
WHEN THE FEDERAL DEATH PENALTY IS “CRUEL AND UNUSUAL”

Michael J. Zydney Mannheimer*

Recent changes to the way the U.S. Department of Justice decides whether to pursue capital charges have made it more likely that the federal death penalty will be sought in cases in which the criminal conduct occurred within States that do not authorize capital punishment for any crime. As a result, since 2002, five people have been sentenced to death in federal court for conduct that occurred in States that do not authorize the death penalty. This state of affairs is in serious tension with the Eighth Amendment’s proscription against “cruel and unusual punishments.” A complete understanding of the Bill of Rights can be achieved only by placing primary emphasis on the views of the Anti-Federalists, who conditioned ratification of the Constitution on the inclusion of such a Bill. Such an account of the Bill of Rights recognizes that, with respect to most if not all of its provisions, “structural” and “individual rights” concerns are intertwined. That is, these provisions tie the protection of individual rights to the preservation of state sovereignty from the danger of federal encroachment. In particular, recent scholarship suggests that the criminal procedure protections of the Bill were in large part motivated by a desire on the part of the Anti-Federalists to make it more difficult for the federal government to investigate, prosecute, convict, and punish persons for crime, traditionally a prerogative of the States. It follows from this that the Eighth Amendment prohibition on “cruel and unusual punishments” should be read primarily as a restraint upon the federal power to punish in a way that conflicts with the norms of an individual State. Thus, the imposition of the death penalty by the federal government in any State that does not impose that mode of punishment constitutes “cruel and unusual punishment” in violation of the Eighth Amendment.

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* Assistant Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. J.D. 1994, Columbia Law School. E-mail: mannheimem1@nku.edu. Many thanks to the participants in the Ohio Legal Scholars Workshop and the Chase Faculty Scholarship Series for their helpful comments and kind encouragement. I also thank Northern Kentucky University for its generous summer research grant that supported my work on this Article.

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INTRODUCTION

The death sentence imposed on Gary Sampson on January 29, 2004 in Massachusetts¹ must have come as quite a surprise to many people in that Commonwealth. After all, Massachusetts had not had a valid death penalty statute on the books since 1984,² and no one had been executed there in nearly six decades.³ Nevertheless, Sampson was eligible for, and ultimately received, a death sentence because he was tried, convicted, and sentenced in federal court, and the federal death penalty statutes do not distinguish between defendants tried in districts located in States that have the death penalty and those tried in districts located in States that do not. Such a distinction has been largely unnecessary because, until recently, local federal prosecutors, when deciding whether to seek the death penalty, heavily weighed the local feelings about the death penalty, and generally did not seek the ultimate sanction where the State had no provision for the death penalty. Recently, however, the Attorney General has overruled such decisions in a number of cases in an effort to make the death penalty more uniform throughout the nation. As a result, five federal defendants since 2002 have been sentenced in federal court to die for crimes committed within States that do not authorize capital punishment for any crime.⁴

This Article argues that such efforts by the Attorney General to achieve national uniformity are not only misguided but also unconstitutional. Specifically, it argues that the Eighth Amendment's proscription of "cruel and unusual punishments" prohibits the federal government from imposing a sentence of death in any State that does not itself impose that punishment. While certainly novel, this proposition is faithful to the vision of the Anti-Federalists who fought for a Bill of Rights that would impose an important constraint on the central government and would repose ultimate authority in the people of the several States to decide whether a particular mode of punishment is acceptable within their respective borders. Moreover, this proposition relies on two well-accepted principles of Eighth Amendment

1. See Jay Lindsay, *Sampson Receives State's First Federal Death Sentence*, BOSTON GLOBE, Jan. 29, 2004, available at http://www.boston.com/news/local/massachusetts/articles/2004/01/29/sampson_receives_states_first_federal_death_sentence (last viewed April 23, 2006).

2. See *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 128 (Mass. 1984) (striking down death penalty law).

3. The last execution in Massachusetts occurred on May 9, 1947, when Philip Bellino and Edward Gertson were executed for murder. See Brian Hauck et al., *Capital Punishment Legislation in Massachusetts*, 36 HARV. J. ON LEGIS. 479, 482 & n.24 (1999).

4. See *infra* notes 38–50 and accompanying text.

jurisprudence. First, this rule is addressed to the constitutionality of a *mode* of punishment, and while the current Justices on the Supreme Court are in wide disagreement over whether and to what extent the Eighth Amendment forbids disproportionate punishments, all agree that it does address whether particular modes of punishment pass constitutional muster. Second, the proposed rule relies solely on objective and readily ascertainable evidence regarding the acceptability of the death penalty—whether the people of a State have indeed accepted it—and while some Justices believe that the Court is required to go beyond objective evidence in determining whether a punishment is “cruel and unusual,” all agree that such objective evidence must take first priority.

Part I of this Article looks at the federal death penalty and its recent application to defendants who committed crimes in States that do not authorize capital punishment. Part II reviews the Supreme Court’s Eighth Amendment jurisprudence on “cruel and unusual punishments,” distilling four main principles from that jurisprudence: that the Amendment prohibits punishments not authorized by law; that it forbids certain modes of punishment; that it prohibits non-capital punishments that are grossly disproportionate to the crime; and that it categorically bars certain classes of offenses and offenders from receiving capital punishment. Part III looks at the Eighth Amendment from an Anti-Federalist point of view. This Part advances the view that the criminal procedure protections of the Bill of Rights are designed not to ensure the general fairness and reliability of the federal criminal process, but instead to create obstacles to the investigation, prosecution, conviction, and punishment of persons for federal crimes. This view treats the protection of criminal defendants at the federal level as intimately intertwined with the protection of state prerogatives in addressing crime, and treats the Eighth Amendment as a particular embodiment of this interconnectedness of individual and collective rights.

Part IV re-examines the principles of Eighth Amendment jurisprudence in light of the Anti-Federalist approach to the Bill of Rights and distills the key principle of the Eighth Amendment in its purest form, unmediated by the demands of the Fourteenth Amendment: the prohibition of particular modes of punishment, as informed by the use of inter-jurisdictional comparisons of punishments for identical or similar crimes. Part IV also proposes that the Eighth Amendment restrains the federal power to utilize a particular mode of punishment, including the death penalty, when that power conflicts with the norms of an individual State. Finally, Part IV discusses possible objections to this

approach.

I. THE FEDERAL DEATH PENALTY

The federal government has always exacted death as the price for the most serious crimes. Only recently, however, as a result of the federalization of crime, has the federal death penalty covered so many crimes that traditionally were left to the States to punish. Even more recently, the Department of Justice has instituted policies to enhance national uniformity in the imposition of the federal death penalty. As a result of the confluence of these two trends, there are now five prisoners on federal death row who committed their crimes in States that do not authorize capital punishment.

A. History and Scope of the Federal Death Penalty

Shortly after the First Congress approved the Bill of Rights, it drafted a federal crime bill that attached the penalty of death by hanging to several of the crimes it created.⁵ Among the capital crimes were treason, murder on federal land, forgery, uttering forged securities, counterfeiting, and various offenses (including piracy) committed on the high seas.⁶ In 1897, Congress reduced the number of capital crimes to five.⁷ Although the death penalty was expanded over the next several decades, only thirty-four people were executed by the federal government from 1927 through 1963.⁸

The federal government was effectively without a death penalty for sixteen years after the U.S. Supreme Court's 1972 decision in *Furman v. Georgia*,⁹ which ushered in a new era of death penalty jurisprudence.¹⁰

5. See Christopher Q. Cutler, *Death Resurrected: The Reimplementation of the Federal Death Penalty*, 23 SEATTLE U. L. REV. 1189, 1193 (2000); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 349, 360, 365 (1999) [hereinafter Little, *History*]; Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 538 (2000) [hereinafter Little, *Future*]. The discussion of the federal death penalty in this subpart excludes capital crimes under the jurisdiction of the U.S. military.

6. See Cutler, *supra* note 5, at 1193; Little, *History*, *supra* note 5, at 362–63; Little, *Future*, *supra* note 5, at 538.

7. See Cutler, *supra* note 5, at 1195; Little, *History*, *supra* note 5, at 367; Little, *Future*, *supra* note 5, at 538.

8. See Cutler, *supra* note 5, at 1193; George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 329 (1996); Little, *History*, *supra* note 5, at 370; Little, *Future*, *supra* note 5, at 539.

9. 408 U.S. 238 (1972).

10. See Little, *History*, *supra* note 5, at 349.

While several pre-*Furman* statutes continued to authorize the death penalty for some federal crimes, these statutes were likely unconstitutional because they did not provide for procedures that the Supreme Court had held are required by the Eighth Amendment.¹¹

The federal government re-introduced the death penalty with the Anti-Drug Abuse and Death Penalty Act of 1988, also informally known as the Drug Kingpin Act,¹² which “added the death penalty for a very narrow realm of cases in which murder resulted during a drug related offense.”¹³ The federal government greatly expanded the scope of the death penalty in 1994 with the Federal Death Penalty Act (FDPA),¹⁴ “a revolution for federal capital punishment.”¹⁵ The FDPA “substantially increased the availability of the death penalty for federal offenders” by creating several new death-eligible crimes; authorizing the death penalty for several pre-existing federal crimes; and detailing the procedures to be employed for pre-existing statutes that already provided for the death penalty but that were likely unconstitutional after *Furman*.¹⁶ Although the number of new death-eligible federal offenses is “open to interpretation,”¹⁷ by most counts the FDPA created sixty capital crimes.¹⁸ Moreover, other than “treason against the federal government [and] offenses committed exclusively on federal territory,”¹⁹ every crime covered by the Kingpin Act and the FDPA is also punishable pursuant to the laws of the several States.²⁰ Indeed, every single one of the forty-

11. See Sandra D. Jordan, *Death for Drug Related Killings: Revival of the Federal Death Penalty*, 67 CHI.-KENT L. REV. 79, 86 & n.26 (1992); Little, *History*, *supra* note 5, at 349 n.5, 373–76.

12. See John P. Cunningham, Comment, *Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939, 950 (1998).

13. Charles C. Boettcher, Comment, *Testing the Federal Death Penalty Act of 1994*, 29 TEX. TECH L. REV. 1043, 1054 (1998).

14. See John Brigham, *Unusual Punishment: The Federal Death Penalty in the United States*, 16 WASH. U. J.L. & POL’Y 195, 210–11 (2004); Little, *History*, *supra* note 5, at 381–88; Little, *Future*, *supra* note 5, at 539.

15. Boettcher, *supra* note 13, at 1057.

16. See Little, *History*, *supra* note 5, at 388–91.

17. See Little, *History*, *supra* note 5, at 391 (quoting Charles Kenneth Eldred, *Recent Developments, The New Federal Death Penalties*, 22 AM. J. CRIM. L. 293, 297 n.21 (1994)).

18. See Boettcher, *supra* note 13, at 1057; Brigham, *supra* note 14, at 211; Cunningham, *supra* note 12, at 952; Cutler, *supra* note 5, at 1209–10 & n.150; Eldred, *supra* note 17, at 293 n.2; Kannar, *supra* note 8, at 328.

19. Little, *Future*, *supra* note 5, at 542.

20. See Boettcher, *supra* note 13, at 1054–55, 1058–59; Cunningham, *supra* note 12, at 954–55; Eldred, *supra* note 17, at 296–97; Little, *History*, *supra* note 5, at 388–91 & nn.232, 237, 238; Little, *Future*, *supra* note 5, at 541; Sean M. Morton, Comment, *Death Isn’t Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 ALB. L. REV. 1435, 1440 (2001); Brian Serr, *Of Crime and Punishment, Kingpins and Footsoldiers, Life*

three current federal death row prisoners could have been tried, convicted, and sentenced for murder in state court.²¹

B. The Federal Death Penalty in States Without Capital Punishment

As of this writing, twelve States do not authorize capital punishment: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.²² Yet the federal death penalty applies nationwide, even in those States that do not authorize capital punishment for any crime.²³ Indeed, the FDPA expressly contemplates this, because it provides that if a

and Death: The Drug War and the Federal Death Penalty Provision—Problems of Interpretation and Constitutionality, 25 ARIZ. ST. L.J. 895, 906–18 (1993); Peggy M. Tobolowsky, *Drugs and Death: Congress Authorizes the Death Penalty for Certain Drug-Related Murder*, 18 J. CONTEMP. L. 47, 69 (1992).

21. See Little, *Future*, *supra* note 5, at 532–33 (“[O]f the twenty-six federal defendants that have been sentenced to death since 1988 [as of 2000], all were convicted of criminal conduct duplicative of capital murder conduct as defined by the states in which the murders occurred.”). See also Rory K. Little, *Why a Federal Death Penalty Moratorium?*, 33 CONN. L. REV. 791, 802–07 (2001). For an update to Little’s work, see Federal Death Row Prisoners, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?scid=29&did=193> (last viewed Mar. 20, 2006). Despite the fact that some of these crimes occurred on federal property, the defendants’ “conduct plainly violated state murder statutes,” Little, *Future*, *supra* note 5, at 533 n.17, and “there is no theoretical reason that states could not be given authority to prosecute crimes committed on federal property within their borders.” *Id.* at 545. For a helpful chart demonstrating the state crimes for which these federal prisoners could have been prosecuted, see *id.* at 543–44.

22. See *Roper v. Simmons*, 543 U.S. 551, 579 (2005). Although Kansas’s death penalty statute was invalidated in *State v. Marsh*, 102 P.3d 445 (Kan. 2004), the U.S. Supreme Court recently agreed to hear the case. See *Kansas v. Marsh*, 125 S.Ct 2517 (2005) (mem.). New York also has a death penalty statute that recently was invalidated in *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004). The State did not petition the U.S. Supreme Court for a writ of certiorari and its time for doing so has expired. E-mail from Barbara Zolot, Supervising Attorney, Center for Appellate Litigation, New York, N.Y., to Michael J.Z. Mannheimer, Assistant Professor of Law, Salmon P. Chase College of Law (June 8, 2005) (on file with author). Prospects in New York for reinstatement of the death penalty appear dim. See Patrick D. Healy, “*Death Penalty Seems Unlikely to be Revived*,” N.Y. TIMES, Feb. 11, 2005, at B1. Thus, the current number of non-death penalty jurisdictions might be more accurately calculated as fourteen.

23. See Jordan, *supra* note 11, at 85 (observing that the 1988 Act “imposes the death penalty in states that have not enacted legislation to execute their citizens, even for the most heinous crimes”); Little, *History*, *supra* note 5, at 472 (“Congress has written a federal death penalty statute which is applicable nationally and contains no express suggestion or endorsement of regional disparities in its implementation.”); Morton, *supra* note 20, at 1436 (“[T]he absence of a state capital punishment regime in a given state would not bar a federal capital prosecution in that state”); Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departure to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 731 (2002) (“[M]ost striking [in terms of federal/state sentencing disparity] are the federal death penalty cases in states that do not authorize capital punishment.”); see also Brigham, *supra* note 14, at 216 (“[N]o jurisdiction ‘will be able to declare itself a death penalty free zone.’” (quoting Eric Goldscheider, *Fed’s Death Penalty Net Casts Ever Wider*, BOSTON GLOBE, June 11, 2000, at E1)).

conviction takes place in a State that does not authorize capital punishment, the court must designate another State where the sentence may be executed.²⁴ Moreover, “although the new federal statutes do not demand national uniformity in administration of the federal death penalty, such a legislative policy is strongly implied.”²⁵

The Department of Justice (DOJ) has also expressed a goal of avoiding geographical disparity in the imposition of the federal death penalty.²⁶ To achieve this end, the DOJ has centralized federal death penalty prosecutions by instituting formal Capital Case Protocols (Protocols). These Protocols require the Attorney General’s approval via a Death Penalty Evaluation form before the death penalty is sought in any federal case.²⁷ In addition, even in cases where the local U.S. Attorney could, but does not, request permission from the Attorney General to seek the death penalty, she must still complete such a form.²⁸

Shortly after President George W. Bush took office, three changes to the way the DOJ decides whether to pursue capital charges made it likely that the U.S. government would seek the death penalty more often within States that do not authorize capital punishment. First, prior to that time, “recommendation[s] . . . against seeking death in a death-eligible case [were] almost always accepted . . . because U.S. Attorneys generally exercise great care in submitting their recommendations and are presumed to know their local communities, jury pools, judges, and the overall strengths and weaknesses of their particular case far better than Main Justice personnel.”²⁹ By contrast, it has been reported that in

24. See Little, *History*, *supra* note 5, at 404; see also Brigham, *supra* note 14, at 225 n.133; Cunningham, *supra* note 12, at 957; Cutler, *supra* note 5, at 1214; Jordan, *supra* note 11, at 91; Kannar, *supra* note 8, at 331; Morton, *supra* note 20, at 1444.

25. Little, *History*, *supra* note 5, at 431–32. Little notes that “one goal” of the Sentencing Reform Act of 1984 “was to eliminate ‘unwarranted sentencing disparities’ among similar cases and defendants across the country.” *Id.* at 436 (quoting 28 U.S.C. § 991(b)(1)(B)(2003)); see also *id.* at 472 (similar); *id.* at 356 (asserting that Congress “has stated a general sentencing policy that regional ‘disparities’ should be avoided”).

26. See Little, *History*, *supra* note 5, at 439 (“[I]t appears to be current DOJ policy that, as best as humanly possible, the federal death penalty be administered uniformly across the nation.”); John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1699 (2003) (stating that the DOJ has attempted “to achieve national uniformity in the imposition of the federal death penalty”).

27. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9-10.020, 9-10.040 (2001), available at www.usdoj.gov/usao/eousa/foia_reading_room/usam; accord Little, *History*, *supra* note 5, at 407; see also *id.* at 424 (“Only the Attorney General can make a final decision regarding the federal death penalty.”).

28. See U.S. DEP’T OF JUSTICE, *supra* note 27, § 9-10.040; accord Little, *History*, *supra* note 5, at 408.

29. Little, *History*, *supra* note 5, at 422; see also Gleeson, *supra* note 26, at 1715 (“U.S.

several more recent cases, the ultimate decision to seek the death penalty was made over the contrary recommendations of the local U.S. Attorneys.³⁰

Second, prior to 2001, a local U.S. Attorney was required to submit a Death Penalty Evaluation form when a “defendant [was] ‘charge[d] . . . with an offense subject to the death penalty.’”³¹ The DOJ, led by newly appointed Attorney General John Ashcroft, amended the Protocols in June 2001 to require submission of the form whenever the local U.S. Attorney has charged a defendant with “an offense that is punishable by death or conduct that could be charged as an offense punishable by death”³² The intent of the change is obvious. Under the prior version of the Protocols, a local U.S. Attorney could evade DOJ review of the decision not to seek the death penalty simply by declining to charge the defendant with a capital crime and instead charging him with a lesser offense. Thus, a U.S. Attorney in a State with no death penalty could adhere to local views on capital punishment and avoid acceding to the otherwise mandatory DOJ review. Under the revised version of the Protocols, however, the only way a local U.S. Attorney can evade such review is by declining to obtain an indictment of the defendant at all. Otherwise, the DOJ reviews every case in which a defendant’s alleged conduct subjects him to the federal death penalty.

The final change implemented by the Bush administration is perhaps the most significant. The Protocols have always “suggest[ed] . . . that a federal indictment should be returned in a potential death penalty case only when the ‘Federal interest in the prosecution is more substantial than the interests of the State or local authorities.’”³³ This instruction suggests a presumption in favor of state rather than federal prosecution.³⁴ Prior to the revisions, “[t]he protocols expressly

Attorneys know . . . how the communities they serve and protect perceive crimes and evaluate punishments.”).

30. See Dan Eggen, *Ashcroft Aggressively Pursues Death Penalty*, WASH. POST, July 1, 2002, at A1; Shelley Murphy, *Death Penalty Foes Rap Ashcroft*, BOSTON GLOBE, Sept. 30, 2003 available at http://www.boston.com/news/local/articles/2003/09/20/death_penalty_foes_rap_ashcroft. Because the DOJ has not released statistics regarding recommendations by local U.S. attorneys, see Little, *History*, *supra* note 5, at 423–24, reliance on anecdotal evidence is necessary.

31. Little, *History*, *supra* note 5, at 409–10 (quoting U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9–10.040 (1999)) (alteration in original).

32. U.S. DEP’T OF JUSTICE, *supra* note 27, § 9–10.040 (emphasis added).

33. Little, *History*, *supra* note 5, at 413 (quoting U.S. DEP’T OF JUSTICE, *supra* note 31, § 9–10.070); accord Morton, *supra* note 20, at 1441.

