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DEATH, DESUETUDE, AND ORIGINAL MEANING

JOHN F. STINNEFORD*

*“[I]n nothing is the gradual change of the common law more apparent, and in nothing does it accommodate itself more to the change of manners and effect of education, than in the silent and gradual disuse of barbarous criminal punishments.”*¹

*“The [Cruel and Unusual Punishments Clause] ... may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”*²

ABSTRACT

One of the most common objections to originalism is that it cannot cope with cultural change. One of the most commonly invoked examples of this claimed weakness is the Cruel and Unusual Punishments Clause, whose original meaning would (it is argued) authorize barbaric punishment practices like flogging and branding, and disproportionate punishments like the death penalty for relatively minor offenses. This Article shows that this objection to originalism is inapt, at least with respect to the Cruel and Unusual

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1. *James v. Commonwealth*, 12 Serg. & Rawle 220, 228 (Pa. 1825).

2. *Weems v. United States*, 217 U.S. 349, 378 (1910).

Punishments Clause. As I have shown in prior articles, the original meaning of “cruel and unusual” is “cruel and contrary to long usage,” or “cruel and new.” The primary purpose of the Cruel and Unusual Punishments Clause is to prevent legislatures and courts from imposing new punishments that are unduly harsh in light of the long usage of the common law. This Article demonstrates that the Clause also incorporates the common law doctrine of desuetude, which holds that a once traditional punishment can become “unusual” if it falls out of usage long enough to show a stable multigenerational consensus against it. State courts and the Supreme Court of the United States employed this doctrine in decisions prior to 1958 to determine whether punishments such as ducking of a common scold, execution accompanied by torture, and imprisonment at hard labor for a minor offense were cruel and unusual. Under the original meaning of the Cruel and Unusual Punishments Clause, the death penalty could become unconstitutional if it fell out of usage long enough to show a stable, multigenerational consensus against it. This process already occurred with respect to flogging, branding, and execution for relatively minor crimes like theft, and under the constitutions of states that abolished the death penalty several generations ago.

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INTRODUCTION

One of the primary objections to originalist constitutional interpretation is that this approach renders the Constitution obsolete and inflexible, incapable of dealing with societal change over time.³ The Cruel and Unusual Punishments Clause is one of the most-cited examples of originalism's claimed unworkability, thanks in part to the extremely narrow "originalist" reading Justice Scalia and others have given the Clause.⁴ This Article serves as a challenge both to Justice Scalia's reading of the Cruel and Unusual Punishments Clause and to the anti-originalist objections to which it has given rise.

To frame the issue, this Article asks whether the death penalty could ever become unconstitutional, consistent with the original meaning of the Cruel and Unusual Punishments Clause. The current debate boils down to two positions: Justice Scalia's claim that the death penalty could not be declared unconstitutional because the Eighth Amendment was meant to embody the moral perceptions of the late eighteenth century, a time when society widely accepted the death penalty,⁵ and the "living originalist" claim

3. See, e.g., William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) ("[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time."); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1095 (1989) ("Probably the most prevalent argument against originalism is that it is too static, and thereby disregards the need to keep the Constitution up to date with changing times."); Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What it Always Meant?*, 77 COLUM. L. REV. 1029, 1032 (1977) (arguing that originalist interpretation would lead to a Constitution that is "rigid and out-of-date"); Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1105 (1998) (questioning the legitimacy of constitutional interpretation focusing on original meaning on the ground that such methodology "lacks any account of its own legitimate authority, its own supremacy over the popular will of the present moment"). But see, e.g., Lee J. Strang, *Originalism and Legitimacy*, 11 KAN. J.L. & PUB. POL'Y 657, 666 (2002) ("[T]he claim that in a changing society originalism is too static ignores the reality that the values advocated by nonoriginalists are often themselves not supported by society, but only by the courts.").

4. See *infra* Part I.A.

5. See, e.g., *Baze v. Rees*, 553 U.S. 35, 94-95 (2008) (Scalia, J., concurring) (arguing that the constitutionality of the death penalty is "evident both from the ubiquity of the death penalty in the founding era and from the Constitution's express provision for capital

(articulated by scholars such as Ronald Dworkin, Jack Balkin, and Michael Perry) that the death penalty could be declared unconstitutional because the Eighth Amendment embodies an abstract moral prohibition of cruelty, and it is up to each generation to decide for itself which practices violate that principle.⁶ This debate is part of a larger debate about whether the Constitution is meant to embody natural principles of justice, and if so, how those principles can be applied in a way that is stable and reliable, but also sensitive to cultural change.⁷

This Article will argue that the word “unusual” resolves the death penalty debate. As I have shown in previous articles, the word “unusual” in the Cruel and Unusual Punishments Clause means “contrary to long usage.”⁸ At the time the Eighth Amendment was adopted, the common law was regarded as the law of “custom and long usage.”⁹ If a given practice was “used” over a long period of time, this was powerful evidence that it comported with principles of justice and that it enjoyed the consent of the people. A new practice enjoyed no such presumption. When the state tried to introduce

punishment”) (internal citations omitted); Antonin Scalia, *Response, in A MATTER OF INTERPRETATION* 129, 145 (Amy Gutmann ed., 1997) (arguing that the meaning of the Eighth Amendment is “rooted in the moral perceptions of *the time*” when it was adopted—that is, the late eighteenth century).

6. See, e.g., MICHAEL J. PERRY, *HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES* 80-83 (Cambridge University Press 2013); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) [hereinafter Balkin, *Abortion and Original Meaning*]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007) [hereinafter Balkin, *Original Meaning and Constitutional Redemption*]; Ronald Dworkin, *Comment, in A MATTER OF INTERPRETATION, supra* note 5, at 115, 120.

7. See *infra* Part II.A-B. Christopher Green has advocated an approach to original meaning that lies somewhere between Justice Scalia and the “living originalists.” Using the sense-reference distinction from the philosophy of language, Green argues that the original “sense” or meaning of constitutional terms should be binding, but that such terms’ original “reference”—that is, the objects the Framers would have considered to come within the application of such terms—should be accorded a lesser degree of deference. See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006). Thus the scope of the Constitution’s application could change over time, even though the meaning of its terms does not.

8. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 907 (2011) [hereinafter Stinneford, *Rethinking Proportionality*]; John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1764 (2008) [hereinafter Stinneford, *The Original Meaning of Unusual*].

9. See *infra* Part II.A.

a new punishment practice, the new practice was judged against the traditional practices it replaced. If a new punishment practice was too harsh in light of the preceding tradition, it would be judged “unusual” because it was new, and “cruel” because it was harsher than the tradition would permit.¹⁰

This Article contributes further to our understanding of the original meaning of the Cruel and Unusual Punishments Clause by demonstrating that it incorporates the doctrine of “desuetude.”¹¹ Desuetude is the idea that a legally authorized practice loses its authority when it falls out of usage long enough that a “negative custom” of non-usage has replaced it.¹² Like long usage, long non-usage was thought to have great normative significance, for it tended to show that the practice had either become obsolete or that it was never truly reasonable in the first place.¹³ This is not to say that there was no controversy concerning desuetude in the seventeenth and eighteenth centuries. Proponents of the absolute sovereignty of parliament argued that neither a positive custom, such as a common law right, nor a negative custom (desuetude) could invalidate a statute because statutes represent sovereign will.¹⁴ Nonetheless, it was recognized that a showing of contrary custom could negate statutes that were declaratory of the common law.¹⁵ Because a declaratory statute did not purport to represent the will of the sovereign, but the actual practice of the common law, a showing that a statute misrepresented the custom would negate the statute.¹⁶

The Cruel and Unusual Punishments Clause makes statutes authorizing punishment for crime analogous to statutes that are declaratory of the common law.¹⁷ Although punishment statutes do not purport to “declare” custom, they are explicitly bound to custom by the Cruel and Unusual Punishments Clause. If they are harsher than custom (positive or negative) will permit, they are cruel and

10. *See infra* Part III.A.

11. *See infra* Part II.B.

12. *See infra* note 158 and accompanying text.

13. *See infra* Part II.B.1.

14. *See infra* Part II.B.3.

15. *See infra* notes 201-04 and accompanying text.

16. *See infra* Part II.B.3.

17. *See infra* Part II.C.

unusual.¹⁸ Thus, for example, the Pennsylvania Supreme Court declared in 1825 that the once traditional practice of subjecting a woman convicted of being a “common scold” to ducking in cold water had become unusual, and therefore illegal, because it had fallen out of usage at around the same time the practice of burning witches at the stake had fallen into disrepute a century before.¹⁹ Prior to 1958, the United States Supreme Court’s decisions concerning the scope of the Cruel and Unusual Punishments Clause also relied on desuetude to determine which punishments were actually cruel and unusual.²⁰

The original meaning of the Cruel and Unusual Punishments Clause shows that the Eighth Amendment was not meant to embody the particular moral perceptions of 1790, nor to allow each generation to decide for itself what morality requires. The moral perception of any one moment in time is not a reliable basis for constitutional doctrine because at any given moment the people may be caught in a moral panic and unduly prone to cruelty.²¹ The common law idea of long usage avoids this problem by focusing on multigenerational moral consensus. If a once traditional punishment falls out of usage long enough to show a stable, multigenerational consensus against it, this punishment may appropriately be called cruel and unusual.²² This insight explains, for example, Justice Scalia’s declaration that he would have to strike down as unconstitutional any attempt to revive eighteenth century punishment practices such as branding or flogging, despite the fact that they were considered acceptable in 1790.²³ Such practices have

18. See *infra* Part III.A.

19. See *James v. Commonwealth*, 12 Serg. & Rawle 220, 230 (Pa. 1825); see also *infra* Part II.C.1 (providing a more complete discussion of *James v. Commonwealth*).

20. See *infra* Part II.C.

21. See, e.g., Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807 (2003) (describing moral panic as a situation in which “media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat”); Stinneford, *Rethinking Proportionality*, *supra* note 8, at 907 (arguing that the core purpose of the Cruel and Unusual Punishments Clause is “to protect criminal offenders when the government’s desire to inflict pain has become temporarily and unjustly enflamed, whether this desire is caused by political or racial animus or moral panic in the face of a perceived crisis”); see also *infra* notes 118-25 and accompanying text.

22. See *infra* note 280 and accompanying text.

23. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“I cannot imagine myself, any more than any other federal judge, upholding a statute that

fallen out of usage long enough that there is now a custom of non-usage or desuetude. If revived, they would now be “unusual” and almost certainly cruel.

All of this implies that the death penalty could be declared unconstitutional consistent with the original meaning of the Cruel and Unusual Punishments Clause if it were to fall out of usage long enough that a “tradition” or “custom” of desuetude developed against it. Such non-usage would have to last several generations to be considered a reliable measure of constitutionality. We have not reached that point at the national level, but it may already be the case that the death penalty is cruel and unusual under the constitutions of states that abolished it several generations ago.²⁴

Part I of this Article sets forth the current debate concerning the death penalty and original meaning. It examines what Justice Scalia and the living originalists respectively claim to be the original meaning of the Cruel and Unusual Punishments Clause, what evidence supports the correctness of either reading, what standards of adjudication each reading implies, and what benefits and detriments each reading offers. Part II introduces the concept of desuetude, demonstrates that it is part of the original meaning of the Cruel and Unusual Punishments Clause, and shows how it furthers the constitutional norms underlying the Clause in a manner that is stable and judicially manageable, but also sensitive to cultural change. Part III discusses the implications of desuetude for the Supreme Court’s current Eighth Amendment jurisprudence, particularly as it concerns the death penalty. This Part also discusses how desuetude may affect the constitutionality of the death penalty under state constitutions in those states that abolished the death penalty several generations ago.

I. THE DEATH PENALTY DEBATE

A. *The Death Penalty and Justice Scalia’s Originalism*

Justice Antonin Scalia is the most prominent advocate of the position that, absent constitutional amendment, the death penalty

imposes the punishment of flogging.”).

24. See *infra* notes 328-30 and accompanying text.

can never be declared unconstitutional consistent with the original meaning of the Cruel and Unusual Punishments Clause. This Subpart sets forth Justice Scalia's claim, describes the evidence he uses to support the claim, examines the standards of adjudication the claim implies, and evaluates the benefits and detriments this reading of the Cruel and Unusual Punishments Clause offers.

1. The Substance of Justice Scalia's Claim

In *Baze v. Rees*, Justice John Paul Stevens announced that he no longer believed that the death penalty is constitutional.²⁵ In Justice Stevens's judgment, the death penalty does not adequately further core penal goals such as retribution, deterrence, or incapacitation,²⁶ and creates an unacceptable risk that defendants will be executed based on invidious discrimination²⁷ or a mistaken finding of guilt.²⁸ For these reasons, Justice Stevens concluded that the death penalty amounted to the "extinction of life with only marginal contributions to any discernible social or public purposes" and that it was therefore cruel and unusual.²⁹

Justice Stevens's opinion in *Baze* was based on the assumption that judges, or at least Justices, have the authority to declare the death penalty unconstitutional despite its long existence within the American criminal justice system. Justice Scalia wrote a separate concurrence in *Baze* for the specific purpose of refuting this assumption.³⁰ Justice Scalia's opinion appeared to rest on two semi-independent arguments. The first argument was explicitly textualist. Justice Scalia noted that the Fifth Amendment refers to the death penalty twice, granting the right to indictment by grand jury for "a capital, or otherwise infamous crime" and forbidding the federal government from denying any person the right to due process or the privilege against double jeopardy in cases involving a potential deprivation of "life."³¹ Because the death penalty is

25. See 553 U.S. 35, 86 (2008) (Stevens, J., concurring).

26. *Id.* at 78-81.

27. *Id.* at 85.

28. *Id.* at 84-86.

29. *Id.* at 86 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

30. *Id.* at 87 (Scalia, J., concurring).

31. *Id.* at 87-88.

“explicitly sanctioned”³² by “the very text”³³ of the Constitution, this penalty must be “a permissible legislative choice.”³⁴

Justice Scalia’s second argument focused less on the text of the Fifth Amendment and more on what Justice Scalia took to be the original public meaning of the Cruel and Unusual Punishments Clause. The phrase “Cruel and Unusual Punishments” may not be read to prohibit the death penalty, Justice Scalia argued, because there is no evidence that Americans in the late eighteenth century read it this way. The First Congress—“[t]he same Congress that proposed the Eighth Amendment”—also enacted a criminal statute that imposed the death penalty for several offenses.³⁵ The same Congress also proposed the Fifth Amendment, which makes reference to “capital” crimes and requires the federal government to provide due process before depriving defendants of “life.”³⁶ These facts indicate that the generation that adopted the Eighth Amendment did not read the Cruel and Unusual Punishments Clause to forbid the death penalty. If this is so, Justice Scalia argued, we may not conclude that this punishment violates the Eighth Amendment today.

Justice Scalia’s use of the phrase “explicitly sanction[s]”³⁷ is, at best, misleading. The Fifth Amendment does not say, “The Congress shall have power to authorize imposition of the death penalty.” It says that anyone the federal government charges with a serious crime, including a capital offense, has the right to indictment by grand jury and against double jeopardy, and that anyone the federal government deprives of a serious personal interest (life, liberty or, property) has the right to due process.³⁸ These provisions 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

32. *Id.* at 88.

33. *Id.* at 87.

34. *Id.*

35. *Id.* at 88.

36. *Id.* at 87-88.

37. *Id.*

38. U.S. CONST. amend. V (“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 be deprived of life, liberty, or property, without due process of law.”).

unusual.”³⁹ But at no point do they or any other part of the constitutional text “explicitly sanction” the death penalty.

Justice Scalia’s original public meaning argument, on the other hand, raises some very important questions. Does the Eighth Amendment’s prohibition of cruel and unusual punishments refer to the standards of cruelty that prevailed in 1791, when the amendment was adopted? To current standards of cruelty? To a “real” moral standard that is somehow distinct from the societal norms of a given place and time? To something else altogether?

Justice Scalia appears to believe that the Cruel and Unusual Punishments Clause is a positive legal norm that forbids only those punishments that violate the standards of cruelty that prevailed in 1791. As he put it in *A Matter of Interpretation*, the Clause does not embody “a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel.”⁴⁰

2. Evidence Supporting the Correctness of Justice Scalia’s Claim

Justice Scalia does not provide direct evidence that his reading of the Cruel and Unusual Punishments Clause is correct, but infers it from the fact that the Constitution is written law, its authority derives from the consent of the people, and its purpose is to entrench constitutional rights and principles.⁴¹ The primary contrast between the United States Constitution and the English Constitution from which the prohibition of cruel and unusual punishments originally derived is that the United States Constitution is a written document,⁴² formally enacted by the people,⁴³ and

39. *Baze*, 553 U.S. at 87-88.

40. Scalia, *supra* note 5, at 145.

41. Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION*, *supra* note 5, at 3, 40-41 (“It certainly cannot be said that a Constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that ‘evolving standards of decency’ always ‘mark progress,’ and that societies always ‘mature,’ as opposed to rot.”).

