



INTERACTIVE *Constitution*



8TH AMENDMENT: EXCESSIVE FINES, CRUEL AND UNUSUAL PUNISHMENTS HIGH SCHOOL LEVEL LESSON PLAN

NATIONAL CONSTITUTION CENTER



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NATIONAL CONSTITUTION CENTER

LESSON PLAN

Grade Levels: 12th

Number of class periods: 1 (approximately 45-minutes)

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ABOUT THIS LESSON

This lesson introduces students to different viewpoints and debates surrounding the 8th Amendment by using the National Constitution Center's *Interactive Constitution*. Students will build understanding of the resources and methods used by justices on the Supreme Court and Constitutional scholars when analyzing and forming opinions about articles, sections, and clauses of the Constitution. Using graphic organizers, students will identify key points from the essays of constitutional scholars Bryan A. Stevenson and John F. Stinneford. Students will be able to trace the historic development of the 8th Amendment with help from the Common Interpretation and matters of debate essays, and use evidence from the readings to explore modern interpretation of the 8th Amendment.

For students studying the Constitution and the Bill of Rights, this lesson helps clarify the role of the Supreme Court and constitutional scholars in interpreting and applying the Constitution today.



COMMON CORE STANDARDS**KEY IDEAS AND DETAILS****CCSS.ELA-Literacy.RH.11-12.1**

Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.

CCSS.ELA-Literacy.RH.11-12.2

Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.

CCSS.ELA-Literacy.RH.11-12.6

Evaluate authors' differing points of view on the same historical event or issue by assessing the authors' claims, reasoning, and evidence.

ESSENTIAL QUESTIONS:

- ★ What are the tools and resources used by the Supreme Court and experts who study the Constitution?
- ★ How are parts of the Constitution understood at different points of history?
- ★ How do the Supreme Court and experts who study the Constitution understand and apply the 8th Amendment?

MATERIALS:

- ★ Excerpts from Bryan A. Stevenson's and John F. Stinneford's "Matters of Debate" essays from the *Interactive Constitution* (attached)
Full essays available here:
["The Eighth Amendment- A Contemporary Perspective"](#) (Stevenson)
["Against Cruel Innovation: The Original Meaning of the Cruel and Unusual Punishments, and Why it Matters Today"](#) (Stinneford)
- ★ Sticky notes
- ★ 8th Amendment graphic organizer (attached)
- ★ Key points from the Common Interpretation (attached)
- ★ Excerpt of the Common Interpretation (attached)

OBJECTIVES:

- ★ Trace the development of understanding and application of the 8th Amendment throughout history.
- ★ Analyze the methods and tools used by scholars to interpret the Constitution.
- ★ Assess the strength of an argument based on the evidence.



PROCEDURE:**1. THINK AND WRITE: Preview / Hook Activity / Do Now (2-3 minutes):**

As the students walk into the class, they will see the symbol for the 8th Amendment from the *Interactive Constitution*. Have the students describe the details of the symbol and identify what they think they will discuss during the lesson.



2. INTRO: Use the student observations about the symbol to start a broader discussion about the 8th Amendment, what the students will be doing, and why they are going to be doing it. Use the following questions to guide the discussion.

- ★ Where are specific rights of American citizens protected? (Students will say the Constitution or Bill of Rights)
- ★ Who interprets, or answers legal questions about, the Constitution? (The students might say the government, the President, but they will likely say the Supreme Court.)
- ★ How might the justices on the Supreme Court form their opinions? (Students might say personal experience, history, etc. The Justices actually form their opinions based on the work of constitutional experts. They also form ideas working with their clerks, staff who help look at history and modern debates.)
- ★ Where do clerks get their information? (They get their information from constitutional scholars, too.)
- ★ “So, today, we will investigate opinions from top constitutional scholars—just like clerks and Justices at the Supreme Court to better understand debates about the 8th Amendment.”

