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Religion, the Framers, and the Death Penalty: How Does a Canvassing of Religion at the Time of the Founding Inform the Debates Surrounding the Eighth Amendment's Original Meaning as it Pertains to the Death Penalty?

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INTRODUCTION

It is undisputable that the death penalty is contentious.[1] From this reality extends a ferocious scholarly debate concerning the Eighth Amendment's Cruel and Unusual Punishments Clause—primarily revolving around its original meaning—and the death penalty.[2] Indeed, one would likely be hard pressed to identify a similarly brief text in American history (sixteen words) that has been debated so intensely by legal scholars and law professors,[3] practicing lawyers,[4] innumerable judges,[5] and members of the public.[6] The debate is often intertwined with life-or-death implications, which means that it has played out in scholarly articles, federal and state courts, and, of course, in the Supreme Court of the United States.[7]

There are two competing groups of scholars and jurists in the Eighth Amendment's "original meaning" arena: *originalists* and *living originalists*.[8] Originalists interpret the Eighth Amendment's Cruel and Unusual Punishments Clause based on how it was to be interpreted and applied during the late 1700s, when it was written,[9] and as such, hold fast to the idea that the death penalty cannot be unconstitutional, because the Eighth Amendment was adopted at a time

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[1] 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, 254 (2009).
[2] *Id.*
[3] *Compare* RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 1-6 (1982) (arguing that *Furman v. Georgia* was wrongly decided insomuch as it held that the death penalty was a "cruel and unusual" punishment), *with* HUGO ADAM BEDAU, KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA 91 (2004) (arguing that a moral interpretation of the Eight Amendment renders the death penalty unconstitutional).
[4] *See, e.g.*, COLIN DAYAN, THE STORY OF CRUEL AND UNUSUAL (2007).
[5] *Compare Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (holding that the Constitution's text makes apparent that capital punishment was widely accepted by the Framers during the time of ratification), *with* Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY, 521, 523 (2017) (for more than half of a century, thirty-five or more state and federal judges believed the death penalty to be unconstitutional *per se*).
[6] *See, e.g.*, Bob Herbert, Opinion, *In America; Cruel and Unusual*, N.Y. TIMES (Mar. 8, 2001), https://nyti.ms/2IByrwG.
[7] John D. Bessler, *A Century in the Making: the Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL OF RTS. J. 989, 990-91 (2019).
[8] *Id.* at 990.
[9] Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 580 (1998).

in which the death penalty was widely imposed and socially accepted.[10] Contrarily, living originalists typically believe that the death penalty could be unconstitutional, arguing that the Framers intended the Cruel and Unusual Punishments Clause to embody an "abstract moral prohibition of cruelty,"[11] and therefore "it is up to each generation to decide for itself which practices violate that principle."[12] Though not the focus of this article, there is also a morals component to the debate, of which scholars should at least be aware when studying the death penalty and its debates.[13] It is straightforward: those who would abolish the death penalty believe that it is an immoral or unethical form of punishment, whereas those who wish to retain the death penalty believe the opposite.[14]

Originalist or living originalist, abolitionist or not, all can likely agree that the discussion around the original meaning of the Cruel and Unusual Punishments Clause is extremely contentious, and has accordingly occupied innumerable hours of legal thought and scholarship.[15]

The Role of Religion in the "Original Meaning" Death Penalty Debate

This article seeks to see what happens when religion—that existed at the time of the adoption of the Eighth Amendment—is thrown into the midst of these originalism debates, and how the religious realities at the time of the founding, when compared and contrasted with the beliefs and views of the founders, inform the original meaning of the Eighth Amendment as it relates to the death penalty. There are already a slew of considerations that both parties take into account when assessing the original meaning of the Eighth Amendment, including its plain language, and historical references and documents, such as the Bill of Rights or even the

[10] John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 535 (2014).
[11] *Id.* at 536.
[12] *Id.*
[13] *See* Kevin Barry, *From Wolves, Lambs (Part I): The Eighth Amendment Case for Gradual Abolition of the Death Penalty*, 66 FLA. L. REV. 313, 332 (2014).
[14] *Id.*
[15] *See* Bessler, *supra* note 1, at 254.

English's Declaration of Rights.[16] The justifications for assigning a role to religion in the death penalty debates are commonsense. Justice William O. Douglas once observed that "we are a religious people."[17] This observation held true for the American public of the eighteenth-century,[18] and it *clearly* holds true for Americans today.[19] Moreover, many of the Constitution's Framers, Founding Fathers, and men involved in the writing of the Eighth Amendment (the men who provided the kindling for original meaning debates in the first place), had strong views on religion.[20] Therefore, because religion permeated some of the Founders' views and certainly those of the general public in the late 1700s, an originalist analysis of the death penalty, which so innately involves morality (which for many is tied to religion[21]), would be remiss without at least an inquiry into the beliefs of mainstream religions and Framers at the time of the founding.

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[16] *Harmelin v. Michigan*, 501 U.S. 957 (1991).
[17] *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).
[18] *Religion and the Founding of the American Republic*, LIBRARY OF CONGRESS, https://www.loc.gov/exhibits/religion/rel02.html (between seventy-five to eighty percent of the population of eighteenth-century America attended church).
[19] Polls have consistently demonstrated that Americans are highly religious in nature.

A Gallup poll from December, 1999 found that "almost nine out of ten Americans (86%) say that they believe in God, even when given the choice of saying that they 'don't believe in God, but believe in a universal spirit or higher power.'" Frank Newport, *Americans Remain Very Religious, But Not Necessarily in Conventional Ways*, THE GALLUP ORGANIZATION (Dec. 24, 1999), http://www.gallup.com/poll/releases/r991224.asp.

Now, a recent Gallup poll from 2018 found that of the Americans polled, "72% say religion is important in their lives, including 51% who say it is *very* important." Despite the fact that this is lower than Gallup's 1999 poll, American religiosity remains at high levels. Megan Brenan, *Religion Considered Important to 72% of Americans*, THE GALLUP ORGANIZATION (Dec. 24, 2018), https://news.gallup.com/poll/245651/religion-considered-important-americans.aspx.

In addition, American religiosity can withstand strife. A 2020 Gallup poll found that 48% of Americans said religion is very important in their lives, 25% rated it "fairly important" and 27% "not very important." The poll found that "although the coronavirus pandemic has wreaked havoc on many aspects of Americans' lives in the past year, it did not alter the importance of religion in their lives." While this poll is lower than 2018, the result is undeniable: religion play a crucial aspect in Americans' lives. Megan Brenan, *Religiosity Largely Unaffected by Events of 2020 in U.S.*, THE GALLUP ORGANIZATION (Mar. 29, 2021), https://news.gallup.com/poll/341957/religiosity-largely-unaffected-events-2020.aspx.
[20] *C.f.* A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 93 (1985) (Like many of the Founding Fathers, James Madison was deeply religious—his "'idea of religion ... was one of a highly personal relationship between the individual and his maker.'").
[21] Noah Feldman, *Religion and Morality in the Public Square: Religion and Morality in the Public Square: Excerpts from Keynote Address*, 22 ST. JOHN'S J.L. COMM. 417, 425 (2007).

A Brief Overview of this Article

Part IA of this article discusses the Eighth Amendment's history, including its adoption, ratification, and application during the colonial era, as well as some legal discourse on the Eighth Amendment's major players. Part IB explores seminal Supreme Court cases to get a grasp on the state of death penalty jurisprudence, the Court's methodology, the judicial originalism debate, and how the Court defines the Cruel and Unusual Punishment Clause's key terms, specifically, "cruel" and "unusual."

Part II revisits the two main sides of the debate (i.e., the Originalists versus the Living Originalists) in greater depth. It provides a full-fledged statement of modern scholarship on the death penalty debates, and the analyses used by each group of scholars to arrive at their conclusions as to the Eighth Amendment's original meaning as it pertains to the death penalty.

Once the Eighth Amendment's history, jurisprudence, and modern scholarship have been established as they pertain to its original meaning, Part IIIA creates a religious backdrop at the time of the founding. It canvasses a number of the religious groups that existed at the time of the founding, but focuses on the mainstream groups that existed in the late 1700s, and those groups' beliefs pertaining to capital punishment. Part IIIB drills down into the Eighth Amendment's prominent Framers and notable Founding Fathers to bring out their religions and views on the death penalty.[22] Part IIIC discusses lead orators and thinkers who were involved or asserted an influential opinion during the eighteenth-century, and draws out their religious beliefs and views regarding the propriety of the death penalty.

Lastly, Part IV—the heart of the article—compares and synthesizes Parts IB, II, and III, to determine whether religion and the article's findings add anything new to the debates. By

[22] Relying on inferences or, where available, discussion of explicit references or quotes of their views.

synthesizing these three sections, it can be seen that a canvassing of religions at the time of the founding and their beliefs pertaining to the death penalty sheds new light on the "original-meaning of the Eighth Amendment" debates in that it manifests a difference in what the Cruel and Unusual Punishments Clause meant to the enactors of the Eighth Amendment, versus what it meant to the general public. This public-view/enactor-view dichotomy raises some potential concerns with traditional originalism, and unearths potential areas for future study to continue to shed light on the Eighth Amendment's original meaning.

