Towards a Post-Historicist Punishments Clause Jurisprudence

Gabriel S. Sanchez

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol56/iss4/9

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
TOWARDS A POST-HISTORICIST PUNISHMENTS CLAUSE JURISPRUDENCE

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

—Declaration of Independence

Does this nation in its maturity still cherish the faith in which it was conceived and raised? Does it still hold those “truths to be self-evident”?

—Leo Strauss

INTRODUCTION

Historicism, according to German sociologist Ernst Troeltsch, is “the recognition that all human ideas and values are historically conditioned and subject to change.” By the late nineteenth and early twentieth centuries, this recognition “had become the dominant, inescapable attitude of the Western world.” In the realm of the Supreme Court’s Punishments Clause jurisprudence, the historicist worldview has come to guide the Court’s hand. Instead of interpreting the Punishments Clause in accordance with some higher principle of right, it has interpreted it on the basis of “the evolving standards of decency that mark the progress of a maturing society.” This historicist turn carries grave ramifications, not only for the Punishments Clause, but for the integrity of law itself. Its dependence on an outmoded conception of progress is fundamentally flawed, and its use of disparate modes of legal reasoning is fundamentally incoherent. It is time to look beyond the Court’s historicist approach for a new way—a way that gives permanent moral meaning to the Punishments Clause, but does not reach beyond the foundational principles of the American Republic.

1. The Declaration of Independence para. 2 (1776).
2. Leo Strauss, Natural Right and History 1 (1953).
4. Id.
This Comment presents a critique of the Court’s Punishments Clause jurisprudence and points towards a horizon beyond historicism. Part II provides an overview of the background and interpretation of the Punishments Clause, along with a summary of the historicist worldview. Part III analyzes the Court’s historicist interpretation and concludes that it is predicated upon a flawed conception of progress and history. It demonstrates that the Court’s attempt to blend historicism with independent judgment and positivism has failed. Part IV assesses the impact of the Court’s historicist approach and sets forth an alternate, post-historicist Punishments Clause jurisprudence. In essence, this Comment invites a reconsideration of the Court’s Punishments Clause jurisprudence and the place of historicism within it. The hope remains that further contributions to this line of inquiry will restore an approach to this area of law that is moral, meaningful, and just.

II. THE PUNISHMENTS CLAUSE AND HISTORICISM

This Part presents an overview of the background and interpretation of the Punishments Clause, as well as a summary of the historicist worldview. It first looks at the text of the Eighth Amendment and traces some early attempts by the Supreme Court to inject meaning into its ambiguous language. It then summarizes the development of the Court’s historicist interpretation of the text, taking note of alternative lines of Eighth Amendment interpretation proposed by Justices William Brennan and Antonin Scalia. Finally, this Part summarizes the historicist worldview, its foundational assumptions, and its implications for morality, law, and science.

A. The Text of the Eighth Amendment

The Eighth Amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The last clause, generally referred to as the Pun-
ishments Clause, has its origins in the English Bill of Rights of 1689. Although in England the phrase dealt with the infliction of punishments without statutory or judicial authorization, in American law it has been interpreted to bar allegedly brutal, malicious, or uncivilized forms of punishment. Unfortunately, the constitutional text itself does not specify which punishments are cruel and unusual as a matter of law. In the nineteenth century, the Supreme Court felt “it [was] safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment].” Punishments believed to be “manifestly cruel and unusual, [such] as burning at the stake, crucifixion, breaking on the wheel, or the like,” ran afoul of the Constitution. Death by firing squad, however, did not.

The Amendment’s text does not explicitly state which punishments are unconstitutional. The language of the Fifth and Fourteenth Amendments makes plain that the deprivation of life is contemplated by the Constitution as a lawful form of punishment, subject to due process considerations. But there is no indication in the text as to the permissible scope of the death penalty. It does not specify which offenses may lawfully be penalized by death, nor does it make any mention about which classes of offenders should be subject to an exemption. It is out of this void—or out of a need to fill it—that the Court’s historicist Punishments Clause jurisprudence has emerged.

B. The Interpretation of the Punishments Clause in the Light of “Evolving Standards”

In the Court's 1958 decision, Trop v. Dulles, Chief Justice Earl Warren announced, “The basic concept underlying the Eighth Amend-

17. See id. at 839-44; see also Howard v. Fleming, 191 U.S. 126, 136 (1903) (avoiding the question of “what is necessary to render a punishment cruel and unusual”); Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (discussing torture as a cruel form of punishment).
19. In re Kemmler, 136 U.S. at 446.
21. GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY 89 (1995). The relevant portion of the Fifth Amendment reads as follows: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. V. The language of the Fourteenth Amendment repeats the deprivation of life prohibition, applying it against the states. U.S. CONST. amend XIV.
ment is nothing less than the dignity of man." 22 Since "the words of the Amendment are not precise, and ... their scope is not static," the Chief Justice proclaimed that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 23 In setting forth this hermeneutical principle, the Court left the Punishments Clause open to interpretation in the light of shifting understandings. Though the Court's language clearly envisions a progressive understanding, the Trop opinion failed to unpack the statement any further. It did, however, point to Weems v. United States, where the Court stated "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." 24 Weems presaged the Trop declaration by noting that, "in the opinion of the learned commentators," the Punishments Clause "may be . . . progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." 25 "Progress" and "humane justice" were left undefined.

Trop emphasized the need to exercise judgment in interpreting the Punishments Clause, rather than relying simply on subjective preferences. 26 It would take the Court almost twenty years to make this rhetoric a reality. In Gregg v. Georgia, a plurality determined that the "evolving standards of decency" by which the Punishments Clause was interpreted should be assessed on the basis of "objective indicia that reflect the public attitude toward a given sanction." 27 Initially, this included only legislative enactments and the sentencing behavior of juries, 28 but the Court later expanded its scope to include the views of professional organizations as well as international law and opinion. 29 The impetus was the Court's plurality opinion in Coker v. Georgia, which announced the view that "the attitude of state legislatures" is not wholly determinative: "[T]he Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 30 While this expansion of the relevant indicia was met

23. Id. at 100–01.
25. Id. at 378.
with criticism—and even briefly rejected by the Court—\footnote{See Stanford v. Kentucky, 492 U.S. 361, 377 (1989).} it was never permanently put to rest.

