AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice: Punishments: The Death Penalty

**Bucklew v. Precythe**, \_\_\_ U.S. \_\_\_ (2019)

*Russell Bucklew in 1996 brutally murdered Michael Sanders, who was housing his estranged ex-girlfriend. Bucklew was convicted of murder by a Missouri trial court and sentenced to death. After failing to convince a series of appellate courts that he had been unconstitutionally sentenced to death, Bucklew challenged the process by which he was to be executed. Missouri by the mid-2010s had adopted lethal injection as the means for implementing the death penalty. Condemned prisoners were first injected with a sedative, pentobarbital, to prevent them from feeling any pain, and then given pancuronium bromide and potassium chloride, which induce paralysis and cardiac arrest. A divided Supreme Court in* Baze v. Rees *(2008) and* Glossip v. Gross *(2015) held that this method of execution did not violate the cruel and unusual punishment clause of the Eighth Amendment as incorporated by the due process clause. Bucklew then revised his challenge. His suit against Anne Precythe, the director of the Missouri Department of Corrections, claimed that Missouri’s method of execution was unconstitutional as-applied to him because he suffered from cavernous hemangioma, a rare disease that would prevent the sedative from adequately circulating in his body and result in the lethal injection causing excruciating and unconstitutional pain. The local federal district court and Court of Appeals for the Eighth Circuit rejected this claim. Bucklew appealed to the Supreme Court.*

*The Supreme Court by a 5-4 vote rejected Bucklew’s claim. Justice Neil Gorsuch’s majority opinion declared that persons claiming a method of execution was cruel and unusual had to demonstrate some other feasible method of execution that was significantly less painful. Why does he think that standard correct and why does he think Bucklew failed to satisfy that standard? Justice Stephen Breyer in dissent claimed that persons claiming a method of execution was cruel and unusual had to claim only that they would experience extreme pain? Why does he make that claim? Who has the better of the constitutional argument? To what extent are the claims in* Bucklew *rooted in more general beliefs about capital punishment, with persons who support capital punishment inclined to think that some pain, even extreme pain, should not slow down the execution process and persons who oppose capital punishment determined to claim any excessive pain should prevent an execution? Gorsuch and Justice Sonya Sotomayor also dispute the lengthy process inherent in contemporary capital appeals. Is this a rehearsal for a far bigger case to come? What steps are conservatives likely to take to speed up the execution process? Should those steps be taken?*

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I5a32e600547611e9ab26b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5a32e600547611e9ab26b3103407982a) delivered the opinion of the Court.

. . . .

The Constitution allows capital punishment. In fact, death was “the standard penalty for all serious crimes” at the time of the founding. S. Banner, The Death Penalty: An American History 23 (2002) (Banner). Nor did the later addition of the Eighth Amendment outlaw the practice. On the contrary—the Fifth Amendment, added to the Constitution at the same time as the Eighth, expressly contemplates that a defendant may be tried for a “capital” crime and “deprived of life” as a penalty, so long as proper procedures are followed. Of course, that doesn't mean the American people must continue to use the death penalty. The same Constitution that permits States to authorize capital punishment also allows them to outlaw  it. But it does mean that the judiciary bears no license to end a debate reserved for the people and their representatives.

While the Eighth Amendment doesn't forbid capital punishment, it does speak to how States may carry out that punishment, prohibiting methods that are “cruel and unusual.” What does this term mean? At the time of the framing, English law still formally tolerated certain punishments even though they had largely fallen into disuse—punishments in which “terror, pain, or disgrace [were] superadded” to the penalty of death. . . . Methods of execution like these readily qualified as “cruel and unusual,” as a reader at the time of the Eighth Amendment's adoption would have understood those words. They were undoubtedly “cruel,” a term often defined to mean “[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting,” or “[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness,” And by the time of the founding, these methods had long fallen out of use and so had become “unusual.”

. . . .

Consistent with the Constitution's original understanding, this Court in *Wilkerson v. Utah* (1879), permitted an execution by firing squad while observing that the Eighth Amendment forbade the gruesome methods of execution described by Blackstone “and all others in the same line of unnecessary cruelty.” A few years later, the Court upheld a sentence of death by electrocution while observing that, though electrocution was a new mode of punishment and therefore perhaps could be considered “unusual,” it was not “cruel” in the constitutional sense: *In re Kemmler* (1890). It's instructive, too, to contrast the modes of execution the Eighth Amendment was understood to forbid with those it was understood to permit. At the time of the Amendment's adoption, the predominant method of execution in this country was hanging. While hanging was considered more humane than some of the punishments of the Old World, it was no guarantee of a quick and painless death. . . .

