

## *Online Essay*

### THE DEATH PENALTY AND THE FIFTH AMENDMENT<sup>†</sup>

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**ABSTRACT**—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?

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.

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INTRODUCTION

Can the Supreme Court find unconstitutional something that the text of the Constitution “contemplates”?<sup>1</sup> If the Bill of Rights mentions a punishment, does that make it a “permissible legislative choice” immune to independent constitutional challenges?<sup>2</sup>

The dueling opinions in *Glossip v. Gross*<sup>3</sup> have brought renewed attention to the constitutionality of the death penalty.<sup>4</sup> In a dissent joined by Justice Ginsburg, Justice Breyer identified “three fundamental constitutional defects” with the death penalty: “(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays.”<sup>5</sup> These defects led him to conclude “that the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishment[t].’”<sup>6</sup> Justice Breyer’s dissent marked the first time that two members of the current Court have announced a belief that the death penalty is likely

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<sup>1</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring) (emphasis removed).

<sup>2</sup> *Baze v. Rees*, 553 U.S. 35, 87–88 (2008) (Scalia, J., concurring in the judgment).

<sup>3</sup> 135 S. Ct. 2726.

<sup>4</sup> See generally E.B., *Capital Punishment and the Supreme Court: Last Gasps*, THE ECONOMIST: DEMOCRACY IN AM. (June 29, 2015, 10:51 PM), <http://www.economist.com/blogs/democracyinamerica/2015/06/capital-punishment-and-supreme-court> [<https://perma.cc/C6R4-MKCK>] (analyzing the competing opinions in *Glossip*); Linda Greenhouse, Editorial, *Talking About the Death Penalty, Court to Court*, N.Y. TIMES (Aug. 20, 2015), <http://www.nytimes.com/2015/08/20/opinion/talking-about-the-death-penalty-court-tocourt.html?smid=pl-share> [<https://perma.cc/Y8AM-EHZP>] (arguing *Glossip* and state court cases signal that the Supreme Court will eventually find the death penalty unconstitutional); Richard Wolf & Kevin Johnson, *Courts, States Put Death Penalty on Life Support*, USA TODAY (Sept. 14, 2015), <http://www.usatoday.com/story/news/nation/2015/09/14/death-penalty-execution-supreme-court-lethal-injection/32425015/> [<http://perma.cc/KF2P-E8CJ>] (“The ruling gave impetus to states . . . seeking to jump-start executions after a hiatus of several years. But it also rejuvenated legal efforts by groups opposed to the death penalty . . .”).

<sup>5</sup> *Glossip*, 135 S. Ct. at 2755–56 (Breyer, J., dissenting).

<sup>6</sup> *Id.* at 2756 (alteration in original) (quoting U.S. CONST. amend. VIII).

unconstitutional “in and of itself,” and the opinion has justifiably been treated as a significant development.<sup>7</sup>

In a blistering concurrence, 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.”<sup>8</sup> Justice Scalia argued that the Fifth Amendment afforded a textual basis for the capital punishment’s continued constitutionality:

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.”<sup>9</sup>

Announcing his concurrence from the bench, Justice Scalia made the point even more strongly, saying that “the death penalty is approved by the Constitution.”<sup>10</sup> He and many others have made some version of this point—the “Fifth Amendment Argument,” for simplicity’s sake<sup>11</sup>—many times before.<sup>12</sup> Perhaps the Argument is best understood as a simple rhetorical move, or a 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 does not account for the way proponents actually use it—as a response to other constitutional arguments—nor the respect it garners:

<sup>7</sup> See *supra* note 4.

<sup>8</sup> *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 Weiss, *Scalia Says He ‘Wouldn’t Be Surprised’ if SCOTUS Overturns the Death Penalty*, A.B.A. J. (Sept. 24, 2015, 7:16 AM), [http://www.abajournal.com/news/article/scalia\\_says\\_he\\_wouldnt\\_be\\_surprised\\_if\\_scotus\\_overturns\\_the\\_death\\_penalty/](http://www.abajournal.com/news/article/scalia_says_he_wouldnt_be_surprised_if_scotus_overturns_the_death_penalty/) [<https://perma.cc/J5V2-SUR6>].

<sup>9</sup> *Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring).

