

Cruel and Unusual Federal Punishments

Michael J. Zydny Mannheimer*

ABSTRACT: Virtually all federal defendants who have challenged their sentences as “cruel and unusual punishment” in violation of the Eighth Amendment have failed. This is because the Supreme Court’s jurisprudence on cruel and unusual carceral punishments is extraordinarily deferential to legislative judgments about how harsh prison sentences ought to be for particular crimes. This deferential approach stems largely from concerns of federalism, for all of the Court’s modern cases on the Cruel and Unusual Punishments Clause have addressed state, not federal, sentencing practices. Thus, they have addressed the Eighth Amendment only as incorporated by the Fourteenth. Federal courts accordingly find themselves applying a deferential standard designed in large part to safeguard the values of federalism in cases where those values do not call for deference.

This Article’s aim is to re-discover the “pure” Eighth Amendment, unmediated by the Fourteenth. This requires an appreciation of the role of the Anti-Federalists in the adoption of the Bill of Rights. The Eighth Amendment, like the rest of the Bill of Rights, was an attempt by the Anti-Federalists to secure individual rights through the preservation of a robust form of state sovereignty. Moreover, the Anti-Federalists, and their political heirs, the Republicans, rejected a “pre-realist” vision of common law in favor of an approach that recognized the common law as varying from State to State. Thus, the Anti-Federalists took a decidedly State-centered and State-specific approach to the common-law rights that the Eighth Amendment was designed to encapsulate. And the views and general outlook of the Anti-Federalists are critical to a complete understanding of the Bill of Rights, for it was the Anti-Federalists who won the adoption of the Bill as the price of union.

* Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. J.D. 1994, Columbia Law School. E-mail: mannheimem1@nku.edu. I thank Miriam Baer, Will Berry, Laurence Claus, Adam Gershowitz, Brooks Holland, Dan Markel, Richard McAdams, Meghan Ryan, and George Thomas; participants at the 2011 Law and Society Annual Conference; participants at the 2011 conference of the Central States Law Schools Association; and participants of faculty workshops at Indiana University Robert H. McKinney School of Law and University of Toledo College of Law for their helpful comments and suggestions.

This contextualized account of the ratification of the Eighth Amendment evidences a design to limit the power of the federal government to punish criminals to the same extent that the States have limited their own power to punish. That is to say, whether a federal punishment for a crime is “cruel and unusual” can be answered only in reference to the punishment for the same offense meted out by the States. Moreover, the Anti-Federalists’ views on the nature of the common law indicate that the appropriate comparator is the State where the criminal conduct occurred, not the States generally.

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INTRODUCTION

The fifty-five-year sentence imposed upon Weldon Angelos in 2004 caused quite a stir. Angelos had been convicted of three counts of possessing a firearm in furtherance of a federal drug-trafficking crime after having twice sold a moderate amount of marijuana to a government informant.¹ Fifty-five years imprisonment was the mandatory minimum sentence for the firearm possession counts; District Judge Paul Cassell had no discretion to impose a lesser sentence, meaning that Angelos, twenty-four years old at the time, would very likely die in prison.² This mandatory sentence exceeded what Angelos could have received in any State for the same conduct, and far exceeded the seven years in prison he could have received in Utah, where the crimes occurred.³ Judge Cassell called the sentence “cruel, unjust, and irrational.”⁴ He openly called upon Congress to amend the mandatory-minimum provision at issue, and upon the President of the United States to commute Angelos’ sentence.⁵ An extraordinary coalition of 163 individuals consisting of former United States District and Circuit Judges, former United States Attorneys, and even four former Attorneys General of the United States, filed a brief *amicus curiae*, arguing that the sentence constituted “cruel and unusual punishment” in violation of the Eighth Amendment.⁶ Yet both Judge Cassell in sentencing Angelos as the statute required and the U.S. Court of Appeals for the Tenth Circuit in affirming the sentence rejected this argument.⁷

Angelos is but an extreme example of the disconnect between, on the one hand, the sense that federal sentencing in some cases has gone haywire, and, on the other hand, the unwillingness of federal judges to find merit in Eighth Amendment challenges to federal sentencing. In a recent survey, a majority of federal judges indicated their belief that the mandatory minimum federal sentences for trafficking crack cocaine and marijuana and for receiving child pornography were excessive.⁸ Over forty percent thought

1. See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

2. *Id.*

3. *Id.* at 1259.

4. *Id.* at 1230.

5. *Id.* at 1230–31.

6. See *Amici Curiae Brief at 1–2*, *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006) (No. 04-4282), 2005 WL 2347343.

7. *Angelos* is discussed more fully *infra* Part II.B.2.

8. See U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at 5 tbl.1 (2010), available at www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf. Of the 942 federal district judges to whom the survey questions were asked, 639 responded, a response rate of 67.8%. *Id.* at 3. Concededly, the figure for crack cocaine trafficking might be lower today, given that the survey results were collected before the effective date of the Act to Restore Fairness to Federal Cocaine Sentencing, commonly known as the “Fair Sentencing Act of 2010,” which lowered sentences

the same of the mandatory minimum federal sentences for trafficking heroin, powder cocaine, and methamphetamine, as did over a third regarding the mandatory minimum federal sentences for distribution of child pornography and certain firearms offenses.⁹ In addition, about seventy percent believed that the federal sentencing guidelines' ranges for trafficking crack cocaine and possession or receipt of child pornography were too harsh.¹⁰

Yet exceedingly few federal defendants have successfully challenged their sentences on Eighth Amendment grounds. This is unsurprising, as the test the U.S. Supreme Court has developed to successfully challenge a prison sentence as "cruel and unusual" is virtually impossible to satisfy. Both courts and commentators have failed to recognize the inadequacy of current Eighth Amendment jurisprudence as specifically applied to federal punishments. The root cause of this inadequacy is that all but one of the Supreme Court cases addressing the disproportionality between crimes and sentences under the Cruel and Unusual Punishments Clause have concerned state, not federal, punishments. The exception is truly an outlier that is now over a century old. Thus, because the Court's Cruel and Unusual Punishments Clause jurisprudence stems solely from controversies dealing with state sentences, what we think of as "Eighth Amendment" cases are actually Fourteenth Amendment cases. Yet the courts reflexively apply the same deferential "Eighth Amendment" standard to both state and federal punishments, and commentators have failed to take them to task for doing so. Both have forgotten that as originally conceived, the Eighth Amendment, like the rest of the Bill of Rights, was a curb only on federal power, and remained so for at least seventy-seven years.

While many have decried the spike in federal sentences and some have suggested using state law as a benchmark for federal punishments,¹¹ none has yet to suggest that the Eighth Amendment might command that we do so. This Article does just that. The goal of this Article is to rediscover the appropriate standards governing the "pure" Eighth Amendment, unmediated by the Fourteenth and applicable only to the federal government. In determining these standards, one must analyze the origins of the Bill of Rights within the crucible of the struggles between Federalists and Anti-Federalists. The Anti-Federalists opposed ratification of the

for trafficking crack cocaine. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010).

9. See U.S. SENTENCING COMM'N, *supra* note 8, at 5 tbl.1.

10. See *id.* at 11 tbl.8.

11. See, e.g., Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 675–82 (1997) (making this argument on equal protection grounds); Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures To Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 725 (2002) (making this argument on policy grounds).

Constitution because they felt that it granted the new central government too much power at the expense of the States and that the absence of a Bill of Rights was a fatal defect. To assuage these concerns and to assure ratification of the Constitution in key States such as New York and Virginia, a compromise was struck: the Constitution would be ratified, but a Bill of Rights would be added. The key concerns of the Anti-Federalists—the preservation of both state sovereignty and individual rights—were intertwined, and both find expression in the Bill of Rights.

This way of examining the origins of the Bill of Rights sheds new light on what the framers and ratifiers of the Eighth Amendment might have contemplated by adopting the Cruel and Unusual Punishments Clause. In light of the Anti-Federalists' twin concerns of state sovereignty and individual rights, and their view that the two were inextricably linked, this Article suggests a reading of the Clause that history has overlooked: as an imperative that federal punishments be tied to state norms. That is to say, at its core, the Cruel and Unusual Punishments Clause can be read to require that federal punishments be no more severe than the punishments prescribed by the States for the same criminal conduct.

A cautionary word is appropriate from the outset. Readers who are expecting definitive proof of what the Cruel and Unusual Punishments Clause specifically meant in 1791 will be left disappointed. There is strong evidence that the Clause was understood at that time as imposing common-law-type constraints on Congress's power to punish. Beyond that high level of generality, however, there was perhaps as much consensus in 1791 over the meaning of that provision (and many others) as there is today. Contemporaneous discussions of the Cruel and Unusual Punishments Clause were both sparse and vague. This Article attempts to discern a more specific understanding of the meaning of the Clause in 1791 by situating its language within the historical context, particularly the Anti-Federalist opposition to the Constitution that directly resulted in the adoption of the Bill of Rights.¹² Therefore, the central claim of this Article relates not to *the* "original understanding" of the Clause, but to one within a *range* of possible "original understandings."¹³ Yet, it is an understanding that history has overlooked and which is well worth rediscovering.

12. In this way, this Article's methodology is aligned with what James Ryan has dubbed "the new textualism." See generally James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011).

13. See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 690 (1987) (cautioning that, in some instances of constitutional interpretation, "[w]hat history gives us . . . is not a focused, specific answer, but a range of original understandings"); Kathryn Preyer, *Jurisdiction To Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 223 (1986) ("[T]here were abundant differences of opinion and many 'original understandings' about the nature of federalism among the founders of the Republic . . ."); see also Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 342 (1982) (reviewing THE COMPLETE ANTI-

Part I briefly reviews modern trends in federal sentencing practices by explaining the recent, rapid increase in federal sentencing for ordinary street crime as the product of both the federalization of crime and the advent of harsher sentencing in the Guidelines era. Part II discusses the highly deferential standard that the Supreme Court has created to review the proportionality of carceral sentences, the federalism concerns driving this extreme deference, and the almost certain failure federal offenders face when challenging their sentences on Eighth Amendment grounds. Part III discusses and critiques the popular view that the Cruel and Unusual Punishments Clause is a common-law constraint on the federal government's power to punish. While largely accepting that view, this Part also takes it to task for failing to fully appreciate the extent to which concerns for state sovereignty in the criminal justice arena drove the framers to adopt the criminal procedure protections of the Bill of Rights. Finally, Part IV suggests a view of the Cruel and Unusual Punishments Clause that history has ignored, but which has the benefits of both administrability and fidelity to the federalism constraint contained in the Eighth Amendment—a view requiring that federal sentences be no stricter than state sentences for the same crime.

I. THE CURRENT STATE OF FEDERAL SENTENCING

The last few decades have seen tremendous disparities between federal and state sentencing for the same criminal conduct. These disparities are largely the result of the confluence of two trends. First, over the past century, and especially for the past four decades or so, Congress has increasingly federalized criminal law, regulating conduct that was once considered solely the purview of state criminal law. Second, since the advent of federal sentencing “reform,” sentences for federal crime have skyrocketed, even as compared to state sentences for the same conduct.

A. THE FEDERALIZATION OF CRIMINAL LAW

The Constitution enumerates only four types of federal crimes: counterfeiting,¹⁴ piracy and felonies on the high seas,¹⁵ offenses against the law of nations,¹⁶ and treason.¹⁷ Ever since the Nation’s birth, however, the

FEDERALIST (Herbert J. Storing ed., 1981) [hereinafter THE COMPLETE ANTI-FEDERALIST]); GEORGE LEE HASKINS & HERBERT A. JOHNSON, THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. II, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15 (1981)) (observing that Anti-Federalist thought is worth studying “not for the dubious enterprise of establishing the ‘intent of the framers,’ but for a critical perspective on the American polity and its possible alternatives”).

14. See U.S. CONST. art. I, § 8, cl. 6.

15. See U.S. CONST. art. I, § 8, cl. 10.

16. See *id.*

17. See U.S. CONST. art. III, § 3.

federal government has criminalized a range of other activities that directly threaten the interests of the federal government. For example, the First Congress criminalized bribery of a federal official¹⁸ and perjury in federal court.¹⁹ Prior to the Civil War, most federal criminal statutes “addressed uniquely federal concerns, such as crimes against the federal government itself (e.g., treason) or crimes committed within federal territorial jurisdiction.”²⁰ Following the Civil War, when Congress broadened the federal criminal law, it typically did so because the States were either unwilling to prosecute harmful conduct, as with federal civil rights laws, or unable to do so, as with fraudulent activities that straddled state boundaries.²¹

However, by the dawn of the twentieth century, Congress began to pass criminal statutes to police conduct traditionally regulated by state criminal law, notably in the areas of sexual activity and drugs.²² Not long after, the Prohibition era dramatically enhanced the presence of the federal criminal law enforcement regime in an area previously addressed only by state law.²³ When Prohibition ended, a large number of federal criminal statutes were enacted to fill the void, covering “extortion, kidnapping, bank robbery, theft, kickbacks, racketeering, and firearms possession.”²⁴

The final push toward federalization of the criminal law began within the last fifty years.²⁵ Since the late 1960s, Congress has enacted legislation regulating various conduct, including gambling, loansharking, and the use of firearms, explosives, and narcotics, as well as such far-flung criminal activity as “drug-induced rape, sexual abuse of children, identity theft, telemarketing fraud, theft of cellular phone services, interstate domestic violence, carjacking, and . . . failure to pay interstate child support.”²⁶ The

18. Act of Apr. 30, 1790, 1 Stat. 112, § 21.

19. *Id.* § 18.

20. Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 902 (2000); see also Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 83 (Phyllis McDonald & Janice Munsterman eds., 2000), available at https://www.ncjrs.gov/criminal_justice2000/vol_2/o2d2.pdf (“Congress, for most of the 19th century, limited itself to targeting activity that injured or interfered with the Federal Government itself, its property, or its programs.”). This is not to say that some early federal criminal statutes did not duplicate state criminal law. For example, Congress in 1792 criminalized theft from the U.S. Post Office, a crime that would also undoubtedly constitute theft in the State where the conduct occurred. See Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 58 (1996).

21. Simons, *supra* note 20, at 902–03.

22. See Richman, *supra* note 20, at 85; Simons, *supra* note 20, at 903–04.

23. See Richman, *supra* note 20, at 85; Simons, *supra* note 20, at 904.

24. Simons, *supra* note 20, at 904–05 (footnotes omitted); see also Richman, *supra* note 20, at 87.

25. O’Hear, *supra* note 11, at 726.

26. Simons, *supra* note 20, at 906–07; see also Clymer, *supra* note 11, at 654–55.

flurry of federal criminal provisions over the past four decades, according to one estimate, accounts for over forty percent of new federal criminal statutes enacted since 1865.²⁷

As noted, much of the federal criminal legislation enacted in the last century, and especially within the past forty years, covers conduct previously addressed exclusively by state authorities.²⁸ As a result, the overlap between substantive state and federal criminal law is now “virtually complete.”²⁹ Take, for instance, a recent amendment to the federal kidnapping statute. Prior to 2006, kidnapping was a federal crime only if the victim was taken across a state or international boundary.³⁰ This made some sense: while a State could prosecute a kidnapping that took place within its borders, moving the victim out of the State would render it difficult for state authorities to investigate and prosecute the crime.³¹ Indeed, the impetus for the statute³² was a spate of such kidnappings in the early part of the twentieth century, typically of the wealthy for ransom, the Lindbergh baby kidnapping being the most famous.³³

27. O’Hear, *supra* note 11, at 726 (citing TASK FORCE ON FEDERALIZATION OF CRIM. LAW, AM. BAR ASS’N, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 7 (1998)); *see also* Richman, *supra* note 20, at 89 (“Congress has engaged in an orgy of criminal lawmaking . . .”). Separate and apart from the sheer number of statutes Congress has passed criminalizing vast swaths of activity is the fact that the courts have tended to give those statutes expansive constructions. *See* Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 884 (2005).

28. *See* Clymer, *supra* note 11, at 654 (“[M]any federal statutes duplicate state laws by prohibiting the same or similar conduct and enabling federal prosecutors to bring charges to protect interests no different than those that state laws address.”); Kurland, *supra* note 20, at 2 (“Congress . . . has enacted waves of new federal criminal legislation, effectively ‘federalizing’ a wide variety of conduct that was already criminal under state law and that traditionally had been the responsibility of state criminal law enforcement.”).

29. Richman, *supra* note 20, at 91; *see also* Smith, *supra* note 27, at 896 (“[F]ew categories of crime recognized at the state level will not be crimes at the federal level as well.”).

30. *See* 18 U.S.C. § 1201(a)(1) (2000) (providing that a person is guilty of a federal crime when he or she “unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when the person is willfully transported in interstate or foreign commerce, regardless of whether [he or she] was alive when transported across a State boundary if the person was alive when the transportation began”).

31. *See* Chatwin v. United States, 326 U.S. 455, 463 (1946) (observing that, prior to the enactment of a federal kidnapping statute in 1932, “a man would be kidnapped in one State and whisked into another, and still another, his captors knowing full well that the police in the jurisdiction where the crime was committed had no authority as far as the State of confinement and concealment was concerned” (quoting Hugh A. Fisher & Matthew F. McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L.Q. REV. 646, 653 (1935))).

32. *See id.* at 462–63.

33. Fisher & McGuire, *supra* note 31, at 654; *see also* Richman, *supra* note 20, at 86 (observing that the kidnapping statute was enacted a week after the Lindbergh baby’s body was discovered); Simons, *supra* note 20, at 904 n.45 (observing that the kidnapping statute was enacted “just weeks” after the Lindbergh kidnapping).

In 2006, however, as part of the Adam Walsh Child Protection and Safety Act, Congress amended the federal kidnapping statute to cover wholly intrastate kidnappings, as long as the actor “uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense.”³⁴ That is to say, as long as the offender mails a letter, makes a telephone call, enters a chat room, posts a status update on a social-networking site, or sends a text, e-mail, instant message, or tweet—or, perhaps, even uses an automobile³⁵—in the planning, commission, or cover-up of even a wholly intrastate kidnapping, the crime is now a federal offense.³⁶ Since this likely describes the overwhelming majority of kidnappings, “federal authorities now share concurrent jurisdiction with the [S]tates over virtually every kidnapping in this country.”³⁷

Similarly, the Hobbs Act makes it a federal offense to “in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery.”³⁸ Moreover, “commerce” is defined broadly to include “all . . . commerce over which the United States has jurisdiction.”³⁹ The result of this broad statutory language, coupled with the Court’s latitudinarian approach to Congress’s power to enact laws pursuant to the Commerce and Necessary and Proper Clauses, is that any run-of-the-mine robbery of any business that receives any products from outside the State where it is located is a federal crime. Thus, in *United States v. Watkins*, the defendant was convicted of violating the Hobbs Act for the armed robbery of a gas station in Virginia that netted him a meager \$300.⁴⁰

The reach of federal criminal authority is even more salient in the more mundane areas of criminal conduct, such as gun possession and narcotics possession and distribution.⁴¹ One of the most commonly invoked federal

34. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-218, § 213, 120 Stat. 587, 616.

35. See *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir. 1995) (“[M]otor vehicles are instrumentalities of interstate commerce.”).

36. See, e.g., *United States v. Jacques*, No. 2:08-cr-117, 2011 WL 1706765, at *7-12 (D. Vt. May 4, 2011) (holding the Federal Kidnapping Act constitutional as applied to wholly intrastate kidnapping accomplished by means of luring the victim via text messaging).

