Harmelin's Faulty Originalism

Michael J.Z. Mannheimer
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ABSTRACT

In Harmelin v. Michigan, in 1991, Justice Scalia, writing only for himself and Chief Justice Rehnquist, set forth the claim that the Cruel and Unusual Punishments Clause, as understood in 1791, did not require proportionality in sentencing. Instead, he argued, it was understood at that time as addressing only certain methods of punishment. Twenty-one years later, the plurality opinion in Harmelin remains the foundation for conservative originalist arguments against the notion that the Clause forbids disproportionate punishment. It has continued to be cited by its adherents, Justices Scalia and Thomas, as recently as the last week of the October 2011 Term. Meanwhile, those who contend that the Eighth Amendment prohibits disproportionality in sentencing have generally conceded the originalist position, and Harmelin’s originalist arguments have gone virtually unchallenged.

Until now. This Essay contains a point-by-point refutation of the arguments made by Justice Scalia in Harmelin. It demonstrates that the original understanding of the Cruel and Unusual Punishments Clause is not nearly as clear as the Harmelin plurality opinion pretends. Moreover, to the extent that there was any consensus in 1791, it appears that the framers and ratifiers of the Clause contemplated that it encompassed some requirement of proportionality. In any event, the notion that the Clause was clearly understood as forbidding only certain methods of punishment is demonstrably false.

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Justice Thomas wrote in 2010: “It is by now well settled that the Cruel and Unusual Punishments Clause was originally understood as prohibiting [only] torturous `methods of punishment.’”1 In the world of advertising, this might be called “puffery.”2 In the academic world, there are stronger words for such a demonstrably untrue claim. It has been twenty-one years since Justice Scalia penned his plurality opinion in Harmelin v. Michigan,3 on which Justice Thomas’ claim is based, asserting that the Cruel and Unusual Punishments Clause encompasses no requirement of proportionality. Yet, since that time, no more than three of the sixteen Justices who have sat on the Court have adhered to this view. Moreover, this position has attracted only a smattering of support from the academic world.4

One might forgive Justice Thomas for this bit of puffery, as Justice Scalia’s plurality opinion in Harmelin has gone virtually unchallenged. In particular, in the more than two decades since that opinion was written, no one has attempted to systematically refute the arguments that Justice Scalia set forth purporting to show that the Cruel and Unusual Punishments Clause was understood in 1791 as covering only methods of punishment.5 Judges and commentators

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1 Graham v. Florida, 130 S.Ct. 2011, 2044 (2010) (Thomas, J., dissenting) (quoting Harmelin v. Michigan, 501 U.S. 957, 979 (1991) (plurality)). I have added the word “only” to make explicit what Justice Thomas makes clear just four sentences later: his belief that “there is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing.” Id.


5 While John F. Stinneford, Rethinking Proportionality Under the Cruel and Unusual Punishments Clause, 97 VA. L. REV. 899 (2011), is a recent, welcome
have all but ceded the originalism argument and have looked elsewhere for support of an Eighth Amendment proportionality principle.

This Essay constitutes the first point-by-point refutation of Justice Scalia’s arguments in Harmelin. Part I briefly discusses Harmelin and its continuing influence, in order to demonstrate the danger of letting its faux originalism go unchallenged. Part II then outlines and deconstructs the four major arguments Justice Scalia set forth in his plurality opinion in Harmelin. With regard to some of these arguments, this Essay demonstrates that the evidence is not entirely clear either way whether the Cruel and Unusual Punishments Clause was understood in 1791 as covering disproportionality of punishments. One could stop there and be satisfied that it is by no means “well settled that the Cruel and Unusual Punishments Clause was originally understood as prohibiting [only] torturous methods of punishment.” But other evidence that Justice Scalia chose to ignore flatly refutes the notion that the Clause was understood as covering only methods of punishment.

I. The Enduring Significance of Harmelin

In Harmelin v. Michigan, the petitioner claimed that his sentence of life imprisonment without parole for possession of more than 650 grams of cocaine violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, as incorporated by the Fourteenth, because it was disproportionate to the crime.6 The Court rejected that argument 5-4. However, no opinion commanded a majority of the Justices. Justice Kennedy, joined by Justices O’Connor and Souter, in a concurring opinion that later assumed the addition to the literature, he focuses on adducing his own evidence of what “cruel and unusual” meant in 1791 rather than in directly confronting each of Justice Scalia’s arguments.

