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Bucklew v. Precythe139 S. Ct. 1112 (2019)

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I. INTRODUCTION

The Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment,[1] provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[2] It was originally understood that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain."[3] However, it appears that the understanding of the Constitution is "evolving" faster than one would suspect.[4]

The Supreme Court in *Baze v. Rees* stated that a method of execution must create an intolerable risk of harm to be deemed as cruel and unusual.[5] Seven years later, in the Supreme Court case of *Glossip v. Gross*,[6] the Court added a second component to that pleading standard holding that an inmate must also provide an alternative method of execution in order to prove cruel and unusual punishment under the Eighth Amendment.[7] These two decisions left courts confused as to the standard that is to be applied when an inmate challenges a State's method of execution.

In the 2019 term, the Supreme Court was presented with an opportunity to settle this legal confusion. The question presented to the Court in *Bucklew v. Precythe*[8] was what legal standards govern an as-applied Eighth Amendment challenge to a State's method of carrying out a death sentence.[9] The Court held that the *Baze-Glossip* test governed both facial and as-applied Eighth Amendment challenges.[10] Ultimately, this means that when an inmate brings a method of execution challenge against the state, the inmate must prove a viable alternative method of execution.[11]

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1. *See* Robinson v. California, 370 U.S. 660, 666 (1962).
2. U.S. CONST. amend. VIII.
3. Baze v. Rees, 553 U.S. 35, 94 (2008) (Thomas, J., concurring).
4. *Id.* at 104.
5. *Id.* at 50.
6. 135 S. Ct. 2726 (2015).
7. *Id.* at 2738.
8. 139 S. Ct. 1112 (2019).
9. *Id.* at 1122.
10. *Id.* at 1126.
11. *Id.* at 1125.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 1998, a Missouri jury convicted and sentenced Russell Bucklew to death for first degree murder, kidnapping, burglary, forcible rape, and armed criminal action.[12] His direct appeal was unsuccessful.[13] Furthermore, separate rounds of state and federal post-conviction proceedings also failed to yield Mr. Bucklew the relief he was seeking.[14] After almost a decade of litigation, it seemed as though Mr. Bucklew was out of legal options.

However, Mr. Bucklew filed suit with the district court on May 9, 2014 and moved for a stay of execution on May 14, 2014 to provide time to litigate his claims before his scheduled execution on May 21, 2014.[15] In this case, Mr. Bucklew presented an as-applied Eighth Amendment challenge to Missouri's lethal injection protocol contending that, regardless of whether it would cause excruciating pain for all prisoners, it would cause him excruciating pain due to his particular medical condition.[16] Mr. Bucklew's medical condition is known as cavernous hemangioma, which causes vascular tumors—which are clumps of blood vessels—to grow in his head, neck, and throat.[17] The complaint alleged that this disease could prevent the lethal drugs from circulating properly in his body, that the use of chemical dyes in the execution process would cause his blood pressure to rise and his tumors to rupture, and that the lethal drugs could react adversely with his other medications.[18]

Ultimately, the district court dismissed Mr. Bucklew's claims for failing to plead a feasible and readily available alternative method of execution.[19] The Eighth Circuit granted a stay, but the stay was vacated en banc later that day.[20] However, the Supreme Court then ordered a stay of execution while he litigated his appeal.[21] Ultimately, the Eighth Circuit reversed the district court's dismissal and remanded for further proceedings, holding that Mr. Bucklew's complaint failed as a matter of law to identify a feasible and readily available alternative method of execution that would significantly reduce the risks he alleged would result from Missouri's lethal injection

12. Brief for Petitioner at 5, *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (No. 17-8151), 2018 WL 3456065.

13. State v. Bucklew, 973 S.W.2d 83 (Mo. 1998), *cert. denied*, 525 U.S. 1082 (1999).

14. Bucklew v. State, 38 S.W.3d 395 (Mo. 2001), *cert. denied*, 534 U.S. 964 (2001); Bucklew v. Luebbers, 436 F.3d 1010 (8th Cir. 2006), *cert. denied*, 549 U.S. 1079 (2006).

15. Brief for Petitioner, *supra* note 13, at 17.

16. *Bucklew*, 139 S. Ct. at 1120.

17. *Id.*

18. *Id.*

19. Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014 WL 2736014, at **6-7 (W.D. Mo. May 18, 2014), rev'd,783 F.3d 1120 (8th Cir. 2015).

20. Bucklew v. Lombardi, 565 F. App'x. 562 (8th Cir. 2014), *vacated en banc*, 572 U.S. 1132 (2014).

21. Bucklew v. Lombardi, 572 U.S. 1131 (2014).

protocol.[22] Mr. Bucklew then filed his fourth amended complaint in which he, for the first time, proffered lethal gas as a feasible and available alternative method of execution.[23]

On remand, the district court allowed Mr. Bucklew "extensive discovery" on his method of execution proposal. [24] But even at the close of discovery in 2017, the district court found his proposal lacking and granted the State's motion for summary judgment, concluding that the record did not present a genuine issue of material fact concerning whether execution by lethal gas would significantly reduce Mr. Bucklew's risk of suffering.[25]