37. Colin V. Ram, Note, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What Is Truly National and What Is Truly Local*, 65 WASH. & LEE L. REV. 767, 770 (2008).

38. 18 U.S.C. § 1951(a) (2006).

39. 18 U.S.C. § 1951(b)(3).

40. *United States v. Watkins*, 388 F. App’x 307, 308-11 (4th Cir. 2010); see also *United States v. Brown*, 959 F.2d 63, 68 (6th Cir. 1992) (“[T]he United States could in theory prosecute virtually every would-be thief . . . no matter how trivial the amount at issue.”); Richman, *supra* note 20, at 87-88 (noting that the Hobbs Act has been used in federal courts to prosecute robberies of restaurants and grocery stores).

41. See O’Hear, *supra* note 11, at 727-28 (“Perhaps most controversial is the federal prosecution of routine ‘street crimes,’ such as low-level gun and drug offenses, which were once

laws criminalizes the possession by anyone who has been convicted of any felony—state or federal—of a firearm that “has been shipped or transported in interstate or foreign commerce”⁴²—which, of course, includes virtually any firearm.⁴³ Federal law also criminalizes the manufacture, distribution, and possession any one of dozens of controlled substances.⁴⁴ As one commentator remarked with regard to drug offenses, “federal law overlaps almost completely with state law.”⁴⁵

B. SKYROCKETING FEDERAL SENTENCES

On average, federal sentences increased significantly following the advent of the federal sentencing guidelines in 1987.⁴⁶ Since the guidelines were implemented, “the average time served by federal defendants has increased by approximately thirty months.”⁴⁷ This is, in part, a result of the U.S. Sentencing Commission’s actions in increasing the guideline sentencing ranges for crimes involving drugs and violence above and beyond those typical prior to the introduction of the guidelines.⁴⁸ It is also a result of the growing prevalence of mandatory minimum sentences, such as for drug, gun, and sex crimes.⁴⁹ By one account, Congress enacted or expanded 179

a nearly exclusive preserve of state and local law enforcement.”); Smith, *supra* note 27, at 880–81 (“Much of th[e] unrelenting growth [of federal criminal law] has been aimed at activities that are vigorously prosecuted at the state level, such as violent crime and drug trafficking.”).

42. 18 U.S.C. § 922(g).

43. See Richman, *supra* note 20, at 89 (“Because just about every gun has traveled in commerce at some point, the element has become a mere formality in most trials.” (citations omitted)).

44. See 21 U.S.C. §§ 812, 841(a)–(b)(1)(A), 844(a).

45. Sara Sun Beale, *Too Many and Yet Too Few: New Principles To Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 998 (1995).

46. O’Hear, *supra* note 11, at 730 (“[T]he Guidelines . . . have resulted in substantially harsher sentences.”).

47. *Id.* (citing KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING* 62 (1998)).

48. See Clymer, *supra* note 11, at 674 (“Federal law often allows greater maximum sentences for drug trafficking.”); O’Hear, *supra* note 11, at 730 (citing STITH & CABRANES, *supra* note 47, at 60–61).

49. See Smith, *supra* note 27, at 895 (“[A] number of these [mandatory minimum] provisions concern the frequently prosecuted areas of drug and weapons offenses.”); *see also*, e.g., 18 U.S.C. § 924(c)(1) (establishing mandatory minimum sentences for various gun crimes); 18 U.S.C. § 2241(c) (establishing mandatory minimum sentences for various sex crimes involving children); 21 U.S.C. § 841(b) (establishing mandatory minimum sentences for various drug crimes).

mandatory minimum provisions between 1987 and 2010.⁵⁰ These provisions have been applied in hundreds of thousands of federal cases.⁵¹

As a result, “[i]n many cases, federal sentences far exceed state sentences for comparable conduct.”⁵² The available sentence in federal court can be “ten or even twenty times higher” than sentences available for the same conduct in state court.⁵³ Indeed, the mandatory *minimum* sentence required by federal law sometimes exceeds the *maximum* allowable sentence available for the same conduct under state law.⁵⁴

What is more, the choice to prosecute federally is often driven by the very fact that federal sentencing is typically harsher than state sentencing. United States Attorneys General and individual U.S. Attorneys have sometimes been quite explicit about policies designed to prosecute as federal offenses conduct that also constitutes state crimes because of the harsher penalties available in federal court.⁵⁵ The U.S. Attorneys’ manual itself directs federal prosecutors, when deciding whether to bring federal charges in such cases, to consider “[t]he probable sentence or other consequences if the person is convicted in the [state] jurisdiction.”⁵⁶ Indeed, that factor is considered “[t]he ultimate measure of the potential for effective prosecution in another jurisdiction.”⁵⁷ The starker example of this tactic is when the federal government prosecutes under federal law and seeks the death penalty where state law does not authorize capital

50. See FAMILIES AGAINST MANDATORY MINIMUMS, MANDATORY MINIMUM SENTENCES CREATED OR EXPANDED BY CONGRESS, 1987–2010, at 4 (2011), available at <http://www.famm.org/Repository/Files/Fed%20MMs%20by%20Number%20Passed%20Per%20Yr%204.8.11.docx>.

51. See Smith, *supra* note 27, at 895 (“[B]etween 1984 and 1991 alone, ‘nearly 60,000 cases’ were sentenced pursuant to mandatory minimums.” (quoting U.S. SENTENCING COMM’N, REPORT ON MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 12 (1991))). Extrapolating out, that number is now likely at least 240,000.

52. Simons, *supra* note 20, at 916; accord Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 574 (2011) (“[F]ederal law typically establishes higher sentences than state law for the same conduct . . .”).

53. Beale, *supra* note 45, at 998.

54. See Clymer, *supra* note 11, at 674 (“[S]ome federal laws, most notably those dealing with drug trafficking and weapons offenses, require imposition of harsh statutory mandatory minimum sentences which can be as long or longer than the *maximum* sentences permitted under some state laws.” (footnote omitted)); O’Hear, *supra* note 11, at 730.

55. See Barkow, *supra* note 52, at 574–75; see also Smith, *supra* note 27, at 884 (“[F]ederal prosecutors [are encouraged] to shift defendants from state court, where more lenient and more flexible sentencing policies apply, into federal court, where sentencing is anything but lenient or flexible.”).

56. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.240(A)(3) (updated Aug. 2002), available at www.usdoj.gov/usao/eousa/foia_reading_room/usam.

57. *Id.* § 9-27.240(B)(3).

punishment for the same offense.⁵⁸ Professor Rachel Barkow has concluded that the existence of harsher federal sentences explains much of the federal government's motive in prosecuting crime that could otherwise be prosecuted in state court.⁵⁹

Of course, that federal sentences can be harsher than state sentences for the same offense has generally not been thought to implicate the Constitution. The States and the federal government are separate sovereigns with different interests and divergent views on appropriate punishment. On the other hand, the Constitution does contain a provision—the Cruel and Unusual Punishments Clause of the Eighth Amendment—specifically constraining the federal government's power to punish for crimes. Moreover, that Clause has been construed as encompassing a proportionality requirement. It is to that requirement that this Article now turns.

II. APPLYING THE EIGHTH AMENDMENT'S PROPORTIONALITY PRINCIPLE TO FEDERAL SENTENCING

The Supreme Court has for a century recognized a proportionality principle in the Cruel and Unusual Punishments Clause—that punishment must be proportional to the offense. Only in the last thirty years, however, has the Court attempted to guide the lower courts in applying this principle. In doing so, the Court has struggled to articulate what constitutes cruel and unusual punishment, using a mish-mash of different benchmarks of proportionality that has resulted in a doctrine that, at least in the context of carceral sentences, is extraordinarily deferential to the sentencing authority. Notably, all of the cases the Court has decided concerning the proportionality of sentences have arisen under state law, and thus actually represent the application of the Eighth Amendment as incorporated by the Fourteenth. When lower federal courts have applied these principles to federal cases, they have almost uniformly rejected Eighth Amendment challenges to federal sentences.

58. See Michael J. Zydny Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual,"* 74 U. CIN. L. REV. 819, 826–29 (2006) (discussing instances in which federal capital prosecutions have been successfully brought in States that prohibit the death penalty).

59. See Barkow, *supra* note 52, at 578 ("[U]nless just about every state is mistaken . . . the federal government is reaching farther than institutional competency suggests it should. And the main reason appears to be sentencing."); see also Camille Kenny, Comment, *Federal Criminal Jurisdiction: A Case Against Making Federal Cases*, 14 SETON HALL L. REV. 574, 596 (1984) ("[F]ederal prosecutors' power to turn minor state offenses into federal felonies gives them broad discretion to determine the degree of punishment to be meted out.").

A. EIGHTH AMENDMENT DISPROPORTIONALITY OF CARCERAL PUNISHMENTS

Over a century ago, in *Weems v. United States*, the U.S. Supreme Court first recognized a proportionality requirement in the Eighth Amendment.⁶⁰ However, it is not altogether clear whether the decision rested on the ground that the defendant's punishment was disproportionate to his crime, or, rather, that the punishment was categorically barred for any crime. The opinion "contains language that will support either theory."⁶¹ Moreover, although it was styled as a federal case, *Weems* arose from the Philippines, a U.S. territory at the time. Thus, the case involved not an interpretation of the Cruel and Unusual Punishments Clause directly but of the analogous provision of the Philippine Bill of Rights.⁶² Moreover, that the punishment was imposed by neither a State nor the federal government meant that the Court did not have to take into account the federalism and separation-of-powers concerns it would typically face when deciding whether to invalidate a criminal punishment.⁶³

It took seven decades for the Court to fully address another Eighth Amendment challenge to the length of a prison sentence. In *Rummel v. Estelle*, the Court came close to precluding such challenges altogether, observing that "one could argue without fear of contradiction by any decision of th[e] Court that for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative."⁶⁴ In *Rummel*, the Court rejected a challenge to a sentence of life imprisonment with the possibility of parole after "as little as 12 years" for receiving about \$120 by false pretenses as the defendant's third felony.⁶⁵ Likewise, in *Hutto v. Davis*, the Court rejected an Eighth Amendment challenge to a sentence of forty years imprisonment for the possession and distribution of a small amount of marijuana.⁶⁶ However, just one year later in *Solem v. Helm*, the Court reversed course, holding that a sentence of life imprisonment with no chance of parole was disproportionate to the crime of "uttering a 'no account' check for \$100" as a seventh felony.⁶⁷

60. *Weems v. United States*, 217 U.S. 349 (1910). For the definitive treatment of *Weems*, see Margaret Raymond, "No Fellow in American Legislation": *Weems v. United States and the Doctrine of Proportionality*, 30 VT. L. REV. 251, 267–301 (2006).

61. *Harmelin v. Michigan*, 501 U.S. 957, 992 (1991) (plurality opinion).

62. *Weems*, 217 U.S. at 365.

63. See Raymond, *supra* note 60, at 254 ("*Weems* . . . recognized the doctrine of proportionality, but suggested little in the way of principle that would enable courts to apply that doctrine to more familiar punishments imposed by domestic legislatures." (footnote omitted)).

64. *Rummel v. Estelle*, 445 U.S. 263, 274 (1980).

65. See *id.* at 265–66, 280–81.

66. *Hutto v. Davis*, 454 U.S. 370, 370–71, 374–75 (1982) (per curiam).

67. *Solem v. Helm*, 463 U.S. 277, 279–82, 303 (1983).

After *Rummel*, *Hutto*, and *Solem*, the character of the proportionality constraint embedded in the Cruel and Unusual Punishments Clause remained entirely unclear. The Court soon responded to that lack of clarity by adopting a standard that is easy to state, difficult to apply, and virtually impossible to satisfy. In *Harmelin v. Michigan*, the Supreme Court enunciated a two-part, three-factor test to determine whether a carceral punishment violates the Eighth Amendment.⁶⁸ At the first step, a court must determine whether “a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”⁶⁹ If so, the court continues to the second step, which requires considering two factors: an intra-jurisdictional analysis, addressing whether the sentence imposed for the crime at issue is out-of-line with sentences imposed in the same jurisdiction for other offenses;⁷⁰ and an inter-jurisdictional analysis, addressing whether “sentences imposed for the same crime in other jurisdictions” are less severe than the sentence at issue.⁷¹

In practice, the first step provides for almost complete deference to legislative judgments about the severity of the crime.⁷² For example, in *Harmelin*, Justice Kennedy compared the crime at issue—possession of 650 grams of cocaine⁷³—with the uttering of a no account check after having committed six other non-violent felonies in *Solem*.⁷⁴ In both cases, the defendant was sentenced to life imprisonment without parole.⁷⁵ In *Solem*, the Court had held that this sentence violated the Eighth Amendment.⁷⁶ In *Harmelin*, however, Justice Kennedy concluded that possession of 650 grams of cocaine, which could be converted into from 32,500 to 65,000 individual doses of the drug, was far more grave.⁷⁷ Justice Kennedy cited three dangers in particular to support his reasoning: that a drug user might commit more

68. See *Harmelin v. Michigan*, 501 U.S. 957, 1001–05 (1991) (Kennedy, J., concurring in part and concurring in the judgment); see also *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (describing Justice Kennedy’s separate opinion in *Harmelin* as “[t]he controlling opinion”); *Ewing v. California*, 538 U.S. 11, 23–24 (2003) (plurality opinion) (utilizing this test); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 693 (2005) (noting that Justice Kennedy’s separate opinion in *Harmelin* “eventually came to assume the status of law”).

69. *Harmelin*, 501 U.S. at 1005; accord *Graham*, 130 S. Ct. at 2022; *Ewing*, 538 U.S. at 28.

70. See *Harmelin*, 501 U.S. at 1004–05.

71. *Id.* at 1004.

72. See Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 553 (2008) (“In practice, courts have adopted such a high standard for gross disproportionality and such a low standard for their own responsibility to make meaningful proportionality judgments that virtually no case requires [application of the second step]”).

73. *Harmelin*, 501 U.S. at 1002.

74. *Solem v. Helm*, 463 U.S. 277, 279–80 (1983).

75. See *Harmelin*, 501 U.S. at 1001; *Solem*, 463 U.S. at 295–96.

76. See *Solem*, 463 U.S. at 303.

77. *Harmelin*, 501 U.S. at 1002.

crime while under the influence, that she might commit crime in order to pay for her drugs, and that violent crime may result from drug transactions.⁷⁸ Helm's crime, by contrast, "was 'one of the most passive felonies a person could commit.'"⁷⁹

As in *Harmelin*, a plurality of the Court in *Ewing v. California* rejected the contention that a sentence of twenty-five years to life imprisonment for a recidivist who stole \$1200 worth of merchandise raised an inference of gross disproportionality.⁸⁰ The plurality first noted the "seriousness" of the theft, observing that it would be treated as a felony in most American jurisdictions.⁸¹ The plurality determined that given Ewing's "long, serious criminal record," the sentence did not raise an inference of gross disproportionality to the penological goals of incapacitation and deterrence.⁸²

"[O]nly in the rare case" that a comparison between the crime and the sentence raises "an inference of gross disproportionality" should a court proceed to the second step of the analysis.⁸³ Again, at this second step, a court should consider whether the sentence is out of proportion to sentences meted out in (a) the same jurisdiction for other offenses⁸⁴ and (b) other jurisdictions for the same offense.⁸⁵ These intra- and inter-jurisdictional analyses are designed to confirm or dispel the initial assessment of gross disproportionality⁸⁶ in a way that purports to be more objective than the first prong of the test.⁸⁷ However, as noted above and as will be discussed below, Eighth Amendment challenges to carceral sentences nearly always fail the highly deferential first prong of the *Harmelin* test.

The almost complete deference the Court has afforded to legislative bodies to dictate the appropriate punishment for crime has engendered substantial criticism.⁸⁸ This deference is the predictable, perhaps inexorable,

78. *Id.*

79. *Solem*, 463 U.S. at 296 (quoting *State v. Helm*, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting), *rev'd*, 463 U.S. 277 (1983)).

80. *Ewing v. California*, 538 U.S. 11, 28–31 (2003) (plurality opinion).

81. *Id.* at 28 (internal quotation marks omitted).

82. *Id.* at 29–30.

83. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment); *accord* *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010); *Ewing*, 538 U.S. at 30.

84. See *Harmelin*, 501 U.S. at 1004.

85. See *id.* at 1005.

86. See *id.* ("The proper role for comparative analysis of sentences . . . is to validate an initial judgment that a sentence is grossly disproportionate to a crime.").

87. See 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) (observing that comparative analysis is designed to "circumscribe federal judicial subjectivity by relying on objective data from the state legislatures").

88. See, e.g., Lee, *supra* note 72, at 532 (proposing a framework to give meaningful content to first prong of *Harmelin* test).

result of a doctrine that allows legislative decisions about punishment to be justified on any one of the major, often competing, theories of punishment, or on an amalgam of two or more of them combined.⁸⁹ As a consequence, while the Court continues to pay lip service to the notion that the Eighth Amendment forbids disproportionate carceral sentences, critics observe that this line of jurisprudence exists only in theory.⁹⁰ Indeed, *Solem* remains the only case in which the Court has found that a carceral sentence violates the Eighth Amendment using this disproportionality framework.⁹¹

Arguably, this line might be re-invigorated after *Graham v. Florida*, where the Court recently declared unconstitutional the practice of sentencing juveniles to life imprisonment without the possibility of parole for non-homicide crimes.⁹² However, in *Graham* the Court eschewed the two-step, three-factor framework described here, which was designed for case-by-case review, and instead used the categorical analysis it had previously reserved for the capital context.⁹³ And, even after taking *Graham* into account, it can accurately be said that “[f]or all practical purposes, the Court is out of the

89. See Samuel B. Lutz, Note, *The Eighth Amendment Reconsidered: A Framework for Analyzing the Excessiveness Prohibition*, 80 N.Y.U. L. REV. 1862, 1871 (2005) (“[C]urrent doctrine . . . asks courts to advance simultaneously the competing goals of efficiency, equity, and adherence to the will of national political majorities without providing a method of resolving concrete cases when these competing ends conflict.”).

90. See Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1061 (2004) (“[T]here is little in the way of proportionality review for prison sentences.”); Adam M. Gershowitz, Note, *The Supreme Court’s Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1263–64 (2000) (“[I]t appears that while proportionality review of excessive criminal punishments survives, successful challenges are nearly impossible.”).

91. See *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (finding reasonable a California court’s conclusion that a prison sentence of from fifty years to life for a recidivist who stole approximately \$150 worth of merchandise did not violate the Eighth Amendment); *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (plurality opinion) (concluding that Ewing’s prison sentence of from twenty-five years to life for stealing \$1200 worth of merchandise as a recidivist did not violate the Eighth Amendment); *id.* at 32 (Scalia, J., concurring in the judgment) (rejecting the notion that the Eighth Amendment forbids disproportionate punishment); *id.* (Thomas, J., concurring in the judgment) (same); *Harmelin*, 501 U.S. at 965 (same); *id.* at 1009 (Kennedy, J., concurring in part and concurring in the judgment) (concluding that a prison sentence of life imprisonment without parole for possessing over 650 grams of cocaine “does not violate the Eighth Amendment”); *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (per curiam) (holding that a prison sentence of forty years for possession with intent to distribute marijuana did not violate the Eighth Amendment); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (holding that a sentence of life imprisonment with possibility of parole for obtaining approximately \$120 by false pretenses as a recidivist did not violate the Eighth Amendment). But see *Solem v. Helm*, 463 U.S. 277, 303 (1983) (concluding that a prison sentence of life imprisonment without parole for a recidivist who uttered a no account check violated the Eighth Amendment).

92. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

93. *Id.* at 2022–23.

business of using the Constitution to regulate the proportionality of prison sentences other than life imprisonment.”⁹⁴

B. EXAMPLES OF EIGHTH AMENDMENT CHALLENGES TO FEDERAL SENTENCING

In the past thirty-two years, the Supreme Court has addressed Eighth Amendment disproportionality challenges to prison sentences on seven different occasions.⁹⁵ Each time, the challenged sentence was imposed by a state court.⁹⁶ The Court has never, with the possible and unusual exception of *Weems*,⁹⁷ addressed an Eighth Amendment excessiveness challenge to a federally imposed sentence. To understand how the Cruel and Unusual Punishments Clause applies to federal sentencing, then, one must look to the lower federal courts. Understandably, given the almost insurmountable hurdle they face, federal defendants have rarely made successful Eighth Amendment challenges to federal carceral sentences.⁹⁸ Two recent examples, both involving conduct traditionally prosecutable pursuant to state law, will suffice.

1. *United States v. Farley*

On May 15, 2007, thirty-seven-year-old Kelly Farley flew from Dallas, Texas, to Atlanta, Georgia, hoping to have sex with an eleven-year-old girl.⁹⁹ Farley had spent the previous seven months setting up the arrangement with someone he believed to be the girl’s mother.¹⁰⁰ His correspondent, however, was an agent of the Federal Bureau of Investigation,¹⁰¹ and Farley was ultimately convicted of “cross[ing] a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years” in violation of federal law.¹⁰² The mandatory minimum term of imprisonment for the crime was thirty years.¹⁰³ The U.S. District Court for the Northern District of Georgia held that such a term of imprisonment constituted “cruel

94. Smith, *supra* note 27, at 892.

95. See *Graham*, 130 S. Ct. 2011; *Lockyer*, 538 U.S. 63; *Ewing*, 538 U.S. 11; *Harmelin*, 501 U.S. 957; *Solem*, 463 U.S. 277; *Hutto*, 454 U.S. 370; *Rummel*, 445 U.S. 263.

96. See *Graham*, 130 S. Ct. at 2018–20 (Florida); *Lockyer*, 538 U.S. at 66–68 (California); *Ewing*, 538 U.S. at 19–20 (California); *Harmelin*, 501 U.S. at 961 (Michigan); *Solem*, 463 U.S. at 281–82 (South Dakota); *Hutto*, 454 U.S. at 370–71 (Virginia); *Rummel*, 445 U.S. at 264–66 (Texas).

97. See *supra* text accompanying notes 60–63.

98. See *Appellate Review of Sentences*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 841, 852 n.2624 (2006) (collecting cases); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 498 n.86 (2002).

99. United States v. Farley, 607 F.3d 1294, 1300, 1306 (11th Cir. 2010).

100. *Id.* at 1300–06.

101. *Id.* at 1306.

102. 18 U.S.C. § 2241(c) (2006); see also *Farley*, 607 F.3d at 1309, 1314.

103. See *Farley*, 607 F.3d at 1319.

and unusual punishment" in violation of the Eighth Amendment, based in part on the finding that "no state would sentence Mr. Farley to a term of 30 years for a crime similar to the one he committed."¹⁰⁴

The U.S. Court of Appeals for the Eleventh Circuit reversed, holding that, because the sentence did not raise an inference of gross disproportionality, it was unnecessary to engage in an intra- or inter-jurisdictional analysis.¹⁰⁵ The Eleventh Circuit exhaustively surveyed the Supreme Court's modern "Eighth" Amendment cases, from *Rummel* to *Graham*, but never once acknowledged that each of those cases, unlike Farley's, involved the limitations on the sentencing power of a state pursuant to the Fourteenth Amendment rather than those imposed on the federal government by the Eighth Amendment.¹⁰⁶

2. *United States v. Angelos*

On each of three separate occasions in May and June of 2002, Weldon Angelos sold eight ounces of marijuana to a government informant for \$350.¹⁰⁷ On two of those occasions Angelos carried with him a firearm, and more guns were found at his home after his arrest.¹⁰⁸ A jury convicted him of various charges, including three counts of possessing a firearm in furtherance of a drug trafficking crime in violation of federal law.¹⁰⁹ A single count of this offense requires a mandatory term of imprisonment of at least five years.¹¹⁰ However, for a "second or subsequent" offense, the mandatory minimum prison sentence leaps to twenty-five years.¹¹¹ Because Angelos was convicted of three counts, two of them were deemed "second or subsequent" convictions, and he was sentenced to fifty-five years and a day in prison.¹¹² The government conceded that this sentence was harsher than Angelos could have received in any State, and that in Utah, where the crimes occurred, Angelos would have been sentenced to serve no more than seven years.¹¹³

The U.S. Court of Appeals for the Tenth Circuit rejected Angelos's claim that his sentence violated the Cruel and Unusual Punishments Clause

^{104.} *United States v. Farley*, No. 1:07-CR-196-BBM, 2008 U.S. Dist. LEXIS 104437, at *30 (N.D. Ga. Sept. 2, 2008), *rev'd*, 607 F.3d 1294 (11th Cir. 2010).

^{105.} *Farley*, 607 F.3d at 1343–44.

^{106.} *Id.* at 1336–44.

^{107.} *United States v. Angelos*, 345 F. Supp. 2d 1227, 1231 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

^{108.} *Id.*

^{109.} See 18 U.S.C. § 924(c)(1)(A) (2006); *United States v. Angelos*, 433 F.3d 738, 743 (10th Cir. 2006).

^{110.} 18 U.S.C. § 924(c)(1)(A)(i).

^{111.} *Id.* § 924(c)(1)(C)(i).

^{112.} *Angelos*, 433 F.3d at 743.

^{113.} *Angelos*, 345 F. Supp. 2d at 1259.

of the Eighth Amendment.¹¹⁴ Like the Eleventh Circuit in *Farley*, the court held that because the sentence did not raise an inference of gross disproportionality, it was unnecessary to engage in an intra- or inter-jurisdictional analysis.¹¹⁵ And, like the Eleventh Circuit in *Farley*, the *Angelos* court examined the Supreme Court's modern "Eighth" Amendment jurisprudence without recognizing that the Court had been, in essence, applying the Fourteenth Amendment.¹¹⁶

C. SQUARE PEG, ROUND HOLE: THE "GROSS DISPROPORTIONALITY" TEST APPLIED TO FEDERAL SENTENCING

It is unsurprising that the Eighth Amendment challenges to federal sentences in these cases failed, given the stringent standard for carceral sentences. What is perhaps surprising is that it appears that no one has challenged the assumption that this stringent standard applies in federal court. That standard, after all, was adopted in the context of *state* criminal punishments, and the courts have unblinkingly applied it to challenges to *federal* criminal punishments as well. In other words, the courts have applied what is in essence Fourteenth Amendment case law to Eighth Amendment cases.

The Supreme Court has never fully addressed a claim that a carceral sentence imposed for a *federal* crime violates the Eighth Amendment.¹¹⁷ All of the Supreme Court's modern proportionality cases have arrived at the Court's doorstep after a *state* conviction.¹¹⁸ Accordingly, the Court has uniformly proceeded from the assumption that concerns of federalism figure greatly in determining the precise bounds of the proportionality requirement, and the cases are rife with warnings for federal courts to tread lightly when addressing challenges to state criminal practice. For example, in *Rummel v. Estelle*, the first modern case to address the issue, the Court warned: "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."¹¹⁹

^{114.} *Angelos*, 433 F.3d at 753.

^{115.} *See id.*

^{116.} *See id.* at 750–51. It is telling as well that some defendants sentenced to extraordinarily long prison terms in federal court do not even bother to challenge their sentences on Eighth Amendment grounds. *See, e.g.*, United States v. Porter, 293 F. App'x 700, 702–03 (11th Cir. 2008) (defendant sentenced to 182 years imprisonment on seventeen gun- and narcotic-related counts did not raise an Eighth Amendment challenge).

^{117.} Six years after *Weems*, the Court, through Justice Holmes' characteristic terseness, brushed aside an Eighth Amendment challenge to a five-year prison sentence for seven separate instances of mail fraud: "[T]here is no ground for declaring the punishment unconstitutional." *Badders v. United States*, 240 U.S. 391, 393–94 (1916).

^{118.} *See supra* text accompanying notes 95–96.

^{119.} *Rummel v. Estelle*, 445 U.S. 263, 282 (1980); *see also* *Graham v. Florida*, 130 S. Ct. 2011, 2047 (2010) (Thomas, J., dissenting) ("[P]rinciples of federalism require substantial

Later, Justice Kennedy, in his controlling opinion in *Harmelin*, articulated four “common principles” that have appeared in this line of Supreme Court cases.¹²⁰ One such core principle is that a wide divergence of opinion and practice in the realm of criminal justice is inevitable, even desirable, in a federal system:

[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. . . . “Our federal system recognizes the independent power of a State to articulate societal norms through criminal law.” State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise. . . . [D]iffering attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes.¹²¹

Thus, the deferential approach outlined in Justice Kennedy’s concurrence presupposes that state—not federal—punishments are the primary object of inquiry.

Justice Kennedy also had federalism concerns foremost in his mind when he wrote: “The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”¹²² As if to hammer the point home, Justice Kennedy closed his *Harmelin* opinion with a paean to Justice Brandeis’ oft-quoted dissent in *New State Ice Co. v. Liebmann*, which extolled that one of the “happy incidents of the federal system” is that the States are free to act as “laborator[ies]” to “try novel social and economic experiments without risk to the rest of the country.”¹²³ Justice Kennedy not only cited the Brandeis dissent¹²⁴ but also expressly invoked its spirit, declaring that though it was “far from certain that Michigan’s bold experiment will succeed,” the State should be given the opportunity to see for itself.¹²⁵ Thus, the highly deferential standard stemming from *Solem*, synthesized in *Harmelin*, ratified in *Ewing*, and in use today, was designed with state, not federal, sentencing in mind.

deference to legislative choices regarding the proper length of prison sentences.”); *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (plurality opinion) (“Diversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system.”).

¹²⁰. *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment).

¹²¹. *Id.* at 999–1000 (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)).

¹²². *Id.* at 999.

¹²³. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹²⁴. See *Harmelin*, 501 U.S. at 1009 (Kennedy, J., concurring in part and concurring in the judgment) (citing *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting))).

¹²⁵. *Id.* at 1008.

Tellingly, the Court has used language from its Fourteenth Amendment jurisprudence to justify the outcomes in these “Eighth” Amendment cases. For example, in his controlling opinion in *Harmelin*, Justice Kennedy declared that “a *rational basis* exists for Michigan to conclude that [Harmelin’s] crime is as serious and violent as the crime of felony murder without specific intent to kill.”¹²⁶ He supposed that “the Michigan Legislature could *with reason* conclude that the threat posed to the individual and society by possession of this large an amount of cocaine . . . is momentous enough to warrant the deterrence and retribution of a life sentence without parole.”¹²⁷ In her plurality opinion in *Ewing*, Justice O’Connor echoed this sentiment: “It is enough that the State of California has a *reasonable basis* for believing that dramatically enhanced sentences for habitual felons ‘advance[s] the goals of [its] criminal justice system in any substantial way.’”¹²⁸

But to say that a State does not violate the Eighth Amendment because there is a “reason” or a “rational basis” for a sentence imposed is to not apply the Eighth Amendment at all—it is to apply the Fourteenth.¹²⁹ The “rational basis” test represents the most deferential form of scrutiny applied to challenges to state legislation pursuant to the Due Process and Equal

126. *Id.* at 1004 (emphasis added).

127. *Id.* at 1003 (emphasis added). This passage was quoted in upholding the defendant’s sentence in *Angelos*. See *United States v. Angelos*, 433 F.3d 738, 752 (10th Cir. 2006) (“Congress ‘could with reason conclude that the threat posed to the individual and society’ by possessing firearms in connection with serious felonies . . . was ‘momentous enough to warrant the deterrence and retribution’ of lengthy consecutive sentences” (quoting *Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring in part and concurring in the judgment))).

128. *Ewing v. California*, 538 U.S. 11, 28 (2003) (plurality opinion) (alterations in original) (emphasis added) (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)). It is possible that a “reasonable basis” is something more than a “rational basis.” This is unlikely, however, as Justice O’Connor also wrote that Ewing’s sentence “reflects a *rational legislative judgment*, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.” *Id.* at 30 (emphasis added).

129. See Michael P. O’Shea, *Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences*, 72 TENN. L. REV. 1041, 1074–77, 1080–81 (2005) (describing the methodology employed in *Harmelin* and *Ewing* as rational basis review); see also Lee, *supra* note 68, at 741 (observing that the *Ewing* Court’s approach “renders the prohibition on excessive punishment probably only as strong as a rational basis inquiry would permit, which is not very strong at all”); Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 187 (2008) (“The use of the phrase ‘rational basis’ [in *Harmelin*] is particularly telling . . . because it echoes the Court’s lowest tier of scrutiny for equal protection challenges to legislative classifications—challenges that almost never succeed.”); Allyn G. Heald, Note, *United States v. Gonzalez: In Search of a Meaningful Proportionality Principle*, 58 BROOK. L. REV. 455, 480 n.90 (1992) (comparing the standard enunciated in *Harmelin* to the standard used by the Court since the New Deal era in reviewing state economic legislation pursuant to the Fourteenth Amendment).

Protection Clauses of the Fourteenth Amendment.¹³⁰ Whatever the merits of applying “rational basis” review to prison sentences when the Eighth Amendment applies only by virtue of its incorporation by the Fourteenth,¹³¹ such review is ill-fitting from both a textual and historical perspective when the Eighth Amendment proper is at issue. Textually, a prohibition on “cruel and unusual” punishments seems an odd way of prohibiting those that are “irrational.” And no one who has studied the original understanding of the Amendment has concluded that it forbade only—or all—“irrational” punishments. The task, then, is to determine whether and to what extent the Cruel and Unusual Punishments Clause, in its pure form, free from concerns about federalism that attend its application to the States via the Fourteenth Amendment, should be thought to regulate the excessiveness of punishments.

III. REDISCOVERING THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

One can view the original understanding of the Cruel and Unusual Punishments Clause as a point of departure for addressing whether and to what extent the Clause should be understood as imposing constraints on the federal government that are not imposed on the States via the Fourteenth Amendment. There is a general consensus among commentators that the Clause is a descendant of the Cruel and Unusual Punishments Clause of the English Bill of Rights of 1689 (“1689 Bill”). Thus, understanding the circumstances surrounding the passage and initial invocation of this provision is critical to understanding how the American version of the Clause was truly meant to function.

There is an emerging consensus that our version of the Clause was likely understood as limiting punishments to those established by the common law of punishment. Thus, one can understand the Cruel and Unusual Punishments Clause as imposing a bar on punishment that is excessive in relation to that which has been imposed on similarly situated offenders according to longstanding practice. However, this account is incomplete, for the Clause can be fully understood only with reference to the larger program of the Anti-Federalist proponents of the Bill of Rights: the reservation of state control over criminal law. Relatedly, one can approach a complete understanding of the common-law-type constraints imposed by the Clause only by appreciating the extent to which the Anti-Federalists conceived of the common law as both state-centered and state-specific.

¹³⁰. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

¹³¹. See O’Shea, *supra* note 129, at 1086–94 (defending rational basis review for state prison sentences).

A. ORIGINS OF THE CLAUSE IN THE 1689 ENGLISH BILL OF RIGHTS

The Cruel and Unusual Punishments Clause of the Eighth Amendment tracks nearly verbatim the analogous provision of the Virginia Declaration of Rights, which in turn mirrors the language of the 1689 Bill.¹³² Thus, the circumstances surrounding the enactment of the 1689 Bill are highly relevant to the meaning of the American Clause.¹³³ Specifically, those circumstances can inform us as to whether the Clause was originally understood as imposing a constraint only upon the type of punishment that could be inflicted or, instead, was also understood as imposing a proportionality constraint. The better view is that the Clause did both.

1. The Trial of Titus Oates

It is commonly accepted that the Cruel and Unusual Punishments Clause of the 1689 Bill was inspired by what is known as the Titus Oates affair.¹³⁴ In 1679, Oates, a Protestant cleric, falsely claimed the existence of a “Popish Plot” by some Catholics to assassinate King Charles II.¹³⁵ He later perjured himself at trial and at least fifteen innocent men were convicted and executed as a direct result.¹³⁶ In 1685, after having been found out, Oates was convicted of perjury.¹³⁷ He was sentenced by Lord Chief Justice Jeffreys of the King’s Bench, who lamented that death was not a permissible punishment for perjury, but who insisted 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.”¹³⁸ Jeffreys sentenced Oates to be fined 2000 marks, defrocked, “whipped from Aldgate to Newgate” the following Wednesday and “from Newgate to Tyburn” the following Friday, pilloried four times a year, and imprisoned for the remainder of his life.¹³⁹

^{132.} See *Harmelin*, 501 U.S. at 966 (plurality opinion).

^{133.} See *id.* at 967.

^{134.} See *id.* at 969–74; Mannheimer, *supra* note 58, at 833–34.

^{135.} See *Harmelin*, 501 U.S. at 969 (plurality opinion); Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 136 (2004); Mannheimer, *supra* note 58, at 833; William H. Mulligan, *Cruel and Unusual Punishment: The Proportionality Rule*, 47 FORDHAM L. REV. 639, 640–41 (1979); Charles W. Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 379 (1980).

^{136.} See *Harmelin*, 501 U.S. at 969; Claus, *supra* note 135, at 136–37; Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted”: The Original Meaning, 57 CALIF. L. REV. 839, 857 (1969); Mannheimer, *supra* note 58, at 833; Mulligan, *supra* note 135, at 641; Schwartz, *supra* note 135, at 379.

^{137.} See *Harmelin*, 501 U.S. at 969; Granucci, *supra* note 136, at 857; Mannheimer, *supra* note 58, at 833; Mulligan, *supra* note 135, at 640–41.

^{138.} *The Second Trial of Titus Oates, D.D. at the King’s Bench, for Perjury: 1 James II. A.D. 1685, in 10 A THE COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783*, at col. 1227, col. 1314 (T.B. Howell ed., 1816) [hereinafter *Second Trial of Titus Oates*].

^{139.} *Id.* at cols. 1316–17.

Four years later, just after the 1689 Bill was adopted, Oates petitioned Parliament for relief from his sentence.¹⁴⁰ The House of Lords rejected the petition.¹⁴¹ However, a minority of Lords dissented, contending that the sentence violated the Cruel and Unusual Punishments provision of the 1689 Bill, and providing an opinion containing six somewhat overlapping reasons for granting Oates's request.¹⁴² Oates had greater luck in the House of Commons, which voted to annul the sentence.¹⁴³ The Commons, however, were unsuccessful in getting their counterparts in the upper House to change their position.¹⁴⁴ The Commons also issued a report detailing their position.¹⁴⁵

It is the language from these reports that have been considered most useful in uncovering what the Clause might have meant to those in the American colonies and new American republic. Many of the reasons given by the Commons and the dissenting Lords are unhelpful inasmuch as they contend that the sentence was "illegal" or "unusual" without explaining exactly why. For example, the following three paragraphs of the statement by the dissenting Lords shed little light on why they felt the sentence was objectionable:

4. [T]hat this will be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter, unless this judgment be reversed.
5. . . . That the said judgments were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed.
6. Because it is contrary to the declaration on the twelfth of February last . . . that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.¹⁴⁶

That the punishment of Oates was "contrary to law and ancient practice" (paragraph five), violated the Cruel and Unusual Punishments provision of the 1689 Bill (paragraph six), and thus set a bad precedent (paragraph four), tell us nothing about which characteristics of the punishment were objectionable. Were one or more of the *methods* of punishment (e.g., fine,

140. See *id.* at col. 1317; see also *Harmelin*, 501 U.S. at 970 (plurality opinion); Claus, *supra* note 135, at 139; Schwartz, *supra* note 135, at 379.