6 501 U.S. 957, 961 (1991) (plurality). Harmelin also claimed that the sentence violated the Eighth Amendment, as incorporated, because it was mandatory. See id. at 961-62. The Court rejected that claim. See id. at 994-96.
status of law, wrote that the Cruel and Unusual Punishments Clause encompassed a bar on carceral punishments that are “grossly disproportionate” to the crime of conviction, but that the punishment meted out to Harmelin did not violate that principle. In an opinion joined only by himself and Chief Justice Rehnquist, Justice Scalia laid out the case for the position that the Clause does not encompass a proportionality requirement at all. Rather, the argument goes, the Clause forbids only certain methods of punishment, which cannot be inflicted for any type of offense. The foundation of this argument is the claim that the Clause was not understood in 1791 as encompassing a principle of proportionality.

Justice Scalia’s suggestion that the Eighth Amendment contains no proportionality requirement was a break with the past. Eleven years earlier, in *Rummel v. Estelle*, the Court rejected a claim that a prison sentence was unconstitutionally disproportionate, but stopped short of concluding that the Cruel and Unusual Punishments Clause contains no proportionality principle whatsoever. Just three

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8 See *Harmelin*, 501 U.S. at 1001-05 (Kennedy, J., concurring in part and concurring in the judgment).

9 By later joining the plurality opinion in *Ewing*, 538 U.S at 14, which recognized a narrow proportionality principle, Chief Justice Rehnquist distanced himself from the position expressed by Justice Scalia in *Harmelin*.

10 See *Harmelin*, 501 U.S. at 993 (plurality).

11 See Atkins v. Virginia, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting) (“The Eighth Amendment is addressed to always-and-everywhere ‘cruel’ punishments, such as the rack and the thumbscrew.”).

12 445 U.S. 263, 274 (1980) (“[O]ne 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.”).
years after that, in *Solem v. Helm*, the Court found that the Clause did indeed contain such a precept when it held that a sentence of life imprisonment without parole was disproportionate to the crime of “uttering a ‘no account’ check for $100” as a seventh felony. The Court has held on five occasions, before and since *Harmelin*, that a death sentence was disproportionate to the offense or the offender in violation of the Eighth and Fourteenth Amendments.

Following *Harmelin*, Justice Thomas, who joined the Court subsequent to that case, has indicated his agreement with Justice Scalia’s opinion in *Harmelin*. The opinion has been cited a number of times by Justices Scalia and Thomas – as recently as June 25, 2012 – for the proposition that the Cruel and Unusual Punishments Clause, as originally understood, did not contain a proportionality

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14 See *Kennedy v. Louisiana*, 554 U.S. 407, 423, 434 (2008) (forbidding capital punishment for the rape of a child); *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (holding capital punishment unconstitutional for capital offenses committed by those under age eighteen); *Atkins*, 536 U.S. at 321 (holding capital punishment unconstitutional for mentally retarded capital offenders); *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (forbidding capital punishment for felony murderers whose participation in felony and culpability for killing fell below certain threshold levels); *Coker v. Georgia*, 433 U.S. 584, 595–96 (1977) (plurality) (forbidding capital punishment for the rape of an adult woman). In *Harmelin*, Justice Scalia indicated that he would grudgingly accept this line of case law but would limit it to the capital context. See 501 U.S. at 994 (plurality) (“Proportionality review is one of several respects in which we have held that `death is different,’ and have imposed protections that the Constitution nowhere else provides.”).

requirement.¹⁶ In short, *Harmelin* is not going away. It is therefore important that its faulty originalism be exposed.

**II. DECONSTRUCTING HARMELIN**

Justice Scalia’s originalist arguments in *Harmelin* fall into four general categories. First, he looked at the origin and surrounding circumstances of the English Bill of Rights of 1689, the progenitor of our own Cruel and Unusual Punishments Clause.¹⁷ Second, he discussed ratification era statements regarding cruel and unusual punishments.¹⁸ Third, he performed a textual analysis of the Clause, and a textual comparison between it and the analogous state constitutional provisions that were contemporaneous with the Clause.¹⁹ Finally, he looked at nineteenth-century academic and state court interpretations of federal and state constitutional provisions forbidding cruel and unusual punishment.²⁰ While some of these arguments are better than others, Justice Scalia ultimately fails to carry the burden of showing that the Cruel and Unusual Punishments Clause was originally understood to address only methods of punishment.

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¹⁷ See *Harmelin*, 501 U.S. at 969-74 (plurality).

¹⁸ See *id.* at 979-80 (plurality).

¹⁹ See *id.* at 975-78 (plurality).

²⁰ See *id.* at 981-85 (plurality).
A. Origins of the 1689 English Bill of Rights

In *Harmelin*, Justice Scalia recognized that the Cruel and Unusual Punishments Clause was taken from language in the Virginia Declaration of Rights, which in turn was taken verbatim from the English Bill of Rights of 1689. Thus, the starting point for determining the meaning of our own Clause is the analogous Clause in the 1689 Bill and the circumstances surrounding its enactment.