This time, a divided Eighth Circuit panel affirmed the district court's decision to grant summary judgment in favor of the State and vacated the stay.[26] The court concluded that Mr. Bucklew provided no evidence showing that his pain "would be substantially reduced by use of nitrogen hypoxia instead of lethal injection as the method of execution."[27] Furthermore, the Court of Appeals denied Mr. Bucklew's petition for a panel rehearing or a rehearing en banc, as well as his motion for an emergency stay.[28] On April 30, 2018, the day Mr. Bucklew was scheduled to be executed, the Supreme Court stayed his execution and granted his petition for writ of certiorari in order to clarify the legal standards that govern an as-applied Eighth Amendment challenge to a State's method of carrying out a death sentence.[29]

III. COURT'S DECISION AND RATIONALE

A. Majority Opinion by Justice Gorsuch

Writing for the majority, Justice Gorsuch, joined by Justices Roberts, Thomas, Alito, and Kavanaugh, began with an examination of the original and historical understanding of the Eighth Amendment and the Court's precedent in *Baze v. Rees* and *Glossip v. Gross*.[30] Next, the Court addressed whether, in light of those authorities, it would be appropriate to adopt a different constitutional test for as-applied challenges.[31] Finally, the Court turned to the question of whether Mr. Bucklew was able to satisfy the constitutional test that is set by precedent.[32]

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22. *Bucklew*, 139 S. Ct. at 1121.
23. *Id.*
24. Bucklew v. Precythe, 883 F.3d 1087, 1094 (8th Cir. 2018).
25. *Bucklew*, 139 S. Ct. at 1121.
26. *Id.* at 1122.
27. *Id.* (quoting *Bucklew*, 883 F.3d. at 1096).
28. *Id.*
29. Bucklew v. Precythe, 138 S. Ct. 1706 (2018).
30. *Bucklew*, 139 S. Ct. at 1122.
31. *Id.*
32. *Id.* at 1129.

In part II of the opinion, Justice Gorsuch acknowledged the Eighth Amendment forbids "cruel and unusual" punishment but "does not guarantee a prisoner a painless death – something that, of course, isn't guaranteed to many people, including most victims of capital crimes."[33] He explained that the Eighth Amendment, as originally understood, tolerated methods of execution that involved a significant risk of pain and only forbade punishments imposed to intentionally 'superadd' "terror, pain, or disgrace."[34] These methods of execution that intentionally superadded pain included such "[d]isgusting" practices as disemboweling, quartering, public dissection, and burning alive, all of which "savor[ed] of torture or cruelty."[35] Next, Justice Gorsuch explained that for an inmate to show that a State's chosen method of execution cruelly superadds pain he "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason."[36] Justice Gorsuch then emphasized that *Glossip* left no doubt that this standard was to govern "all Eighth Amendment method-of-execution claims," not just facial challenges.[37] Furthermore, in *Baze* and *Glossip*, the Court recognized that the Eighth Amendment "does not demand the avoidance of all risk of pain in carrying out executions."[38] In fact, history has shown that the Constitution allows a "measure of deference to a State's choice of execution procedures" and does not permit any court to serve as "boards of inquiry charged with determining 'best practices' for executions."[39] It was then made clear that traditionally accepted methods of execution are not rendered unconstitutional as soon as an arguably more humane method of execution becomes available.[40]

Next, Justice Gorsuch turned to Mr. Bucklew's argument that a different constitutional test should govern as-applied challenges.[41] Mr. Bucklew argued that he should not have to prove an alternative method of execution in his as-applied challenge because "certain categories" of capital punishment are so "manifestly cruel . . . such that they are plainly forbidden by the Eighth Amendment without reference to any alternative methods."[42] However, Justice Gorsuch asserted that this argument is foreclosed by precedent.[43] The

33. *Id.* at 1124 (citing *Glossip*, 135 S. Ct. at 2726).
34. *Id.* at 1123 (quoting 4 W. Blackstone, Commentaries on the Laws of England 370 (1769)).
35. *Bucklew*, 139 S. Ct. at 1123.
36. *Id.* at 1125. *See Glossip*, 135 S. Ct. at 2726; *Baze*, 553 U.S. at 52.
37. *Glossip*, 135 S. Ct. at 2731.
38. *Bucklew*, 139 S. Ct. at 1125 (quoting *Baze*, 552 U.S. at 47).
39. *Id.* (quoting *Baze*, 552 U.S. at 51-52).
40. *Id.*
41. *Id.* at 1126.
42. Brief for Petitioner, *supra* note 13, at 41.
43. *Bucklew*, 139 S. Ct. at 1126.