This may be a good point to emphasize that Supreme Court Justices use more than their personal opinions and beliefs to interpret the Constitution when making rulings. The students will not use their personal political opinions during this lesson, either. They will look at the arguments put forth by the constitutional scholars and decide who makes the better argument.

3. SHORT LECTURE (5-10 minutes): Common Interpretation: The Common Interpretation essay on the 8th Amendment was written by Bryan A. Stevenson (Professor of Clinical Law, New York University School of Law, and Executive Director, Equal Justice Initiative) and John F. Stinneford (Professor of Law and Assistant Director, Criminal Justice Center, University of Florida Levin College of Law)—leading conservative and liberal scholars on the 8th Amendment. It includes information and interpretations on which the two scholars **agree**. It provides a foundation of *common* ground before students consider opposing viewpoints about how we might interpret the Amendment in the future.

Break students into groups of 3 or 4. Each group will read the excerpt of the Common Interpretation or they can use the Interactive Constitution App or website to read through it. The groups should spend about 5 to 10 minutes tracing the historical development and application of the 2nd Amendment. After the groups are done reading, the teacher should lead a quick review of the Common Interpretation and its key points to insure that all of the groups have a similar understanding of the Common Interpretation.

Key Points from the Common Interpretation:

- ★ The 8th Amendment prohibits the federal government from using harsh penalties for criminal defendants, either as the price for pretrial release **or** as punishment for crime after conviction. “Cruel and Unusual Punishments Clause” is most important and controversial part of the amendment.
- ★ Modern debates: What does it mean for a punishment to be “cruel and unusual”? How do we measure cruelty? If punishment is cruel, why should we care if it is “unusual”?
- ★ Founding Era: The phrase “cruel and unusual” comes from England in 1689. The Constitution made the federal government more powerful than under the Articles of Confederation. Significant new power was power to create federal crimes and to punish those who committed them. Opponents of the Constitution feared this allowed Congress to use cruel punishments to oppress the people.
- ★ Today: Most people also agree “Cruel and Unusual Punishments Clause” limits state power as well as federal power.
- ★ Questions today: How should the Court use to decide if punishment is cruel? Does the Amendment only prohibit harsh methods of punishment, or does it prohibit punishment that does not match the crime (a life sentence for chewing gum in school)? Does the Amendment prohibit the death penalty? Do modern methods of punishment violate the Amendment?

4. **GROUP ACTIVITY (12-14 minutes):** Each group will read the excerpts from the “Matters of Debate” essays by Bryan A. Stevenson and John F. Stinneford. In these essays the same scholars who wrote the Common Interpretation write individual essays about how they believe the Amendment should be interpreted moving forward.

As the students are reading, they should identify the thesis or “main point” of each scholar by highlighting, circling, or underlining the thesis of each essay and filling in each side of the graphic organizer. This will help the students focus on the argument the scholar is trying to make.

After finding the thesis for each scholar, students should write at least one question they have for the scholars.

- ★ “If the scholars were in the room with us, today, what is something you would want to ask them about their opinion? What would need to have clarified to understand their argument?”



- ★ While students complete these the teacher should post the names “Bryan A. Stevenson” and “John F. Stinneford” on opposite sides of the classroom.
- ★ Teacher will circulate through the room to support students, as needed, with isolating the thesis, understanding new vocabulary, etc.

Once they identify the theses and develop questions, each group should, then, write each thesis and two of their questions on separate sticky notes (four, total, for each group).

Students should place their sticky notes—with the theses and questions—on the wall under the corresponding scholars’ names.

- ★ Having the students use sticky notes to report their findings and question at the front of the room allows the teacher to quickly assess the answers from all the groups at once rather than going around the room group by group. The anonymity also removes the pressure of students being “put on the spot” when reporting out the theses or asking their questions.

5. **SHARE (6-8 minutes):** Once every group has posted their theses and questions, use their findings and questions to facilitate discussion about Stevenson’s essay and Stinneford’s essay. This can help as a quick assessment to make sure each group knows what each scholar is trying to say. The teacher will be able to clarify any questions the students may have and highlight the key arguments of each scholar.