It is well settled among courts and commentators that the Cruel and Unusual Punishments Clause of the 1689 Bill was a reaction to some of the excesses of Lord Chief Justice Jeffreys of King’s Bench, and in particular the Titus Oates affair. In 1679, Oates, a Protestant cleric, committed perjury in the treason trial of a number of Catholics who supposedly plotted to assassinate King Charles II. As a result, more than a dozen innocent men were executed. Six years later, Oates was convicted of perjury before

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21 See id. at 966 (plurality).

22 See id. at 967 (plurality).


25 See *Harmelin*, 501 U.S. at 969 (plurality); Baniszewski, supra note 24, at 932; Claus, supra note 24, at 136; Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:* The Original Meaning,” 57 Cal. L. Rev. 839, 857 (1969); Mannheimer, supra note 23, at 833; Mulligan, supra note 24, at 641; Schwartz, supra note 24, at 379.
Jeffreys.\textsuperscript{26} Jeffreys sentenced Oates to a fine of two-thousand marks, to be defrocked, to be “whipped from Aldgate to Newgate”\textsuperscript{27} the following Wednesday and “from Newgate to Tyburn”\textsuperscript{28} the following Friday, to be pilloried four times a year, and to be imprisoned for life.\textsuperscript{29}

After the Cruel and Unusual Punishments Clause of the English Bill was adopted in 1689, Oates asked Parliament to relieve him from his sentence.\textsuperscript{30} The House of Commons voted to grant him relief and issued a report explaining their conclusion that the sentence violated the Cruel and Unusual Punishments Clause.\textsuperscript{31} The House of Lords, however, disagreed and Oates was denied relief.\textsuperscript{32} But the dissenter in the House of Lords also issued an opinion providing a number of reasons why the sentence violated the Clause.\textsuperscript{33}

\textsuperscript{26} See Harmelin, 501 U.S. at 969 (plurality); Baniszewski, supra note 24, at 932; Granucci, supra note 25, at 857; Mannheimer, supra note 23, at 833; Mulligan, supra note 24, at 640-41.

\textsuperscript{27} This was a distance of about one-and-a-half miles. See Leonard W. Levy, Origins of the Bill of Rights 236-37 (1999).

\textsuperscript{28} This was a distance of about two miles. See id.

\textsuperscript{29} The Second Trial of Titus Oates, in 10 A 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. 1316-17 (T.B. Howell ed. 1816) [hereinafter Second Trial of Titus Oates].

\textsuperscript{30} See Second Trial of Titus Oates, supra note 29, at col. 1317; see also Harmelin, 501 U.S. at 970 (plurality); Baniszewski, supra note 24, at 933; Claus, supra note 24, at 139; Mannheimer, supra note 23, at 834; Schwartz, supra note 24, at 379.

\textsuperscript{31} See Harmelin, 501 U.S. at 971 (plurality); Baniszewski, supra note 24, at 933; Claus, supra note 24, at 139; Mannheimer, supra note 23, at 834; Schwartz, supra note 24, at 379.

\textsuperscript{32} See Baniszewski, supra note 24, at 933; Claus, supra note 24, at 140; Mannheimer, supra note 23, at 834.

\textsuperscript{33} See Second Trial of Titus Oates, supra note 29, at col. 1325.
According to Justice Scalia, these two documents demonstrate that a punishment was not considered to violate the 1689 Cruel and Unusual Punishments Clause based on disproportionality but only “because it [was] `out of [the Judges’] Power,’ `contrary to Law and ancient practice,’ without `Precedents’ or `express Law to warrant,’ `unusual,’ `illegal,’ or imposed by `Pretence to a discretionary Power.’”34 Thus, according to Justice Scalia, the Clause “was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition,” unless a deviation from the common law was authorized by Parliament.35 He considered it “most unlikely” that the Clause forbade disproportionate punishments.36

But a constraint that judges sentence only as authorized by common law or statute and a constraint that they impose punishments that are not disproportionate are not mutually exclusive. To be sure, a punishment might be outside of the power of the judge to inflict because it is of a particular type. For example, the defrocking of Oates clearly violated this precept. As the dissenting Lords put it:

[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.37

The House of Commons likewise wrote in its report that “it was surely of ill Example for a Temporal Court to give Judgment, That a

34 Harmelin, 501 U.S. at 973 (plurality).
35 Id. at 974 (plurality).
36 Id.
Clerk be divested of his Canonical Habits; and continue so divested during his Life.”