Court in *Glossip* held that identifying an available alternative is "a requirement of all Eighth Amendment method-of-execution claims" alleging cruel pain.[44] This is because distinguishing between constitutionally permissible and impermissible degrees of pain is a necessarily comparative exercise.[45] Furthermore, Justice Gorsuch contended that Mr. Bucklew's argument fails for another independent reason: it is inconsistent with the original and historical understanding of the Eighth Amendment on which *Baze* and *Glossip* rest.[46] When determining whether a punishment is unconstitutionally cruel, the question has always been whether the punishment intentionally "superadds" pain well beyond what is needed to carry out a death sentence.[47] Justice Gorsuch urged this question should be answered with a comparison of available alternatives.[48] This is because it would be strange for the Constitution be applied differently depending on how broad a remedy the plaintiff seeks.[49] Furthermore, Justice Gorsuch outlined another reason Mr. Bucklew's argument is impermissible: it invites pleading games.[50] Not only does the line between facial and as-applied challenges sometimes prove "amorphous,"[51] and "not so well defined,"[52] there is little likelihood that an inmate facing serious risk of pain will be unable to identify an "feasible" and "readily implemented" alternative.[53]

In part III of the opinion, Justice Gorsuch turned to the question of whether Mr. Bucklew was able to satisfy the *Baze-Glossip* test.[54] The question was whether Mr. Bucklew identified a feasible and readily implemented alternative method of execution that the State refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain.[55] According to Justice Gorsuch, Mr. Bucklew failed to present a genuine issue of material fact on the viability of nitrogen hypoxia as an alternative to the State's execution protocol for two independent reasons.[56]

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44. *Glossip*, 135 S. Ct. at 2731.
45. *Bucklew*, 139 S. Ct. at 1126.
46. *Id.*
47. *Id.* at 1127.
48. *Id.*
49. *Id.* at 1127-28. *See* Gross v. United States, 771 F.3d 10, 14-15 (D.C. Cir. 2014) ("[T]he substantive rule of law is the same for both [facial and as-applied] challenges"); Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp., 462 F.3d 219, 228 (2d Cir. 2006) (the facial/as-applied distinction affects "the extent to which the invalidity of a statute need be demonstrated," not "the substantive rule of law to be used.").
50. *Bucklew*, 139 S. Ct. at 1128-29.
51. Elgin v. Dep't of Treasury, 567 U.S. 1, 15 (2012).
52. Citizen United v. FEC, 558 U.S. 310, 331 (2010).
53. *Bucklew*, 139 S. Ct. at 1128-29.
54. *Id.* at 1129.
55. *Id.*
56. *Id.*

First, Justice Gorsuch asserts that an inmate must show that his proposed alternative method is not just "feasible" but also "readily implemented."[57] This means the inmate's alternative proposal must be detailed enough to allow a finding that the State could carry it out "relatively easily and reasonably quickly."[58] According to Justice Gorsuch, Mr. Bucklew's bare-bones alternative proposal falls well short of that pleading standard.[59] Justice Gorsuch contended that Mr. Bucklew presented no evidence on essential questions; instead, he pointed to reports from correctional authorities in other States indicating that additional study is needed to develop a protocol for execution by nitrogen hypoxia.[60] This was simply a proposal for more research, not the feasible and readily implemented alternative that the *Baze-Glossip* test requires.[61]

Second, Justice Gorsuch asserted that the State had a "legitimate" reason for declining to switch from its current method of execution as a matter of law.[62] Justice Gorsuch pointed out that instead of pointing to a proven alternative method, Mr. Bucklew sought the adoption of an entirely new method—one that had "never been used to carry out an execution" and had "no track record of successful use."[63] Therefore, Justice Gorsuch reasoned that choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it.[64]

Next, Justice Gorsuch reasoned that even if nitrogen hypoxia were a readily available alternative, neither of the two theories Mr. Bucklew advanced turned out to be supported by record evidence.[65] First, Mr. Bucklew contended that the State may use painful procedures to administer the lethal injection.[66] He stated that the execution team might try to insert an IV into one of his peripheral veins, which could cause it to rupture; or the team could force him to lie flat on his back during the execution, which he alleged could impair his breathing before the lethal drug is administered.[67] However, Justice Gorsuch noted that each of Mr. Bucklew's contentions rested on speculation unsupported, if not explicitly contradicted, by the evidence in the case.[68] Moreover, Justice Gorsuch reiterated that to the extent the record is

57. *Glossip*, 135 S. Ct. at 2737.
58. *Bucklew*, 139 S. Ct. at 1129 (quoting McGehee v. Hutchinson, 854 F.3d 488, 493 (8th Cir. 2017)).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 1129-30.
63. *McGehee*, 854 F.3d at 493.
64. *Bucklew*, 139 S. Ct. at 1130.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

unclear on any of these issues, Mr. Bucklew had ample opportunity to conduct discovery and develop a factual record concerning the procedure the State planned to use.[69]

Second, Mr. Bucklew contended that while both methods would cause him to have similar feelings of pain and suffocation before he is rendered fully unconscious, the duration of that feeling would be much shorter with his proposed method of execution.[70] However, Justice Gorsuch again stated that the record contained insufficient evidence concerning this issue.[71] In fact, there was nothing in the record to suggest that Mr. Bucklew would be capable of experiencing pain for significantly more time after being injected with lethal drugs than he would after receiving nitrogen hypoxia.[72] Justice Gorsuch pointed out that Mr. Bucklew's claim rested upon his expert's testimony regarding a study of euthanasia in horses that everyone now agrees was incorrect.[73]

In closing, Justice Gorsuch stated that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence."[74] He stressed that "[l]ast-minute stays should be the extreme exception, not the norm, and 'the last-minute nature of an application' that 'could have been brought' earlier, or 'an applicant's attempt at manipulation,' 'may be grounds for denial of a stay.'"[75]