Teacher will remind the students, as needed, that they are analyzing the scholars’ constitutional arguments—not having a political debate.

NOTE: The teacher will answer the “Questions for Stevenson” and “Questions for Stinneford” based on the scholars’ essay. So she/he will need to be familiar with the full text of those essays before using this lesson.

- ★ **Full essays available here:**
[“The Eighth Amendment- A Contemporary Perspective”](#) (Stevenson)
[“Against Cruel Innovation: The Original Meaning of the Cruel and Unusual Punishments, and Why it Matters Today”](#) (Stinneford)

6. **LINE-UP (6-8 minutes):** After the students have gathered information from the common interpretation and the essays, ask the students to use the understandings they developed from the readings and discussion (not their political opinions) to stand on the side of room near the name of the scholar they think does **a better job of providing an understanding of how the Amendment should be applied**. Explain to the students that they can stand somewhere in the middle if they do not fully agree with one side or the other, if they have more questions, or if they need more information. Once the students have picked a place to stand, lead a discussion asking some students why they stood where they did reminding the student that they should relate their answer back to the history, common interpretation, and scholar essays.



(It is important to remind students throughout that they are considering the arguments are presented in the lecture, essay excerpts, and whole class discussion—they are NOT debating political/personal opinions.)

- ★ Ask a student standing near Stevenson to explain why they think Stevenson offers the stronger argument.
- ★ Ask a student standing near Stinneford to explain why they think Stinneford offers the stronger argument.
- ★ Ask a student in the middle why they are standing in the middle.
- ★ Ask a student standing near Stevenson to explain why they think someone else might think Stinneford offers the stronger argument (get the students to consider the other side of the argument)
- ★ Ask a student standing near Stinneford to explain why they think someone else might think Stevenson offers the stronger argument.

- 7. REFLECTION/EXIT SLIP (2 minutes):** Students will then go back to their seats and write a brief reflection on how their understandings of the scholars' viewpoint affected their understanding of the amendment. This, along with the work from the rest of the activity, will be on their 8th Amendment graphic organizer and can be collected to assess class participation and learning outcomes.



NAME:

8TH AMENDMENT

Notes on the “Common Interpretation”. What are the things on which the scholars agree?

BRYAN A. STEVENSON:

JOHN F. STINNEFORD:

QUESTION FOR STEVENSON:

QUESTION FOR STINNEFORD:

How do you understand current debates about this Amendment based on the “Common Interpretation” and what Stevenson and Stinneford say? (Why did you stand where you did when everyone lined up and why did you not stand somewhere else?)



TEACHER KEY

8TH AMENDMENT

Notes on the “Common Interpretation”. What are the things on which the scholars agree?

- ★ The 8th Amendment prohibits the federal government from using harsh penalties for criminal defendants, either as the price for pretrial release or as punishment for crime after conviction. “Cruel and Unusual Punishments Clause” is most important and controversial part of the amendment.
- ★ Modern debates: What does it mean for a punishment to be “cruel and unusual”? How do we measure cruelty? If punishment is cruel, why should we care if it is “unusual”?
- ★ Founding Era: The phrase “cruel and unusual comes from England in 1689. The Constitution made the federal government more powerful than under the Articles of Confederation. Significant new power was power to create federal crimes and to punish those who committed them. Opponents of the Constitution feared this allowed Congress to use cruel punishments to oppress the people.
- ★ Today: Most people also agree “Cruel and Unusual Punishments Clause” limits state power as well as federal power.
- ★ Questions today: How should the Court use to decide if punishment is cruel? Does the Amendment only prohibit harsh methods of punishment, or does it prohibit punishment that does not match the crime (a life sentence for chewing gum in school)? Does the Amendment prohibit the death penalty? Do modern methods of punishment violate the Amendment?