34. See Little, *History*, *supra* note 5, at 464–65 (“[T]he DOJ’s death penalty protocols seem to suggest a preference for state prosecution in potential federal capital cases”); cf. O’Hear, *supra* note 23, at 733–34 n.73 (“The presumption in favor of federal prosecution is not so strong in capital cases.”).

direct[ed] that . . . penalty-driven decisions to file federal charges are inappropriate: 'the fact that the maximum Federal penalty is death [where the relevant State's maximum penalty is not] is insufficient, standing alone, to show a more substantial interest in Federal prosecution.'"³⁵ The June 2001 version of the Protocols removed this admonition.³⁶ Although the Protocols do not expressly state that the absence of death as a possible state court punishment is alone a sufficient reason to bring a federal prosecution, the message to local U.S. Attorneys is unmistakable: it is now "'fair game' to pull a state case into federal court in a bid to win a death sentence."³⁷

Consequently, five of the forty-three current federal death row prisoners were tried, convicted, and sentenced to death for conduct committed within States that do not authorize capital punishment.³⁸ Marvin Gabrion was sentenced to death on March 16, 2002, for a 1997 murder in Manistee National Forest, located in Michigan.³⁹ Gary Sampson was convicted of murdering two men during separate carjackings in Massachusetts, and he was sentenced to death on January 29, 2004.⁴⁰ On October 11 and December 20, 2005, respectively, Dustin Honken and Angela Johnson were sentenced to death for the murder in Iowa of two girls who were witnesses to the murder of their mother.⁴¹ And on July 14, 2005, a federal jury in Vermont recommended a sentence of death for Donald Fell, who murdered a woman following a

35. Little, *History*, *supra* note 5, at 414 (quoting U.S. DEP'T OF JUSTICE, *supra* note 31, § 9-10.070) (alteration in original); *see also id.* at 466 ("[T]he death penalty protocols make it clear that the fact that the death sentence might be available if the case were charged federally, where the conduct occur[ed] in a state that does not authorize capital punishment, is not 'alone' sufficient to establish a 'more substantial' federal interest."); *accord* Morton, *supra* note 20, at 1442 & n.49; O'Hear, *supra* note 23, at 731 n.57.

36. *See* O'Hear, *supra* note 23, at 731 n.57; *see also* Murphy, *supra* note 3.

37. Murphy, *supra* note 30 (quoting Donald K. Stern, former U.S. Attorney for the District of Massachusetts); *see also* Brigham, *supra* note 14, at 220 ("[F]ederal capital statutes are sometimes turned to where the availability of the death penalty under federal law presents an opportunity to seek harsher punishment where the states do not provide a capital sanction.").

38. *Cf.* Morton, *supra* note 20, at 1465 (presciently predicting in 2001 that "it seems almost inevitable . . . that a [successful] federal capital prosecution will occur in a state that does not . . . provide for . . . the death penalty"); O'Hear, *supra* note 23, at 731 n.57 (making similar prediction in 2002).

39. *See* Federal Death Row Prisoners, *supra* note 21.

40. *See id.*; Lindsay, *supra* note 1.

41. *See* Federal Death Row Prisoners, *supra* note 21; *National Briefing—Midwest: Iowa: First Death Sentence in 40 Years*, N.Y. TIMES, Oct. 12, 2005, at A17; Kevin Dobbs, *Johnson Will be First Woman Executed by U.S. Since '53*, DES MOINES REGISTER, Dec. 21, 2005, available at <http://www.desmoinesregister.com> (last visited Mar. 20, 2006).

carjacking in that State.⁴² Additionally, Alfonso Rodriguez Jr. has been charged with kidnapping a woman in North Dakota and murdering her in Minnesota.⁴³ His capital trial is scheduled to start July 6, 2006, in U.S. District Court for the District of North Dakota.⁴⁴ Each of these defendants could have been prosecuted on state-law murder charges in Michigan,⁴⁵ Massachusetts,⁴⁶ Iowa,⁴⁷ Vermont,⁴⁸ or North Dakota,⁴⁹ respectively. However, none of these States authorizes the death penalty for murder or any other crime.⁵⁰

Of course, the Supremacy Clause of the U.S. Constitution provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁵¹ Thus, it appears at first blush that Congress’s authorization of the death penalty in federal cases trumps an individual State’s policy decision to eschew capital punishment. But, of course, the U.S. Constitution also contains a later-enacted provision limiting the federal government’s power to punish. Does the Eighth Amendment’s ban on “cruel and unusual punishments”⁵² have any impact on the federal government’s ability to impose the death penalty within the

42. See Federal Death Row Prisoners, *supra* note 21.

43. See *Dru Sjodin Case: Rodriguez Trial Jury Pool Will Come From Southeastern North Dakota*, GRAND FORKS HERALD, Dec. 16, 2004, available at <http://www.grandforks.com/mld/grandforks/news/local/10427569.htm> (last visited Mar. 20, 2006).

44. See *Dru Sjodin Case: Rodriguez Attorneys File Five More Motions*, GRAND FORKS HERALD, Jan. 5, 2006, available at <http://www.grandforks.com/mld/grandforks/news/13552179.htm> (last visited Mar. 20, 2006).

45. See MICH. COMP. LAWS § 750.316(1)(a) (2005) (“A person who commits [murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing] is guilty of first degree murder . . .”). Though Gabrion’s crime occurred on federal land, Michigan has retained concurrent criminal jurisdiction over national forest lands in the State. See *id.* § 3.401.

46. See MASS. GEN. LAWS Ch. 265 § 1 (2005) (“Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree.”).

47. See IOWA CODE ANN. § 707.2(1) (2005) (“A person commits murder in the first degree when the person . . . willfully, deliberately, and with premeditation kills another person.”).

48. See VT. STAT. ANN. tit. 13, § 2301 (2005) (“Murder . . . committed in perpetrating . . . robbery . . . shall be murder in the first degree.”).

49. See N.D. CENT. CODE § 12.1-16-01(1)(c) (2005) (“A person is guilty of murder . . . if the person . . . commits . . . robbery [or] kidnapping . . . and, in the course of and in furtherance of such crime or of immediate flight therefrom, the person or any other participant in the crime causes the death of any person.”).

50. See *supra* text accompanying note 22.

51. U.S. CONST. art. VI, § 1, cl. 2.

52. “[C]ruel and unusual punishments [shall not be] inflicted.” U.S. CONST. amend. VIII.

boundaries of a State that chooses not to do so?⁵³ It is to this question that this Article now turns.

II. THEORIES OF THE EIGHTH AMENDMENT

To understand Eighth Amendment jurisprudence, we must first take a brief look at the Amendment's text and its history, and then turn to the four main principles of law stemming from these sources.

53. This question has not been addressed in any systematic fashion. Professor Rory K. Little has acknowledged that "the federalism issues raised by applying a national death penalty law in states that do not accept that penalty raise vital questions that go deep into our theories of government as well as criminal punishment." Little, *Future*, *supra* note 5, at 573–74. He allows that "[o]n an issue so sensitive, so irrevocable, and so morally defined for many, perhaps recognition of state preferences is not unreasonable." *Id.* at 566. Yet Little indicates his belief that any exemptions for whole States from the federal death penalty "runs counter to the overwhelming number of federal criminal sentencing provisions" that stress national uniformity and seek to avoid geographic disparities. *Id.* at 565. Ultimately, Little leaves the issue for another day. *See id.* at 566.

A provision of the proposed Innocence Protection Act of 2000 (IPA), introduced in the U.S. Senate, *see* S. 2073, 106th Cong. § 401 (2000), would have generally prohibited the federal government from "seek[ing] the death penalty in any case initially brought before a district court of the United States that sits in a State that does not prescribe, authorize, or permit the imposition of such penalty for the alleged conduct." *See* Brigham, *supra* note 14, at 219; Little, *Future*, *supra* note 5, at 564. However, the Senate sponsors' belief that they were merely exercising legislative grace, rather than acting pursuant to constitutional mandate, is demonstrated by the fact that the exemption could have been overridden upon appropriate certification by the Attorney General. *See* S. 2073 § 401; Little, *Future*, *supra* note 5, at 564–65. In any event, when the IPA became law in 2004, this provision was not included. *See* Ronald Weich, *The Innocence Protection Act of 2004: A Small Step Forward and a Framework for Larger Reforms*, 29 CHAMPION 28, 29 (2005).

Professor John Brigham, quoting an e-mail communication from former Oregon Supreme Court Justice Hans Linde, has suggested that "[t]he death penalty no longer is unusual in Texas or Florida, but is highly unusual, and arguably regarded as unacceptably cruel, among the people of Massachusetts." Brigham, *supra* note 14, at 214 n.90. Brigham has endorsed Linde's suggestion of "a 'state-based, relativist interpretation to [sic] the Eighth Amendment's ban against 'cruel and unusual' punishments.'" *Id.* at 214 (emphasis omitted). However, he has not supported this position with any textual, historical, or structural analysis of the Eighth Amendment.

Finally, student commentator Sean Morton has argued that the notion of "'cruel and unusual punishments' under the Eighth Amendment should be defined according to local values expressed by individual states through fundamental state law." Morton, *supra* note 20, at 1437–38 (footnote omitted). However, he apparently would limit application of this principle in two ways. First, it would apply only to those States whose constitutions forbid the death penalty. *See id.* at 1463 ("[A] serious difficulty arises when the federal government attempts to exercise its criminal jurisdiction within a State that affirmatively prohibits the death penalty via that state's constitution.") (emphasis added). Second, it would apply only to States that reject "the death penalty as an impermissible cruel and unusual punishment," *see id.* at 1437, rather than merely undesirable or ineffective. Additionally, like Brigham, Morton does not engage in any sustained textual, historical, or structural analysis of the Cruel and Unusual Punishments Clause.

A. *A Word (or Two) About the Text*

Our starting point, of course, is the text of the Cruel and Unusual Punishments Clause. As Justice Scalia has noted, for a punishment to violate the Clause, it must be both “cruel *and* unusual.”⁵⁴ After all, at the time the Eighth Amendment was ratified, “five State Constitutions prohibited ‘cruel *or* unusual punishments,’ and two prohibited ‘cruel’ punishments.”⁵⁵ Had the framers and ratifiers of the Eighth Amendment intended to prohibit anything less than punishments that were both cruel and unusual, they knew how to do so. Yet cruelty is not a difficult threshold to meet. At the time the Clause’s direct ancestor, the English Bill of Rights,⁵⁶ was written, “the word ‘cruel’ . . . simply meant severe or hard.”⁵⁷ Thus, a sentence of death or of a lengthy term of imprisonment at hard labor might be cruel but, as Tom Jones might say, it’s not unusual.⁵⁸

But it is not enough that a punishment be both unusual and severe (cruel). For example, because death is a severe, and therefore cruel, punishment, a method of execution that has never been attempted and is therefore unusual might be considered both “cruel” and “unusual.” However, the Supreme Court rejected this very argument, albeit in dicta, in *In re Kemmler*, when it wrote that the electric chair, though unusual in 1890 because of its novelty, did not render death by electrocution cruel and unusual, because the method of execution was adopted to make the process more, not less, humane.⁵⁹ Rather, “[u]nusual” is probably best thought of as adverbially modifying ‘cruel.’⁶⁰ That is, the Clause forbids extreme distinctness of punishment in the direction of greater,

54. See *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (plurality) (“[A] disproportionate punishment can perhaps always be considered ‘cruel,’ but it will not always be (as the text also requires) ‘unusual.’”).

55. *Id.* at 966 (emphasis added). See also *id.* at 984–85 (distinguishing *State v. Becker*, 51 N.W. 1018, 1022 (S.D. 1892), on ground that state constitutional provision there prohibited punishments “that were merely ‘cruel’”). But see John L. Bowers, Jr., & J.L. Boren, Jr., *The Constitutional Prohibition Against Cruel and Unusual Punishment—Its Present Significance*, 4 VAND. L. REV. 680, 681 n.1 (1951) (“Apparently, no significance attaches to these variations; *cruel* is the key word in all.”).

56. See *infra* text accompanying notes 62–63.

57. Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CAL. L. REV. 839, 860 (1969).

58. See TOM JONES, *It’s Not Unusual*, on ALONG CAME JONES (Decca Records 1965).

59. 136 U.S. 436, 447 (1890); see Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 637 (1966) (“[T]he novelty of a punishment—the mere fact that it is ‘unusual,’ without any excessive cruelty—does not suffice to prohibit it constitutionally.”).

60. Note, *supra* note 59, at 638 n.16.

but not lesser, cruelty.⁶¹

But the text of the Amendment can take us only this far. History must be our next guide.

B. Origins of the Eighth Amendment

It is widely accepted that the Cruel and Unusual Punishments Clause was derived directly from section 9 of the 1776 Virginia Declaration of Rights, which in turn was derived from the 1689 English Bill of Rights.⁶² Indeed, except for the fact that the Cruel and Unusual Punishments Clause contains the mandatory “shall” rather than the precatory “ought,” it is a verbatim replica of the same clause in the English Bill.⁶³ The history surrounding the enactment of the English Bill is thus universally recognized as relevant to a complete understanding of our own Eighth Amendment.⁶⁴

The “cruel and unusual punishments” provision of the English Bill is generally believed to have been prompted by one or both of two episodes in English history, both involving Lord Chief Justice Jeffreys, who served on the King’s Bench during the reign of James II, the last of the Stuart kings.⁶⁵ First, following an unsuccessful rebellion by the Duke of Monmouth in 1685, “a special commission led by Jeffreys tried, convicted, and executed hundreds of suspected insurgents.”⁶⁶ The

61. See Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 149 (2004) (defining “cruel and unusual” as “depart[ure] from precedent without morally sufficient reason in the direction of greater severity”).

62. See *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (plurality); *Solem v. Helm*, 463 U.S. 277, 286 n.10 (1983); *Ingraham v. Wright*, 430 U.S. 651, 664 (1977); see also Chris Baniszewski, Comment, *Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment’s Proportionality Requirement*, 25 ARIZ. ST. L.J. 930 (1993); Granucci, *supra* note 57, at 852–53; William Hughes Mulligan, *Cruel and Unusual Punishment: The Proportionality Rule*, 47 FORDHAM L. REV. 639, 640 (1979); Note, *supra* note 59, at 636; Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 839 (1972).

63. See *Harmelin*, 501 U.S. at 966 (plurality); Bowers & Boren, *supra* note 55, at 682; NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 617 (1997); Granucci, *supra* note 57, at 853; Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 378 (1980); Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 788 n.11 (1974).

64. See *Harmelin*, 501 U.S. at 967 (plurality).

65. See *id.*; *Ingraham v. Wright*, 430 U.S. 651, 664 (1977); Note, *What is Cruel and Unusual Punishment?*, 24 HARV. L. REV. 54, 55 (1910).

66. *Harmelin*, 501 U.S. at 968 (plurality); see Baniszewski, *supra* note 62, at 931; Granucci, *supra* note 57, at 853; Schwartz, *supra* note 63, at 378.

commission practiced the traditional method of execution for traitors: drawing the condemned man to the gallows on a cart; hanging by the neck; cutting down the prisoner before death ensues; disemboweling the prisoner while still alive and burning his entrails; beheading; and quartering the body.⁶⁷ Female traitors were burned at the stake.⁶⁸ The proceedings came to be known as the “Bloody Assizes.”⁶⁹

The second episode involved Titus Oates, a Protestant cleric. In 1679, Oates had testified against a number of “prominent Catholics for allegedly organizing a ‘Popish Plot’ to overthrow King Charles II.”⁷⁰ The defendants were convicted and executed.⁷¹ Later, Oates was discovered to be an inveterate liar who had perjured himself, leading to the execution of at least fifteen innocent men.⁷² Oates was tried for perjury and convicted in 1685.⁷³ At sentencing, Jeffreys deemed it unfortunate that the death penalty could no longer be imposed for perjury,⁷⁴ but asserted that “crimes of this nature are left to be punished according to the discretion of the court, so far as that the judgment extend not to life or member.”⁷⁵ The court sentenced Oates to pay a fine of two thousand marks, to be defrocked, to be pilloried four times annually, to be whipped “from Aldgate to Newgate” on May 20, to be whipped “from Newgate to Tyburn” on May 22, and to life imprisonment.⁷⁶ Apparently, Jeffreys believed this to be the equivalent of a death sentence, for he did not expect Oates to survive the

67. See *Harmelin*, 501 U.S. at 968 (plurality); Baniszewski, *supra* note 62, at 931; Granucci, *supra* note 57, at 854; Mulligan, *supra* note 62, at 640; Schwartz, *supra* note 63, at 378.

68. See *Harmelin*, 501 U.S. at 968 (plurality); Granucci, *supra* note 57, at 853.

69. See *Harmelin*, 501 U.S. at 968 (plurality); Baniszewski, *supra* note 62, at 931; Granucci, *supra* note 57, at 853; Mulligan, *supra* note 62, at 640; Schwartz, *supra* note 63, at 378.

70. *Harmelin*, 501 U.S. at 969 (plurality); see Baniszewski, *supra* note 62, at 932; Claus, *supra* note 61, at 136; Granucci, *supra* note 57, at 856–57; Mulligan, *supra* note 62, at 640–41; Schwartz, *supra* note 63, at 379.

71. See *Harmelin*, 501 U.S. at 969 (plurality); Baniszewski, *supra* note 62, at 932; Claus, *supra* note 61, at 136; Granucci, *supra* note 57, at 857; Mulligan, *supra* note 62, at 641.

72. See *Harmelin*, 501 U.S. at 969 (plurality); Baniszewski, *supra* note 62, at 932; Claus, *supra* note 61, at 136; Granucci, *supra* note 57, at 857; Mulligan, *supra* note 62, at 641; Schwartz, *supra* note 63, at 379.

73. See *Harmelin*, 501 U.S. at 969 (plurality); Baniszewski, *supra* note 62, at 932; Granucci, *supra* note 57, at 857; Mulligan, *supra* note 62, at 640–41.

74. See *Harmelin*, 501 U.S. at 970 (plurality); Baniszewski, *supra* note 62, at 933; Claus, *supra* note 61, at 137; Granucci, *supra* note 57, at 857–58.

75. Claus, *supra* note 61, at 137 (quoting Trial of Titus Oates, 10 Howell’s State Trials 1079, 1314 (K.B. 1685)).

76. *Harmelin*, 501 U.S. at 970 (plurality); see Baniszewski, *supra* note 62, at 933; Claus, *supra* note 61, at 137; Granucci, *supra* note 57, at 858; Schwartz, *supra* note 63, at 379.

whipping.⁷⁷

He was wrong. After the enactment of the English Bill of Rights in 1689, Oates asked the Parliament to set aside his sentence as contrary to the provisions of the Bill.⁷⁸ Although the House of Lords refused to disturb the sentence,⁷⁹ a minority dissented and issued a statement opining that Oates's punishment was contrary to the "cruel and unusual punishments" clause of the Bill.⁸⁰ Oates then persuaded the House of Commons to pass a bill annulling the sentence, but the Commons was unsuccessful in getting the Lords to change their position.⁸¹ However, the Commons issued a report echoing the sentiments of the dissenting Lords, explaining that the Oates punishment was "cruel and unusual" in violation of the English Bill.⁸²

Of course, the most important evidence regarding the term "cruel and unusual punishment" must come from those who framed and ratified the Eighth Amendment.⁸³ Unfortunately, the history surrounding the adoption of the Amendment is sparse. Congressional debate on the Cruel and Unusual Punishments Clause was apparently limited to one relatively unenlightening exchange.⁸⁴ To find any helpful discussion of the concept of cruel and unusual punishments, one must go back to conventions held in Massachusetts and Virginia to debate the ratification of the Constitution. In Massachusetts, delegate Abraham Holmes complained:

Congress [would be] possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*.

What gives an additional glare of horror to these gloomy

77. See *Harmelin*, 501 U.S. at 970 (plurality).

78. See *id.*; Baniszewski, *supra* note 62, at 933; Claus, *supra* note 61, at 139; Schwartz, *supra* note 63, at 379.

79. See Baniszewski, *supra* note 62, at 933; Claus, *supra* note 61, at 140.

80. See *Harmelin*, 501 U.S. at 971 (plurality); Baniszewski, *supra* note 62, at 933–34; Claus, *supra* note 61, at 140–41; Granucci, *supra* note 57, at 858; Schwartz, *supra* note 63, at 379.

81. See *Harmelin*, 501 U.S. at 971 (plurality); Claus, *supra* note 61, at 139; Schwartz, *supra* note 63, at 379.

82. See *Harmelin*, 501 U.S. at 972 (plurality); Claus, *supra* note 61, at 142–43 n.107.

83. See *Harmelin*, 501 U.S. at 975 (plurality) ("[T]he ultimate question is not what 'cruell [sic] and unusuall [sic] punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment.").