B. Concurring Opinion by Justice Thomas

In his concurring opinion, Justice Thomas joined the Court's judgment; however, he wrote separately to explain his view that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain."[76] He explained, "the evil the Eighth Amendment targets is intentional infliction of gratuitous pain."[77] He pointed to historical evidence that shows the Framers of the Constitution sought to disable Congress from imposing various kinds of diabolical torture.[78] However, Justice Thomas was careful to explain that disabling diabolical torture did not put an end to capital punishment.[79] Capital punishment would continue, but without those

69. *Bucklew*, 139 S. Ct. at 1131.
70. *Id.*
71. *Id.*
72. *Id.* at 1132.
73. *Id.*
74. *Bucklew*, 139 S. Ct. at 1133 (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)).
75. *Id.* at 1134.
76. *Id.* at 1135 (quoting *Baze*, 553 U.S. at 94) (Thomas, J., concurring).
77. *Id.* (quoting *Baze*, 553 U.S. at 102).
78. *Id.*
79. *Bucklew*, 139 S. Ct. at 1135 (Thomas, J., concurring).

punishments that deliberately superadded pain.[80] In sum, Justice Thomas emphasized that the constitutionality of a particular execution turns on whether the Government "deliberately designed" the method of execution "to inflict pain."[81]

C. Concurring Opinion by Justice Kavanaugh

Justice Kavanaugh joined the Court's opinion but wrote separately to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law—a legal issue that had been uncertain before the Court's decision in this case.[82] He explained that an inmate who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method that would significantly reduce the risk of pain.[83] Justice Kavanaugh proffered the firing squad as such an alternative, if adequately pleaded.[84] In short, Justice Kavanaugh wanted to emphasize the Court's statement that "we see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative."[85]

D. Dissenting Opinion by Justice Breyer

Justice Breyer, with whom Justices Ginsburg, Sotomayor, and Kagan join as to all but part III, expressed disapproval of the Court's holding.[86] Justice Breyer turned to three questions he believed the case raised.[87] He began with a factual question: whether Mr. Bucklew has established that, because of his rare medical condition, the State's current method of execution risks subjecting him to excessive suffering.[88] In Justice Breyer's opinion, Mr. Bucklew established a triable fact regarding whether an execution by lethal injection would subject him to impermissible suffering.[89] In coming to this conclusion, Justice Breyer relied on Mr. Bucklew's submitted sworn declarations, deposition testimony from an expert witness, and medical condition.[90] He believed that when looking at the evidence, taken in the light most favorable to Mr. Bucklew, there was a genuine issue as to whether the State's lethal injection protocol would subject him to several minutes of

80. *Id.* at 1135.
81. *Id.* (quoting *Baze*, 553 U.S. at 97-98).
82. *Id.* at 1136.
83. *Id.*
84. *Bucklew*, 139 S. Ct. at 1136.
85. *Id.*
86. *Id.* (Breyer, J., dissenting).
87. *Id.*
88. *Id.*
89. *Bucklew*, 139 S. Ct. at 1137.
90. *Id.*

"severe pain and suffering,"[91] during which he would suffocate on his own blood.[92] However, since experts were disputing whether Mr. Bucklew's execution would prove as unusually painful as he claims, Justice Breyer believed the resolution of that dispute is a matter for trial.[93]

Next, Justice Breyer raised a primarily legal question; namely, he asked whether a prisoner like Mr. Bucklew who has a rare medical condition must identify an alternative method of execution.[94] Justice Breyer began this discussion by acknowledging that the Court in *Glossip* held, in the context of a facial challenge to a State's execution protocol, that the plaintiffs were required not only to establish that the execution method gave rise to a "demonstrated risk of severe pain," but also to identify a "known and available" alternative method.[95] Furthermore, the Court added that the alternative method must be "feasible, readily implemented, and in fact significantly reduc[e] a substantial risk of severe pain."[96] For present purposes, Justice Breyer accepted the *Glossip* majority opinion as governing, but he nonetheless did not believe its "alternative method" requirement should have been applied in this case because he believed the *Glossip* case and the present case to be different for three distinct reasons.[97]

First, the *Glossip* Court stressed the importance of preventing method-of-execution challenges from becoming a backdoor means to abolishing capital punishment, stating, "because it is settled that capital punishment is constitutional, it necessarily follows that there must be a constitutional means of carrying it out."[98] The Court in *Glossip* stressed that capital punishment is not per se unconstitutional, however, the Court feared that allowing prisoners to invalidate a State's method of execution without identifying an alternative would "effectively overrule these decisions."[99] However, Justice Breyer points out that there is no such risk in this particular situation.[100] He stated that holding the State's lethal injection protocol as applied to Mr. Bucklew who has a severe and rare medical condition would not risk invalidating the death penalty.[101]

Second, Justice Breyer pointed to the fact that precedent counsels against extending *Glossip* to as-applied challenges.[102] He emphasized the fact that