BRYAN A. STEVENSON:

As our notions of fairness, equality, and justice have evolved, so too must our interpretation of the Constitution. No provision of the Constitution enshrines this principle more clearly than the Eighth Amendment.

JOHN F. STINNEFORD:

If a given punishment has been continuously used for a very long time, this is powerful evidence that multiple generations of Americans have considered it reasonable and just.

QUESTION FOR STEVENSON:

QUESTION FOR STINNEFORD:

How do you understand current debates about this Amendment based on the “Common Interpretation” and what Stevenson and Stinneford say? (Why did you stand where you did when everyone lined up and why did you not stand somewhere else?)



EIGHTH AMENDMENT, FROM THE *INTERACTIVE CONSTITUTION***EXCESSIVE FINES, CRUEL AND UNUSUAL PUNISHMENT**

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

JOINT STATEMENT: BRYAN STEVENSON AND JOHN STINNEFORD

The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” This amendment prohibits the federal government from imposing unduly harsh penalties on criminal defendants, either as the price for obtaining pretrial release or as punishment for crime after conviction.

The Cruel and Unusual Punishments Clause is the most important and controversial part of the Eighth Amendment. In some ways, the Clause is shrouded in mystery. What does it mean for a punishment to be “cruel and unusual”? How do we measure a punishment’s cruelty? And if a punishment is cruel, why should we care whether it is “unusual”?

We do know some things about the history of the phrase “cruel and unusual punishments.” In 1689 – a full century before the ratification of the United States Constitution – England adopted a Bill of Rights that prohibited “cruell and unusuall punishments.” In 1776, George Mason included a prohibition of cruel and unusual punishments in the Declaration of Rights he drafted for the Commonwealth of Virginia. In 1791, this same prohibition became the central component of the Eighth Amendment to the United States Constitution.

When the United States Constitution was first ratified by the states, it did not contain a Bill of Rights, and it did not prohibit cruel and unusual punishments. These protections were not added until after the Constitution was ratified. The debates that occurred while the states were deciding whether to ratify the Constitution shed some light on the meaning of the Cruel and Unusual Punishments Clause, because they show why many people thought this Clause was needed.

The proposed Constitution made the federal government much more powerful than it had been under the Articles of Confederation. One of the most significant of these new powers was the power to create federal crimes and to punish those who committed them. Opponents of the Constitution feared that this new power would allow Congress to use cruel punishments as a tool for oppressing the people. For example, Abraham Holmes argued that Congress might repeat the abuses of “that diabolical institution, the Inquisition,” and start imposing torture on those convicted of federal 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.” Patrick Henry asserted, even more pointedly than Holmes, that the lack of a prohibition of cruel and unusual punishments meant that Congress could use punishment as a tool of oppression: “Congress . . . may introduce the practice



of France, Spain, and Germany of torturing, to extort a confession of the crime. They . . . will tell you that there is such a necessity of strengthening the arm of government, that they must . . . extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.” Largely as a result of these objections, the Constitution was amended to prohibit cruel and unusual punishments.

As these debates demonstrate, the Cruel and Unusual Punishments Clause clearly prohibits “barbaric” methods of punishment. If the federal government tried to bring back the rack, or thumbscrews, or gibbets as instruments of punishment, such efforts would pretty clearly violate the Eighth Amendment. Most people also agree that the Cruel and Unusual Punishments Clause now limits state power as well as federal power, because the Fourteenth Amendment prohibits states from abridging “the privileges or immunities of citizens of the United States” and from depriving “any person of life, liberty, or property, without due process of law.”

But once we get beyond these areas of agreement, there are many areas of passionate disagreement concerning the meaning and application of the Cruel and Unusual Punishments Clause:

First and foremost, what standard should the Court use in deciding whether a punishment is unconstitutionally cruel? Should it look to the standards of 1791, when the Eighth Amendment was adopted? Should it look to contemporary public opinion? Should it exercise its own moral judgment, irrespective of whether it is supported by societal consensus? Should it look to some other standard?