The more expansive approach returned in \textit{Atkins v. Virginia}, though it was given limited weight.\footnote{536 U.S. 304, 316 n.21 (2002).} Just three years later, in \textit{Roper v. Simmons}, the Court devoted considerable attention to both the positive law of the international community\footnote{543 U.S. 551, 575–78 (2005).} and the findings of social science\footnote{\textit{Id.} at 568–75.} in holding that the death penalty was unconstitutional as applied to juveniles.\footnote{\textit{Id.} at 578–79.} The Court applied social science to a \textit{Weems}-style proportionality analysis,\footnote{See \textit{Weems} v. United States, 217 U.S. 349, 367 (1910).} stating that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability make them ‘the most deserving of execution.’”\footnote{\textit{Roper}, 543 U.S. at 568 (quoting \textit{Atkins}, 536 U.S. at 319).} In the opinion of the Court, social science “tend[ed] to confirm” the “lack of maturity and . . . underdeveloped sense of responsibility . . . in youth more often than in adults.”\footnote{\textit{Id.} at 569 (internal quotation marks omitted).} It also demonstrated that juveniles are susceptible “to negative influences and outside pressures,”\footnote{\textit{Id.} at 570.} and that a child’s “character . . . is not as well formed as that of an adult.”\footnote{\textit{Id.} at 571.} For these reasons, they could not be classified as the worst offenders. The Court also referenced the penological justifications of the death penalty—retribution and deterrence—and concluded that both applied to juveniles with “lesser force” based on scientific findings.\footnote{\textit{Atkins}, 536 U.S. at 321.}

This jurisprudence has resulted in a rapid-fire overturning of fairly recent case law. In \textit{Atkins}, the Court determined that, by 2002, standards had “evolved” to the point where executing a mentally retarded offender violated the Eighth Amendment,\footnote{See \textit{Penry} v. Lynaugh, 492 U.S. 302 (1989).} even though it had been acceptable just thirteen years earlier.\footnote{\textit{Roper}, 543 U.S. at 304, overruling \textit{Stanford} v. Kentucky, 492 U.S. 361, 371–72, 380 (1989).} Similarly, \textit{Roper} overruled a 1989 determination that executing offenders between the ages of sixteen and eighteen was permissible.\footnote{\textit{Roper}, 543 U.S. 551, overruling \textit{Stanford} v. Kentucky, 492 U.S. 361, 371–72, 380 (1989).} When the Missouri Supreme Court considered \textit{Roper} and applied the “evolving standards” jurisprudence, it overruled precedent that permitted the execution of juve-
nile offenders. Even though the dissenters in Roper criticized this clear abandonment of precedent, it was not addressed in the majority opinion.

C. Two Alternative Interpretations

Even though the Court’s Punishments Clause jurisprudence has been largely informed by the “evolving standards of decency,” two other avenues of interpretation have been proposed. The first is Justice Brennan’s interpretation in the light of overarching concerns of human dignity. The second is Justice Scalia’s originalist interpretation of the Eighth Amendment.

1. Justice Brennan’s Human Dignity Interpretation

Concurring in the holding in Furman v. Georgia, which temporarily invalidated the death penalty, Justice Brennan took a unique step: “[The Punishments Clause] prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.” Accompanying this definition was his “primary principle... that a punishment must not be so severe as to be degrading to the dignity of human beings.” Further, punishment should not be arbitrarily imposed, offensive to the values of society, or excessive. On the basis of these principles, Justice Brennan proposed asking “whether a punishment comports with human dignity.” In this case, the answer was clear: “Death, quite simply, does not.”

Justice Brennan’s Furman concurrence is notable in that it makes a decidedly moral and absolute argument against the death penalty. Though Justice Brennan’s principle against arbitrary enforcement was at the heart of the Court’s decision to reinstate the death penalty in

45. See State ex rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003) (en banc).
46. See Roper, 543 U.S. at 593–94 (O’Connor, J., dissenting); id. at 628–30 (Scalia, J., dissenting).
47. See infra notes 49–58 and accompanying text.
48. See infra notes 59–70 and accompanying text.
49. 408 U.S. 238, 270 (1972) (Brennan, J., concurring).
50. Id. at 271.
51. Id. at 274.
52. Id. at 277.
53. Id. at 279.
54. Id. at 305.
55. Furman, 408 U.S. at 305.
Gregg, his dissent in that case reiterated his Furman position that the death penalty was always a "cruel and unusual" punishment under the Eighth Amendment. Even his principle against excessiveness contains a strong moral component, embedded in its condemnation of "the pointless infliction of suffering." It has not, however, resurfaced as a principle to guide the Court in deciding more recent death penalty cases.

2. Justice Scalia's Originalist Interpretation

In Stanford v. Kentucky, a case decided sixteen years before Roper, the Court upheld the execution of juvenile offenders between the ages of sixteen and eighteen. Justice Scalia wrote that, prior to examining whether a punishment coheres with "evolving standards of decency," a court must first look to whether the punishment is grounded in the Anglo-American legal tradition. Since the tradition demonstrated that an offender as young as seven could be executed at common law, Justice Scalia found that applying the death penalty to juveniles was not automatically barred by the Eighth Amendment. Though Justice Scalia did not ignore "evolving standards of decency," he found that this approach was only used to determine if a countervailing tradition had arisen; it was not sufficient in and of itself. He also sought to limit this line of inquiry to legislative enactments, arguing that polling data and the opinions of interest groups were unpersuasive. This attempt to graft an alternative analysis onto the Court's Punishments Clause jurisprudence was short-lived.

In Penry v. Lynaugh, the Court held that executing a mentally retarded offender was not prohibited by the Eighth Amendment; Justice Scalia's approach was relegated to a separate opinion. By the time the Court reconsidered the question in Atkins, Justice Scalia's interpretation became the dissent. There, as in Penry, he applied an

57. Id. at 227–31 (Brennan, J., dissenting).
58. Furman, 408 U.S. at 279 (Brennan, J., concurring).
60. Id. at 368–69.
61. Id. at 368. In a dissent penned a year earlier, Justice Scalia had used the same analysis to argue for the legal permissibility of executing a fifteen-year-old offender. See Thompson v. Oklahoma, 487 U.S. 815, 864 (1988) (Scalia, J., dissenting).
63. Id.
64. Id. at 373–74.
66. Id. at 350–60 (Scalia, J., concurring in part and dissenting in part).
67. See id. at 351–52.
originalist interpretation, finding that "[o]nly the severely or profoundly mentally retarded . . . enjoyed any special status under the law" when the Eighth Amendment was adopted.\textsuperscript{68} Thus, other mentally retarded offenders could be subject to execution.\textsuperscript{69} Just three years later, in \textit{Roper}, this line of analysis had been relegated to a footnote.\textsuperscript{70}