91. *Id.* at 1138 (quoting *Glossip*, 135 S. Ct. at 2726).
92. *Id.*
93. *Id.* at 1138-39.
94. *Bucklew*, 139 S. Ct. at 1136 (Breyer, J., dissenting).
95. *Id.* at 1139 (quoting *Glossip*, 135 S. Ct. at 2726).
96. *Id.* at 1140 (quoting *Glossip*, 135 S. Ct. at 2726).
97. *Id.*
98. *Id.* (quoting *Glossip*, 135 S. Ct. at 2726).
99. *Bucklew*, 139 S. Ct. at 1140.
100. *Id.*
101. *Id.*
102. *Id.* at 1141.

neither the Court's oldest method-of-execution case, *Wilkerson v. Utah*,[103] nor any subsequent decision of the Court until *Glossip*, held that prisoners who challenge a State's method of execution must identify an alternative method of execution.[104] Justice Breyer next points to the case of *Hill v. McDonough* in which the Court squarely and unanimously rejected the argument that a "prisoner must identify an alternative, authorized method of execution."[105] Justice Breyer went on to reemphasize that the Constitution itself never hints at such a pleading requirement, the Court has not applied such a requirement in more than a century of method-of-execution cases, and the pleading requirement was unanimously rejected in *Hill*.[106] Justice Breyer suggested that confining the *Glossip* "alternative method" requirement to facial challenges would help solve many issues.[107]

Third, Justice Breyer believed that the implications of the majority's holding provided the best reason to decline extending the *Glossip* "alternative method" requirement to as-applied challenges.[108] Justice Breyer contended that the majority's decision permits a State to execute a prisoner who suffers from a medical condition that would render his execution painful.[109] Justice Breyer again turned to Mr. Bucklew's evidence of his medical condition and stated that although Mr. Bucklew presented evidence of a serious risk that his execution will be severely painful, the State is going to execute him anyway.[110] Justice Breyer was troubled by this and believed that the Court had converted the Eighth Amendment's "categorical prohibition into a conditional one."[111]

Justice Breyer then assumed for argument's sake that the *Glossip* "alternative method" requirement did extend to Mr. Bucklew, and he must bear the burden of showing the existence of a "known and available" alternative method of execution that "significantly reduces a substantial risk of severe pain.[112] According to Justice Breyer, the record contained more than enough evidence that nitrogen hypoxia, a type of lethal gas, is an available alternative.[113] More specifically, he pointed out that Missouri law permits the use of lethal gas a method of execution.[114] Furthermore, three other states – Alabama, Mississippi, and Oklahoma – have specifically

103. 99 U.S. 130 (1879).
104. *Bucklew*, 139 S. Ct at 1141.
105. *Id.* at 582.
106. *Bucklew*, 139 S. Ct. at 1141.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Bucklew*, 139 S. Ct. at 1142 (quoting *Glossip*, 135 S. Ct. 2726) (Breyer, J., dissenting)).
112. *Id.*
113. *Id.*
114. *Id. See* Mo. Rev. Stat. § 546.720 (2002).

authorized nitrogen hypoxia as a method of execution.[115] Justice Breyer then made a point to emphasize that an inmate is not required to answer all essential questions and not required to provide guidance about the administration of the alternative method of execution down to the last detail as the majority proposed.[116] Justice Breyer was fearful that the hurdle the majority seemed to invent could permit States to execute even those that will endure the most serious pain and suffering, regardless of how exceptional their case and irrespective of how thoroughly they prove it.[117]

Lastly, Justice Breyer turned to a more general question, namely, how to minimize delays in executing offenders who have been condemned to death.[118] Justice Breyer acknowledged the fact that Mr. Bucklew was arrested for the crime that led to his death sentence more than twenty years ago.[119] However, he was quick to point out that Mr. Bucklew's case was not an anomaly.[120] In fact, the average time between sentencing and execution approaches eighteen years and in some instances rises to more than forty years.[121] Justice Breyer agreed with the majority that these delays are excessive, and undue delays in death penalty cases frustrate the interests of the State and of surviving victims, who have "an important interest" in seeing justice done quickly.[122] Yet, Justice Breyer contended that the majority responded to these delays by curtailing the constitutional guarantees afforded to prisoners, like Bucklew, who have been sentenced to death.[123] He concluded that despite the length of time between sentencing and execution, the law entitles Mr. Bucklew to an opportunity to prove his claim at trial.[124]

In sum, Justice Breyer disagreed with the majority's answers to all three questions that were raised.[125] He concluded by stating the case at hand adds to the mounting evidence that we can either have a death penalty that avoids excessive delays and "arguably serves legitimate penological purposes," or we can have a death penalty that "seeks reliability and fairness in the death penalty's application" and avoids the infliction of cruel and unusual punishment.[126] However, Justice Breyer asserts that it may well be that we "cannot have both."[127]

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115. *Id.* at 1142.
116. *Bucklew*, 139 S. Ct. at 1143.
117. *Id.*
118. *Id.* at 1136 (Breyer, J., dissenting).
119. *Id.* at 1144.
120. *Id.*
121. *Bucklew*, 139 S. Ct. at 1133.
122. *Id.* (quoting *Hill*, 547 U.S. at 584).
123. *Id.* at 1144. (Breyer, J., dissenting).
124. *Id.* at 1145.
125. *Id.* at 1136.
126. *Bucklew*, 139 S. Ct. at 1145 (quoting *Glossip*, 35 S. Ct. 2726) (Breyer, J., dissenting).
127. *Id.*