But a punishment might also be outside the statutory or common-law authority of a judge to impose because it is excessive. Many of the statements made in the two reports seem to point to this meaning. For example, the punishment is described as “extravagant” and “exorbitant” in the Commons report, which indicates the view of the Commons that at least some aspects of the punishment violated the Clause because they were excessive. Moreover, the Commons report also complained that: “It was of ill Example, and unusual, That an Englishman should be exposed upon a Pillory, so many times a Year, during his Life.” And Sir William Williams commented in the House of Commons that what was objectionable about Oates’ punishment was the accumulation of so many different aspects of punishment to be inflicted on one person. Indeed, because fine, imprisonment, pillorying, and whipping were all commonly used punishments at the time, the better view is that it was the amount of punishment and the combination of punishments that was thought contrary to the Clause. Accordingly, “Justice Scalia’s attempt to separate the unprecedented nature of Oates’

38 Harmelin, 501 U.S. at 972 (plurality).


40 Stinneford, supra note 5, at 934.


42 See Claus, supra note 24, at 140 (“‘There may be precedent for whipping, but for all these parts in one Judgment, let any man give us a Precedent to square with that Judgment.’” (quoting 9 DEBATES OF THE HOUSE OF COMMONS 291 (Anchitell Grey ed. 1763)).

43 See id. at 143 (“The methods mandated by the Oates . . . judgments were wholly unremarkable.”): Granucci, supra note 25, at 859 (observing that life imprisonment, whipping, and fines, were commonly imposed in 1689); John 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.”).
punishments from their excessiveness was mistaken.” The punishments were beyond the judge’s power to impose because they were excessive.

In order to come to a contrary conclusion, Justice Scalia simply ignored five words from the statement of the dissenting Lords that show beyond peradventure that the Lords were objecting to the excessiveness of the punishment for the crime committed. The dissenting Lords wrote “that . . . there is no precedents [sic] to warrant the punishments of whipping and committing to prison for life, for the crime of perjury . . .” Thus, their complaint was not that whipping and life imprisonment were unauthorized modes of punishment, but only that they were unauthorized – that is, excessive – for the crime of conviction. Justice Scalia’s opinion in Harmelin simply ignored this.

Justice Scalia did make two trenchant points that tend to show that the 1689 Cruel and Unusual Punishments Clause did not forbid sentences that were disproportionately harsh in relation to the crimes committed. First, he suggested that, given that Oates’s perjuries led to the deaths of at least fifteen innocent men, his sentence, harsh as it was, was not disproportionate to the crime. Second, he observed that England continued for well over a century after 1689 to punish over 200 crimes with death. Justice Scalia was correct to suggest that these examples indicate that the 1689 Clause did not forbid punishment that was disproportionate to crime severity. Similarly, Justice Scalia keenly observed that the First

44 Stinneford, supra note 5, at 934.
45 Second Trial of Titus Oates, supra note 29, at col. 1325.
47 Similarly, Parr, supra note 4, at 44, entirely ignores five of the six paragraphs of the dissenting Lords’ statement.
49 See id. at 974-75 (plurality).
Congress, after proposing the Eighth Amendment to the States, prescribed death as the penalty for such disparate crimes as forgery of United States securities and murder.\(^{50}\) This, too, militates toward a conclusion that our Cruel and Unusual Punishments Clause, like its predecessor, was not understood as requiring proportionality between punishment severity and crime gravity. It does not rule out, however, a different type of proportionality principle: that a punishment must not be excessive compared to some benchmark other than the gravity of the crime. This is a far cry from Justice Scalia’s conclusion that “[t]he Eighth Amendment is addressed [only] to always-and-everywhere ‘cruel’ punishments, such as the rack and the thumbscrew.”\(^{51}\)

B. Statements Made During the Ratification Process

Justice Scalia was on a somewhat surer footing when he asserted that statements made during the ratification process demonstrate that the framers and ratifiers of the Eighth Amendment understood the Cruel and Unusual Punishments Clause to forbid only certain methods of punishment. He quoted Abraham Holmes’ and Patrick Henry’s comments opposing ratification of the Constitution in the Massachusetts and Virginia ratifying conventions, respectively. Holmes complained that

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

> What gives an additional glare of horror to these gloomy circumstances is . . . that Congress [is] nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on

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\(^{50}\) See id. at 980-81 (plurality).

them, but that racks and gibbets may be amongst the most mild instruments of their discipline.\textsuperscript{52}

Similarly, Henry, after reminding his fellow delegates of Virginia’s own provision against cruel and unusual punishments, lamented the absence of a similar provision in the proposed national Constitution: “In this business of legislation, your members of Congress will lose the restriction of not . . . inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? – That they would not admit of tortures or cruel and barbarous punishment.”\textsuperscript{53}

Yet neither of these statements can be read to exclude a proportionality principle. These statements suggest that forbidding certain methods of punishment was foremost in the minds of at least two members of the generation that framed and ratified the Eighth Amendment. But they do not exclude the possibility that the framers and ratifiers also were concerned with punishments that were excessive. Indeed, the statements fit comfortably with the idea that those who proposed and ratified the Eighth Amendment were mainly concerned with a different type of proportionality principle: that federal punishments not be more severe than those meted out by the States, whether in the method of punishment or otherwise.\textsuperscript{54}