42. The fact that the United States Constitution is a written document is often asserted as one of the strongest arguments for an originalist approach to constitutional interpretation.

supreme over all other laws.⁴⁴ Whereas the British Parliament claimed the right to change the English constitution through ordinary legislation,⁴⁵ the United States Constitution cannot be changed except through a formal amendment process that is

See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 91 (2004) (“Once the importance of text or ‘writtness’ is conceded, some version of originalism becomes much harder to resist.”); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 47 (1999) (“[A]n originalist interpretive approach is ... required by the very fact that the United States has a written constitution.”); Balkin, *Original Meaning and Constitutional Redemption*, *supra* note 6, at 429 (arguing that originalism is entailed by the fact that the Constitution “is a written constitution, and it is enforceable law”); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 413 (2009) (“[C]onstitutional theorists have argued that the authority of the original meaning is entailed by the fact that the Constitution is written: the point or purpose of writtness is to fix and constrain the content of constitutional doctrine.”); Lee J. Strang, *The Challenge of, and Challenges to, Originalism*, 29 CONST. COMMENT. 111, 123-24 (2013) (arguing that the Constitution’s writtness “more than anything else ... accounts for originalism’s staying power”); *cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) (“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”). *But see* Andrew B. Coan, *The Irrelevance of Writtness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1030 (2010) (“The writtness of the Constitution is ... irrelevant to the choice between originalism and other plausible contenders.”).

43. Popular sovereignty is also often invoked as an argument for originalism. If the authority of the Constitution derives from the people, it is argued, only the people should have the power to change the meaning of the Constitution, and only through the formal amendment process prescribed therein. *See, e.g.*, WHITTINGTON, *supra* note 42, at 55-61 (arguing that popular sovereignty, as well as writtness and the rule of law require that the Constitution be interpreted according to its original meaning); Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 34-37 (2000) (defending the text of the Constitution as an expression of popular sovereignty); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) (arguing that judges engaged in constitutional adjudication have “no democratic warrant” to go “beyond the meaning of the words that were enacted” in order to enforce the judges’ own ideas of “the needs and goals of society”). *But see* Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1629 (2013) (arguing that the fact that the Fourteenth Amendment was forced upon the former Confederate states “at gunpoint” undermines the claim that the democratic legitimacy depends upon traditional notions of popular sovereignty).

44. U.S. CONST. art. VI, cl. 2 (“This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

45. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *156 (describing Parliament as having “absolute despotic power”); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 259-65 (1969).

significantly more onerous than the process of enacting ordinary legislation.⁴⁶

Justice Scalia argues that we can only honor the Constitution's writtenness and its concern for entrenchment and popular sovereignty by interpreting its terms to cover essentially the same referents they would have been read to cover at the time the Constitution was adopted.⁴⁷ Justice Scalia's reasons for this position are discussed in Part I.A.4, below.

3. Standards of Adjudication Implied by Justice Scalia's Claim

Justice Scalia's approach to interpreting the Cruel and Unusual Punishments Clause creates a relatively bright-line rule.⁴⁸ If a punishment was acceptable in 1791, it must be acceptable today. If it was considered unacceptably cruel in 1791, it must be unacceptably cruel today.⁴⁹ Justice Scalia further claims that the Cruel and Unusual Punishments Clause forbids only barbaric methods of punishment, not punishments that are cruel by virtue of being disproportionate to the offense.⁵⁰ Judges may not ask whether a given punishment would have been considered too harsh for a given offense in 1791, but only whether the punishment would have been considered too harsh to impose for *any* offense.⁵¹ As long as the

46. U.S. CONST. art. V (setting forth the process for amending the Constitution).

47. Scalia, *supra* note 5, at 145 (arguing that the purpose of reducing the prohibition of cruel and unusual punishments to writing is to preserve "the moral perceptions of the time" at which it was enacted against "the moral perceptions of a future, more brutal, generation").

48. Scholars have given various accounts of the distinction between "rules" and "standards" in constitutional adjudication. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 956-57 (1995).

49. See Scalia, *supra* note 5, at 145.

50. For Justice Scalia's historical argument supporting the claim that the Cruel and Unusual Punishments Clause does not prohibit disproportionate punishments, see *Harmelin v. Michigan*, 501 U.S. 957, 966-85, 991-93 (1991) (Scalia, J.). For a demonstration that Justice Scalia's anti-proportionality argument is based upon an incorrect understanding of the Cruel and Unusual Punishments Clause's original meaning, see Stinneford, *Rethinking Proportionality*, *supra* note 8, at 926-61.

51. See *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting) (arguing that the Cruel and Unusual Punishments Clause only prohibits "always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew").

punishment was not completely unknown or absolutely rejected at the time the Eighth Amendment was adopted, it is not cruel and unusual today, even if it is applied to a different and much less serious crime today than in 1791.⁵²

Justice Scalia acknowledges that this approach will not answer every question. For example, when a legislature imposes a new form of punishment that was unknown at the time the Constitution was adopted, courts must engage in an “exercise of judgment” that is not entirely “cut-and-dried.”⁵³ In such situations, the court must “follow the trajectory”⁵⁴ of the constitutional provision in order to determine whether the punishment would have been considered unconstitutional had it been known in 1791. But given the rarity of situations in which the government invents a genuinely new form of punishment, Justice Scalia’s approach would almost always work as a “cut-and-dried” bright-line rule.

4. Benefits of Justice Scalia’s Approach

According to Justice Scalia, the main benefit of his approach to constitutional interpretation is that it protects the constitutional values of entrenchment and popular sovereignty. Justice Scalia sees his main interpretive rival as “Living Constitution[alism],” an approach that treats the Constitution as “a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society.”⁵⁵ Justice Scalia rejects living constitutionalism because, he argues, this approach allows judges to impose their own subjective preferences on the rest of society.⁵⁶ Such power is inconsistent with entrenchment⁵⁷ and popular sovereignty.⁵⁸

To establish his point, Justice Scalia compares living constitutionalism to common law adjudication—a form of judging that is,

52. *See Harmelin*, 501 U.S. at 936.

53. Scalia, *supra* note 41, at 45.

54. *Id.*

55. *See id.* at 38.

56. *See id.* at 16-18.

57. *See id.* at 40-41.

58. *See id.* at 9.

Justice Scalia argues, a thinly disguised judicial power grab.⁵⁹ According to Justice Scalia, the common law was seen prior to the end of the eighteenth century as “a preexisting body of rules, uniform throughout the nation.”⁶⁰ Common law judges were thought to discover these rules rather than create them.⁶¹ Oliver Wendell Holmes and the Legal Realists who followed him showed, however, that this view of the common law was false.⁶² In reality, “judges ... ‘make’ the common law, and ... each state has its own.”⁶³ Thus the “*attitude* of the common-law judge” is one that asks, “What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?”⁶⁴ This process is “exhilarating” because it involves “devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind.”⁶⁵

Justice Scalia argues that living constitutionalism permits judges to treat the Constitution like the common law, despite the fact that the Constitution is a written document whose meaning is supposed to be fixed.⁶⁶ Under living constitutionalism, judges no longer ask what the Constitution means but focus instead on “what the judges currently [think] it desirable for it to mean.”⁶⁷ Living constitutionalism is “the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.”⁶⁸ Such power is inconsistent with popular sovereignty because it enables unelected judges to overrule the will of the people based on nothing more than

59. *See id.* at 29.

60. *Id.* at 10.

61. *Id.*

62. *See, e.g.*, OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35-36 (Boston, Little, Brown, & Co. 1881); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 11-15 (1960); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820-21 (1935); *cf.* L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 435-38 (1934). For an important critique of Oliver Wendell Holmes’s impact on twentieth century law, see generally ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* (2000).

63. Scalia, *supra* note 41, at 10.

64. *Id.* at 13.

65. *Id.* at 7.

66. *Id.* at 38.

67. Scalia, *supra* note 23, at 852.

68. Scalia, *supra* note 41, at 38.

the judges' own subjective preferences.⁶⁹ Furthermore, although a living constitutionalist approach might permit judges to expand the scope of constitutional protections—for example, by declaring the death penalty unconstitutional—it would also permit them to retract constitutional protections to reflect “the moral perceptions of a future, more brutal, generation.”⁷⁰ Such power is inconsistent with the idea of entrenched constitutional rights.⁷¹

Justice Scalia argues that only by reading the Cruel and Unusual Punishments Clause to cover nothing other than the punishments that would have been considered cruel and unusual in 1791, can we prevent judges from replacing the will of the people with their own will, and potentially undermining constitutional rights that are supposed to be permanent.⁷²

5. Detriments of Justice Scalia's Approach

Not long after he joined the Supreme Court, Justice Scalia gave a remarkably candid speech⁷³ in which he acknowledged the key weakness of his version of originalism: cultural values really do change over time. An approach to constitutional interpretation that does not take this into account will sometimes appear woefully inadequate. Justice Scalia framed the problem this way:

What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an [E]ighth [A]mendment challenge.... [A]ny espousal of originalism as a practical theory of exegesis must somehow come to terms with

69. *See id.* at 9 (observing sarcastically that the common law method of adjudication “would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy”).

70. *See* Scalia, *supra* note 5.

71. *See id.*

72. *See id.*

73. Scalia, *supra* note 23.

that reality.... I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.⁷⁴

This passage highlights several weaknesses of Justice Scalia's version of originalism. First, this approach tends strongly toward the antiquarian, treating the Constitution as an eighteenth century relic that asks judges to apply standards that no one—including a strongly committed originalist like Justice Scalia—is willing to apply today.⁷⁵ This antiquarianism leads Justice Scalia to abandon his interpretive principles in situations when the cognitive dissonance between eighteenth and twenty-first century values seems too great—for example, when a legislature tries to bring back an eighteenth-century punishment, such as flogging or branding. Justice Scalia's pragmatic willingness to abandon principles in certain cases creates the risk that he will, as Jack Balkin put it, “pick and choose” when to employ or not employ his originalist methodology.⁷⁶ This freedom creates the further risk that Justice Scalia's version of originalism will end up “track[ing] particular political agendas and allow[ing] judges to impose their political ideology on the law—the very thing that the methodology purports to avoid.”⁷⁷ In other words, Justice Scalia's version of originalism recreates the very threat to entrenchment and popular sovereignty that it purports to avoid.⁷⁸

74. *Id.* at 861, 864. Recently, Justice Scalia indicated that he has changed his views regarding the constitutionality of flogging. See MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013); Jennifer Senior, *In Conversation: Justice Scalia*, N.Y. MAG., Oct. 14, 2013, at 24 (“[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.”).

75. Of course, the Constitution does not guarantee outcomes that always appear morally attractive by today's standards. See, e.g., Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). But an approach to constitutional interpretation that completely forecloses any capacity to take cultural change into account would make the Constitution unworkable or obsolete, as Justice Scalia's struggle with flogging and branding demonstrates.

76. Balkin, *Abortion and Original Meaning*, *supra* note 6, at 298.

77. *Id.* at 299.

78. Originalist scholar Randy Barnett has made a similar critique of Justice Scalia's approach to constitutional interpretation. See Randy E. Barnett, *Scalia's Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13 (2006) (“Justice Scalia is simply not an originalist [because Justice Scalia's approach to constitutional jurisprudence gives him] three different routes by which to escape adhering to the original meaning of the text. These

B. The Death Penalty and “Living Originalism”

Justice Scalia’s arguments have drawn forth a competing originalist account of constitutional interpretation, sometimes called “semantic originalism,”⁷⁹ or “text and principle” originalism,⁸⁰ or “living originalism.”⁸¹ Scholars such as Ronald Dworkin, Jack Balkin, and Michael Perry argue that the death penalty can be declared unconstitutional consistent with the original meaning of the Cruel and Unusual Punishments Clause, viewed from a living originalist perspective.⁸² This Subpart summarizes the living originalist claim, describes the evidence used to support the claim, examines the standards of adjudication this claim implies, and evaluates the benefits and detriments this reading of the Cruel and Unusual Punishments Clause seems to offer.

1. The Substance of the Living Originalist Claim

The key claim of living originalism is that we should be bound by the original meaning of the constitutional text but not necessarily by its “original expected application.”⁸³ As Ronald Dworkin put it, the “rights-granting clauses [should] be read to say what those who made them intended to say,” but they need not “be understood to have the consequences that those who made them expected them to have.”⁸⁴ Instead, such clauses should be applied in accordance with contemporary values and expectations.⁸⁵

are more than enough to allow him, or any judge, to reach any result he wishes.”).

79. Dworkin, *supra* note 6, at 119 (internal quotation marks omitted).

80. Balkin, *Abortion and Original Meaning*, *supra* note 6, at 293.

81. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

82. See Balkin, *Abortion and Original Meaning*, *supra* note 6, at 348 & n.151; Balkin, *Original Meaning and Constitutional Redemption*, *supra* note 6, at 432-33; Dworkin, *supra* note 6, at 120; Perry, *supra* note 6, at 79-83.

83. Balkin, *Abortion and Original Meaning*, *supra* note 6, at 293; see also Dworkin, *supra* note 6, at 117 (“[T]extualism insists on deference to one kind of intention—semantic intention.”); *id.* at 119 (distinguishing “‘semantic’ originalism, which insists that the rights-granting clauses be read to say what those who made them intended to say” from “‘expectation’ originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have”).

84. Dworkin, *supra* note 6, at 119.

85. Dworkin argues that a semantic originalist approach to constitutional interpretation is superior to Justice Scalia’s because it focuses the inquiry on the moral principle embedded in the Constitution rather than a “concrete and dated” rule. See *id.* at 120. Balkin makes a

Under this account, the Cruel and Unusual Punishments Clause does not forbid those punishments that the enactors and early readers of the Bill of Rights considered unacceptably cruel, but “whatever punishments are in fact cruel and unusual,”⁸⁶ regardless of what the Framers thought of them. This approach to constitutional interpretation appears to be based on an implicit natural law conception:⁸⁷ some punishments “are in fact”⁸⁸ cruel and unusual and some are not. Living originalists argue that because eighteenth century Americans did not occupy a privileged ground from which to discern what natural law requires, we are free to revisit the natural law concepts built into the Constitution and apply them in light of our own experiences and understandings. If we think the death penalty is “in fact” cruel and unusual, we are free to declare it unconstitutional.⁸⁹

similar point, arguing that a living originalist approach to constitutional interpretation allows “each generation of Americans [to] seek to persuade each other about how the text and its underlying principles should apply to their circumstances, their problems, and their grievances.” Balkin, *Abortion and Original Meaning*, *supra* note 6, at 301. Balkin claims that this approach allows “[e]ach generation [to] make[] the Constitution their Constitution by calling upon its text and its principles and arguing about what they mean in their own time.” *Id.* at 302.

86. Dworkin, *supra* note 6, at 120.

87. By “natural law conception,” I mean the idea that there is an objectively real moral order, discernible by reason and capable of serving as a measure for the critique of positive law. *See, e.g.*, Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L.J.* 1651, 1653 (1994) (“Natural law theory treats law essentially as the embodiment in rules and concepts of moral principles that are derived ultimately from reason and conscience.”); *see also* 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. II-I, q. 90, art. 1, *reprinted in* 20 *GREAT BOOKS OF THE WESTERN WORLD* 205 (Robert M. Hutchins ed., Fathers of the English Dominican Province trans., 1952) (“Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting: for *lex* (law) is derived from *ligare* (to bind), because it obliges (*obligare*) one to act. Now the rule and measure of human acts is the reason, which is the first principle of human acts.”); ARISTOTLE, *POLITICS*, bk. III, *reprinted in* 9 *GREAT BOOKS OF THE WESTERN WORLD: THE WORKS OF ARISTOTLE* 445, 485 (Robert M. Hutchins ed., Benjamin Jowett trans., 1952) (“The law is reason unaffected by desire.”); CICERO, *ON THE LAWS*, bk. I, § 28 *reprinted in* 1 *ON THE COMMONWEALTH AND ON THE LAWS* 105, 115 (James E. G. Zetzel ed., 1999) (“[W]e are born for justice and ... justice is established not by opinion but by nature.”).

88. Dworkin, *supra* note 6, at 120.

89. *Id.*; *see also* Balkin, *Abortion and Original Meaning*, *supra* note 6, at 295 (“[T]he Eighth Amendment’s prohibitions on ‘cruel and unusual punishments’ bans punishments that are cruel and unusual as judged by contemporary application of these concepts (and underlying principles), not by how people living in 1791 would have applied those concepts and principles.”).