<sup>10</sup> For an audio recording and transcript of the opinion announcement, see *Glossip v. Gross: Announcement—June 29, 2015 (Part 4)*, OYEZ PROJECT, [https://apps.oyez.org/player/#/roberts6/opinion\\_announcement\\_audio/23934](https://apps.oyez.org/player/#/roberts6/opinion_announcement_audio/23934) [<https://perma.cc/9MG5-PAD7>]. (last visited July 3, 2016) (“[U]nlike opposite sex marriage, the death penalty is approved by the Constitution. You are 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.”).

<sup>11</sup> 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.

<sup>12</sup> See *infra* Part I.

Even critics of capital punishment have described it as a “devastating problem.”<sup>13</sup>

It is nothing of the sort. The Fifth Amendment contains *prohibitions*, not powers,<sup>14</sup> and there is no reason to suppose that it somehow nullifies *other* constitutional prohibitions—most importantly, the ban on cruel and unusual punishment.<sup>15</sup> The real target of the Fifth Amendment Argument can only be the Court’s longstanding Eighth Amendment doctrine, which is not limited to the punishments considered cruel and unusual at the time of the Constitution’s framing.<sup>16</sup> Unless and until that doctrine changes, the Argument itself carries no weight.<sup>17</sup>

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,<sup>18</sup> 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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<sup>13</sup> Sanford Levinson, *Wrong But Legal?*, NATION, Feb. 26, 1983, at 248 (“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.”).

<sup>14</sup> See *infra* Section II.A.

<sup>15</sup> See *infra* Section II.B.

<sup>16</sup> See *infra* Section II.C.

<sup>17</sup> 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., *People v. Anderson*, 493 P.2d 880, 886 (Cal. 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.”), *superseded by* CAL. CONST. art. 1, § 27 (explaining that the death penalty will not be deemed “cruel or unusual punishment[.]”); *State v. Santiago*, 122 A.3d 1, 80 (Conn. 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 . . .”).

<sup>18</sup> See, e.g., Editorial, *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 & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215, 1217 (2015) (explaining the impact of European drug manufacturers’ refusal to export lethal injection drugs).

## 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.

In its strongest form, the Argument holds that capital punishment must be constitutionally permissible because the text of the Fifth Amendment refers to it. Justice Scalia made this argument in *Glossip*: “It is impossible to hold unconstitutional that which the Constitution explicitly contemplates,”<sup>19</sup> 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.”<sup>20</sup> 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.”<sup>21</sup>

A slightly different form of the Argument makes the 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, “[i]t is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.”<sup>22</sup> Other Justices have echoed this view,<sup>23</sup> 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-constitutional argument could be more or less identical to the Constitution-says-it-now argument,

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<sup>19</sup> 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring).

<sup>20</sup> 553 U.S. 35, 87 (2008) (Scalia, J., concurring in the judgment). The United States had argued as much in its brief. See Brief for the United States as Amicus Curiae Supporting Respondents at 10–11, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439), 2007 WL 4351595, at \*10–11 (“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.’”) (alteration in original) (citation omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

<sup>21</sup> 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting); see also William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 450 (2011) (“These constitutional provisions plainly allow for the possibility that federal and state governments may choose to use capital punishment . . .” (citing the Fifth and Fourteenth Amendments)).

<sup>22</sup> 428 U.S. at 177 (opinion of Stewart, Powell & Stevens, JJ.).

<sup>23</sup> *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 . . .”).

but in practice most originalists do not think that original expected applications translate directly into constitutional doctrine.<sup>24</sup>

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: “We begin with the principle . . . that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out.”<sup>25</sup>

Chief Justice Roberts’s argument in *Baze* has become a standby response to methods-of-execution challenges.<sup>26</sup> It is problematic for many reasons,<sup>27</sup> 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 of its use do not currently satisfy the Eighth Amendment, and perhaps never will.) 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 torturous pain, the Court would (quite properly) 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.”<sup>28</sup> *Baze* says that this was “settled by *Gregg*,”<sup>29</sup> but that is unsatisfying. It is true that *Gregg* upheld the constitutionality of the death

<sup>24</sup> See *infra* notes 69–76 and accompanying text.

<sup>25</sup> *Baze*, 553 U.S. at 47 (plurality opinion) (citation omitted).