Moreover, the suggestion that the meaning of the Cruel and Unusual Punishments Clause is limited by the few statements made on the subject during the ratification period proves too much, given Henry’s remarks immediately following those quoted by Justice Scalia in his \textit{Harmelin} plurality opinion:

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2 \textsc{Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution} 111 (2d ed. 1881) (emphases omitted).
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\textsc{Speech of Patrick Henry (June 16, 1788), reprinted in 5 \textsc{Herbert J. Storing, The Complete Anti-Federalist} 249 (1981)}.
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\textit{See generally} Mannheimer, supra note 13.
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But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany – of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confessions by torture, in order to punish with still more relentless severity.\(^{55}\)

Henry thus equated “punishment” with the practice of torturing to extract a confession of a crime. Yet the Supreme Court has squarely rejected the notion that “punishment” within the meaning of the Cruel and Unusual Punishments Clause can occur before a criminal conviction is obtained.\(^{56}\) Thus, if we limit our understanding of cruel and unusual punishments based on Henry’s remarks, we would be left with the paradox that the framers and ratifiers of the Clause meant it to apply primarily, or even exclusively, in a context in which the Supreme Court has firmly denied that the Clause has any application whatsoever.

C. Textual Points

Justice Scalia also relied on a number of textual points to show that the phrase “cruel and unusual” could not have encompassed a proportionality requirement. First, he observed that the constitutions of New Hampshire, Pennsylvania, and South Carolina each contained a provision requiring that punishments be made “in general more proportionate to the crimes”\(^{57}\) or

\(^{55}\) Speech of Patrick Henry (June 16, 1788), reprinted in 5 Storing, supra note 53, at 249 (emphasis added).

\(^{56}\) See Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) (“[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt . . . .”).

\(^{57}\) Harmelin v. Michigan, 501 U.S. 957, 977 (1991) (plurality) (quoting PA. CONST. § 38 (1776); S.C. CONST., Art. XL (1778)).
“proportioned to the nature of the offense.”58 In addition, the New Hampshire Constitution, like the Ohio Constitution adopted only 12 years after the Eighth Amendment was ratified, contained both a proportionality provision and a ban on “cruel and unusual” (or “cruel or unusual”) punishments.59 Had a ban on cruel and unusual punishments been thought to have encompassed a proportionality requirement, the argument goes, the latter provision would have been superfluous.

The fatal flaw of this argument is that it conceives of only one kind of excessiveness: excessiveness of the punishment when compared to the crime. But the Cruel and Unusual Punishments Clause might encompass a principle of proportionality that uses as its benchmark of excessiveness something other than the gravity of the offense. If so, then it would not be odd at all to include two separate provisions in a state constitution: one forbidding punishments disproportionate to the gravity of the offense and one forbidding punishments disproportionate in some other way.60

Justice Scalia also pointed to the Excessive Fines Clause of the Eighth Amendment to show that the Cruel and Unusual Punishments Clause was not intended to address excessiveness of sentences. Because fines are a type of punishment, the arguments goes, it would be superfluous to prohibit excessive fines, and then go on to prohibit “cruel and unusual punishments” if that term itself forbade excessive sentences, including fines. Thus, reading a

58 Id. (quoting N.H. BILL OF RIGHTS Art. XVIII (1784)).

59 See id. at 977-78 (plurality) (citing N.H. BILL OF RIGHTS Arts. XVIII, XXXIII (1784); OHIO CONST., Art. VIII, ss. 13, 14 (1802)).

60 The same is true of those state constitutions adopted some time after 1791 to which Justice Scalia refers that also contained both a “cruel punishments” provisions and a proportionality requirement. See Harmelin, 501 U.S. at 982 (plurality). Stinneford, supra note 5, at 955-58, provides an additional explanation for the two types of provisions: the “cruel and unusual punishments” provisions acted as constraints upon legislative excess in formulating punishments, while the “proportionate punishment” provisions acted as guides for further legislative reform.
proportionality principle into the Cruel and Unusual Punishments Clause would render the Excessive Fines Clause superfluous.\textsuperscript{61}

This argument is similarly flawed in that it conceives of excessiveness as necessarily using the gravity of the crime as its benchmark. But the primary concern of the Excessive Fines Clause is something completely different. It forbids the excessiveness of fines \textit{in relation to the defendant’s ability to pay}. At common law, one who could not pay a fine was imprisoned until he was able to pay. Thus, absent a ban on the imposition of fines that are beyond the ability of the defendant to pay, any offense for which a fine is a prescribed punishment could in reality be punished by indefinite – even perpetual – imprisonment.\textsuperscript{62} Indeed, the history of England is replete with such examples.\textsuperscript{63} The Excessive Fines Clause was meant to curb such practices.\textsuperscript{64} Accordingly, reading the Cruel and

\textsuperscript{61} Harmelin, 501 U.S. at 978 n.9 (plurality).