141. See Claus, *supra* note 135, at 140.

142. See *Second Trial of Titus Oates*, *supra* note 138, at col. 1325.

143. See *Harmelin*, 501 U.S. at 971; Claus, *supra* note 135, at 139; Schwartz, *supra* note 135, at 379.

144. See *Harmelin*, 501 U.S. at 971 (plurality opinion); Claus, *supra* note 135, at 140; Schwartz, *supra* note 135, at 379.

145. See *Harmelin*, 501 U.S. at 971; Claus, *supra* note 135, at 139; Schwartz, *supra* note 135, at 379.

146. See *Second Trial of Titus Oates*, *supra* note 138, at col. 1325.

defrocking, imprisonment, pillorying, or whipping) “contrary to law and ancient practice” because no law authorized such methods? Or was some part of the punishment (e.g., imprisonment *for life*, annual pillorying, whipping *for the entire distance from Aldgate to Newgate and from Newgate to Tyburn*)¹⁴⁷ “contrary to law and ancient practice” because it was in some way *disproportionate* to Oates’s crime? These portions of the dissenting Lords’ statement could bear either meaning. However, given that fines, imprisonment, pillorying, and whipping were all commonly used punishments at the time,¹⁴⁸ the latter reading appears the more natural.

There is some agreement that Oates’s defrocking was objectionable not because it was excessive, but because the court lacked the ability to strip someone of his religious status. Indeed, the dissenting Lords gave this as their initial objection to Oates’s sentence:

[T]hat the king’s bench, being a temporal court, made it part of the judgment, that Titus Oates, being a clerk, should for his said perjuries, be divested of his canonical and priestly habit, and to continue divested all his life; which is a matter wholly out of their power, belonging to the ecclesiastical courts only.¹⁴⁹

The report of the Commons echoed this sentiment: “[I]t was surely of ill Example for a Temporal Court to give Judgment, That a Clerk be divested of his Canonical Habits; and continue so divested during his Life.”¹⁵⁰

But other portions of the statements of the Commons and the dissenting Lords suggest that some aspects of Oates’s punishment were objectionable because their *excessiveness* rendered them unauthorized by statute or common law. The Commons report noted: “[I]t was illegal, cruel, and of dangerous Example, That a Freeman should be whipped in such a barbarous manner, as, in Probability, would determine in Death.”¹⁵¹ The dissenting Lords likewise described the punishment as “barbarous, inhuman, and unchristian.”¹⁵² These objections refer not to the punishment of whipping, which “continued as a punishment in England well into the

¹⁴⁷. According to LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 236–37 (1999), these distances were about one-and-a-half and two miles, respectively.

¹⁴⁸. See Claus, *supra* note 135, at 143 (“The methods mandated by the Oates . . . judgments were wholly unremarkable.”); Granucci, *supra* note 136, at 859 (observing that life imprisonment, whipping, and fines were commonly imposed in 1689); John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1820 (2008) (“The punishments inflicted on Oates—floggings, pillorying, imprisonment, and fines—were all methods of punishment that fell well within the common law tradition.”).

¹⁴⁹. See *Second Trial of Titus Oates*, *supra* note 138, at col. 1325.

¹⁵⁰. 10 H.C. JOUR. 247 (Aug. 2, 1689) (internal quotation marks omitted); see also *id.* (“That it was of ill Example, and illegal, That a judgment of perpetual Imprisonment should be given in a Case, where there is no express Law to warrant it.”).

¹⁵¹. *Id.*

¹⁵². See *Second Trial of Titus Oates*, *supra* note 138, at col. 1325.

twentieth century,”¹⁵³ but of whipping in an excessive manner. It is, of course, possible to read these objections as decrying the form of punishment, not simply its extent. For if, as some have suggested,¹⁵⁴ Jeffreys contemplated that Titus would not survive the whipping, the sentence was not simply a whipping but *death* by whipping.

However, the House of Commons also complained that “[i]t was of ill Example, and unusual, That an Englishman should be exposed upon a Pillory, *so many times a Year, during his Life.*”¹⁵⁵ Further, on the floor of the House of Commons, Sir William Williams protested that there was no precedent for inflicting all of the individual aspects of Oates’s punishment on one individual.¹⁵⁶ Also notable is that the Commons used the words “extravagant” and “exorbitant,”¹⁵⁷ “which are synonyms for ‘excessive’ or ‘disproportionate,’”¹⁵⁸ in describing Oates’s sentence. But the most persuasive evidence that the Clause houses a proportionality constraint is that the dissenting Lords, in calling for the annulment of Oates’s sentence, argued that “there is no precedents [sic] to warrant the punishments of whipping and committing to prison for life, *for the crime of perjury.*”¹⁵⁹ Thus, the dissenting Lords’ complaint suggests not that whipping and life imprisonment were contrary to precedent as methods of punishment, but that they were contrary to traditional punishments “for the crime of perjury.”¹⁶⁰ That is to say, the punishments were objectionable, in part, because they were unprecedented in their excessiveness in relation to Oates’s crime.

Yet, establishing that a proportionality principle is embedded in the Cruel and Unusual Punishments Clause is only the first step in determining the exact command of the Eighth Amendment. Just as the related norm of equality is meaningless absent a substantive standard for determining which cases are alike and which unalike,¹⁶¹ so too is “disproportionality . . . meaningless . . . in the absence of a clearly defined and defensible normative

153. LEVY, *supra* note 147, at 237.

154. See *Harmelin v. Michigan*, 501 U.S. 957, 970 (1991) (plurality opinion).

155. 10 H.C.JOUR. 247 (emphasis added).

156. See *Claus*, *supra* note 135, at 140 (“There may be a precedent for whipping, but for all these parts in one Judgment, let any man give us a Precedent to square with that Judgment.” (quoting 8 DEBATES OF THE HOUSE OF COMMONS 291 (Anchitell Grey ed., 1763))).

157. 10 H.C.JOUR. 249.

158. John F. Stineford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 934 (2011).

159. *Second Trial of Titus Oates*, *supra* note 138, at col. 1325 (emphasis added).

160. See Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 510–11 (2005). Writing for the plurality in *Harmelin v. Michigan*, 501 U.S. 957, 973 (1991) (plurality opinion), Justice Scalia, in coming to his conclusion that the English Cruel and Unusual Punishments Clause did not encompass a proportionality principle, simply ignored these five words.

161. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

framework.”¹⁶² The word “unusual” cries out for a benchmark.¹⁶³ If the Clause forbids punishments unusual in their excessiveness, one must ask: “Excessive compared to what?”¹⁶⁴ The answer lies in the common law of punishment.

2. The Nature and Character of the Common Law of Punishment

For seventeenth-century Britons, the common law was regarded “as customary law, the law of ‘long use’ and ‘custom.’”¹⁶⁵ Judges viewed their role as “identifying long-standing customary rules and applying them to particular cases.”¹⁶⁶ At the time, the general consensus was that law consisted of a set of natural rules that was knowable through the exercise of pure reason.¹⁶⁷ For Edward Coke, the greatest expositor of common-law principles of seventeenth-century England,¹⁶⁸ the key to the legitimating power of the common law was its “long usage,” its acceptance over a long period of time.¹⁶⁹ That common-law rules survived after centuries of use demonstrated to Coke that the law had been refined to eliminate irrational and flawed rules and retain only the good, the pure, and the reasonable.¹⁷⁰ Moreover, that these rules survived for centuries confirms their legitimacy, given the tacit consent bestowed upon them by the generations of those governed by these rules.¹⁷¹ Thus, a criminal punishment that is consistent

162. Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 40 (2008); see also Lutz, *supra* note 89, at 1881 (“[I]t is impossible for us to define a particular punishment as excessive until we have first selected the standard against which its purported excessiveness will be measured.”).

163. See Lutz, *supra* note 89, at 1881 (“[E]xcessiveness is a concept of degree that requires a comparison to be made between the challenged punishment and a normative baseline that will define the ‘ideal’ punishment and thereby serve as a point of reference for the excessiveness inquiry.”).

164. See Frase, *supra* note 162, at 39 (“[A]ny judgment of excessiveness (or disproportionality) requires a normative framework—‘excessive’ relative to what?”); Stinneford, *supra* note 158, at 904 (“When one says that a punishment must not be excessive, the natural next question is: ‘Relative to what standard?’”).

165. Stinneford, *supra* note 148, at 1768; see also Claus, *supra* note 135, at 121 (positing that the common law was the repository of “the historic custom of the community”).

166. Stinneford, *supra* note 148, at 1769.

167. See *id.* at 1773 (“In the seventeenth century, it was generally agreed that the ultimate basis for law was an objectively real moral order that inhered in nature and was knowable by reason.”).

168. See *id.* at 1771 (“Edward Coke has been described as the most important common law jurist in English history.”).

169. See *id.* at 1774 (discussing “Coke’s conception of the normative power of ‘long usage’”).

170. See *id.* at 1775 (discussing Coke’s belief that “[a]s courts decide cases year after year and century after century, impractical and unjust legal practices fall away like dross, while practical and just ones survive”).

171. See *id.* (“Coke argued that legal practices that enjoy long usage must also enjoy the consent of the people, otherwise they would fall out of usage.”).

with longstanding usage, both as to type and extent, would be considered “usual.” By contrast, a punishment that is at odds with longstanding usage in either of those respects, and is harsher than traditionally applied, is justifiably condemned as “cruel and unusual.”

If the legitimacy of the *content* of the common law was grounded in consent, then the legitimacy of the common law *process* was grounded in equality, its imperative that like cases be treated alike and unlike cases be treated differently.¹⁷² Viewed in this light, punishments that were harsher than permitted by the common law were thus “cruel and unusual” because they constituted an affront to the principle of equality that the common law demanded.¹⁷³

Thus, when the 1689 Bill barred “cruel and unusual punishments,” it was setting forth both a norm of equality and a related norm of continuity with past practices. The Cruel and Unusual Punishments Clause of the 1689 Bill barred “singl[ing] out an offender on a morally insufficient basis for more punishment than was customarily imposed.”¹⁷⁴ In much the same way, the Clause was designed to prevent a judge from imposing a harsher punishment than was permitted by common law for that particular offense.¹⁷⁵ These were precisely the defects in Titus Oates’s sentence: it combined a number of otherwise acceptable punishments in a way that singled out Oates for special treatment,¹⁷⁶ and “was significantly harsher than the punishments that had previously been given for the crime of perjury.”¹⁷⁷ In so sentencing Oates, Lord Chief Justice Jeffreys exceeded the scope of his legal authority to punish.

172. See Claus, *supra* note 135, at 122 (“[T]he common law doctrine of precedent insisted that judicial decisions could succeed in articulating law if and only if they served an underlying principle of moral—and therefore legal—equality among litigants.”).

173. See *id.* at 121–22.

174. *Id.* at 136 (emphasis omitted); see also Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL’Y 35, 37 (2008) (“Cruel unusualness was constituted by departure from the common law in the direction of greater severity without the kinds of morally sufficient reasons that would indicate an evolved understanding of the common law.”).

175. See Stinneford, *supra* note 158, at 935 (“The English Bill of Rights forbade judges from imposing new (‘unusual’) punishments that were significantly more harsh (‘cruel’) than those that were traditionally permitted under the common law.”).

176. See Claus, *supra* note 135, at 143 (“[T]he law did not allow the Court of King’s Bench to impose those punishments for the offenses of conviction to the degree and in the combination that the Court had done.”); Claus, *supra* note 174, at 40 (“[T]he notorious punishments that Parliament called cruel and unusual were targeted, novel combinations of wholly accepted methods.”).

177. Stinneford, *supra* note 158, at 935; see also Stinneford, *supra* note 148, at 1762 (“[T]he primary thrust of the argument that Oates’s punishment was ‘cruel and unusual’ was that it was contrary to precedent.”).

B. TRANSPLANTING THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE INTO AMERICAN SOIL

As noted above, it appears that the English version of the Cruel and Unusual Punishments Clause was intended to ensure that judges did not impose punishments more severe than were allowed under common law. Of course, this constraint was developed in a system of legislative supremacy with a unitary sovereign. The puzzle is in determining how the Cruel and Unusual Punishments Clause operates as a constraint on the legislative branch as well as the judiciary, and how it operates within a system where each citizen must obey the criminal laws of two different sovereigns simultaneously. That is, one must consider how the framers and ratifiers of our Eighth Amendment incorporated this meaning into a system encompassing both *popular* sovereignty and *dual* sovereignty.

1. Adapting the Clause to Popular Sovereignty

If the American Cruel and Unusual Punishments Clause meant only that punishments be in conformity with common law, it would barely be a constraint at all. After all, legislatures typically dictate what punishments are permissible for particular crimes, and legislatures can derogate from the common law at will. Yet it is clear that the Clause was intended to bar not only federal judges from imposing, but also federal legislators from prescribing, unduly severe punishments.¹⁷⁸ For one thing, the Eighth Amendment, as originally proposed, was to be inserted into the body of the Constitution in Article I, section 9, which contains a number of restrictions on Congress.¹⁷⁹ For another, the Eighth Amendment avoids the wording used in at least three contemporaneous state constitutions that expressly limited their provisions forbidding “cruel or unusual punishments” to the courts.¹⁸⁰ Perhaps most revealing, all three members of the state ratifying

178. See Claus, *supra* note 135, 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.”); see also *Harmelin v. Michigan*, 501 U.S. 957, 975–76 (1991) (plurality opinion) (“[T]he provision must have been meant as a check not upon judges but upon the Legislature.”); *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)); Mulligan, *supra* note 135, at 639 (“The . . . restriction binds both the legislative and judicial branches of the federal government . . . ”).

179. See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 605 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS].

180. See *id.* at 614 (“[C]ruel or unusual punishments [ought not be] inflicted by the courts of law.” (quoting MD. DECL. OF RIGHTS § 22 (1776))); *id.* (“No magistrate or court of law, shall . . . inflict cruel or unusual punishments.” (quoting MASS. CONST. pt. I, art. XXVI

conventions who mentioned the lack of a constraint in the Constitution on cruel and unusual punishments made clear that such a constraint should apply to Congress.¹⁸¹

Accordingly, in transporting the Cruel and Unusual Punishments Clause across the Atlantic, the framers apparently understood that it would lose its character as a common-law constraint in at least this respect: while the common law can generally be abrogated by statute, Congress could not modify what constituted “cruel and unusual punishment.” But if the benchmark for unusualness was not simply the common law of punishment in America, as it was in England, something else must act as a benchmark.

That benchmark was longstanding practice. Again, the constraint against “unusual” punishments assured both equality among similarly situated offenders and historical continuity by relying on longstanding punishment practices as the guide. In the pre-Revolutionary period, the colonists consistently argued that some “fundamental common law rules embodied by long usage” could not be abrogated by Parliament.¹⁸² Moreover, they sometimes used the epithet “unusual” to refer to practices authorized by Parliament yet contrary to longstanding practice,¹⁸³ which suggests that, prior to the Revolution, the word “unusual” primarily meant

(1780)); *id.* (“No magistrate or court of law shall . . . inflict cruel or unusual punishment.” (quoting N.H. BILL OF RIGHTS pt. I, art. XXXIII (1783))).

181. See Speech of Patrick Henry (June 16, 1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 248 (“In the definition of crimes, I trust [Congress] 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.”); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 111 (Jonathan Elliot ed., J.P. Lippincott & Co. 2d ed. 1881) (statement by Abraham Holmes at the Massachusetts ratifying convention that Congress is “nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes”); George Mason, *Objections to the Constitution of Government Formed by the Convention* (1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 13 (“Under their own Construction of the general Clause at the End of the enumerated powers the Congress may . . . constitute new Crimes [and] inflict unusual and severe Punishments.”).

182. Stinneford, *supra* note 148, at 1794.

183. *Id.* at 1795 (“Americans repeatedly condemned Parliament’s actions during this time period as ‘innovations’ and ‘usurpations’ that were ‘unusual,’ ‘unconstitutional,’ and ‘void’ because they were contrary to ‘common right or reason.’”); *id.* at 1797 (discussing the assertion by the Virginia House of Burgesses that the proposed practice of removing American protestors to England for trial would be “new, unusual . . . unconstitutional and illegal” (quoting JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1766–69, at 214 (John Pendleton Kennedy ed., 1906)) (alteration in original)); *id.* (observing the complaint in the Declaration of Independence that the King had convened “legislative bodies at places unusual, uncomfortable, and distant from the repository of public records, for the sole purpose of fatiguing them into compliance with his measures” (quoting THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776))).

"contrary to long usage."¹⁸⁴ By engraving this word into the Eighth Amendment, the framers and ratifiers meant to constrain each branch of the federal government, including Congress, from implementing punishments that were harsher than those allowed by longstanding practice.¹⁸⁵

2. Adapting the Clause to Dual Sovereignty

The above account explains the appearance of provisions forbidding cruel and unusual punishments (or, alternatively, cruel *or* unusual punishments) in various state constitutions after 1776.¹⁸⁶ Both in Britain in 1689 and the States immediately after securing independence, one was subject to only a single criminal lawmaking sovereign. The only modification the States needed to make in adopting these provisions, as discussed, was to ensure that they constrained the legislature as well as the judiciary.

The more difficult task is in understanding how the prohibition on cruel and unusual punishments was adapted to the demands of a system of dual sovereignty. The framers and ratifiers of the Constitution, in Justice Kennedy's memorable phrase, "split the atom of sovereignty."¹⁸⁷ In order to gain a fuller understanding of the role of the Clause in this novel federal system, one must fully appreciate the role of the Anti-Federalists and their demand for a Bill of Rights as the price of their reluctant acquiescence to union. Two distinct but related points are critical here: that the preservation of state sovereignty was a primary motivation for the Anti-Federalists' demand for the Bill of Rights in general (and the Eighth Amendment in particular); and that the Anti-Federalists viewed the common law not as uniform, but as varying from State to State.

184. *Id.* at 1798 ("The Continental Congress's use of the word 'unusual' in the Declaration of Independence indicates that at the moment America formally separated itself from all legal ties to England, it saw long usage as a relevant source of standards for judging government actions.").

185. *See id.* at 1809–10 ("[T]he Cruel and Unusual Punishments Clause was meant to be a check on the federal government's ability to innovate in punishment."); *see also* Claus, *supra* note 135, at 147–48 (concluding that the framers and ratifiers of the Cruel and Unusual Punishments Clause likely viewed it as encapsulating common-law precepts that constrained Congress as well as federal courts).