\textbf{D. \ The Historicist Worldview}

The historicist worldview, in the assessment of Leo Strauss, came about as a response to the intellectual upheavals of the Enlightenment that asserted natural rights justifications for the reordering of society.\textsuperscript{71} The historicist approach was a means of upholding the traditions of society with principles drawn from history.\textsuperscript{72} For those principles to be meaningful, however, history had to be coherent, rational, and progressive. In time, the belief in history's coherence and rationality waned,\textsuperscript{73} giving rise to a more radical form of historicism: "History—history divorced from all dubious or metaphysical assumptions—became the highest authority."\textsuperscript{74} Strauss explained the shortcomings of this view:

\begin{quote}
Human thought is essentially limited in such a way that its limitations differ from historical situation to historical situation and that the limitation characteristic of the thought of a given epoch cannot be overcome by any human effort. There always have been and there always will be surprising, wholly expected, changes of outlook which radically modify the meaning of all previously acquired knowledge. No view of the whole, and in particular no view of the whole of human life, can claim to be final or universally valid. Every doctrine, however seemingly final, will be superseded sooner or later by another doctrine.\textsuperscript{75}
\end{quote}

\textsuperscript{69} Id. at 340-41.
\textsuperscript{70} See 543 U.S. 551, 609 n.1 (2005) (Scalia, J., dissenting).
\textsuperscript{71} STRAUSS, supra note 2, at 13-14; see also LEOPOLD VON RANKE, \textit{On the Relation of and Distinction Between History and Politics}, in \textit{The Secret of World History: Selected Writings on the Art and Science of History} 105 (Roger Wines trans., 1981). It was Ranke who observed, in the nineteenth century, that "[t]he error of the philosophers of the last century was that they formulated a universal doctrine according to which every state must be ruled." \textit{Id.} at 116.
\textsuperscript{72} See Iggers, supra note 3. For further discussions and explorations into historicism, see PAUL HAMILTON, \textit{Historicism} (2d ed. 2003); GEORG G. IGGERS, \textit{The German Conception of History: The National Tradition of Historical Thought from Herder to the Present} (rev. ed. 1983); LEONARD KRIEGER, \textit{Ranke: The Meaning of History} (1977); PETER HANNS REILL, \textit{The German Enlightenment and the Rise of Historicism} (1975).
\textsuperscript{73} See Iggers, supra note 3, at 132-33.
\textsuperscript{74} STRAUSS, supra note 2, at 17.
\textsuperscript{75} Id. at 21.
Philosopher Alasdair MacIntyre noted that this worldview is essentially relative: "Morality which is no particular society's morality is to be found nowhere. There was the-morality-of-fourth-century-Athens, there were the-moralities-of-thirteenth-century-Western-Europe, there are numerous such moralities, but where ever was or is morality as such?" This turn has a similar impact on law itself. Quoting German jurist Karl Bergbohm, Strauss highlighted that Bergbohm's "strict argument against the possibility of natural right . . . is based on 'the undeniable truth that nothing eternal or absolute exists,'" and "that 'the standards with reference to which we pass judgment on the historical, positive law . . . are themselves absolutely the progeny of their time and are always historical and relative.'" Historicism underlines the universal character of social science by holding the subjectively selected inquiries that animate it to be a product of a given scientist's historical situation. The truth of its conclusions are relative at best; it is certainly no more privileged as a means to comprehend the world than other relative orientations.

III. HISTORICISM AND POSITIVISM IN THE COURT'S JURISPRUDENCE

This Part analyzes the Court's historicist interpretation of the Punishments Clause, demonstrating that it is predicated upon a flawed conception of both progress and history. It further illustrates that the Court's attempt to bolster this jurisprudence through the use of independent judgment, along with scientific and legal positivism, is incoherent.

A. The Pitfall of a Historicist Jurisprudence

An accurate analysis of the Court's historicist Punishments Clause jurisprudence must begin with an account of the assumptions that underlie it. Though Trop offered the most explicit principle of this his-

76. Alasdair MacIntyre, After Virtue 265–66 (2d ed. 1984). Strauss echoed this concern with regards to political philosophy: "Plato's political philosophy is essentially related to the Greek city of the fourth century B.C., just as Locke's political philosophy is essentially related to the English revolution of 1688." Leo Strauss, What Is Political Philosophy?: And Other Studies 63 (Univ. of Chi. Press 1988) (1959). Thus, "no political philosophy can reasonably claim to be valid beyond the historical situation to which it is essentially related." Id.

77. Strauss, supra note 2, at 10 n.3 (second alteration in original) (citations omitted).

78. See id. at 36–39 (discussing the historicist challenge to social science and Max Weber's response to it).

79. Strauss, supra note 76, at 25–26 (discussing the rejection of science's authority by historicism).

80. See infra notes 82–95 and accompanying text.

81. See infra notes 96–118 and accompanying text.
toricism, the seeds were already planted in *Weems*. Unfortunately, the Court did not engage in the effort to fertilize its opinion with a cogently reasoned definition of the Punishments Clause. In holding that the Punishments Clause "may be . . . progressive" and "acquire meaning as public opinion becomes enlightened by a humane justice," the Court did not explain why the clause is progressive and how this alleged progress ought to be understood in future cases. At face value, the words themselves evoke a teleological conception of history in which human society grows more enlightened with the march of time. Even if the *Weems* Court was trying to be coy, it is not difficult to discern that this conception of the Eighth Amendment had as little interest in keeping to standards drawn from the well of time as it did in precision. That such a clear Enlightenment value as "progress" could be bound up in a judicial decision in 1910, prior to the Great War, is not surprising. What is surprising, however, is that in the nearly fifty years that separated *Trop* from *Weems*, the Court never recovered from the hangover brought on by its intoxication with the idea of progress. In *Trop*, the Court even made the bald assertion that American democracy was "an enlightened democracy" and, for that reason, the Court seldom had the opportunity to properly define the Punishments Clause.