PART I: AN OVERVIEW, HISTORY, AND THE COURT'S JURISPRUDENCE

A. Adoption and Ratification by the First Congress, and Prominent Advocates

To obtain an adequate grasp of the Eighth Amendment's adoption by Congress in 1789 and subsequent ratification in 1791, it is important to understand the full-scale ratification event at the time: the adoption of the Bill of Rights. During the Virginia Ratification Convention in 1788, a fierce fight ensued, the Federalists versus the Anti-Federalists,[23] the latter complaining that the proposed Constitution's biggest shortcoming was the absence of a bill of rights.[24] Due to these concerns, some wondered if the Constitution would be ratified.[25] Patrick Henry and George Mason,[26] serving as the lead orators opposing the Constitution's adoption absent a bill of rights, were particularly concerned about the use of "torturing to extort a confession."[27] Due to their

[23] Note that Virginia was not the only state to propose such an amendment: Rhode Island, North Carolina, New York, and Pennsylvania all included Eighth Amendment-resembling provisions in their respective ratification conventions. Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 127 (2004).
[24] Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 676 (2004).
[25] *Id.*
[26] John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments clause*, 97 VA. L. REV. 899, 944 (2011).
[27] Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 447-48, available at: https://memory.loc.gov/ll/lled/003/0400/04590447.tif.

strong advocacy, a compromise was reached between the two parties, and Madison, a staunch Federalist, agreed to recommend such an amendment, contingent upon Henry, Mason and their allies voting to ratify the constitution as it was.[28] Thus, during the Virginia Ratification Convention in 1788, the body endorsed the Constitution, but conditioned its approval on the group of proposed amendments, which were described as "a declaration or bill of rights."[29] James Madison remained true to his word, and during the close of the first Congressional Meeting of 1789,[30] Madison submitted a proposal to the House for the amendments.[31] A considerable majority of the U.S. House of Representatives agreed to Madison's proposal, the U.S. Senate concurred, and thus the resolution was passed that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[32]

The Eighth Amendment received sparse attention by Congress during the legislative processes.[33] During the first Congressional Sessions, only two comments were made pertaining to the Eighth Amendment.[34] The first observed that the amendment was problematic because it prohibited punishments which were accepted at that time.[35] The second stated that the amendment was too vague, and therefore meaningless.[36] In fact, throughout Congress's First Session (March to September 1789), criminal law issues were hardly addressed at all, and when they were, they were given merely tangential treatment,[37] as our country's "most basic constitutional criminal procedure tenets" were not proposed by Madison until the end of the first

[28] Rumann, *supra* note 24, at 677.
[29] Claus, *supra* note 23, at 127.
[30] Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 360 (2004).
[31] Rumann, *supra* note 24, at 679.
[32] The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 928 (Neil H. Cogan ed., 2d ed. 2015).
[33] Rumann, *supra* note 24, at 679.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Little, *supra* note 30, at 361.

session, and the "substantive definition of federal crimes and their punishment" were left unaddressed until the Second Congressional Session in January of 1790.[38]

In its Second Session during January 1790, the First Congress began work on the early drafts for a federal criminal code. This birthed Congress's extensive "Act for the Punishment of Certain Crimes Against the United States" (the Act), which defined the federal offenses of piracy, forgery, treason, and murder, and prescribed a punishment of death upon conviction.[39] In addition, the Act listed death as a punishment for other esoteric federal offenses.[40] All-in-all, approximately twelve federal offenses included a death penalty as punishment.[41] In contrast to the minimal treatment afforded the Eighth Amendment and its provisions, the death penalty provoked significant debate and conversation during Congress's second meeting.[42] Indeed, the death penalty provisions from the Act sparked the only "reported debate" pertaining to the crime bill in either House.[43] One debate concerned a "dissection provision" which James Madison supported, that would permit surgeons to dissect executed criminals' bodies.[44] The second concerned whether or not the death penalty was appropriate for "passing counterfeit currency."[45] Finally, in addition to the debates, the First Congress officially identified the method of execution in crimes carrying the death penalty as "hanging the person convicted by the neck until dead."[46]

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[38] *Id.*
[39] *Id.* at 362-63.
[40] Other federal offenses which were punishable by death included: "offenses committed on the high seas when punishable by death 'if committed within the body of a county;' violent acts committed on a ship's commander to hinder defense of the ship or its goods; 'making a revolt in the ship;' 'any act of hostility against the United States, or any citizen thereof, upon the high sea under colour of authority from any foreign prince or state;" aiding and abetting piracy; assisting forgery or uttering forged public securities; and rescue or freeing of anyone convicted of a federal capital offense." *Id.* at n.66.
[41] *Id.* at 363.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 364.
[46] *Id.* at 365.

In 1791, just a year or so after the Eighth Amendment's ratification and adoption by the First Congress, the death penalty was imposed widely across the states.[47] The states evenly followed the common-law tradition of prescribing death as a mandatory penalty for specific offenses, even though the spectrum of such offenses in America was rather limited in comparison to the over 200 offenses which were "punishable by death in England" at the time.[48] Thus, as death penalty scholar Rory K. Little put it, "the federal death penalty . . . has been part of our national structure since our country's earliest origins."[49]

B. The Supreme Court's Refusal to Address the Constitutionality of the Death Penalty Per Se, and its Cruel and Unusual Punishments Clause Jurisprudence

The U.S. Supreme Court has left the pointed question of the *per se* constitutionality of the death penalty largely unaddressed since the 1970s.[50] During the 1970s there were four major Supreme Court decisions that addressed the death penalty's constitutionality squarely:[51] *McGautha v. California*,[52] *Furman v. Georgia*,[53] *Gregg v. Georgia*,[54] and *Woodson v. North Carolina*.[55] This section will cover the holdings of each case briefly to get a feel for the contours of Supreme Court death penalty jurisprudence (addressing its *per se* constitutionality), and then move on to the Court's definitions of the Eighth Amendment's terms, which continue to play a part in the modern scholarly debates on the death penalty discussed in Part II.

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[47] *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976).
[48] *Id.*
[49] Little, *supra* note 30, at 365.
[50] John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1913 (2012).
[51] *Id.*
[52] 402 U.S. 183 (1971).
[53] 408 U.S. 238 (1972).
[54] 428 U.S. 153 (1976).
[55] 428. U.S. 280.

(1) Landmark Decisions

First, in its landmark decision in 1971 in *McGautha v. California*, the Court held that the jury—who imposed the death penalty without a set of governing standards—did not violate the Due Process Clause of the Fourteenth Amendment.[56] Next, in 1972, the Court birthed *Furman v. Georgia*, where it in application reversed its *McGautha v. California* holding, holding that the death sentences (as applied) were unconstitutional, based on its interpretation of the Cruel and Unusual Punishments Clause.[57] In reaching its *per curiam* five-to-four decision, the Court struck down death penalty legislation as violations of the Fourteenth and Eighth Amendments.[58] In nine separate opinions, the Justices voiced a handful of reasons for the decision, ranging from the arbitrary nature of death sentences to the racial prejudice or inequality that accompanied many of the executions.[59] In 1976, just four years later, the Court reversed course again through the vehicle of *Gregg v. Georgia* (plus two companion cases), once more approving the death penalty as a form of punishment for certain offenses.[60] The primary driver of this flip-flop was the fact that thirty-five states enacted death penalty legislation in the timespan immediately following *Furman*.[61] Specifically, the Court held that it was constitutionally permissible for laws to provide guidance to the ordinarily unbridled discretion of capital juries by requiring them to make special findings, or balance "mitigating" versus "aggravating" circumstances.[62] The Court refined its analysis later that year in *Woodson v. North Carolina*, and established that mandatory death

[56] *McGautha*, 402 U.S. at 196.
[57] *Furman*, 408 U.S. at 239-40.
[58] *Id.*
[59] *Id.* at 309-10.
[60] *Gregg*, 428 U.S. at 153 (1976).
[61] JOHN D. BESSLER, KISS OF DEATH: AMERICA'S LOVE AFFAIR WITH THE DEATH PENALTY 60 (2003).
[62] Bessler, *supra* note 50, at 1914.

sentences, which were commonplace during the time of the Framers in Colonial America, were unconstitutional and "unduly harsh and unworkably rigid."[63]

Since this rapid-fire spurt of cases in the 1970s, the question of whether the death penalty could again be unconstitutional *per se* has been left unaddressed, and, one could argue, intentionally skirted around by the Supreme Court's Justices.[64] The bottom line is that while the Nation's highest Court has, since the 1970s, reevaluated permissible methods of executions,[65] it has more consistently upheld the constitutionality of the death penalty, and "allowed death sentences for those who kill or show a 'reckless indifference to the value of human life.'"[66]

(2) Methodology and Terms

The Eighth Amendment is decidedly brief.[67] In fact, the Amendment is only sixteen words long: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[68] Despite its brevity, the Amendment's legal interpretation remains contentious among courts and scholars.[69] For the scope and purposes of this article, it is only necessary to understand the Supreme Court's understanding of six words, which make up

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[63] *Id.*

[64] *Id.* at 1916 ("Instead of focusing on whether executions are 'cruel' and have become 'unusual' as a factual and legal matter, the Justices have preferred to leave the issue of capital punishment largely to juries, legislative bodies, and executive branch officials.").