186. *See THE COMPLETE BILL OF RIGHTS*, *supra* note 179, at 613 (quoting DEL. DECL. OF RIGHTS § 16 (1776)); *id.* at 615 (quoting N.Y. BILL OF RIGHTS § 8 (1787)); *id.* (quoting N.C. DECL. OF RIGHTS § X (1776)); *id.* at 616 (quoting PA. CONST. art. IX, § XIII (1790)); *id.* (quoting S.C. CONST. art. IX, § 4 (1790)); *id.* at 617 (quoting VA. DECL. OF RIGHTS § IX (1776)).

187. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); *see also* Preyer, *supra* note 13, at 224 ("[G]eneral problems of sovereignty and the particular problem of the reception of English [common] law were further compounded by the structure of the new national government with its . . . novel relationship to the states of the union.").

a. The Bill of Rights as an Instrument To Preserve State Sovereignty

The Eighth Amendment, like the Bill of Rights generally, was concerned primarily with protecting the States' interests and those of their respective citizens vis-à-vis the new, powerful central government.¹⁸⁸ The champions of the Bill of Rights were the Anti-Federalists, those who initially opposed the Constitution because they feared it would centralize all power in the national government and destroy the autonomy of the States.¹⁸⁹ They presciently predicted that the more general provisions of the Constitution, such as the Necessary and Proper Clause,¹⁹⁰ could be read to effect "sweeping changes in the balance of national versus state powers."¹⁹¹ Most Anti-Federalists, however, came to realize the need for the strong central government lacking in the Articles of Confederation.¹⁹² They reluctantly accepted the inevitability of the Constitution, provided that a bill of rights be adopted soon thereafter.¹⁹³

To be sure, the ultimate goal of the Bill of Rights was to protect individual rights, but it did so by ensuring the States' right to self-governance. In this way, the rights of the States and the rights of their citizens were intertwined, bound together symbiotically and synergistically.¹⁹⁴

188. See 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, 1262 (1989) ("[T]he original purpose of the Bill of Rights was to protect the states and their citizens against the potentially dangerous expansion of federal power . . .").

189. See Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1231 (asserting that the "Anti-Federalist constitution[]]" [was] one concerned with preserving the states as autonomous units of government and as structural bulwarks of human liberty"); Wilmarth, *supra* note 188, at 1263 ("The Antifederalists were convinced that the Constitution would ultimately destroy the power of the states and extinguish personal liberty by 'consolidating' the United States under one all-powerful central government.").

190. 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 . . .").

191. Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39, 57 (1989) (quoting Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 85, 95 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978)).

192. See Wilmarth, *supra* note 188, at 1281 (discussing the "dilemma" for most Anti-Federalists, who "desired a 'strong central government' but were determined not to 'relinquish, beyond a certain medium, the rights of man for the dignity of government'" (quoting Letter from Mercy Warren to Catharine Macaulay (Sept. 28, 1787), available at <http://www.digitalhistory.uh.edu/exhibits/dearmadam/letter4.html>).

193. See *id.* ("As the ratification debates proceeded, many Antifederalists . . . shift[ed] from a position of complete opposition to the Constitution to a reluctant acceptance of the instrument provided that appropriate constitutional restraints were placed upon the powers of the federal government.").

194. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 128 (1998) ("[The] point is not that substantive rights are unimportant, but that these rights were intimately intertwined with structural considerations."); SAUL CORNELL, *THE OTHER FOUNDERS:*

As Professor Wilson Carey McWilliams put it: “Individuality is possible only because political society protects and nurtures our individual strengths and attributes”¹⁹⁵ Pursuant to prevailing Anti-Federalist doctrine, state power and individual rights were thought to be aligned with each other against the central government. Indeed, state power was thought to be the principal protection for individual rights.¹⁹⁶ The states were considered “structural bulwarks of human liberty.”¹⁹⁷

There were only a handful of framing-era statements contemplating the danger of “unusual” punishments—a criticism that led to the adoption of the Eighth Amendment—and two of these statements manifest a fear that Congress might supplant state criminal law with federal criminal law. Anti-Federalist leader George Mason, who attended the Philadelphia Convention but pointedly refused to sign the Constitution,¹⁹⁸ published his *Objections to the Constitution of Government Formed by the Convention*. In that document, he expressly forewarned of the danger to both state power and individual rights that would result from Congress’s powers pursuant to the Necessary and Proper Clause to create “new crimes” and assign punishments, thereby encroaching into matters traditionally governed by state law:

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

ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 6 (1999) (“Cast in modern terms, states’ rights and individual rights were not antithetical in Anti-Federalist constitutionalism, but intimately bound together.”); Murray Dry, *The Case Against Ratification: Anti-Federalist Constitutional Thought, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 271, 275 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (“[T]he Anti-Federal interest in rights goes together with an interest in mild, and hence decentralized, government.”); Robert C. Palmer, *Liberties as Constitutional Provisions, 1776–1791, in LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 55, 108 (William E. Nelson & Robert C. Palmer eds., 1987) (“Preservation of state authority and liberty restrictions on the federal government can never be distinct; the individuals who would benefit most from individual rights preserved against the federal government were those who were supporting a state government’s policy at odds with federal policy.”).

^{195.} Wilson Carey McWilliams, *The Anti-Federalists, Representation, and Party*, 84 NW. U. L. REV. 12, 19 (1989).

^{196.} See Palmer, *supra* note 194, at 115 (“[The Anti-Federalists] considered the states protectors, not opponents, of rights.”); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 180 (2001) (“The anti-Federalists who pressed the Bill of Rights to limit federal power saw state legislatures and state courts as the protectors of citizens and not as threats.”); Wilmarth, *supra* note 188, at 1281 (observing that, according to the Anti-Federalists, “the states . . . were considered to be the true guardians of the people’s rights”).

^{197.} Massey, *supra* note 189, at 1231; see also Mannheimer, *supra* note 58, at 851 (“Close scrutiny of the Anti-Federalists’ Bill of Rights reveals their profound concern with preserving state sovereignty as a means of furthering liberty.”).

^{198.} See 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 9.

proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.¹⁹⁹

Notice how the concern that Congress might “inflict unusual and severe Punishments” goes hand-in-hand with the concern that Congress could create “new Crimes,” both of which threatened the then-existing State monopoly on criminal justice. Notice also that Mason mentions Congress’s unbridled power to “grant Monopolies in Trade and Commerce” in the same breath as its power to “inflict unusual and severe Punishments.” Though we think of the former as implicating structural concerns and the latter as sounding purely in individual rights, this passage demonstrates how Anti-Federalists viewed the relationship between state power and individual rights as interconnected.

Perhaps most telling, however, is that Mason’s fear that “State Legislatures [will] have no Security for the Powers now presumed to remain to them” follows closely on the heels of his concern regarding three potential incursions on those powers by Congress under the new Constitution: the “grant[ing of] Monopolies in Trade and Commerce,” the creation of “new Crimes,” and the “inflict[ion of] unusual and severe Punishments.” But, of course, Mason could not have meant that the State legislatures should retain the power not only to create crimes and grant monopolies, but also to “inflict unusual and severe Punishments.” After all, Virginia’s own 1776 Declaration of Rights, drafted by Mason himself, forbade the infliction of “cruel and unusual punishments.”²⁰⁰ This passage makes little sense unless Mason believed that State legislatures must be permitted to retain, among “the Powers [then] presumed to remain to them,” the power to set the outer bounds of criminal punishment, and that the “unusual and severe Punishments” to which he referred were *federal* punishments that were more severe than those authorized by State legislatures.

The second significant statement comes from Patrick Henry’s June 16, 1788 speech in the Virginia ratifying convention. He, too, expressed concern over Congress’s potential creation of new crimes that mirrored those under state law but that would be punished more severely:

199. Mason, *supra* note 181, at 13 (emphasis added). Mason’s *Objections* are particularly significant for two reasons. First, they were written before the Constitution was even signed, becoming “the first salvo in the paper war over ratification.” Robert A. Rutland, *Framing and Ratifying the First Ten Amendments*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION*, *supra* note 194, at 305. Moreover, Mason’s *Objections* were second only to Hon. Mr. [Elbridge] Gerry’s *Objections to Signing the National Constitution*, reprinted in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 13, at 6–8, in their influence over the later writings and speeches of other Anti-Federalists. See CORNELL, *supra* note 194, at 29.

200. See Stinneford, *supra* note 148, at 1798.

Congress from their general powers may fully go into the 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. What says [the Virginia] Bill of Rights? "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Are you not therefore now calling on those Gentlemen who are to compose Congress, to prescribe trials and define punishments without this controul [sic]?²⁰¹

While Henry was more sanguine than Mason about the substance of any new crimes that Congress might create, what piqued Henry's concern were two things: the procedures by which crimes would be tried (addressed in the same speech) and the punishments that would be rendered. And it is these two aspects of the criminal process most clearly covered by the Bill of Rights.

The prediction that federal and state criminal law would overlap was widely shared.²⁰² As Henry's statements demonstrate, the Anti-Federalists were concerned that federal criminal law would largely preempt state criminal law, rendering state Bills of Rights useless with no alternatives to safeguard individual rights. He saw the Constitution as "superced[ing] [sic]" and "annihilat[ing]" Virginia's current arrangement with its people.²⁰³ He worried that the State, if it were to adopt the Constitution, would "abandon[] all its powers . . . of direct taxation, the sword, and the purse."²⁰⁴ Virginia would still have its own Bill of Rights, to be sure, but since the State would be divested of all power, that Bill would be as toothless as the government it sought to rein in. The Virginia Bill, in Henry's words, would be "[p]ointed against [a] weakened, prostrated, enervated State Government!"²⁰⁵ Mason began his *Objections* with the very same sentiments: "There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declaration of Rights in the separate States are no Security."²⁰⁶ Pennsylvania Anti-Federalist Centinel echoed these thoughts when he wrote that the

201. Patrick Henry, Speech in the Virginia State Ratifying Convention (June 16, 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 248.

202. See Kurland, *supra* note 20, at 88 ("[A] jurisdictional overlap was contemplated by the Framers."); see also JACKSON TURNER MAIN, THE ANTFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 124 (1961) ("Since the powers of Congress were so extensive, state and general governments would frequently legislate on the same subject . . .").

203. Henry, *supra* note 201, at 247.

204. *Id.*

205. *Id.*

206. Mason, *supra* note 181, at 11.

federal “government would . . . annihilate the particular [State] governments,” leading to the destruction of individual rights because “the security of personal rights of the people by the state constitutions [would be] superseded.”²⁰⁷ A federal Bill of Rights, therefore, was necessary to substitute for the state Bills, and the criminal procedure protections of a federal Bill would be a surrogate for those of the state Bills in cases where—as Henry, Mason, and Centinel feared—federal criminal law subsumed states’ criminal law.

Some Anti-Federalists went so far as to assert that Article III would give the federal courts jurisdiction over ordinary state crimes even without Congressional legislation creating new federal crimes. Agrippa read Article III, which allows for federal court jurisdiction over “Controversies . . . between a State and Citizens of another State,”²⁰⁸ to extend to all criminal cases where a state law is violated by a citizen of another State.²⁰⁹ And Centinel read Article III to grant federal jurisdiction for the prosecution of any state crime: “This jurisdiction goes also to controversies between any state and its citizens; which, though probably not intended, may hereafter be set up as a ground to divest the states, severally, of the trial of criminals . . .”²¹⁰

Of course, Centinel was spectacularly wrong, for Article III does not even purport to grant federal jurisdiction in cases between a State and its own citizens.²¹¹ And both Agrippa and Centinel had to finesse the fact that “controversies,” as used in Article III, may have meant only civil cases.²¹² Indeed, they may not have even believed their own arguments.²¹³ The question is not, however, whether the views of Agrippa and Centinel were misguided or erroneous, but whether they were widely enough accepted to have led to the adoption of the Bill of Rights. Centinel in particular “stood out among Anti-Federalist authors as one of the most adept at reaching a

207. Letter from Centinel to the People of Pennsylvania (Nov. 30, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 143, 152; *see also* PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 287 (John Bach McMaster & Frederick Dawson Stone eds., 1888) (“I consider [the Constitution] as the means of annihilating the constitutions of the several States, and consequently the liberties of the people.” (statement of Robert Whitehill)); Essay by the Impartial Examiner (Mar. 5, 1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 185 (asserting that the Constitution “expunges your bill of rights by rendering ineffectual, all the state governments”).

208. U.S. CONST. art. III, § 2.

209. Letter from Agrippa to the Massachusetts Convention (Jan. 14, 1788), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 94, 97 (“Th[e] right to try causes between a state and citizens of another state, involves in it all criminal causes . . .”).

210. Letter from Centinel to the People of Pennsylvania, *supra* note 207, at 148.

211. *See* U.S. CONST. art. III, § 2.

212. *See* John Harrison, *The Power of Congress To Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 227 (1997).

213. *See id.* (“Centinel and Agrippa opposed ratification and were clearly reaching for anything they could find.”).

broad popular audience.”²¹⁴ And the letter in which Centinel’s erroneous charge appears was particularly popular—it was reprinted eleven times, making it among the most widely circulated ten percent of Anti-Federalist writings of the period.²¹⁵

A primary concern of the Anti-Federalists, therefore, was the continuing prerogative of the States to set their own parameters for crime and punishment. This explains why the lion’s share of protections in the Bill of Rights deal expressly with, or have their most significant impact on, the federal government’s involvement in criminal matters.²¹⁶ The new Americans had a long history of mistrusting a central power that demonstrated its willingness to “abuse . . . the criminal justice system to serve political ends.”²¹⁷ Without certain protections, the Anti-Federalists feared, “the powerful federal government would seek to persecute its enemies through the use of federal law.”²¹⁸

The Fourth, Fifth, Sixth, and Eighth Amendments were adopted largely to obviate these concerns.²¹⁹ The Fourth Amendment hinders the federal government in *investigating* alleged offenders: it may not search or seize unreasonably or rely on overly broad warrants.²²⁰ Most of the Fifth Amendment hinders the federal government in *prosecuting* alleged offenders: it may not do so after the person suspected of a crime has already been acquitted or convicted of the “same offence,” nor may it prosecute unless a panel of ordinary citizens has chosen to indict nor force the criminal suspect to testify in furtherance of such indictment.²²¹ The Sixth Amendment hinders the federal government in *convicting* alleged offenders: it must afford the accused counsel, notice of the charges against him, a trial that must be both speedy and public, and a jury drawn from the district where the crime occurred; it must allow the defendant the means to produce witnesses favorable to his defense; and it must allow the defendant to cross-examine the witnesses against him.²²² And the Eighth Amendment hinders the federal government in *punishing* alleged offenders.²²³

214. CORNELL, *supra* note 194, at 46.

215. *See id.* at 25, app. 1.

216. *See* Mannheimer, *supra* note 58, at 858–59.

217. Kurland, *supra* note 20, at 21.

218. Thomas, *supra* note 196, at 152; *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) (“[C]riminal law inspired dread and jealousy.”).

219. *See* Mannheimer, *supra* note 58, at 857 (“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 . . . the power to prosecute is the power to persecute.”).

220. U.S. CONST. amend. IV.

221. U.S. CONST. amend. V.

222. U.S. CONST. amend. VI.

223. *See* U.S. CONST. amend VIII.

Importantly, these restrictions on the federal government's ability to investigate, prosecute, convict, and punish have little, if anything, to do with ensuring the reliability of the criminal process. Rather, they were designed to protect the guilty as well as the innocent.²²⁴ Indeed, many of the framers and ratifiers of the Bill of Rights had themselves been "smugglers, tax evaders, seditionists and traitors to the regime of George III."²²⁵ The point of the criminal procedure protections of the Bill of Rights was not to reliably convict the guilty and acquit the innocent. The goal was instead to subject federal prosecutors to many of the same constraints that applied to their state counterparts,²²⁶ thereby removing any comparative advantage to federal prosecution in the hopes that the realm of criminal justice would remain largely reserved to the States.²²⁷

It is only because we are accustomed to talking about the protections of the Bill of Rights as they apply to the States through the Fourteenth Amendment that their focus appears to be individual liberty, not state sovereignty. Since the incorporation revolution began, constitutional doctrine regarding the Bill of Rights has been built primarily on state, not federal, cases.²²⁸ Because of this, we fool ourselves into thinking that the provisions of the Bill of Rights have an individual-rights-colored hue, even though they are merely reflecting the major theme of the Fourteenth Amendment, not the first ten.²²⁹ To use Professor Akhil Amar's trenchant analogy: "Like people with spectacles who often forget they are wearing them, most lawyers read the Bill of Rights through the lens of the

224. See Thomas, *supra* note 196, at 152 ("[T]he Framers of the Bill of Rights intended them to be formidable barriers to the successful federal prosecution of criminal defendants, whether guilty or innocent."); *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.").

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

226. See Thomas, *supra* note 196, 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."); *see also 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.").

227. *See id.* at 149 (observing that pursuant to the pre-incorporation Bill of Rights, "the States remain[ed] sovereign, free to conduct their affairs in most criminal matters").

228. *See id.* at 162 ("[C]riminal procedure doctrine in the last forty years has largely come from state cases.").

229. *See id.* ("No one has noticed [this phenomenon] because everyone has taken at face value the Court's repeated insistence that after incorporating a particular Bill of Rights guarantee, it is then interpreting the language of the Bill of Rights rather than that of the Fourteenth Amendment."); *see also* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1054 (2011) ("[T]he Bill of Rights is not strictly, or even primarily, individualistic and countermajoritarian. In many respects, it is as much about structure as it is about rights . . .").

Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.”²³⁰

For example, it is difficult to explain why the Anti-Federalists so strenuously pressed for inclusion in the Bill of Rights the right to a trial by a jury of the vicinage²³¹ with reference to an individual defendant’s right to a reliable trial outcome. There is no reason to think that juries are better than judges at sorting innocent defendants from guilty ones. Rather, juries are better at channeling the moral sensibilities of the community in order to nullify unjust laws,²³² judging the character of their neighbors as defendants, accusers, and witnesses,²³³ and adapting generally applicable law to idiosyncratic local conditions.²³⁴ Juries also provide an opportunity for active civic engagement by the ordinary citizen.²³⁵ The jury-trial right is more about the local control of criminal justice than it is about any benefit conferred on the accused.

Thus, serious consideration of the motivations and general views of the Anti-Federalists requires that we recognize their principal concern of preserving state primacy in the criminal-justice arena. Such an approach would read the Eighth Amendment as imposing a different constraint on the federal government’s power to punish than the constraint imposed upon the States by the Fourteenth Amendment. The “pure” Eighth Amendment constraint is, in part, structural, and is tied to state norms on punishment. Like the jury-trial right, the right to be free from cruel and unusual punishment is largely about local control of criminal justice.

Arguably, the state norms to which the Eighth Amendment is tied are those contained in state constitutional provisions forbidding cruel and

230. Amar, *supra* note 218, at 1136–37.

231. See CORNELL, *supra* note 194, at 60 (“It would be difficult to overstate the importance of trial by jury in the minds of [some] Anti-Federalists.”); GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 98 (2008) (“[I]t was the imperfections in the right to trial by jury that dominated the ratifying conventions.”).

232. See Thomas, *supra* note 196, at 156 (“Potential jury nullification must have been in the mind of the Framers when they insisted that the Sixth Amendment jury be drawn from the community.”).

233. See THOMAS, *supra* note 231, at 99 (“The Anti-Federalists preferred the judgment of a community . . . [as to] the characters of the accused, the accuser, and the witnesses.”).

234. See 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, 91 (1989) (observing that the Anti-Federalist conception of the jury was that of an institution that “would base its decision on the local knowledge of ordinary people (including information about the parties) rather than on some uniform, homogeneous version of the law”).