The dubious nature of the Court's decision to crown the United States as "enlightened" in 1958, while the country was still roiled in racial turmoil, should be obvious. Also obvious is that the Court once again failed to give an account of what it meant by "progress." The Court inextricably linked its belief in progress to historicism by positing that "standards of decency" evolve with the age of society rather than remaining available to human reason, but this linkage hardly elucidated the matter. In fact, it obscured the definition of progress fur-

---

83. The Court offered only the following: "What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like." *Weems* v. United States, 217 U.S. 349, 368 (1910). The Court then proceeded through a pedantic account of the nebulous understanding of the Punishments Clause in both treatises and case law. *Id.* at 368–78.
84. *Id.* at 378.
85. The intellectual revolt against the Enlightenment was already well underway by the time the Court penned the *Trop* decision. Following two World Wars and the catastrophes surrounding them, the faith in a reasoned, historical progression was under attack. In fact, reason—specifically Enlightenment-style positive reason—was set as a prime target for the enterprise of critical theory. *See generally* Max Horkheimer, *Eclipse of Reason* (Continuum 2004) (1947); Max Horkheimer & Theodor W. Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., Stanford Univ. Press 2002) (1947).
ther by making its measure the handmaid of history; the Court offered no governing principle to distinguish the movement of history from bad to good or reasonable to insane. To accept the Court's words in Trop, one would have to be prepared to accept their transition from jurists to prophets.\textsuperscript{87}

Assuming that divinization is beyond the realm of possibility for even the highest court in the land, confronting their thinking philosophically is not unwarranted. At a minimum, the very notion of progress is problematic in that it "means that certain questions, the basic questions can be settled once and for all, so that the answers to these questions can be taught to children, so that subsequent generations simply can build up the solutions found out by earlier generations, without bothering any longer about the basic questions," and thus "that the answers to the basic questions can be taken for granted, that they can be permitted to become prejudices for all generations after that of the founding fathers."\textsuperscript{88} In other words, the Court has held that the meaning of the text of the Eighth Amendment progresses. This approach leads down a pathway of nuances and accretions, the legitimacy of which remain unquestioned because of an unproven assumption that these alterations—subtle though they may be—are for the better.\textsuperscript{89} It forecloses a return to the actual meaning on the grounds that doing so is a regression.

And what of the "standards of decency"? The fact that the Court's jurisprudence accepts that those standards evolve confines the inquiry to the present, regardless of the state of that present. To return again to Strauss, his observations on law are a compelling response to this jurisprudential assumption:

Now it is obviously meaningful, and sometimes even necessary, to speak of "unjust" laws or "unjust" decisions. In passing such judgments we imply that there is a standard of right and wrong independent of positive right and higher than positive right: a standard with


\textsuperscript{88} Leo Strauss, \textit{The Living Issues of German Postwar Philosophy} (1940), in Heinrich Meier, \textit{Leo Strauss and the Theologico-Political Problem} 115, 123-24 (Marcus Brai-nard trans., 2006).

\textsuperscript{89} In the century preceding the establishment of the Court's historicist Punishments Clause jurisprudence, the Catholic counterrevolutionary tradition had already contended with the spiritual, metaphysical, and political outcomes of progressive conception of the historical process. \textit{Cf. Juan Donoso Cortés, Letter to Cardinal Fornari on the Errors of Our Times, in Selected Works of Juan Donoso Cortés} 101, 103-04 (Jeffrey P. Johnson trans., 2000) (arguing that a belief in the perfection of human things comes as a result of denying man's sinfulness); Joseph de Maistre, \textit{Considerations on France} 32–33 (Richard A. Lebrun trans., 1994) (arguing against the establishment of innovative political forms on the basis of a static history).
reference to which we are able to judge of positive right. Many people today hold the view that the standard in question is in the best case nothing but the ideal adopted by our society or our "civilization" and embodied in its way of life or its institutions. But, according to the same view, all societies have their ideals, cannibal societies no less than civilized ones. If principles are sufficiently justified by the fact that they are accepted by a society, the principles of cannibalism are as defensible or sound as those of civilized life. ... And, since the ideal of our society is admittedly changing, nothing except dull and stale habit could prevent us from placidly accepting a change in the direction of cannibalism.  

Hyperbole aside, a jurisprudence so self-consciously tethered to historically variable convention has the potential to fail. This apparently did not sway the Court. Instead, they became what Nietzsche called "historical men": "Looking into the past urges them toward the future, incites them to take courage and continue to engage in life, and kindles the hope that things will yet turn out well and that happiness is to be found behind the mountain toward which they are striding."  91 This is intelligible insofar as the Court believed it had observed a movement from barbarism to humanity in recent history. Still, as Justice Scalia has warned, "the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views." 92 If those views find revulsion in the practice of flogging or see strong measures taken against criminals as unbecoming of an "enlightened democracy," the interpretation of history reveals a progress towards some ill-defined pinnacle of "humane justice." What must be admitted, however, is that this direction upward is in no sense obvious. Like their historicist forebears, the Court has fallen into the difficulty that "[b]y denying the significance, if not the existence, of universal norms, [it] destroyed the only solid basis of all efforts to transcend the actual." 93 The fact that the "actual" shifts for the Court is readily apparent; less apparent is the direction. This too follows the logic of the historicists who believed "history was . . . the only empirical, and hence the only solid, knowledge of what is truly human, of

---

90. STRAUSS, supra note 2, at 2–3.  
91. FRIEDRICH NIETZSCHE, ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE § 1, at 13 (Peter Preuss trans., 1980); cf. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE § 224, at 152 (Walter Kaufmann trans., Vintage Books 1989) ("As men of the 'historical sense' we also have our virtues; that cannot be denied: we are unpretentious, selfless, modest, courageous, full of self-overcoming, full of devotion, very grateful, very patient, very accommodating; but for all that we are perhaps not paragons of good taste.").  
93. STRAUSS, supra note 2, at 15.
man as man: of his greatness and misery."94 Yet, as Strauss has observed, "To the unbiased historian, 'the historical process' revealed itself as the meaningless web spun by what men did, produced, and thought, no more than by unmitigated chance—a tale told by an idiot."95 Sadly, the idiot's tale became the authoritative wisdom for the genesis of the Court's Punishments Clause jurisprudence.