E. Dissenting Opinion by Justice Sotomayor

Justice Sotomayor authored the second dissenting opinion.[128] According to Justice Sotomayor, the majority's decision contained troubling dicta concerning late-arising death penalty litigation.[129] She contended that the majority seemed to imply that this litigation has been no more than manipulation of the judicial process for the purpose of delaying an inmate's execution.[130] Justice Sotomayor was also deeply troubled by the majority's statement that "[l]ast minute stays should be the extreme exception," which she thought could be read to imply that late-occurring stay requests from capital prisoners should be reviewed with a jaundiced eye.[131] She admitted that a court may deny relief when a party has "unnecessarily" delayed seeking a stay, and courts should not grant equitable relief on clearly "dilatory," "speculative," or "meritless" grounds.[132] However, she stressed that this is hardly the same thing as treating a late-arising claim as presumptively suspect.[133] In sum, Justice Sotomayor believed that the only sound approach is for courts to continue to afford each and every request for equitable relief a careful hearing on its own merits especially when the litigation concerns an impending execution.[134]

IV. ANALYSIS

A. Introduction

In *Bucklew*, the Court affirmed that the *Baze-Glossip* test applies to both facial and as-applied method-of-execution challenges that an inmate may assert.[135] This test heightens the pleading standard for inmates and requires them to show a "feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason."[136] This is a diversion from the original understanding of the Eighth Amendment in which many understood a method of execution to violate the Cruel and Unusual Punishments Clause only if it is deliberately designed to inflict pain,

128. *Id.* at 1145 (Sotomayor, J., dissenting).
129. *Id.* at 1146.
130. *Id.*
131. *Bucklew*, 139 S. Ct. at 1146.
132. *Id.* at 1147 (quoting *Hill*, 547 U.S. at 584-85).
133. *Id.*
134. *Id.*
135. *Id.* at 1112.
136. *Bucklew*, 139 S. Ct. at 1125.

and it injects the Court into matters it has no institutional capacity to resolve.[137]

With this background established, this Note focuses on (1) the Eighth Amendment in light of the historical practices that led the Framers to include it in the Bill of Rights, (2) Supreme Court cases that are consistent with the original understanding of the Cruel and Unusual Punishments Clause, and (3) the majority's willingness to discard the unbroken line of authority in favor of a new standard.[138] This Note will also briefly address potential implications for future death penalty challenges brought by an inmate.[139]

B. Discussion

1. The Eighth Amendment in Light of Historical Practices

The Eighth Amendment's prohibition on the infliction of "cruel and unusual punishments" must be understood in light of the historical practices that led the Framers to include it in the Bill of Rights.[140] It is clear that the Eighth Amendment does not prohibit the death penalty.[141] However, just because the Constitution permits capital punishment in principle does not mean that all methods of execution are constitutional.[142]

In English and early colonial practice, the death penalty was not a uniform punishment, but rather a range of punishments and devices that were intended to torture offenders to death.[143] Executions were often performed publicly in order to impress on bystanders the consequences of violating the law.[144] Death by hanging was the most common mode of execution both before and after 1791, and there is no doubt that it remained a permissible punishment after the enactment of the Eighth Amendment.[145] However, it is imperative to note that death by hanging was not the harshest penalty in the seventeenth and eighteenth century.[146] In addition to hanging, "'[o]fficials also wielded a set of tools capable of *intensifying* a death sentence,' that is, 'ways of producing a punishment worse than pain.'"[147]

One such tool that was capable of intensifying a death sentence was burning at the stake.[148] Burning, unlike hanging, was always painful and

137. *Baze*, 553 U.S. at 94 (Thomas, J., concurring).
138. *See infra* Parts IV.B.1-3.
139. *See infra* Part IV.B.4.
140. *Baze*, 553 U.S. at 94 (Thomas, J., concurring).
141. *Id.*
142. *Id.* at 95.
143. *Id.*
144. *Id.*
145. *Baze*, 553 U.S. at 95 (Thomas, J., concurring).
146. *Id.*
147. *Id.*
148. *Id.* at 95.

destroyed the body.[149] In fact, burning alive was such a dreadful punishment that sheriffs often times hanged the offender first "as an act of charity."[150] Some other methods of intensifying a death sentence included gibbeting, hanging the condemned in an iron cage so that his body would decompose in public view,[151] and public dissection.[152] However, none of these methods were worse than the worst fate a criminal could meet, which was the punishment for the crime of high treason.[153] This sentence involved "embowelling alive, beheading, and quartering."[154] It is clear that these punishments were purposely designed to inflict and superadd pain to the sentence of death.[155]

Although the Eighth Amendment was not the subject of extensive discussion during the debates on the Bill of Rights, it seemed as though the Framers believed that such embellishments upon the death penalty designed to inflict pain fell within the prohibition of the Cruel and Unusual Punishments Clause.[156] In fact, by the late eighteenth century, the more violent modes of execution faded away,[157] and for that reason would have been considered "unusual" in the sense that they were no longer regularly employed.[158] Furthermore, as time went on, enhancements to the death penalty that were designed to intentionally inflict pain were understood to fall within the meaning of "cruel."[159]