Second, does the Cruel and Unusual Punishments Clause only prohibit barbaric methods of punishment, or does it also prohibit punishments that are disproportionate to the offense? For example, would it violate the Eighth Amendment to impose a life sentence for a parking violation?

Third, does the Cruel and Unusual Punishments Clause prohibit the death penalty? Many argue that capital punishment fails to advance any public good, that it is of a past era, and it should be eliminated. Proponents of the death penalty argue that some people have committed such atrocious crimes that they deserve death, and that the death penalty may deter others from committing atrocious crimes. They also point out that the punishment is authorized in a majority of states, and public opinion polls continue to show broad support for it.

Finally, are some modern methods of punishment – such as the extended use of solitary confinement, or the use of a three-drug “cocktail” to execute offenders – sufficiently “barbaric” to violate the Eighth Amendment?

There is not time or space here to answer all these questions, but the essays that follow will demonstrate differing ways of approaching several of them.



THE EIGHTH AMENDMENT – A PROGRESSIVE PERSPECTIVE (BRYAN STEVENSON), FROM THE INTERACTIVE CONSTITUTION

In 1804, Aaron Burr, the sitting Vice President of the United States, shot and killed Alexander Hamilton in a duel that took place in New Jersey. Burr ran for governor of New York and Hamilton – widely considered the most influential “founding father” of the United States – opposed his candidacy, making public remarks that Burr found insulting. Burr lost the election, and he blamed Hamilton, so he challenged Hamilton to a duel. Dueling had a long history in the United States; in fact, Hamilton’s son had died in a duel a few years earlier. Dueling continued in the United States until the mid-19th century. Burr was never prosecuted for the murder of Hamilton. After Hamilton’s death, many religious leaders began arguing for the abolition of dueling the way some people now seek the abolition of the death penalty.

Today, dueling is deemed unconscionable. No American leader could credibly support dueling as an acceptable method for resolving conflicts. It is hard for us now to understand how the Framers of our Constitution could embrace such a misguided and barbaric practice. It is unfathomable to us today that those who drafted our nation’s charter nonetheless accepted human slavery, denied women equal treatment and the right to vote, and violently removed Native Americans from their land in what many historians now characterize as genocide. Neither the Constitution’s Framers nor the document they created was flawless. To become a great country, America needs its laws and basic constitutional principles to evolve as our understanding of human capacity and behavior deepens. For many, this means it is critical to reject efforts to limit constitutional protections to the “original intentions” of the flawed men who wrote the Constitution.

The greatness of our Constitution and America itself is dependent on how the Constitution is interpreted to ensure that all people are treated equally and fairly and have the same opportunity to exercise the rights to life, liberty, and the pursuit of happiness as the exclusive group of men who authored the Constitution. As our notions of fairness, equality, and justice have evolved, so too must our interpretation of the Constitution. No provision of the Constitution enshrines this principle more clearly than the Eighth Amendment.

Progressive perspectives on the Eighth Amendment insist that “evolving standards of decency” must shape and inform the Supreme Court’s application of the Eighth Amendment. Focusing on the original intentions of “Founding Fathers” cannot resolve important questions about punishment today.

This approach begs complex questions, such as who decides what is decent and what is cruel? Some Supreme Court justices believe it is the Court’s responsibility to make these decisions independently, because a punishment may be cruel and unusual even if it is popular among the general public and even if a legislature has deemed it appropriate. Throughout its history, the Court has ruled that certain practices are unconstitutional or indecent even when such practices were popular. Ending racial segregation in schools or restaurants and striking down bans on interracial marriage never could have been achieved by a popular vote in the American South. Black people were a political



minority, and policies that denied their basic rights were extremely popular. Accordingly, progressives believe the Court must protect the disfavored, the unpopular, the minority groups who can expect no protection from officials elected by majority vote. For progressives, what constitutes cruel punishment cannot be resolved by opinion polls or the popularity of the punishment. The legitimacy of a punishment must be assessed instead by evaluating whether it serves an appropriate and acceptable penological purpose.