84. See *COGAN*, *supra* note 63, at 618; see also *Ingraham v. Wright*, 430 U.S. 651, 666 (1977); *Weems v. United States*, 217 U.S. 349, 369 (1910); Claus, *supra* note 61, at 128; Granucci, *supra* note 57, at 842; Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 705 (2005).

circumstances is . . . that Congress [is] nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.⁸⁵

In Virginia, contrasting the Constitution with the State's own Bill of Rights, delegate George Mason noted that "torture was included in the prohibition" of the "clause of the [Virginia] bill of rights provid[ing] that no cruel and unusual punishments shall be inflicted."⁸⁶ Delegate Patrick Henry expressed his trust in the Nation's officials in defining crimes but not in prescribing the punishments for them:

Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtues of representatives. . . .

In this business of legislation, your members of Congress will loose the restriction of not . . . inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity.⁸⁷

Running through these American and British pre-enactment statements are several themes that have re-appeared in the U.S. Supreme Court's Eighth Amendment jurisprudence.

85. 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881); *see also* Claus, *supra* note 61, at 130; Granucci, *supra* note 57, at 841.

86. 3 ELLIOT, *supra* note 85, at 452; *see also* Claus, *supra* note 61, at 131; Granucci, *supra* note 57, at 841–42.

87. 3 ELLIOT, *supra* note 85, at 447–48; *see also* Claus, *supra* note 61, at 131; Granucci, *supra* note 57, at 841 n.10.

C. Cruel and Unusual Punishments Under the Eighth Amendment

A number of substantive⁸⁸ principles derive from the Eighth Amendment case law. First, the Cruel and Unusual Punishments Clause prohibits judges from imposing punishments that are not authorized by statute. Second, it prohibits the legislature from authorizing certain modes of punishment. Third, the Eighth Amendment prohibits the imposition of punishments that are grossly disproportionate to the crime committed. And, finally, the Eighth Amendment categorically bars the death penalty for certain classes of offenses and offenders.⁸⁹

88. "Substantive" is used to distinguish these principles from the specialized procedural guidelines the Court has established in death penalty cases beginning with *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Gregg's* companion cases. See Lee, *supra* note 84, at 725 (distinguishing Court's "substantive" from "procedural" death penalty jurisprudence). In the simplest of terms, those specialized procedures are designed to further the twin (and some say irreconcilable) goals of (1) eliminating arbitrariness in capital sentencing and (2) ensuring individualized treatment of the capital defendant. See LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW § 13.06, at 178–81 (2004). Arguably, these two lines of cases, given that they address procedural requirements, are not Eighth Amendment cases at all but are pure "due process" cases that prescribe the process that is due when life—the predominant value in the "life, liberty, or property" hierarchy—is on the line. See generally Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

89. The Court has also held that "the Cruel and Unusual Punishments Clause . . . imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). The Court has applied this limitation in only a single case, *Robinson v. California*, 370 U.S. 660, 667 (1962), in which the Court held that it violated the Cruel and Unusual Punishments Clause, as incorporated through the Fourteenth Amendment, for California to make narcotics addiction a criminal offense. The Court made clear that it was not the possible sentence—ninety days in jail—that was unconstitutional but the fact that the State had made such a status criminal at all: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* Accord *id.* at 676 (Douglas, J., concurring) ("Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime.").

However, as Herbert Packer recognized shortly after *Robinson* was decided—and surprisingly few have acknowledged since—*Robinson* is not *really* an Eighth Amendment decision at all but one that sounds purely in due process:

Robinson v. California may have established in the [E]ighth [A]mendment a basis for invalidating legislation that is thought inappropriately to invoke the criminal sanction, despite an entire lack of precedent for the idea that a punishment may be deemed cruel not because of its mode or even its proportion but because the conduct for which it is imposed should not be subjected to the criminal sanction.

Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1071 (1964) (footnote omitted). See also Mulligan, *supra* note 62, at 644 ("[W]hether a certain act should be a crime and whether the punishment should fit the crime are entirely separate inquiries."); Schwartz & Wishingrad, *supra* note 63, at 802 ("It is questionable whether *Robinson* really presented an [E]ighth [A]mendment issue. . . . [T]he application of the [E]ighth [A]mendment to the nature of the conduct made criminal, instead of the method or kind of punishment, represented a unique use of the [A]mendment's protection.").

1. Prohibitions on Severe Punishment Not Authorized by Law

The ban on severe punishments unauthorized by law is the Eighth Amendment's core, uncontroversial protection. Referring to Lord Chief Justice Jeffreys' role in both the Bloody Assizes and the Titus Oates affair, Justice Scalia wrote for a plurality in *Harmelin v. Michigan* that "Jeffreys was widely accused of 'inventing' special penalties for the King's enemies . . . that were not authorized by common-law precedent or statute."⁹⁰ Justice Scalia also relied on many of the statements from the House of Commons report and the dissenters in the House of Lords regarding the Titus Oates case to shore up this conclusion. The Commons report had noted, for example, that "there [was] no express Law to warrant" life imprisonment for Oates, and that Jeffreys and his colleagues had made a "Pretence to a discretionary Power" that did not exist in the law.⁹¹ For their part, the dissenting Lords had noted that for the King's Bench to defrock Oates was "wholly out of their Power, belonging to the Ecclesiastical Courts only," and that the sentence was "contrary to Law and ancient Practice."⁹²

Justice Scalia deduced that the "requirement that punishment not be 'unusuall' [sic] . . . was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition."⁹³ However, "[d]epartures from the common law were lawful . . . if authorized by statute."⁹⁴ In short, he concluded, "a punishment is 'cruel and unusual' if it is illegal because not sanctioned by common law or statute."⁹⁵

Justice Scalia recognized, however, that the Clause could not be wrenched from its British roots and simply re-planted in American soil. Merely limiting judges to the imposition of punishments authorized by statute or common law made sense in Great Britain, with its notion of

90. 501 U.S. 957, 968 (1991) (plurality).

91. *Id.* at 972, 973.

92. *Id.* at 971, 973.

93. *Id.* at 974; *accord* Claus, *supra* note 61, at 121 ("In adopting the 1689 Bill of Rights, the English Parliament sought to condemn punishments that were illegal because they were contrary to the common law . . . in the direction of greater severity.").

94. *Harmelin*, 501 U.S. at 974.

95. *Id.* at 984 n.10; *see also* Claus, *supra* note 61, at 136 (asserting that the "core concern" of those who drafted the English cruel and unusual punishments clause "was illegality, that is, violation of the common law or existing statutes"); Granucci, *supra* note 57, at 859 ("In the context of the Oates' [sic] case, 'cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose." (footnotes omitted)); Wheeler, *supra* note 62, at 855 ("[O]ne of the two recognized purposes of the original language of [the English Bill] was to prevent the judiciary from exceeding its authority in punishing criminals.").

legislative supremacy. The Eighth Amendment, however, was meant also—even primarily—as a check upon the Legislature.⁹⁶ Therefore, the Clause must mean something more.

2. Prohibitions on Unduly Severe Modes of Punishment

The idea that the Cruel and Unusual Punishments Clause prohibits the imposition of certain modes of punishment is the second uncontroversial proposition in Eighth Amendment jurisprudence. Justice Scalia set forth this interpretation in his plurality opinion in *Harmelin v. Michigan*.⁹⁷ Because in the context of American constitutionalism “unusual” could not mean only unauthorized by positive law, it must be given its other typical meaning: “[s]uch as [does not] occur in ordinary practice.”⁹⁸ Accordingly, “the Clause disables the Legislature from authorizing particular forms or ‘modes’ of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.”⁹⁹

This view is supported by the statements of those who voiced support for the addition of a cruel and unusual punishments clause to the Constitution.¹⁰⁰ George Mason observed that the Virginia version of the Clause prohibited “torture.”¹⁰¹ Abraham Holmes feared that without

96. *Harmelin*, 501 U.S. at 975–76; see also *Ingraham v. Wright*, 430 U.S. 651, 665 (1977) (“Americans . . . feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured. Indeed, the principal concern of the American framers appears to have been with the legislative definition of crimes and punishments.” (citations omitted)); Claus, *supra* note 61, at 146 (“The American founders adopted the ‘punishments’ prohibition of the English Bill of Rights as a limitation on the power of the new federal government, without specifying to which branch or branches of that government the limitation applied.”); Mulligan, *supra* note 62, at 639 (“The . . . restriction binds both the legislative and judicial branches of the federal government . . .”).

97. 501 U.S. 957 (1991).

98. *Id.* at 976 (quoting WEBSTER’S AMERICAN DICTIONARY (1828)) (alterations in original).

99. *Id.*; accord *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958) (plurality) (“If the word ‘unusual’ is to have any meaning apart from the word ‘cruel’ . . . the meaning should be the ordinary one, signifying something different from that which is generally done.”); see also *Ingraham*, 430 U.S. at 667 (“[T]he Cruel and Unusual Punishments Clause . . . limits the kinds of punishment that can be imposed on those convicted of crimes . . .”); Claus, *supra* note 61, at 123 (arguing that the Clause “condemn[s] punishments unknown to the common law for the offense of conviction”); Lee, *supra* note 84, at 705 (“[T]here has been no disagreement on the proposition that the Eighth Amendment prohibits [certain modes of punishment].”); Note, *supra* note 59, at 637 (“[T]he word ‘unusual’ . . . at least normally suggests that the provision is not intended to prohibit punishments that have been commonly authorized or imposed.”).

100. See *Harmelin*, 501 U.S. at 979–80; Schwartz, *supra* note 63, at 382 (“[W]hat little evidence there is clearly centers around a concern to prevent the national government from initiating barbarous methods of punishment.”).

101. See *supra* text accompanying note 86.

such a clause, Congress could introduce the “rack[] and [the] gibbet[].”¹⁰² And Patrick Henry warned that, without an express prohibition, Congress could establish “tortures or cruel and barbarous punishment” such as that practiced by “the civil law” regimes in “France, Spain, and Germany.”¹⁰³

This interpretation of the Cruel and Unusual Punishments Clause has manifested itself in two ways. First, the Clause “forbids the infliction of unnecessary pain in the execution of [a] death sentence.”¹⁰⁴ Thus, the Court has continually upheld the death penalty against the charge that it is cruel and unusual, and has noted that “something more than the mere extinguishment of life,” such as “torture or a lingering death,” must be present to render execution cruel and unusual.¹⁰⁵ Though the Court has not ruled that any particular method of execution violates the Clause, it has written in dicta that the traditional English punishment for treason¹⁰⁶ is forbidden,¹⁰⁷ as are “burning at the stake, crucifixion, breaking on the wheel, [and] the like.”¹⁰⁸

Second, certain types of non-capital punishments are forbidden. For example, in *Weems v. United States*, the defendant was convicted of

102. See *supra* text accompanying note 85.

103. See *supra* text accompanying note 87. Granucci, *supra* note 57, at 860–65, argues that this view by Henry, Holmes, and Mason was based on the erroneous belief that the cruel and unusual punishments clause of the English Bill also prohibited certain modes of punishment. Granucci’s argument that the English Bill did not proscribe particular modes of punishment is persuasive. First, the gruesome methods of execution of female and male traitors utilized by the Bloody Assizes continued in use until 1790 and 1814, respectively, more than a century after the Bill was enacted. See *id.* at 855–56. In addition, each of the methods of punishment used against Titus Oates also was continued in use for some times afterward—whipping until 1948. See *id.* at 859. It is also noteworthy that neither the report of the House of Commons nor the statement of the dissenters in the House of Lords intimates that Oates’ punishment was illegal because of the methods used. But see Note, *supra* note 59, at 637 (asserting that “it was the unusual cruelty in the *method* of punishment that was condemned” by the English Bill). Nonetheless, it seems immaterial whether the framers’ intended use of the words “cruel and unusual” in the Eighth Amendment conformed to a correct or an erroneous interpretation of the same words in another document; all that matters is the meaning they intended. See Schwartz, *supra* note 63, at 380 (“[S]ince Granucci admits that the American framers originally intended to prohibit cruel methods of punishment, one must question the relevance of his two proposed English meanings, even assuming they are correct.”).

104. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality).

105. *In re Kemmler*, 136 U.S. 436, 447 (1890) (dicta).

106. See *supra* text accompanying note 67.

107. See *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (dicta) (“[P]unishments of torture . . . and all others in the same line of unnecessary cruelty [as were practiced by the Stuart Kings] are forbidden by [the Eighth] [A]mendment.”).

108. *In re Kemmler*, 136 U.S. at 446 (dicta); accord *Bowers & Boren*, *supra* note 55, at 685 (observing that the Clause prohibits “torturous and barbarous punishments . . . [such] as drawing and quartering, disemboweling, stretching on the rack, breaking on the wheel and burning alive”).

making a false entry in a public document with intent to defraud the government.¹⁰⁹ He was sentenced to fifteen years of *cadena temporal*, a form of punishment encompassing “hard and painful labor” while “carry[ing] a chain at the ankle, hanging from the wrist”; civil interdiction, depriving him “of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, [and] the right to dispose of his own property by acts *inter vivos*”; “perpetual absolute disqualification” from voting or holding public office; and lifetime surveillance by the authorities, including the inability to move his domicile without permission and the requirement that he make himself and his home available for inspection.¹¹⁰ The Court held that this sentence violated the Cruel and Unusual Punishments Clause.¹¹¹

Weems is extraordinarily significant for at least two reasons. First, the Court rejected the idea that the Cruel and Unusual Punishments Clause was static, instead adopting a dynamic view of the Clause: “[G]eneral language should not . . . be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth.”¹¹² Second, the *Weems* Court introduced the notion of “intra-jurisdictional analysis,” i.e., a comparison of the punishment for the crime in question with punishments for other crimes within the same jurisdiction.¹¹³ In *Weems*, the Court concluded that the punishment was too severe because more serious crimes were punished just as severely,¹¹⁴ and comparable crimes were treated less severely.¹¹⁵

109. 217 U.S. 349, 357 (1910).

110. *Id.* at 363–65.

111. *See id.* at 377.

112. *Id.* at 373; *see also* *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (“[T]he Eighth Amendment’s proscriptions are not limited to those practices condemned by the common law in 1789.”); Mulligan, *supra* note 62, at 644 (noting that *Weems* stands for the proposition “that the [E]ighth [A]mendment prohibition is evolutionary in nature”).

113. *See* Schwartz & Wishingrad, *supra* note 63, at 799.

114. *Weems*, 217 U.S. at 380–81 (noting that punishment was same for “forgery of or counterfeiting the obligations or securities of the United States[,] a crime which may cause the loss of many thousands of dollars”); *see also id.* at 380 (noting that several “degrees of homicide[,] misprision of treason, inciting rebellion, conspiracy to destroy the government by force, recruiting soldiers in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, [and] larceny” were each punished less severely).

115. *See id.* (noting that embezzlement, which was “similar[] to the offense for which *Weems* was convicted,” was punishable only by two years imprisonment, with none of the “accessories” of the

Likewise, in *Trop v. Dulles*, a plurality of the Court determined that loss of citizenship for a native-born citizen was cruel and unusual punishment for the crime of wartime desertion.¹¹⁶ *Trop* reaffirmed both significant aspects of the *Weems* methodology. First, the Court reiterated that the meaning of the Eighth Amendment was not frozen in time in 1791, but that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹¹⁷ Second, the Court performed a type of comparative analysis, this one inter-jurisdictional in nature, noting that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for a crime,” and that “only . . . the Philippines and Turkey impose denationalization as a penalty for desertion.”¹¹⁸

3. Prohibitions on Disproportionate Punishment

The Court has also recognized another, more controversial proposition: the Eighth Amendment prohibits punishments that are “grossly disproportionate” to the crime. The currently operative exposition of this principle appears in Justice Kennedy’s opinion in *Harmelin v. Michigan*.¹¹⁹ The analysis proceeds in two parts. First, a court must ask whether “a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”¹²⁰ If such an inference is raised, then the court undertakes “intra-jurisdictional and inter-jurisdictional analyses,” i.e., “a comparative analysis between [the] sentence [at issue] and sentences imposed for other crimes in [the same jurisdiction] and sentences

cadena temporal).

116. 356 U.S. 86, 101 (1958) (plurality). Justice Brennan concurred on the ground that denationalization for wartime desertion was “beyond the power of Congress” because there was no rational relation between Congress’ power to wage war and a blanket rule stripping the citizenship of any and all wartime deserters. *See id.* at 113–14 (Brennan, J., concurring). Rather, the motive seemed to him to be “naked vengeance,” an improper legislative purpose. *See id.* at 112.

117. *Id.* at 101 (plurality).

118. *Id.* at 102–03.

119. 501 U.S. 957, 1001–05 (1991) (Kennedy, J., concurring in part and concurring in the judgment). Because Justice Kennedy concurred in the result on the narrowest grounds in *Harmelin*, his separate opinion has been treated as controlling. *See Ewing v. California*, 538 U.S. 11, 23–24 (2003) (plurality); Lee, *supra* note 84, at 693 (noting that Justice Kennedy’s “opinion . . . eventually came to assume the status of law”).

120. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment); *see also Ewing*, 538 U.S. at 28 (plurality); *Solem v. Helm*, 463 U.S. 277, 290–91 (1983); Lee, *supra* note 84, at 693–94.

imposed for the same crime in other jurisdictions.”¹²¹ These last two steps purport to “circumscribe federal judicial subjectivity by relying on objective data from the state legislatures.”¹²²

For example, in *Solem v. Helm*, the defendant was sentenced to the mandatory prison term of life without parole for attempting to use a one-hundred dollar check drawn on a non-existent account after having previously been convicted of six non-violent felonies.¹²³ The Court determined that Helm’s punishment, at first glance, seemed disproportionate to his crime.¹²⁴ The Court then performed an intra-jurisdictional analysis and found both that “Helm ha[d] been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes,” and that it appeared that Helm was the only individual South Dakota had punished as severely for comparable crimes.¹²⁵ Finally, the Court found “that Helm was treated more severely than he would have been in any other State.” Only Nevada provided for a comparable sentence for Helm’s crime, but even there, such a sentence was merely authorized, not mandated, and no one similar to Helm in material respects had apparently ever received such a sentence in Nevada.¹²⁶ The Court concluded that Helm’s sentence was constitutionally disproportionate to his crime.¹²⁷

The notion that the Eighth Amendment contains a proscription against disproportionate punishments has engendered much controversy, both on and off the Court. Aside from textual and historical arguments,¹²⁸ the

121. *Harmelin*, 501 U.S. at 1004, 1005 (Kennedy, J., concurring in part and concurring in the judgment); see also *Ewing*, 538 U.S. at 30 (plurality); *Solem*, 463 U.S. at 291; *O’Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting) (noting that defendant received heavier prison term for selling liquor than he could have received for “burglary or highway robbery”); Lee, *supra* note 84, at 693–94, 731. Cf. *In re Kemmler*, 136 U.S. at 449 (opining that Equal Protection Clause “requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses”). When the Court initially established this standard in *Solem*, 463 U.S. at 292, it set forth these three factors as a non-exhaustive list of “objective criteria” for courts to consider. Justice Kennedy altered this standard in *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment), by declaring that “intra-jurisdictional and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”

122. Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court “From Precedent to Precedent,”* 27 ARIZ. L. REV. 25, 56 (1985).

123. 463 U.S. at 279–80.

124. See *id.* at 296–97.

125. *Id.* at 299.

126. *Id.* at 299–300.

127. See *id.* at 303.

128. See, e.g., *Harmelin*, 501 U.S. at 977 (plurality) (“[T]o use the phrase ‘cruel and unusual

theory's detractors have substantial pragmatic grounds to dispute it. They argue that the standards established by the Court to determine whether a punishment is disproportionate to the offense "seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values."¹²⁹ The threshold issue of the "gravity" of the crime cannot be objectively measured.¹³⁰ It is true that some general objective principles regarding the relative gravity of offenses can be formulated.¹³¹ For example, the magnitude of different degrees of the exact same type of harm can be reliably measured; intentional conduct is universally recognized as more serious than negligent conduct; lesser included offenses are generally less serious than the greater offense; and "attempts are less serious than completed crimes."¹³² However, beyond these few guideposts, judges are largely at sea in evaluating the relative gravity of crimes. Is intentionally selling cocaine worse than intentionally embezzling a million dollars? And how should we treat a lesser mental state attendant to a greater harm as compared with the reverse? That is, is intentionally cutting off another person's pinky toe worse than recklessly blinding her or negligently killing her? Moreover, the State might emphasize deterrence, which depends not only on the severity of the punishment but also, among

punishment' to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly."); *id.* at 978 n.9 ("If 'cruel and unusual punishments' included disproportionate punishments, the separate prohibition of disproportionate fines (which are certainly punishments) would have been entirely superfluous."); *id.* at 979 (pointing out that all of the statements made surrounding adoption of Eighth Amendment discuss only forbidden modes of punishment and none indicates an intention to proscribe disproportionate punishments); *see also* Schwartz, *supra* note 63, at 378–82 (same). Because the rule espoused by this Article ultimately does not depend on an Eighth Amendment disproportionality principle, a more complete analysis of these textual and historical arguments is beyond the Article's scope.