B. The Problems with Positivism

The Court has turned to both legal and scientific positivism to bolster its Punishments Clause decisions. With respect to the latter, its use has come in conjunction with the Court's own independent judgment in interpreting the Eighth Amendment.96 The use of this independent judgment is fundamentally incompatible with the Court's historicism.97 The use of scientific positivism on the part of the Court is of limited value, given the Court's approach.98 The reference to legal positivism within the Court's historicist jurisprudence also presents problems.99

1. The Incoherency of the Independent Judgment Rule

In addition to the Court interpreting the Punishments Clause by the "evolving standards of decency," it has continually reasserted its right to bring its own independent "judgment . . . to bear on the question of the acceptability of the death penalty under the Eighth Amendment."100 This use of independent judgment to interpret the Punishments Clause has met with stiff criticism from Justice Scalia. In his reading, this "rule . . . is reflected solely in dicta and never once in a holding" and "has no foundation in law or logic."101 As to its foundation in law, the reality is that the approach, legitimate or not, has remained relevant to the Court's historicist jurisprudence. At first blush, it may even seem that the exercise of independent judgment makes for a sturdy rope to help hoist the Court out of the pitfalls of historicism. This is where Justice Scalia's indictment of its foundation in logic becomes critical: to hold that the Eighth Amendment takes its

94. Id. at 17.
95. Id. at 18.
96. See supra notes 30–34 and accompanying text.
97. See infra notes 100–103 and accompanying text.
98. See infra notes 104–113 and accompanying text.
99. See infra notes 114–118 and accompanying text.
101. Roper, 543 U.S. at 615–16 (Scalia, J., dissenting).
meaning from society’s “evolving standards of decency” is fundamentally incompatible with an approach that posits an equally (if not more) valuable standard. If the historicism that animates the Court’s jurisprudence is correct, then the independent judgment of the Court is no less free from the historical process than the standards of society. If there is a conflict, then it would be a conflict of taste, pedigree, Weltanschauung, and so forth; the privileging of the Court’s judgment over the collective judgment of society stands, in the light of historicism, as a willful power grab. Or, in the words of Justice Scalia, it “is to replace judges of the law with a committee of philosophers.”

What is also of critical relevance is the fact that, according to the analysis of Professor William Heffernan, “the public-sentiment dog has wagged the tail of independent judicial judgment.” That is, the Court has never exercised its own judgment against the perceived standards of society, and has never offered a substantial principle to guide any future disagreement. As a point of legal history, then, the independent judgment rule is not a proven bulwark against historicism. At some point in the future, the Court could become stacked with Justices willing to baldly assert their judgment over and against that of society. But to do so coherently, they would have to put to bed the Court’s historicist Punishments Clause jurisprudence once and for all.

2. Social Science in the Horizon of Historicism

The use of social science by the Court to determine the “evolving standards of decency” has come in two forms. The first is drawn from polling data on the American populace, the second from the studies of social scientists. But the Court has never explained how the presumably static findings of social science give rise to any particular value, especially given the Court’s transitory view of standards in its Punishments Clause jurisprudence. In the use of polling data, for example, the Court may be correct that it demonstrated “a widespread consensus among Americans ... that executing the mentally retarded is wrong.” But that opinion is no more persuasive than a poll which

---

104. See, e.g., Atkins, 536 U.S. at 316 n.21.
105. See, e.g., Roper, 543 U.S. at 568–74.
106. Atkins, 536 U.S. at 316 n.21. In his dissent, Chief Justice Rehnquist offered a strong argument against the “blind-faith credence” the Court accorded to opinion polls in its decision. Id. at 326 (Rehnquist, J., dissenting) (“An extensive body of social science literature describes
shows most Americans believe the Earth is flat or that human slavery is just. Its only true usefulness within the Court’s historicism is methodological. It makes no strides towards interpreting social fiat, but rather offers the Court another means by which to hold to the historically transient views of society without regard for their rightness or wrongness.

These problems become more evident in the Court’s use of social science studies. In Roper, the Court relied on their findings to conclude that certain “general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” This conclusion supported the Court’s holding that punishing juveniles with death for the crime of murder was not proportionate. The “values” to which the Court made reference its discussion were the penological justifications for the death penalty—retribution and deterrence—and the belief that the penalty ought to apply only to the worst offenders. The problem for the Court remains, however, the reality that social science itself cannot give rise to those values, even if it may support them. The availability of a contradictory reading of the facts animated by equal or greater logical rigor would undoubtedly throw even that limited applicability of social science into question.

how methodological and other errors can affect the reliability and validity of [the data]. Everything from variations in the survey methodology . . . and the statistical analyses used to interpret the data can skew the results.”). For the full analysis, including an appendix of examples, see id. at 328–37.

107. Note Strauss’s example (drawn from the position of Max Weber): “No conclusion can be drawn from any fact as to its valuable character, nor can we infer the factual character of something from its being valuable or desirable.” Strausss, supra note 2, at 39. Further, “[b]y showing that certain religious or ethical ideas had a very great effect or no effect, one does not say anything about the value of those ideas.” Id. at 39–40. This opposition, typically described as the opposition of the “is” and the “ought,” confines modern social science in this way; values—especially those which are held to accord with right—must find their basis elsewhere. See Nasser Behejegar, Leo Strauss, Max Weber, and the Scientific Study of Politics 72–76 (2003).

108. Roper, 543 U.S. at 569. These “general differences” included an “underdeveloped sense of responsibility” that leads to reckless behavior, the susceptibility of juveniles “to negative influences and outside pressures, including peer pressure,” and “the character of a juvenile [which] is not as well formed as that of an adult.” Id. at 569–70. The use of these factors to support a categorical rule exempting juveniles from the death penalty was heavily criticized by both Justice Scalia and Justice O’Connor in their respective dissents. Justice Scalia has observed, “At most, these studies conclude that, on average, or in most cases, persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes.” Id. at 618 (Scalia, J. dissenting); accord id. at 598–604 (O’Connor, J., dissenting).

109. Id. at 570–74 (majority opinion).

110. Id. at 569, 571.

111. See, e.g., Roper, 543 U.S. at 616–22 (Scalia, J., dissenting).
While it may be possible that the factual conclusions of social science the Court used are steady in their logical rigor, and hence not subject to change, the values the Court identifies are themselves historically relative. While “social science is said to be a body of true propositions about social phenomena” that provide answers to certain questions, “the questions depend on one’s direction of interest, and hence on one’s values, i.e., on subjective principles.” Under the horizon of historicism, these values cannot be timeless because they cannot be divorced from the historical process itself. It would be inconsistent for the Court to hold that the principles embodied in social science are timeless, while the “evolving standards of decency” are not. The best the Court can claim to be doing is keeping with the times—whether civilized or barbaric.

3. Legal Positivism and Historicism

The Court has turned to legal positivism in two distinct ways. The first has looked at “objective indicators of society’s evolving standards” in the form of legislative enactments and the behavior of juries. The second, more controversial approach has looked to the positive law of the international community. Both approaches exclude an evaluation of the rightness or wrongness of the laws in question; they serve as reference points indicating the apparent content of society’s historically variable standards.