In this respect, the Eighth Amendment does not merely prohibit barbaric punishments; it also bars disproportionate penalties. A sentence of life imprisonment without parole may be acceptable for some crimes, but it would violate the Constitution to condemn anyone to die in prison for shoplifting or simple marijuana possession. For progressives, the constitutionality of a particular punishment cannot be evaluated in the abstract. The decency or legitimacy of a punishment can be assessed reliably only in context.

I believe that the question whether the death penalty violates the Eighth Amendment cannot be resolved by simply asking whether a person deserves to die for the crime he has committed. I believe we must first ask whether we deserve to kill. If we have a death penalty that is applied in a racially discriminatory manner, where the race of the victim shapes who gets the death penalty and who does not; if we have a death penalty that is imposed not on the rich and guilty but on the poor and innocent; if we execute people with methods that are torturous and inhumane, then we have a death penalty that violates the Eighth Amendment. Since the modern era of capital punishment in the United States began in the 1970s, 154 people have been proven innocent after being sentenced to death. We have executed more than 1400 people during the same time period. For every nine people executed, one innocent person has been exonerated. For progressives, this is an unacceptably high rate of error: The probability that an innocent person has been or will be executed offends our standards of decency, and renders the death penalty cruel and unusual punishment that violates the Eighth Amendment. Fairness, reliability, racial discrimination, bias against the poor, political arbitrariness, and other factors that did not trouble the framers of the Constitution, nonetheless shape how a decent society must interpret the Eighth Amendment today.

Finally, evolving standards of decency will require the Court to prohibit many modern punishments that didn't exist in the eighteenth century, like solitary confinement or death-in-prison sentences for children or the mentally ill. For progressives, the Constitution must evolve and be interpreted so that the rights of people who are less favored, less protected, and less influential are not sacrificed to serve the interests of the powerful and the popular. The framers of the American Constitution should be celebrated for creating a prohibition on punishments which are cruel and unusual; but it is incumbent on all of us to insist on a Court that applies the prohibition fairly, sensibly and justly for an evolving nation.



AGAINST CRUEL INNOVATION: THE ORIGINAL MEANING OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE, AND WHY IT MATTERS TODAY: (JOHN STINNEFORD), FROM THE *INTERACTIVE CONSTITUTION*

This essay concerns the original meaning of the Cruel and Unusual Punishments Clause. It argues that the Constitution should be interpreted in accordance with its original public meaning, and it demonstrates what effect such an interpretation would have in the real world.

In recent years, some judges and scholars have argued that the meaning of the Constitution should change as societal values change. For example, Chief Justice Earl Warren once famously wrote that the Cruel and Unusual Punishments Clause should “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles* (1958). This approach allows the Supreme Court to get to whatever result it considers desirable, regardless of what the text of the Constitution actually means. If the Court wanted to get rid of the death penalty, for example, it could simply announce that the death penalty no longer comports with current “standards of decency,” and thereby abolish it. Originalists object to this approach for many reasons, including the fact that it is inconsistent with democratic principles and the rule of law. Phrased differently, there is nothing in the Constitution that gives unelected judges the authority to overturn laws enacted by democratically elected legislatures, based on the judges’ own subjective ideas of what current “standards of decency” require.

In response to the non-originalist approach to the Constitution, some judges and scholars – most prominently Justices Scalia and Thomas – have argued for a very narrow approach to original meaning that is almost willfully indifferent to current societal needs. To understand their approach, let us revisit the four questions raised in the joint statement concerning the settled history and meaning of the Eighth Amendment: (1) What standard should the Court use in deciding whether a punishment is unconstitutionally cruel? (2) Does the Cruel and Unusual Punishments Clause only prohibit barbaric methods of punishment, or does it also prohibit punishments that are disproportionate to the offense? (3) Does the Cruel and Unusual Punishments Clause prohibit the death penalty? (4) Are some modern methods of punishment – such as the extended use of solitary confinement, or the use of a three-drug “cocktail” to execute offenders – sufficiently “barbaric” to violate the Eighth Amendment?