<sup>26</sup> See, e.g., *id.* at 63 (Alito, J., concurring) (“[W]e proceed on the assumption that the death penalty is constitutional.”); see also Berry, *supra* note 21, at 450 (“These constitutional provisions plainly allow for the possibility that federal and state governments may choose to use capital punishment . . .”).

<sup>27</sup> See generally Nadia N. Sawicki, “*There Must Be a Means*”—*The Backward Jurisprudence of Baze v. Rees*, 12 U. PA. J. CONST. L. 1407 (2010) (discussing the flaws in the *Baze* plurality opinion’s reasoning and the consequences of that reasoning); Phyllis Goldfarb, Response, *Glossip v. Gross*, GEO. WASH. L. REV. DOCKET (July 2, 2015), <http://www.gwlr.org/glossip-v-gross/> [<https://perma.cc/AUU2-6754>] (“An adverse impact on the quality of the Court’s functioning is yet more collateral damage from our capital punishment system.”).

<sup>28</sup> *Baze*, 553 U.S. at 47 (plurality opinion).

<sup>29</sup> *Id.*

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,<sup>30</sup> and it hardly seems sufficient to reject a constitutional challenge by invoking a case that did not reach that issue. Notably, Justice Stevens joined the joint opinion in *Gregg* (including that portion citing the Fifth Amendment), but concurred with some important reservations 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.”<sup>31</sup>

The underlying supposition behind the “principle” cited in *Baze* seems to be 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 . . . .<sup>32</sup>

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.

*Gregg*’s use of the Fifth Amendment Argument is significant not only for what it says about the constitutionality of capital punishment, but also 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 first example for the point that, to an originalist, “for the vast majority of questions the answer is clear.”<sup>33</sup> As

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<sup>30</sup> *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (considering “whether the sentence of death for the crime of murder is a *per se* violation of the Eighth and Fourteenth Amendments to the Constitution”).

<sup>31</sup> *Baze*, 553 U.S. at 86 n.19 (2008) (Stevens, J., concurring in the judgment).

<sup>32</sup> *Gregg*, 428 U.S. at 177 (opinion of Stewart, Powell & Stevens, JJ.).

<sup>33</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

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.”<sup>34</sup> And, as Justice 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 punishments” also passed legislation making several offenses punishable by death.<sup>35</sup>

The Argument’s role in the interpretive debates is a testament to its influence. 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.”<sup>36</sup> Scholars, including those critical of the death penalty, have sometimes made the same concession.<sup>37</sup>

And yet there are also those who question the Argument. In the same opinion in which he noted that “the Constitution appears to permit[] the penalty of death,”<sup>38</sup> Justice Blackmun also penned his famous declaration: “From this day forward, I no longer shall tinker with the *machinery of death*.”<sup>39</sup> How can these statements be reconciled? How could he refuse to engage with a machinery that the Constitution “appears to permit”? Justice Blackmun himself provided 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.”<sup>40</sup> Justice Blackmun’s conclusion might well be correct even if, as he suggests, there is public and textual support for the death penalty. But his conclusion is almost beyond dispute if the phrase “and the Constitution

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<sup>34</sup> 408 U.S. 238, 419 (1972) (Powell, J., dissenting).

<sup>35</sup> *Id.* at 420 (referring to the first Crimes Act of 1790); *see also Baze*, 553 U.S. at 88 (Scalia, J., concurring in the judgment).

<sup>36</sup> *Callins v. Collins*, 510 U.S. 1141, 1147 (1994) (Blackmun, J., dissenting).

<sup>37</sup> Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 11–12 (2007) (“[N]either the text nor the original understanding of the Constitution supported *Furman*’s ruling. . . . The Constitution’s text clearly assumes the death penalty’s legitimacy, and the Framers did as well.”); Levinson, *supra* note 13; *cf.* John Hart Ely, *Interclausal Immunity*, 87 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.”).

<sup>38</sup> *Callins*, 510 U.S. at 1147 (Blackmun, J., dissenting).

<sup>39</sup> *Id.* at 1145 (emphasis added).

<sup>40</sup> *Id.* at 1147.



appears to permit<sup>41</sup> has no weight—public support alone cannot constitutionalize the death penalty if it cannot be applied consistently and rationally. In other words, Justice Blackmun might be right even if the Fifth Amendment Argument is correct.<sup>42</sup> He is almost 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.<sup>43</sup> And even if the Fifth Amendment provided a grant of government power, the Eighth Amendment's limitations would still apply.<sup>44</sup> For the Argument to have any real power, the Court would first have to overturn decades of Eighth Amendment jurisprudence. But the Fifth Amendment Argument has no purchase on Eighth Amendment jurisprudence and therefore provides no guidance with regard to the continued constitutionality of the capital sanction.