What does all this tell us about how the Eighth Amendment applies to methods of execution? For one thing, it tells us that the Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes. . . . This Court has yet to hold that a State's method of execution qualifies as cruel and unusual, and perhaps understandably so. Far from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite. . . . Still, accepting the possibility that a State might try to carry out an execution in an impermissibly cruel and unusual manner, how can a court determine when a State has crossed the line? THE CHIEF JUSTICE's opinion in [*Baze*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015800858&pubNum=0000780&originatingDoc=I5a32e600547611e9ab26b3103407982a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *v. Rees* (2008). . . supplies critical guidance. It teaches that where (as here) the question in dispute is whether the State's chosen method of execution cruelly superadds pain to the death sentence, 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. . . .

. . . [T]the Eighth Amendment “does not demand the avoidance of all risk of pain in carrying out executions.” To the contrary, the Constitution affords a “measure of deference to a State's choice of execution procedures” and does not authorize courts to serve as “boards of inquiry charged with determining ‘best practices’ for executions.” The Eighth Amendment does not come into play unless the risk of pain associated with the State's method is “substantial when compared to a known and available alternative.’ . . .

[W]e must confront Mr. Bucklew's argument that a different standard entirely should govern as-applied challenges like his. . . . The first problem with this argument is that it's foreclosed by precedent. *Glossip v. Gross* (2015) expressly held that identifying an available alternative is “a requirement of all Eighth Amendment method-of-execution claims” alleging cruel pain. . . . Mr. Bucklew's argument fails for another independent reason: It is inconsistent with the original and historical understanding of the Eighth Amendment. . . . [W]hen it comes to determining whether a punishment is unconstitutionally cruel because of the pain involved, the law has always asked whether the punishment “superadds” pain well beyond what's needed to effectuate a death sentence. And answering that question has always involved a comparison with available alternatives, not some abstract exercise in “categorical” classification. . . . A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications. So classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding “breadth of the remedy,” but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation. . . .

. . . .

. . . . Mr. Bucklew has failed for two independent reasons to present a triable question on the viability of nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) as an alternative to the State's lethal injection protocol. First, an inmate must show that his proposed alternative method is not just theoretically “ ‘feasible’ ” but also “ ‘readily implemented.’ ” . . . Mr. Bucklew's bare-bones proposal falls well short of that standard. He has presented no evidence on essential questions like how nitrogen gas should be administered (using a gas chamber, a tent, a hood, a mask, or some other delivery device); in what concentration (pure nitrogen or some mixture of gases); how quickly and for how long it should be introduced; or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks. Second, and relatedly, the State had a “legitimate” reason for declining to switch from its current method of execution as a matter of law. Rather than point 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.” But choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it. . . .

Even if a prisoner can carry his burden of showing a readily available alternative, he must still show that it would significantly reduce a substantial risk of severe pain. . . . [Mr. Bucklew’s] contentions . . . rest on speculation unsupported, if not affirmatively contradicted, by the evidence in this case. . . [T]o the extent the record is unclear on any of these issues, Mr. Bucklew had ample opportunity to conduct discovery and develop a factual record concerning exactly what procedures the State planned to use. He failed to do so. . . . In fact, there's nothing in the record to suggest that Mr. Bucklew will be capable of experiencing pain for significantly more than 20 to 30 seconds after being injected with pentobarbital. . . .

In sum, even if execution by nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) were a feasible and readily implemented alternative to the State's chosen method, Mr. Bucklew has still failed to present any evidence suggesting that it would significantly reduce his risk of pain. For that reason as well, the State was entitled to summary judgment on Mr. Bucklew's Eighth Amendment claim.

“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.” Those interests have been frustrated in this case. Mr. Bucklew committed his crimes more than two decades ago. He exhausted his appeal and separate state and federal habeas challenges more than a decade ago. Yet since then he has managed to secure delay through lawsuit after lawsuit. He filed his current challenge just days before his scheduled execution. . . . The people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better. . . . The answer is not, as the dissent incongruously suggests, to reward those who interpose delay with a decree ending capital punishment by judicial fiat. Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve. The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-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.”

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I5a32e600547611e9ab26b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5a32e600547611e9ab26b3103407982a), concurring.

I adhere to my view that “a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain.” Because there is no evidence that Missouri designed its protocol to inflict pain on anyone, let alone Russell Bucklew, I would end the inquiry there. . .