129. *Harmelin*, 501 U.S. at 986 (plurality); *see also* Baniszewski, *supra* note 62, at 958–59 ("[T]he *Helm* test gives judges too much discretion to impose their subjective values into sentencing.").

130. *See Harmelin*, 501 U.S. at 987–88 (plurality); Baker & Baldwin, *supra* note 122, at 69 ("Ascertaining the gravity of the offense is very problematical."); Baniszewski, *supra* note 62, at 959 ("[A] 'threshold comparison' of the crime with the punishment . . . gives judges too much discretion in determining the gravity of the offense and harshness of the penalty."); Pamela S. Karlan, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 888 (2004); ("Surely the seriousness of an offense is not a universal, timeless fact."); Mulligan, *supra* note 62, at 646 ("The first prong of the test requires the court to make a judgment as to the seriousness of the crime charged and this of course invites the substitution of the subjective views of the judge for those of the legislature.").

131. *See Rummel v. Estelle*, 445 U.S. 263, 304 (1980) (Powell, J., dissenting) ("[I]n this case, we can identify and apply objective criteria that reflect constitutional standards of punishment and minimize the risk of judicial subjectivity.").

132. *Solem*, 463 U.S. at 293.

other things, on its certainty.¹³³ Depending on the particular crimes at issue, the perpetrator of the intuitively “lesser” crime might be so likely to escape capture that, for the punishment to have the desired deterrent effect, those who are brought to justice must be punished more severely than those who commit the intuitively “greater” crime,¹³⁴ assuming we can even objectively differentiate the lesser from the greater in the first place. Intra-jurisdictional analysis—the comparison of punishments for different crimes within the same jurisdiction—suffers from the same problem: “One cannot compare the sentences imposed by the jurisdiction for ‘similarly grave’ offenses if there is no objective standard of gravity.”¹³⁵

At the same time, difficulties in applying a proportionality principle cannot justify the courts’ failure to enforce such a principle, assuming that its existence is a justifiable conclusion from text and history.¹³⁶ Yet those who insist that the Eighth Amendment contains a proportionality principle find it difficult, if not impossible, to articulate a truly objective methodology for translating that principle into law.¹³⁷ The choice, then, seems to be between the courts’ abdication of their responsibility to enforce the Eighth Amendment or their imposition of their own subjective views.¹³⁸ Although using only the inter-jurisdictional analysis is one potential solution,¹³⁹ that analysis has pitfalls of its own,

133. See *Harmelin*, 501 U.S. 989 (plurality) (“[D]eterrent effect depends not only upon the amount of the penalty but upon its certainty.”); Lee, *supra* note 84, at 738 (“[T]he less certain the punishment is, the more severe it needs to be to sufficiently deter potential criminals.”).

134. See *Harmelin*, 501 U.S. at 989 (plurality) (“[C]rimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties.”); Karlan, *supra* note 130, at 895 (similar); Wheeler, *supra* note 62, at 851–52 (“Some crimes cause little mischief individually but are more difficult to detect than more mischievous ones. . . . It could therefore be argued that a severe penalty must be imposed for those few who are caught doing the proscribed act . . .”).

135. *Harmelin*, 501 U.S. at 988 (plurality); see also *Rummel*, 445 U.S. at 282 n.27 (“Other crimes . . . implicate other societal interests, making any such comparison inherently speculative.”); Mulligan, *supra* note 62, at 647 (“The problem of determining the gravity of a particular crime is difficult enough without having to make judgments about other crimes.”).

136. See *Hutto v. Davis*, 454 U.S. 370, 383 (1982) (Brennan, J., dissenting) (“[A] general principle of deference surely cannot justify the complete abdication of our responsibility to enforce the Eighth Amendment.”); Lee, *supra* note 84, at 745 (“[T]he truism that legislatures get to decide amounts of punishment is no reason for the Court to evade its responsibility to enforce the Eighth Amendment . . .”).

137. See Baker & Baldwin, *supra* note 122, at 59 (“The . . . demand for complete objectivity cannot be satisfied.”).

138. See Bruce W. Gilchrist, Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1136 (1979); see also Baniszewski, *supra* note 62, at 951 (“[T]he Court has not been able to develop an objective approach or to strike a proper balance between the courts’ power of review and the legislatures’ initial power to determine prison sentences.”).

139. See Gilchrist, *supra* note 138, at 1136 (opining that courts “must look to the judgments of

as the next section will demonstrate. Consequently, the compromise reached by Justice Kennedy in *Harmelin*—which is currently the law—recognizes a proportionality principle in the Eighth Amendment that is nearly impossible for the State not to satisfy.

4. Categorical Bars to the Death Penalty

The final principle of Eighth Amendment jurisprudence that has been recognized by the Supreme Court is that the death penalty cannot be imposed on certain types of offenders or for certain classes of crimes. Though similar to the proportionality principle, the objective line between death and all other punishments has allowed the Court to treat this area as a self-contained sphere of jurisprudence.¹⁴⁰ Pursuant to this line of jurisprudence, the death penalty cannot be imposed for most offenses not resulting in death,¹⁴¹ or for felony murder where the defendant does not himself kill and does not at least display reckless disregard for human life while playing a major role in the underlying crime.¹⁴² In addition, the death penalty cannot be imposed on the mentally retarded¹⁴³ or on those who killed before reaching the age of eighteen years.¹⁴⁴

many legislatures for an approximation of current norms of proportional punishment for the crime in question”).

140. See *Harmelin*, 501 U.S. at 994 (plurality) (“[T]his line of authority [i]s an aspect of [the Court’s] death penalty jurisprudence, rather than as a generalizable aspect of Eighth Amendment law.”); *Hutto*, 454 U.S. at 373 (“[W]e distinguish[] between punishments—such as the death penalty—which by their very nature differ from all other forms of . . . punishment, and punishments which differ from others only in duration.”); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“Because a sentence of death differs in kind from any sentence of imprisonment . . . our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance . . .”).

141. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality); *id.* at 600 (Brennan, J., concurring in the judgment) (opining that death penalty is always “cruel and unusual”); *id.* (Marshall, J., concurring in the judgment) (same); see also Lee, *supra* note 84, at 721. A broad reading of *Coker* leads to the conclusion that the death penalty is barred for any crime unless death results, while, pursuant to a narrower reading, the death penalty is still permissible for some non-homicidal conduct. See, e.g., *State v. Wilson*, 685 So. 2d 1063, 1066 (La. 1996) (“The [*Coker*] plurality took great pains in referring only to the rape of adult women throughout their opinion, leaving open the question of the rape of a child.” (footnote and emphasis omitted)).

142. See *Tison v. Arizona*, 481 U.S. 137, 158 (1987); *Enmund v. Florida*, 458 U.S. 782, 787–88 (1982); see also Lee, *supra* note 84, at 721.

143. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); see also Lee, *supra* note 84, at 721.

144. See *Roper v. Simmons*, 543 U.S. 551 (2005); see also Lee, *supra* note 84, at 721. In addition, the Court has held that the Constitution forbids execution of the insane. See *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986). This differs somewhat from the “categorical bar” cases, for each of those addresses constraints on the ability of governments to impose the sentence, while *Ford* constrains only their ability to execute the sentence. However, the methodology used by the *Ford* Court

The methodology used in these “categorical bar” cases is similar to that used in the non-capital disproportionality cases.¹⁴⁵ Again, the Court has developed a two-part test. First, the Court looks to objective evidence,¹⁴⁶ by conducting an inter-jurisdictional analysis looking primarily¹⁴⁷ at how many jurisdictions authorize capital punishment in similar circumstances,¹⁴⁸ and secondarily to how often juries impose the punishment under like circumstances.¹⁴⁹ The Court has also performed

to reach this conclusion was consistent with the methodology used in the “categorical bar” cases.

145. See *Baker & Baldwin*, *supra* note 122, at 58–59 (noting similarity between the two tests).

146. See *Atkins*, 536 U.S. at 312 (“Proportionality review . . . should be informed by objective factors to the maximum possible extent.” (internal quotation marks omitted)); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (“[W]e have looked to objective evidence of how our society views a particular punishment today.”); *Ford*, 477 U.S. at 406 (“[T]his Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the [Eighth] Amendment protects.”).

147. See *Roper*, 543 U.S. at 564 (“The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.” (emphasis added)); *Penry*, 492 U.S. at 331 (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”); *Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988) (O’Connor, J., concurring in the judgment) (“[T]he decisions of American legislatures . . . about the minimum age at which a juvenile’s crimes may lead to capital punishment . . . should provide the most reliable signs of a society-wide consensus on this issue.”); *Tison*, 481 U.S. at 152 (“[W]e find the state legislatures’ judgment as to proportionality in these circumstances relevant to th[e] constitutional inquiry.”).

148. See *Roper*, 543 U.S. at 564 (finding that twenty States allow execution for crime committed while under age of eighteen); *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) (finding that twenty-five States permitted execution of seventeen-year-old offenders and twenty-two permitted execution of sixteen-year-old offenders); *Thompson*, 487 U.S. at 829 (plurality) (finding that of “the 18 States that have expressly established a minimum age in their death-penalty statutes . . . all of them require that the defendant have attained at least the age of 16 at the time of the capital offense”); *Tison*, 481 U.S. at 154 (“[O]nly 11 States authorizing capital punishment forbid imposition of the death penalty even though the defendant’s participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness.”); *Ford*, 477 U.S. at 408 (“[N]o State in the Union permits the execution of the insane.”); *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (“[O]nly eight jurisdictions authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life.”); *Coker v. Georgia*, 433 U.S. 584, 595–96 (1977) (plurality) (finding that only one jurisdiction authorized capital punishment for rape of adult woman). Beginning in *Atkins*, 536 U.S. at 315–16, the Court also looked to “the consistency of the direction of change” among jurisdictions in limiting the death penalty to certain offenses and offenders; considered how “overwhelmingly” such limitations have been approved; and took into account “the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime.” See also *Roper*, 541 U.S. at 565. In some cases, the inter-jurisdictional analysis has taken into account non-American, and even non-common-law, jurisdictions. See, e.g., *id.* at 1198–1200.

149. See *Roper*, 541 U.S. at 564 (“[E]ven in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent.”); *Atkins*, 536 U.S. at 316 (“[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon.”); *Enmund*, 458 U.S. at 795 (finding that only three of 796 then-current death row prisoners “did not participate in the fatal assault on the victim” and neither “hired [n]or solicited someone else to kill the victim [n]or participated in a scheme designed to kill the victim”). The Court in *Stanford*, 492 U.S. at 374, warned that care

an intra-jurisdictional analysis in some cases by looking to the judgments of juries within the jurisdiction in question.¹⁵⁰ The objective approach is required in part by the Eighth Amendment's text, which, again, forbids "only those punishments that are both 'cruel and unusual,'"¹⁵¹ and in part by the requirement of deference to legislative judgments in "our federal system."¹⁵²

Second, the Court uses a more subjective analysis,¹⁵³ bringing its "own judgment . . . to bear on the question of the acceptability of the death penalty under the Eighth Amendment."¹⁵⁴ The Court looks at the culpability of the defendant and the harm he has caused compared to the typical first-degree murderer. If the defendant is less culpable or caused less harm than the typical first-degree murderer, then death is a disproportionate punishment because not even all first-degree murderers deserve the death penalty.¹⁵⁵ In an overlapping, sometimes indistinguishable inquiry, the Court asks whether (in light of the defendant's level of culpability) his execution would meaningfully advance—i.e., advance by some meaningful increment beyond what would be achieved by imposition of a lesser sentence—either of the accepted goals of capital punishment: retribution and deterrence.¹⁵⁶ If not, then imposition of the death penalty "is nothing more than the purposeless and needless imposition of pain and suffering" forbidden by

should be taken in relying too heavily on this factor, since "the very considerations which induce [some] to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed."

150. See *Enmund*, 458 U.S. at 795 (finding that, of the "[f]orty-five felony murderers . . . currently on [Florida's] death row," only one—petitioner—neither killed nor intended to kill); *Coker*, 433 U.S. at 597 (plurality) (finding that ninety percent of Georgia juries rejected capital punishment for rapists).

151. *Stanford*, 492 U.S. at 369 (quoting *Gregg v. Georgia*, 428 U.S. 153 (1976)) (emphasis in original); see also *Thompson*, 487 U.S. at 822 n.7 (plurality) ("[C]ontemporary standards, as reflected by the actions of legislatures and juries, provide an important measure of whether the death penalty is 'cruel and unusual' [in part because] whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance.").

152. *Stanford*, 492 U.S. at 369–70.

153. See *Atkins*, 536 U.S. at 312 ("[T]he objective evidence, though of great importance, d[oes] not 'wholly determine' the controversy" (quoting *Coker*, 433 U.S. at 597 (plurality))).

154. *Coker*, 433 U.S. at 597 (plurality). Accord *Roper*, 541 U.S. at 564; *Atkins*, 536 U.S. at 313; *Thompson*, 487 U.S. at 833 (plurality); *Enmund*, 458 U.S. at 797; Lee, *supra* note 84, at 689.

155. See *Roper*, 541 U.S. at 569–71; *Thompson*, 487 U.S. at 834 (plurality); *Tison v. Arizona*, 481 U.S. 137, 155–58 (1987); *Enmund*, 458 U.S. at 798; *Coker*, 433 U.S. at 598 (plurality). Accord Lee, *supra* note 84, at 689–90.

156. See *Roper*, 541 U.S. at 569–71; *Atkins*, 536 U.S. at 318–20; *Penry*, 492 U.S. at 336; *Thompson*, 487 U.S. at 833 (plurality); *Enmund*, 458 U.S. at 798–801; Lee, *supra* note 84, at 690. In *Atkins*, 536 U.S. at 316–17 n.21, the Court also looked to such indicia as: the opinions of professional organizations; the stance of religious groups; and public opinion data.

the Eighth Amendment.¹⁵⁷

Like the Court's disproportionality analysis, its categorical bar methodology has detractors on and off the Court. The subjective portion of the analysis has been predictably dismissed as merely a seat-of-the-pants determination based on nothing more than the personal preferences of a majority of the Justices.¹⁵⁸ Even the objective portion of the analysis is subject to criticism. At first blush, the inter-jurisdictional analysis "can be applied with clarity and ease."¹⁵⁹ However, after the Court has added up the jurisdictions on either side of the ledger, it must then decide how many jurisdictions must eschew capital punishment in a particular context before a national consensus has been reached. Some cases, of course, are easier than others. In *Coker v. Georgia*, the Court observed that Georgia was the only jurisdiction that authorized execution for the rape of an adult woman.¹⁶⁰ But in two more recent cases, the Court held that a national consensus existed against execution of mentally retarded and juvenile offenders, even though only sixty percent of the States, and only forty-seven percent of the States with the death penalty, precluded its use in those contexts.¹⁶¹ Even some Justices in the majority in those cases conceded that such objective evidence is truly insufficient to demonstrate a national consensus, and that the subjective aspect of the test was actually driving those decisions.¹⁶² In turn, this has opened the Court up to even more criticism that its categorical bar jurisprudence simply reflects the

157. *Coker*, 433 U.S. at 592 (plurality); *accord Penry*, 492 U.S. at 335; *Enmund*, 458 U.S. at 798.

158. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (plurality) ("[T]o mean that . . . it is for us to judge . . . on the basis of what we think 'proportionate' and 'measurably contributory to acceptable goals of punishment' . . . is to replace judges of the law with a committee of philosopher-kings.").

159. *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (plurality).

160. 433 U.S. at 595-96 (plurality).

161. See *Roper*, 541 U.S. at 564 (finding that twenty of thirty-eight death penalty States allow execution for crime committed while under age of eighteen); *Atkins*, 536 U.S. at 314-15 (finding that twenty of thirty-eight death penalty States allow execution of mentally retarded). *Roper* brought to the surface a subsidiary debate within the Court: whether to include non-death penalty States in the denominator when determining whether there is a national consensus. Compare *id.* at 574 ("[T]he *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty . . .") with *id.* at 610 (Scalia, J., dissenting) ("None of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely." (emphasis omitted)).

162. See, e.g., *id.* at 595 (O'Connor, J., dissenting) ("[T]he objective evidence of national consensus, standing alone, was insufficient to dictate the Court's holding in *Atkins*."). Justice O'Connor had been in the majority in *Atkins*, 536 U.S. at 305.

personal preferences of a majority of the Justices.¹⁶³

III. THE ANTI-FEDERALISTS' EIGHTH AMENDMENT

All of the applications of the Eighth Amendment discussed above have at least one thing in common: none distinguishes the Eighth Amendment in its pristine form from the Amendment as incorporated through the Fourteenth Amendment. Since 1962, when the Eighth Amendment was held to bind the States,¹⁶⁴ both courts and commentators have assumed that the same Eighth Amendment standards—whatever those might be—apply identically to the federal and state governments.¹⁶⁵ Indeed, the two main cases applying the “pure” Eighth Amendment, *Weems v. United States*¹⁶⁶ and *Trop v. Dulles*,¹⁶⁷ have greatly influenced the development of “incorporated” Eighth Amendment jurisprudence through their dynamic rather than static view of the Amendment and their use of comparative analysis among and within jurisdictions. Conventional wisdom thus holds that there is no “pure” Eighth Amendment jurisprudence distinct from the Court’s “incorporated” Eighth Amendment jurisprudence.

However, recent research reveals that the criminal procedure protections of the Bill of Rights were adopted primarily to make it more difficult for the federal government to investigate, prosecute, convict, and punish people for crime, regardless of the guilt or innocence of the accused. This function contrasts sharply with the reliability-enhancing rationale ascribed to the Fourteenth Amendment’s Due Process Clause. This distinction suggests that the Bill of Rights applies more stringently to the federal government than it does to the States, a notion that makes perfect sense in light of the communitarian ideology of the Anti-Federalists, who insisted on the inclusion in the Constitution of the Bill of Rights. After all, there is no more fundamental way to exclude citizens from their communities, literally or figuratively, than by subjecting them to criminal sanction. This potential power to exclude by

163. See, e.g., *Roper*, 541 U.S. at 615 (Scalia, J., dissenting) (“Of course, the real force driving today’s decision is not the actions of [the] state legislatures, but the Court’s ‘own judgment’ that murderers younger than 18 can never be as morally culpable as older counterparts.” (internal quotation marks omitted)); *Atkins*, 536 U.S. at 338 (Scalia, J., dissenting) (“Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.”).

164. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

165. But see *Packer*, *supra* note 89, at 1074 n.11 (suggesting that different standards might apply).

166. 217 U.S. 349 (1910) (interpreting a provision of the Constitution of the Philippines identical to the Eighth Amendment and explicitly stating it is interpreted exactly as the Eighth Amendment).

167. 356 U.S. 86 (1958) (plurality).

the new central government was among the most feared by the Anti-Federalists. The Anti-Federalists' desire to hobble the federal government's power to re-shape local communities through federal criminal law extended naturally to the federal power to punish, because punishment, even upon a properly-obtained federal conviction, dictates the nature, length, and extent of a citizen's exclusion from his community.

A. The Anti-Federalists and the Bill of Rights

We tend to think of the Bill of Rights as a charter of freedom that puts a thumb on the scale on the side of "the individual" against that abstraction known as "the state."¹⁶⁸ In this paradigm, it matters not whether "the state" is the local or the national government. Both are equally capable of arbitrarily or maliciously taking freedom and reducing citizens to the status of mere subjects. Indeed, for moderns, living in the aftermath of Jim Crow and the civil rights movement, it is near gospel that we have more to fear from local government than from the national government.¹⁶⁹

But what is orthodoxy today was heterodoxy in 1791. The Anti-Federalists "saw state legislatures and state courts as the protectors of citizens and not as threats."¹⁷⁰ Instead, they feared the newly created central government. George C. Thomas III invites us back into time:

Return to the 1790s. The States eye the central government, to which they have just ceded much of their sovereignty, as a potential bully or, worse, as a tyrant. The States look upon the freshly minted central government as it looms above them, and it reminds them of King George III and Parliament.¹⁷¹

168. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 34 (1998) ("[T]he conventional assumption [is] that virtually all the provisions of the Bill of Rights . . . were essentially designed to protect individual rights.").