2. *Evidence Supporting the Correctness of the Living Originalist Claim*

Living originalists rely primarily on the fact that the Cruel and Unusual Punishments Clause uses abstract moral language.⁹⁰ Some parts of the Constitution are written as concrete, determinate rules. Clause 4 of Article II, Section 1, for example, requires that the President be at least thirty-five years old.⁹¹ Clause 1 of Article I, Section 3 requires that the United States Senate be composed of two Senators from every state.⁹² By contrast, the Cruel and Unusual Punishments Clause contains an abstract moral prohibition: don't be cruel.⁹³ Living originalists argue that this use of abstract moral language is important because it signals that the best way to be faithful to the original meaning of the Cruel and Unusual Punishments Clause is to engage in abstract moral reasoning.⁹⁴ If the enactors of the Bill of Rights intended to prohibit only those punishments considered cruel in 1791, they could have simply made a list of prohibited punishments. The fact that they did not do so, but instead used abstract moral language, indicates that the Cruel and Unusual Punishments Clause was not meant to be limited by the particular expectations of 1791.⁹⁵

3. *Standards of Adjudication Implied by the Living Originalist Claim*

How to use abstract moral reasoning to decide cases under the Cruel and Unusual Punishments Clause is unclear. Ronald Dworkin

90. See Balkin, *Abortion and Original Meaning*, *supra* note 6, at 304 (“We look to underlying principles because when the text uses relatively abstract and general concepts, we must know which principles the text presumes or is attempting to embrace.”); Dworkin, *supra* note 6, at 120 (arguing that the Framers “intended to lay down an abstract principle forbidding whatever punishments are in fact cruel and unusual”).

91. U.S. CONST. art. II, § 1, cl. 4.

92. U.S. CONST. art. I, § 3, cl. 1.

93. See U.S. CONST. amend. VIII.

94. See, e.g., Balkin, *Abortion and Original Meaning*, *supra* note 6, at 304-05; Dworkin, *supra* note 6, at 120, 122-23.

95. Dworkin and Balkin have been criticized for assuming that constitutional provisions have “abstract meaning” without adequately exploring the possibility that their true meaning is concrete. See John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737 (2012).

argues that judges should be free to use their own moral judgment “to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command.”⁹⁶ Jack Balkin argues that judicial interpretation of the Constitution should be “parasitic”⁹⁷ on interpretation by citizens, and that social and political movements should be the main driver of changes to constitutional doctrine.⁹⁸ Michael Perry asserts that the Supreme Court of the United States should look to international human rights law and determine that the death penalty is cruel and unusual because there is an emerging international consensus against it.⁹⁹ The Court itself uses a mix of these approaches, sometimes relying primarily on its own “independent judgment”¹⁰⁰ to decide cases,¹⁰¹ sometimes attempting to

96. See Dworkin, *supra* note 6, at 123 (quoting RONALD DWORIN, *LIFE'S DOMINION* 145 (1993)).

97. Balkin, *Abortion and Original Meaning*, *supra* note 6, at 308.

98. See *id.* at 308-09.

99. See Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even If We Think It Is, Should We Want the Supreme Court to So Rule?*, 41 GA. L. REV. 867, 896-97 & nn.80-83 (2007) [hereinafter Perry, *Is Capital Punishment Unconstitutional?*]. Professor Perry's claim is predicated upon two factual assertions concerning the meaning of the Cruel and Unusual Punishments Clause. First, Professor Perry takes the position that “unusual” means “rare” rather than “contrary to long usage.” See *id.* Second, Professor Perry claims that a “true global morality” has emerged since the end of World War II, a morality he calls “the morality of human rights.” See Michael J. Perry, *Adjudicating Rights-Based Constitutional Claims: The Morality of Human Rights and the Power of Judicial Review* 2 (Emory Legal Studies Research Paper No. 14-271), available at <http://perma.cc/4YR3-48JN>. Perry argues that this “global morality” provides the substantive content of the Cruel and Unusual Punishments Clause. Thus, he asserts, courts should ask whether the death penalty is sufficiently rare in countries that recognize the “morality of human rights” that we can say it violates the Cruel and Unusual Punishments Clause. See *id.* at 23-24; MICHAEL J. PERRY, *HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES*, *supra* note 6, 80-83.

100. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

101. For example, in *Miller v. Alabama*, the Supreme Court declared mandatory life sentences with no possibility of parole unconstitutional as applied to juvenile homicide offenders. 132 S. Ct. 2455, 2457-58 (2012). In reaching this decision, the Court made no effort to show that its holding comported with either the original meaning of the Cruel and Unusual Punishments Clause or any current societal consensus. The Court argued instead that its holding was justified because it flowed “straightforwardly” from the Court's own prior Eighth Amendment precedents, and because it accorded with the Court's own beliefs concerning the proper justifications for punishment. *Id.* at 2464-66, 2471. Similarly, in *Graham v. Florida*, 560 U.S. 48, 48-49 (2010), *Kennedy v. Louisiana*, 554 U.S. 407, 407-09 (2008), and *Roper*, 543 U.S. at 551, 562, the Supreme Court invalidated punishment practices that were authorized in a large number of states or showed a strong trend toward general approval. Although the Court claimed to find a societal consensus against the punishment practice in each case, these

discern whether there is a “societal consensus” against a given punishment,¹⁰² and sometimes looking to international practice and opinion to supplement its reasoning.¹⁰³ To date, the Court has not established a stable relationship between these various modes of reasoning, nor has it discerned a principle for determining which mode of reasoning should prevail in the event they conflict with each other in a given case.

4. Benefits of the Living Originalist Approach

The primary benefit claimed for living originalism is that it avoids the antiquarian tendencies of Justice Scalia’s approach to constitutional interpretation. As noted above, cultural norms really do change over time. An approach to constitutional interpretation that does not take this into account forces its adherents either to

claims were not plausible. *See* Stinneford, *Rethinking Proportionality*, *supra* note 8, at 921-23.

102. The Supreme Court’s effort to determine whether there is a current societal consensus against a given punishment derives from the plurality opinion in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), which held that the meaning of the Cruel and Unusual Punishments Clause must be determined in accordance with the “evolving standards of decency that mark the progress of a maturing society.” Between 1958 and 2012, when *Miller*, 132 S. Ct. at 2455, was decided, the Supreme Court never declared a criminal sentence cruel and unusual without at least pretending to find a societal consensus against it, except in cases involving the procedures for imposing a death sentence. *See, e.g., Graham*, 560 U.S. at 48-49; *Kennedy*, 554 U.S. at 407-08; *Roper*, 543 U.S. at 551-52; *Atkins v. Virginia*, 536 U.S. 304 (2002); *Solem v. Helm*, 463 U.S. 277 (1983); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977); *cf., e.g., Woodson v. North Carolina*, 428 U.S. 280, 280-82 (1976) (invalidating mandatory death penalty statutes because they did not provide adequate discretion to jurors in death penalty cases). As noted above, the Supreme Court’s claims about societal consensus have become increasingly implausible in recent years. *See supra* note 101. The evolving standards of decency test has been criticized for a variety of reasons, including the fact that this test, if followed faithfully, would have the perverse effect of making the rights of an unpopular minority group dependent on majority public opinion. *See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST* 69 (1980); Erwin Chemerinsky, Foreword, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 88 n.200 (1989); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113 (2006); Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POLY 47, 63 (2008); Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1753-55; David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 868 (2009).

103. *See, e.g., Graham*, 560 U.S. at 80-81; *Roper*, 543 U.S. at 575-80. The Supreme Court’s references to international opinion and practice in its Eighth Amendment decisions have been controversial and have drawn significant scholarly commentary. *See, e.g., Youngjae Lee, International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 63-64 (2007).

take morally unattractive positions—for example, that it would be constitutional for a legislature to revive flogging as a form of punishment¹⁰⁴—or to abandon their own principles to avoid such a result.¹⁰⁵ By contrast, living originalism allows the Supreme Court to take social change into account when it formulates constitutional doctrine. For example, Jack Balkin argues that decisions to outlaw racial segregation and to uphold the New Deal are hard to justify from the perspective of Scalia-type originalism, but are “supremely easy” to justify under a living originalist approach to constitutional interpretation.¹⁰⁶ Such decisions rested on changes to the political and social culture that allowed them to become accepted and stable parts of constitutional doctrine.¹⁰⁷

A further advantage claimed for living originalism is that it allows the Supreme Court to drive social change, not merely take account of it.¹⁰⁸ When *Brown v. Board of Education* was decided, the idea of desegregation was still very controversial.¹⁰⁹ By giving desegregation constitutional stature, the Supreme Court arguably helped change the culture by delegitimizing claims that legally enforced racial separation might be an acceptable social policy.¹¹⁰ Living originalists argue that when the Court uses the Constitution to change the culture, such occasions may appropriately be considered “achievements”¹¹¹ rather than “deviations and mistakes.”¹¹²

5. *Detriments of the Living Originalist Approach*

The primary detriment of the living originalist approach to constitutional interpretation is that it is hard to square with

104. See Scalia, *supra* note 23.

105. See *supra* Part I.A.5.

106. Balkin, *Original Meaning and Constitutional Redemption*, *supra* note 6, at 450.

107. See *id.* at 477 (“*Brown*, *Loving*, *Craig*, and the New Deal decisions became precedents in the first place because political and social movements demanded change and argued for different interpretations of the Constitution. Once these precedents were adopted and established, they served ‘widely held values of stability and continuity.’”).

108. See Balkin, *Abortion and Original Meaning*, *supra* note 6, at 300-02, 307-09 (arguing that judges can legitimately use constitutional law to help social movements gain political traction).

109. 349 U.S. 294 (1955).

110. See Balkin, *Abortion and Original Meaning*, *supra* note 6, at 300-02, 307-09.

111. *Id.* at 299.

112. *Id.* at 300.

principles of entrenchment, popular sovereignty, and even the rule of law. It is exceedingly difficult to use abstract moral reasoning to make reliable decisions in concrete cases—particularly when one lives, as we do, at the end of a century-long period in which most legal scholars and judges have rejected natural law thinking.¹¹³ How can the Supreme Court make constitutional decisions about what morality requires if it is not sure that morality really exists, and if the grounds for moral judgment are deeply contested in society? If the Court does make such decisions under these conditions, how is this anything other than the imposition of the Justices' own subjective preferences on the rest of society? How can such impositions be compatible with the principles of entrenchment, popular sovereignty, and rule of law that underlie our constitutional order?

As noted in Part I.B.3 above, living originalists have offered a variety of accounts of the appropriate methodology for adjudicating moral claims under the Constitution, including unconstrained moral reasoning by judges,¹¹⁴ reasoning that is “parasitic”¹¹⁵ on the results of social movements, and reasoning that looks to international moral consensus.¹¹⁶ But all three approaches suffer from similar, and ultimately fatal, weaknesses. Ronald Dworkin's argument for unconstrained judicial moral reasoning is most obviously problematic, for it gives the Supreme Court the power to overrule the moral judgment of the politically accountable branches of government in the name of the Court's own moral judgment. Moreover, by cloaking such judgments in the mantle of the Constitution, the Supreme Court can prevent them from being revisited through the normal political process. Such power is arguably incompatible with popular sovereignty because it allows the Justices' own subjective will to prevail over the will of the people. The unconstrained power to “construct, reinspect, and revise”¹¹⁷ constitutional rights is arguably incompatible with entrenchment because it allows the Court to give as broad or narrow an interpretation of a given right as it wishes.

113. See, e.g., Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 PEPP. L. REV. 491, 492-94 (2009).

114. See Dworkin, *supra* note 6, at 123.

115. Balkin, *Abortion and Original Meaning*, *supra* note 6, at 308.

116. See Perry, *Is Capital Punishment Unconstitutional?*, *supra* note 99, at 896-97 & nn.80-83.

117. See Dworkin, *supra* note 6, at 123 (quoting RONALD DWORKIN, *LIFE'S DOMINION* 145 (1993)).

If the eighteenth-century enactors of the Bill of Rights did not occupy a privileged position from which to determine what morality requires, neither does the current Supreme Court.

Jack Balkin's argument that social movements should drive judicial decisions suffers from a similar set of weaknesses. Social movements sometimes get the answer wrong, particularly if they are driven by a moral panic. We approve of the movements to abolish slavery and end segregation because they have been shown, over time, to be obviously correct. But other social movements turn out to be terribly misguided. For example, the movement to sterilize "mental defectives" led to the involuntary sterilization of more than sixty thousand people,¹¹⁸ a result that is generally condemned today. Regarding criminal punishment, there have been social movements to abolish the death penalty¹¹⁹ and to reform prisons,¹²⁰ but also to impose extremely harsh punishments on drug offenders,¹²¹ sex offenders,¹²² juvenile offenders,¹²³ recidivists,¹²⁴ and others. Moreover, there are often opposing social movements that exist at the same time—the pro-choice and pro-life movements, for example. Which of these social movements get morality right and which do not? The mere existence of the social movement itself cannot answer this question. Even if a judge's decision is "parasitic"¹²⁵ on the results of social movements, the judge must still

118. See, e.g., PHILIP R. REILLY, *THE SURGICAL SOLUTION* 94 (1991) (presenting data as to involuntary sterilization in the United States between 1907 and 1963); see also DANIEL J. KEVLES, *IN THE NAME OF EUGENICS* 47-48 (1985); EDWARD J. LARSON, *SEX, RACE, AND SCIENCE* 1-2 (1995). The Supreme Court validated the involuntary sterilization movement in *Buck v. Bell*, 274 U.S. 200, 207 (1927), in which Justice Holmes infamously declared, "three generations of imbeciles is enough."

119. See, e.g., John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195 (2009).

120. See generally THE OXFORD HISTORY OF THE PRISON (Norval Morris & David J. Rothman eds., 1995) (discussing the evolution of prisons from the late 1700s to the 1990s).

121. See *Harmelin v. Michigan*, 501 U.S. 957, 961 & n.1 (1991).

122. See Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 653-54, 671-72 (2008); see also John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 561-62 (2006).

123. See HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT* 88-89 (1999), available at <http://perma.cc/UV6G-A7NP>.

124. See *Ewing v. California*, 538 U.S. 11, 14-15, 30 (2003).

125. Balkin, *Abortion and Original Meaning*, *supra* note 6, at 308.

decide which movements to rely upon and which to reject. Thus, we are ultimately led back to Ronald Dworkin's position that judges should have unconstrained power to pick winners and losers.¹²⁶

Michael Perry's argument about international human rights law presents the same problems as Jack Balkin's social movement argument, but on a global scale. Sometimes the world is enflamed with good ideas—the movement against the death penalty may be an example of that.¹²⁷ But sometimes the world is enflamed with bad ideas—for example, the pervasive anti-semitism that preceded World War II.¹²⁸ Moreover, it is even rarer to find international consensus around any given moral ideal than it is to find national consensus. Although many countries have abolished the death penalty, many continue to impose it.¹²⁹ The United States itself has refused to join any international treaties that forbid the death penalty.¹³⁰ The only way to find an international consensus against the death penalty is to limit the countries we are willing to include in the international community—focusing only, for example, on “liberal democracies.”¹³¹ But such picking and choosing implies the existence of a moral standard for such choice. Where does the standard come from? How is it anything other than the imposition of judicial will?

The “international consensus” argument is also the least compatible with original meaning. The ratification debates show quite

126. See *supra* note 96 and accompanying text.

127. See generally DAVID GARLAND, PECULIAR INSTITUTION 3-5 (2010) (noting the rarity of capital cases that are not marred with doubt).

128. See U.S. DEP'T OF STATE, CONTEMPORARY GLOBAL ANTI-SEMITISM: A REPORT PROVIDED TO THE UNITED STATES CONGRESS (2008), available at <http://perma.cc/RBZ2-L2VU>.

129. According to Amnesty International, fifty-eight countries currently authorize use of the death penalty and ninety-eight do not. See *Figures On The Death Penalty*, AMNESTY INT'L, <http://www.amnesty.org/en/death-penalty/numbers> [<http://perma.cc/RGP9-ETQH>] (last visited July 6, 2014); see also PERRY, *supra* note 6, at 71 (noting that about half the countries in the world are parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, which prohibits capital punishment).

130. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (noting that every country except the United States and Somalia has joined the United Nations Convention on the Rights of the Child, which forbids execution of juvenile offenders); PERRY, *supra* note 6, at 71-72 (noting that the United States is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights, nor to the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, both of which prohibit capital punishment).

131. PERRY, *supra* note 6, at 81 (arguing for the unconstitutionality of the death penalty, partially on the ground that “[t]he list of ‘retentionist’ liberal democracies is quite small”).

clearly that the Cruel and Unusual Punishments Clause was thought to be necessary to prevent Congress from adopting the punishment practices of Europe, which included torture devices like “racks and gibbets.”¹³² For example, Patrick Henry argued in the Virginia Convention that if the Constitution did not require the federal government to stay within common law bounds, “Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime.”¹³³ Even more colorfully, Abraham Holmes got up in the Massachusetts convention and gave the following dire warning:

On the whole, when we fully consider this matter, and fully investigate the powers granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*.

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.¹³⁴

As these speeches indicate, a prohibition of cruel and unusual punishments was thought to be necessary to protect American citizens from foreign punishment standards, not to bring American punishments into accord with therewith. This concern is consistent with the original meaning of “cruel and unusual,” which is cruel in light of the “long usage of the common law,”¹³⁵ not cruel in light of contemporary international practice.