. . . “[T]he evil the Eighth Amendment targets is intentional infliction of gratuitous pain.” The historical evidence shows that the Framers sought to disable Congress from imposing various kinds of torturous punishments, such as “ ‘gibbeting,’ ” “burning at the stake,” and “ ‘embowelling alive, beheading, and quartering.’” The founding generation ratified the Eighth Amendment to reject that practice, contemplating that capital punishment would continue, but without those punishments deliberately designed to superadd pain. . . .

[M]y view does not render the Eighth Amendment “a static prohibition” proscribing only “the same things that it proscribed in the 18th century.” A method of execution not specifically contemplated at the founding could today be imposed to “superad[d]” “terror, pain, or disgrace.” Thankfully . . . States do not attempt to devise such diabolical punishments.

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I5a32e600547611e9ab26b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5a32e600547611e9ab26b3103407982a), concurring.

[*omitted*]

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I5a32e600547611e9ab26b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5a32e600547611e9ab26b3103407982a), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I5a32e600547611e9ab26b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5a32e600547611e9ab26b3103407982a), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I5a32e600547611e9ab26b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5a32e600547611e9ab26b3103407982a), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I5a32e600547611e9ab26b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5a32e600547611e9ab26b3103407982a) join as to all but Part III, dissenting.

. . . .

Bucklew has easily established a genuine issue of material fact regarding whether an execution by lethal injection would subject him to impermissible suffering. Bucklew maintains that, as a result of [his] medical condition, executing him by lethal injection would prove excruciatingly painful. In support of this claim, Bucklew submitted sworn declarations and deposition testimony. . . . The State asked the District Court to grant summary judgment in its favor on the theory that Bucklew failed to identify a genuine factual issue regarding whether an execution by lethal injection would be impermissibly painful. The District Court refused. The court believed that Bucklew had adequately shown that for up to several minutes he “could be aware that he is choking or unable to breathe but be unable to ‘adjust’ his breathing to remedy the situation.” Recognizing that the State's evidence suggested that Bucklew would experience this choking sensation for a shorter period, the District Court concluded that the dispute between the experts was “a factual dispute that the Court cannot resolve on summary judgment, and would have to be resolved at trial.” The District Court was right. The evidence, taken in the light most favorable to Bucklew, creates a genuine factual issue as to whether Missouri's lethal injection protocol would subject him to several minutes of “severe pain and suffering,” during which he would choke and suffocate on his own blood. . . .

. . . .

The plaintiffs in *Glossip v. Gross* (2015) undertook an across-the-board attack against the use of a particular execution method, which they maintained violated the Eighth Amendment categorically. In this case, by contrast, Bucklew does not attack Missouri's lethal injection protocol categorically, or even in respect to any execution other than his own. Instead, he maintains that he is special; that he suffers from a nearly unique illness; and that, by virtue of that illness, Missouri's execution method will be excruciatingly painful for him even though it would not affect others in the same way. These differences make a difference.

. . . .

The *Glossip* Court stressed the importance of preventing method-of-execution challenges from becoming a backdoor means to abolish capital punishment in general. . . . But there is no such risk here. Holding Missouri's lethal injection protocol unconstitutional as applied to Bucklew—who has a condition that has been identified in only five people would not risk invalidating the death penalty in Missouri. . . .

The *Glossip* Court, in adopting the “alternative method” requirement . . . discussed the need to avoid “intrud[ing] on the role of state legislatures in implementing their execution procedures.” But no such intrusion problem exists in a case like this one. When adopting a method of execution, a state legislature will rarely consider the method's application to an individual who, like Bucklew, suffers from a rare disease. . . .

The Court in *Glossip* may have also believed that the identification of a permissible alternative method of execution would provide a reference point to assist in determining how much pain in an execution is too much pain. But there is no need for any such reference point in a case like this. Bucklew accepts the constitutionality of Missouri's chosen execution method as to prisoners who do not share his medical condition. . . . To the extent that any comparator is needed, those executions provide a readymade, built-in comparator against which a court can measure the degree of excessive pain Bucklew will suffer.

. . . [P]recedent counsels against extending *Glossip*. Neither this Court's oldest method-of-execution case nor any subsequent decision of this Court until *Glossip*, held that prisoners who challenge a State's method of execution must identify an alternative means by which the State may execute them. . . . It is thus difficult to see how the “alternative-method” requirement could be “compelled by our understanding of the Constitution,” even though the Constitution itself never hints at such a requirement [and] even though we did not apply such a requirement in more than a century of method-of-execution cases. . . .