169. See *id.* at 4 ("[M]any lawyers embrace a tradition that views state governments as the quintessential threat to individual and minority rights, and federal officials—especially federal courts—as the special guardians of those rights.").

170. George C. Thomas, III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 180 (2001); see also Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1281 (1989) ("[T]he states, and not the distant federal government, were considered [by the Anti-Federalists] to be the true guardians of the people's rights.").

171. *Id.* at 149. See also Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1231 (asserting that the Bill of

The Constitution was ratified by many States on the implicit condition that a Bill of Rights be added shortly thereafter to assuage these fears.¹⁷² The underlying premises of the Anti-Federalists, then, are critical to an understanding of the Bill of Rights, because without their assent, the Constitution might never have been ratified.¹⁷³

Close scrutiny of the Anti-Federalists' Bill of Rights reveals their profound concern with preserving state sovereignty as a means of furthering liberty. Though framed in terms of protecting the rights of individuals, the Bill of Rights was viewed in 1791 as a barrier between the States and the national government.¹⁷⁴ While moderns view the Bill of Rights as counter-majoritarian,¹⁷⁵ the ancients did not: the Bill of Rights, as originally conceived, was a stridently majoritarian document.¹⁷⁶ The Bill was primarily concerned with lowering what Akhil Amar has dubbed the "agency costs" of representative

Rights is "a constitutional antidote to the potential excesses of national power so feared by the Anti-Federalists").

172. See Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39, 66 (1989) ("[R]atification of the Constitution was only secured because Federalists agreed to consider subsequent amendments recommended by Anti-Federalists in various state conventions."); Massey, *supra* note 171, at 1236 ("[T]he Anti-Federalist opposition [to the Constitution] shifted 'to a reluctant acceptance of the instrument provided that appropriate constitutional restraints were placed upon the powers of the federal government.'" (quoting Wilmarth, *supra* note 170, at 1276)); Thomas, *supra* note 170, at 157 (observing that Bill of Rights was added "to satisfy the anti-Federalists"); Wilmarth, *supra* note 170, at 1264 ("In order to overcome the Antifederalists' opposition and to secure ratification of the Constitution in such key states as Massachusetts, Virginia, and New York, the Federalists were obliged to promise that amendments protecting state autonomy interests would be made to the Constitution promptly after it became effective.").

173. See Cornell, *supra* note 172, at 67 ("Anti-Federalist intentions are relevant to understanding the Constitution; without their acquiescence ratification might never have been secured. In particular, Anti-Federalist political thought is essential to understanding the meaning of the Bill of Rights."). This is not to imply that Anti-Federalist theory was monolithic. See HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 5 (1981) ("It would be difficult to find a single point about which *all* of the Anti-Federalists agreed."). It is only to say that certain themes were heavily emphasized in Anti-Federalist thought.

174. See Thomas, *supra* note 170, at 149. See also Massey, *supra* note 171, at 1231 (contending that the "'Anti-Federalist constitution' [is] concerned with preserving the states as autonomous units of government and as structural bulwarks of human liberty").

175. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1203 (1991) ("Today, the very phrase 'Bill of Rights' is virtually synonymous with a compilation of counter-majoritarian personal rights.").

176. See *id.* at 1202 ("[T]he world view underlying the Bill of Rights was not dominated by the idea of individualistic, counter-majoritarian rights."); AMAR, *supra* note 168, at xii ("The genius of the Bill was . . . not to impede popular majorities but to empower them."); see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 520 (1972) ("[Anti-federalists] were 'localists,' fearful of distant governmental, even representational, authority for very significant political and social reasons that in the final analysis must be called democratic.").

democracy.¹⁷⁷ The Anti-Federalists knew that, because the number of the people's representatives in the nation's capital would be relatively small, only the aristocratic few, "with reputations spanning wide geographic areas," would be well-known enough to be elected.¹⁷⁸ The Anti-Federalists feared that these aristocratic "representatives" would be truly unrepresentative, given their physical and psychic distance from the "middling classes" that made up the mass of the people.¹⁷⁹ The danger was that the people's national representatives, far removed from the concerns of the communities they purported to represent, would be motivated more by self-interest than by civic virtue.¹⁸⁰ State legislators, by contrast, were drawn from smaller geographic regions and, thus, would be more familiar to their constituents and more familiar with local conditions, and therefore more trustworthy.¹⁸¹ The Bill of Rights was proposed and adopted as a method of cutting back on the potential self-dealing on the part of the people's national representatives by facilitating "the ability of local governments to monitor and deter federal abuse."¹⁸²

The notion that a responsive and representative local authority could provide a check on the abuses of an unrepresentative central authority

177. See AMAR, *supra* note 168, at xiii.

178. *Id.* at 11; see also Wilson Carey McWilliams, *The Anti-Federalists, Representation, and Party*, 84 NW. U. L. REV. 12, 30 (1989) ("The Anti-Federalists . . . believed [that] a large republic with a fragmented and dispersed citizenry gave decisive advantages to organized elites—specifically, government officials, the wealthy, and men of commerce."); Letter from the Federal Farmer (Jan. 4, 1788), *reprinted in* 2 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 276 (1981) ("[T]he best practical representation, even in a small state, must be several degrees more aristocratical than the body of the people."); Speech by Melancton Smith (June 21, 1788), *reprinted in* 6 STORING, *supra*, at 157 ("[T]his Government is so constituted, that the representatives will generally be composed of . . . the natural aristocracy of the country.").

179. AMAR, *supra* note 168, at 11; see also McWilliams, *supra* note 178, at 25 ("The Anti-Federalists . . . argued that . . . in large states, rulers could know their people only as so many abstractions."); Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 90 (1989) (noting the Anti-Federalists' fear that their "so-called representatives, ignorant of their constituents' needs, and both literally and psychically distant from those constituents, would pass laws that were unsuited to the different parts of the republic"); Speech by Melancton Smith (June 21, 1788), *reprinted in* 6 STORING, *supra* note 178, at 157 ("[R]epresentatives [should] resemble those they represent; they should be a true picture of the people; possess the knowledge of their circumstances and their wants; sympathize in all their distresses, and be disposed to seek their true interests."); 3 ELLIOT, *supra* note 85, at 322 (statement of Patrick Henry) ("[I]nstead of a confidential connection between the electors and the elected, they will be absolutely unacquainted with each other.").

180. See AMAR, *supra* note 168, at xiii; accord Wilmarth, *supra* note 170, at 1278 ("The Antifederalists alleged that a natural aristocracy . . . could have no real understanding of the needs and interests of the ordinary people, and that such an elite would therefore govern primarily in the interests of their own class.").

181. See AMAR, *supra* note 168, at 11; accord STORING, *supra* note 173, at 17.

182. AMAR, *supra* note 168, at xiii.

was deeply ingrained in the minds of the framers. At the time of the framing, many of the state governments were well into their second century.¹⁸³ In the dozen or so years from 1763 until the Revolution began, “colonial governments took the lead in protecting their citizens from perceived Parliamentary abuses. Colonial legislatures kept a close eye on the central government; sounded public alarms whenever they saw oppression in the works; and organized political, economic, and (ultimately) military opposition to perceived British evils.”¹⁸⁴

The idea is not that the Bill of Rights was designed to protect collective rights *rather than* individual rights. To the contrary, the Anti-Federalists saw the two as fairly indistinguishable.¹⁸⁵ The prevailing Anti-Federalist thought at the time viewed individuals as primarily constituent parts of the community.¹⁸⁶ Accordingly, the fortunes of the individual were intimately intertwined with the fortunes of his fellow citizens as a collective whole.¹⁸⁷ The ultimate goal was preservation of individual liberty and self-determination by protecting the collective rights of “the people,” a phrase that is repeated five times in the Bill.¹⁸⁸

183. See *id.* at 5 (pointing out that the Virginia “House of Burgesses had been meeting since the 1620s”).

184. *Id.* See also *id.* at 4 (“[The] states’-rights tradition . . . extolled the ability of local governments to protect citizens against abuses by central authorities.”).

185. See *id.* at 128 (“[The] point is not that substantive rights are unimportant, but that these rights were intimately intertwined with structural considerations.”); see also Wilmarth, *supra* note 170, at 1284 (“Because of the Antifederalist belief that the states were the most reliable guarantors of individual liberty, the Antifederalists placed their primary emphasis on preserving state autonomy.”).

186. See McWilliams, *supra* note 178, at 19 (noting the Anti-Federalist view that “[i]ndividuality is possible only because political society protects and nurtures our individual strengths and attributes, making it possible for each of us to do what he or she does best”); *id.* at 19–20 (“It was common for Anti-Federalists to argue . . . that political societies, once created, became ‘one body,’ a collective second nature that subsumes and supersedes all or most individual rights.” (footnote omitted) (quoting Speech by Melancton Smith (June 20, 1788), reprinted in 6 STORING, *supra* note 178, at 149, 153)).

187. See AMAR, *supra* note 168, at 126 (quoting leading Anti-Federalists who expressly conjoined concerns for both individual and States’ rights); see also *id.* at xii (“A close look at the Bill reveals structural ideas tightly interconnected with language of rights . . .”); Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMP. L. REV. 95, 113 (1996) (“[B]ecause the anti-federalists felt that individuals are defined primarily by their communities, they stressed the interconnections and interdependencies between individual and society.”); McWilliams, *supra* note 178, at 24 (observing that Anti-Federalists “link[ed] [individual] well-being with that of the community”); STORING, *supra* note 173, at 15 (“The Anti-Federalists’ defense of federalism and of the primacy of the states rested on their belief that there was an inherent connection between the states and the preservation of individual liberty, which is the end of any legitimate government.”).

188. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . .”); *id.* amend. II (“[T]he right of the people to keep and bear Arms, shall not be infringed.”); *id.* amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”); *id.* amend.

Thus, individual rights and collective rights are often “marbled together” in the provisions of the Bill.¹⁸⁹

Unfortunately, this original view of the Bill of Rights has been lost to the courts and all but a few scholars. Because most of the modern Supreme Court cases interpreting the Bill of Rights have come from the States, they have really been interpretations of the Fourteenth Amendment.¹⁹⁰ Given the focus of the framers and ratifiers of the Fourteenth Amendment on the protection of former slaves and other minorities—ethnic, religious, and political—from dominant local majorities, that Amendment has a distinctively individual-rights hue.¹⁹¹ This, in turn, has colored the way we think about the provisions of the Bill of Rights itself, since, through the fiction of incorporation, we pretend we are interpreting the first eight amendments rather than the Fourteenth.¹⁹² Thus, we think of the Bill of Rights as emphasizing individual rights, even though the Bill itself was—and is—far more concerned with federalism, popular sovereignty, and collective rights than we typically acknowledge.¹⁹³

IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

189. AMAR, *supra* note 168, at 222. It must be conceded that even some Anti-Federalists admitted to a more modern understanding of the Bill of Rights as a means of “secur[ing] the minority against the usurpation and tyranny of the majority.” Letter of Agrippa to the Massachusetts Convention (Feb. 5, 1788), *reprinted in* 4 STORING, *supra* note 178, at 111. *See also* Essay by a Farmer (Feb. 15, 1788), *reprinted in* 5 STORING, *supra* note 178, at 15 (“[T]he rights of individuals are frequently opposed to the apparent interests of the majority—[f]or this reason the greater the portion of political freedom in a form of government the greater the necessity of a bill of rights . . .”). However, these sentiments were rarely expressed by the Anti-Federalists.

190. *See* Thomas, *supra* note 170, at 162 (“[M]ost of what we know or think we know about the Bill of Rights guarantees has been produced by cases in which the Court is interpreting the Fourteenth Amendment.”).

191. *See* AMAR, *supra* note 168, at 7 (“Through the Fourteenth Amendment . . . the Bill has been pressed into the service of protecting vulnerable minorities from dominant social majorities. Given the core concerns of the Fourteenth Amendment, all this is fitting . . .”); *id.* at 23 (noting that Fourteenth Amendment “focuses more on overweening majoritarianism than attenuated representation”).

192. *See id.* at 7 (“Like people with spectacles who often forget that they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.”); *see also* Amar, *supra* note 175, at 1201 (“[A]doption of the Fourteenth Amendment appears to have transformed the nature of the Bill.”).

193. *See* McWilliams, *supra* note 178, at 20 (“In advocating a Bill of Rights, the Anti-Federalists most zealously defended public freedoms and the right to a republican civil life.”); *see also* AMAR, *supra* note 168, at 23 (“[P]opular speech was the paradigm of our First Amendment . . .”); *id.* at 26 (“The right of the people to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express reservation of the collective right of We the People to assemble . . .” (emphasis omitted)); *id.* at 30 (“As with assembly, the core petition right is collective and popular . . .”); *id.* at 55–56 (“[T]he militia system [protected by the Second Amendment] was

Some have gone so far as to suggest a “two-track” model for some provisions of the Bill of Rights, proposing different constraints when those provisions are applied to the States than when they are applied to the federal government.¹⁹⁴ After all, while the Fourteenth Amendment arguably incorporates the provisions of the Bill of Rights against the States, it “did not repeal the fundamentally populist philosophy of the original Constitution and Bill of Rights.”¹⁹⁵ Thus, Amar advocates what he calls “refined incorporation,” in which only those provisions of the Bill of Rights that guarantee an individual right—“rather than a right of states or the public at large”—are incorporated by the Fourteenth Amendment.¹⁹⁶ Moreover, even those provisions that are incorporated might apply in different ways to the States than to the federal government.¹⁹⁷ Recent research reveals that the criminal procedure protections of the Bill of Rights are particularly susceptible to such a “two-track” interpretation.

*B. The Design of the Criminal Procedure Protections
of the Bill of Rights*

While Amar declines to apply a “two-track” model to the criminal procedure protections of the Bill of Rights,¹⁹⁸ George Thomas picks up

carefully designed to protect liberty through localism . . . [F]reedom and federalism pulled together.”); *id.* at 67–68 (“[T]he Fourth Amendment evinces at least as much concern with the agency problem of protecting the people generally from self-interested government policy as with protecting minorities against majorities of fellow citizens.”); *id.* at 82 (“[M]ost [of the] provisions of Amendments V–VIII were centrally concerned with the agency problem—the danger that government officials might attempt to rule in their own self-interest at the expense of their constituents’ sentiments and liberty.”).

194. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (“[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government.”); *Walz v. Tax Comm’n*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring) (“It may . . . be that the States, while bound to observe strict neutrality [with regard to religion], should be freer to experiment with involvement—on a neutral basis—than the Federal Government.”); Mannheimer, *supra* note 187, at 142–43 (suggesting that a “two-track” model apply to the Establishment Clause). At least three Justices have suggested such a “two-track” model for the Free Speech Clause of the First Amendment. See *Roth v. United States*, 354 U.S. 476, 503–06 (1957) (Harlan, J., concurring in part and dissenting in part); *Beauharnais v. Illinois*, 343 U.S. 250, 288, 294–95 (1952) (Jackson, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). See also Mannheimer, *supra* note 187, at 140–42 (discussing merits of this view).

195. AMAR, *supra* note 168, at 103.

196. *Id.* at xiv (emphasis omitted).

197. See *id.*

198. See generally AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997) (positing unitary theory of criminal procedure protections); see also Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road*

where Amar leaves off. In a recent work, Thomas shows that these provisions were “not designed with accuracy of outcome as the principal goal.”¹⁹⁹ Rather, “the Framers of the Bill of Rights intended them to be formidable barriers to the successful federal prosecution of criminal defendants, *whether guilty or innocent*.”²⁰⁰ Indeed, “the Framers almost surely intended the Bill of Rights to permit guilty defendants to go free.”²⁰¹ On this reading, the criminal procedure protections of the Bill of Rights, like the rest of the Bill, are “profoundly antigovernment.”²⁰² Only because the Due Process Clause of the Fourteenth Amendment is primarily concerned with protecting the innocent from wrongful conviction and punishment, and because most of our current jurisprudence stems from that Amendment, do we believe the criminal procedure protections of the Bill of Rights themselves to be concerned with the accuracy of trials.²⁰³ Again, we are entranced by the optical illusion of incorporation.

This view largely explains why the Anti-Federalists cared so much about preserving and fortifying the right to trial by jury in criminal cases.²⁰⁴ Although Article III of the Constitution already guaranteed trials by jury would “be held in the State where the . . . Crimes shall have been committed,”²⁰⁵ the Anti-Federalists spent much energy advocating an even stricter rule. This rule, which ultimately found its

Again,” 74 N.C. L. REV. 1559, 1562 n.19 (1996) (book review) (noting that “Amar’s ‘refined incorporation’ is not invoked” in Amar’s work on criminal procedure); *id.* at 1563 (“[Amar] believes in a single, national set of individual rights against criminal investigation and prosecution . . .”).

199. Thomas, *supra* note 170, at 152; *see also id.* at 174 (“We have come to believe . . . that the reason to have protections benefiting criminals is that these protections best deliver accurate verdicts . . .”).

200. *Id.* at 152 (emphasis added). *See also id.* at 156 (“[T]he Bill of Rights . . . sought to impose restrictions on the federal government without regard to the innocence of particular defendants.”); *id.* at 160 (“The principal concern in the Bill of Rights was not to protect innocent defendants. The Framers instead intended to create formidable obstacles to federal investigation and prosecution of crime.”); *id.* at 174–75 (“The Framers did not focus on separating the guilty from the innocent because they were concerned with curtailing the power of federal prosecutors and judges.”).

201. *Id.* at 156.

202. *Id.* at 157; *see also id.* at 232 (“[T]he Bill of Rights . . . was fundamentally antigovernment. It was not designed to produce fair outcomes or reasonable accommodations to permit more effective crime control. It was designed to hobble federal prosecution of crime.”).

203. *See* Dripps, *supra* note 197, at 1637 (“[P]reventing punishment outside the criminal process, and ensuring that the criminal process does all it can to prevent unjust convictions, are the core ideas of due process of law.”); *id.* (“Arbitrary searches and seizures deprive people of liberty without due process, for it is the prospect of a valid prosecution that justifies coercive methods of investigation.”).

204. *See* AMAR, *supra* note 168, at 83 (“The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury.”); Thomas, *supra* note 170, at 176 (“[I]t was correcting the Article III jury right that was the passion of the anti-Federalists.”).

205. U.S. CONST. art. III, § 2, para. 3.

way into the Sixth Amendment, goes even further in two respects: first, it guarantees that the trial would take place, not just in the “State” but also within the “district” where the crime was committed; and second, it guarantees that the *jury* would also come from that same State and district.²⁰⁶ The Anti-Federalists believed that the jury, in its role as the voice of the local community,²⁰⁷ could be counted on to sympathize with a defendant who was being persecuted by the federal government, even if the defendant were guilty.²⁰⁸ The jury was “interpose[d] between the citizens and the central government as a way to place stringent limitations on the federal government.”²⁰⁹ The framers were familiar with this tactic. Prior to the Revolution, when locals disloyal to the Crown were tried for violating valid but unpopular laws such as those prohibiting smuggling, the defendants often could count on local juries to acquit against the evidence, a practice known today as jury nullification.²¹⁰ The Anti-Federalists’ focus on the particulars of the jury-trial right strengthens the inference that the Bill of Rights was not primarily intended to protect just the innocent, for their preoccupation would be “an odd historical fact if protecting innocence were uppermost in the minds of the Framers.”²¹¹

The Anti-Federalists insisted on throwing the procedural hurdles of the Fourth, Fifth, Sixth, and Eighth Amendments in the paths of federal investigators, prosecutors, and judges, because, just as “the power to tax involves the power to destroy,”²¹² the power to prosecute is the power to persecute. “The Framers feared that the powerful federal government would seek to persecute its enemies through the use of federal law.”²¹³

206. “In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury of the State and district wherein the crime shall have been committed . . .” U.S. CONST. amend. VI.

207. See Thomas, *supra* note 170, at 177 (“The colonists wanted not truth as much as the voice and the law of the community.”); see also AMAR, *supra* note 168, at 88–89 (“[T]he jury would be composed of citizens from the same community, and its actions were expected to be informed by community values.”).

208. See AMAR, *supra* note 168, at 84 (“[T]he jury played a leading role in protecting ordinary individuals against governmental overreaching.”).

209. Thomas, *supra* note 170, at 177; see also AMAR, *supra* note 168, at 87 (“[T]he criminal petit jury could interpose itself on behalf of the people’s rights by refusing to convict when the executive sought to trump up charges against its political critics”); Thomas, *supra* note 170, at 179 (“[A] jury who knows the defendant’s character will nullify a prosecution that was viewed as overreaching on the part of the federal government, without regard to whether the defendant was factually guilty.”).

210. See Thomas, *supra* note 170, at 176–77.

211. *Id.* at 175.

212. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

213. Thomas, *supra* note 170, at 152.

Again, the framers had seen this before. After all, “many of the Framers themselves had violated British [criminal] law.”²¹⁴ “[F]resh from [their] experience as smugglers, tax evaders, seditionists, and traitors to the regime of George III,”²¹⁵ the framers identified and empathized with those who were enmeshed in the criminal justice system and guilty of laws that were, to them, unjust.²¹⁶ Moreover, just as King George had concentrated his efforts on the colonists, the same power to persecute through unpopular criminal laws might be used by the federal government to target particular sections of the nation.²¹⁷ Before the Bill of Rights was ratified, the Anti-Federalists saw

a powerful federal government that wanted to eradicate its enemies. The legislature might enact general search warrants that could be used to sweep buildings, neighborhoods, and whole towns, looking not for evidence of crimes of violence or theft but, instead, for evidence of opposition to the government. . . . [A] grand jury could subpoena those suspected of harboring antigovernment sentiments and force them to answer questions about their activities and their friends under threat of contempt. . . . [P]rosecutors could bring a criminal prosecution in a corner of the State far from where the alleged crime occurred; the defendant would be unknown and without friends and resources to assist in his defense. If the judge set bail impossibly high, the defendant could be held in jail for months or years waiting for the prosecution to proceed. When trial did finally begin, under the supervision of a lax federal judge, it could be done largely by affidavit . . . without a lawyer for the defendant and without access to subpoena power to compel attendance of the defense witnesses. And if the defendant somehow escaped with an acquittal, or with a sentence that the prosecutor found too lenient, the prosecutor could prosecute the same offense all over again.²¹⁸

Thus, the Fifth (save for its final clause), Sixth, and Eighth Amendments specifically address the procedures to be followed in criminal cases. Although the Fourth Amendment does not, strictly speaking, apply only in the criminal arena, its limits on the powers of investigation in the pre-regulatory state surely had its predominant impact on the criminal

214. *Id.* at 156.

215. Louis B. Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157, 158 (1954).

216. See Thomas, *supra* note 170, at 175 (arguing that early federal laws prohibited “what seemed to [some] little more than antigovernment conduct”).

217. See O’Hear, *supra* note 23, at 759 (“[F]ederal law enforcement has the ability to concentrate its resources on particular types of offenses in particular geographic areas.”).

218. Thomas, *supra* note 170, at 158–59; see also Amar, *supra* note 175, at 1183 (“[C]riminal law inspired dread and jealousy.”).

process.²¹⁹

Why does the prospect of a government's abuse of the criminal law engender such fear? Certainly, a tyrannical central government might use the civil courts to persecute and torment its adversaries as well. It might bankrupt its enemies by exacting stiff forfeitures and civil fines for violations of federal law.²²⁰ Of course, the Anti-Federalists fought for the right to trial by jury in federal civil matters as well as in criminal cases. Yet the provisions of the Bill of Rights pertaining to civil trials—the Civil Jury Clause,²²¹ the Reexamination Clause,²²² and the civil application of the Due Process Clause²²³—are duplicative of, and not nearly as extensive as, those occasioning criminal trials. To be sure, the primary check on the central government in criminal cases as well as civil was “the populist and local institution of the jury.”²²⁴ One may ask why, in addition to the jury-trial rights, the Anti-Federalists insisted on all of the other accoutrements of the criminal process contained in the Fourth, Fifth, Sixth, and Eighth Amendments.²²⁵ The answer lies in the recognition of the Anti-Federalists' deep respect for the value of community participation and in their deep fear of the central government's potential ability to re-shape local communities through the criminal law.

219. See Thomas, *supra* note 170, at 158 (“The Fourth, Fifth, Sixth, and Eighth Amendments mostly have to do with the power of the federal government to identify and punish criminals . . .”).

220. See *id.* at 179 (noting that Bill of Rights “make[s] it difficult for the federal government . . . to subject anyone to forfeiture, fines, and civil penalties”).

221. See U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

222. See U.S. CONST. amend. VII (“[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”). In criminal trials, the function of this Clause is largely performed by the Double Jeopardy Clause, *id.* amend V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”). See AMAR, *supra* note 168, at 96 (comparing Double Jeopardy and Reexamination Clauses).

223. See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

224. AMAR, *supra* note 168, at 83; see *supra* text accompanying notes 204–11.

225. It is on this point that, in my opinion, Amar's account falls short. While justifiably focusing on the right to jury trials, in both civil and criminal cases, as the Anti-Federalists' “dominant strategy to keep agents of the central government under control,” AMAR, *supra* note 168, at 83, this was not their only strategy. Amar originally characterized the remaining protections of the Sixth Amendment as “nonstructural benefits,” i.e., as purely individual rights. See Amar, *supra* note 175, at 1197. When he later expressed his views in book form, however, Amar removed the word “nonstructural,” see AMAR, *supra* note 168, at 106, perhaps indicating a willingness to consider the remaining criminal procedural protections of the Bill of Rights as also having some structural components.

C. The Criminal Conviction and Its Impact on Community Participation

The value of community participation was a central tenet in Anti-Federalist thought.²²⁶ Indeed, the Anti-Federalists valued local autonomy over centralized governance precisely because decentralized decisionmaking “would enable the people to participate more directly, through debate and dialogue, in the decisions that would affect their lives.”²²⁷ As Hanna Pitkin summarized this view, “the distinctive promise of political freedom remains the possibility of genuine collective action, an entire community consciously and jointly shaping its policy, its way of life.”²²⁸ Such collective action through widespread participation yields benefits for the polity itself. First, those who actively participate in the political life of the community “have more of a stake in the outcome for their community and will concern themselves with public, as opposed to private, issues.”²²⁹ In addition, widespread participation in community affairs fosters a sense of legitimacy and confidence about the outcomes of the political process. This sense of legitimacy obviates the desire of those who find themselves on the losing side of an issue to resort to extra-legal means to attain their goals.²³⁰ Thus, active participation in the political life of the community by its constituent members is essential for the prosperity and well-being of the community itself.²³¹

The Anti-Federalists’ focus on active community participation explains their deep concern with the specter of the new federal government’s use of the criminal law as a tool of oppression. The criminal process has the unique ability to strip people of their right to participate fully in the political life of the community. A citizen who

226. See Mannheimer, *supra* note 187, at 111 (“[T]he concern for widespread participation in community decisionmaking was a crucial strain in anti-federalist thought.”).

227. *Id.*; accord Wilmarth, *supra* note 170, at 1318 (“[T]he principle of local self-determination reflects the deeply rooted conviction—which many Founders shared—that the direct participation of citizens in self-government is essential to the preservation of republican values and civic virtue.”).

228. Hanna F. Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 344 (1981).

229. Mannheimer, *supra* note 187, at 114; accord Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1510 (1989) (book review) (arguing that those who participate in governance have vested stake in community and that if they are too far removed from governance, their interests turn to private matters); Pitkin, *supra* note 228, at 347 (asserting that those involved in community affairs ultimately concern themselves with “the long-range and large-scale significance of what we want and are doing”).

230. See Mannheimer, *supra* note 187, at 114 (“[P]articipation in governance fosters confidence in the laws that government produces, leading to a more stable polity.”) (footnote omitted); see also STORING, *supra* note 173, at 16–17 (arguing that political participation is essential for respect for law).

231. See Mannheimer, *supra* note 187, at 113.

has lost a civil case is a bit lighter in the wallet, perhaps, but is still a citizen. His vote in local and national elections still counts as much as anyone else's; he is still eligible to serve on juries and in militias; and his voice still carries the same authority it had had before.

In stark contrast, a criminal convict has always been treated differently. By dint of a criminal conviction, the lawbreaker is actually and constructively excluded from the political community. Most obviously, the coercive sanction itself works a permanent or temporary physical exclusion of the outlaw from the community: execution permanently and completely excludes the lawbreaker, while imprisonment and banishment work a complete exclusion of the outlaw from the community either permanently or temporarily.²³² In addition, those convicted of felonies are typically disenfranchised—they may not hold office, sit on juries, or vote.²³³ In some States today, this disenfranchisement is permanent.²³⁴ In nearly all, it lasts at least as long as the felon is serving his sentence.²³⁵ And, critically, most state disenfranchisement laws do not distinguish between state and federal offenders,²³⁶ so that those convicted of federal felonies are disenfranchised from participating in matters of state governance. Thus, the federal government, through use or abuse of the power of the criminal process, can greatly affect the composition of the polity at the state level.

But there is more. Even beyond the literal exclusion from the political community that comes with such punishments as execution, imprisonment, banishment, and disenfranchisement, those convicted of a crime carry another serious disability into the political arena. The true distinction between criminal and civil liability, in Henry Hart's oft-

232. Indeed, the etymological derivation of the word "outlaw" stems from the lawbreaker's status as someone "outside the law" and therefore deprived of the benefits and protections of the community. See BLACK'S LAW DICTIONARY 761 (6th ed. abr. 1991).

233. See *Developments in the Law—One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1942–43 (2002) [hereinafter *One Person, No Vote*]. This was equally true at the time of the founding. See Letter from the Federal Farmer (Dec. 31, 1787), reprinted in 2 STORING, *supra* note 178, at 267 (observing that those "convicted of crimes . . . are excluded any share in the government").

234. See *One Person, No Vote*, *supra* note 233, at 1943 (noting that eight States take this position).

235. See *id.* at 1942 ("Only two states . . . grant prisoners the franchise.").

236. See U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY ii (1996), available at http://www.usdoj.gov/pardon/forms/state_survey.pdf ("The disabilities imposed upon felons under state law generally are assumed to apply with the same force whether the conviction is a state or federal one; in only a few states have particular disabilities been held not to apply to federal offenders.").

quoted words, is that a criminal conviction entails the “formal and solemn pronouncement of the moral condemnation of the community.”²³⁷ Criminal punishment has a distinctive expressive component.²³⁸ The criminal conviction stigmatizes in a way that the civil judgment does not.²³⁹

This stigma can understandably be expected to detract from one’s voice in the political process.²⁴⁰ After all, political participation potentially consists of more than running for office or casting a vote. Participation includes all “arenas of citizenship in the comparably broad sense in which citizenship encompasses not just formal participation in affairs of state but respected and self-respecting presence—distinct and audible voice—in public and social life at large.”²⁴¹ As Carol Rose cogently observed:

[V]oting may well be a relatively minor aspect of local civic participation. Other versions of voice may be much more important locally: the informal constituent contacts, the PTA meetings, the civic groups’ banging on the door at city hall, the cub reporters’ scandal-mongering, the highly issue-oriented jawboning that is the very stuff of local controversy.²⁴²

Because all public life involves interactions among citizens—interactions that can potentially shape the social and political views of the participants—all public life is potentially political.²⁴³ Thus, a citizen’s voice can be dampened or even muted by the stigma that attaches upon a criminal conviction.

Federal criminal law, then, posed the greatest danger of all to the Anti-Federalists, for nothing gives a sovereign greater power to reshape

237. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

238. See Lee, *supra* note 84, at 712 (“[T]he institution of punishment has an expressive dimension. When it punishes, it condemns the behavior it punishes as wrong . . .”).

239. See *Robinson v. California*, 370 U.S. 660, 677 (1962) (Douglas, J., concurring) (“A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well.”). That the framers recognized this is evidenced by the constraint placed on the federal government in the Grand Jury Clause of the Fifth Amendment in its ability to prosecute for “infamous crime[s]”: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .” U.S. CONST. amend. V. See Schwartz & Wishingrad, *supra* note 63, at 794.

240. Cf. Lee, *supra* note 84, at 718 (noting that “the stigma attached to criminals” is one factor detracting from “effective lobbying on behalf of criminal defendants”).

241. Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1531 (1988).

242. Rose, *supra* note 179, at 97.

243. See Mannheim, *supra* note 187, at 114; Pitkin, *supra* note 228, at 346.

communities than the power of the criminal law. The Anti-Federalists did not naively believe that citizens were so uniformly virtuous as to render the criminal law unnecessary. To the contrary, “they recognized the need for coercion and constraint” of those disinclined to follow society’s basic norms.²⁴⁴ Yet, they sought largely to reserve to the States the power to shape the community through the use of the criminal sanction. Just as the Anti-Federalists sought to retain control over the intermediate associations of jury, militia, and church,²⁴⁵ so, too, they strived to retain control over the criminal process.

D. The Anti-Federalists and the Eighth Amendment

Why the Anti-Federalists fought to enshrine the Cruel and Unusual Punishments Clause in the Constitution remains to be seen. Again, they were frightened by the prospect of a distant central government using its power to alter the character of local communities by deciding who could and could not be part of those communities. Given this, the criminal procedure protections contained in the Fourth, Fifth, and Sixth Amendments would seem sufficient for the task. Once the hurdles established by these provisions were cleared and a defendant was nonetheless convicted, the jig would be up. The stigma traditionally attached to the convict would be indelibly applied, his ability to participate in the life of the community forever altered, and the character of the community changed.

It is true that the criminal conviction in and of itself does work to exclude the convict from the community. But the punishment attached to the conviction is also critical, because it dictates the *nature*, the *extent*, and the *duration* of that exclusion. Non-confinement punishments work no additional exclusion from the community beyond the substantial effects of the stigma attaching to the conviction itself. Such exclusion is merely constructive. Imprisonment, on the other hand, works an actual exclusion from the community, temporarily or for life. And execution, of course, permanently and absolutely removes the lawbreaker from his community.

Moreover, the nature, extent, and duration of punishment also determine the level of stigma the community places on a particular

244. McWilliams, *supra* note 178, at 22.

245. See, e.g., AMAR, *supra* note 168, at 45 (“The possibility of national control over [the church,] a powerful intermediate association self-consciously trying to influence citizens’ worldviews, shape their behavior, and cultivate their habits obviously struck fear in the hearts of Anti-Federalists.”).

offender.²⁴⁶ Some non-confinement punishments, such as the pillory or ducking stool, were designed almost exclusively to shame the lawbreaker, while others, such as the imposition of a fine, involve little more stigma than that imposed by the criminal conviction itself. Still others, such as whipping and branding, appeared designed to inflict both pain and shame on the offender.

Even when comparing two sentences involving the same type of punishment, the amount or degree of punishment imposed sends a strong message about the community's view of the respective crimes. Intuitively, for example, we know that the person who has just served a one-day sentence in county jail is likely not quite as deserving of our scorn as the person who has just served twenty-five years in the state penitentiary, even without knowing that the latter offender was convicted of rape or murder while the former offender's transgression was spitting on the sidewalk. "[W]hen the state punishes, how one's punishment stands in relation to punishments for other crimes supplies a crucial piece of information as to how wrong the behavior punished is viewed by the society."²⁴⁷

The Anti-Federalists wanted to reserve to the States not only the power to investigate, prosecute, and convict people for crimes, but also the authority to determine what kind of punishment, and how much, each type of transgression would merit. They did not wish this power to reside in the new federal government, because such authority was part and parcel of the power to re-shape communities that the Anti-Federalists so feared would fall into the hands of the central government:

[T]he effects of sentencing tend to be localized: the sense of vindication felt by victims and the community; the deterrence of future crimes in the community; the defendant's loss of liberty; and the disruption of relationships between the defendant and his or her family and friends. [W]hen federal courts impose nationally determined sentences . . . they inappropriately undermine the integrity of localized responses.²⁴⁸

Concern over the dramatic "effect[s] of harsh sentences on families, communities, and the offender's capacity for rehabilitation"²⁴⁹ explains why States might wish to impose more lenient punishment on

246. See Lee, *supra* note 84, at 712 ("[T]he degree to which . . . behavior is condemned is expressed by varying the amount of punishment.").

247. *Id.*

248. O'Hear, *supra* note 23, at 755.

249. *Id.* at 760.

lawbreakers than does the federal government:

When federal incarceration results in the disintegration of a family, state and local agencies must pick up the pieces. When federal incarceration results in the removal of young males from a community en masse, the costs are felt primarily at a state and local level. When federal inmates are returned years later with poor job prospects and high risks of recidivism, the localized community suffers again.²⁵⁰

Likewise, “the removal of large numbers of working-age males to prison may cause substantial social and economic instability, including ‘churning’ in local labor markets that may make the communities unattractive to businesses.”²⁵¹

As in many other ways, the Anti-Federalists intertwined notions of individual rights and state autonomy in reserving to the States the power to define for themselves the limits of the criminal sanction. Thus, leading Anti-Federalist George Mason expressly invoked both state power and individual rights as potential casualties of Congress’ feared power, pursuant to the Necessary and Proper Clause,²⁵² to devise criminal punishments:

Under their own Construction of the general Clause at the End of the enumerated powers the Congress may grant Monopolies in Trade and Commerce, constitute new Crimes, *inflict unusual and severe Punishments*, and extend their Power as far as they shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.²⁵³

This statement is a striking example of the Anti-Federalist concept of the intimate interconnections between individual and collective rights. The “Powers” of “the State Legislatures” and the “Rights” of “the People” are thought to be aligned with each other against the central government. Moreover, the concern over Congress’ supposed power to “grant Monopolies”—surely a concern sounding more in structure than in individual rights—is lumped together with its purported power to “inflict unusual and severe Punishments.” Though the latter sounds to modern ears as a purely individual-rights matter, it is not so easily disentangled from structural concerns.

250. *Id.*

251. *Id.* at 760 n.237.

252. See U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .”).

253. GEORGE MASON, OBJECTIONS TO THE CONSTITUTION OF GOVERNMENT FORMED BY THE CONVENTION (1787), reprinted in 2 STORING, *supra* note 178, at 13.

Finally, the Anti-Federalists' goal of limiting, through the Eighth Amendment, the federal power to punish fits nicely with a dominant theme in Anti-Federalist thought: minimization of the use of force by government against citizen. The Anti-Federalists adhered to the notion that, in an ideal polity, persuasion would be the rule and force the exception. As one prominent Anti-Federalist wrote, "Our true object is . . . to arm persuasion on every side, and to render force as little necessary as possible."²⁵⁴ A government that relied primarily on force of arms to keep order could not truly call itself republican. Thus, coercion and force would be required in some instances, but Anti-Federalist doctrine called for the use of force only on such occasions and in such amounts as would be necessary. The Cruel and Unusual Punishments Clause can be explained as a measure designed to keep criminal punishments from going beyond what was necessary to deter and punish criminals.

IV. THE EIGHTH AMENDMENT AND THE FEDERAL DEATH PENALTY

All prevailing theories of the Eighth Amendment's Cruel and Unusual Punishments Clause suffer from the problem that they address a potential type of overreaching by government against citizen in general terms. While each thus takes account of the individual rights "strand" of the Clause, none takes into account the unique concerns that drove the Anti-Federalists to limit the new federal government's prospective venture into the world of criminal justice. The goal of a distinctively "pure" Eighth Amendment jurisprudence is to find a theory that achieves maximum coherence with both the Amendment's Anti-Federalist underpinnings and the individual rights-oriented jurisprudence that has grown up around the Eighth and Fourteenth Amendments. To formulate a distinctive jurisprudence for the "pure" Eighth Amendment, then, one must reexamine current doctrine and determine how it should be translated into language the Anti-Federalists would understand.

By taking the principles that have emerged from traditional theories of the Eighth Amendment, and by distilling these principles through the Anti-Federalist filter of federalism, popular sovereignty, and collective rights, we can devise at least one principle of Eighth Amendment jurisprudence that applies only in "pure" Eighth Amendment cases. That principle is easy to apply, commonsensical, and follows almost

254. Letter from the Federal Farmer (Dec. 31, 1787), *reprinted in* 2 STORING, *supra* note 178, at 264.

inexorably from the Anti-Federalist underpinnings of the Bill of Rights: The federal government may not impose a mode of punishment, including death, within the bounds of any State that does not authorize that mode of punishment by law. Happily, this principle also coheres with much of contemporary, individual rights-centered Eighth Amendment jurisprudence while avoiding some of its pitfalls.

*A. Re(dis)covering the Eighth Amendment:
Abiding the Will of “The People” in Abjuring
“Cruel and Unusual” Modes of Punishment*

The protection of individual rights through the retention of popular sovereignty and local control is a basic theme running through the Bill of Rights.²⁵⁵ Against this backdrop, consider again the statements of Abraham Holmes and Patrick Henry. The paradigmatic “unusual” punishments they discussed were those practiced during the Spanish Inquisition and by the major Continental governments (France, Spain, and Germany) more generally.²⁵⁶ Their overarching concern was to prevent the new federal government from devising modes of punishment practiced on the Continent but unknown to English-speaking peoples in general, and the newly minted Americans in particular. Holmes’s and Henry’s statements bespeak a design to allow Congress to use only those modes of punishment known to English law and, by extension, the laws of the States—that is, state norms constituted the benchmark for whether a federal punishment was “cruel and unusual.”