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

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, . . . nor shall any person be subject for the same offence 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 . . . .<sup>45</sup>

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.

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<sup>41</sup> Public support—or lack thereof—for a penalty is a factor in Eighth Amendment analysis, but it is not dispositive. *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.”).

<sup>42</sup> 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.

<sup>43</sup> *See infra* Section II.A.

<sup>44</sup> *See infra* Section II.B.

<sup>45</sup> U.S. CONST. amend V.

In other words, the Fifth Amendment Argument takes a list of rights against government to be evidence of a government power and then insulates that power against other constitutional provisions. This version of the Fifth Amendment Argument is exactly the nightmare of those Federalists who worried that a Bill of Rights might be misinterpreted to give government the power to do things not expressly forbidden.<sup>46</sup> Part of their solution—the Ninth Amendment—is discussed in more detail below.<sup>47</sup>

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.”<sup>48</sup> 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,<sup>49</sup> but only insofar as it seeks to *limit* that possibility.<sup>50</sup>

The Fifth Amendment Argument instead transforms the textual prohibitions (i.e., “If not *Y* then not *X*”) into conditional grants of power (i.e., “If *Y* then *X*”). This requires a logical 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 . . .” → No *X* (death penalty) unless *Y* (presentment or indictment) → If no *Y* then no *X*.

If no *Y* then no *X* ≠ If *Y* then *X*.

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<sup>46</sup> See THE FEDERALIST NO. 84, at 433–34 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“[B]ills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? . . . [I]t would furnish, to men disposed to usurp, a plausible pretense for claiming . . . power.”); see also AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 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.”).

<sup>47</sup> See *infra* notes 57–59 and accompanying text.

<sup>48</sup> William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 324 (1986).

<sup>49</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring) (emphasis removed).

<sup>50</sup> Bruce Ledewitz, *Judicial Conscience and Natural Rights: A Reply to Professor Jaffa*, 10 U. PUGET SOUND L. REV. 449, 459 (1987) (“The fifth amendment represents a limitation on capital punishment, 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  $X \neq$  If no  $Y$  then  $X$ .

(3) “nor be deprived . . . without due process” → No  $X$  (death penalty) without  $Y$  (due process) → If no  $Y$  then no  $X$ .

If no  $Y$  then no  $X \neq$  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 the logic-chain answer to the Fifth Amendment Argument commits the very same sin inherent in the Argument: 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. 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 encourage or prohibit. 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—dissociation from reality—also renders it ineffective against the kinds of arguments raised by Justice Breyer in *Glossip*.<sup>51</sup> 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,<sup>52</sup> 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<sup>53</sup>—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.<sup>54</sup> Complying with

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<sup>51</sup> *Glossip*, 135 S. Ct. at 2755–56 (Breyer, J., dissenting) (pointing to practical problems with “administration of the death penalty” such as “(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays”).

<sup>52</sup> See *infra* Section II.C.

<sup>53</sup> See Sherry F. Colb, *A Fundamental Right to Execute People*, DORF ON LAW (Aug. 5, 2015, 8:30 AM), <http://www.dorfonlaw.org/2015/08/a-fundamental-right-to-execute-people.html> [<https://perma.cc/89FF-DXSE>] (arguing *Glossip* relies on an indefensible Fifth Amendment-based “‘right’ of the state to execute . . . prisoner[s]”).

<sup>54</sup> 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 with 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,

one set of prohibitions does not give the 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.<sup>55</sup> 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 cannot 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 justify double jeopardy, for example. Clearly, the three conditions are cumulative. 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,<sup>56</sup> 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

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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, J., dissenting from the denial of rehearing en banc) (arguing rehearing is needed to consider situations where federal law orders execution of a prisoner in states that have “effectively done away with capital punishment”).

<sup>55</sup> *Cf. Baze v. Rees*, 553 U.S. 35, 86 n.19 (2008) (Stevens, J., concurring in the judgment) (“[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.”).

<sup>56</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general . . .”).