Indeed, even though the Justices have been presented with "credible statistical proof" showcasing a "persistent pattern of racial bias in capital sentencing proceedings," they consistently refuse to strike down the death penalty as unconstitutional. *Id.*

In 2008, the U.S. Supreme Court came the closest to reevaluating the death penalty since its 1970s line of cases, in *Baze v. Rees*. *Id.* at 1917. The decision instigated a halt in executions around the country, as all waited for the decision to be handed down. Unsurprisingly, the Court rejected the inmates claims that Kentucky's lethal injection protocol was unethical in that there was a potential for high levels of pain. The Court held that the inmates failed to carry their burden "of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment." *Id.*

[65] *Id.* at 1918 (The Supreme Court has reconsidered and even reevaluated "the constitutionality of certain types of executions.").

[66] *Id.* at 1919 (quoting *Tison v. Arizona*, 481 U.S. 137 (1987)).

[67] U.S. CONST. amend. VIII.

[68] *Id.*

[69] Bessler, *supra* note 1, at 254.

the Cruel and Unusual Punishments Clause: ". . . nor cruel and unusual punishments inflicted."[70] From the Eighth Amendment's inception, the Court's Justices have—particularly its originalist Justices—worried about and been unable to dispositively discern the "original meaning" of the Cruel and Unusual Punishments Clause.[71] Meaning, the Court has not been able to definitively determine what the terms of the Cruel and Unusual Punishments clause meant to the eighteenth-century Americans that adopted the Amendment.[72]

For over half of a century, the Court has employed the "Evolving Standards of Decency Test" in its Cruel and Unusual Punishments jurisprudence.[73] The test was originally articulated by Chief Justice Warren in *Trop v. Dulles*, where the Court first had to officially decide what the Cruel and Unusual Punishments Clause meant.[74] In that case, the nonoriginalist plurality decided that "rather than tying the Cruel and Unusual Punishments Clause to the outdated standards of the past . . . , the Clause 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[75] This methodology, which plainly allows for an expansive and fluid interpretation of the Eighth Amendment,[76] received pushback, of course, from the Court's traditional originalists, and notably, the late Justice Antonin Scalia. Justice Scalia's fairly "bright-line" approach, articulated in *Baze v. Rees* and quite opposite to Warren's view, states: "if a punishment was acceptable in 1791, it must be acceptable today;" conversely, if a punishment "was considered unacceptably cruel in 1791, it must be unacceptably cruel

[70] U.S. CONST. amend. VIII.
[71] John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739, 1743 (2008).
[72] *C.f. Id.* at 1748-49.
[73] *Id.* at 1749.
[74] *Id.*
[75] *Id.* (quoting *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002)).
[76] *See Id.* at 1758 (arguing the interpretation is "unduly" expansive).

today."[77] This view results in a considerably more narrow and static interpretation of the Amendment.[78]

While this judicial tension that accompanies the Cruel and Unusual Punishments Clause makes it difficult to plainly state the Court's legal definitions of the Clause's terms, the Court has, in a few of its prominent death penalty cases, given somewhat straightforward explanations of how it views the words "cruel" and "unusual."[79] For example, in *Gregg v. Georgia*, the Court described a "cruel" punishment as a "harsh punishment, one that inflicts suffering," and one "so totally without penological justification that it results in the gratuitous infliction of suffering."[80] Interestingly, in *Trop v. Dulles*, the Court seemingly erased the word "unusual" from the Amendment, stating that it has little independent significance from the word "cruel," thus tethering it to "cruel."[81] Nevertheless, in more recent decisions, such as *Ewing v. California*, the Court treated "unusual" as its own word, distinct from "cruel," in upholding a punishment that was alleged to be "unusual."[82]

As demonstrated by the diversity of perspectives on the Court, the Eighth Amendment's legal interpretation remains contentious among the Judiciary—the views of the originalists are always in tension with those of the nonoriginalists, particularly in light of Scalia's mighty shadow still hovering over the Court.[83] Such tensions (or similar), which run back to *Trop v. Dulles*,[84] seem to manifest themselves when the Court's waffles back and forth in the 1970s on the death penalty's *per se* constitutionality. As is about to be seen, the tensions in the Judiciary

[77] Stinneford, *supra* note 10, at 544.
[78] *See* Stinneford, *supra* note 71, at 1742.
[79] Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL OF RTS J. 475, 481 (2005).
[80] *Gregg*, 428 U.S. at 183 (Powell, Stewart, & Stevens, JJ., plurality opinion).
[81] Stacy, *supra* note 79, at n.45.
[82] *C.f. Id.* at 487.
[83] *Baze v. Rees*, 553 U.S. 35 (2008). *Baze* was only decided a little over a decade ago, in 2008, where Scalia again articulated his bright-line rule.
[84] *Trop v. Dulles*, 356 U.S. 86 (1958).

are reflected in the modern scholarly debates of the Eighth Amendment's original meaning—except that in the academic arena, the debates are battled out perhaps even more viciously.

PART II: THE MODERN-DAY DEATH PENALTY DEBATES

A Brief Overview: Traditional Originalism Versus Living Originalism

Somewhere along the way, scholars became aware that there is something inherently awry with Eighth Amendment jurisprudence:[85] disarray;[86] incoherent; ineffectual; a mess; embarrassing; and, last but not least, a train wreck—these are the choice adjectives employed by legal commentators to describe the Supreme Court's handling of the Cruel and Unusual Punishments Clause.[87] Given the split of views on the Court regarding the original meaning of the Eighth Amendment as it pertains to the death penalty, and the ambiguous caselaw these views have produced,[88] it is understandable that scholars think so lowly of the Court's death penalty jurisprudence. It may be even less of a stretch to realize why the original meaning debates have gripped the academic and scholarly communities.

The original meaning death penalty debate primarily fixates on determining if the death penalty could be unconstitutional, "consistent with the original meaning of the Cruel and Unusual Punishments Clause."[89] As touched upon earlier, there are two scholarly camps when it comes to ascertaining the Clause's original meaning: Justice Scalia's "traditional originalist" claim, that because at the time the Eighth Amendment was enacted society accepted the death penalty widely, and the Clause was meant to "embody the moral perceptions" of that time, the death penalty must also be constitutional today; and then the claim made by "living

[85] Stinneford, *supra* note 71, at 1740.
[86] Stacy, *supra* note 79, at 476.
[87] Stinneford, *supra* note 71, at 1740.
[88] *See Id.*
[89] Stinneford, *supra* note 10, at 535.

originalists,"[90] that the Eighth Amendment was meant by the Framers to "embody an abstract moral prohibition of cruelty," and that each generation must independently decide which practices violate this prohibition.[91] The section serves to provide a detailed statement of the analyses used by each side.

A. Camp One: Scalia and Traditional Originalism

The more traditional originalism, the originalism of Justice Scalia, advocates that without constitutional amendment, the death penalty cannot be unconstitutional—at least not if the Court is to remain true to the Cruel and Unusual Punishments Clause's *original meaning*.[92] Broadly speaking, and as touched upon in Part I, under Justice Scalia's originalism, the Cruel and Unusual Punishments Clause needs to be "assigned the meaning" that it had for the people at the time the Clause was adopted.[93] In addition to this pure originalist foundation, Scalia bolsters the analysis with "longstanding societal traditions."[94] Scalia's approach therefore combines traditional originalism and societal tradition.[95] This subpart sets forth some of the materials Scalia and his followers use to arrive at their conclusion that the death penalty must be constitutional.

Such materials which inform Scalia's originalism analysis are best set out in his opinion in *Harmelin v. Michigan*.[96] Though the opinion consists of several parts, the one that is relevant to this article is Scalia's originalist-societal tradition analysis, affectionately referred to by some as his "originalist Eighth Amendment manifesto,"[97] which best lays out the views of the

[90] *Id.* at 535-36.
[91] *Id.* at 536.
[92] *Id.* at 539-40.
[93] Stacy, *supra* note 79, at 507.
[94] *Id.*
[95] *Id.*
[96] Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J.L. & PUB POL'Y 91 137, 137 (2019).
[97] *Id.* at 140.

traditional originalists. *Harmelin* concerned a life sentence, without parole, that was mandatorily imposed as part of a scheme wherein the sentencer was deprived of discretion due to the nature of the crime (drug trafficking).[98] In analyzing the constitutionality of Harmelin's mandatory death sentence, Scalia first turned to determining whether mandatory death sentences existed and were prevalent at the founding era.[99] In line with classic traditional originalism, he asserted that though severe mandatory sentences could be cruel, they are certainly not unusual, citing historical evidence that they abounded in the first Penal Code, and were incredibly common in the states at the founding.[100]

In addition to his initial determination on mandatory sentences, Scalia had to address whether the Eighth Amendment contains a "proportionality" guarantee.[101] Scalia drew from the English Declaration of Rights of 1689, stating that there is "no doubt" that it is the "antecedent of our constitutional text."[102] He explained how the Federal Bill of Rights closely mirrors the English Declaration of Rights, and that the Eighth Amendment's entire text is taken "almost verbatim" from it, "which provided 'that excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.'"[103] Scalia postulated that "the Americans of 1791" could have understood the Clause to mean that which it meant to the Englishmen of 1689, and that at the very least the English's Declaration is "relevant" to the analysis.[104] To then discover what it might have meant to Englishmen at the time, he forged into various contemporaneous incidents, referencing in particular the case of Titus Oates in 1685, to understand whether the English Houses of Lords and Commons considered there to be a

[98] *Id.* at 139.
[99] *Harmelin*, 501 U.S. at 995.
[100] *Id.*
[101] *Id.* at 994.
[102] *Id.* at 966.
[103] *Id.*
[104] *Id.* at 966-67.