An Anti-Federalist view of the Eighth Amendment’s prohibition on certain modes of punishment might thus embrace one of several different, increasingly broad propositions. Most narrowly, one might argue that Congress is prohibited only from implementing modes of punishment not practiced in the States in 1791. More broadly, one might argue that Congress is prohibited from implementing modes of punishment that were practiced generally in the States in 1791 but that have since been rejected by a consensus of the States. Finally, one might argue that Congress is prohibited from implementing within a particular State modes of punishment not practiced within that State. This last and broadest proposition is the most coherent with both Anti-Federalist thought and current Eighth Amendment jurisprudence.

255. See *supra* Part III.A.

256. See *supra* text accompanying notes 85, 87.

1. Option #1: A Prohibition on Imposing Modes of Punishments
Not Imposed in 1791

An Eighth Amendment doctrine that prohibits Congress from imposing only those punishments not generally imposed in 1791 would be consistent, at least superficially, with an originalist view of the Eighth Amendment. It would not, however, be consistent with current Eighth Amendment doctrine. At least since *Weems v. United States*,²⁵⁷ the Court has embraced a dynamic, rather than static, view of the Cruel and Unusual Punishments Clause. The Court has frequently reiterated the plurality's conclusion in *Trop v. Dulles* that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²⁵⁸ While Justices Scalia and Thomas have advocated the view that the Clause's meaning was frozen in time in 1791,²⁵⁹ a majority of the Court has never accepted this view. "It is by now beyond serious dispute that the Eighth Amendment's prohibition of 'cruel and unusual punishments' is not a static command."²⁶⁰ Moreover, even Justices Scalia and Thomas have grudgingly accepted "evolving standards of decency" as the touchstone.²⁶¹

In addition, the "evolving standards of decency" benchmark is probably more consistent with the original understanding of the Eighth Amendment than is the Scalia/Thomas brand of originalism.²⁶² The framers and ratifiers of the Eighth Amendment foresaw that views on criminal punishments would evolve over time, and we may reasonably infer that they anticipated that the limitations on Congress would change accordingly. Indeed, a national debate on the propriety of capital punishment for some, or even all, crimes developed in the critical period from 1760 to 1800.²⁶³ The result was that five States by the turn of the century would effectively abolish the death penalty for all crimes but

257. 217 U.S. 349 (1910). See *supra* notes 109–15 and accompanying text.

258. 356 U.S. 86, 101 (1958) (plurality). See *supra* text accompanying note 117.

259. *Roper v. Simmons*, 541 U.S. 551, 608 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (contending that the Court's "modern . . . jurisprudence" of using "modern 'standards of decency'" as the touchstone is "mistaken").

260. *Id.* at 589 (O'Connor, J., dissenting).

261. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 339–40 (2002) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

262. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) (asserting that "original intent" initially "referred to the 'intentions' of the sovereign parties to the constitutional compact [the States], as evidenced in the Constitution's language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or of anyone else").

263. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 88–111 (2002).

murder.²⁶⁴

Take the example of Pennsylvania. In 1776, Pennsylvania adopted a new constitution hailed as establishing “the most democratic of the early state constitutions.”²⁶⁵ One of its distinctive features was its progressive view on criminal punishments, which was heavily influenced by the reformist views of such Enlightenment figures as Montesquieu.²⁶⁶ Section 38 of the new constitution provided: “The penal laws, as heretofore used, shall be reformed by the future Legislature of this State, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes.”²⁶⁷ True to form, in 1786, Pennsylvania “abolished the death penalty for robbery, burglary, sodomy and buggery.”²⁶⁸ Then, in 1794, scarcely three years after the Bill of Rights was ratified, Pennsylvania took the extraordinary step of eliminating the death penalty for all crimes but first-degree murder.²⁶⁹

A similar movement occurred in Virginia. In 1778, Thomas Jefferson drafted a bill that would have reserved the death penalty for only the most heinous offenses.²⁷⁰ The Virginia legislature, following Pennsylvania’s lead, adopted it in 1796.²⁷¹ Jefferson later pondered the “ripening” of public opinion in Virginia that was necessary before legal reform took root, “by time, by reflection, and by the example of Pennsylvania.”²⁷² Kentucky followed suit in 1798, two years after New York and New Jersey each limited the death penalty to murder and treason.²⁷³

Thus, movements were afoot in five States—including New York, Pennsylvania and Virginia, three of the four most populous States in 1790²⁷⁴—to reform criminal punishments, straddling the period during

264. *See id.* at 98–99.

265. Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 766 (1949).

266. *See id.* at 767.

267. *Id.* at 766–67 n.66 (quoting PA. CONST. §§ 38, 39 (1776)); *see also* BANNER, *supra* note 263, at 94; Schwartz & Wishingrad, *supra* note 63, at 821.

268. Keedy, *supra* note 265, at 767; *see also* BANNER, *supra* note 263, at 97; Schwartz & Wishingrad, *supra* note 63, at 822.

269. *See* Keedy, *supra* note 265, at 772–73; *see also* BANNER, *supra* note 263, at 94.

270. *See* Schwartz & Wishingrad, *supra* note 63, at 818.

271. *See id.*

272. *Id.* at 818–19 (quoting 1 THE WRITINGS OF THOMAS JEFFERSON 67 (1903)).

273. *See* BANNER, *supra* note 263, at 98.

274. *See* RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (1793), available at <http://www2.census.gov/prod2/decennial/documents/1790a-02.pdf> (last viewed Aug. 3, 2005).

which the Constitution and Bill of Rights were framed, debated, and ratified. This alone is powerful evidence that the framers and ratifiers of the Eighth Amendment knew that the States' views on punishment were sure to change over time.²⁷⁵ Moreover, Jefferson, the lead proponent of reform in Virginia, while not a full-blown Anti-Federalist, certainly shared many Anti-Federalist sentiments about state sovereignty, federalism, and a limited national government.²⁷⁶ Of course, Jefferson later became the hero of the Democratic-Republicans (the direct ideological descendents of the Anti-Federalists),²⁷⁷ running for President on that line in 1796, 1800, and 1804, winning the latter two races.

Meanwhile, in Pennsylvania, the Constitutionalists, the leading defenders of the progressive 1776 constitution, later became known by another moniker: Anti-Federalists.²⁷⁸ Indeed, Judge George Bryan played a pivotal role in drafting the constitution.²⁷⁹ Bryan was also "the principal leader of the Anti-Federalists in [Pennsylvania],"²⁸⁰ probable author of the classic Anti-Federalist essay, *Address of the Minority of the Pennsylvania House of Representatives*,²⁸¹ and father of (and close collaborator with) Samuel Bryan, who, under the name Centinel, was "[t]he most prolific and one of the best known of the Anti-Federalist essayists."²⁸² Accordingly, leading Anti-Federalists were not only well aware that the penal law was undergoing reform at the time the Cruel and Unusual Punishments Clause was adopted, but some even paved the way for this reform.²⁸³

275. See O'Hear, *supra* note 23, at 758 ("[M]ost of the major penological reform movements in the nation's history evolved at the state and local level . . .").

276. See, e.g., Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1363–64 (1982).

277. See John E. Nowak, *Chasing the Cannon: A Tail's View of, and Requests to, the Dog*, 17 CONST. COMMENT. 375, 379 n.7 (2000) ("The Democratic-Republicans espoused a modified version of the Anti-Federalist philosophy; they mirrored the Anti-Federalists in their opposition to the Federalists' political philosophy.").

278. See 3 STORING, *supra* note 178, at 3.

279. Keedy, *supra* note 265, at 766, writes that the constitution was drafted primarily by James Cannon, "with the advice and help of Judge Bryan." One contemporary writer gave the majority of the credit to Bryan, writing that the constitution "'was understood to have been principally the work of Mr. George Bryan, in conjunction with a Mr. Cannon, a schoolmaster.'" *Id.* (quoting ALEXANDER GRAYDON, MEMOIRS OF A LIFE 266 (1811)).

280. 2 STORING, *supra* note 178, at 130. *Accord* 1 *id.* at 9; 3 *id.* at 5.

281. See 3 *id.* at 11.

282. 2 *id.* at 130.

283. This is not to ignore the important roles of Federalists William Bradford, Thomas Mifflin, Benjamin Rush, and James Wilson with regard to the 1794 legal reform in Pennsylvania. See Keedy, *supra* note 265, at 768–71. It is only to note the role of a key Pennsylvania Anti-Federalist in the drafting of the extraordinarily progressive 1776 Pennsylvania Constitution, without which the 1794

Given this, is it possible that the Anti-Federalist framers and ratifiers of the Cruel and Unusual Punishments Clause understood that it would limit Congress only to the extent that the common law limited punishments in 1791? Suppose, for example, that the day after the Bill of Rights had been adopted, each of the States decided to do away with whipping as a form of punishment. Assuming that whipping is “cruel”—that is, severe²⁸⁴—can it really be argued that Congress would have still been permitted, notwithstanding the Cruel and Unusual Punishments Clause, to impose whipping for federal crimes though the practice had been rendered “unusual” by dint of its elimination in every single State? To ask the question is to answer it. Accordingly, a broader conception of a distinctively “pure” Eighth Amendment is necessary.

2. Option #2: A Prohibition on Imposing Modes of Punishments
Abandoned by a National Consensus Since 1791

Another possible view is that the Eighth Amendment prohibits Congress from imposing, not only those punishments not generally imposed in 1791 in the States, but also those that were imposed in 1791 but that have since fallen out of favor according to a consensus of the States. This is a more attractive theory, because it is more consistent with current Eighth Amendment jurisprudence, which has adopted the notion of “evolving standards of decency” and which looks largely to whether a national consensus has developed against a particular punishment to determine what those standards are.²⁸⁵ Nevertheless, this conception must be rejected as insufficiently broad to be reflective of the Anti-Federalist underpinnings of the Eighth Amendment.

The Anti-Federalists did not see any significance in “national consensus.” Indeed, if they had, they would have been ardent supporters of the new Constitution. Rather, they “desire[d] a continuance of *each distinct sovereignty*.”²⁸⁶ The Anti-Federalists recognized the diversity among the States, and favored “the preservation of the *individual states*.”²⁸⁷ As “Brutus” wrote:

The United States includes a variety of climates. The productions of the

legislative reform would not have been possible.

284. See *supra* text accompanying note 57.

285. See *supra* text accompanying notes 121, 146–52.

286. *Essay by the Impartial Examiner*, VA. INDEP. CHRON. (May 28, 1788), reprinted in 5 STORING, *supra* note 173, at 191 (emphasis added).

287. Letter from Robert Yates & John Lansing, Jr., to George Clinton, Gov. of New York (Dec. 21, 1787), reprinted in 2 STORING, *supra* note 173, at 17 (emphasis added).

different parts of the union are very variant, and their interests, of consequence, diverse. Their manners and habits differ as much as their climates and productions; and their sentiments are by no means coincident. The laws and customs of the several states are, in many respects, very diverse, and in some opposite²⁸⁸

While this was an argument against conjoining those diverse areas, some Anti-Federalists celebrated the diversity among the States, though strictly for instrumentalist reasons. John Francis Mercer wrote that a “diversity of State-interests, prejudices and parties . . . acting without uniformity and frequently counteracting each other, leaves the great majority of the Component Members sound and cool to repress the agitation of a part.”²⁸⁹

The Anti-Federalists’ recognition, if not celebration, of diversity among the States was most clearly manifested in the Establishment Clause of the First Amendment.²⁹⁰ While each State might have preferred having its own majority sect established as the national religion, the Anti-Federalists settled on everyone’s second choice: no federal involvement in religion at all while each State was free to continue its own established church.²⁹¹ Again, diversity among the States was seen by some as instrumental in preserving liberty. As John Francis Mercer again put it: “Parties in politics, like sects in Religion, can only be divested of their danger by multiplying their number and diversifying their objects.”²⁹²

The Anti-Federalists must have understood that different States would have different views of criminal punishment as well. Indeed, although penal reform occurred at about the same time in Kentucky, New Jersey, New York, Pennsylvania, and Virginia,²⁹³ other States lagged behind in a pattern that continues to this day: “[V]iews regarding sentencing policy follow ‘strong and consistent’ regional patterns, with residents of

288. Essay of Brutus to the Citizens of the State of New York (Oct. 18, 1787), *reprinted in* 2 STORING, *supra* note 178, at 369–70.

289. Letter from John Francis Mercer to Thomas Jefferson (Oct. 27, 1804), *reprinted in* 5 STORING, *supra* note 178, at 31 n.35. *See also* Letter of Agrippa (Dec. 25, 1787), *reprinted in* 4 STORING, *supra* note 178, at 84 (“A diversity of produce, wants and interests, produces commerce, and commerce, where there is a common, equal and moderate authority to preside, produces friendship.”).

290. “Congress shall make no law respecting an establishment of religion” U.S. CONST. amend. I.

291. *See* Mannheimer, *supra* note 187, at 104–05.

292. Letter from John Francis Mercer to Thomas Jefferson (Oct. 27, 1804), *reprinted in* 5 STORING, *supra* note 178, at 36 n.40. Of course, this mirrors the classic Federalist defense of union contained in THE FEDERALIST NO. 10 (James Madison).

293. *See supra* notes 265–73 and accompanying text.

New England demonstrating the greatest tendency to be lenient and residents of central southern states displaying the least leniency. These differing viewpoints express themselves in disparate state sentencing laws.”²⁹⁴ Not only must the Anti-Federalists have recognized that the States’ views on criminal punishment were evolving, they also must have foreseen that this evolution would take place at different speeds in different States.²⁹⁵

Moreover, an interpretation of the Eighth Amendment that allowed a national consensus to govern what Congress could do would not lead us to a distinctively “pure” Eighth Amendment doctrine. Instead, it would merely replicate the existing “incorporated” Eighth Amendment doctrine. Under current law, a particular mode of punishment is forbidden to the States when a national consensus against the practice has emerged.²⁹⁶ Presumably, the same would be true if Congress attempted to impose a punishment that had been rejected by a national consensus. And there is no reason to think that less of a national consensus would be necessary to show that a punishment is “unusual” in the latter case than in the former. Indeed, after *Atkins v. Virginia*²⁹⁷ and *Roper v. Simmons*,²⁹⁸ that hardly seems possible.

In sum, the Cruel and Unusual Punishments Clause evinces a design to reserve to each State individually, and not to the States generally, the authority to determine its own norms for the criminal punishments to be imposed within its borders.

3. Option #3: A Prohibition on Imposing a Mode of Punishment Within a State that Does Not Impose that Punishment

What we are left with, then, is a principle coherent with both the Anti-Federalist underpinnings of the Cruel and Unusual Punishments Clause and the Clause’s more modern manifestations. That principle dictates that, within the boundaries of a particular State, the federal government may not inflict a mode of punishment—including the death penalty—

294. O’Hear, *supra* note 23, at 755–56.

295. See Morton, *supra* note 20, at 1464–65 (“States, as independent sovereigns, ‘evolve’ at different rates, and a state that has chosen to recognize the death penalty as inherently cruel should not be forced to languish behind, waiting for its sister states to reach the same conclusion.”).

296. See *supra* text accompanying notes 146–52.

297. 536 U.S. 304, 314–15 (2002) (finding national consensus against execution of mentally retarded even though 40% of States, and 53% of States with death penalty, permitted it).

298. 541 U.S. 551, 564 (2005) (finding national consensus against execution for crime committed while under age of eighteen even though 40% of States, and 53% of States with death penalty, permitted it).

that is unauthorized in that State.

This principle dovetails nicely with Anti-Federalist doctrine. The primary objective of the Anti-Federalists was the preservation of popular sovereignty through the continued primacy of the States in those spheres carved out by the Bill of Rights.²⁹⁹ Through the criminal procedure protections, the Anti-Federalists sought to make it harder for the federal government to investigate, prosecute, convict, and punish people for crimes, thereby preserving the States' traditional control over the criminal law. This would allow the States, for the most part, to maintain control of the membership of the political community by giving them primary authority to determine, by use of the criminal sanction, who would be excluded from the community, the way they would be excluded, and for how long. Through the Cruel and Unusual Punishments Clause, the Anti-Federalists sought to preserve state prerogatives in setting the limits of the severity of the criminal sanction. When placed in this context, the Clause naturally offers an interpretation that retains for each State the ultimate authority to decide whether a mode of punishment such as the death penalty will be carried out within its borders.

This principle reflects a paradigm of the notion of the "marbl[ing] together" in the Bill of Rights of individual and collective rights. The collective polity's right to determine the absolute ceiling on the severity of criminal punishments harmonizes perfectly with the individual citizen's right not to be subjected to a level of punishment exceeding that upper limit. The Cruel and Unusual Punishments Clause encompasses both these rights. In this way, federalism acts as it was originally intended: as an additional layer of protection for the rights of individuals.³⁰⁰ The Anti-Federalist notion of the intimate interconnection between individual and collective rights is vindicated.

In addition, the principle limiting the federal government to those modes of punishment practiced in each individual State is remarkably coherent with current Eighth Amendment jurisprudence. First, the principle is concerned only with prohibiting certain modes of punishment, which all agree is at the core of the Cruel and Unusual Punishments Clause. While Justice Scalia has claimed that "[t]he Eighth Amendment is addressed to always-and-everywhere 'cruel'

299. See Massey, *supra* note 171, at 1249 (setting forth view of Ninth Amendment consistent with the desire of the Anti-Federalists "to reserve to the people their rights under local law, and to insulate those rights from federal invasion").

300. See *id.* at 1254 (advocating view of Ninth Amendment that "use[s] the states . . . as structural bulwarks of human liberty").

punishments, such as the rack and the thumbscrew,”³⁰¹ he has failed to support this ipse dixit with any authority. Even if one agrees that the Cruel and Unusual Punishments Clause addresses only modes of punishment, it does not necessarily follow that certain modes of punishment are forbidden “always[]and[]everywhere,” rather than just sometimes and in some places. The key issue is whether the punishment is “unusual” in the particular context. Indeed, this is the underlying premise of the Court’s categorical bar cases.

Moreover, the principle makes use of inter- and intra-jurisdictional analysis, collapsed into a single inquiry: is the mode of punishment sought by the federal government in a State authorized by that State? This inquiry avoids the two main pitfalls of the Court’s use of inter- and intra-jurisdictional analyses in the disproportionality and categorical bar cases. First, the inquiry is purely objective, while the analyses in these other contexts can only purport to be. Levels of seriousness of various crimes are not considered or compared, as they are in the disproportionality cases.³⁰²

Second, the inquiry is easily answered. While the inter-jurisdictional analysis of the disproportionality and categorical bar cases begins as a purely objective counting up of jurisdictions that do or do not impose the punishment at issue, that is only the beginning of the inquiry. The Court must also divine whether the States on the prohibitionist side of the ledger amount to a national consensus.³⁰³ By stark contrast, in deciding whether the federal government can impose a particular type of punishment, a determination of whether the relevant State authorizes the same type of punishment is both the beginning and the end of the inquiry. If the State does not impose that type of punishment, the federal government cannot impose it within that State. However, if the people of a State have authorized the imposition of a mode of punishment, the federal government may impose it as well, even if the State does so only rarely.³⁰⁴ In short, this principle posits an active role for the courts in protecting Eighth Amendment rights while leaving virtually no judicial discretion, thus reconciling the otherwise

301. *Atkins*, 536 U.S. at 349 (Scalia, J., dissenting).

302. See *supra* notes 129–35 and accompanying text.

303. See *supra* notes 160–63 and accompanying text.

304. See O’Hear, *supra* note 23, at 769 (“The state maximum sentence will be reasonably easy to determine based on a review of state law, but actual state sentencing practices will be far more difficult to establish.”); see also *id.* at 737 (“As a general rule, claims of de jure disparity present a stronger case for departure [from the Federal Sentencing Guidelines] than claims of de facto disparity because it is more certain that the defendant would have received a different sentence in state court.”).

irreconcilable tension in the Court's current Eighth Amendment jurisprudence.