Fifth Amendment to block consideration of the Eighth.<sup>57</sup> The Ninth Amendment indicates that the *entire* Bill of Rights—let alone any particular provision of it—cannot be read as an exclusive list.<sup>58</sup> 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.<sup>59</sup>

### 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 punishments that added ‘terror, pain, or disgrace’ to an otherwise permissible capital sentence.”<sup>60</sup> But this claim about the original meaning of the Eighth Amendment is contestable at best,<sup>61</sup> and, more importantly for present purposes, the “constitutional text” of the Fifth Amendment cannot be made to support it, for all the reasons discussed above. The Argument should therefore be unconvincing even to those who take an originalist or

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<sup>57</sup> William Baude, Editorial, *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> [<https://perma.cc/64A8-V957>] (arguing that Justice 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”).

<sup>58</sup> *Id.* (“[O]ur Ninth Amendment . . . warns that no specific right should be taken to preclude other possibly relevant rights.”).

<sup>59</sup> Because the Fifth Amendment does not *mandate* the persistence of capital punishment, there would be no intratextual 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).

<sup>60</sup> 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring) (quoting *Baze*, 553 U.S. at 96 (Thomas, J., concurring in the judgment)).

<sup>61</sup> See, e.g., John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1742 (2008) (explaining Justice Scalia’s “originalist approach to the Cruel and Unusual Punishments Clause” as “intend[ing] to prohibit only certain inherently cruel forms of punishment, such as the rack, that were already unacceptable by the end of the eighteenth century”).

textualist approach to the Eighth Amendment,<sup>62</sup> and largely irrelevant to those who do not.

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 has animated Eighth Amendment doctrine for decades.<sup>63</sup> 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."<sup>64</sup> This does not mean that the Justices' own "evolving" moral views determine the analysis,<sup>65</sup> only that the original expected applications do not control.<sup>66</sup>

So long as *Trop* is the law, the Fifth Amendment Argument against constitutional abolition is a nonstarter. Jurisprudentially speaking, *Trop* is Justice Scalia's true target in *Glossip*, 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.*<sup>67</sup>

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.

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<sup>62</sup> 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." (footnote omitted)).

<sup>63</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (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").

<sup>64</sup> *Trop*, 356 U.S. at 101.

<sup>65</sup> *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.").

<sup>66</sup> *See Furman v. Georgia*, 408 U.S. 238, 266 (1972) (Brennan, J., concurring) (reasoning that the Eighth Amendment is not limited to banning punishments common to the Stuart era).

<sup>67</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring) (emphasis added).

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.<sup>68</sup> Indeed, it was 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.”<sup>69</sup>

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, 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

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<sup>68</sup> Stinneford, *supra* note 61, at 1765 (“Some punishments that were acceptable at the end of the eighteenth century seem so harsh by modern standards that it is hard to imagine any court upholding them.”); *id.* at 1742 (“In America, criminal offenders were subjected to public flogging, pillorying, or even mutilation. The First Congress authorized the death penalty for crimes we now consider relatively minor, such as counterfeiting.” (footnotes omitted)); *see also* *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (opinion of Scalia, J.) (“[T]his Court has ‘not confined the prohibition embodied in the Eighth Amendment to ‘barbarous’ methods that were generally outlawed in the 18th century,’ but instead has interpreted the Amendment ‘in a flexible and dynamic manner.’” (citing *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (opinion of Stewart, Powell & Stevens, JJ.)), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>69</sup> Scalia, *supra* note 33, at 864. He later repudiated that position and declared himself to be an “honest originalist.” Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/> [<https://perma.cc/4TTJ-CE7C>] (“[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.”). In any event, the Justice apparently saw no contradiction between the Fifth Amendment Argument and his prior faintheartedness, since he advanced both positions in the same 1989 article. It is beyond the scope of this short Essay to explore that issue.



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.<sup>70</sup> They also, perhaps more relevantly, proposed and passed capital legislation.<sup>71</sup>

But this observation about Founding Era penological thinking cannot be translated directly into constitutional law, *even if* one is an originalist.<sup>72</sup> As a constitutional matter, few even among committed originalists find this sort of “original expectation” persuasive.<sup>73</sup> Rather, most originalists have come to recognize a difference between original expected applications (i.e., what the Framers or ratifiers 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).<sup>74</sup> For most originalists, it is the latter that controls.<sup>75</sup>

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

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<sup>70</sup> *Cf. Gregg*, 428 U.S. at 177 (opinion of Stewart, Powell & Stevens, JJ.) (“The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction . . .”).