235. See Herbert J. Storing, *What the Anti-Federalists Were For*, in 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 19 (“The question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the administration of government.” (emphasis omitted)).

unusual punishments rather than those encompassed by sub-constitutional state law. That is to say, perhaps only those punishment practices forbidden as “cruel and unusual” according to state constitutions should be considered “cruel and unusual” in violation of the Eighth Amendment. But the thrust of the Anti-Federalists’ arguments against the proposed federal constitution suggests a more robust constraint, one which would dissuade the federal government from undertaking criminal prosecutions by eliminating any comparative advantage it might have vis-à-vis state prosecutors, including the availability of increased punishments for the same offenses. Furthermore, George Mason’s warnings that Congress’s power to “inflict unusual and severe Punishments” would threaten the “Security for the Powers now presumed to remain” with “the State Legislatures”²³⁶ makes little sense if the Eighth Amendment was meant only to duplicate state constitutional provisions against cruel and unusual punishment rather than requiring that Congress respect the States’ legislative prerogative in calibrating punishments to crimes.

The question remaining is why we should look to the Anti-Federalists at all when interpreting the Bill of Rights. After all, the Anti-Federalists were on the losing side of history. But the historical picture is not so simple, for while their first choice may have been to defeat adoption of the Constitution altogether, the inclusion of the Bill of Rights represents a victory for the Anti-Federalists. The Bill was an explicit concession to the Anti-Federalists by the Federalists—those in favor of the new Constitution—to ensure ratification in Massachusetts, New York, and Virginia.²³⁷ It is easy to forget that the framers’ bold experiment nearly failed, because in each of these key States the Anti-Federalists were initially in the majority.²³⁸ Indeed, in Massachusetts, New Hampshire, New York, and North Carolina, the initial votes were *against* ratification, while the Virginia convention was initially split down the middle.²³⁹ Ultimately, the Federalists won narrow victories in these States, but not before “accepting recommended amendments and pledging

236. See *supra* text accompanying note 199.

237. See Wilmarth, *supra* note 188, 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.”).

238. See *id.* at 1288 (“[I]n the conventions held in Massachusetts, New Hampshire, Virginia and New York, the intensity of the Antifederalist opposition made it difficult to secure ratification on any terms. In each of these states, the Federalists at first found themselves in the minority”); see also MAIN, *supra* note 202, at 286 (estimating that at least sixty percent of eligible voters in Virginia were Anti-Federalists during the ratification period); Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 5 (1955) (“A very large proportion of the people in 1787-1788 were Anti-Federalists” (emphasis omitted)).

239. See MAIN, *supra* note 201, at 288.

to work for the adoption of such amendments as soon as the new federal government was organized.”²⁴⁰ James Madison himself viewed the Bill of Rights as a concession to the more moderate forces among the Anti-Federalists—those who strongly bridled against a powerful central government but who could, in the end, be reconciled to the Constitution.²⁴¹ Their concession worked, and a sufficient number of moderate Anti-Federalists ultimately voted in favor of ratification.²⁴² For these reasons, “Anti-Federalist political thought is essential to understanding the meaning of the Bill of Rights.”²⁴³

b. The Anti-Federalist View of the Common Law

If the British version of the Cruel and Unusual Punishments Clause imposed common-law constraints on the power to punish, one must also address how the Anti-Federalists viewed the common law. Recall that the constraint on legislative bodies as well as courts from imposing harsher punishments than were customarily permitted was a necessary concession to the demands of a system of popular sovereignty. In its original iteration, the constraint required using the common law of punishments as its baseline. But what does that mean in a system of fourteen separate sovereigns—the States and the new federal government—applying, potentially, fourteen different varieties of the common law?

240. Wilmarth, *supra* note 188, at 1288; accord Cornell, *supra* note 191, at 66 (“[R]atification of the Constitution was only secured because Federalists agreed to consider subsequent amendments recommended by Anti-Federalists in various state conventions.”); Dry, *supra* note 194, at 287 (“[T]he Constitution would not have been ratified without the promise . . . that recommendatory amendments accompanying a vote for unconditional ratification would be considered in Congress.”); Rutland, *supra* note 199, at 306 (“The major roadblock to ratification was the lack of a bill of rights, and not until its supporters conceded that they would offer amendments in the First Congress was a fair trial for the Constitution assured.”).

241. See Wilmarth, *supra* note 188, at 1305 (“Madison sponsored the Bill of Rights primarily to reconcile the moderate Antifederalists to the Constitution.”).

242. See MAIN, *supra* note 201, at 177.

243. Cornell, *supra* note 191, at 67; see also Palmer, *supra* note 194, at 105 (“The Antifederalist origin to the demand for a Bill of Rights dictates a state-oriented approach to the Bill of Rights.” (footnote omitted)). See generally Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 84–88 (2005) (discussing the “Gentlemen’s Agreement” between the Federalists and moderate Anti-Federalists). The necessity of looking to Anti-Federalist ideology in assigning meaning to the Bill of Rights should be straightforward to anyone familiar with the Supreme Court’s “Marks Rule”: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .’” Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)). By like reasoning, when a “fragmented” nation adopted the Constitution in 1789, the more moderate Anti-Federalists acquiesced “on the narrowest grounds”—acceptance of the Constitution, but with the inclusion of a Bill of Rights. Accordingly, their motivations for demanding the Bill should be given considerable weight in its interpretation.

Some commentators have mistakenly attributed to the members of the framing generation a “pre-realist” view of the common law as unitary and generally applicable. Professor Laurence Claus, for example, has asserted that American thought during this period “reflected a conception of the law as a Platonic reality, of which the individual actions of courts and legislatures were at best illustrative, not constitutive.”²⁴⁴ And Professor John Stinneford has asserted that “[c]ommon law judges did not see themselves as formulating policy, but rather as identifying long-standing customary rules and applying them to particular cases.”²⁴⁵ Thus, in their view, the framers and ratifiers conceived of a common law that was uniform, declaratory, and regardless of sovereignty.²⁴⁶

Yet perspectives on the common law in the new American States were hardly uniform.²⁴⁷ In particular, around this time period, as “the instrumental (rather than the declaratory) nature of the common law increasingly began to take hold in legal thinking,” a rift formed in the way lawyers and jurists conceived of the common law.²⁴⁸ This rift took the form of a fundamental dispute over whether the English common law had been adopted wholesale in America or, rather, whether some aspects of English common law had been adopted, others rejected, and yet others modified to meet local needs.²⁴⁹ Peter Du Ponceau later characterized the schism as

244. Claus, *supra* note 135, at 147; *see also id.* (discussing “[t]he founding generation’s pre-realist vision of law”).

245. See Stinneford, *supra* note 148, at 1768–69. While Stinneford is referring here to judges of an earlier period, he claims that the framers and ratifiers of the Eighth Amendment, in advocating common-law constraints on punishment, adhered to this conceptualization of the common law. *See id.* at 1793–1807.

246. As Justice Holmes famously wrote, criticizing this view:

Books written about any branch of the common law treat it as a unit . . . It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law.

Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

247. See 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 655 (1974) (“[W]hen the term ‘common law’ was not qualified by the word ‘English,’ the speakers harbored a variety of opinions.”).

248. Henry P. Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 774 (2010); *see also* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1056–57 (1985) (observing that the view of the common law as declaratory “was under attack” at this time “and would eventually be replaced by a view of judges as instrumental decisionmakers who were making rules, not discovering them”).

249. See GRANT GILMORE, THE AGES OF AMERICAN LAW 20 (1977); *see also* Monaghan, *supra* note 248, at 769 (“Throughout the first two decades of our national existence, intense debate

reflecting “the distinction between the common law considered as a *source* of jurisdiction, and as a *means* for exercising it.”²⁵⁰ There was, in short, no single conception of the common law at the time: some adhered to the “pre-realist” view while others took a more modern approach—viewing the common law as unique in every jurisdiction in which it developed.²⁵¹

Perhaps unsurprisingly, this split generally corresponded with political affiliation, the Federalists generally retaining a pre-realist approach to the common law and the Anti-Federalists—and their political descendants, the Republicans²⁵²—generally adopting the more modern view. There is, perhaps, no better statement of the Federalists’ view than Zephaniah Swift’s assertion that “[j]udges have no power to frame laws—they can only expound them.”²⁵³ By contrast, in his 1800 manifesto on States’ rights, the *Report on the Virginia Resolutions*, James Madison articulated the Republican view that the common law differed in each colony prior to the Revolution:

In the state prior to the Revolution, it is certain that the common law, under different limitations, made a part of the colonial codes. But . . . it was the separate law of each colony within its respective limits, and was unknown to them, as a law pervading and operating through the whole, as one society.

occurred over the relationship between the new national courts and an ‘American’ common law.”).

^{250.} PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES, at xiii (1824); *accord* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1282 (1985).

^{251.} See GILMORE, *supra* note 248, at 20 (“Such questions never received neat and tidy answers.”); Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 921 n.10 (1992) (“[T]he term ‘common law’ had a notoriously slippery meaning in the late 18th century.”).

^{252.} While it would be an oversimplification to equate the Republican Party of the 1790s and early 1800s with the Anti-Federalists of the ratification era, *see* CORNELL, *supra* note 194, at 173, the former absorbed many of the leaders and much of the ideology of the latter, especially with regard to the doctrine of states’ rights and the notion of a limited federal government. *See id.* at 147–218; *see also infra* note 254.

^{253.} Jay, *supra* note 248, at 1057 (quoting 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 93–94 (1795)). In the same vein is Alexander Hamilton’s famous assertion that federal judges would exercise “neither force nor will, but merely judgment.” THE FEDERALIST No. 78 (Alexander Hamilton); *see also* Laurence Claus, *Montesquieu’s Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUD. 419, 449 & n.162 (2005) (characterizing both Hamilton and John Marshall as having subscribed to a pre-Realist view of the law); Harry W. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1037 (1974) (observing that Hamilton’s aphorism “comes close to saying that judges are not decision-makers and never have to do more than announce judgments foreordained for them by ‘the law’”).

It could not possibly be otherwise. The common law was not the same in any of the two colonies; in some the modifications were materially and extensively different.²⁵⁴

Likewise, in 1803, Republican St. George Tucker, in his American edition of Blackstone's work, criticized the absurdity of maintaining that each of the States followed a single, uniform common law:

[I]t would require the talents of an Alfred to harmonize and digest into one system such opposite, discordant, and conflicting municipal institutions, as composed the codes of the several colonies at the period of the revolution . . . In vain then should we attempt, by any *general theory*, to establish an uniform authority and obligation of the common law of England, over the American colonies . . .²⁵⁵

It is true that, at the brink of the Revolution, the newly independent States adopted reception provisions which generally established English common law as the law of each State. Yet each reception provision differed widely in its particulars. For example, New York adopted English common law as of the date of the Battles of Lexington and Concord, but only "such parts" as were already in effect in the colony as of that date.²⁵⁶ Massachusetts'

^{254.} *Mr. Madison's Report on the Virginia Resolutions*, reprinted in THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99, at 21, 31 (Jonathan Elliot ed., 1832) [hereinafter *Madison's Report*]. Although Madison, one of the authors of *The Federalist Papers*, obviously was a Federalist during the ratification debates, the split among Federalists over the scope of federal power led to the creation of the Republican Party in the 1790s, populated by more moderate Federalists and former Anti-Federalists. See CORNELL, *supra* note 194, at 168 ("The creation of a Democratic-Republican opposition was an amalgam of ideas drawn from various parts of Anti-Federalism and those more closely associated with Jefferson and Madison."). *Madison's Report* represents a successful repackaging of Anti-Federalist thought that became a cornerstone for the Republicans' vision of limited government for decades to come. *See id.* at 245 (noting that, in his 1800 *Report*, "Madison appropriated and reshaped Anti-Federalist ideas" and that "[f]or much of the next two decades, dissent would build on the foundations [he] laid"); *see also* Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 182 (2006) (observing that some characterized *Madison's Report* as "the 'Magna Charta' of the Republicans, [which] became a foundational document for nineteenth-century advocates of states' rights").

^{255.} 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, at 405 app. E (1803); *accord* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 11 (1977); Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450, 469 (1954) (book review) ("In Tucker's view the adoption of common law and English statutes in a particular state or in several states was a separate act of each state . . .").

^{256.} *See* Goebel, *supra* note 255, at 467; *see also id.* ("[A]nyone who knows of the circumstances under which the New York Constitution was drafted . . . will find it difficult to imagine that the reception provision was a dedication to a 'single transcendental corpus' of law or that it was intended to repudiate provincial variations of the common law theme."). The majority of reception statutes, in fact, were of the same type. *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 799–800 (1951).

reception provision did not even explicitly mention the common law.²⁵⁷ And Connecticut did not enact a reception provision at all.²⁵⁸ In fact, most of the States adopted “provisions continuing in force either (1) preexisting law, or (2) the common law and British statutes as previously applied *in that particular jurisdiction.*”²⁵⁹ Far from enacting all of the English common law bag and baggage on the eve of the States’ irrevocable break with the mother country, the reception provisions did quite the opposite: they preserved as the status quo the systems of law that had developed *within each former colony* for over a century, each greatly deviating from English common law.²⁶⁰ The reception statutes thus served to make English common law, with its local emendations, a mere placeholder in anticipation of the revision of the laws to follow the cessation of hostilities with England.²⁶¹

The Anti-Federalists, and later the Republicans, opposed the notion of a general federal common law because they saw its invocation as a mechanism by which the federal government could assert power far beyond that which it was granted in the Constitution. Since the common law was formed over centuries and encompassed strictures relating to all manner of human activity, the existence of a federal common law would allow the federal government to effectively regulate all human endeavors. What good were the limitations on the legislative power contained in Article I, they argued, if the notion of a federal common law enabled the same power to seep in through Article III? As Madison put it, if there were a federal common law,

it then follows that the authority of Congress is co-extensive with the objects of the common law; that is to say, with every object of legislation The authority of Congress would, therefore, be no

257. See Goebel, *supra* note 255, at 467; WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 8 (1975).

258. See Goebel, *supra* note 255, at 467; see also Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 114 (2004); Hall, *supra* note 256, at 800.

259. Binder, *supra* note 258, at 113–14 (emphasis added) (footnote omitted); see also NELSON, *supra* note 257, at 8 (observing that Massachusetts’ courts construed its reception provision “as authorizing reception of the entire common law and statute law of England in effect at the time of the Revolution, ‘except such parts as were judged inapplicable’ to the Commonwealth’s ‘new state and conditions’” (quoting *Sackett v. Sackett*, 25 Mass. (8 Pick.) 309, 316 (1829))).

260. See Goebel, *supra* note 255, at 467 (“The practical purpose of the reception statutes was to make provision during the alarms of the Revolution for the continuance, so far as possible, of existing systems of law.”).

261. See generally Charles T. Cullen, *Completing the Revision of Laws in Post-Revolutionary Virginia*, 82 VA. MAG. HIST. & BIOGRAPHY 84 (1974) (documenting the revision of Virginia law from the passage of the reception statute in 1776 to its ultimate reformation in 1792).

longer under the limitations marked out in the Constitution. They would be authorized to legislate in all cases whatsoever.²⁶²

Thomas Jefferson denounced the “new doctrine” of federal common law as an “audacious, barefaced and sweeping pretension” that threatened the existence of independent state courts and legal systems.²⁶³ Compared to the assertion of a federal common law jurisdiction, even the reviled Alien and Sedition Acts were “unconsequential” and “timid things.”²⁶⁴ Indeed, the Republican response to the notion of a general federal common law at the turn of the nineteenth century was eerily reminiscent of the Anti-Federalists’ reaction to the proposed federal constitution a decade or so earlier. As Tucker put it, a federal common law jurisdiction for the courts would portend “the establishment of a general consolidated government, which should swallow up the state sovereignties, and annihilate their several jurisdictions, and powers, as *states*.²⁶⁵

This political and legal dispute during the framing period over the nature of the common law first manifested itself in the debate over whether there was a federal *criminal* common law. For while the law governing civil

262. *Madison’s Report*, *supra* note 254, at 33; see also Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1176 (2006) (noting Madison’s argument that incorporation of the common law by federal courts “would be inconsistent with the limited and enumerated powers assigned to the federal government”); Jay, *supra* note 248, at 1080 (discussing House Minority Leader Albert Gallatin’s declaration that allowing the federal courts the authority to apply common law would be the same “as setting aside at one stroke all the restrictions and limitations of power as expressed in the Constitution” (quoting 10 ANNALS OF CONG. 413 (1800))); Rowe, *supra* note 251, at 935 (“[I]n attributing to the courts criminal power greater than that actually exercised by Congress, [the Federalist position would] vest[] the national government with an indefeasible sovereignty.”).

263. Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), reprinted in 4 THE WRITINGS OF THOMAS JEFFERSON 301, 301–02 (H.A. Washington ed., H.W. Derby 1859) [hereinafter Jefferson–Randolph Letter]; see also DU PONCEAU, *supra* note 250, at xiii (“[I]f the federal Judges were to assume this power, there was no knowing where they might stop, that they would have not only an almost unlimited authority over the lives and fortunes of the citizens, but might, in a great degree, impair, if not destroy the sovereignty of the States”); *Instruction from the General Assembly of Virginia to the Senators from That State in Congress* (Jan. 11, 1800), reprinted in DU PONCEAU, *supra* note 250, at 225 (adverting to the “monstrous pretensions resulting from the adoption of th[e] principle” that “the common law of England is in force under the government of the United States”); Letter from Thomas Jefferson to Gideon Granger (Aug. 13, 1800), reprinted in PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 1871–1873, at 138 (1873) (“[I]f the principle were to prevail of a common law being in force in the U.S. (which principle possesses the general government at once of all the powers of the state governments; and reduces us to a single consolidated government) it would become the most corrupt government on the face of the earth.”).

264. Jefferson–Randolph Letter, *supra* note 263, at 301–02.

265. TUCKER, *supra* note 255, at 412; see also Jay, *supra* note 250, at 1252 (“Republicans in the late 1790s accused Federalists of scheming to dissolve any limitations on federal authority through the wholesale incorporation of British common law, which would have rendered legislative authority boundless.”).

matters could be derived from and shaped by the customary practices of private parties, the law of criminal offenses and punishments is unavoidably determined solely by the social policy of each particular sovereign.²⁶⁶ Again, because the two main political parties stood on opposite ends of this divide,²⁶⁷ the issue remained unresolved during the first generation of the Republic.²⁶⁸ The dispute over the existence of a federal criminal common law was publicly aired for the first time by Justice Samuel Chase of the U.S. Supreme Court in *United States v. Worrall*,²⁶⁹ a scant seven years after the Bill of Rights was ratified.

Worrall had been charged with attempting to bribe a federal Commissioner of Revenue.²⁷⁰ He was tried before a jury in the Circuit Court for Pennsylvania, presided over by Justice Chase and Judge Richard Peters of the District Court.²⁷¹ After Worrall was found guilty, he moved in arrest of judgment on the ground that the bribery of a Commissioner of Revenue was not by federal statute a criminal act.²⁷² When the District Attorney, William Rawle, suggested that the indictment could be supported at common law, Justice Chase interrupted him: “Do you mean, Mr. Attorney, to support this indictment solely at common law? If you do, I have no difficulty upon the subject: the indictment cannot be maintained in this Court.”²⁷³ When Rawle answered in the affirmative, Chase cut the argument short and delivered an opinion rejecting the idea of a general federal criminal common law.²⁷⁴

Chase opined that “the United States, as a Federal government, have no common law.”²⁷⁵ Although each of the former colonies had adopted English common law, each adopted only “so much of the common law as was

^{266.} See RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 46–48 (1977).