132. See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1888) [hereinafter ELLIOT'S DEBATES].

133. 3 ELLIOT'S DEBATES, *supra* note 132, at 447-48.

134. 2 ELLIOT'S DEBATES, *supra* note 132, at 111.

135. See Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1819.

C. *What Is Needed*

What is needed is an approach to constitutional interpretation that suffers from neither the weaknesses of Scalia-type originalism nor those of living originalism. Such an approach would be sensitive to social change,¹³⁶ but also consistent with principles of entrenchment, popular sovereignty, and the rule of law. As it turns out, the true original meaning of the Cruel and Unusual Punishments Clause has these characteristics. It is set forth below.

II. DESUETUDE AND ORIGINAL MEANING

Scalia-type originalism and living originalism both tend to ignore the word “unusual” in the Cruel and Unusual Punishments Clause, treating the Clause as a bare prohibition of cruel punishments.¹³⁷ The reason for this is fairly obvious: there is no clear connection between a punishment’s rarity and its cruelty. A law mandating the public torture of all sex offenders, for example, would seem crueler than a law calling upon courts to impose torture only on rare

136. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 545 (2003) (suggesting that the Cruel and Unusual Punishments Clause might have originally been meant to “incorporate[] some aspects of present-day circumstances as relevant variables”).

137. Indeed, Justice Scalia dismisses the word “unusual” in almost precisely the same language as that used by the Supreme Court’s nonoriginalists. Chief Justice Warren’s plurality opinion in *Trop v. Dulles*, which announced the quintessentially nonoriginalist “evolving standards of decency” test, had this to say about the word “unusual”:

On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word “unusual.” If the word “unusual” is to have any meaning apart from the word “cruel,” however, the meaning should be the ordinary one, signifying something different from that which is generally done.

356 U.S. 86, 100-01 n.32 (1958) (plurality opinion). Justice Scalia’s plurality opinion in *Harmelin v. Michigan*, 501 U.S. 957 (1991), argues that the word “unusual” meant “contrary to law” in the English Bill of Rights, but then asserts (without historical evidence) that the term “could hardly mean” illegal in the context of the Eighth Amendment. Justice Scalia then adopts the *Trop* definition of “unusual,” asserting that it must mean “such as [does not] occur[] in ordinary practice.” *Harmelin*, 501 U.S. at 973-76 (plurality opinion) (citation omitted). In practice, both the nonoriginalists and Justice Scalia ignore the word “unusual.” See Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1749-51, 1763-65.

occasions. Given the lack of an intuitive connection between rarity and cruelty, it is natural and predictable that courts and commentators would largely ignore the word “unusual.”¹³⁸

This understandable neglect is based on an interpretive error. As I have shown in previous articles, the word “unusual” in the Cruel and Unusual Punishments Clause does not mean “rare,” but “new.”¹³⁹ More specifically, it means “contrary to the long usage of the common law.”¹⁴⁰ The Cruel and Unusual Punishments Clause forbids punishments that are cruel in light of longstanding practice.

A. Common Law, Custom, and Long Usage

As described in Part I.A.4, above, Justice Scalia presents two views of the common law in his account of constitutional interpretation. He claims that at the time the Constitution came into being, the common law was falsely seen as “a preexisting body of rules, uniform throughout the nation.”¹⁴¹ Justice Scalia argues that the Legal Realists debunked this view, showing that the common law is nothing more than judges making up law as they go, based on their view of “the most desirable resolution of [any given] case.”¹⁴²

138. On occasion, some Justices and scholars have attempted to define the meaning of the word “unusual.” In *Furman v. Georgia*, Justice Stewart implied that the term might mean “wantonly and ... freakishly imposed,” like being “struck by lightning.” 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring). Justice Douglas argued in the same case that “unusual” means “discriminatory” with respect to “race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.” *Id.* at 242 (Douglas, J., concurring); see also, e.g., RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT’S OBSTACLE COURSE* 41 (1982) (stating that the term means “something different from that which [was] ordinarily done” at the time the Eighth Amendment was adopted); Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 122 (2004) (stating that the term means “immorally discriminatory”); Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*,” 57 CALIF. L. REV. 839, 840 (1969) (stating that the term is “constitutional ‘boilerplate’”); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 46 (2004) (arguing that the Supreme Court interprets “unusual” to mean uncommon in light of “foreign and international practice” as well as domestic practice); Perry, *Is Capital Punishment Unconstitutional?*, *supra* note 99, at 880 (stating that the term means “[n]ot common; not frequent; rare,” as defined in Samuel Johnson’s *A Dictionary of the English Language*).

139. See Stinneford, *Rethinking Proportionality*, *supra* note 8, at 935-61; Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1766-823.

140. See Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1766-823.

141. Scalia, *supra* note 41, at 10.

142. *Id.* at 13.

Although this narrative is widely shared among lawyers and academics today, it is false.

At the time the Constitution was adopted (and for centuries prior to that time), the common law was not seen as the product of judges exercising a “legislative function,”¹⁴³ nor was it seen as the series of fixed, transcendent rules Justice Holmes mockingly described as a “brooding omnipresence in the sky.”¹⁴⁴ Rather, the common law was considered to be a kind of customary law—the law of “custom” and “long usage.”¹⁴⁵ The basic idea was that a practice that enjoyed long usage throughout the jurisdiction obtained the force of law, despite the fact that it had never been mandated by king or parliament.¹⁴⁶ Such laws were considered normatively superior to laws imposed by the sovereign because long usage guaranteed that they were reasonable and that they enjoyed the consent of the people. These ideas were stated succinctly in 1612 by Sir John Davies, Attorney General for Ireland, in the Dedication to his *Irish Reports*:

For the *Common lawe* of England is nothing else but the
Common custome of the Realme:....

For a *Custome* taketh beginning & groweth to perfection in
this manner. When a reasonable act once done, is found to bee
good & beneficiall to the people, & agreeable to their nature &

143. HOLMES, *supra* note 62.

144. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

145. *See, e.g.*, 1 BLACKSTONE, *supra* note 45, at *64 (describing the common law as custom that enjoys “long and immemorial usage” and “universal reception throughout the kingdom”); EDWARD COKE, *THE COMPLETE COPYHOLDER* (1630), *reprinted in* 2 *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* 563, 563 (Steve Sheppard ed., 2003) (“Customes are defined to be a Law, or Right not written, which being established by long use, and the consent of our Ancestors, hath been, and is daily practised.”); THOMAS USK, *TESTAMENT OF LOVE*, bk. III, ch. 1, ll. 78-83 (R. Allen Shoaf ed., 1998) (c. 1380) (“But custome is a thyng that is accepted for right or for lawe, there as lawe and right faylen.... [C]ustome is of comen usage by length of tyme used, and custome nat writte is usage; and if it be writte, constitutyon it is ywritten and ycleped.”); 1 *THE WORKS OF JAMES WILSON* 435 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) (“[L]ong customs, approved by the consent of those who use them, acquire the qualities of a law.”).

146. As Grant Gilmore and others have shown, the claim that common law judges never did anything other than identify and apply longstanding customs was exaggerated. *See, e.g.*, GRANT GILMORE, *THE AGES OF AMERICAN LAW* 5-7 (1977). Nonetheless, the common law judges did see such identification and application of longstanding custom as their main duty. More importantly for our purposes, the common law’s dependence on long usage gave it the capacity to resist governmental innovations that threatened common law rights. *See, e.g.*, *THE WORKS OF JAMES WILSON*, *supra* note 145, at 185-87.

disposition, then do they use it, & practise it, againe, & againe, & so by often iteration & multiplication of the act, it becometh a *Custome*, & being continued without interruption time out of minde, it obtaineth the force of a *lawe*.

And this *Customary lawe* is the most perfect, & most excellent, and without comparison the best, to make & preserve a commonwealth, for the *written lawes* which are made either by the edicts of Princes, or by Counsellors of estate, are imposed upon the subject before any Triall or Probation made, whether the same bee fitt & agreeable to the nature & disposition of the people, or whether they will breed any inconvenience or no. But a *Custome* doth never become a *lawe* to binde the people, untill it hath bin tried & approved time out of minde, during all which time there did thereby arise no *inconvenience*, for if it had beene found *inconvenient* at any time, it had been used no longer, but had beene interrupted, & consequently it had lost the vertue & force of a *lawe*.¹⁴⁷

These ideas—that the common law is the law of custom and long usage; that long usage demonstrates that a law is “fit and agreeable” to the people it governs; and that long usage makes the common law normatively superior to law imposed by the sovereign—were often repeated by English and American legal and political thinkers ranging from Edward Coke and William Blackstone to John Adams and James Wilson.¹⁴⁸

147. JOHN DAVIES, *A Preface Dedicatory*, in *LE PRIMER REPORT DES CASES & MATTERS EN LEY RESOLUES & ADIUDGES EN LES COURTS DEL ROY EN IRELAND* *2 (Dublin, 1615); see also J. G. A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 30-55 (1987).

148. See *supra* note 145; see also BLACKSTONE, *supra* note 45, at *70 (asserting that when a statute is enacted to change a common law rule, the typical result is that “the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation”); 1 EDWARD COKE, *INSTITUTES OF THE LAWES OF ENGLAND*, reprinted in 2 *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE*, *supra* note 145, at 577, 740 (“[W]hen any innovation or new invention starts up, ... trie it with the Rules of the common Law, ... for these be true Touchstones to sever the pure gold from the drosse and sophistications of novelties and new inventions. And by this example you may perceive, That the rule of the old common Law being soundly ... applied to such novelties, it doth utterly crush them and bring them to nothing.”); 2 *THE WORKS OF JAMES WILSON*, *supra* note 145, at 453 (“It is the characteristic of a system of common law that it be accommodated to the circumstances, the exigencies, and the conveniences of the people, by whom it is appointed.”). Edward Corwin has shown that the idea of “immemorial usage as superior to human rule-making” dates back at least as far as Sophocles, and that the English common law had been equated with “right reason” since at least the fourteenth century. EDWARD S. CORWIN, *THE “HIGHER LAW”*

These ideas were important because they gave rise to the English, and later the American, conception of rights enforceable against the sovereign.¹⁴⁹ Throughout the seventeenth and eighteenth centuries, two views of governmental power struggled for dominance. Proponents of absolute sovereignty argued that the sovereign was the source of all law and therefore could not be constrained by law.¹⁵⁰ In contrast, common law thinkers argued that sovereign power was limited by the fundamental principles and practices of the common law.¹⁵¹ They argued that the common law predated the sovereign

BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 6, 26 (1955).

149. Edward Coke, for example, identified the common law as the source of numerous rights and liberties of citizens. See EDWARD COKE, *Dr. Bonham's Case*, reprinted in 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, *supra* note 145, at 264, 277 [hereinafter COKE, *Dr. Bonham's Case*] (identifying the right not to be subjected to double jeopardy); 2 COKE, *supra* note 148, at 858 (identifying the right to due process of law); *id.* (identifying the right to indictment by grand jury); *id.* at 862-64 (identifying the right to habeas corpus relief); Edward Coke, Petition of Right (June 2, 1628), in 3 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, *supra* note 145, at 1225, 1228-91 [hereinafter Coke, Petition of Right] (identifying the right to taxation only with the consent of Parliament). Coke described the Magna Carta itself as “but a confirmation or restitution of the Common Law.” 1 COKE, *supra* note 148, at 697.

150. See, e.g., BLACKSTONE, *supra* note 45, at *90 (“[T]he legislature, being in truth the sovereign power, is always ... of absolute authority.”); THOMAS HOBBS, LEVIATHAN 91 (E.P. Dutton & Co. 1950) (1651) (ascribing to the sovereign “the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may doe, without being molested by any of his fellow Subjects”); KING JAMES I, THE TRUE LAW OF FREE MONARCHIES, in CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I 1603-1625, at 9, 9-10 (J.R. Tanner ed., 1960) (1598) (“Kings [are] the authors and makers of the laws and not the laws of the Kings.... [T]he King is above the law as both the author and giver of strength thereto.”); JOHN MILTON, BRIEF NOTES UPON A LATE SERMON, TITL'D, THE FEAR OF GOD AND THE KING 11 (photo. reprint 1977) (Mathew Griffith, D.D. 1660) (“[T]he Parliament is above all positive Law ... whether civil or common, makes or unmakes them both.”); GEORGE SAVILE, POLITICAL THOUGHTS AND REFLECTIONS (1750), reprinted in THE COMPLETE WORKS OF GEORGE SAVILE, FIRST MARQUESS OF HALIFAX 209, 214 (Walter Raleigh ed., Clarendon Press 1912) (“If the Common Law is Supream, then those are so who judge what is the Common Law; and if none but the Parliament can judge so, there is an end of the Controversy.... There is then no other Fundamental, but that *every Supream Power must be Arbitrary.*”); see also Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 398 (1964) (“The development of the modern nation state was achieved through absolute monarchism. The King was seen as completely sovereign. To admit that his statutory commands could be invalidated, even by his long failure to enforce them on a widespread practice of nonobservance, was to deny that absolute sovereignty.”) (footnote omitted).

151. See, e.g., CHARLES HERLE, A FULLER ANSWER TO A TREATISE WRITTEN BY DOCTOR FERNE 6 (London, 1642) (arguing that legislation should not displace fundamental common law principles: “[A] foundation must not be stirr'd while the building stands.... *Magna Charta*, where most of these *fundamentals* are (at least) implied was *Law* before 'twas *Written*, and but there, and then, collected for easier conservation and use”); JOHN WHITEHALL, THE

and gave the sovereign its authority, and that the common law better reflected natural principles of justice than could any exercise of sovereign will.¹⁵²

The great battles of English and early American constitutional history all involved a contest between claims of absolute sovereign power and claims that such power was limited by the common law. When English kings and queens used the rack against suspected enemies, common lawyers argued that such practices were illegal because torture was contrary to long usage.¹⁵³ During the back-and-forth struggles between king and parliament throughout the seventeenth century, the holder of state power, whether king or parliament, frequently claimed absolute sovereignty unconstrained by law,¹⁵⁴ whereas the power-holder's opponents claimed that the common law limited sovereign authority.¹⁵⁵ The American Revolution itself was justified as a struggle to preserve the common law rights of American colonists¹⁵⁶ against a British parliament that

LEVIATHAN FOUND OUT 53-54 (London, 1679) (arguing that if the fundamental basis for law is sovereign will rather than long usage, then "down goes the Common Law, ... and then let the strongest take all"). See generally J. W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY (1955) (describing seventeenth and eighteenth century views of the common law as fundamental law).

152. See, e.g., 4 EDWARD COKE, REPORTS, in 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, *supra* note 145, at 1, 102 ("The King is under no man, but onely God and the Law, for the Law makes the King: Therefore let the king attribute that to the Law, which from the law he hath received, to wit, power and dominion: for where will, and not law doth sway there is no King."); DAVIES, *supra* note 147 (arguing that legislation and royal edicts are normatively inferior to the common law because they "are imposed upon the Subject before any Triall or Probation made, whether the same bee fitt & agreeable to the nature & disposition of the people, or whether they will breed any inconvenience or no").

153. See, e.g., 3 COKE, *supra* note 148, at 1025 ("[U]pon this occasion [the installation of the rack in the Tower of London], Sir John Fortescue Chiefe Justice of England, wrote his Book in commendation of the lawes of England; and therein preferreth the same for the government of this countrey before the Civill Law; and particularly that all tortures and torments of parties accused were directly against the Common Lawes of England."); see also SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIÆ: A TREATISE IN COMMENDATION OF THE LAWS OF ENGLAND 71-75 (Francis Gregor trans., Cincinnati, Robert Clarke & Co. 1874) (condemning the use of the rack).

154. See, e.g., KING JAMES I, *supra* note 150; MILTON, *supra* note 150.

155. See Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1781-86 and sources cited therein.

156. See, e.g., WOOD, *supra* note 45, at 10 (arguing that American colonists "revolted not against the English constitution but on behalf of it"); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 865-66, 870-71, 890-91 (1978); see also, e.g., JOURNALS OF THE HOUSE OF BURGESSSES

claimed absolute power to make law governing the American colonies.¹⁵⁷

B. Desuetude and Long Usage

Desuetude is the idea that if a law is left unenforced for a long time despite numerous enforcement opportunities, it may lose all legal force because a negative custom has grown up against it.¹⁵⁸ The doctrine of desuetude is an ancient one, dating back at least to Roman law.¹⁵⁹ It has been recognized more or less continuously

OF VIRGINIA 1766-1769, at 214-15 (John Pendleton Kennedy ed., 1906) (describing a British plan to remove American colonists to England for trial as “highly derogatory of the Rights of *British Subjects*” and “new, unusual ... unconstitutional and illegal”); John Adams, *Notes of Debates (Sept. 8, 1774)*, in 1 LETTERS OF DELEGATES TO CONGRESS 1774-1789, at 46 (Paul H. Smith ed., 1976) (recording Richard Henry Lee’s argument that American rights “are built on a fourfold foundation—on Nature, on the british Constitution, on Charters, and on immemorial Usage”); *id.* at 47 (recording Roger Sherman’s assertion that American rights were based on colonial adoption of “the common Law, not as the common Law, but as the highest Reason”); *Declaration and Resolves of the First Continental Congress*, Oct. 14, 1774, http://avalon.law.yale.edu/18th_century/resolves.asp [<http://perma.cc/QQT4-GB6K>] (claiming the right to “the common law of England”; asserting that American rights were based on “the immutable laws of nature, the principles of the English constitution, and the several charters or compacts” of the various colonies; that the colonists retained the “rights, liberties, and immunities of free and natural-born subjects, within the realm of England”; and that these rights included the right to “the common law of England, and more especially to the great and inestimable priviledge of being tried by their peers of the vicinage, according to the course of that law”).