Of particular significance is the use of international law, because the Court has failed to inquire into how that law is applied and in what judicial context. There also exists, in the opinion of Justice Scalia, an abiding contradiction running through the Court’s jurisprudence in its selective use of international law. In his words, “To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.” It is here, perhaps, that the independent judgment rule makes itself felt most strongly, even though the Court has never used the positive law of another country to overrule what it perceived as the “evolving standards of decency” of American society. Even if the Court were to engage in a

112. Strauss, supra note 76, at 25.
116. See Roper, 543 U.S. at 624–27 (Scalia, J., dissenting).
117. Id.
118. Id. at 627.
more substantial evaluation of the positive law it chose to incorporate, that would not cleanse it of historicism. The positive law is treated only as a means by the Court to further its historicist jurisprudence; not once in these decisions did the Court assign any law a higher authority on the basis of any normative principle. Like the Court's use of social science, the incorporation of an analysis of the positive law is only a methodological device.

IV. BEYOND HISTORICISM

Montesquieu was certainly correct when, in his erudite consideration of the Romans, he observed that the laws "are never stronger than when they reinforce the dominant passion of the nation for which they are made." The problem that the Court ignored in establishing its historicist Punishments Clause jurisprudence is that those "dominant passions" may be patently unjust. This Part continues the critique of the Court's approach and assesses its impact. It then posits a horizon beyond historicism. Finally, this Part offers a post-historicist Punishments Clause jurisprudence that takes into account the alternate approaches of Justices Scalia and Brennan while overcoming their difficulties.

A. The Impact of the Court's Historicist Jurisprudence

It is undeniable that the Court's interpretation of the Punishments Clause has moved in one direction—toward the abolition of the death penalty. Both Atkins and Roper, in striking down the application of the death penalty to the mentally retarded and juveniles, overruled Court precedent that had less than two decades to ferment. As the reasoning goes, challenges to the applicability of the death penalty to other classes of offenders would further erode its place in the criminal justice system. Thus, what the historicist interpretation has allowed is an ambling approach: whatever society wants, society gets. This approach says nothing about the correctness of society's want; it

119. MONTESQUIEU, CONSIDERATIONS ON THE CAUSES OF THE GREATNESS OF THE ROMANS AND THEIR DECLINE 233 (David Lowenthal trans., Hackett Publ'g Co. 1999).
120. See infra notes 123–132 and accompanying text.
121. See infra notes 133–140 and accompanying text.
122. See infra notes 141–157 and accompanying text.
blindly defers. As such, the progressivist vision that underlies the approach, as well as the apparent hopes of those offended by the death penalty, remain at the mercy of history. The inevitable triumph of humane justice over barbarism is less than certain. On the basis of the Court's historicism, it is far from clear whether such a move would be the right move—rather than simply the movement of the times.

If it is impossible to be objectively confident that "standards of decency" are indeed progressing and that society's maturation is inevitably for the better, the future of the death penalty (or any punishment, for that matter) remains an open question. In fact, nothing stated in the opinions of the Court or reasonably implicit in its jurisprudence demonstrates that any society—even one at the peak of its alleged progress—would necessarily find the death penalty, flogging, or dismemberment "cruel and unusual." Consider the words of Sammuel Livermore on punishment:

No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having ears cut off; but are we 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 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.

Setting aside any modern indictment of Livermore's mind-set, his words express what is implicit in the Punishments Clause itself: the need for society to thwart crime and punish criminals. Any consideration of how to meet that need requires the commitment and concern of reasonable persons; it cannot be left to blow with the winds of change.

The Court's historicist jurisprudence also implicates the integrity of law itself. In his masterwork, *The Politics*, Aristotle commented on changes in the law: “[L]aw has no strength with respect to obedience apart from habit, and this is not created except over a period of time. Hence the easy alteration of existing laws in favor of new and different ones weakens the power of law itself.” This weakening has already begun, as evidenced by the internal instability of the Court's interpretation of the Punishments Clause, as well as by the decision of the lower court in *Roper* to blatantly disregard the Court's then-set-

125. See supra notes 82–118 and accompanying text.
126. *Anastaplo*, supra note 21, at 89 (quoting *1 Annals of Congress* 754 (Joseph Gales ed., 1789)).
tled precedent. That is not surprising given the nebulousness of the Court's Punishments Clause jurisprudence. A principle that purposefully espouses history as its beacon is susceptible to not only a change of course, but frequent change. This may be better for a particular end, but is hardly beneficial for law itself.

Aristotle's observation that "all seek not the traditional but the good" is far from assured today, but this is not to say that change in the law is never permissible or beneficial:

[H]uman law is a dictate of reason by which human acts are directed. Accordingly, there can be two reasons why human law may be justly changed: one having to do with reason, the other having to do with man, whose acts are regulated by law. As regards reason, it seems natural for human reason to advance gradually from the imperfect to the perfect. . . . So too in practical matters; for those who first set out to discover something useful for the community of mankind, because they were not by themselves able to take everything into account, made certain imperfect arrangements which were deficient in many ways; and these were changed by their successors, who made other arrangements which would fail to secure the common welfare in fewer cases.

As regards man, whose acts are regulated by law, the law can be rightly changed because of the changed circumstances of man, to whom different things are expedient according to different conditions. The key here is that law is sought out through the advance of reason, not history. The usefulness of any punishment may be considered in conjunction with the changing circumstances of humanity, not a change in attitude. Laws suitable for an angelic society are not suitable for one steeped in depravity. On the other hand, a society that would orient itself by the virtue of mercy has considerably more to take into account in assessing the permissiveness of any punishment,

128. See supra notes 42-46 and accompanying text.
129. ARISTOTLE, supra note 127, at 73.
130. THOMAS AQUINAS, Summa Theologiae IaIae 97, in POLITICAL WRITINGS 149, 150 (R.W. Dyson trans., 2002); cf. FRANCISCO DE VITORIA, On Law, in POLITICAL WRITINGS 183, 184 (Anthony Pagden & Jeremy Lawrance eds., 1991) (noting the distinction between laws that are ignored and laws that are neglected).
131. Aquinas himself recognized that, just as "the health of the whole body requires the removal of some member, perhaps because it is diseased or causing the corruption of other members," so too ought "some man who is dangerous to the community, causing its corruption because of some sin . . . be slain in order to preserve the common good; for 'a little leaven corrupteth the whole lump.'" THOMAS AQUINAS, Summa Theologiae IaIae 64, in POLITICAL WRITINGS, supra note 130, at 251, 253-54 (quoting 1 Corinthians 5:6).
especially one that deprives a human being of his or her life. What remains crucial is the valuation of what is right over what is desired.