\textsuperscript{62} See 4 William Blackstone, Commentaries on the Laws of England 373 (1769) (“[C]orporal punishment, or a stated imprisonment . . . is better than an excessive fine, for that amounts to imprisonment for life.”).

\textsuperscript{63} See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 267 (1989) (“In the 1680’s . . . some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed.”); Claus, supra note 24, at 137-38 (discussing cases of Samuel Johnson and Sir Samuel Barnardiston in 1683 and 1684, respectively).

\textsuperscript{64} See United States v. Bajakajian, 524 U.S. 321, 354-55 (1998) (Kennedy, J., dissenting) (“One of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor’s prison.”); Browning-Ferris Indus., 492 U.S. at 267. This explains why the ban on excessive fines is coupled in the Eighth Amendment with the ban on excessive bails, see Bajakajian, 524 U.S. at 355 (Kennedy, J., dissenting) (“Concern with imprisonment may explain why the Excessive Fines Clause is coupled with, and follows right after, the Excessive Bail Clause.”), given that the main function of bail is not to somehow approximate the gravity of the crime alleged but to assure the defendant’s return to court for trial. Only by calibrating bail with the defendant’s ability to pay can courts assure that it is high enough to discourage flight, and subsequent forfeiture of the bond, but not so high as to result in lengthy pre-trial detention. The Excessive Bail Clause, similarly to the Excessive Fines Clause, serves this purpose. Notably, Justice Kennedy’s dissent in Bajakajian was joined by Justice Scalia. See 524 U.S. at 344.
Unusual Punishments Clause to encompass a disproportionality component does not render the Excessive Fines Clause superfluous, as the two Clauses contemplate as evils two very different types of excessiveness.

As a final textual point, Justice Scalia contends that “it would seem quite peculiar to refer to cruelty and unusualness for the offense in question, in a provision having application only to a new government that had never before defined offenses, and that would be defining new and peculiarly national ones.”65 However, as Tom Stacy aptly observed, “[t]his argument rests on an implausible view that, in the eyes of the Founders, new offenses enacted by the federal government would be incommensurable with existing offenses and their punishments.”66 Indeed, of the offenses contained in the nation’s first crime act, most if not all were comparable to existing common-law crimes, such as running away with a ship or vessel (comparable to common-law larceny), forgery of United States securities (comparable to common-law larceny by trick), and murder on the high seas (comparable to common-law murder).

Moreover, the Anti-Federalists, in demanding inclusion of what became the Eighth Amendment, did not seem concerned with “peculiarly national” crimes. To the contrary, as demonstrated by Patrick Henry’s memorable statements in the Virginia ratifying convention – again, in a portion of his speech omitted by Justice Scalia in Harmelin – some worried far more about Congress’s potential creation of new crimes that mirrored those under state law but that would be punished more severely:

65 Harmelin, 501 U.S. at 978 (plurality).

66 Stacy, supra note 46, at 513 n.215; see also Harmelin, 501 U.S. at 1011 (White, J., dissenting) (“[T]he people of the new Nation had been living under the criminal law regimes of the States, and there would have been no lack of benchmarks for determining unusualness.”).

67 Act of Apr. 30, 1790, ch. 9, § 8.

68 See id. § 14.

69 See id. § 8.
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.\(^{70}\)

Likewise, George Mason appeared concerned that the “new crimes” created by Congress pursuant to the Necessary and Proper Clause\(^ {71}\) would extend to virtually all 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 proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.\(^ {72}\)

Thus, Justice Scalia’s argument underestimates the prescience of many during the ratification period in predicting that Congress would use its powers to create a federal criminal code that in many ways duplicated state criminal law.

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\(^{70}\) Speech of Patrick Henry (June 16, 1788), reprinted in 5 STORING, supra note 53, at 248.

\(^{71}\) 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 . . . .”).

\(^{72}\) George Mason, *Objections to the Constitution of Government formed by the Convention* (1787) (emphasis added), reprinted in 2 STORING, supra note 53, at 11.
Finally, Justice Scalia looked at the meaning of the Cruel and Unusual Punishment Clause according to nineteenth-century courts and commentators. He pointed to some “early judicial constructions of the Eighth Amendment and its state counterparts” as “[p]erhaps the most persuasive evidence” that the Cruel and Unusual Punishments Clause reached only inherently cruel methods of punishment.\(^73\) The earliest case he cites, *Barker v. People*, is an 1823 decision of a New York trial court in a case involving the punishment of disenfranchisement for the crime of dueling.\(^74\) The entirety of the trial court’s holding on the Eighth Amendment point is as follows:

> The supposed repugnancy of the act to the constitution of the United States, as it is urged, is to the eighth amendment, which declares, that cruel and unusual punishments shall not be inflicted. The disfranchisement of a citizen is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences.\(^75\)

That the trial court came to this conclusion without undergoing any kind of proportionality analysis concededly supports Justice Scalia’s claim.\(^76\)


\(^75\) *Barker*, 20 Johns. at 459.