[T]he troubling implications of today's ruling provide the best reason for declining to extend *Glossip*'s “alternative method” requirement. The majority acknowledges that the Eighth Amendment prohibits States from executing prisoners by “ ‘horrid modes of torture’ ” such as burning at the stake. But the majority's decision permits a State to execute a prisoner who suffers from a medical condition that would render his execution no less painful. . . .

. . . .

Bucklew identified as an alternative method of execution the use of nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), which is a form of execution by lethal gas. . . . Three other States—Alabama, Mississippi, and Oklahoma—have specifically authorized nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) as a method of execution. And Bucklew introduced into the record reports from Oklahoma and Louisiana indicating that nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) would be simple and painless. . . .

. . . .

The majority . . . believes that Bucklew's evidence fails to show that nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) would be easy to implement. But the reports from Oklahoma and Louisiana tell a different story. The Louisiana report states that nitrogen [hypoxia](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ia99c9dd3475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) would be “simple to administer.” The Oklahoma report similarly concludes that “[d]eath sentences carried out by nitrogen inhalation would be simple to administer.” . . .

. . . .

. . . Justice THOMAS' view would make the constitutionality of a particular execution turn on the intent of the person inflicting it. But it is not correct that concededly torturous methods of execution such as burning alive are impermissible when imposed to inflict pain but not when imposed for a subjectively different purpose. To the prisoner who faces the prospect of a torturous execution, the intent of the person inflicting the punishment makes no difference.

For another thing, we have repeatedly held that the Eighth Amendment is not a static prohibition that proscribes the same things that it proscribed in the 18th century. Rather, it forbids punishments that would be considered cruel and unusual today. . . . . The question is not, as Justice THOMAS maintains, whether a punishment is deliberately inflicted to cause unnecessary pain, but rather whether we would today consider the punishment to cause excessive suffering.

Implicitly at the beginning of its opinion and explicitly at the end, the majority invokes the long delays that now typically occur between the time an offender is sentenced to death and his execution. . . . I agree with the majority that these delays are excessive. 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. . . . The majority responds to these delays by curtailing the constitutional guarantees afforded to prisoners like Bucklew who have been sentenced to death. By adopting elaborate new rules regarding the need to show an alternative method of execution, the majority places unwarranted obstacles in the path of prisoners who assert that an execution would subject them to cruel and unusual punishment. These obstacles in turn give rise to an unacceptable risk that Bucklew, or others in yet more difficult circumstances, may be executed in violation of the Eighth Amendment. . . . It might be possible to end delays by limiting constitutional protections for prisoners on death row. But to do so would require us to pay too high a constitutional price. . . . It may be that there is no way to execute a prisoner quickly while affording him the protections that our Constitution guarantees to those who have been singled out for our law's most severe sanction. And it may be that, as our Nation comes to place ever greater importance upon ensuring that we accurately identify, through procedurally fair methods, those who may lawfully be put to death, there simply is no constitutional way to implement the death penalty.

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I5a32e600547611e9ab26b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5a32e600547611e9ab26b3103407982a), dissenting.

. . . [T]here is no sound basis in the Constitution for requiring condemned inmates to identify an available means for their own executions. . . .

Given the majority's ominous words about late-arising death penalty litigation, one might assume there is some legal question before us concerning delay. Make no mistake: There is not. . . .

The majority seems to imply that this litigation has been no more than manipulation of the judicial process for the purpose of delaying Bucklew's execution. When Bucklew commenced this case, however, there was nothing “settled,” about whether the interaction of Missouri's lethal-injection protocol and his rare medical condition would be tolerable under the Eighth Amendment. . . .

I am especially troubled by the majority's statement that “[l]ast-minute stays should be the extreme exception,” which could be read to intimate that late-occurring stay requests from capital prisoners should be reviewed with an especially jaundiced eye. . . . It is equally well established that “[d]eath is a punishment different from all other sanctions in kind rather than degree.” For that reason, the equities in a death penalty case will almost always favor the prisoner so long as he or she can show a reasonable probability of success on the merits.

. . . .

The principles of federalism and finality that the majority invokes are already amply served by other constraints on our review of state judgments—most notably the Antiterrorism and Effective Death Penalty Act of 1996, but also statutes of limitations and other standard filters for dilatory claims. We should not impose further constraints on judicial discretion in this area based on little more than our own policy impulses. Finality and federalism need no extra thumb on the scale from this Court, least of all with a human life at stake.

. . . .

There are higher values than ensuring that executions run on time. If a death sentence or the manner in which it is carried out violates the Constitution, that stain can never come out. Our jurisprudence must remain one of vigilance and care, not one of dismissiveness.