"proportionality" requirement.[105] Scalia brought in other contemporaneous discussions, one which was an actual interpretation of the English "cruell and unusuall Punishments" Clause, [106] to conclude that the Clause was not meant to "forbid 'disproportionate' punishments," and that it was not "'one of the traditional rights and privileges of Englishmen,'" because at that time, a "punishment [was] not considered objectionable because it [was] disproportionate," but effectively because it was "illegal" or "unusual" or "contrary to Law and ancient practice."[107]

In wrapping up, Scalia slyly tied this analysis to eighteenth-century America, stating that early American Eighth Amendment commentary "contains no reference to disproportionate or excessive sentences," and "indicates that it was designed to outlaw particular *modes* of punishment."[108] He further supported this finding by referencing what he believed to be "perhaps the most persuasive evidence" of the Clause's original meaning: early judicial decisions which, based on their constructions of the provision, "considered a punishment's proportionality to be irrelevant."[109] Scalia and the majority used this stew of historical references, contemporaneous examples, and founding materials to conclude that Eighth Amendment's original meaning does not include a "guarantee against disproportionate sentences."[110]

Harmelin and its reasoning and medley of historical references which the Court relied upon is the posterchild of traditional originalism, as embraced by Justice Scalia and his

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[105] *Id.*
[106] *Id.* at 972-73. At this part in the *Harmelin* opinion, Scalia referenced the *Second Trial of Titus Oates*.
[107] *Id.* at 973-74. Scalia also adds that the phrase "'cruell and unusuall' is treated as interchangeable with 'cruel and illegal.'"
[108] *Id.* at 982.
[109] *Id.* at 982-93.

Scalia cites an expansive list of authority to support his position: *See* "*Barker v. People*, 20 Johns. *457 (N.Y. Sup. Ct. 1823); *Aldridge v. Commonwealth*, 4 Va. 447 (1824); *Commonwealth v. Hitchings*, 71 Mass. 482, 486 (1855); *Garcia v. Territory*, 1 N.M. 415, 417-19 (1869); *Whitten v. Georgia*, 47 Ga. 297, 301 (1972); *Cummins v. People*, 42 Mich. 142, 143-44 (1879); *State v. Williams*, 77 Mo. 310, 312-13 (1883); *State v. White*, 44 Kan. 514, 520-21 (1890); *People v. Morris*, 80 Mich. 634, 638 (1890); *Hobbs v. State*, 133 Ind. 404, 408-10, (1893); *State v. Hogan*, 63 Ohio St. 202, 218 (1900)."
[110] *Harmelin*, 501 U.S. at 985.

followers.[111] Despite the wide variety of documents and contemporaneous accounts that Scalia relies upon, the word religion appears only once in the *Harmelin* opinion, and it has absolutely nothing to do with the Court's analysis. Does this come as a surprise, given the extreme religiosity of Americans and its utter pervasiveness on American life,[112] and the death penalty's innately moral and, for many, religious nature?[113] Or is religion properly pushed to the side, and excluded?

B. Camp Two: The Living Originalists

The prominence of Scalia and his followers has unearthed a group of scholars and jurists that profess a competing view of originalism, sometimes known as "living originalism," or "semantic originalism," or "text and principle" originalism.[114] Scholars who subscribe to living originalism—such as Michael Perry, Jack Balkin, and Ronald Dworkin—assert that it *is* possible for the death penalty to be unconstitutional consistent with the Cruel and Unusual Punishment Clause's original meaning.[115] This subpart, much like the one which preceded it, sets forth a statement of their views.

Ronald Dworkin summarized the views of living originalists well: the Constitution's "right-granting clauses should be read to say what those who made them intended to say," but do not need to "be understood to have the consequences that those who made them expected them to have."[116] This reading provides the Clause with a bit of wiggle room because, said differently, the thrust of living originalism is that society is bound by the text's original meaning, but not

[111] *See* Stinneford, *supra* note 71, at 1758.
[112] *See supra* text accompanying note 19.
[113] Gregory M. Ashley, Note, *Theology in the Jury Room: Religious Discussion as "Extraneous Material" in the Course of Capital Punishment Deliberations*, 55 VAND. L. REV. 127, 152 (2002).
[114] Stinneford, *supra* note 10, at 549.
[115] *Id.*
[116] *Id.*

always by the "original expected application."[117] Rather than being tethered to the original expected application, living originalists believe that the Cruel and Unusual Punishment's Clause (and other such constitutional clauses) "should be applied in accordance with contemporary values and expectations."[118] An originalist analysis with an evolving or living application is, of course, a glaring contrast to the views of Scalia and his followers—who would say that (taking thumbscrew torture as an example) because the people who existed at the time the Bill of Rights was enacted specifically understood the Clause to preclude thumbscrew torture, such methods of torture could never be constitutional today, even if modern society were to approve of it. The living originalist view does not give heed to what the Framers or American public thought of a particular act or punishment, and certainly does not *per se* forbid such punishments, but instead cares about those punishments that the society of today finds to be cruel and unusual.[119]

Professor John Stinneford aptly points out that the living originalist approach to interpreting the constitution may be founded upon an "implicit natural law conception" that "some punishments 'are in fact' cruel and unusual and some are not." Building on this, living originalists believe that founding-era Americans did not "occupy a privileged ground from which to discern what natural law requires."[120] Accordingly, living originalists assert that Americans should be able to revisit the Constitution's natural law concepts and apply them based on contemporary understandings and experiences. If society now believes that the death penalty is cruel and unusual, it can declare it unconstitutional.[121]

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[117] *Id.*
[118] *Id.*
[119] *Id.* at 550.
[120] *Id.*
[121] *Id.*

To support their claim that the original meaning was meant to be flexible, living originalists point to the Clause's use of abstract moral language.[122] They contrast the Clause's language with some of the Constitution's plain rules: the president needs to be, at the very least, thirty-five years of age;[123] the Senators that compose the United States Senate must come in sets of two from each state;[124] the Cruel and Unusual Punishment Clause simply says: "don't be cruel."[125] Living originalists thus assert that abstract moral reasoning is the only fitting way honor the Cruel and Unusual Punishments Clause's original meaning, in accordance with the Clause's abstract moral language.[126] They say that the Bill of Rights' enactors could have easily composed a list of punishments they felt were cruel and therefore prohibited.[127] Thus, the capstone of their arguments is that the intentional use of abstract moral language manifests that the Clause was not supposed to be constrained by the expectations of the people of 1791.[128]

Summarizing the Debate and each Side's Strengths and Weaknesses

At face value, one approach to the constitutional interpretation of the Eighth Amendment and the death penalty is not necessarily better than the other, and both have benefits and detriments. For example, the primary benefit to Justice Scalia's approach is that it safeguards certain constitutional values, such as popular sovereignty and entrenchment.[129] The main detriment, however—as Justice Scalia himself acknowledges—is that "cultural values really do change over time," and an analysis that does not account for this may be inadequate.[130] On the

[122] *Id.* at 551. Compare this approach with Scalia's citations to the English Declaration of Rights and other historical materials explored in part IIA.
[123] U.S. Const. Clause 4 of Article II, Section 1.
[124] *Id.* at Clause 1 of Article I, Section 3.
[125] Stinneford, *supra* note 10, at 551.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.* at 545.
[130] *Id.* at 547.

other hand, the main benefit to the living originalists' views is that social change can be taken into account when formulating constitutional doctrine, while purportedly remaining true to the Clause's original abstract language, which is attractive.[131] The detriment to the living originalists' approach stems from difficulty in application: it is incredibly difficult to apply abstract moral reasoning in concrete, real-life cases today, particularly at the end of a century in which the majority of jurists have explicitly shunned natural law thinking.[132] Does one approach make more sense than the other? Could either of these analyses of the Amendment's original meaning be a bit incomplete, or off-base?

PART III: EIGHTEENTH-CENTURY RELIGION AND THE FOUNDERS

A Brief Overview

This section now surveys the religious backdrop at the time of the founding by canvassing the religious groups that existed at that time, and laying out their views on the death penalty. Next, it matches up some of the Eighth Amendment's prominent players and outspoken founders to their respective religions, which allows for inferences to be drawn regarding their views on the death penalty. Lastly, this section briefly investigates some of the lead orators and influences at the time of the framing, and digs into their views on the death penalty.

