G. Calabresi & Livia Fine, Two Cheers for Professor Balkin’s Originalism, 103 NW. U. L. REV. 663, 672 (2009) (“Professor Balkin is absolutely right when he says that fidelity to original meaning does not require fidelity to original expected application.”).

\textsuperscript{68} Furman v. Georgia, 408 U.S. 238, 283 (1972) (Brennan, J., concurring) (internal citation omitted); see also MICHAEL J. Perry, CONSTITUTION IN THE COURTS: LAW OR
Justice Stevens later noted that “even the four dissenters [in Furman], who explicitly acknowledged that the death penalty was not considered impermissibly cruel at the time of the framing, proceeded to evaluate whether anything had changed in the intervening 181 years that nevertheless rendered capital punishment unconstitutional.”

A second problem with trying to get originalist legal mileage out of this bit of history is that it reads the Bill of Rights in a way that would have been foreign to the Framers themselves. The Fifth Amendment Argument suggests that one can infer the existence of an implicit power from the existence of an express prohibition. The Framers are unlikely to have drawn that conclusion. It is hard to imagine, for example, that the language of the First Amendment implied that Article I legitimately delegated to Congress the power to enact a federal religious establishment, or to prevent petitions for the redress of grievances. Violating the original understanding of the Constitution’s logic is a peculiar way of honoring the document’s original meaning.

What we are left with, then, is a fact about founding-era views on capital punishment for which the language of the Fifth Amendment provides modest and largely unnecessary support. The only constitutional argument to which this fact is at all relevant is one concerning the original meaning of the Eighth Amendment. And as to that, the Fifth Amendment itself does no work: the relevant constitutional question is whether the Eighth Amendment’s original meaning sets an unbreachable outer limit on the Eighth Amendment’s present-day application. Supreme Court doctrine has squarely answered that question in the negative, and nothing in the Fifth Amendment will help us resolve the question whether the Eighth Amendment caselaw about “evolving standards of decency” ought to be reconsidered. In short, the Fifth Amendment Argument is irrelevant to the issues at the heart of the current debate.

69 Baze v. Rees, 553 U.S. 35, 86 n.19 (2008) (Stevens, J., concurring) (citing Furman, 408 U.S., at 380–384 (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, J.J., dissenting); see also id., at 420 (Powell, J., joined by Burger, C.J., and Blackmun and Rehnquist, J.J., dissenting). (“Nor are ‘cruel and unusual punishments’ and ‘due process of law’ static concepts whose meaning and scope were sealed at the time of their writing”).
CONCLUSION

By many measures, the movement to abolish capital punishment is gaining steam. Wrongful convictions and botched executions continue to make headlines, and the death penalty is increasingly limited to a very small percentage of counties across the nation. In *Glossip*, two sitting Justices concluded that “the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishment,’” and even defenders of the death penalty’s constitutionality seem to think that changes may be on the horizon.

Against this backdrop, the appeal of the Fifth Amendment Argument is apparent. If it works, then one can avoid difficult questions about the constitutionality of capital punishment. But it does not work. There may be many good reasons—including constitutional reasons—not to abolish the death penalty, but the Fifth Amendment is not one of them.

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71 DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2013: YEAR END REPORT http://deathpenaltyinfo.org/documents/YearEnd2013.pdf (noting that all 80 death sentences in 2013 came from 2% of the nation’s counties, and the 39 executions came from just 1%).

72 *Glossip*, 135 S.Ct. at 2755-56 (Breyer, J., dissenting).