157. Among other things, Parliament claimed the power to enact legislation that contravened the common law rights American colonists claimed for themselves. *See* Declaratory Act, 1766, 6 Geo. 3, c. 12 (Gr. Brit.), [hereinafter Declaratory Act] *available at* <http://perma.cc/87NU-N2VW> (claiming “full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America ... in all cases whatsoever”).

158. *See* Bonfield, *supra* note 150, at 396 (observing that a statute would become desuete “only if the long failure to enforce it was in the face of a public disregard so prevalent and long established that one could deduce a custom of its nonobservance”); *see also* JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND bk. I, at 18 (James Ivory ed., 1824). (“[A]s a posterior statute may repeal or derogate from a prior, so a posterior custom may repeal or derogate from a prior statute, even though that prior statute should contain a clause forbidding all usages that might tend to weaken it; For the contrary immemorial custom sufficiently presumes the will of the community to alter the law in all its clauses, and particularly in that which was intended to secure it against alteration; and this presumed will of the people operates as strongly as their express declaration.”).

159. *See* DIG. 1.3.32 (Julianus, Digest 84) (Charles Henry Monro trans., 1904) (“[S]tatutes themselves are binding for no other reason than because they are accepted by the judgment of the people On this principle it is also admitted law, and very rightly so, that statutes are

throughout Western history, albeit with significant controversy since the rise of the nation-state and the idea of absolute sovereignty.¹⁶⁰

1. *The Normative Basis for Desuetude*

Desuetude has received attention in recent decades from constitutional law scholars such as Alexander Bickel and Cass Sunstein, who argue that desuete statutes raise due process issues similar to those arising from unconstitutionally vague statutes.¹⁶¹ When a law is not enforced for decades despite numerous open violations, this nonenforcement creates the risk that the public will be lulled into believing that the law no longer exists. If a prosecutor chooses to revive the law and prosecute individuals for violating it, such individuals might be caught off guard because they reasonably believed the conduct was no longer illegal. The continued existence of such laws also creates the risk that law enforcement will revive them for improper, discriminatory reasons. Alexander Bickel argues that these notice and discrimination issues were the true problem with the anti-contraception statutes at issue in *Poe v. Ullman*.¹⁶² Similarly, Cass Sunstein suggests that the sodomy statutes struck down in *Lawrence v. Texas* may have been unconstitutional

abrogated not only by the voice of one who moves to repeal them ... but also by the fact of their falling out of use by common consent.”); see also CODE JUST. 1.17.1.10 (Justinian 534) (S.P. Scott trans., 1934) (“Where, however, any laws contained in the ancient books have already fallen into desuetude, We, under no circumstances, permit you to insert them; for We only wish those to remain in force which frequent decisions have established, or the long-continued custom of this Fair City has confirmed.”); H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 364 (1954) (“From the frequent repetition of the theory given by Julian and from the actual examples of statutory rules said to have fallen into disuse, we can probably say that the general classical opinion would have been that custom could prevail against statute.”) (footnotes omitted).

160. See *infra* notes 185-207 and accompanying text.

161. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 152-55 (Yale Univ. Press 2d ed. 1986); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 29-30, 73 (2003); see also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 17-24 (1982); Bonfield, *supra* note 150, at 414 (“[D]esuetudinal enactments ‘cast the same shadow of potentially arbitrary and abusive law enforcement as that cast by purposefully overdrawn legislation.’”) (quoting Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 911 (1962)); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 592 (2001).

162. See BICKEL, *supra* note 161, at 154.

primarily because their long nonenforcement created unacceptable fair notice and discriminatory enforcement problems.¹⁶³

Although courts and commentators have occasionally focused on the fair notice issues arising from long dormant laws,¹⁶⁴ this has not historically been the primary justification for the doctrine of desuetude.¹⁶⁵ Instead, long nonenforcement of a law has been thought to show that the law is substantively unreasonable¹⁶⁶ and that it does not enjoy the consent of the people.¹⁶⁷ These arguments have predominated because desuetude is the mirror image of “long usage.” Just as long usage tends to show that a practice is reasonable and enjoys public acceptance, long non-usage tends to show the opposite.

The idea of desuetude has always been bound together with the idea of long usage. The great common law thinker Edward Coke compared the long usage of the common law to the refinement of gold in a fire. He asserted that as cases get decided “by many successions of ages,” the common law is “fined and refined” until it reaches greater perfection than any lawmaker or group of lawmakers could provide.¹⁶⁸ This analogy implies both continuity and loss. As the refinement continues over time, the true “gold” of the law remains, while the dross falls away. Common law thinkers considered the “gold” of the law to include the common law rights that developed and persisted over time, such as the right to due process

163. 539 U.S. 558 (2003); see Sunstein, *supra* note 161, at 73.

164. See *Hill v. Smith*, 1 Morris 95, 107 (Iowa 1840) (arguing that it is “contrary to the spirit of that Anglo-Saxon liberty ... to revive, without notice, an obsolete statute, one in relation to which long disuse and a contrary policy had induced a reasonable belief that it was no longer in force”).

165. See Bonfield, *supra* note 150, at 427 (asserting that *Hill v. Smith* was the “only judicial opinion ever to adequately recognize the grave fair-notice issues involved” in the renewed enforcement of desuete statutes).

166. See, e.g., CODE JUST. 6.51.1 (Justinian 534) (S.P. Scott trans., 1932) (“And as the [Papian Law] ... has finally fallen into desuetude, We desire that the practice of forfeitures may, by Our agency, lose its invidious force, which was displeasing to the most eminent jurists, who invented many ways to prevent it from taking effect.”).

167. See, e.g., *James v. Commonwealth*, 12 Serg. & Rawle 220, 227 (Pa. 1825) (arguing that laws calling for the execution of witches and gypsies had been “repealed by the voice of humanity, and not by positive law”).

168. 1 COKE, *supra* note 148, at 701.

of law,¹⁶⁹ indictment by grand jury,¹⁷⁰ habeas corpus,¹⁷¹ the right not to be subjected to double jeopardy,¹⁷² the right to taxation only with the consent of parliament,¹⁷³ and the right not to be subjected to cruel and unusual punishments.¹⁷⁴

The dross of the law, on the other hand, included those once traditional practices that fell away because they turned out to be unreasonable or no longer fit the needs of society, and thus lost the consent of the people. Edward Coke wrote that “Custome ... lose[s] its] being, if usage faile.”¹⁷⁵ Similarly, Sir John Davies maintained that if a traditional legal practice has “been found inconvenient” it is “used no longer” and thus “los[es] the virtue and force of a lawe.”¹⁷⁶ James Wilson, one of the most important drafters of the U.S. Constitution, argued that the interplay between long usage and desuetude gave the common law its dual character as stable and durable but also sensitive to cultural change:

It is the characteristic of a system of common law, that it may be accommodated to the circumstances, the exigencies, and the conveniences of the people, by whom it is appointed. Now, as these circumstances, and exigencies, and conveniences insensibly change; a proportioned change, in time and in degree must take place in the accommodated system.... [Time] silently and gradually introduces; it silently and gradually withdraws its customary laws.¹⁷⁷

169. *See* 2 *id.* at 858.

170. *Id.*

171. *Id.* at 862-64.

172. *See* COKE, *Dr. Bonham's Case*, *supra* note 149, at 277 & n.55 (“*Nemo debet bis puniri pro uno delicto.*”).

173. *See* An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1 W. & M., c.2 (1688), *reprinted in* 6 THE STATUTES OF THE REALM 142-45 (London, 1819) [hereinafter An Act Declaring] (complaining that James II had violated longstanding common law rights by levying taxes without the consent of parliament); Coke, *Petition of Right*, *supra* note 149, at 1288-91.

174. *See* An Act Declaring, *supra* note 173, at 143.

175. COKE, *supra* note 145, at 564.

176. DAVIES, *supra* note 147.

177. THE WORKS OF JAMES WILSON, *supra* note 145, at 453-55; *see also* *Hurtado v. California*, 110 U.S. 516, 530 (1884) (asserting that the normative power of the common law comes largely from its capacity to adapt to new circumstances).

2. *Conditions Necessary for Desuetude*

A momentary lapse in usage was not thought to be sufficient to make a law desuete. Just as a practice could not become part of the common law until it was used continuously throughout the jurisdiction for a long time, a law could not become desuete unless it fell out of usage long enough to show a stable, universal consensus against it.¹⁷⁸

The historical literature does not agree upon a specific amount of time a legal practice must remain out of usage¹⁷⁹ before it can be considered desuete, although the weight of authority appears to conclude that the period of non-usage must last several generations—fifty to one hundred years.¹⁸⁰ The basic idea is that non-usage

178. The rationale for requiring disuse to continue for several generations before it can invalidate a statute was well articulated in *Hill v. Smith*. 1 Morris 95, 107 (Iowa 1840) (“[P]ublic opinion would frequently be a very unsafe guide for a judicial decision. The fluctuating feelings of the multitude frequently operated upon by momentary excitement, by prejudice or by caprice, would very improperly be adopted as the standard of truth or sound reason. But where the same opinions are concurred in for centuries, and after passion and prejudice have wholly subsided, such opinions are always founded in truth and justice, and can more safely be followed than those of the most learned and able judges. Fortified by this authority, we pronounce it contrary to the spirit of that Anglo-Saxon liberty which we inherit, to revive, without notice, an obsolete statute, one in relation to which long disuse and a contrary policy had induced a reasonable belief that it was no longer in force. If custom can make laws, it can, when long acquiesced in, recognized and countenanced by the sovereign power, also repeal them.”).

179. “Non-usage” does not mean the same thing as “infrequent usage.” When a legal practice continues to be used, albeit infrequently, any determination that there is a stable societal consensus against it is not likely to be reliable. For example, the criminal price fixing provisions of the Sherman Antitrust Act were infrequently used between 1890 (when they were enacted) and 1955 (when the fines were increased from \$5000 to \$50,000). But such provisions were enforced more frequently starting in 1959. See Vivek Ghosal & D. Daniel Sokol, *The Evolution of U.S. Cartel Enforcement*, J.L. & ECON. (forthcoming), available at <http://perma.cc/L6ND-WGZD>. A person looking at the rare enforcement of these provisions in 1954 would have been mistaken in any conclusion that they had become so obsolete as to be considered desuete.

180. See, e.g., DAINES BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES FROM MAGNA CHARTA TO THE TWENTY-FIRST OF JAMES I CAP. XXVII. 45 (London, 5th ed. 1796) (noting that under Scottish law, statutes become desuete after fifty years of nonenforcement); ERSKINE, *supra* note 158, at 18 (“[W]here any later usage, which has been gradually gathering strength, is pleaded upon as law, the antiquity and universality of that usage must be proved to the judge, as any other matter of fact; for all customary law is founded on long usage, which is fact. No precise time or number of facts is requisite for constituting custom; because some things require in their nature longer time, and a greater frequency of acts to establish them, than others.”); 1 FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 138-39

must persist long enough that we can be confident that society has rejected the practice as unreasonable, and that this rejection is both universal and stable.¹⁸¹ This period may vary because the occasions for using certain legal practices may not occur very often. If treason trials occur once every twenty years, for example, the failure to execute anyone for treason during a forty year period is probably not sufficient to show a stable societal consensus against the practice.¹⁸² A forty-year failure to execute offenders for a frequently committed homicide offense, however, might have quite a different significance.

Other relevant factors include whether long non-usage reflects open disregard of the law, and whether there is significant political conflict about the law's goodness. If a legal practice is not used for a period of time through neglect or error, this tells us less about its reasonableness than if there is a conscious, voluntary decision not to use it.¹⁸³ Similarly, if there is ongoing political conflict about a law's goodness, a period of non-usage may simply show that those who oppose it have temporarily gained the upper hand.¹⁸⁴ It may not show that there is a universal, stable societal consensus against it. The less open the non-usage, or the greater the political conflict

(William Holloway trans., 1867) (noting that some authorities hold that desuetude requires a century of non-usage, whereas others say forty years or less, and others say it is up to the discretion of the judge; and arguing that "it is of the utmost consequence [that the time period be sufficient] to guard against the individual, casual, transient, through the deceitful appearance which they may assume, being falsely regarded as indications of a common conviction of law lying at the foundation of them"); *cf.* *Adams v. Norris*, 64 U.S. 353, 364 (1859) (arguing that under the Spanish civil law system, when a ten year custom contrary to statutory provisions regarding the proper method of making wills is "so prevailing and notorious that the tacit assent to it of the authorities may be presumed, it will operate to repeal the prior law").

181. See *Bonfield*, *supra* note 150, at 419 ("[T]here must be an absolute omission to enforce the statute for a sufficient period to dispel any reasonable possibility that it reflects a transitory or unsettled policy.").

182. See *VON SAVIGNY*, *supra* note 180, at 157 (arguing that a period of nonenforcement will not give rise to desuetude where no occasions for enforcement have occurred; a custom of nonenforcement can only develop when "cases [for enforcement] [have] actually arisen and nevertheless the application of the written law been intermitted").

183. See *Bonfield*, *supra* note 150, at 420 (arguing that desuetude "requires a sufficiently widespread and notorious violation of the statute to assure that the administrative failure to apply it evidences a clear policy of completely disregarding its violation").

184. See *id.* ("[W]hen the failure of a statute's administrators to enforce it is surrounded by active political conflict over the acceptability of such action, a longer period of uninterrupted nonapplication will be required than when the community is relatively settled in its acquiescence to the provision's demise.").

surrounding it, the longer the period of time necessary to show that the legal practice has become desuete.

3. *Desuetude and Absolute Sovereignty*

The doctrine of desuetude has become more controversial with the rise of the nation-state and the doctrine of absolute sovereignty. If the sovereign has absolute authority, and is the source of all law, neither law nor custom can constrain it.¹⁸⁵ As described in Part II.A, above, the great English and early American constitutional battles of the seventeenth and eighteenth centuries represented, in large part, the conflict between proponents of absolute sovereignty and proponents of the common law idea that sovereign power must be constrained by the longstanding universal custom of the jurisdiction. This conflict applied both to positive custom (common law rights) and negative custom (desuetude).¹⁸⁶ Because a statute represents the exercise of sovereign will, proponents of absolute sovereignty argued that non-usage could never negate it.¹⁸⁷

Edward Coke stood, in many ways, at the beginning of these controversies in England, and his writings about the common law had great influence on the development of the English and American constitutional orders.¹⁸⁸ During Coke's career as a lawyer and

185. See KING JAMES I, *supra* note 150; MILTON, *supra* note 150; see also Declaratory Act, *supra* note 157.

186. See Bonfield, *supra* note 150, at 398-99 (arguing that a statute "can as easily be abrogated by 'a genuine proper custom of not applying it' as by 'a custom which sets up another positive rule instead of the written law;' for they are really both the same") (quoting VON SAVIGNY, *supra* note 180, at 157).

187. See *id.* at 409 ("The doctrine of absolute sovereignty] leaves no room for the abrogation of an English statute by a protracted administrative failure to enforce it, even in the face of its widespread and long-continued violation. Regardless of the injustice, English courts are always bound to apply desuetudinal acts in those prosecutions properly before them."); see also 1 BLACKSTONE, *supra* note 45, at *76-77 ("[N]o custom can prevail against an express act of parliament.").