A. The Religious Backdrop at the Time of the Founding (The American Public's Religion)

(1) The Puritans

The Puritans were the predominant protestant religious group in New England at the time of the framing.[133] Located primarily in the Connecticut, New Hampshire, and Massachusetts Bay

[131] *Id* at 553-54 (For example, one appealing point is that adherents will never really need to assume antiquated and "morally unattractive positions.").
[132] *Id.* at 555.
[133] Carl H. Esbeck, *Church Autonomy and Establishments of Religion: Article: Dissent and Disestablishment: The Church State Settlement in the Early American Republic*, 2004 B.Y.U.L. Rev. 1385, 1415 (2004).

areas, the Puritans left England and "High-Church Anglicanism" to achieve greater religious freedom, to "follow God as they understood Him."[134] The Puritans' following was large,[135] and was focused on rejecting the traditional tenets of "Church of England" religion in favor of a congregation-lead church.[136]

The Puritans, particularly those who settled in Connecticut and Massachusetts, were not shy in voicing their immense support for a death penalty.[137] This was in large part due to their view of themselves as "children of Israel."[138] This belief influenced the Puritans during the establishment of their new society in America, and, accordingly, they based many of their capital crimes on those laid out in the Mosaic law, such as the capital crime compilation found in the Torah.[139] In fact, the Massachusetts Code of 1648, which contained a "long list of capital crimes," is, in certain parts, almost verbatim with the Mosaic law.[140] Notably, heresy, the act of defying the leading religious establishment (in this case, Puritanism), was a capital crime.[141]

In addition to the Puritans' reliance on the Mosaic law in shaping their stance on the death penalty, it must be underscored that in Puritan New England, executions served important civil and religious roles.[142] Executions—which were conducted in public, with both the clergy

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[134] *Id.*
[135] *Id. at* 1411.
[136] *Id.* The Puritans adamantly rejected all of the traditional, "bells and whistles" of religion, such as "clerical vestments, the sign of the cross, saint's days, church statuary, and prayers recited from a common book." *Id.* They found little value in formalistic and "impersonal" religion. *Id.* Rather, the Puritans "believed that the people, assembled as believers, were the source of governance of the church." *Id.* Therefore, the Puritans were publicly resistant to any notion of an "American bishopric" which was possibly to be created by the Church of England. *Id.* at 1415. Above all, they emphasized that the congregation was to lead the church, not "top-down control by bishops." *Id.* at 1411.
[137] Davison M. Douglas, *Religion's Role in the Administration of the Death Penalty: God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL OF RTS. J. 137, 155 (2000).
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.* (explaining that it was not uncommon for witches and even Quakers to face execution in seventeenth-century Connecticut and Massachusetts—indicative of the religious weight the Puritans allocated to the death penalty).
[142] Douglas, *supra* note 137, at 156.

and the magistrates heavily involved—performed the "social function of deterring others from like behavior and the religious function of inducing repentance and expiating the evil that had polluted the community."[143] Sermons typically preceded the executions, in which clergy preached to the guilty and to the general public to both encourage repentance and, importantly here, explain the "divine requirements of execution."[144] Such "execution sermons" attached a religious weight to the Puritans' executions and shaped the way the community looked at the death penalty.[145] Thus, the Puritans gladly put citizens to death for a variety of capital crimes based on their self-identification as children of Israel, and the religious significance they attached to the act of execution.

(2) The Presbyterians

At the time of the founding, most of the House of Delegates' evangelical members were Presbyterians.[146] The Presbyterians absolutely resented the Anglican Church and its dominance in Virginia.[147] John Witherspoon, perhaps *the* most prominent Presbyterian representative at the time, was the tutor of James Madison who also signed the Declaration of Independence.[148]

While Witherspoon's and the Presbyterians' beliefs pertaining to the death penalty at the time of the founding are not explicitly laid out, it is known that Witherspoon was a Federalist.[149] Federalists, as discussed in Part I, were engaged in a debate with the Anti-Federalists, arguing that a bill of rights was not needed.[150] From this fact it is appears permissible to infer that the

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[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] Steven J. Heyman, *Reason and Conviction: Natural Rights, Natural Religion, and The Origins of the Free Exercise Clause*, 23 U. PA. J. CONST. L. 1, 81 (2021).
[147] *Id.*
[148] Stephen A. Marini, *Religion, Politics, and Ratification*, *in* RELIGION IN A REVOLUTIONARY AGE 184, 203 (Peter J. Albert & Ronald Hoffman eds., 1994).
[149] *Id.*
[150] *See supra* pp. 5-6.

Presbyterians, represented by leaders such as the Federalist John Witherspoon, were either indifferent about the death penalty or for it—but certainly not against it.

(3) The Quakers

The presence the Quakers may have lacked in New England was made up for by their dominance in the middle colonies, Pennsylvania, West Jersey, and Delaware.[151] The Quakers—a liberal religious group—subscribed to human and divine nature theologies that focused on "god's goodness" and the "human capacity for moral improvement," rather than the Calvinist's emphasis on human depravity and God's judgment.[152]

The Quakers were one of the few religious groups on the forefront of death penalty opposition during the revolutionary era.[153] The driving force behind their opposition to the death penalty was a pacifist-mindset, which also made them resistant to war.[154] These qualities assigned the Quakers a fundamental role in actually limiting capital punishment in parts of colonial America during the late eighteenth-century.[155] Due in large part to Quaker influence, Pennsylvania reformed its penal code, the first state to do so, dramatically reducing the number of crimes which could be punished with death.[156] So strong and known was the Quakers' opposition to capital punishment during the late eighteenth-century and early nineteenth-century, that one was considered lucky to get a Quaker on the jury in his capital case,[157] and judges even

[151] Esbeck, *supra* note 133, at 1415.
[152] Douglas, *supra* note 137, at 158.
[153] *See Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] G. Ben Cohen & Robert J. Smith, *The Death of Death-qualification*, 59 CASE W. RES. 87, 94 (2008).

A capital trial from the early 1800s concerned defendant, Mr. Lesher, who was fortunate enough to live in Pennsylvania at a time in which Quakerism flourished. Quakers were prevalent enough—and their beliefs staunch enough—to "give one hope that a Quaker would serve on his jury." *Id.* The state had also banned preemptory challenges by the prosecution, which seemingly bolstered Lesher's chance of getting a Quaker. Lesher did indeed receive a potential juror "who opposed the application of the death penalty in all circumstances." *Id.* Unfortunately for him, this same juror decided to—unilaterally—tell the judge of his "inability to sentence Lesher" . . . or "anyone

went so far as to remove Quakers, sua sponte, out of fear that they would not be able to properly perform their jobs as jurors.[158] Thus, the Quaker's opposition to the death penalty was no joke, and in the years following the Constitution's adoption, this staunch opposition to capital punishment effected a divide between the Quakers and other religious groups.[159]

(4) The Catholics

At the time of the founding, the Catholics were small in number,[160] and despised by larger religious organizations such as the Puritans[161] and Quakers.[162] The tide of anti-Catholic sentiments drove the majority of Catholics to settle in the supposed "Catholic-haven" of Maryland.[163] Maryland, founded by the Calverts,[164] promised religious freedom to the Catholics.[165] This segregation was celebrated by the Virginia Council, who were primarily Protestant, and did not wish to share land with Catholics.[166]

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else for that matter" . . . "to death." *Id.* The State's successful "for-cause challenge" ultimately lead to Lesher's conviction and death sentence. *Id.*

[158] *Id.* at 93.

Justice Joseph Story handled a famous case which arose out of the Quakers' refusal to "impose a death sentence." *Id.* A federal judge of the district court removed Quaker jurors—sua sponte—from the jury body in a capital trial due to their "conscientious opposition to the death penalty." *Id.* Justice Story affirmed the Quakers' removal on appeal, concluding that "objector jurors, such as quakers, would not apply the facts of the case to the law, and thus could not perform their proper tasks as jurors." *Id.*

[159] *Id.* at n.31. *See United States v. Cornell*, 25 F. Cas. 650, 655 (C.C.D.R.I. 1820) (Justice Story stated that "it is well known, that the Quakers entertain peculiar opinions on the subject of capital punishment." He proceeded to point out that it is unusual that "they believe men may be rightfully punished with death for the causes set down in the divine law, but for none others.").

[160] Esbeck, *supra* note 133, at 1400.

[161] Michael Newdow, *Question to Justice Scalia: Does the Establishment Clause Permit the Disregard of Devout Catholics?*, 38 CAP. U.L. REV. 409, 472 (2009).

[162] *Id.* at 473 (Famous Pennsylvania Quaker leader William Penn wrote that "Catholicism was unparalleled in its 'stupid superstition, . . . brutish zeal,' and 'inhuman and barbarous inventions and cruelties.'") (quoting William Penn, *A Seasonable Caveat Against Popery, in* 3 THE SELECT WORKS OF WILLIAM PENN IN FIVE VOLUMES 53-89 (3d ed. 1782)).

[163] Newdow, *supra* note 161, at 474.

[164] *Id.* (The Calverts were purportedly "the only Catholics to secure a royal charter.").

[165] *Id.*

[166] *Id.* at 475 (Catholics who settled in Maryland were "cut off from all participation in public life.").

There is not much to say about the founding-era Catholics' views pertaining to the death penalty, other than that the Catholic church has unequivocally taught for centuries that the death penalty is appropriate for "the most serious crimes."[167]

(5) The Jews

Similar to the plight of the Catholics, the Jews were also small in number at the time of the founding.[168] Accordingly, their views on capital punishment were not influential or widespread, and difficult to ascertain. One would think that strong assumptions can be made on the eighteenth-century Jewish stance on capital punishment through passages set forth in the Mosaic Law in the Torah.[169] It is well known that in more than one place, the Torah calls for punishment for certain offenses by death, and even discusses the methods of death to be employed for different offenses: strangulation, decapitation, burning, and stoning.[170] However, the Jewish and late federal Judge, Jack B. Weinstein, authored an article in the New York Law Journal that stated, in pertinent part: "those who merely take a cursory glance at the Torah, with its numerous transgressions seemingly carrying a sentence of death, miss the point."[171] According to Judge Weinstein—going as far back as biblical times—executions were an extreme rarity in Jewish culture, due primarily to the fact that there were vast procedural protections in place that limited and possibly even eliminated its application all together.[172] The Mishnah supports Judge Weinstein's proposition, stating in one passage that "a Sanhedrin that executes one person in seven years is considered bloodthirsty."[173] Moreover, prominent rabbis have stated

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[167] Robert F. Drinan, S.J., *Religion's Role in the Administration of the Death Penalty: Religious Organizations and the Death Penalty*, 9 WM. & MARY BILL OF RTS J. 171, 172 (2000).
[168] Esbeck, *supra* note 133, at 1400.
[169] Jack B. Weinstein, *Death Penalty: The Torah and Today*, DEATH PENALTY INFORMATION CENTER (Aug. 23, 2000), https://deathpenaltyinfo.org/stories/death-penalty-the-torah-and-today.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] MISHNAH, Makkot: 1:10.

that even executing one person in seventy years would be considered murderous.[174] If one couples this information with the fact that today only about 33% of Jews support capital punishment,[175] it is a safe assumption that the small body of eighteenth-century Jews would have taken a Quaker-esque approach to the death penalty, favoring imprisonment and other punishments over death.