<sup>71</sup> *Baze v. Rees*, 553 U.S. 35, 88 (2008) (Scalia, J., concurring in the judgment) (“The same Congress that proposed the Eighth Amendment also enacted the Act of April 30, 1790, which made several offenses punishable by death.”).

<sup>72</sup> 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 AND 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.”).

<sup>73</sup> *Id.* at 144 (rejecting reliance on “concrete expectations of lawgivers”).

<sup>74</sup> 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.”).

<sup>75</sup> See, e.g., 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.”); 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.”).

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.<sup>76</sup>

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.”<sup>77</sup>

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 infers the existence of an implicit power from the existence of an express prohibition. The Framers are unlikely to have drawn that conclusion.<sup>78</sup> 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

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<sup>76</sup> *Furman v. Georgia*, 408 U.S. 238, 283 (1972) (Brennan, J., concurring) (footnote omitted); see also MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 46 (1994) (“[T]hat the ratifiers expected a practice, like the death penalty or segregated public schooling, to persist into the future is evidence that they did not believe that they were prohibiting the practice. But that they did not believe that they were prohibiting a practice does not mean that the constitutional directive they issued is not best specified to prohibit the practice.”); Ely, *supra* note 37, at 1189–90 (“These references—most unambiguously the reference to capital crimes—do corroborate (what we would have known anyway) that most members of the founding generation regarded the death penalty as a permissible punishment for serious offenses. To say that, however, is a far cry from saying that they meant forever to insulate it from invalidation under the Eighth Amendment’s Cruel and Unusual Punishment Clause . . .”).

<sup>77</sup> *Baze v. Rees*, 553 U.S. 35, 86 n.19 (2008) (Stevens, J., concurring) (citing *Furman*, 408 U.S. at 380–84 (Burger, C.J., joined by Blackmun, Powell & Rehnquist, JJ., dissenting)); see also *Furman*, 408 U.S. at 420 (Powell, J., joined by Burger, C.J., Blackmun & Rehnquist, JJ., 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.”).

<sup>78</sup> For a thoughtful discussion of the distinction between constitutional authorizations and constitutional prohibitions—the very distinction that the Fifth Amendment Argument muddles—see H. JEFFERSON POWELL, *TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR* 38–42 (2016).

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 speaks to whether the "evolving standards of decency" principle ought to be reconsidered. In short, the Fifth Amendment Argument is irrelevant to the issues at the heart of the current debate.

#### CONCLUSION

By many measures, the movement to abolish capital punishment is gaining steam. Wrongful convictions and botched executions continue to make headlines,<sup>79</sup> and the death penalty is increasingly limited to a very small percentage of counties across the nation.<sup>80</sup> In *Glossip*, two sitting Justices concluded that "the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment[t],'"<sup>81</sup> and even defenders of the death penalty's constitutionality seem to think that changes may be on the horizon.<sup>82</sup>

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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<sup>79</sup> See, e.g., Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES (Apr. 29, 2014), <http://nyti.ms/1iEBDCq> [<https://perma.cc/AU3U-S9PJ>]; Jonathan M. Katz, *North Carolina Men Are Released After Convictions Are Overturned*, N.Y. TIMES (Sept. 3, 2014), <http://nyti.ms/1qyr7iJ> [<https://perma.cc/RCB2-4YSD>]; Katie Rogers, *Man Is Released After 34 Years in Prison; Murder Conviction is Thrown Out*, N.Y. TIMES (Aug. 14, 2015), <http://nyti.ms/1LcYzrP> [<https://perma.cc/WF54-LGCL>].

<sup>80</sup> DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2013: YEAR END REPORT, <http://deathpenaltyinfo.org/documents/YearEnd2013.pdf> [<https://perma.cc/3JPE-VVSV>] (noting that all eighty death sentences in 2013 came from two percent of the nation's counties, and the thirty-nine executions came from just one percent); see also Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 233–34 (2012) (finding that ten percent of counties in the United States accounted for all executions between 2004 and 2009 and fourteen counties accounted for one-third of death sentences during the same period).

<sup>81</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting) (alteration in original) (quoting U.S. CONST. amend. VIII).

<sup>82</sup> Weiss, *supra* note 8.

