done, we ought not to be restrained from making necessary laws by any declaration of this kind."[42] It is clear from some of the complaints about the absence of a bill of rights including a guarantee against cruel and unusual punishments in the ratifying conventions that tortures and barbarous punishments were much on the minds of the complainants,[43] but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates additional concern with arbitrary and disproportionate punishments.[44] Though few in number, the decisions of the Supreme Court interpreting this guarantee have applied it in both senses.

Style of Interpretation

At first, the Court was inclined to an historical style of interpretation, determining whether a punishment was "cruel and unusual" by looking to see if it or a sufficiently similar variant had been considered "cruel and unusual" in 1789.[45] In *Weems v. United States*,[46] however, the Court concluded that the framers had not merely intended to bar the reinstitution of procedures and techniques condemned in 1789, but had intended to prevent the authorization of "a coercive cruelty being exercised through other forms of punishment." The Amendment therefore was of an "expansive and vital character"[47] and, in the words of a later Court, "must draw its meaning from the evolving standards of decency that mark the progress

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[42] 1 ANNALS OF CONGRESS 754 (1789).

[43] *E.g.*, 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 111 (2d ed. 1836); 3 id. at 447–52.

[44] *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969). Disproportionality, in any event, was used by the Court in Weems v. United States, 217 U.S. 349 (1910). It is not clear what, if anything, the word "unusual" adds to the concept of "cruelty" (*but see* Furman v. Georgia, 408 U.S. 238, 276 n.20 (1972) (Justice Brennan concurring)), although it may have figured in *Weems*, 217 U.S. at 377, and in Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (plurality opinion), and it did figure in Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) ("severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history").

[45] Wilkerson v. Utah, 99 U.S. 130 (1878); *In re* Kemmler, 136 U.S. 436 (1890); *cf.* Weems v. United States, 217 U.S. 349, 368–72 (1910). Chief Justice Rehnquist subscribed to this view (*see*, *e.g.*, Woodson v. North Carolina, 428 U.S. 280, 208 (dissenting)), and the views of Justices Scalia and Thomas appear to be similar. *See*, *e.g.*, Harmelin v. Michigan, 501 U.S. 957, 966–90 (1991) (Justice Scalia announcing judgment of Court) (relying on original understanding of Amendment and of English practice to argue that there is no proportionality principle in non-capital cases); and Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Justice Thomas dissenting) (objecting to Court's extension of the Amendment "beyond all bounds of history and precedent" in holding that "significant injury" need not be established for sadistic and malicious beating of shackled prisoner to constitute cruel and unusual punishment).

[46] 217 U.S. 349 (1910).

[47] 217 U.S. at 376–77.