(6) The Anglicans

While the Anglican presence was never robust in the northern colonies,[176] and weak early on in the southern colonies,[177] the Anglican church reasserted itself in early eighteen-century America in North Carolina, Virginia, and South Carolina, and to some extent, in New York.[178]

The death penalty was highly favored by the Anglicans during the eighteenth century.[179] Anglicans, who can be considered "religious traditionalists,"[180] "defended the retribution theory of punishment that underlay capital punishment."[181] Anglican Clergy, the Church's leaders, directly supported capital punishment, and in doing so, rejected the views of other religious

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[174] Nathan J. Diament, *Judaism and the Death penalty; Of Two Minds but One Heart*, OU ADVOCACY (Apr. 1, 2004), https://advocacy.ou.org/judaism-and-the-death-penalty-of-two-minds-but-one-heart/.

[175] *Opinion Polls: Death Penalty Support and Religion*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/facts-and-research/religious-statements/opinion-polls-death-penalty-support-and-religion.

In 2014, 33% of Jews answered that they would impose the death penalty when asked the question, "Which punishment do you prefer for people convicted of murder – the death penalty or life in prison with no chance of parole?" *Id.* 57% of Jews responded that they would prefer life in prison, whereas 4% chose an "other" category, and 6% did not have an opinion or refused to answer. *Id.*

[176] *Cf.* Esbeck, *supra* note 133, at 1415 (This was likely due to the large Puritan presence in New England. The Puritans ferociously lashed out against Anglican missionaries, and, as stated earlier, against any notion of an American Bishopric).

[177] *Id.* (Initially, the Carolinas and Virginia had "weak Anglican establishments.").

[178] *Id.*

[179] *See* Douglas, *supra* note 137, at 154-55.

[180] *See Id.* at 159.

[181] *Id.* at 156-59 (Historians have put forth an interesting argument that theorizes that the Clergy were particularly outspoken in their support for the death penalty during the eighteenth-century because "execution day sermons" gave them a chance to "reassert their influence at a time when the authority of the clergy was slipping.").

organizations such as the Quakers, who proffered doctrines of divine and human nature.[182] The basis for their unwavering support of capital punishment can be traced back all the way back to the Thirty-Seventh Article of Faith, which is one of the traditional Thirty-Nine that the Church of England adopted in 1563, as well as the English Parliament, eight years later, in 1571.[183] The text reads: "the Laws of the Realm may punish Christian men with death, for heinous and grievous offences."[184] Notably, the text does not make capital punishment mandatory for certain offenses; rather, it merely grants the State permission to impose the death penalty.[185] This certainly did not deter Anglicans from imposing the death sentence widely, and this provision from the Thirty-Seventh Article is still in effect in the Anglican Church today.[186]

(7) The Baptists

The Baptists' presence in Northeast America at the time of the founding is difficult to measure, but the Great Awakening acted as a catalyst for substantial Baptist growth in the southern colonies.[187] During the revolutionary era, prominent Baptist leader Isaac Backus fought, on behalf of the Baptists as a whole, for the disestablishment of religion.

Though there is scant information on the death penalty views of eighteenth-century Baptists, there is data showcasing the modern-day Baptist position, which is staunchly in favor of the death penalty.[188] Baptists today are among the death penalty's foremost supporters.[189]

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[182] *Id.* Despite Puritan hatred for Anglicanism, the communities' joint support for capital punishment may be an area of similarity.
[183] David F. Greenberg & Valerie West, *Siting the Death Penalty Internationally*, 33 LAW & SOC. INQUIRY, 295, 305 (2008).
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] Esbeck, *supra* note 133, at 1418. One example of this growth occurred in the town of Sandy Creek, North Carolina, where revivals—in only three years—resulted in the planting of enough Baptist churches to form a Baptist Association.
[188] Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 392 (2001).
[189] *Id.*

Assuming this position did not drastically flip-flop in the last century or two, it is highly likely that eighteenth-century Baptists felt similarly.

(8) The Deists

Deism at the time of the founding can be defined as "a heterogeneous 'movement' . . . [which placed] much emphasis on natural religion,"[190] where natural religion is the belief that "knowledge of God is obtainable by human reason alone . . . ."[191] Eighteenth-century deism aligned with the Enlightenment, in that they both rejected mysticism and the concept of blind faith, and instead advocated for scientific inquiry, reason, and truth.[192] Many of the founding fathers were deists, which is exemplified in the Declaration of Independence's lack of any reference to the bible, but direct reference to "Nature's God" (rather than the Christian God).[193] Because deism is more akin to a theistic stance and was not an organized religion at the time of the founding (like the Quakers or the Puritans), there are minimal sources that allow for inferences into their beliefs on the death penalty as a whole. Part IIIB, below, explores the death penalty views of particular Founding Fathers who happened to be deists, which sheds more light on deists' views pertaining to the death penalty.

B. The Founders, their Religions, and their Views on the Death Penalty

This subpart identifies the religion of seven different Founders, and draws on explicit references where available to discern their views on the death penalty. The seven men surveyed were either involved in the drafting of the Eighth Amendment or outspoken about their views pertaining to the death penalty. The trend in this section is of interest: though capital

[190] THE CONCISE OXFORD DICTIONARY OF WORLD RELIGIONS 151 (John Bowker ed., 2005).
[191] *Id.* at 406.
[192] Susan Henderson-Utis, Comment, *What Would the Founding Fathers Do? The Rise of Religious Programs in the United States Prison System*, 52 HOW. L.J. 459, 484 (2009).
[193] *Id.* at 483.

punishments were commonplace during eighteenth-century America, as clearly seen in part IIIA, all Framers surveyed were "fascinated by the potential of penitentiaries and the viability of alternatives to capital punishment,"[194] and even condemned the death penalty, publicly. This disparity is the cornerstone of this article's findings as to the Clause's original meaning.

(1) James Madison

James Madison was a deist.[195] There are two primary pieces of historical evidence that evince Madison's disdain for capital punishment. Madison's writings in the 1820s indicate that he was attracted to "penitentiary discipline" instead of "the cruel inflictions so disgraceful to penal codes."[196] Then, in 1823, Madison's writings were even more explicit, stating that he would "not regret a fair and full trial of the entire abolition of capital punishments by any State willing to make it . . . ."[197] There is therefore little doubt as to how he felt about the death penalty: Madison would be content if no state ever subjected a defendant to death, again.

(2) Thomas Jefferson

Thomas Jefferson, like Madison, was a deist, and had doubts about the existence of heaven.[198] Jefferson was a forward-thinking Founding Father,[199] personifying the ideal of the Enlightenment.[200] Accordingly, Jefferson was influenced by the writings of Cesare Beccaria, writing that Beccaria "had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death."[201] In Virginia during the year of 1785, Jefferson attempted to turn his views into a proposal that, if passed, would limit the imposition of executions to cases

[194] Bessler, *supra* note 50, at 1916.
[195] Henderson-Utis, *supra* note 192, at 484.
[196] Bessler, *supra* note 50, at 1935.
[197] *Id.*
[198] Henderson-Utis, *supra* note 192, at 481-84.
[199] *Id.* at 466. Jefferson was a political theorist, author, architect, statesman, inventor, philosopher, and scientist, and heavily supported reason.
[200] *Id.*
[201] Bessler, *supra* note 50, at 1935.

involving murder or treason—the proposal lost by a single vote.[202] Such writings and attempted legislation manifest that Jefferson supported the abolishment of the death penalty.

(3) Benjamin Franklin

Like Jefferson, Franklin was an "excellent example of the 'enlightened' man."[203] Franklin was also a deist,[204] and explicitly questioned the death penalty's propriety on more than one occasion, asking, "To put a man to death for an offence which does not deserve death, is it not murder?"[205] He also railed against the practice of innocent individuals being "dragg'd into noisome Dungeons, tortured with cruel Irons, and even unmercifully *starv'd* to Death." Lastly, Franklin also displayed his desire for penal reform by joining, along with William Bradford, the "Philadelphia Society for Alleviating the Miseries of Public Prisons."[206] Franklin's ponderings and close friendships with individuals such as Benjamin Rush[207] indicate, at the very least, a level of intolerance for the death penalty.