188. For example, Thomas Jefferson wrote, "[B]efore the revolution, Coke [on] Littleton was the universal elementary book of law students, and a sounder [W]hig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties." 10 THE WRITINGS OF THOMAS JEFFERSON 376 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1899); see also CORWIN, *supra* note 148, at 56-57; INTRODUCTION TO LAW, LIBERTY AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE, at xiii-xiv (Allen D. Boyer ed., 2004) ("Coke's works have been to the common law what Shakespeare has been to literature, and the King James Bible to religion.") (citing William Holdsworth); *id.* at xiii ("Wherever the common law has been applied, Coke's

judge, the Stuart kings claimed the power of absolute monarchs much more aggressively than had their Tudor predecessors.¹⁸⁹ These claims and the reaction they provoked led ultimately to the Petition of Right, the English Civil War, the Glorious Revolution, and the adoption of the English Bill of Rights.¹⁹⁰

In his writings, Coke attempted to accommodate both the doctrine of absolute sovereignty and the doctrine that sovereignty is limited by the fundamental principles of the common law. On the one hand, he acknowledged that king and parliament, acting together, had “transcendent and absolute”¹⁹¹ power, and that this included the power to “control”¹⁹² the common law. On the other hand, he repeatedly claimed that neither king nor parliament could legitimately alter fundamental common law principles, and that any attempt to do so would endanger the very “fabrick of the Commonwealth.”¹⁹³ Coke sometimes tried to reconcile these conflicting views by claiming that the king and parliament had too much wisdom (“ultimum Sapientiae”)¹⁹⁴ to pass laws that fundamentally conflict with the common law. Sometimes, however, he simply asserted that any royal or parliamentary effort to alter fundamental common law principles would be “void.”¹⁹⁵ For example, acting as a royal judge, Coke famously stated in dicta that parliament lacked the authority to make a party a judge in its own case, for this would violate basic principles of justice reflected in the common law.¹⁹⁶ Acting as a member of parliament, Coke led the charge for the Petition of Right, arguing that the royal prerogative power was limited by fundamental common law principles such as those reflected in the Magna Carta.¹⁹⁷

influence has been monumental.”); STEPHEN D. WHITE, SIR EDWARD COKE AND “THE GRIEVANCES OF THE COMMONWEALTH,” 1621-1628, at 9-11 (1979).

189. See Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1781.

190. See *id.* at 1781-86.

191. 4 COKE, *supra* note 148, at 1133.

192. 1 *id.* at 711.

193. 2 *id.* at 907.

194. 4 *id.* at 1067.

195. See COKE, *Dr. Bonham's Case*, *supra* note 149, at 275.

196. See *id.*

197. See Coke, *Petition of Right*, *supra* note 149 (“I know that prerogative is part of the law, but ‘Sovereign Power’ is no parliamentary word.... Take we heed what we yield unto: Magna Charta is such a fellow, that he will have no ‘Sovereign.’ I wonder this ‘Sovereign’ was not in Magna Charta, or in the confirmations of it. If we grant this, by implication we give a

Coke's treatment of desuetude reflected a similar balancing act. He denied that desuetude could invalidate a statute, asserting that "a man cannot prescribe or alledge a custome against a statute,"¹⁹⁸ and that "an act of parliament by non-user [cannot] be antiquated or lose his force."¹⁹⁹ At the same time, he argued that long nonenforcement of a statute may affect the way it is interpreted, permitting judges to conclude that it does not impose the prohibitions and penalties it seems to impose: "as usage is a good interpreter of lawes, so non usage ... is a great intendment that the law will not beare it."²⁰⁰

More significantly for our purposes, Coke identified one category of statute that a contrary custom could void: declaratory statutes. A declaratory statute is an act of parliament that does not purport to create new law, but merely restates the custom of the realm.²⁰¹ Sometimes declaratory statutes were enacted to reaffirm fundamental common law rights. For example, Magna Carta and the numerous statutes enacted to reaffirm it were all considered declaratory statutes. Sometimes declaratory statutes affirmed more mundane common law rules, such as the rule that it is unlawful to cut down trees in a forest "without the view of the Forester."²⁰²

Because a declaratory statute purports to say what the custom of the realm is, it may be voided if the evidence shows that the actual

'Sovereign Power' above all laws.').

198. EDWARD COKE, 1 THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 170 (Phila., Johnson & Warner, & Samuel R. Fisher, Jr. 1812).

199. *Id.* § 108.

200. *Id.* Coke's ambivalence as to how to treat desuete statutes is typical of the attitude reflected in a variety of seventeenth and eighteenth century English legal sources. *See, e.g.*, *The King v. Cnty. of Cumberland*, [1795] 101 Eng. Rep. 507 (K.B.) (refusing to apply a statute that had not been enforced for ninety years); *Leigh v. Kent*, [1789] 100 Eng. Rep. 621, 622 (K.B.) ("[W]here the words of an Act of Parliament are plain it cannot be repealed by non-user, yet when there has been a series of practice, without any exception, it goes a long way to explain them where there is any ambiguity."); An Act for Repealing an Act Made in the First Year of the Reign of King Henry the Fifth, 14 Geo. 3, c. 58 (1774) [hereinafter An Act for Repealing an Act] (noting that the acts referenced in the statute's title "have been found, by long Usage, to be unnecessary, and are become obsolete" and explicitly repealing such acts "[i]n order ... to obviate all Doubts that may arise upon the same"); *see also* FARDINANDO PULTON, KALENDAR OF ALL THE STATUTES (1608 & 1617) (marking a variety of statutes as "obsoletum, that is, worn out of use"); Bonfield, *supra* note 150, at 406-07 (discussing these sources).

201. *See* An Act for Repealing an Act, *supra* note 200 (noting that previous statutes have been rendered obsolete through custom).

202. *See* COKE, *supra* note 148, at 709.

custom is contrary to the statute. For example, Coke discussed a declaratory statute from the time of Edward I that affirmed a common law rule forbidding anyone from cutting down trees in his own forest “without the view of [a] Forester.”²⁰³ During the reign of Queen Elizabeth I, Coke noted, a man was able to defeat a prosecution for violating this statute by showing that the actual custom permitted him to cut down trees in the forest even if the forester was not present. Just as a litigant is permitted to “allege a Custome against the Common Law, so a man may doe so against [a declaratory] Statute.”²⁰⁴

To the extent Coke’s writings implied that the long usage (or long non-usage) of the common law could undermine or void an unreasonable statute, such implications were increasingly rejected in eighteenth century England, as parliament consolidated its status as the possessor of absolute sovereign power.²⁰⁵ For example, although William Blackstone agreed with Coke and other common law thinkers that the common law was normatively superior to statutory law, he denied that the common law could ever void a statute—parliament possessed “absolute despotic power”²⁰⁶ that could not be controlled by the common law or anything else. The Americans who revolted against England and insisted on the Bill of Rights had very different ideas about the relationship between sovereign power and customary rights.²⁰⁷ These ideas will be discussed in the next Part.

C. Desuetude and the Cruel and Unusual Punishments Clause

The United States Constitution is, in some ways, quite different from the English constitution. The United States Constitution does not derive its authority from custom²⁰⁸ but from a formal act of ratification by the people, who are themselves conceived as the

203. *See id.*

204. *See id.*; *see also* Bonfield, *supra* note 150, at 406 (“[I]f there is a long failure to enforce a statute declaratory of the common law on an inconsistent practice, it may be expressly abrogated.”).

205. *See* Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1789-90.

206. BLACKSTONE, *supra* note 45, at *90.

207. *See* Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1792-1810.

208. For a discussion of the customary nature of the English Constitution, see POCOCK, *supra* note 147, at 30-69.

sovereign.²⁰⁹ The United States Constitution also creates a federal government with supreme but limited, enumerated powers, unlike the general authority possessed by the English sovereign.²¹⁰ But the anti-Federalists who opposed ratification of the Constitution, and who ultimately forced the adoption of the Bill of Rights, did not consider popular sovereignty or federalism to be sufficient protection against the potentially despotic power of the new federal government.²¹¹ They were particularly concerned about the fact that the federal government would not be bound by the fundamental principles of the common law, and they insisted on a Bill of Rights that would ensure the new government did not transgress these bounds.²¹² One of the rights included in the Bill of Rights was the prohibition of Cruel and Unusual Punishments,²¹³ a common law right that had been included in the English Bill of Rights a century

209. See U.S. CONST. pmb. (“We the People ... do ordain and establish this Constitution for the United States of America.”); see also, e.g., WHITTINGTON, *supra* note 42, at 55-61; Amar, *supra* note 43, at 35-37; McConnell, *supra* note 43.

210. See, e.g., James Wilson, Speech Before the Pennsylvania Convention for Ratification of the United States Constitution (Nov. 20, 1787), in ELLIOT’S DEBATES, *supra* note 132, at 453-54 (“[The new federal government’s powers] are particularly enumerated. In [such a] case, the implied result is, that nothing more is intended to be given than what is so enumerated, unless it results from the nature of the government itself.”).

211. See Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1800-08 and sources cited therein.

212. See *id.*; see also, e.g., Letter from the Federal Farmer to the Republican, No. 3 (Oct. 10, 1787), reprinted in LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 13, 24 (Walter Hartwell Bennett ed., 1978) (“I confess in the constitution of this supreme court, as left by the constitution, I do not see a spark of freedom or a shadow of our own or the British common law.”); Abraham Holmes, Speech in the Massachusetts Convention for the Ratification of the United States Constitution, in ELLIOT’S DEBATES, *supra* note 132, at 109, 111 (arguing that the lack of common law constraints in the Constitution would allow Congress to transform itself into the equivalent of the Spanish Inquisition); George Mason, *Objections to this Constitution of Government* (Sept. 15, 1787), reprinted in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 637, 637-40 (Max Farrand ed., 1911) (“There is no Declaration of Rights.... Nor are the people secured even in the enjoyment of the benefit of the common law.”).

213. See U.S. CONST. amend. VIII.

before,²¹⁴ but that was thought to date back to early English history.²¹⁵

In both England and America, “cruel and unusual” meant cruel in light of the long usage of the common law.²¹⁶ The Cruel and Unusual Punishments Clause forbids legislatures and judges from imposing punishments that are significantly harsher than prior practice would permit.²¹⁷ Thus, the Clause makes statutes authorizing criminal punishments analogous to the declaratory statutes discussed earlier.²¹⁸ Like a declaratory statute, punishment statutes

214. The prohibition of “cruel and unusual punishments” first appeared in 1689, in the English Bill of Rights. *See* An Act Declaring, *supra* note 173, at 143 (prohibiting “cruell and unusuall Punishments”). In 1776, George Mason included this prohibition in the Virginia Declaration of Rights. *See* VA. DECLARATION OF RIGHTS art. IX (1776), available at <http://perma.cc/M4DU-ANUA>. By the time the United States Constitution was ratified, nine state constitutions prohibited “cruel and unusual,” “cruel or unusual,” or “cruel” punishments. *See* Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1798-99 and sources cited therein. The Virginia ratifying convention included this prohibition in its proposed amendments to the United States Constitution. *See* ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 174 (1983). James Madison ultimately proposed the prohibition of cruel and unusual punishments to the First Congress, and it was adopted as part of the Bill of Rights. *See id.* at 202.

215. *See* 10 H.C. JOUR. 247 (1689) (noting the “ancient Right of the People of *England* that they should not be subjected to cruel and unusual Punishments”).

216. During the American Revolution and again during the debates over the ratification of the United States Constitution, Americans consistently used the word “unusual” to condemn governmental actions that transgress common law bounds established through long usage. For example, in the run-up to the American Revolution the Virginia House of Burgesses called an English plan to try American protesters in England “new, unusual, ... unconstitutional and illegal.” JOURNALS OF THE HOUSE OF BURGESSES 1766-1769, at 215 (John Pendleton Kennedy ed., 1906); *see also, e.g.*, THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776) (complaining of the recent English practice of calling colonial legislatures at “places unusual,” that is, non-customary locations). Similarly, during the debate over ratification of the United States Constitution, Patrick Henry argued that because the new federal government was not constrained by the common law, it would be a disastrous series of “new and unusual experiments in government,” and that Congress would abuse the Treaty Power, the Militia Power, and the power to prosecute crime, respectively, to inflict “unusual punishments,” “unusual and severe punishments,” and “cruel and unusual punishments.” *See* Patrick Henry, Speech to the Virginia Ratifying Convention for the United States Constitution (June 9, 1788), in 1 ELLIOT’S DEBATES, *supra* note 132, at 172, 412, 447-48, 503-04; *see also, e.g.*, Mason, *supra* note 212 (warning that the lack of common law constraints in the new Constitution would permit Congress to create “new crimes, inflict unusual and severe punishments, and extend their powers”). *See generally* Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1792-1810.

217. *See generally* Stinneford, *Rethinking Proportionality*, *supra* note 8; Stinneford, *The Original Meaning of Unusual*, *supra* note 8.

218. *See supra* Part II.B.3.

can become void if they are inconsistent with the actual custom of the jurisdiction—at least where their deviation from custom is in the direction of greater cruelty.

The requirement that punishment statutes comply with long-standing custom was meant to prevent the government from imposing barbaric methods of punishment that were not part of the common law tradition, such as the “*racks* and *gibbets*” employed by the Inquisition.²¹⁹ It was also meant to prevent the government from imposing punishments that were cruel because they were excessive in relation to the crime for which they were imposed.²²⁰ The basic method for determining whether a punishment was barbaric or excessive was to compare it to punishment practices that enjoyed long usage.²²¹

1. Ducking and Desuetude: The Treatment of Once Traditional Punishments in State Courts

The United States Supreme Court did not decide a case under the Cruel and Unusual Punishments Clause until nearly a century after the Bill of Rights was adopted.²²² During this time period, however, there were a handful of state court decisions concerning state constitutional analogues to the Cruel and Unusual Punishments Clause.²²³ Virtually all of these decisions recognized that a punishment was cruel and unusual if it was unduly harsh in light of long usage.²²⁴

One of these decisions, *James v. Commonwealth*, demonstrated that a once traditional punishment could become unusual if it fell out of usage for a sufficient period of time.²²⁵ Nancy James was convicted of being a “common scold” and was sentenced to be placed on a “ducking or cucking-stool” and “plunged three times in the water.”²²⁶ She appealed this sentence to the Pennsylvania Supreme

219. See ELLIOT’S DEBATES, *supra* note 132.

220. See Stinneford, *Rethinking Proportionality*, *supra* note 8, at 907.

221. See *id.* at 968-78; Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1815-19.

222. See *Wilkerson v. Utah*, 99 U.S. 130 (1878).

223. See Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1810-13 and cases cited therein.

224. See *id.*; see also Stinneford, *Rethinking Proportionality*, *supra* note 8, at 947-52.

225. 12 Serg. & Rawle 220, 227 (Pa. 1825).

226. *Id.* at 220, 225.

Court, arguing that the punishment was unconstitutionally cruel, and that the cruelty of the punishment was shown by the fact that it had fallen out of usage many years before.²²⁷

The Pennsylvania Supreme Court started by taking the position that the “long disuetude of any law amounts to its repeal.”²²⁸ As societal circumstances and attitudes change, so that the law’s “objects vanish or [its] reason ceases,” long non-usage may render the law “obsolete.”²²⁹ In other words, “total disuse of any civil institution for ages past, may afford just and rational objections against disrespected and superannuated ordinances.”²³⁰

The common law doctrine of desuetude is a particularly important constraint on criminal punishment, the *James* court asserted, because it allows the law to accommodate societal advancements in “manners” and “education” through the “silent and gradual disuse of barbarous criminal punishments.”²³¹ The court noted several examples of once traditional punishments that lost their validity through long non-usage. These included laws calling for the execution of witches and gypsies, neither of which had been enforced for over a century, and which thus had been “repealed by the voice of humanity, and not by positive law.”²³² Similarly, the punishment for those convicted of conspiracy had once been to be “discredited as jurors or witnesses, to forfeit their goods and chattels and lands for life, to have their fields wasted, houses razed, their trees rooted up, their own bodies committed to prison.”²³³ But this punishment was made “obsolete” by “long disuse” and was replaced by a punishment of “fine and imprisonment, or the pillory.”²³⁴ The common law also permitted numerous methods of punishment, many of which were barbarous by the standards of 1825. These methods included execution by “hanging, burning, boiling, pressing,” and noncapital punishments such as “cutting off the hand or ear, burning or branding the hand, face, shoulders, whipping, imprisonment, stocking, sitting in the pillory, or on the cucking-stool.... pulling out

227. *See id.* at 221-22.

228. *Id.* at 227.

229. *Id.*

230. *Id.* at 228.

231. *Id.*

232. *Id.* at 227.

233. *Id.* at 228.

234. *Id.*

the tongue for false rumors, cutting off the nose, and for adultery, taking away the privy parts.”²³⁵ Some of these punishments—such as hanging, imprisonment, and the pillory—were still in use. But others had become “nothing more than the memorials of times that are past, as the usages of our uncivilized ancestors.”²³⁶ Because such practices had suffered long non-usage, they were—“Blessed be GOD!”²³⁷—no longer part of the Anglo-American legal tradition.

The *James* court considered ducking to be a barbarous punishment comparable to those listed above because it was degrading to women and to the old and poor, and because it imposed this degradation without advancing any evident social good.²³⁸ The punishment was “revolting to humanity” and was “invented in an age of barbarism.”²³⁹ It arose at a time when men were allowed to beat their wives, and when literate women were denied the benefit of clergy in capital cases, so that they would be executed for the same crimes for which “their more ignorant husbands, who could with difficulty read even the neck-verse, were burnt in the hand with a cold iron.”²⁴⁰ Only a woman could be subjected to ducking “while the most scandalously abusive and railing man goes unpunished.”²⁴¹ This disparity showed that ducking “degraded woman to a mere *thing*, to a *nuisance*, and does not consider her as a person.”²⁴² The practice was also objectionable because it discriminated against the poor and the old: “it was never intended for the rich, and never was inflicted on beauty and youth.”²⁴³ Finally, ducking failed to advance the legitimate purposes of punishment:

If the reformation of the culprit, and prevention of the crime, be the just foundation and object of all punishments, nothing could be further removed from these salutary ends, than the infliction in question. It destroys all personal respect; the women thus

235. *Id.*

236. *Id.*

237. *Id.*

238. *See id.* at 225-26, 229.