Justices Scalia and Thomas argue that the four questions raised above should be answered as follows: (1) The standards of cruelty that prevailed in 1791, the year the Eighth Amendment was adopted, provide the appropriate benchmark for determining whether a punishment is cruel and unusual. If a punishment was acceptable in 1791, it must be acceptable today. (2) The Clause prohibits only barbaric methods of punishment, not disproportionate punishments. A life sentence for a parking violation, for example, would not violate the Constitution. (3) The Cruel and Unusual Punishments Clause does not prohibit the death penalty, because capital punishment was permissible in 1791, and because the text of the Constitution mentions the death penalty. Specifically, the Fifth Amendment commands that “No person shall be held to answer for a capital . . . crime, unless on a



presentment or indictment of a Grand Jury . . . nor be deprived of life . . . without due process of law.” If the death penalty were unconstitutional, they argue, it would not be mentioned in the Constitution. (4) Modern methods of punishment may violate the Cruel and Unusual Punishments Clause only if they are deliberately designed to inflict pain for pain’s sake, and are objectively harsher than punishments permissible in 1791. Since flogging, branding, and various forms of bodily mutilation were permissible in the Eighteenth Century, few modern forms of punishment are likely to fall into this category.

My own research into the original meaning of the Cruel and Unusual Punishments Clause shows that Justice Scalia’s and Thomas’s approach has a fatal flaw: It ignores the meaning of the word “unusual.” Their decision to ignore this word makes sense because there seems to be no connection between a punishment’s rarity and its cruelty. In other words, a common punishment might be more cruel than a rare one: For example, it would be more cruel to commit torture on a mass scale than on rare occasions, not less. But in reality, the word “unusual” in the Eighth Amendment did not originally mean “rare”—it meant “contrary to long usage,” or “new.” A punishment is cruel and unusual if it is “cruel in light of long usage” – that is, cruel in comparison to longstanding prior practice or tradition.

This understanding of the original meaning of the Cruel and Unusual Punishments Clause leads to very different results than either the non-originalist approach or Justices Scalia’s and Thomas’s approach. The best way to understand this is to run through those four questions once again, using our new understanding of the original meaning of the Clause:

(1) The appropriate benchmark for determining whether a punishment is cruel and unusual is neither the subjective feelings of the current Supreme Court nor the outdated standards of 1791. Rather, the benchmark is longstanding prior practice. If a given punishment has been continuously used for a very long time, this is powerful evidence that multiple generations of Americans have considered it reasonable and just. This does not mean that any punishment that was once part of our tradition can still be used today. If a once-traditional punishment falls out of usage for several generations, it becomes unusual. If a legislature then tries to reintroduce it, courts should compare how harsh it is relative to those punishment practices that are still part of our tradition.

(2) The Clause prohibits disproportionate punishments as well as barbaric methods of punishment. If a punishment is significantly harsher than punishments traditionally given for the same or similar crimes, it is cruel and unusual, even though the same punishment might be acceptable for other crimes. For example, it would be cruel and unusual to impose a life sentence for a parking violation, but not for murder.

(3) The death penalty is currently constitutional because it is a traditional punishment that has never fallen out of usage. If it fell out of usage for multiple generations, however, it might become cruel and unusual. This has already occurred with respect to some once-traditional applications of the death penalty. It is no longer constitutional to execute a person for theft, for example, because this punishment fell out of usage for this crime a long time ago, and the punishments that have replaced it are far less severe.



(4) Some new punishment practices, such as lethal injection or long-term solitary confinement, appear to pose a risk of excessive physical or mental pain. If a court were to find that their effect is significantly harsher than the longstanding punishment practices they have replaced, it could appropriately find them cruel and unusual.