Moreover, the evidence we do have from the debates on the Bill of Rights confirms that the Eighth Amendment was intended to disable Congress from imposing such diabolical and torturous punishments.[160] Early commentators on the Constitution interpreted the Cruel and Unusual Punishments Clause as referring to intentionally inflicting torturous punishments.[161] Another commentator stated that so barbaric were the punishments prohibited by the Eighth Amendment that the provision was "wholly unnecessary in a free government, since it is scarcely possible, that any department of such a

149. *Id.*
150. *Baze*, 553 U.S. at 95.
151. *Id.*
152. *Id.* (quoting 4 W. Blackstone, Commentaries 376 (1796) (W. Lewis ed. 1897)).
153. *Id.* at 95-96 (quoting Blackstone at 376).
154. *Id.* at 96.
155. *Baze*, 553 U.S. at 96-97 (Thomas, J., concurring).
156. *Id.* at 97.
157. *Id.*
158. *Id.* at 96-97 (Thomas, J., concurring) (quoting Harmelin v. Michigan, 501 U.S. 957, 976 (1991).
159. *Id.* (citing 1 N. Webster, An American Dictionary of the English Language 52 (1828) (defining "cruel" as "disposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness")).
160. *Baze*, 553 U.S. at 97 (Thomas, J., concurring).
161. *Id.* at 98.

government should authorize, or justify such atrocious conduct."[162] In short, it is clear to see that the Eighth Amendment was strategically designed to prohibit only those punishments in which the government intentionally inflicted pain on one sentenced to death.

2. The Supreme Court and the Cruel and Unusual Punishments Clause

The Supreme Court has kept consistent with the original understanding of the Cruel and Unusual Punishments Clause and has repeatedly taken the view that the Framers intended to prohibit intentional infliction of torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment.[163] Three landmark cases emphasized that the Eighth Amendment is aimed at methods of execution purposely designed to intentionally inflict pain.[164]

In the case of *Wilkerson v. Utah*, the defendant had been convicted of first-degree murder in the Territory of Utah and sentenced to death by being "publicly shot until . . . dead."[165] Utah statues provided for the death penalty for first degree murder but did not specify the method of execution.[166] Prior state statutes specified shooting, hanging, or beheading as the primary methods of capital punishment, but those statutory provisions were repealed in 1876.[167] Wilkerson argued that the sentencing judge was without authority to sentence him to death by firing squad. However, the Supreme Court rejected his contention, and in doing so, reviewed various modes of execution that were catalogued as intentionally torturous.[168] The Court in *Wilkerson* found it "safe to affirm that punishments of torture. . .and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]."[169] The Court unanimously decided that death by firing squad did not fall within the category of cruel and unusual punishment.[170]

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162. *Id.* at 99 (quoting 3 J. Story, Commentaries on the Constitution of the United States 750 (1883)).

163. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("[T]he primary concern of the drafters was to proscribe 'tortures and other barbarous' methods of punishment."); Weems v. United States, 217 U.S. 349, 390 (1910) (White, J., dissenting) ("It may not be doubted, and indeed is not questioned by any one, that the cruel punishments against which the bill of rights provided were the atrocious, sanguinary and inhuman punishments which has been inflicted in the past upon the persons of criminals.").

164. *Baze*, 553 U.S. at 99 (Thomas, J., concurring).

165. *Wilkerson*, 99 U.S. at 131.

166. *Id.* at 136.

167. *Id.*

168. *Id.* at 135.

169. *Id.* at 136.

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

Twelve years after *Wilkerson*, in *In re Kemmler*,[171] the Court denied an application for a writ of error that sought reversal of a New York state court decision upholding electrocution as consistent with the state's constitutional proscription of cruel and unusual punishment.[172] The Court interpreted the Eighth Amendment as prohibiting punishments that "were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like."[173] Justice Fuller elaborated stating, "punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhuman and barbarous, something more than the mere extinguishment of life."[174] This case reaffirmed that the Eighth Amendment is solely aimed at methods of execution purposely designed to intentionally inflict pain.

Lastly, in the landmark case of *Louisiana ex rel. Francis v. Resweber*,[175] the Court called into question the cruelty of electrocution. The issue in that case was whether the State of Louisiana could constitutionally execute the petitioner, Willie Francis, after the electric chair had accidentally malfunctioned during a previous execution attempt.[176] The Court rejected the petitioner's contention that the Eighth Amendment prohibited Louisiana from subjecting him to a second attempt at electrocution.[177] The Court interpreted the Cruel and Unusual Punishments Clause to prohibit only the "wanton infliction of pain" or the "infliction of unnecessary pain," not the suffering involved in "humane" executions.[178] The Court reasoned that because the pain inflicted on Francis was accidental and unintentional, the State would not be precluded from making a second attempt to execute him.[179]

3. The Majority's Willingness to Discard the Unbroken Line of Authority

It is clear that the consistent interpretation of the Cruel and Unusual Punishments Clause forbade methods of execution that were purposely designed to intentionally inflict pain.[180] Surprisingly, however, the majority is willing to discard this unbroken line of authority for a standard that finds no support in the historical understanding of the Eighth Amendment or in the

171. 136 U.S. 436 (1890).
172. *Id.* at 438, 443-44, 449.
173. *Id.* at 446.
174. *Id.* at 447.
175. 329 U.S. 459 (1947).
176. *Id.* at 460.
177. *Id.*
178. *Id.* at 463-64.
179. *Id.* at 476 (Burton, J., dissenting).
180. *Baze*, 553 U.S. at 101 (Thomas, J., concurring).