^{267.} See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 159 (1924) (“The assertion of the Jurisdiction of the United States Courts in cases involving criminal indictments based on English common law . . . in the absence of any Federal penal statute, had been especially obnoxious to the Anti-Federalists . . .”); Preyer, *supra* note 13, at 236 (relating the debate over federal criminal common law to “the political partisanship which divided Federalist from Republicans”); Rowe, *supra* note 251, at 922 n.12 (“Federalists (with the notable exception of Justice Samuel Chase) tended to support common law criminal jurisdiction and Jeffersonians to oppose it.”).

^{268.} See Preyer, *supra* note 13, at 263 (describing issue as “muddled”); see also Jay, *supra* note 248, at 1010 (“[T]he idea of what ‘common law’ entailed corresponded to the ideological orientations of particular advocates . . .”).

^{269.} *United States v. Worrall*, 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766).

^{270.} See FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 189 (1849).

^{271.} *Worrall*, 2 U.S. 28 F. Cas. at 774.

^{272.} See WHARTON, *supra* note 270, at 193–94.

^{273.} *Id.* at 196.

^{274.} See *id.* at 196–98.

^{275.} *Id.* at 197.

applicable to their local situation and change of circumstances.”²⁷⁶ Chase provided an account of the common law as instrumental and divergent, not declaratory and uniform, encapsulating the Anti-Federalist and Republican understanding of the common law:

[E]ach colony judged for itself what parts of the common law were applicable to its new condition; and in various modes by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different States, will soon discover, that the whole of the common law of England has been nowhere introduced . . . and that there is . . . a great and essential diversity in the subjects to which the common law is applied, as well as the extent of its application. The common law of one State, therefore, is not the common law of another

....

[W]hat is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified, as it exists in some of the States; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?²⁷⁷

It is true that Justice Story later wrote that Chase was the only one of the Justices of the Supreme Court until 1804 who rejected the idea of a federal criminal common law.²⁷⁸ There is some dispute over this account.²⁷⁹ But

^{276.} *Id.*

^{277.} *Id.* at 197–98; see also 1 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660, at 129–31 (2008) (observing that, by 1660, significant differences had emerged between the New England and Chesapeake colonies regarding the reception of English common law); Goebel, *supra* note 255, at 464–65 (documenting “some very bold and drastic divagations from the common law practice [that] were pursued” in the colonies); Monaghan, *supra* note 248, at 774 (“Americans understood that the common law varied from state to state, and Republicans in particular thought that there was no room for a national common law”).

^{278.} See 1 LIFE AND LETTERS OF JOSEPH STORY 299 (William W. Story ed., 1851) (observing that “excepting Judge Chase, every Judge that ever sat on the Supreme Court Bench, from the adoption of the Constitution until 1804, (as I have been very authoritatively informed,) held a like opinion” that there was a general federal criminal common law); accord Jay, *supra* note 248, at 1067 (“The only known dissenting voice among Federalist judges after 1793 to a federal common-law jurisdiction was that of Justice Chase.”); Monaghan, *supra* note 248, at 770 (“[D]uring the 1790s, every single Justice, except Justice Chase, apparently believed in the existence of a body of common law crimes against the United States that could be prosecuted in federal courts.”); cf. WARREN, *supra* note 267, at 433 (“Chief Justices Jay and Ellsworth, and Judges Cushing, Iredell, Wilson, Paterson and Washington had each delivered opinions or charges in support of the existence of such [common law] jurisdiction.”); Stephen B. Presser, *The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Poyer*, 4 LAW & HIST. REV. 325, 326 (1986) (opining that at least “seven of the twelve justices who sat in the first decade of the Republic . . . believed in a jurisdiction for non-

even if Justice Story was correct, it is only because every Justice on the Supreme Court was a Federalist until Republican William Johnson was appointed in 1804.²⁸⁰ Chase, too, was a Federalist at the time of the *Worrall* case.²⁸¹ Yet, only a decade before, he had been an Anti-Federalist, a “vehement opponent of the proposed Federal Constitution on the grounds that it too tightly constricted the sovereignty of the individual states.”²⁸² Chase may have switched parties for political expediency after ratification,²⁸³ but *Worrall* allowed him one final opportunity to display his true colors “as a popular states-rights advocate.”²⁸⁴

The language of Justice Chase’s opinion in *Worrall* was echoed later that year by Republican House Minority Leader Albert Gallatin in the debates over the Alien and Sedition Acts.²⁸⁵ The opinion provided a framework for

statutorily-defined crimes”). In addition, Judge Peters disagreed with Chase on the *Worrall* case. See WHARTON, *supra* note 270, at 198 (“The power to punish misdemeanours is originally and strictly a common law power; of which I think the United States are constitutionally possessed.”).

279. Katherine Preyer took the position that, at most, only five Justices openly supported the notion that there was a general criminal common law. See Preyer, *supra* note 13, at 231. Moreover, there is reason to believe that no one on the federal judiciary before the *Worrall* case seriously considered the proposition that the United States had adopted a general common law of crimes at the time the Constitution was ratified. See *id.* Most provocatively, Robert Palmer has asserted that, prior to *Worrall*, even those judges who accepted the notion of federal court jurisdiction over common-law crimes were applying *state*, not federal, common law. See Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 294–96, 299–301 (1986); see also *infra* text accompanying notes 329–39.

280. See Jay, *supra* note 248, at 1016 (“[P]rior to the Republican ascension to the federal judiciary beginning in the first Jefferson Administration, the virtually unanimous opinion of federal judges—all of whom were Federalists—was that indictments could be sustained in federal court under the common law for crimes against the United States.”).

281. See Stephen B. Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence*, 84 NW. U. L. REV. 106, 129 (1989) (“By the 1790s Chase, an ‘Anti-federalist’ who opposed the Constitution, had moved, never really to leave, into the ‘Federalist’ fold”).

282. Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26, 73 (1978) (“Chase was the first Federalist judge to utter the heresy that there was no federal common law.”); accord Jay, *supra* note 248, at 1068 (observing that Chase “was once a strident Antifederalist who had opposed ratifying the Constitution”); see also Samuel Chase, *Notes of Speeches Delivered to the Maryland Ratifying Convention (Apr. 1788)*, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 79–91 (articulating arguments against the proposed constitution).

283. See Presser, *supra* note 282, at 73; see also Daniel W. Howe, *Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding*, 84 NW. U. L. REV. 1, 8, 10 (1989).

284. Presser, *supra* note 282, at 73; accord Jay, *supra* note 248, at 1068–69 (asserting that Chase’s “*Worrall* opinion reflected a deep-seated states’ rights philosophy”).

285. See Jay, *supra* note 248, at 1079 (“The common law of Great Britain received in each colony, had in every one received modifications arising from their situation . . . and now each State had a common law, in its general principles the same, but in many particulars differing from each other.” (quoting 8 ANNALS OF CONG. 2137 (1798)) (alteration in original)).

the Republicans' successful attempt to repeal the Judiciary Act of 1801.²⁸⁶ Chase's opinion laid the groundwork for Jefferson's, Madison's, and Tucker's proclamations on federal common law.²⁸⁷ And it would become the cornerstone of the Republican position against a federal criminal common law.

Critically, Republicans identified a link between the recognition of a federal criminal common law and the imposition of overly harsh punishments rejected by many of the States.²⁸⁸ Madison, in his 1800 *Report*, lamented that if "the common law is established by the Constitution . . . the whole code, with all its incongruities, barbarisms, and bloody maxims, would be inviolably saddled on the good people of the United States."²⁸⁹ Also in 1800, the Republican-held General Assembly of Virginia instructed its U.S. Senators that adhering to the belief "[t]hat the common law of England is in force under the government of the United States . . . opens a new code of sanguinary criminal law, both obsolete and unknown, and either wholly rejected or essentially modified in almost all its parts by State institutions."²⁹⁰ Attorney General Richard Rush, in instructing United States Attorney George Blake not to proceed with common-law criminal prosecutions, later echoed these sentiments, explaining that the federal government could not have incorporated "the whole common law of England, with all or any portion of its dark catalogue of crimes and punishments."²⁹¹ A decade later, Representative Edward Livingston of Louisiana reiterated these sentiments: "Some learned jurists . . . contended that the common law was in full vigor. . . . But, if so, it introduced a dreadful list of capital offenses, and such a one as [I] hope[] never to see recognized in this country."²⁹²

286. See *id.* at 1101 ("Republicans could point to wide discrepancies among the various states with respect to the content of their common law, a consequence of the divergent conditions in the respective jurisdictions and the fact that the colonies were settled at differing times when English common law itself was changing.").

287. See *id.* at 1069–70 ("Chase's views on state common law would become a mainstay of Republican arguments in the near future."); Presser, *supra* note 278, at 329 ("[T]he Jeffersonians . . . took their cue on federal common law of crimes jurisdiction . . . from . . . Samuel Chase . . ."); see also WARREN, *supra* note 267, at 434 (observing that Chase's decision "was regarded by the Federalists as embodying a disastrous doctrine"); Presser, *supra* note 282, at 68 (relating the "dispute . . . over the existence of a federal common law of crime[] . . . to the broader Federalist/Republican split over the extent of powers that the Constitution granted to the central government").

288. See Presser, *supra* note 278, at 329–30 ("[T]he Jeffersonians believed that the invocation of a jurisdiction based on a federal common law of crimes . . . would lead, inexorably, to all the sanguinary and feudal barbarities of the English common law.").

289. *Madison's Report*, *supra* note 254, at 33.

290. *Instruction from the General Assembly of Virginia to the Senators from That State in Congress*, *supra* note 263, at 225.

291. Preyer, *supra* note 13, at 257 (quoting Letter from Richard Rush, U.S. Att'y Gen., to George Blake, U.S. Att'y (July 28, 1814)).

292. Rowe, *supra* note 251, at 932 n.65 (alterations in original) (quoting 1 CONG. DEB. 349 (1825) (internal quotation marks omitted)).

Of course, these statements on their face demonstrate only that the Republicans bristled at the thought of adopting the entirety of English common law absent statutory enactment. But at a deeper level, they expose a significant insight into the Republicans' understanding of the common-law constraints encompassed by the Cruel and Unusual Punishments Clause. If it was understood that the Clause embodied common-law constraints, and if the common law incorporated by the Clause included all English common law, then the Clause would not have been thought to embody any real constraint at all. That is to say, if the only constraint encompassed by the Cruel and Unusual Punishments Clause were that federal punishments must be no harsher than those permitted under English common law, the Clause would be utterly toothless.

The dispute over the existence of a federal criminal common law culminated in *United States v. Hudson*, which resolved the issue in the negative.²⁹³ Echoing Justice Chase in *Worrall*, the Court rejected the notion of a general federal criminal common law, commenting that the common law "var[ied] in every state in the Union."²⁹⁴ Given the political nature of the inquiry, this result was all but foreordained. By 1812, when *Hudson* was decided, only two Federalists remained on the Court.²⁹⁵ One of them, Justice Bushrod Washington, was likely absent from the bench when *Hudson* was decided,²⁹⁶ and the other, Chief Justice John Marshall, apparently joined the opinion.²⁹⁷ And even before *Hudson*, the matter was "long since settled in public opinion."²⁹⁸ Indeed, the Federalists' advocacy for a federal criminal

293. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

294. *Id.* at 33 ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

295. See Clark, *supra* note 262, at 1177 ("By [1812], Republican appointees constituted a majority of the Court for the first time . . ."); Jay, *supra* note 248, at 1012–13 (similar).

296. See *Hudson*, 11 U.S. (7 Cranch) at 32. Katherine Preyer, however, believed that both Justice Washington and Justice Story dissented in the case without opinion. See Preyer, *supra* note 13, at 248. And Stewart Jay believed that the Court likely split 4–3, with Chief Justice Marshall joining Justices Washington and Story in dissent. See Jay, *supra* note 248, at 1016. But see Rowe, *supra* note 251, at 927 ("The weight of the evidence . . . ultimately suggests that the opinion was . . . unanimous.").

297. See Preyer, *supra* note 13, at 247, 248 n.86.

298. *Hudson*, 11 U.S. (7 Cranch) at 32; see also Rowe, *supra* note 251, at 923 ("*Hudson* performed a 'codifying' function, writing into constitutional law that which the political branches of government and the political public had already decided." (footnote omitted)). For some, *Hudson* did not finally settle the matter. Justice Story, on circuit, wrote in *United States v. Coolidge*, 25 F. Cas. 619, 621 (C.C.D. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. 415 (1816), that he did not consider *Hudson* controlling, given that it had been decided "without argument, and by a majority only of the court." Story would have recognized as federal common law offenses "all offences against the sovereignty, the public rights, the public justice, the public peace, the public trade and the public police of the United States." *Id.* at 620. The Supreme Court promptly reversed after the Attorney General, who "consider[ed] the point as decided" by *Hudson*, "declined to argue the cause." *United States v. Coolidge*, 14 U.S. 415, 415–16 (1816).

common law was a major cause of the downfall and extinction of the Federalist Party as a political force in America.²⁹⁹

What is critical for purposes of identifying the common-law constraints imposed by the Cruel and Unusual Punishments Clause is not simply that the Anti-Federalist position ultimately prevailed, though that is important. What is critical is the nature of the argument and who articulated it. Again, the conception of the common law that was ultimately adopted in *Hudson* is much the same as the one we envision today: as a set of policy choices made by judges, varying according to local conditions, not as a single, uniform corpus that judges must attempt to “discover.” And this conception was championed by the Anti-Federalists, who pressed for the Cruel and Unusual Punishments Clause and the rest of the Bill of Rights as the price for their reluctant acquiescence to union.

If we are to properly respect the legacy of the moderate Anti-Federalists—without whom there would be no Bill of Rights, and no Union as we know it—we must operationalize their view of the Cruel and Unusual Punishments Clause as both a reservation of state sovereignty and as a reference to state common law on criminal punishments. Instead, as the Supreme Court’s Eighth Amendment jurisprudence reveals, the Anti-Federalists’ perspective on the Clause has largely been ignored. The challenge, then, is making it relevant once again.

IV. RESUSCITATING THE ANTI-FEDERALISTS’ EIGHTH AMENDMENT

The inclusion of the Eighth Amendment in the Bill of Rights was motivated by a desire to constrain the new federal government within the common law tradition of punishing criminals only to the extent permitted by existing practice and only as severely as others convicted of the same offense. That account, however, is incomplete. Considering the state-sovereignty concerns that provided the foundation for the Anti-Federalists’ push for a Bill of Rights, it follows that state law should be the benchmark for determining whether a federal punishment is “cruel and unusual.” This requires relying on pre-existing punishment practices as the metric while demanding that the focus be on the punishment practices of the States. Although the thought of limiting Congress’s legislative authority by relying on State law may seem strange, using state norms as a baseline for the requirements of federal law would not have seemed odd to the framers and ratifiers of the Eighth Amendment, and should not seem odd to us.

A. USING STATE LAW AS A BENCHMARK FOR FEDERAL PUNISHMENTS

The highly deferential standard used to determine whether a carceral sentence imposed by a State is disproportionate under the Eighth Amendment is a downright peculiar yardstick with which to measure federal

299. See Presser, *supra* note 282, at 46–47.

punishments. Developed largely out of concerns of comity and respect for the autonomy of the States in our federal system, applying the disproportionality standard to federal punishments is positively perverse. It is an excellent example of what Professor George Thomas meant when he described how the process of incorporating the Bill of Rights against the States has diluted those rights as applied to federal defendants, the very people they were designed to protect most robustly. First, the Supreme Court incorporates a criminal procedure right against the States. Then, the Court recognizes that the States deal with the overwhelming majority of serious criminal activity that directly affects our everyday lives, and it becomes reluctant to loose upon us the murderers, rapists, and thieves who might get the benefit of robust criminal procedure protections. Accordingly, the Court applies the incorporated criminal procedure protections stingily as to those state defendants.³⁰⁰ Finally, once these rights are diluted in state court, the Court, “follow[ing] the new and narrower precedents when [hearing the issue] in federal court,” applies the weakened standard.³⁰¹

The threshold step of the current standard, which asks whether a comparison of the gravity of the offense and the severity of the punishment raises an inference of gross disproportionality, is wholly ill-suited to the task of analyzing whether federal punishments are cruel and unusual. Comparing the seriousness of a crime and the severity of a punishment is inherently subjective and, more troubling, is completely divorced from the proportionality principle embedded in the Cruel and Unusual Punishments Clause. The same is true of the intra-jurisdictional analysis, which examines how *different crimes* are punished in the jurisdiction in question. Instead, the Clause’s proportionality principle ought to be understood as requiring a comparison between the crime at issue and *other punishments* for the *same offense*. By requiring a rough calibration of offense gravity and punishment severity in the abstract, these two factors each rely on the wrong benchmark.

Within the current disproportionality standard, however, is the nub of what the Cruel and Unusual Punishments Clause, as applied to the federal government, is all about. The inter-jurisdictional analysis prong of step two asks how appropriate the punishment in question is as compared with the punishments permitted for the same crime in other jurisdictions. Given that the preservation of state primacy in the criminal justice arena was a prime motivator for the Eighth Amendment, it is fitting that the Clause be read to require proportionality between the punishment administered by the federal government and that sanctioned by the States for the same offense. Accordingly, in this context, the two-step, three-factor test should be boiled

³⁰⁰. See Thomas, *supra* note 196, at 151 (“[T]he fact that the States have exclusive jurisdiction over the crimes that most affect our daily lives . . . causes the right to be gradually diluted in order to permit States more latitude in investigating and prosecuting these crimes.”).

³⁰¹. *Id.*

down to a single question: does the federal government punish more severely than do the States for the same offense? This inquiry acknowledges the two principles that are at the heart of the Cruel and Unusual Punishments Clause: first, that punishments not be excessive in relation to that typically and historically administered, and second, that State policy prescribing the appropriate harshness of criminal punishments be supreme to contrary federal policy.

This approach, admittedly, can take a number of different forms. The least protective approach, which can be called the least-common-denominator approach, would ask whether *any* State in the Union punishes as harshly for the conduct in question as the federal government does. Alternatively, one might take a page from the Court's Eighth Amendment jurisprudence with regard to capital punishment and ask whether there is a national consensus opposing a harsh federal sentence, even if one or more States also punish just as harshly for the same offense.³⁰² Finally, a state-specific approach, would ask whether the federal government punishes more harshly than the State where the criminal conduct occurred.