(4) Benjamin Rush

Benjamin Rush, like Jefferson and Franklin, was also a great example of an enlightened man and Founding Father.[208] Hailing from Philadelphia, Rush was a signer of the Declaration of Independence, and a fervent Quaker.[209]

Rush often spoke of his faith in conjunction with his death penalty views.[210] Exceeding even the views of mainstream Quakerism as laid out above, Rush wrote boldly against the death

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[202] *Id.* (Professor John Bessler asserts that Jefferson's piece of legislation "undeniably marked an attempt by Jefferson to drastically scale back the availability of death sentences."). Bessler, *supra* note 1, at 214.
[203] Henderson-Utis, *supra* note 192, at 467. As many know, Franklin was a statesman, inventor, and an author.
[204] *Id.* at 484.
[205] Bessler, *supra* note 50, at 1935.
[206] Henderson-Utis, *supra* note 192, at 479-80.
[207] John D. Bessler, *The Long March Toward Abolition: From The Enlightenment to the United Nations and the Death Penalty's Slow Demise*, 29 U. FLA. J.L. & PUB. POL'Y 1, 33 (2018) (describing Rush and Franklin as friends).
[208] Henderson-Utis, *supra* note 192, at 467.
[209] Douglas, *supra* note 137, at 158.
[210] *See* Bessler, *supra* note 1, at 209-10.

penalty.[211] In his published pamphlet, "Considerations on the Injustice and Impolicy of Punishing Murder by Death," Rush asserted that the death penalty was "contrary to reason,"[212] and urged for incarceration and rehabilitation as replacements for execution.[213] Rush asserted: laws "which inflict death or murder, are, in my opinion, as unchristian as those which justify or tolerate revenge; for the obligations of Christianity upon individuals, to promote repentance, to forgive injuries, and to discharge the duties of universal benevolence, are equally binding upon the states."[214] In March of 1787, Rush, while casually spending time with his friend Benjamin Franklin, declared that capital punishment was inappropriate for *any* crime.[215] There is therefore no doubt as to Benjamin Rush's views pertaining to the death penalty.

(5) Thomas Paine

Thomas Paine was, like many of the Founders, a deist.[216] Paine was also an ardent death-penalty abolitionist,[217] and was in favor of totally dismantling the "state right to the death penalty, except in exceptional circumstances of a threat to the life of the nation."[218] Paine vehemently opposed the execution of Louis XVI, and "regretted the French Assembly's vote to

[211] Douglas, *supra* note 137, at 158 (Professor Davison M. Douglas goes as far as to speculate that that Benjamin Rush was perhaps "the most articulate eighteenth-century opponent of capital punishment."). *See also* Henderson-Utis, *supra* note 192, at 480 (stating that Benjamin Rush was the driving force in penal code reform); Bessler, *supra* note 1, at 209 (calling Benjamin Rush an "ardent death penalty foe.").
[212] Christian Behrmann & Jon Yorke, *The European Union and Abolition of the Death Penalty*, 4 PACE INT'L. L. REV. ONLINE COMPANION 1, 52 (2013).
[213] Douglas, *supra* note 137, at 158.
[214] *Id.* (Rush also criticized death penalty proponents who justified their views by relying on the verse: "whoever sheds the blood of man, by man shall his blood be shed . . . ." *Id.* "Rush argued that it was 'the ignorance and cruelty of man, which by the misapplication of this text of scripture, has so long and so often stained the religion of Jesus Christ with folly and revenge.'"). *Id.*
[215] Bessler, *supra* note 207, at 33.
[216] Jonathan Marker, *Thomas Paine's Attitudes Toward Religion Impacted His Legacy, Author Says*, NATIONAL ARCHIVES (Oct. 18, 2019), (https://www.archives.gov/news/articles/thomas-paine-attitudes-biography.
[217] Bessler, *supra* note 1, at 210.
[218] Behrmann & Yorke, *supra* note 212, at 52.

impose a death sentence."[219] Paine's outspoken misgivings with the death penalty—he has referred to the practice as "barbarous"—manifest a clear abolitionist mindset.[220]

(6) William Bradford

William Bradford was the United States' second Attorney General.[221] He was a close friend of James Madison, who was his classmate in college.[222] While little is known about his religious views, in 1793, Bradford notably authored the essay, "An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania," in which he proposed abolition of the death penalty for every crime except murder.[223] Not surprisingly, though, Bradford was "perfectly willing to entertain the possibility that evidence might later show that the death penalty for that crime was not an appropriate punishment either." Thus, at the very least, Bradford was supportive of abolishing the death penalty as a punishment for the majority of criminal offenses.

(7) Samuel Livermore

Samuel Livermore, a Founding Father and lawyer from Massachusetts,[224] was a Presbyterian.[225] Livermore, who was involved in the drafting of the Eighth Amendment and its debates, argued that as punishment technologies became more effective and humane over time, such as the implementation of a modernized prison system, the death penalty would become obsolete.[226] Livermore was essentially suggesting that once it became unnecessary to implement

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[219] Bessler, *supra* note 1, at 210 (stating that Paine actually risked his own life during the course of his opposition to Louis XVI's execution).
[220] Bessler, *supra* note 50, at 1936.
[221] *Id.* at 1934.
[222] *Id.*
[223] *Id.*
[224] *January 1790*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/01-06-02-0001-0001.
[225] *Representative Samuel Livermore*, BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS 1789-1791, https://www2.gwu.edu/~ffcp/exhibit/p1/members/reps/livermore.html.
[226] Bessler, *supra* note 50, at 1934.

Livermore stated: "It is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be

the death penalty due to appropriate alternative punishments, it should be reconsidered or abandoned.[227] Livermore's views on the death penalty were forward thinking and in-line with abolishment and the views of other Founding Fathers, though possibly in tension with the Federalist-tilting views of John Witherspoon and the Presbyterian Church to which Livermore belonged.

(8) Notable Mentions

While not all Founding Fathers explicitly advocated for the abolition of the death penalty like those above, and some such as John Jay and John Adams did not have as many moral struggles with executions, they still expressed uncertainty in some circumstances.[228] Others were extremely direct in their abolitionist sentiments, such as James Wilson, who took pride in the fact that the United States had less capital crimes in the books than those of England.[229] Moreover, respected military leaders who were also Founding Fathers desired to greatly slow the stream of executions, including George Washington and Alexander Hamilton.[230] The entirety of Founders surveyed in this subpart expressed, at the very least, a degree of disdain for the death penalty.

C. Leading Orators and Influences

To more fully develop the contours of the religious landscape and the death penalty during the time the Eighth Amendment was enacted, this section very briefly explores the

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very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind." *Id.*

[227] *Id.*

[228] Bessler, *supra* note 50, at 1934-35 (explaining that John Adams supported some executions, but disapproved of others).

John Adams was a great admirer of abolitionist Cesare Beccaria. Bessler, *supra* note 1, at 208. In addition, the Adams Family considered the possibility of total abolition of the death penalty, as evinced by Abigail Adams' writings. *Id.*

[229] *Id.* at 263.

[230] Patrick N. Leduc, *Christianity and the Framers: The True Intent of the Establishment Clause*, 5 LIBERTY U. L. REV. 201, 211 (2011).

religious views of three prominent, founding-era orators, George Whitefield, John Locke, and Cesare Beccaria, and explores their influence on the public and Founding Fathers.

(1) George Whitefield

George Whitefield, an English clergyman and ordained Anglican priest, "became a leader of the Methodist faction that was growing within the Church of England."[231] He conducted innumerable public speaking stops through the colonies during the mid-eighteenth-century, effectively preaching to crowds of Americans.[232] Whitefield stressed a heartfelt experience, salvation, and personal repentance,[233] which accordingly shaped American religion.[234] Though it appears that Whitefield did not write explicitly on the death penalty, his ordainment as an Anglican priest allows an inference to be drawn in accordance with the beliefs of eighteenth-century Anglicans as whole, who passionately embraced capital punishment.[235]

(2) John Locke

Though on the unorthodox spectrum, John Locke was a "Christian and Biblicist."[236] The Framers cited John Locke heavily.[237] His influence on the Framers bleeds through heavily in the Declaration of Independence, where, based on Lockian ideas, Thomas Jefferson discussed "natural rights and the social compact, which formed the colonies' justifications to the world to break with Great Britain."[238] Locke thought the death penalty to be appropriate in certain circumstances,[239] as he stated that "each transgression may be *punished* to that *degree*, and with

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[231] James Lowell Underwood, *The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right,* 54 S.C. L. REV. 111, 128 (2002).
[232] Esbeck, *supra* note 133, at 1417.
[233] Underwood, *supra* note 231, at 128.
[234] Esbeck, *supra* note 133, at 1417.
[235] *See* Douglas, *supra* note 137, at 154-55.
[236] Leduc, *supra* note 230, at 211.
[237] *Id.*
[238] *Id.*
[239] Charles J. Reid, Jr., *Tyburn, Thanatos, and Marxist Historiography: The Case of the London Hanged*, 79 CORNELL L. REV. 1158, 1196 (1994).

so much *severity* as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrifie others from doing the like."[240] Thus, Locke felt the death penalty was permissible for some crimes.