\(^76\) But see Stinneford, *supra* note 5, at 950 (contending that the *Barker* court “engaged in . . . proportionality review [by] compar[ing] the challenged punishment to prior punishments given for the same or similar crimes”).
Unfortunately for Justice Scalia, this holding did not last long. Justice Scalia failed to acknowledge that, the following year, the New York Court of Appeals, while affirming the judgment, discussed at great length why the trial court had erred on this point: the Eighth Amendment did not apply to the States. This holding, of course, correctly predicted the U.S. Supreme Court’s decision in *Barron v. City of Baltimore* nine years later. To the extent that the original public meaning of the Cruel and Unusual Punishments Clause can be discerned from one sentence in a decision of a state trial judge 32 years after the Clause was ratified – itself a weak argument – any such reliance is heavily undercut by the fact that the decision on this point was soon rendered dicta by a higher court.

The other cases Justice Scalia cites are equally unhelpful to his cause. Most of them construe state constitutional analogues to the federal Cruel and Unusual Punishments Clause. But if, as I have argued elsewhere, the federal Cruel and Unusual Punishments Clause can be understood only as a unique restriction on federal power for the benefit of the States, then using state court construction of state constitutional provisions is of no help in ascertaining the meaning of a limitation on federal power. Just as Justice Scalia cautions against “the notion of a blind incorporation” of the English Cruel and Unusual Punishments Clause into our own Constitution,

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77 Barker v. People, 3 Cow. 686 (N.Y. 1824).


80 See Hobbs v. State, 133 Ind. 404, 408-10 (1893); State v. White, 44 Kan. 514, 520-21 (1890); Commonwealth v. Hitchings, 71 Mass. 482, 485-86 (1855); People v. Morris, 80 Mich. 634, 638-39 (1890); Cummins v. People, 42 Mich. 142, 143-44 (1879); State v. Williams, 77 Mo. 310, 312-13 (1883); In re Bayard, 25 Hun. 546, 549-50 (N.Y. 1881); State v. Hogan, 63 Ohio. St. 202, 218 (1900); Aldridge v. Commonwealth, 4 Va. 447, 449-50 (Gen. Ct. 1824).


82 See *Harmelin*, 501 U.S. at 975 (plurality).
we should be hesitant to simply assume that state constitutional provisions forbidding “cruel punishments” mean the same thing as the federal Eighth Amendment.

In addition, most of the cases Justice Scalia cited were decided long after the Clause was adopted. All except one were decided in 1855 or later. Of those construing or purporting to construe the Cruel and Unusual Punishments Clause of the federal Constitution, the earliest is from 1869. It is difficult to understand how a case decided six to eight decades after the adoption of a constitutional provision can shed any greater light on the original public meaning of that provision than can our own contemporary powers of investigation. After all, when one attempts to discern

83 See Harmelin, 501 U.S. at 983-84 (plurality). The exception is Aldridge, 4 Va. at 449-50, decided in 1824, which, again, interpreted a state constitutional provision.

84 See Whitten v. State, 47 Ga. 297, 301 (1872); Garcia v. Territory, 1 N.M. 415, 417-19 (1869). Whitten, 47 Ga. at 301, is particularly unreliable, given that it purported to apply the Eighth Amendment to the State of Georgia some 39 years after the U.S. Supreme Court ruled that the Bill of Rights had no application to the States. See Barron v. Mayor and City Council of City of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833). If the Whitten court was implicitly applying the Eighth Amendment as incorporated by the recently enacted Fourteenth Amendment, it was silent on the matter.

85 The same can be said for the cases cited in Stinneford, supra note 5, at 939-41, for the notion that “cruel and unusual” and “cruel or unusual” referred to excessiveness in 1791. Stinneford cites cases from two separate common-law contexts: the law of homicide, which sometimes referred to beatings in an excessive manner, resulting in death, as “cruel and unusual”; and the law of “private punishment” – parent/child, master/servant, and teacher/student – which also sometimes referred to excessive beatings as “cruel and unusual” punishment. Yet, the earliest case Stinneford cites from the private punishment context was decided in 1827, and he cites cases decided as late as 1892. And other than a single 1796 North Carolina case, the earliest case he cites from the homicide context was decided in 1838. Thus, regarding virtually all the case he cites, which post-date ratification of the Eighth Amendment by at least a generation, there is something of a chicken-and-egg puzzle: did the state and federal cruel and unusual punishments clauses draw their meaning from the use elsewhere in the common law of the phrase “cruel and unusual” as a synonym for “excessive?” Or did later common-law judges borrow from state and federal constitutions the handy catchphrase “cruel and unusual” and use it as a synonym for “excessive” regardless of whether that is what those constitutions meant by that phrase?
what the framers and ratifiers of the Fourteenth Amendment meant by “due process of law,” one hardly looks to cases decided during the New Deal era for “[p]erhaps the most persuasive evidence.”