239. *Id.* at 225.

240. *Id.*

241. *Id.* at 226.

242. *Id.* at 225.

243. *Id.* at 230.

punished would scold on for life, and the exhibition would be far from being beneficial to the spectators.²⁴⁴

The fact that ducking had “sunk in oblivion, in the general improvement of society”²⁴⁵ demonstrated its barbarity and cruelty. It had ceased to be imposed in England over a century before: “[N]o poor woman, in that country, has suffered under the edge of a law so barbarous, for the last century; like unscoured armor, it is hung up by the wall; like the law of witchcraft, it has remained unused.”²⁴⁶ The last time anyone tried to impose ducking in England, Chief Justice Holt rejected it on the ground that it would “only harden the criminal; and, if she were once ducked, she would scold all the days of her life.”²⁴⁷ Although two women in Pennsylvania were subjected to ducking toward the end of the eighteenth century, the *James* court refused to give any weight to these precedents because the judges who imposed them were not lawyers and did not understand the common law.²⁴⁸ Aside from these two examples, there was no evidence that ducking had ever become part of the common usage of Pennsylvania.²⁴⁹ The practice had been implicitly disallowed by the penal code of 1790, the object of which was the “abolition of all infamous, disgraceful, public punishments—all cruel and unnatural punishments—for all the classes of minor offences and misdemeanors, to which they had been before applied.”²⁵⁰ No instances of punishment by ducking had arisen in over forty years prior to the Pennsylvania Supreme Court’s decision in *James*.²⁵¹

For all of these reasons, the *James* court held that the once traditional punishment of ducking was no longer permissible under Pennsylvania common law. Because the punishment lacked legal authorization, the court declined to decide whether it was unconstitutionally cruel.²⁵² But the *James* court strongly implied that the long non-usage of this practice was conclusive evidence of its

244. *Id.* at 234.

245. *Id.* at 225.

246. *Id.* at 226-27.

247. *Id.* at 229.

248. *See id.* at 233.

249. *Id.* at 232-33.

250. *Id.* at 231.

251. *Id.* at 234.

252. *Id.* at 235-36.

cruelty, and concluded by expressing the hope “that we shall hereafter hear nothing of the ducking-stool, or other remains of the customs of barbarous ages.”²⁵³

253. *Id.* at 236 (quoting DUPONCEAU ON JURISDICTION 96). Early American courts were divided as to whether desuetude could invalidate a statute in cases that did not involve a claim that the statute imposed a cruel and unusual punishment or violated another customary right embedded in the Constitution. Some courts asserted that desuetude was not, in itself, sufficient ground for invalidating a statute. Interestingly, this assertion appears to have been dicta in most such cases because the conditions necessary for desuetude had not been established. *See, e.g.*, *Commonwealth v. Hoover*, 1 Browne’s Reports, App. 25, 28-29 (Pa. Ct. Com. Pl. 1811) (expressing ambivalence as to whether a statute could be invalidated through desuetude, but concluding that the statute in question was not desuete because it had been revisited by the state assembly seven years before this case arose). Also in *Respublica v. Comm’rs*, 4 Yeates 181 (Pa. 1805), the court upheld a 1795 statute despite the fact that the authorities had followed an agreement not to enforce the statute between 1800 and 1805. In reaching this decision, the court asserted that “[a] statute cannot be repealed by non-user.” *Id.* at 183. This assertion was arguably dictum because a five-year gap in enforcement would not normally be sufficient to establish desuetude. In *Glancey v. Jones*, 4 Yeates 212 (Pa. 1805), the court upheld a statutory provision forbidding a sheriff from advertising land for sale without the proper writ. In reaching this decision, the court stated, “[w]e know of no practice” of ignoring this statute in the relevant county, but that even if there were such a practice “it is bad in itself No usage can repeal the positive provisions of an act of the legislature.” *Id.* at 215. In *State v. Findley*, 2 S.C.L. (2 Bay) 418 (S.C. 1802), the defendant was prosecuted for “taking away a girl under sixteen years of age, and deflowering her, without the consent of her parents.” *Id.* at 418. Although neither of the parties appears to have claimed that the statute was desuete, either the court or the case reporter noted as an aside that this prosecution was “the first ... which ever took place in *Carolina*, under the statute of *Philip and Mary*, for this offence.... It may not be amiss here to observe, that it does not follow that because a statute has been a long time dormant, it is therefore to be considered as obsolete.” *Id.* at 421. Other early American courts held that desuetude could invalidate a statute even if there was no claim that the statute imposed a cruel and unusual punishment or violated a customary right embedded in the Constitution. *See, e.g.*, *Rogers v. Lofland*, 1 Del. Cas. 529 (Del. Ct. Com. Pl. 1815) (upholding sheriff’s return of a levy that did not comply with statute governing such returns, where there had been a twenty-seven-year practice of ignoring the statute); *Hill v. Smith*, 1 Morris 95, 107 (Iowa 1840) (“If custom can make laws, it can, when long acquiesced in, recognized and countenanced by the sovereign power, also repeal them.”); *Porter’s Appeals*, 30 Pa. 496, 498-99 (1858) (“I cannot assent to the doctrine that the usages and customs of an advancing people are incapable of displacing an Act of Assembly that has become unfitted for modern use.... The notion that statutes are not repealable by non-user, is founded on two cases of not very high authority, reported in 4 *Yeates* 181 and 215, both of which depend on an *obiter dictum* in *White v. Boot*, 2 *Term R.* 275, a case that was overruled in *Leigh v. Kent*, 3 *Term R.* 364. A proposition no better supported cannot prevail against the clear reasoning [of cases supporting desuetude].”); *Wright v. Crane*, 13 Serg. & Rawle 447, 452 (Pa. 1826) (“It must be a very strong case, to justify the court in deciding, that an act standing in the statute book, unrepealed, is obsolete and invalid. I will not say that such a case may not exist—where there has been a nonuser for a great number of years—where, from a change of times, and manners, an ancient sleeping statute would do great mischief, if suddenly brought into action—where a long practice, inconsistent with it, has prevailed, and especially,

2. *Painful Death and Desuetude: The Treatment of Once Traditional Punishments in the Supreme Court of the United States, Part 1*

From the beginning, the Supreme Court's death penalty jurisprudence focused on desuetude. The Court's very first merits decision under the Cruel and Unusual Punishments Clause, *Wilkinson v. Utah*, made a constitutional distinction between customary punishments that are still in practice and those that fell out of usage long ago.²⁵⁴ In *Wilkinson*, the defendant was convicted of premeditated murder and was sentenced to be executed by firing squad.²⁵⁵ He challenged this punishment as cruel and unusual.²⁵⁶ The Supreme Court quickly disposed of this claim by noting that execution by shooting was a customary form of punishment that was still regularly practiced.²⁵⁷

Having made this relatively easy decision, the Supreme Court went on to contrast death by firing squad to the various forms of punishment described in Volume Four of Blackstone's *Commentaries on the Laws of England*.²⁵⁸ Blackstone described at some length the gruesome fate that the common law provided for those who committed crimes like treason and murder. These punishments added "circumstances of terror, pain, or disgrace" to the execution, including "being drawn or dragged to the place of execution," "emboweling alive, beheading, and quartering," and "public dissection."²⁵⁹ Women convicted of treason were sentenced to be "burned

where, from other and later statutes, it might fairly be inferred, that, in the apprehension of the legislature, the old one was not in force. But this is not the case [with respect to the statute in issue.]; *O'Hanlon v. Myers*, 44 S.C.L. (10 Rich.) 128, 131 (S.C. 1856) (finding colonial-era statutes criminalizing drunkenness desuete when they had been pronounced obsolete more than a century before "by an eminent jurist and the earliest compiler of our statute law," and when the mode of punishment designated in the statute was no longer available under South Carolina law); *Williamson v. Bacot*, 1 S.C.L. (1 Bay) 62 (S.C. 1787) (statute declaring particular species of money legal tender not enforceable where species has gone out of circulation and become worthless).

254. 99 U.S. 130, 136-37 (1878).

255. *Id.* at 130-31.

256. *Id.* at 133.

257. *Id.* at 133-35.

258. *Id.* at 135.

259. 4 BLACKSTONE, *supra* note 45, at *370.

alive.”²⁶⁰ Although there was an “almost general mitigation” of the cruelest aspects of these punishments—primarily by rendering the offender unconscious before burning her or tearing him to pieces²⁶¹—they were all lawful punishments at the time Blackstone wrote.

Although these punishments were permissible at common law, the *Wilkerson* Court stated that they were obviously unconstitutional under the Cruel and Unusual Punishments Clause: “it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.”²⁶² The *Wilkerson* Court’s assertion that it would be unconstitutional to add unnecessary pain or terror to executions has become bedrock constitutional doctrine, apparently accepted by all members of the Supreme Court in a continuous line of cases leading up to today.²⁶³ Indeed, subsequent Supreme Court opinions have described the *Wilkerson* dictum about unnecessary pain as a not terribly noteworthy application of traditional common law punish-

260. *Id.*

261. *Id.*

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

263. This unanimity was vividly displayed in the relatively recent case of *Baze v. Rees*, in which every member of the the Supreme Court wrote or joined opinions citing *Wilkerson* with approval, despite the fact that the Court could not reach a consensus as to how to determine the constitutionality of death by lethal injection. See *Baze v. Rees*, 553 U.S. 35, 48 (2008) (plurality opinion) (citing *Wilkerson* for the proposition that the Cruel and Unusual Punishments Clause forbids “the deliberate infliction of pain for the sake of pain”); *id.* at 101 (Thomas, J., concurring) (citing *Wilkerson* for the proposition that the Cruel and Unusual Punishments Clause forbids “purposely torturous punishments”); *id.* at 114 (Ginsburg, J., dissenting) (agreeing with the holding of *Wilkerson* but contending that the Cruel and Unusual Punishments Clause forbids a broader group of punishments than those listed therein); see also, e.g., *Graham v. Florida*, 560 U.S. 48, 59 (2010) (citing *Wilkerson* for the proposition that “[t]he Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances”); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (citing *Wilkerson* for the proposition that the death penalty “must not involve the unnecessary and wanton infliction of pain”); *Robinson v. California*, 370 U.S. 660, 676 (1962) (citing *Wilkerson* for the proposition that inherently cruel punishments such as disembowelment are unconstitutional); *In re Kemmler*, 136 U.S. 436, 447 (1890) (holding that use of the electric chair was permissible because it did not involve “torture or a lingering death” and that, although this method of punishment “might be said to be unusual because it was new,” it could not be called cruel because the legislature had concluded that it was “more humane” than other methods of execution, and there was no evidence that this conclusion was incorrect).

ment standards.²⁶⁴ But how could this be, given that *Wilkerson* expressly forbids what Blackstone said the common law expressly permits? The answer is desuetude. In Blackstone's time, gruesome methods of execution were already falling out of usage.²⁶⁵ By the time *Wilkerson* was decided a century later, such punishments had fallen out of usage for so long that the Supreme Court could not even imagine authorizing them.²⁶⁶ A traditional group of punishments had become cruel and unusual.

3. *Excessive Punishments and Desuetude: The Treatment of Once Traditional Punishments in the Supreme Court of the United States, Part 2*

The Supreme Court's proportionality jurisprudence has also incorporated desuetude from the very beginning. Justice Field's dissent in *O'Neil v. Vermont*, which was the first extended discussion of excessive punishments by a Supreme Court Justice, implicitly relied on the doctrine of desuetude.²⁶⁷ Field argued that O'Neil's sentence of fifty-four and one-half years in prison for selling liquor without a license was cruelly excessive because it was more severe than "anything which I have been able to find in the records of our courts for the present century."²⁶⁸ Field did not go back to Blackstone or to eighteenth century punishment practices more generally. If he had done so, he would have found some punishments that would appear more disproportionate than O'Neil's—for example, the English law authorizing the death penalty for cutting down a cherry tree in an orchard.²⁶⁹ For Field, the relevant reference point for measuring excessiveness was not all punishments ever permitted under the English and American constitutional orders, but only those that had had been imposed during the past

264. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.").

265. See 4 BLACKSTONE, *supra* note 45, at *370.

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

267. 144 U.S. 323, 337-66 (1892) (Field, J., dissenting). The majority in *O'Neil* declined to consider O'Neil's Eighth Amendment claim on the ground that the Eighth Amendment did not apply to the states. See *id.* at 331-32.

268. *Id.* at 338.

269. See 4 BLACKSTONE, *supra* note 45, at *4.

century.²⁷⁰ Punishments that had not been imposed during that time period were not relevant because their long disuse removed any presumption of reasonableness they may once have held.

Weems v. United States, the first case in which the Supreme Court declared a punishment cruel and unusual, also relied on the doctrine of desuetude.²⁷¹ In *Weems*, the defendant was sentenced to “cadena temporal”—a punishment involving at least twelve years imprisonment at “hard and painful labor” with shackles about the wrists and ankles, followed by loss of numerous civil rights and subjection to lifetime surveillance by the state²⁷²—for the strict liability offense of entering a false statement in a public record.²⁷³ Like Justice Field’s dissent in *O’Neil*, the *Weems* majority emphasized that this punishment was harsher in relation to Weems’s crime than any imposed within the American criminal justice system in recent memory.²⁷⁴

The *Weems* court went beyond Justice Field, however, by expressly arguing that desuetude is an engine of constitutional development. The Court noted that:

Cooley in his *Constitutional Limitations* says that it may be well doubted if the right exist “to establish the whipping post and the pillory in those States where they were never recognized as instruments of punishment, or in those States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments.” The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.²⁷⁵

270. *O’Neil*, 144 U.S. at 338.

271. 217 U.S. 349 (1910).

272. *Id.* at 364-66.

273. *Id.* at 363.

274. *Id.* at 366-67, 377 (“Such penalties for such offences amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths [and this punishment] has no fellow in American legislation.”).

275. *Id.* at 378 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 329-30 (Boston, Little, Brown, & Co. 1868)).

This is an interesting passage. Cooley's *Constitutional Limitations* describes desuetude in a relatively limited sense. If a practice like the whipping post or the pillory was never part of the usage of a jurisdiction, or fell out of usage prior to the adoption of the jurisdiction's cruel and unusual punishments clause, such a practice might be forbidden because it is "unusual," that is, not part of the jurisdiction's legal usage.²⁷⁶

The *Weems* court, on the other hand, referred to desuetude in its fullest sense. Just as the *James* court held that desuetude permitted the development of the law through the "silent and gradual disuse of barbarous criminal punishments,"²⁷⁷ the *Weems* court stated that desuetude may inform our sense of what is cruel and unusual.²⁷⁸ The Cruel and Unusual Punishments Clause is "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."²⁷⁹ When a once traditional punishment falls out of usage long enough to demonstrate a stable, multigenerational consensus against the punishment, the Cruel and Unusual Punishments Clause may be interpreted to recognize this change in societal standards.²⁸⁰ In this sense, the Clause may be considered "progressive."²⁸¹ Thus, the *Weems* court was able to conclude that even if a punishment like that inflicted on Weems would once have been considered acceptable in the American criminal justice system, it was no longer acceptable.²⁸²

276. *See id.*

277. *James v. Commonwealth*, 12 Serg. & Rawle 220, 228 (Pa. 1825).

278. *Weems*, 217 U.S. at 378.

279. *Id.*

280. *Id.*

281. *Id.*

282. The dissent in *Weems* adopted a remarkably Scalia-like approach to the original meaning of the Cruel and Unusual Punishments Clause, arguing that if a punishment was constitutional at the time the Eighth Amendment was adopted, it could never be considered cruel and unusual. *See id.* at 409-10 (White, J., dissenting) (asserting that "cruel" meant the imposition of "unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel methods of bodily torture which had been made use of prior to the bill of rights of 1689" and "unusual" meant judicial imposition of non-customary punishments unauthorized by statute).

4. *Denationalization and Evolving Standards of Decency: The Death of Desuetude in the Supreme Court of the United States*

The Supreme Court turned decisively away from desuetude in *Trop v. Dulles*.²⁸³ In *Trop*, the petitioner was stripped of his American citizenship after being convicted of wartime desertion from the military.²⁸⁴ This punishment was inflicted under a statute enacted in 1940²⁸⁵ that was designed to update a Civil War Era statute depriving deserters of the “rights of citizenship.”²⁸⁶ A plurality of the Court invalidated the statute on the ground that it was contrary to the “evolving standards of decency that mark the progress of a maturing society.”²⁸⁷ In making this determination, the Court did not examine whether the punishment was “contrary to long usage,” nor did it ask whether the punishment had fallen out of usage during the century between the Civil War and the imposition of this punishment on *Trop*.²⁸⁸ Instead, the plurality simply concluded that denationalization was an unacceptable punishment under the plurality’s own moral judgment.²⁸⁹ The plurality’s moral judgment was bolstered by the fact that denationalization was not imposed as punishment in most “civilized nations,”²⁹⁰ but otherwise the plurality made no reference to any external sources for determining what current “standards of decency” require.²⁹¹ In short, the *Trop* plurality engaged in the abstract moral reasoning, unmediated by tradition, and advocated by Dworkin, Perry, and other “living originalists.”²⁹²

283. 356 U.S. 86 (1958).