Supreme Court's precedent.[181] The Courts majority opinion in *Bucklew* "threaten[s] to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology."[182]

Up until recent Supreme Court decisions, the Court has never suggested that a method of execution is "cruel and unusual" within the meaning of the Eighth Amendment simply because it involved a risk of pain.[183] The only methods the Court has suggested as cruel and unusual were the punishments that were designed to intentionally inflict torture as a way of enhancing the death penalty, such as burning at the stake.[184] As aforementioned, the evil the Eighth Amendment targets is intentional infliction of gratuitous pain—the standard that past cases have explicitly or implicitly invoked.[185]

Moreover, turning back to the landmark Supreme Court case of *Wilkerson v. Utah*, the Court did not find it necessary to conduct a comparative analysis of death by firing squad as opposed to any alternatives because death by firing squad plainly did not fall within the "same line of unnecessary cruelty" as the historical practices used in colonial practice.[186] The same is true in the landmark case of *In re Kemmler*. One can search the opinion in vain for a comparative analysis of electrocution versus any alternatives in the opinion, but they will not succeed in finding any comparison at all.[187] The court in *Kemmler* reasoned that it was not necessary to sift through "the voluminous mass of evidence. . .taken [in the courts below] as to the effect of electricity as an agent of death" in order to confirm that electrocution involved a less substantial risk of pain.[188] Likewise, in *Resweber*, the Court was confronted with the reality that the electric chair involved a significant risk of error and pain.[189] However, absent "malevolence" or a "purpose to inflict unnecessary pain," the Court concluded that that the Constitution did not prohibit the State from subjecting the petitioner to those risks for a second time.[190] No one in this case, or in any landmark Supreme Court case, has suggested that the State is required to implement additional safeguards or that an inmate must plead alternative methods of execution.[191] It is now clear to see that the majority was willing

181. *Id.*
182. *Id.*
183. *Id.*
184. *Kemmler*, 136 U.S. at 447.
185. *Baze*, 553 U.S. at 102 (Thomas, J., concurring).
186. *Wilkerson*, 99 U.S. at 136.
187. *Baze*, 553 U.S. at 102 (Thomas, J., concurring).
188. *Kemmler*, 136 U.S. at 442.
189. *Resweber*, 329 U.S. at 463.
190. *Id.* at 480.
191. *Baze*, 553 U.S. at 103 (Thomas, J., concurring).

to discard the unbroken line of authority for a standard that finds no support in the historical understanding of the Eighth Amendment or in the Supreme Court's precedent.[192]

4. Future Implications for Death Penalty Challenges

The Court was lacking support in history and precedent when reaffirming that "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason" extends to facial challenges as well as as-applied challenges.[193] This decision by the Court is sure to engender more litigation and is far from vindicating the states' "significant interest in meeting out a sentence of death in a timely fashion."[194] Lower courts will now have to consider "[w]hich alternative procedures are 'feasible' and 'readily implemented'" and "[a]t what point does a risk become substantial?"[195] The Court has left the states confused with nothing resembling a bright-line rule.[196]

Furthermore, the alternative proposal standard will require courts to resolve medical and scientific controversies that are largely beyond judicial reach.[197] Under the alternative proposal standard reaffirmed by the majority, the difference between one method of execution that satisfies the Eighth Amendment and one that does not may boil down to a very miniscule matter.[198] The courts have neither the authority or the expertise to manage the state's administration of the death penalty in this manner.[199]

V. CONCLUSION

The Supreme Court's decision in *Bucklew* reaffirmed that "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason" extends to facial challenges as well as as-applied challenges."[200] This decision will require courts to weigh the relative advantages and disadvantages of different modes of execution which is unprecedent and

192. *Id.* at 101.
193. *Bucklew*, 139 S. Ct. at 1125.
194. *Baze*, 553 U.S. at 105. (Thomas, J., concurring).
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 106.
199. *Baze*, 553 U.S. at 106 (Thomas, J., concurring).
200. *Bucklew*, 139 S. Ct at 1125.

unworkable.[201] If an inmate brings either a facial or as-applied challenge concerning a method of execution, the comparative element to the inquiry should be limited to whether the challenged method of execution intentionally inflicts torturous pain.[202] In closing, it is imperative to reiterate the words of Justice Breyer who stated that we can have a death penalty that avoids excessive delays and "arguably serves legitimate penological purposes," or we can have a death penalty that "seeks reliability and fairness in the death penalty's application" and avoids the infliction of cruel and unusual punishment.[203] However, it may well be that we "cannot have both."[204]

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201. *Baze*, 553 U.S. at 106 (Thomas, J., concurring).
202. *Id.*
203. *Bucklew*, 139 S. Ct. at 1145 (quoting *Glossip*, 135 S. Ct. at 2726).
204. *Id.*