B. Looking to a Horizon Beyond Historicism

Strauss observed that, in spite of what history or “the complexity of human affairs may blur” with respect to knowledge, historicism “cannot extinguish[] the evidence of those simple experiences regarding right and wrong which are at the bottom of the philosophic contention that there is a natural right.” In other words, “It is prudent to grant that there are value conflicts which cannot in fact be settled by human reason. But if we cannot decide which of two mountains whose peaks are hidden by clouds is higher[,] . . . cannot we decide that a mountain is higher than a molehill?” Undoubtedly, the question of when and to whom it is appropriate to apply a punishment like death invariably sets one on mountainous terrain, where the clouds of competing interests over retribution, deterrence, and humanity may obscure the peaks. Perhaps that is true of all punishment. Yet in spite of that, the Court has contented itself with allowing public opinion to guess not which peak is higher, but which is momentarily preferable. If that should appear reasonable to the modern eye, it is only because it has grown accustomed to not looking at the best available reports of what indeed are the highest peaks. Does not the United States—being a nation founded upon “the Laws of Nature and of Nature’s God,” which guarantees “certain unalienable rights” to all human beings—have such a report? What neither the historicist worldview nor the Court appear to believe, however, is that such a report exists or, if it does, that it ought to be considered.

There are obvious concerns here. A mere invocation of natural law “out of thin air” is likely to meet with a wall of incredulity. Even Christian theologian Reinhold Niebuhr confessed a need “to appreciate the perennial corruptions of interest and passion which are introduced into any historical definition of even the most ideal and abstract moral principles.” “The question which must be raised,” in Niebuhr’s estimation, “is whether the reason by which standards of

132. In the words of St. Augustine, “Avoid the death penalty, so that there’s someone left to repent. Don’t allow the human being to be killed; then someone will be left to learn the lesson.” AUGUSTINE, Sermon 13, in POLITICAL WRITINGS 119, 124 (E.M. Atkins & R.J. Dodaro eds., 2001).
133. STRAUSS, supra note 2, at 31–32.
134. STRAUSS, supra note 76, at 22–23.
135. THE DECLARATION OF INDEPENDENCE (1776).
justice are established is really so pure that the standard does not contain an echo and an accent of the claims of the class or the culture, the nation or the hierarchy which presumes to define the standard."^{137} The Swiss Reformed theologian Karl Barth held more radical beliefs:

The tasks and problems which the Christian community is called to share, in fulfillment of its political responsibility, are "natural," secular, profane tasks and problems. But the norm by which it should be guided is anything but natural: it is the only norm which it can believe in and accept as a spiritual norm, and is derived from the clear law of its own faith, not from the obscure workings of a system outside itself: it is from knowledge of this norm that it will make its decisions in the political sphere.^{138}

Where Neibuhr offers caution, Barth calls for rejection. Yet neither would deny that it is in the image and likeness of God that man was created.^{139} It is on such a Biblical basis that the late Pontiff of the Catholic Church, John Paul II, could hold that "[n]ot even a murderer loses his personal dignity, and God himself pledges to guarantee this."^{140} Stepping away from the sea of doctrinal differences and principles of theological interpretation that separate these men, what is at the heart of their concerns here is the truth, which ought to guide decisionmaking and which is not limited to historical whim. Whether this is on the basis of faith alone or principles discoverable by human reason, the goal is to avoid a blind submission to human prejudice. The orientation must be toward a transcendent principle that itself is not subject to historical whim, even if the turns in human convention create an environment where it is neither sought nor generally recognized. If such a principle could be found in the cornerstone of the American political community itself, would it not be appropriate to turn the judicial gaze in that direction to secure a guiding truth over fleeting fancy?

C. A Post-historicist Punishments Clause Jurisprudence

Whatever practical failings and theoretical problems historicism may have, there is little doubt that it has purchase in contemporary

---

139. See Genesis 1:26-27 (King James).
140. POPE JOHN PAUL II, EVANGELIUM VITAE ¶ 9 (1995) (emphasis omitted). In the same document, John Paul II limited the permissibility of imposing capital punishment to "cases of absolute necessity: in other words, when it would not be possible otherwise to defend society." Id. ¶ 56.
This reality does not defeat the possibility of moving beyond historicism in certain areas of life. Still, it may mean relinquishing the rhetoric of absolutes and transcendence in order to sell the move. In two respects, Justice Scalia's originalist interpretation of the Punishments Clause offers an important roadmap for how this might be accomplished. First, though it is itself a form of historicism, Justice Scalia's approach solves the problem of variance, which is one of the core difficulties of the "evolving standards of decency" approach. By grounding his interpretation in the American legal tradition, Justice Scalia's approach injects stability into the clause's meaning. Second, by holding to the American legal tradition as opposed to the legal cultures of foreign countries, the originalist approach would not succumb to the criticism of importing alien values into the law.

His approach does, however, have two notable difficulties. First and foremost, as Justice John Paul Stevens pointed out in his Roper concurrence, a straight originalist reading of the Eighth Amendment "would impose no impediment to the execution of 7-year-old children today." Further, such a low bar would have the practical effect of punting the issue of a punishment's legitimacy back into the arms of the legislatures, so long as nothing crossed the threshold of eighteenth-century penal measures. Justice Scalia himself appears cognizant of these difficulties. In a lecture on the virtues of the originalist approach, he "hasten[ed] to confess that in a crunch [he] may prove a faint-hearted originalist." Scalia continued, "I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging. But then I cannot imagine such a case[ ] arising either." Unfortunately, the limits of Justice Scalia's imagination may not be suitable grounds to stand at ease in a social and political environment where some believe that torture is an appropriate means to deal with terrorism.