Finally, the principle proposed here should present no difficulty for an originalist. As Justice Scalia reminded us just recently, tying constitutional principles to underlying state law is not uncommon. For example, the question of whether a Fourth Amendment search or seizure has occurred was traditionally answered by reference to common-law trespass principles.³⁰⁵ Likewise, the issue whether private property has been taken for public use, requiring just compensation, hinges on the threshold question of how the State defines "property."³⁰⁶ Of course, these underlying principles evolve but "[t]here is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change."³⁰⁷ When underlying principles of property law evolve, the *content* of the Fourth and Fifth Amendments might change, but not their *meaning*.³⁰⁸ On this view, the meaning of the Eighth Amendment never changes, even as States adopt and discard various modes of punishment.³⁰⁹ The Eighth Amendment means today what it meant in 1791: that the federal government may not impose a mode of punishment within any State that does not impose such a mode of punishment. If the framers and ratifiers of the Eighth Amendment expected that state law norms would be the benchmark for defining "cruel and unusual punishments," then "[t]his reference to changeable law presents no problem for the originalist."³¹⁰

B. Possible Objections to an Anti-Federalist View of the Federal Death Penalty

A number of objections to this reading of the "pure" Eighth

305. *Georgia v. Randolph*, No. 04-1067, slip op. at 1–2 (Mar. 22, 2006) (Scalia, J., dissenting).

306. *Id.*, slip op. at 2.

307. *Id.*

308. *See id.* ("[C]hanges in the law of property to which the Fourth Amendment referred would not alter the Amendment's meaning: that anyone capable of authorizing a search by a private party could consent to a warrantless search by the police."). Of course, this is true only so long as that meaning is expressed at a sufficiently high level of generality. If the meaning of the Fourth Amendment in 1791 is expressed in more specific terms—say, that any white male could "consent to a warrantless search by the police"—then this meaning has undoubtedly changed. However, as Randy Barnett instructs, originalism properly understood "attempts to identify the level of generality in which the Constitution is objectively expressed." Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. (forthcoming 2006).

309. *See Randolph*, slip op. at 2 (Scalia, J., dissenting) ("No one supposes that the *meaning* of the Constitution changes as States expand and contract property rights.").

310. *Id.*

Amendment are possible. First, one might deem it unfair—or even unconstitutional—to subject a person in one State to the death penalty for commission of a federal capital offense while a similarly situated offender in another State will not face execution. Second, one might contend that allowing local values to effectively “reverse preempt” federal law turns the Supremacy Clause on its head. Third, one might object that the words “cruel and unusual punishments” must always mean the same thing irrespective of whether they appear in the federal or a state constitution. Fourth, one might argue that the Sixth Amendment’s Jury and Vicinage Clauses are sufficient to inject local values in federal capital trials in States that reject the death penalty. Finally, one might contend that the proposed principle, if taken to its logical limits, would also prohibit the federal government from punishing any lawbreaker more severely than could the State where the conduct occurred. None of these objections seriously detracts from the interpretation of the Cruel and Unusual Punishments Clause proposed in this Article.

1. National Dis-Uniformity as the Price of Federalism

One might first point to the obvious fact that the reading of the Eighth Amendment proposed here will lead to different sentences for similarly situated federal offenders, depending on the State in which the crime occurred.³¹¹ The goal of achieving national uniformity in the administration of the death penalty is precisely the reason the current administration has cited for seeking death in States that do not authorize capital punishment.³¹² While that goal is admirable, it cannot trump the best reading of the Eighth Amendment, based on its Anti-Federalist underpinnings. The Constitution, and especially the Bill of Rights, contemplates dis-uniformity on a national scale. This dis-uniformity is the price we pay for our federal system.³¹³ Moreover, while the reading of the Eighth Amendment proposed here breeds national dis-uniformity, it furthers local uniformity: similarly situated offenders within the same State would be treated similarly, irrespective of whether one is charged

311. See, e.g., Little, *Future*, *supra* note 5, at 565 (expressing concern “that a murderer in one federal district might get the death penalty for a crime that, had it been committed on the other side of the river or road, could not result in a federal death sentence”).

312. See *supra* notes 26–37 and accompanying text.

313. See Morton, *supra* note 20, at 1464 (“Defining cruel and unusual punishment at a local level might lead to disparate results from state to state, but this is hardly a new, or necessarily wrong, outcome.”).

with a federal or state crime.³¹⁴ One struggles to think of a good reason why national uniformity is more important than local uniformity.³¹⁵

One potential reason is that disparate treatment by different sovereigns does not implicate the Equal Protection Clause of the Fourteenth Amendment,³¹⁶ while disparate treatment by a single sovereign does. Of course, the Equal Protection Clause does not apply directly to the federal government. It applies only through the verbal gymnastics of its “reverse incorporation” through the Due Process Clause of the Fifth Amendment.³¹⁷ Thus, one answer to this objection is John Hart Ely’s famously accurate observation that “reverse incorporation” is “gibberish both syntactically and historically.”³¹⁸ But even on its own terms, “reverse incorporation” does not necessarily command that the States and the federal government be held to the exact same standard.³¹⁹ After all, direct incorporation of the Bill of Rights through the Fourteenth Amendment does not demand that the two be subject to the same constraints.³²⁰ Specifically, where one provision of the Constitution *forces* the federal government to distinguish between otherwise similarly situated persons, one would be hard pressed to argue that, in so doing, it violates a different provision of the Constitution.³²¹ After all, unequal treatment by either the States or the federal

314. See O’Hear, *supra* note 23, at 725 (“[T]he local uniformity principle insists that similarly situated defendants within the same locality receive similar sentences, whether prosecuted in state or federal court.”).

315. See *id.* (“[O]ne of the central objectives of sentencing reform, the minimization of arbitrariness, provides as much support for local as for national uniformity.”). Congress itself has recognized the importance of federal/state parity of sentences, albeit on a lesser scale. See, e.g., 28 U.S.C. § 994(c)(4), (7) (directing Federal Sentencing Commission to consider “the community view of the gravity of the offense” and “the current incidence of the offense in the community” in formulating the Federal Sentencing Guidelines); Assimilative Crimes Act, 18 U.S.C. § 13 (criminalizing “any act or omission” committed on federal land situated within a State that would be criminal pursuant to the laws of that State, and subjecting any person in violation “to a like punishment” as he would receive pursuant to state law).

316. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

317. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“[D]iscrimination may be so unjustifiable as to be violative of due process.”).

318. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 32 (1980).

319. See Mannheim, *supra* note 187, at 143. But see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (establishing uniform standard).

320. See *supra* notes 194–203 and accompanying text.

321. Cf. Mannheim, *supra* note 187, at 143 (“[S]ince there is, [under] the Establishment Clause, absolutely no federal power over religion, it ought not be construed as stigmatizing as a matter of law when the federal government fails to fund a religious project on the same basis as similar non-religious projects. It is merely declining to act in a sphere where it has no power in the first place.”).

government is justified where there is a compelling interest,³²² and few interests are more compelling than abiding by the Constitution's textual commands.

Calvin Massey has compellingly made a similar argument in a related area. He asserts that the Ninth Amendment³²³ was designed to allow States to carve out in their own constitutions additional, federally enforceable and protected rights to be free from federal encroachment, over and above those granted in the Bill of Rights.³²⁴ Massey concedes, on this reading, that the Ninth Amendment could not "be applied uniformly across the country" and that "some Americans will enjoy more individual liberty than others."³²⁵ However, he defends this result as both a descriptive and prescriptive matter: "Such a result is the probable intention of the [N]inth [A]mendment, part of the legacy of a system of dual sovereignty, and in any case, a virtue. The citizens of each state would be entitled to define their relationship with all of their governmental agents."³²⁶ The same can be said of the Ninth Amendment's next-door neighbor, the Cruel and Unusual Punishments Clause.

2. The Supremacy Clause and "Reverse Preemption"

A related objection would focus on the fact that the principle advocated in this Article seems to turn the Supremacy Clause³²⁷ on its head. This principle does appear to allow a State to, in effect, "reverse preempt" federal legislation. The answer to this must be a resounding: "So what?" On an Anti-Federalist reading of the Bill of Rights, one of

322. See *Adarand Constructors*, 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

323. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

324. See Massey, *supra* note 171, at 1238. My contentions regarding the Eighth Amendment are not precisely coterminous with Massey's regarding the Ninth. He contends that only those rights enshrined in a state constitution are deserving of recognition in the Ninth Amendment, *see id.* at 1233, while my argument is that so long as a State does not authorize capital punishment, whether by virtue of its constitution, legislation, or mere absence of legislation, that punishment is "unusual" in that State within the meaning of the Eighth Amendment. In this regard, the arguments made by student commentator Sean Morton, *see supra* note 52, are similar to Massey's.

325. Massey, *supra* note 171, at 1248.

326. *Id.* See also *id.* ("[N]inth [A]mendment decisional law would develop a richly variegated pattern.").

327. U.S. CONST. art. VI, cl. 2. See *supra* text accompanying note 51.

its purposes is to carve out certain spheres for state primacy, the Supremacy Clause notwithstanding. To put it another way, the Supremacy Clause makes supreme only those “Laws of the United States . . . made in Pursuance” of the Constitution, but a federal law that purports to impose the death penalty within States that do not authorize capital punishment has not been “made in Pursuance of” the Constitution, but rather in violation of it, at least in those States.³²⁸

Again, Massey’s parallel arguments regarding the Ninth Amendment are compelling. He notes that the Anti-Federalists feared that the Supremacy Clause would grant the central government “the authority to make its legislation supreme—displacing any contrary state statutory or constitutional law.”³²⁹ Thus, they proposed and ultimately won ratification of the Ninth Amendment to counteract that authority, at least in part.³³⁰ Admitting that his reading of the Ninth Amendment “is radical stuff” because it “amounts to a form of reverse preemption,”³³¹ Massey contends persuasively that such a reading is compelled by its “text, history, and structural role in the Constitution.”³³² In the same way, the analysis used here demonstrates that a “situational” Eighth Amendment that varies State by State coheres best with the Amendment’s text and history, the underlying premises of the Anti-Federalists, and existing Eighth Amendment jurisprudence.

3. Does “Cruel and Unusual” Always Mean the Same Thing?

A third possible objection would be that, pursuant to this Article’s analysis, “cruel and unusual” means something different depending on whether it appears in a state constitution or the U.S. Constitution. Since the Eighth Amendment was a carbon copy of a provision in the Virginia Declaration of Rights,³³³ and other state constitutional provisions in turn have been adopted based on the language of the federal Constitution,³³⁴

328. Whether the federal death penalty statutes are unconstitutional on their face for failing to exempt States that do not authorize capital punishment, or whether, to the contrary, under a severability analysis, the statutes are unconstitutional only as applied in such a State, is a question that is beyond the scope of this Article.

329. Massey, *supra* note 171, at 1236.

330. *See id.* at 1238 (“[T]he [N]inth [A]mendment was originally intended to allow the people of each state to define unenumerated rights under their own constitutions and laws, free from federal interference.” (quoting Wilmarth, *supra* note 170, at 1297–98)).

331. *Id.* at 1233.

332. *Id.* at 1245.

333. *See supra* text accompanying note 62.

334. *See, e.g.,* N.Y. CONST. art. I, § 5 (“[C]ruel and unusual punishments [shall not] be

this argument posits that all must mean the same thing. This objection, however, fails to appreciate the extent to which words change in meaning and emphasis depending on the context in which they are used. Thus, state constitutional provisions are often interpreted differently from federal constitutional provisions, even when the two share identical language.³³⁵ As Justice Holmes famously wrote for the Court: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”³³⁶

Indeed, the Cruel and Unusual Punishments Clause is a perfect example of this phenomenon. The current federal iteration of the Clause is a near-verbatim copy of the antecedent provision in the 1689 English Bill of Rights.³³⁷ Yet, in the context of British notions of Parliamentary supremacy, the words had a very different emphasis. They primarily meant that judges could not impose a punishment more severe than that allowed by law.³³⁸ Since our own Constitution constrains legislative as well as judicial power, this cannot be the only or even the predominant meaning of our Cruel and Unusual Punishments Clause.³³⁹ Though the two use virtually the same language, our Clause must mean something different from their Clause. So, too, might certain language “in [the] context of state powers and functions . . . mean something quite different from [similar language] in [the] context of federal powers and functions.”³⁴⁰

4. The Impact of the Sixth Amendment Jury and Vicinage Clauses

One might also observe that, if the injection of local values into the sentencing decision is the goal, then the Jury and Vicinage Clauses are sufficient to the task. Recall that the Anti-Federalists, dissatisfied with the jury-trial right already provided in Article III, spent much of their time, energy, and political capital fighting for an enhanced jury-trial right that would better allow local sympathies to work on behalf of the

inflicted . . .”). This provision, based on the language of the federal Constitution, was added to the New York Constitution in 1846. *See* *People v. Broadie*, 332 N.E.2d 338, 349 (N.Y. 1975).

335. *See, e.g.,* *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 561–62 (N.Y. 1986) (interpreting state “search and seizure” provision more broadly than Fourth Amendment despite identity of language).

336. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

337. *See supra* Part II.C.1.

338. *See supra* text accompanying notes 90–95.

339. *See supra* text accompanying note 96.

340. *Beauharnais v. Illinois*, 343 U.S. 250, 288 (1952) (Jackson, J., dissenting).

defendant.³⁴¹ If the local community did not believe death was an appropriate sentence, they could decline to impose it. If, on the other hand, the community believed death to be appropriate in a federal case, even though it was not an option at the state level, the imposition of capital punishment arguably would offend no values of federalism.

On one level, this argument is anachronistic—it assumes a level of jury involvement during sentencing that did not exist in 1791. At that time, capital crimes uniformly carried with them a mandatory death sentence.³⁴² There simply was no discretion to be exercised by the jury.³⁴³ Jury sentencing in capital cases did not take hold until about fifty years later³⁴⁴ and even today is not constitutionally required.³⁴⁵ Indeed, on one view, the Eighth Amendment was thought so critical precisely because sentencing generally took place without input from the jury. Just as the Anti-Federalists sought, via the Fourth Amendment’s restriction on the issuance of warrants, to hem in federal judges when acting without a jury, so too did they design the Eighth Amendment to constrain those judges when acting alone in other contexts: when setting bail and when sentencing a defendant.³⁴⁶

At a deeper level, however, the argument does have some weight. This is because, although the jury had no general legal authority at sentencing, it nonetheless exercised sentencing discretion in capital cases through the widespread practice of jury nullification. At around the time of the American Revolution, English law provided for upwards of 150 capital crimes.³⁴⁷ Yet both English and American juries, often hesitant to send someone to the gallows for less serious offenses, devised several strategies to “exercis[e] de facto sentencing discretion.”³⁴⁸ For example, juries sometimes convicted of manslaughter rather than murder simply to reflect their “judgment that

341. See *supra* notes 204–11 and accompanying text.

342. See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976).

343. See Erik Lillquist, *The Puzzling Return of Jury Sentencing*, 82 N.C. L. REV. 621, 639–41 (2004) (explaining that juries could control sentence only by deciding which crime, if any, on which to convict defendant).

344. See *Woodson*, 428 U.S. at 291.

345. See *Harris v. Alabama*, 513 U.S. 504, 512 (1995); *Spaziano v. Florida*, 468 U.S. 447, 465 (1984).

346. See AMAR, *supra* note 168, at 87 (“[I]n those aspects of a criminal case that might involve a judge acting without a jury—issuing arrest warrants, setting bail, and sentencing—additional restrictions came into play via the Fourth Amendment warrant clause and the Eighth Amendment.”).

347. See BANNER, *supra* note 263, at 7; John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2012 (2005).

348. Douglass, *supra* note 347, at 2012; see also *id.* at 2014.

death was not the appropriate penalty under the circumstances of a particular homicide.”³⁴⁹ Likewise, juries often found defendants charged with capital property crimes guilty of lesser, non-capital offenses where the only distinction was the value of the property stolen—even when the result flew directly in the face of the uncontroverted evidence.³⁵⁰ This practice of juries exercising “de facto sentencing discretion” was firmly established in America at the time the Constitution and Bill of Rights were framed, debated, and adopted.³⁵¹ Thus, in effect if not in form, juries did exercise some control over sentencing decisions in 1791. And since the Sixth Amendment gave the Anti-Federalists the jury-trial right they fought for, any additional constitutional constraint on punishment might be thought unnecessary.

However, the argument proves too much, for the same can be said of any of the criminal procedure protections contained in the Sixth Amendment. If the Jury and Vicinage Clauses were sufficient to protect the values of federalism in criminal trials, none of these provisions would have been necessary. Yet the Anti-Federalists were not willing to put all their eggs in the jury box. Americans of this period championed, and the Anti-Federalists fought hard to enshrine in the new Constitution, not only the jury-trial rights but also the other “adversarial rights of notice, confrontation, compulsory process, and . . . the right to counsel.”³⁵² Indeed, it has been argued that each of these rights developed, “at least in part as counterweights to a substantive criminal law that threatened death in proportions the public . . . could not tolerate.”³⁵³ How fitting, then, that the Anti-Federalists saw fit also to insist on a separate provision, the Eighth Amendment, that would trump the central government’s ability to impose certain *types* of punishments that the public, speaking through their state legislatures, also could not accept.

5. Does the Eighth Amendment Prohibit Disproportionate Federal Punishment?

The most cogent objection to the rule proposed here is based on a “no limiting principle” argument. If the Eighth Amendment forbids the

349. *Id.* at 2013.

350. *Id.*

351. *Id.* at 2014.

352. *Id.* at 2014–15.

353. *Id.* at 2015.

federal government from imposing modes of punishment not imposed in the State where the criminal conduct occurred, then, by virtue of the Amendment's proportionality requirement,³⁵⁴ it also forbids the federal government from imposing sentences of imprisonment greater than those meted out by that State for the same or functionally equivalent crimes.³⁵⁵ Taken to its logical conclusion, the federal government may not even criminalize conduct within a State if the conduct is not prohibited by that State, because the state punishment—nothing—will always be less than the federal punishment.

No simple answer to this question exists and this Article does not attempt one. It may be that the proportionality guarantee that the Court has located in the Eighth Amendment does not really exist there. Or the Eighth Amendment may indeed prohibit federal punishments that exceed state punishments for the same or similar crimes committed in the same place. Or, as is most likely, the Eighth Amendment might generally prohibit the federal government from exacting a greater sanction than does the State where the crime occurred; but other factors, such as a clearly more substantial federal interest or clear evidence of state parochialism, might warrant an exception to the rule. For example, if a State decided not to criminalize treason, the federal government should still be able to punish the traitor if his treasonous activities take place within that State, because treason is a quintessentially federal crime. Likewise, if a State decided to punish murder generally with a mandatory term of life imprisonment without parole, but to punish murder of a federal official with five years in prison, the federal government need not be bound by the State's transparently parochial attempt to de-value the lives of federal officers. Aside from these preliminary thoughts, the issue is beyond the scope of this Article and remains an area for further study.

Yet this does not detract from the principle set forth here. Prohibitions on modes of punishment are directly and indisputably

354. See *supra* Part II.C.3.

355. Steven Clymer and Michael O'Hear have made related arguments. Clymer has argued that because of the disparate and adverse treatment of defendants in federal courts as compared with those in state courts in a number of different areas, including but not limited to sentencing, federal prosecutors are required by equal protection principles to have a rational basis for prosecuting anyone who might be prosecuted in state court. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 652-68 (1997). O'Hear has contended that lack of uniformity between sentences for similar federal and state crimes should generally be a basis for a downward departure under the Federal Sentencing Guidelines. See O'Hear, *supra* note 23, at 725. Neither goes so far as to make the claim that adverse sentencing disparities that inure to the detriment of those prosecuted in federal court are absolutely barred as "unusual" punishments.

contemplated by the Eighth Amendment. Moreover, when a State has ruled out a mode of punishment for even the most serious crimes, little danger exists that it is acting out of parochial self-interest or not properly taking into account a distinctively federal interest. Rather, the State has decided to tie itself to the mast, to impose on itself a constraint with respect to criminal punishment. There can be no greater confidence that a State's motives are pure in foreclosing to the federal government a particular mode of punishment than where the State has imposed the same constraint on itself.³⁵⁶

V. CONCLUSION

Donald Fell. Marvin Gabrion. Dustin Honken. Angela Johnson. Gary Sampson. By all accounts, these are brutal murderers who deserve the harshest sanction allowed by the laws of the States in which they committed their crimes. However, all five face a punishment *more* severe than those permitted by state law. Each awaits execution on federal death row even though none of the States in which the crimes occurred permits capital punishment. Alfonso Rodriguez Jr. might be next.

The Anti-Federalists were no foes of harsh punishment. Not many of them advocated abolition of the death penalty, or even foresaw that one-quarter of the States would eventually choose that path. Were they alive today, however, most of them would shudder at the specter of Fell, Gabrion, Honken, Johnson, Sampson, and potentially Rodriguez, condemned to die by a powerful central government against the express policy choice of the people of the States of Vermont, Michigan, Iowa, Massachusetts, and North Dakota. And the Anti-Federalists likely would not view a prohibition of the federal death penalty in any State that does not authorize capital punishment as some extreme or extravagant interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause. Instead, they would deem such a prohibition to be at that Amendment's core.

356. *Cf. Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”).