284. *Id.* at 87.

285. *Id.* at 88.

286. *Id.* at 89.

287. *Id.* at 101.

288. There was apparently some ambiguity as to whether the Civil War-era statute actually deprived deserters of citizenship, or merely deprived them of certain rights of citizenship, such as the right to vote. *Id.* at 89. If the 1940 statute went further than the civil War statute by stripping deserters of citizenship itself, it was arguably new and therefore “unusual.” The *Trop* plurality did not pursue this line of reasoning.

289. *See id.* at 101-02 (describing the consequences of denationalization that the *Trop* plurality considered unacceptably cruel).

290. *Id.* at 102.

291. *See id.* at 101.

292. *See supra* Part I.B.3.

The Supreme Court's move in *Trop* represented a fundamental break from its prior method of determining whether a punishment is cruel and unusual. Instead of looking to prior practice to determine whether there is a stable, multigenerational societal consensus against a given punishment, the Court would henceforth try to decide whether the punishment meets the standards of today.²⁹³ This new approach has lacked the reliability and stability that come from a focus on long usage or long nonusage.²⁹⁴ It has also created ambiguity as to whether the Supreme Court should rely on its own moral judgment or look for evidence of some kind of current "societal consensus" against the punishment.²⁹⁵ As one commentator observed, the result has been a "train wreck."²⁹⁶ Although the Supreme Court has limited the application of the death penalty in some circumstances,²⁹⁷ and has made it more difficult to impose life sentences with no possibility of parole on juveniles,²⁹⁸ its reasoning in these cases has ranged from implausible to indefensible.²⁹⁹ Even worse, the Supreme Court has abandoned constitutional review of

293. *Trop*, 356 U.S. at 101.

294. For example, in *Stanford v. Kentucky*, the Supreme Court held that it did not violate the Constitution to execute sixteen- or seventeen-year-old murderers. 492 U.S. 361, 380 (1989). Sixteen years later, the Court ruled in *Roper v. Simmons*, that such executions did violate the Constitution. 543 U.S. 551, 578 (2005). Similarly, the Court held in *Penry v. Lynaugh* that execution of the mentally retarded did not violate the Constitution. 492 U.S. 302, 340 (1989). Thirteen years later, in *Atkins v. Virginia*, the Court held that such executions were unconstitutional. 536 U.S. 304, 321 (2002). Neither the *Roper* court nor the *Atkins* court held that the prior cases were wrongly decided. Rather, they determined that a far from overpowering trend toward abolition among the states showed that such punishments no longer comported with current standards of decency. See *Roper*, 543 U.S. at 565 (noting a five state trend toward abolition of the death penalty for minors since *Stanford* was decided in 1989); *Atkins*, 536 U.S. at 313-16 (noting a sixteen state trend toward abolition of the death penalty for the mentally disabled since *Penry* was decided in 1987). These decisions led Justice Scalia to exclaim in exasperation that *Atkins* and *Roper* were based on the proposition "that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*." *Roper*, 543 U.S. at 608 (Scalia, J., dissenting).

295. See *supra* notes 101-102.

296. Benjamin Wittes, *What Is "Cruel and Unusual"?*, 134 POL'Y REV. 15, 15-16 (2005).

297. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 431-34 (2008); *Roper*, 543 U.S. at 566-68; *Atkins*, 536 U.S. at 318-19; *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

298. See *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012); *Graham v. Florida*, 560 U.S. 48, 82 (2010).

299. See Stinneford, *Rethinking Proportionality*, *supra* note 8, at 910-26; Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1747-57.

prison sentences, leaving 99.999% of felony offenders beyond the protection of the Cruel and Unusual Punishments Clause.³⁰⁰ The Supreme Court's half-century-old experiment with evolving standards of decency has not been a happy one.

III. IMPLICATIONS OF DESUETUDE AS A CONSTITUTIONAL STANDARD

This Part of the Article will briefly examine the standards of adjudication implied by the original meaning of the Cruel and Unusual Punishments Clause, and will describe the benefits and detriments associated with this approach to interpretation. Finally, it will assess what this approach tells us about the constitutionality of the death penalty at the federal and state levels.

A. *Standards of Adjudication*

The Cruel and Unusual Punishments Clause asks the Supreme Court to determine whether a given punishment practice is cruel in light of long usage. The Clause does not prohibit punishments that are “cruel and rare,” but those that are “cruel and new.”³⁰¹ A punishment is “new” if it has never been imposed before or if it is revived after having fallen out of usage long ago.³⁰²

The original meaning of the Cruel and Unusual Punishments Clause implies that the main focus of the Supreme Court's inquiry should be objective and straightforward. If a petitioner challenges a given method of punishment—like the firing squad in *Wilkinson*—the Court should first ask whether the punishment is “usual.”³⁰³ That is, it should ask whether the punishment has continuously been used in the jurisdiction for a long time.³⁰⁴ Similarly, if a petitioner challenges a given punishment as excessive—like the imposition of “cadena temporal” for a strict liability false

300. See Stinneford, *Rethinking Proportionality*, *supra* note 8, at 902-03 (arguing that the Supreme Court has restricted proportionality review to such an extent that “[l]ess than one one-thousandth of one percent of all felony offenders are better off than they would have been had the Supreme Court never engaged in proportionality review”).

301. See generally Stinneford, *Rethinking Proportionality*, *supra* note 8; Stinneford, *The Original Meaning of Unusual*, *supra* note 8.

302. See *supra* Part II.C.

303. See *Wilkinson v. Utah*, 99 U.S. 130 (1878).

304. See Stinneford, *The Original Meaning of Unusual*, *supra* note 8, at 1816.

statement crime in *Weems*—the Court should ask whether punishments like this one have customarily been imposed for crimes like this one.³⁰⁵

If the punishment is “usual,” this ends the inquiry; the punishment is constitutional. But if the punishment is new, then the Court must compare it with the punishment practices that have prevailed until now. If it is significantly harsher than those practices, it is cruel and unusual.

B. Benefits of This Approach

This standard for determining whether a punishment is cruel and unusual possesses the main strengths of both Scalia-style originalism and living originalism, with none of their principal weaknesses. Although the test for determining whether a punishment is cruel and unusual is not as “cut and dried”³⁰⁶ as Justice Scalia’s bright-line rules, it is still relatively determinate. Judges are capable of determining objectively whether a practice is new. They are also capable of determining the harshness of a new punishment in relation to the traditional practices it replaces. This inquiry involves an exercise of judgment, but it is judgment directed at an objective fact. The results of cases decided under this standard will be much more reliable and predictable than under the current “evolving standards of decency” approach.

This standard is also sensitive to cultural change in a way that Justice Scalia’s approach is not. If a once traditional practice falls out of usage and remains out of usage for a long time, this is powerful evidence that there is a stable, multigenerational consensus against it.³⁰⁷ When a punishment has been rejected for multiple generations, we may appropriately say that it is no longer part of our legal tradition, and thus no longer “usual.”³⁰⁸ Accordingly, we are not led into the untenable position of having to approve of once traditional punishments like branding, flogging, or bodily mutilation.

305. See *Weems v. United States*, 217 U.S. 349, 349 (1910); Stinneford, *Rethinking Proportionality*, *supra* note 8, at 968-72.

306. Scalia, *supra* note 41, at 45.

307. See *supra* Part II.B-C.

308. See *supra* Part II.C.

Like the living originalist approach, this standard recognizes that the Cruel and Unusual Punishments Clause is consistent with an implicit natural law conception.³⁰⁹ It is directed at those punishments that are “in fact cruel and unusual,”³¹⁰ not just those that were considered cruel at a particular moment in time. At the same time, this standard respects principles of entrenchment, popular sovereignty, and the rule of law in a way that the living originalist approach does not.³¹¹ Under the original meaning of the Cruel and Unusual Punishments Clause, it is not the job of judges to invalidate traditional punishments that are still being used. Rather, such punishments may fall out of usage because they are rejected over a long period of time by some combination of the legislative branch, through statutory amendment to abolish the punishment; the executive branch, through charging decisions and sentencing recommendations; the judicial branch, through decisions about the appropriate sentence in individual cases; and the people themselves, through jury decisions about the appropriate sentence in individual cases. Only if a consensus of these groups—all of which represent “the people” directly or indirectly—holds for a period of several generations will the scope and application of the Cruel and Unusual Punishments Clause change.³¹²

This means that judges lack the power to change the scope of the Cruel and Unusual Punishments Clause. Only the people have this power, and such change can only happen if the people concur over a period of several generations. An entrenched constitutional right cannot be swept away or marginalized in the face of a public panic.

309. Common law thinkers universally held that common law rights, like the right not to be subjected to cruel and unusual punishments, have their ultimate foundation in natural law. For example, Edward Coke asserted that the “Law of Nature is part of the Law of England.” COKE, *Calvin’s Case, or the Case of the Postnati*, in 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, *supra* note 145, at 166, 195. Coke also asserted that “nothing that is contrarie to reason, is consonant to Law,” and that “reason is the life of the Law, nay the common Law it selfe is nothing else but reason.” COKE, *supra* note 148, at 684, 701.

310. Dworkin, *supra* note 6, at 120.

311. *See supra* Part I.B.5.

312. *See supra* Part II.C.

C. Detriments of This Approach

The main weakness of this approach, in contrast to living originalism, is that it slows down constitutional change and does not allow judges to drive such change.³¹³ Only after social movements have changed the societal consensus, and such consensus has been entrenched for several generations, can judges appropriately recognize such change in constitutional adjudication.³¹⁴ The judicial role is not to lead the change, but to recognize it after it has been firmly established.

But this weakness may not be a weakness after all if we care about reliability, entrenchment, and popular sovereignty. Remember what Sir John Davies and numerous other thinkers said about the common law: It is normatively superior to edicts and legislative enactments because it only becomes law after long usage has already shown it to be “fit and agreeable to the nature & disposition of the people.”³¹⁵ If the scope of the Cruel and Unusual Punishments Clause, or any other constitutional provision, can be changed through mere judicial edict, the results are not at all certain to be “fit and agreeable” to American society.

D. The Constitutionality of the Death Penalty

This final Subpart will be short because its conclusion is obvious. The death penalty is not an unconstitutional method of punishment at this point in time because it is a traditional punishment that has never fallen out of usage.³¹⁶ The death penalty is, however, an unconstitutionally excessive punishment for once capital crimes like theft. Because the practice of imposing the death penalty for relatively minor crimes fell out of usage long ago, it is now clearly

313. *See supra* Part I.B.4.

314. *See supra* Part II.B.2.

315. *See* DAVIES, *supra* note 147.

316. According to the Death Penalty Information Center, thirty-two states authorize imposition of the death penalty. *See States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [<http://perma.cc/52DJ-DJWR>]. Although there have been movements to abolish the death penalty from the very beginning of the Republic, the death penalty has continuously been imposed throughout American history, with the exception of the brief hiatus between *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976).

desuete. The constitutionality of the death penalty for more serious nonhomicide offenses, like aggravated rape of a child, is a closer question. At the time the Supreme Court ruled in *Kennedy v. Louisiana* that it was cruel and unusual to impose the death penalty for a nonhomicide offense against an individual, there had not been an execution for a nonhomicide offense in America for forty-four years.³¹⁷ Given this long gap in time, it could be argued that the practice had become desuete.

There are, however, two reasons to doubt this conclusion. First, this gap appears to have resulted at least partly from the Supreme Court's decision in *Furman v. Georgia* to strike down all American death penalty statutes,³¹⁸ and its decision in *Coker v. Georgia* to strike down the death penalty for simple rape.³¹⁹ If legislatures refrained for several decades from enacting statutes authorizing the death penalty for crimes like aggravated rape of a child out of a fear that the Supreme Court would strike such statutes down, such fear would not necessarily be sufficient to show a stable, multigenerational societal consensus against the punishment.

Second, it is unclear that forty-four years of disuse would be sufficient to establish that a punishment has become "unusual," even under less ambiguous circumstances than those we see here. Constitutional desuetude arguably requires a longer period of disuse than pure common law desuetude because the two doctrines differ in their effect. If a court finds a statute desuete without finding it unconstitutional, the legislature has the option to reenact the statute and bring it back to life.³²⁰ But if a court finds a punishment cruel and unusual under the doctrine of constitutional desuetude, such punishment cannot be revived without constitutional amendment.

If the Supreme Court concludes that a punishment has become constitutionally desuete before it has fallen out of usage for a sufficient period of time, there is a good chance that the Court will incorrectly conclude that there is a stable multigenerational consensus against the punishment. Perhaps for this reason, the Supreme Court seems to have employed constitutional desuetude

317. See 554 U.S. 407, 431-34 (2008).

318. See *Furman*, 408 U.S. at 238-40.

319. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

320. See, e.g., Stuntz, *supra* note 161, at 592.

only when a punishment has not been used for close to a century or more.³²¹ The most notable exception to this rule came in *Furman v. Georgia*, in which the Supreme Court struck down all American death penalty statutes.³²² Several of the concurring Justices based their decisions, in part, on the belief that the death penalty was in the process of becoming desuete.³²³ Because they considered the death penalty essentially desuete, several Justices expressed the belief that legislatures would not reenact death penalty statutes after *Furman*.³²⁴

The Justices' belief that America had developed a stable consensus against the death penalty turned out to be incorrect as demonstrated by the fact that thirty-five states reenacted death penalty statutes in the immediate wake of *Furman*.³²⁵ Ironically, the Supreme Court's decision in *Furman* to strike down all American death penalty statutes may have delayed or prevented the development of any consensus against the death penalty, because the perception of improper judicial activism in *Furman* seems to have dramatically increased support for this punishment. As Corinna Barrett Lain described, public support for the death penalty was at or below 50 percent in the years leading up to 1972, the year *Furman* was decided.³²⁶ Within months after *Furman*, public support for the death penalty increased to 57 percent, and reached 66 percent by 1976.³²⁷ The reaction to *Furman* demonstrates the danger of finding a practice desuete before it has fallen out of usage long enough to demonstrate a stable, multigenerational consensus

321. See cases cited *supra* Part II.C.

322. 408 U.S. at 238.

323. See, e.g., *id.* at 300 (Brennan, J., concurring) ("When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances the likelihood is great that the punishment is tolerated only because of its disuse."); *id.* at 313 (White, J., concurring) ("[C]apital punishment ... has for all practical purposes run its course.").

324. See, e.g., THE SUPREME COURT IN CONFERENCE (1940-1985) 619 (Del Dickson ed., 2001) (describing Justice Stewart's opinion that the death penalty "was finished" after *Furman*); BOB WOODWARD & SCOTT ARMSTRONG, THE BROTHERS 219 (1979) (ascribing to Chief Justice Burger the claim that "[t]here will never be another execution in this country").

325. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976); Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 46-55 (2007) (describing the widespread backlash against *Furman*).

326. See Lain, *supra* note 325, at 36.

327. See *id.* at 49.

against it. If the Supreme Court declares a punishment desuete before it has suffered long disuse, there is a good chance that the Court will misread societal attitudes toward the punishment. Such intervention may even provoke a backlash that revives a punishment that had previously been on the way out.

Finally, the death penalty might be cruel and unusual under several states' constitutions. Eighteen states and the District of Columbia have abolished the death penalty.³²⁸ Four of these states (Maine, Michigan, Minnesota, and Wisconsin) abolished this punishment over a century ago.³²⁹ Another five (Alaska, Hawaii, Iowa, Vermont, and West Virginia) abolished the death penalty around fifty years ago.³³⁰ A strong argument could be made that this punishment is now cruel and unusual in these states, particularly those whose consensus against the punishment has lasted more than a century. Should a legislature seek to revive the death penalty in one of these states, a court may appropriately invalidate it on state constitutional grounds.

CONCLUSION

The death penalty could be declared unconstitutional consistent with the original meaning of the Cruel and Unusual Punishments Clause—but not yet. If it were to fall out of usage long enough to demonstrate a stable, multigenerational consensus against it, the Supreme Court could appropriately recognize it as cruel and unusual. This state of affairs has already occurred with respect to certain crimes, such as the death penalty for theft, and under the constitutions of certain states. But it is not yet an entirely impermissible punishment under the United States Constitution. All of this suggests that anti-death penalty advocates should focus their efforts on abolition through the political process. Once they succeed, the desuetude clock will start ticking.

328. See *States With and Without the Death Penalty*, *supra* note 316.

329. See *id.*

330. See *id.*