The national-consensus approach would be inadvisable, if only on pragmatic grounds, as the Court's capital punishment jurisprudence amply demonstrates. The Court has encountered great difficulty in determining when a national consensus has developed against a particular sentencing

302. See *Kennedy v. Louisiana*, 554 U.S. 407, 423, 434 (2008) (forbidding capital punishment for the rape of a child where only seven States permitted it); *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (holding capital punishment unconstitutional for capital offenses committed by those under age eighteen where twenty States allowed the practice); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding capital punishment unconstitutional for mentally retarded capital offenders where twenty States allowed the practice); *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) (holding capital punishment permissible for capital offenses committed by those under age eighteen where twenty-five States permitted execution of seventeen-year-old offenders and twenty-two States permitted execution of sixteen-year-old offenders); *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988) (plurality opinion) (holding capital punishment unconstitutional for capital offenses committed by those under age sixteen where, 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 v. Arizona*, 481 U.S. 137, 154 (1987) (holding capital punishment permissible for felony murder by major participants in the predicate felony who act recklessly where “only 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 v. Wainwright*, 477 U.S. 399, 408 (1986) (forbidding execution of the insane where “no State in the Union permits the execution of the insane”); *Enmund v. Florida*, 458 U.S. 782, 790 (1982) (forbidding capital punishment for some felony murderers where “only 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 opinion) (forbidding capital punishment for the rape of an adult woman where only one jurisdiction authorized such punishment).

practice.³⁰³ In two recent cases, for example, the Court determined that a national consensus had developed against sentencing the mentally retarded and juveniles under the age of eighteen to death, and that these sentencing practices therefore violated the Eighth and Fourteenth Amendments.³⁰⁴ The Court so held even though only sixty percent of the States, and only forty-seven percent of the States authorizing capital punishment, forbade each practice.³⁰⁵ If the latter figure is the appropriate one, the Court's threshold for what constitutes a national consensus is utterly meaningless given that it can be satisfied by less than a majority. And even if all the States are counted, sixty percent can hardly be described as a consensus. In order to manufacture a consensus in these cases where none existed, the Court had to manipulate the numbers by looking to such factors as: how often juries actually impose the death penalty under the circumstances presented;³⁰⁶ "the consistency of the direction of change" among jurisdictions in limiting capital punishment to certain offenses and offenders;³⁰⁷ how "overwhelmingly" such limitations have been approved;³⁰⁸ and "the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime."³⁰⁹ The jurisprudential values of predictability and easy administrability are greatly diminished if the standard is so readily manipulable.³¹⁰

The state-specific approach, while the most novel, is probably also closest to what the Anti-Federalists supposed that they were achieving. If the Cruel and Unusual Punishments Clause was understood as imposing common-law constraints on the federal government's power to punish, and if the common law was understood as varying across the States, then the Anti-Federalists contemplated that the meaning of "cruel and unusual" punishments might also vary by state. This approach is similar to that of Professor Akhil Amar with respect to the Seventh Amendment right to a jury

303. See Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1123–47 (2006) (surveying the shortcomings of the Court's methodology in determining the existence of national consensus); see also Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 587 (2010) ("The Court has been somewhat inconsistent in how it tabulates the number of states adopting or prohibiting a practice that constitutes a consensus against that practice.").

304. *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 321.

305. *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 321.

306. *Roper*, 543 U.S. at 565.

307. *Id.*; *Atkins*, 536 U.S. at 315–16.

308. *Roper*, 543 U.S. at 565.

309. *Atkins*, 536 U.S. at 315.

310. See *id.* at 349 (Scalia, J., dissenting) (characterizing the "consensus" the Court recognized as "contrived").

trial in civil cases.³¹¹ Because the common-law “right of trial by jury” varied from State to State,³¹² Amar interprets the Seventh Amendment’s jury-trial right as being State-specific: if a common-law cause of action is heard in federal court, a jury must be provided if the same case would require a jury in the relevant State.³¹³ The right guaranteed by the Seventh Amendment, according to Amar, “shifts as state law shifts,” across boundaries and over time.³¹⁴

Of course, the Seventh Amendment contains a textual hook absent from the Cruel and Unusual Punishments Clause: the twice-repeated term “common law.” However, neither reference to the common law in the Seventh Amendment refers specifically to the jury-trial right itself. The first simply limits the cases to which the Amendment applies (“suits at common law”) while the second refers to the rules regarding re-examination of a jury’s findings, not the rules governing juries generally. And if, as appears to be the case, the Cruel and Unusual Punishments Clause was contemporaneously understood as imposing a constraint tied to common-law practices, no textual modifier was necessary. Moreover, the term “common law” is not used in the Fourth or Fifth Amendments, which, as Amar points out, “linked constitutional rights to property interests typically created by state law (and thus capable of varying from time to time and state to state).”³¹⁵

Moreover, Americans of the framing period already shared a long history of the use of local norms to moderate what they viewed as the punitive excessiveness of a powerful central authority. For example, one of the “bold and drastic divagations from the common law” in the colonies was “New York’s abandonment of the process of outlawry and of economic sanctions against convicted felons.”³¹⁶ More strikingly, local colonial authorities often bristled at the broad use of capital punishment under English law. There was at least one instance of colonial legislation that defied the sanguinary practice. In 1682, under the leadership of William Penn, the Pennsylvania colony restricted the imposition of capital

311. 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, and no 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.”).

312. See AMAR, *supra* note 194, at 89 (“[T]he right to a civil jury in the late eighteenth century was widely understood as defined only by state-law rules . . . that varied considerably from state to state and were evolving over time.”).

313. See *id.* (“[I]f a state court entertaining a given common-law case would use a civil jury, a federal court hearing the same case . . . must follow . . . that state-law jury right.”).

314. *Id.*

315. *Id.* at 91; see also *Georgia v. Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J., dissenting) (“There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change.”).

316. Goebel, *supra* note 255, at 464.

punishment to cases of premeditated or willful killings, at a time when English law provided for the death penalty for a wide range of felonies.³¹⁷ After several decades during which Pennsylvania resisted pressures from the Crown to bring its criminal laws into conformity with those of England, it finally acceded in 1718.³¹⁸

However, the most significant attempts to make the criminal law less sanguinary in the colonies than the central government preferred were employed on a less systematic basis through juries. From the late-seventeenth century up until the time of the Revolution, colonial criminal codes followed English law in mandating the death penalty in more and more cases.³¹⁹ But both English and colonial juries often resisted. When “the law . . . called for more death than the people would tolerate . . . the people spoke through juries.”³²⁰ In some cases, juries acquitted against the evidence, and in others found defendants guilty only of non-capital offenses.³²¹ This resistance grew such that “[t]he propensity of juries to acquit defendants of property crimes rather than send them to their deaths began to be perceived as a serious problem in the 1760s.”³²² The phenomenon was so widespread that it effectively acted as a veto of some criminal statutes providing for capital punishment.³²³ Moreover, juries using their fact-finding power to make normative determinations as to whether death was an appropriate punishment “was even more entrenched in America than in England.”³²⁴ Thus, the Cruel and Unusual Punishments Clause was adopted in an era of disagreement between local and central authorities over the appropriate harshness of punishments and in which local decision-makers—juries—were recognized as having veto power over the central authority when they deemed it necessary to prevent injustice.

It is true that juries were limited to using this “veto” power in capital cases. In non-capital cases, judges had wide-ranging authority to determine the appropriate punishment less than death, without input from the jury at

317. See Harry E. Barnes, *The Criminal Codes and Penal Institutions of Colonial Pennsylvania*, 11 BULL. FRIENDS' HIST. SOC'Y PHILA. 3, 9 (1922); William Bradford, *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania* 14–16 (1793), reprinted in 12 AM. J. LEGAL HIST. 122, 133–35 (1968); Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 760–61 (1949); Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 145–46 (1999).

318. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 8, 89 (2002); MARCELLO MAESTRO, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM 138 (1973); Barnes, *supra* note 317, at 13–15; Bradford, *supra* note 317, at 16; Keedy, *supra* note 317, at 762–63.

319. See BANNER, *supra* note 318, at 7–9.

320. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2012 (2005).

321. See BANNER, *supra* note 318, at 89–90.

322. *Id.* at 91.

323. Douglass, *supra* note 320, at 2013.

324. *Id.* at 2014.

all.³²⁵ Yet, that is all the more reason that the Cruel and Unusual Punishments Clause would have been thought necessary to calibrate the harshness of federal punishments to local preferences. The power of local juries to essentially determine the penalty in capital cases in accord with local preferences might have been thought sufficiently protected by the Vicinage Clause of the Sixth Amendment.³²⁶ But where the judge sentenced without any input from the jury, additional constraints were required.³²⁷ The main source of those constraints was the Cruel and Unusual Punishments Clause, which in capital cases, supplemented, and in non-capital cases, acted as a surrogate for, the jury's infusion of local values on criminal justice policy.

B. FEDERAL INCORPORATION OF STATE LAW IN THE FRAMING PERIOD AND BEYOND

It would not have seemed strange to the framers and ratifiers of the Eighth Amendment that the punishment available for a federal crime could be limited by state law. From the revolutionary period through the early-nineteenth century, confederal and then federal law in some instances explicitly incorporated state substantive criminal law. Indeed, at least one such example of this phenomenon survives to the present day.

In 1781, ten years before the Bill of Rights was adopted, Congress, under the Articles of Confederation, passed a statute providing for the trial and punishment of piracies on the high seas. The proceedings, however, were to take place in state court with the procedural and substantive law, including the available punishment, to "be that 'as by the laws of the said State is accustomed.'"³²⁸ Of course, this is easier to imagine under a regime such as the Articles of Confederation, for the Constitution effected a seismic shift in the relationship between the States as individual and as collective entities. But it was precisely because of that shift that the Bill of Rights was adopted in an attempt to revert some power back to the States.

Moreover, Professor Palmer has argued that in the first few years of the Republic, when federal courts tried offenses against the law of nations, they applied state law.³²⁹ According to Palmer, section 34 of the Judiciary Act of

325. See *id.* at 2016–17.

326. See U.S. CONST. amend. VI ("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 . . .").

327. See AMAR, *supra* note 194, 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.").

328. Goebel, *supra* note 255, at 482 (quoting 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 354 (Worthington Chauncey Ford ed., 1904)); see also Palmer, *supra* note 279, at 298 ("[P]rior to the Constitution . . . the states justifiably prosecuted crimes against the confederacy.").

329. See Palmer, *supra* note 279, at 272.

1789, which required “[t]hat the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply,”³³⁰ was originally read as referring not only to civil suits but to criminal actions as well.³³¹ Thus, *Henfield’s Case*,³³² a prosecution for a violation of the neutrality the United States observed between warring England and France, was brought as a prosecution for a violation of the law of nations because no federal criminal statute outlawed such a breach of neutrality.³³³ Because the law of nations was a part of the common law, the case was brought pursuant to criminal common law. However, although the case is “normally cited as proof of the early judiciary’s belief in a federal common law of crime,”³³⁴ according to Palmer, *Henfield* was actually brought pursuant to Pennsylvania common law.³³⁵ For instance, on a critical point of law, prosecutors cited *Respublica v. De Longchamps*,³³⁶ a 1784 Pennsylvania case, which stood for the proposition that “the law of nations was part of the law of Pennsylvania.”³³⁷ Additionally, the parties and the court all considered binding a provision of the Pennsylvania Constitution.³³⁸ Later, Attorney General Edmund Randolph, one of the prosecutors in *Henfield*, stated that Pennsylvania law had supplied the substantive law and, critically, the available punishment in that case.³³⁹

The incorporation of state criminal law to govern federal criminal actions was formalized in 1825 with the Assimilative Crimes Act (“ACA”).³⁴⁰ The ACA provides that, where a criminal offense takes place on federal territory within the borders of a State, and no other federal criminal statute applies, the offense shall be punished under federal law to the same extent that the offense could be punished pursuant to state law.³⁴¹ Although the ACA is rarely used today because of the large number of specific federal criminal provisions,³⁴² it is still in effect.³⁴³ Thus, from 1825 up through

330. Judiciary Act of 1798, ch. 20, § 34, 1 Stat. 73, 92.

331. See Palmer, *supra* note 279, at 272, 294; see also *id.* at 297 (“Nothing in the wording of § 34 would indicate that it did not apply to criminal matters.”); accord DU PONCEAU, *supra* note 250, at 36–39 (contending that section 34 was meant to apply to criminal matters).

332. *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360).

333. See Palmer, *supra* note 279, at 291.

334. *Id.*

335. See *id.* at 294–97.

336. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (O. & T. Pa. 1784).

337. Palmer, *supra* note 279, at 294.

338. See *id.* at 295–96.

339. See MONCURE DANIEL CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH 185 (1888) (“[T]he laws of Pennsylvania, within whose boundaries the offence was committed, comprehending the common law, would aid the treaty [of neutrality], which had specified no penalty for *Henfield’s* crime . . .”); accord Palmer, *supra* note 279, at 295.

340. Assimilative Crimes Act, ch. 65, § 3, 4 Stat. 115, 115 (1825).

341. See 18 U.S.C. § 13 (2006).

342. See *supra* Part I.A.

present day, punishments for violations of federal law may well differ by state. Indeed, pursuant to the ACA, some acts which are federal crimes in one locale could be perfectly legal in others, depending upon the underlying state law.

Nor would the “reverse preemption” effect of using state law to mark the outer bounds of federal punishment offend the Supremacy Clause.³⁴⁴ It was precisely because the Supremacy Clause was thought by the Anti-Federalists to portend the expansion of federal power and the annihilation of the States that they demanded the Bill of Rights.³⁴⁵ They specifically cited the Supremacy Clause as the death knell for states’ rights. As Anti-Federalist Centinel ominously warned:

Lest the foregoing powers should not suffice to consolidate the United States into one empire, the Convention[,] as if determined to prevent the possibility of a doubt, as if to prevent all clashing by the opposition of state powers, as if to preclude all struggle for state importance, as if to level all obstacles to the supremacy of universal sway, which in so extensive a territory, would be an iron-handed despotism, [included the Supremacy Clause].³⁴⁶

The Anti-Federalists were particularly worried that, because the Supremacy Clause expressly made federal law supreme even to state constitutions, state bills of rights would no longer adequately protect individual rights. As Cincinnatus put it: “[T]his new system, with one sweeping clause [the Supremacy Clause], bears down every constitution in the union, and established its arbitrary doctrines, supreme and paramount to all bills and

343. See 18 U.S.C. § 13.

344. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

345. See Storing, *supra* note 235, at 28 (“The broad grants of power, taken together with the ‘supremacy’ and ‘necessary and proper’ clauses, amounted, the Anti-Federalists contended, to an unlimited grant of power to the general government to do whatever it might choose to do.”); Jeremiah Van Rensselaer, *Address of the Albany Antifederal Committee* (Apr. 26, 1788), reprinted in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 122, 123 (characterizing the Supremacy Clause as “[a] sweeping clause, which subjects every thing to the controul of the new government”); *A Review of the Constitution Proposed by the Late Convention by a Federal Republican* (1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 65, 80 (asserting that the Supremacy Clause “proves clearly that the whole country is to be comprised into one large system of lordly government”); Essay by Samuel (Jan. 10, 1788), reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 191, 194 (characterizing the Supremacy Clause as “a bold and decisive stroke, whereby all State authority is at once absorbed, or annihilated”).

346. Letter from Centinel to the People of Pennsylvania, *supra* note 207, at 168 (first alteration in original).

declarations of rights”³⁴⁷ Furthermore, at least one Anti-Federalist writer explicitly connected the Supremacy Clause with the States’ loss of control over the domain of crime and punishment. Brutus wrote that the Supremacy and Necessary and Proper Clauses would together render the federal government “a complete one, and not a confederation,” with full power to “declare offences[] and annex penalties.”³⁴⁸ The Bill of Rights was a hedge against this awesome power, a “reservation,” as Centinel put it, “in favor of the rights of the separate states.”³⁴⁹ That is to say, to the extent that the Cruel and Unusual Punishments Clause—or any provision in the Bill of Rights—hems in the federal government by subjecting it to state norms, it is a trump on the Supremacy Clause.

Nor is it a valid criticism that any federalism constraint in the Cruel and Unusual Punishments Clause is no longer relevant in an “age of ‘cooperative federalism,’ where the Federal and State Governments are waging a united front against many types of criminal activity.”³⁵⁰ It is true that state and federal law enforcement are today far more likely to work in tandem than to be antagonistic to one another.³⁵¹ Thus, one might argue that, to the extent that the Clause places a federalism constraint on the federal government that links permissible federal punishments to state norms, the States are, generally speaking, cheerfully willing to overlook such a constraint. But this argument misses the essential point that even the structural constraints embedded in the Constitution exist only to further the end of human liberty.³⁵² Thus, such constraints can be pressed by federal defendants as a kind of third-party beneficiary, even though the primary beneficiaries, the States, might not be too troubled by federal sentences that exceed state norms.

347. Letter from Cincinnatus to James Wilson (Nov. 8, 1787), *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 10, 13; *see also* *Essay by the Impartial Examiner to the Free People of Virginia* (Feb. 20, 1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 173, 178 (asserting that, given the Supremacy Clause, the Constitution would “abolish[] the present independent sovereignty of each state,” without guaranteeing “the bill of rights” of each State); *Essay by One of the Common People* (Dec. 3, 1787), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 120, 121 (asserting that, as a result of the Supremacy Clause, “[i]n the course of a few years our state legislature will be annihilated, together with our bill of rights”).

348. Letter from Brutus to the Citizens of the State of New York (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 13, at 363, 365.

349. Letter from Centinel to the People of Pennsylvania, *supra* note 207, at 169.

350. *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55–56 (1964).

351. *See, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 31–33 (2011) (discussing the typically non-adversarial negotiations that take place between state and federal law enforcement over activity that violates both state and federal criminal law).

352. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“Federalism secures the freedom of the individual.”).

For this proposition, one need go no further than the recent unanimous decision in *Bond v. United States*.³⁵³ There, the U.S. Supreme Court held that the claim that a criminal statute was beyond the power of the federal government to enact can be pressed by anyone charged with such an offense, irrespective of whether the claim is couched in terms of a lack of Article I power or of an impingement upon that residuum of State sovereignty protected by the Tenth Amendment.³⁵⁴ The Court wrote:

The limitations that federalism entails are not . . . a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.³⁵⁵

Thus, that States might willingly accept federal incursion into what the Constitution guarantees as an exclusive domain of the States is irrelevant to whether such an incursion violates the federal Constitution, whether the claim is made under Article I or the Eighth or Tenth Amendments.

CONCLUSION

As applied to federal defendants, current doctrine on the Cruel and Unusual Punishments Clause is exactly backwards. That doctrine has developed in a way that is extraordinarily deferential to the States, driven by concerns of federalism. The federal courts understandably do not want to dictate to the States—the entities primarily responsible for the administration of criminal justice in this country—what their criminal justice policy should be. Even with the explosion of federal criminal law, criminal justice is overwhelmingly a state issue. This means not only that state criminal justice policy should be largely untouched by the subjective preferences of federal judges, but also that wide variations in the philosophy and practice of criminal justice are to be expected, even desired.

These very same concerns undergird the Eighth Amendment itself. At its core is a judgment that criminal justice is largely better left to the States, that variations among the States are a given, and that when the federal government prosecutes crime, its power to punish should be delimited so as to respect the primacy of the States in this sphere and to preserve the diversity of approaches to criminal justice.

353. *Id.*

354. See U.S. CONST. 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.”).

355. *Bond*, 131 S. Ct. at 2364 (citation omitted).

Yet, applying a deferential, federalism-driven version of the Cruel and Unusual Punishments Clause to *federal* offenders stands the Eighth Amendment on its head. Far from ensuring the primacy of state criminal justice systems, this deferential reading of the Eighth Amendment in federal cases permits Congress to subordinate state preferences to those of the federal government. Far from respecting the diversity of approaches that the States can and do take to criminal justice, current Eighth Amendment jurisprudence, as applied to federal offenders, permits Congress to create a one-size-fits-all, nationwide standard for what are typically local problems. If not for the dire consequences for so many federal offenders, the irony would be delicious.