(3) Cesare Beccaria

Last, but most certainly not least: Cesare Beccaria, the "father of the abolitionist movement."[241] Beccaria, a Catholic,[242] rose to infamy through his short treatise, "On Crimes and Punishments,"[243] in which he argued for proportionality and the abolition of "state-sanctioned executions," which he believed brutalized societies.[244] Beccaria's breadth of influence was enormous, particularly on the Founders.[245] His work was admired by John Adams, Thomas Jefferson, James Wilson, Benjamin Rush, John Hancock, William Bradford, and Thomas Paine, to name a few.[246] The Beccaria approach to the death penalty is simple: solving murder by death is murder, and accordingly, absurd.[247]

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[240] Leduc, *supra* note 230, at 211.
[241] Bessler, *supra* note 1, at 196.
[242] *Id.* at 220.
[243] *Id.* at 196 (Beccaria's book was originally published in Italian, entitled, *Dei delitti e delle pene*, and was translated to English 1767).
[244] *Id.* at 196-97.
[245] *See Id. at* 203-08.

One commentator declared Beccaria's book to be "more influential than any other single book" in the revolutionary period. *Id.* at 206.

A study showed that Beccaria ranked as the founders' seventh most-cited figure, outranked only by: Plutarch, David Hume, John Locke, Blackstone, Sir William, and St. Paul Montesquieu. *Id.* at 206-07.

One such example was when "John Adams famously defended British soldiers accused of murder in the Boston Massacre," he showed a "close familiarity with the reform-minded Italian criminologist," Beccaria. *Id.* at 207.
[246] *Id.* at 208-12.
[247] *Id.* at 197.

PART IV: THE PUBLIC-FOUNDER DICHOTOMY

Admittedly, this article has tossed a lot at its reader. In Part I it discussed the Eighth Amendment's history and ratification; in Part II it gave a statement of the modern scholarly debate concerning the Eighth Amendment's original meaning as it pertains to the death penalty; and finally, in Part III, it presented a survey of the various religions that existed in eighteenth-century America to unearth their views on the death penalty, as well as the views of the Founding Fathers and some of the era's leading orators. This section serves as a synthesis of Parts IB, II, and III. Now that additional pieces of information have been presented which may inform the original meaning debates, this section makes the ultimate inquiry: if the earlier discussions and findings of this article were applied to the original meaning debates surrounding the Eighth Amendment and the Death Penalty, would they change the constitutional or original meaning analysis? Do they shed additional light, even an ever so slight light, on the debates, or the proprietary of originalism? The answer is unequivocally "yes."

As this article began to take shape, it was hard to predict what it might uncover. In Part III, however, a fascinating dichotomy emerged between the American public as represented by their various religions' beliefs, and the views of the Founders. This dichotomy revealed that depending upon one's reference group in the original meaning analysis (i.e., the American public as represented by their religions versus the Founders as represented by their religions and views), the original meaning of the Eighth Amendment shifts, giving a new lens through which the arguments of the different proponents of the debate, the traditional originalists and living originalists, may be analyzed.

For example, in Part IIIA, the majority of the religions surveyed were huge proponents of the death penalty. Though some supported it more than others, the eighteenth-century Puritans,

Anglicans, Baptists, Presbyterians, and Catholics all viewed the death penalty as a permissible form of criminal punishment to further deterrence, and sometimes even treated executions as religious, social outings. Moreover, beyond the religious landscape, the public as a whole supported the death penalty.[248] In stark contrast, the group of Founding Fathers surveyed in this article highly opposed the death penalty, and were primarily deist or nonreligious.[249] Benjamin Rush believed it to be unchristian, and contrary to reason; Jefferson passed legislation to try to limit it; Madison wrote that he would be fine with total abolishment; Livermore believed it to be antiquated and inferior to the penitentiaries of the future; Bradford was comfortable with total abolishment; Franklin questioned the death penalty's cruelty often, and desired to build modern penitentiaries; Paine despised the death penalty, a view that put his life in jeopardy. Even the Framers who supported the death penalty for certain crimes, such as John Adams or John Jay, voiced their doubts, at times.

Though there is the question of why this dichotomy exists,[250] the real question is: what does it mean for the original meaning debates and corresponding analyses? Well, it could mean a lot. As Part II hinted at, Scalia's traditional originalists need a point of reference to support their claims. Meaning, because the traditional originalists believe that the legal and social status of the death penalty at the time of the founding must carry over to today, they *must* look to one of two sources to support their contention: either the American public as a whole, or the men who wrote

[248] *See* Greenberg & Litman, *supra* note 9, at 580.
[249] Henderson-Utis, *supra* note 192, at 483.
[250] Though not within the immediate scope of this focused article, the question is there: why does this dichotomy exist? Despite the fact that some of the Founders surveyed were part of organized religions (i.e., Samuel Livermore and Benjamin Rush), the Founding Fathers' religious views were very different than the religions that existed at the time, as most Founders were deists or not religious. *Id.* To venture a guess as to why the dichotomy exists, one possible explanation is that the Founders, who obviously possessed above-average intellect, were more forward-thinking than their general public counterparts. This could be due to their heavy consumption of influential and progressive writers such as Beccaria. Part IIIC shows a few of the Founders' influences, and provides some evidence as to why their views might be different than those of the public.

and enacted the Amendment, the Framers. Obviously, though, as the preceding paragraph and Part III of this article manifested, the views of the Founders and religious public were drastically different, which creates a fairly serious problem for the traditional originalists and their analysis. Depending on which group they reference to determine the eighteenth-century propriety of the death penalty, the result will be different. If one chooses the American public, which seemingly must be the go-to choice of originalists (as indicated by their beliefs that the death penalty is constitutional), they seem to be making a logical choice—by selecting the public as a whole, which supported the death penalty more than not, the death penalty must also be permissible today. Yet—by choosing the American public as a reference point, the traditional originalists are neglecting the men who *wrote and enacted* the Amendment. Could Scalia and his traditional originalists really intend to leave the Founders out of their analysis (or at least the large, important group of Founders discussed in this article), who are arguably as important as (or perhaps even more important than) the public? Moreover, by using both groups interchangeably, the traditional originalists would be caught in a contradictory trap of views that don't align.

This clear discrepancy appears to expose a flaw in Scalia's traditional originalism. With two equally important reference-groups that each possess fairly opposite views on the death penalty, a tough decision must be made when conducting a traditional originalist analysis of the Eighth Amendment as it pertains to the death penalty. This could tip the scales of the debate in favor of the living originalists, or even non-originalism. If the traditional originalists cannot resolve this discrepancy in their analysis, the living originalists' claim that the death penalty should be read to embody the abstract moral principles of each century begins to become more valid, as they rely on the meaning that the enlightened and highly intellectual founders, *alone*, sought to impart to the Amendment and the death penalty: a simple and vague prohibition of

cruelty. The living originalists show proof that the language of the Amendment was carefully selected to embody an abstract, moral principle,[251] and therefore each generation can decide whether they want to put fellow citizens to death for various offenses. This more "language-based" analysis gives the living originalists credibility, as they do not need to pay any attention to the public's beliefs, as represented by their religions. Rather, they can give the Amendment the meaning that they believe the Founders gave it. It is also possible that originalism, "traditional" or "living," is just is not necessary, and that modern society shouldn't care what the Eighth Amendment and the death penalty meant to the Framers or the public. At the very least, it can be seen that there is a degree of misalignment between traditional originalism's take on the death penalty and the views of the Founders, with no easy explanation to rectify the discrepancy.

Now that this dichotomy has been presented, it is time to reflect on this article's broader theme: should religion and similar personal beliefs be a part of the *legal* original meaning analysis? Maybe. This article initially set out to discover and potentially prove that religion needs to be a part of the Eighth Amendment original meaning analysis. Its focus has since shifted, and has primarily sought to provide evidence that religion is at least useful in conducting a thorough determination of what the Eighth Amendment's Cruel and Unusual Punishments Clause originally meant to the American public and the Framers, and how these findings affect the original meaning debates. In the end, regardless of whether religion ought to play a part in future discussions and debates on originalism, it has at least helped to unearth the dichotomy and other findings, which will hopefully pave the way to break new ground in the original meaning arena.

[251] *See supra* Part II (Part II showcased the living originalist analysis, comparing the vague language of the Eighth Amendment to other similar texts).

CONCLUSION AND IDEAS FOR FURTHER STUDY

This article has attempted to shed additional light on the original meaning of the Eighth Amendment debates through canvassing the religions that existed at the time founding and surveying the beliefs of the Founders. By synthesizing the article's first three sections, Part IV revealed an interesting dichotomy, manifesting a difference in what the Cruel and Unusual Punishments Clause meant to the enactors of the Eighth Amendment, versus what it meant to the American public. This dichotomy potentially undermines traditional originalism, presenting originalists with a choice between using as a reference-point either: (1) what the Eighth Amendment and death penalty meant to the American public; or (2) what they meant to the Framers. This perhaps shifts the debate towards the living originalists or even an abandonment of originalism-type analyses altogether, and raises a plethora of questions.

In terms of further study, this article does not profess to crack the code of which side has the "correct" original meaning—indeed, this article may have raised more questions than it answered—but instead seeks to play a part as an enabler, to give other more devoted scholars an additional perspective to consider in this puzzle. For example, what other major beliefs of Americans, if any, could play a part in the original meaning analysis, and why should they play a part? More specifically, scholars must try to resolve the traditional originalist discrepancy as to which group the traditional originalists should rely upon as a reference-point, and why? Are there robust justifications for choosing one group over the other? Can this article's thesis be rebutted, making such a choice unnecessary? This article serves as a preliminary investigation into eighteenth-century religion, the Founders, and the death penalty, and hopes to facilitate further, deeper discussions into traditional originalism versus living originalism, and the role of religion, to finally determine which ought to prevail (or neither!).