141. A confrontation with historicism was in no small part at the heart of Strauss's attempt to resurrect classical political philosophy. It is in his works that the most thoroughgoing critiques are presented. See Strauss, supra note 2; Strauss, supra note 76; see also Leo Strauss, Studies in Platonic Political Philosophy (1983) (collecting Strauss's final statements on classical political philosophy); Leo Strauss, On Collingwood's Philosophy of History, 5 Rev. Metaphysics 559 (1952) (critiquing a historicist interpretation of philosophy).
142. See supra notes 59–70 and accompanying text.
145. Id.
146. See, e.g., The Torture Papers: The Road to Abu Ghraib (Karen J. Greenberg & Joshua L. Dratel eds., 2005); Charles Krauthammer, The Truth About Torture, Wkly. Stan
On the other end of the spectrum, Justice Brennan’s interpretation of the Eighth Amendment in light of human dignity\(^\text{147}\) certainly helps correct the potential excesses allowed by Justice Scalia’s approach. The problem with Justice Brennan’s interpretation, and perhaps his overall approach to constitutional text, is its apparent lack of grounding. Responding to Justice Brennan’s “hope to embody a community striving for human dignity, although perhaps not yet arrived,”\(^\text{148}\) Professor Harry Jaffa retorted that “Mr. Justice Brennan finds the true meaning of the Constitution, not in the text, and not in any interpretation of the text by others, including the entire political community acting through the political process, but in some kind of ‘striving,’ albeit ‘not yet arrived.’”\(^\text{149}\) Jaffa has a point. There are, as constitutional commentator George Anastaplo has pointed out, “echoes [in the Eighth Amendment’s language] of the Fifth Amendment’s Due Process Clause which attempts to protect ‘life, liberty, [and] property.’”\(^\text{150}\) If the text itself contemplates the deprivation of life, can the Eighth Amendment be read in light of a principle (in Justice Brennan’s case, human dignity) that seemingly contradicts the text? In criticizing the infamous slavery case of *Dred Scott v. Sandford*,\(^\text{151}\) Jaffa has routinely invoked the principles of the Declaration of Independence as grounds that the Court ought to have recognized Dred Scott as a human being “with certain unalienable rights” despite his status as a slave.\(^\text{152}\) With respect to the death penalty, Professor Bruce Ledewitz has brought attention to an important inconsistency in Jaffa’s constitutional interpretation:

> [T]he attack on capital punishment through the Eighth Amendment is much more consistent with the text of the Constitution than is Professor Jaffa’s attack on slavery. The constitutional text seems

---

\(^{147}\) See supra notes 49–58 and accompanying text.


\(^{149}\) Id. at 18.

\(^{150}\) ANASTAPLO, supra note 21, at 88 (second alteration in original) (quoting U.S. CONST. amend. V).

\(^{151}\) 60 U.S. (19 How.) 393 (1856).

\(^{152}\) *The Declaration of Independence* para. 2 (1776). For Jaffa’s interpretation of the Declaration and his specific application of it to the *Dred Scott* case, see *HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR* 73–152 (2000); *HARRY V. JAFFA, STORM OVER THE CONSTITUTION* (1999); and Jaffa, supra note 148, at 13–15.
actually to endorse slavery. Conversely, the Eighth Amendment was viewed at the time of its introduction and criticized as an invitation to abolish capital punishment. Reading the reference to deprivation of life in the Fifth Amendment as if it had been intended to quiet the fear of abolition is more weight than this reforming provision will bear. The due process clause is more easily interpreted as quieting the opposite fear: that the death penalty would be widespread and discretionary if the Eighth Amendment were not interpreted to eliminate it. To exclude the due process clause might have suggested that a citizen could be deprived of his life without due process.\textsuperscript{153}

Ledewitz points out that if slavery can be condemned on the basis of the natural right principles of the Declaration, so too can the death penalty, the Framer's opinions and intentions notwithstanding.\textsuperscript{154}

Returning now to the respective approaches of Justice Scalia and Justice Brennan, a synthesis is possible. Justice Scalia's interpretive approach has the recognized benefit of consistency, a consistency borne out of grounding the meaning of the Punishments Clause in the legal tradition of the United States. It does not, however, provide a robust level of protection; Justice Brennan's approach does. Yet Jaffa's criticism is not entirely unfounded; Justice Brennan's interpretation smacks of a subjective construction or, worse, an arrogant pronouncement of a profound moral insight that may continue to evade the rest of humanity until some undisclosed point in the future. It is not inconceivable that such an approach might allow justices with different proclivities than Justice Brennan to make their own profound moral insights. This would lead back to the problem of instability, and would no doubt raise further questions of legitimacy with respect to judges imposing their preferences on the law. To avoid this, holding to a principle set forth beyond the independent reasoning of any justice or group of justices is imperative. It is here that looking to the higher principles enshrined in the Declaration of Independence can serve as a traditional grounding for Justice Brennan's reading of the text in the light of human dignity. Human dignity is not just a value pulled out of thin air, but rather a foundational principle of the American Republic. Of the three rights enumerated in the text of the Declaration itself, \textit{life} is first.\textsuperscript{155} Even earlier in the text of the Declaration is the universal statement that "all men are created equal."\textsuperscript{156}


\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{THE DECLARATION OF INDEPENDENCE} para. 2 (1776).

\textsuperscript{156} \textit{Id.}
there is a fundamental moral equality amongst all human beings that is beyond the law to either give or take away. Human dignity—the principle by which all punishments ought to abide—is central to the principles of the Republic to which the Constitution gives legal structure.

A post-historicist Punishments Clause jurisprudence, then, is a jurisprudence that does not yield to social fiat. Instead, it looks to the foundational principles of the Nation itself to apply the text of the Eighth Amendment to honor those principles. Since these principles are invariable and will remain with the American Republic until its dissolution, this post-historicist jurisprudence is not ahistoricial. While it is regrettable that the transcendent origin of these principles in "the Laws of Nature and of Nature's God" may not garner the same recognition today that they did three centuries ago, even the hardened skeptic can assent to the fact that they are still at the heart of the Republic.

V. Conclusion

This Comment has analyzed the Supreme Court's historicist Punishments Clause jurisprudence and exposed its theoretical and practical shortcomings. It has also demonstrated that the Court's attempt to blend into this jurisprudence a rule of independent judgment, along with the use of legal and scientific positivism, has been unsuccessful. This Comment has further argued that the Court's historicist approach leaves uncertainties in the law itself and presents no guarantee that, based on the transient opinions of society, there is an inevitable move for a better or more humane understanding of what constitutes a "cruel and unusual" punishment. In place of this approach, this Comment has proposed not only that there is a horizon beyond historicism where the Court may look to interpret the Eighth Amendment, but that this horizon is within the sphere of the American Republic itself. A post-historicist Punishments Clause jurisprudence can and ought to be grounded in the founding principles of the Republic as enumerated in the Declaration of Independence. In doing so, the Court may avoid the error of Socrates' comrade in the Minos who believed "without qualification, that law is the official opinion of the city." Surely, as Socrates has told us, "it wouldn't fit harmoniously

157. Id. para. 1.

for the wicked official opinion to be law,” insofar as we “ought to think about law as being something noble and seek it as good.”159

* J.D. 2007, DePaul University College of Law; B.S. 2004, Grand Valley State University. I would like to thank my dear wife Laura for all of her love and support. Glory be to God for all things.

---

159. Id. at 56, 55.