Finally, Justice Scalia looked to four nineteenth-century legal commentators to support the proposition that the Clause encompassed no proportionality requirement. Putting to one side the hazards just mentioned of looking to nineteenth-century sources to discern the meaning of an eighteenth-century text, not one of these commentators unambiguously supports Justice Scalia’s position. James Bayard simply did not address the issue. Benjamin Oliver, as Justice Scalia acknowledged, contended that the Eighth Amendment does require proportionality in carceral sentences: “[I]t would seem, that imprisonment for an unreasonable length of time, is also contrary to the spirit of the constitution.” Justice Scalia dismissed Oliver’s reasoning as “somewhat convoluted.” Justice Scalia also acknowledged that James Kent asserted that “[t]he punishment of death . . . ought to be confined to the few cases of the most atrocious character,” in a paragraph whose topic sentence contains the words “cruel and unusual punishments are universally condemned.” It is possible, as Justice Scalia suggested, that Kent’s

86 Cf. Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 9 (1927) (interpreting Due Process Clause of Fourteenth Amendment as granting individuals the right to freely bargain over the price of cream).

87 See Harmelin, 501 U.S. at 981-82 (plurality) (quoting JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW (1889) (1827); BENJAMIN OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 186 (1832); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1903, at 624 (4th ed. 1873)).

88 See BAYARD, supra note 87, at 154; accord Stinneford, supra note 5, at 961 (“James Bayard . . . did not consider whether the Cruel and Unusual Punishments Clause was meant to prohibit excessive punishments.”).

89 OLIVER, supra note 87, at 185.

90 See Harmelin, 501 U.S. at 981 (plurality).

91 2 KENT, supra note 87, at 14.
views on limiting capital punishment were a simple policy preference rather than a position on constitutional requirements.\textsuperscript{92} However, given that the contents of a paragraph typically relate in some way to the paragraph’s topic sentence, the passage is at least ambiguous in this regard.

With regard to Justice Story, Justice Scalia once again committed a sin of omission by failing to acknowledge a relevant excerpt that undercuts his claim. Justice Scalia cited Justice Story’s Commentaries for the proposition that the Cruel and Unusual Punishments Clause was “adopted as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts.”\textsuperscript{93} After this passage, however, Story continues: “Upon this subject, Mr. Justice Blackstone has wisely remarked that sanguinary laws are a bad symptom of the distemper of any state . . . .”\textsuperscript{94} Blackstone had little problem with capital punishment in itself, but complained that it was an excessive punishment for some crimes. That Story began this observation with the words “[u]pon this subject,” having just discussed the Cruel and Unusual Punishments Clause, demonstrates that, in his view, the Clause does address disproportionality.

Justice Scalia also curiously ignored Thomas Cooley, who suggested in 1868 that state constitutional provisions forbidding cruel and unusual punishments do, in fact, also prohibit punishments excessive in a particular way: in relation to that permitted under common law. He wrote that “probably any new statutory offence may be punished to the extent and in the mode permitted by the common law for offences of similar nature.”\textsuperscript{95} While Cooley was

\textsuperscript{92} See Harmelin, 501 U.S. at 982 (plurality).

\textsuperscript{93} 2 Story, supra note 87, § 1903, at 624.

\textsuperscript{94} Id. (emphasis added).

\textsuperscript{95} Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 472 (7th ed. 1908) (1868); see also Weems v. United States, 217 U.S. 349,
discussing state constitutional provisions rather than the federal Cruel and Unusual Punishments Clause, elsewhere in his *Harmelin* opinion, as previously noted. Justice Scalia indicated his position that nineteenth-century views on the former informed the meaning of the latter.

In sum, the nineteenth-century sources upon which Justice Scalia relied do not unambiguously support the proposition that the Cruel and Unusual Punishments Clause was originally understood as regulating only the methods of punishment and not their excessiveness. Some are equivocal on the point; some seem to refute it; and others are simply too far distant from the adoption of the Eighth Amendment to shed much light on the question at all.

**CONCLUSION**

In his influential plurality opinion in *Harmelin v. Michigan*, Justice Scalia offered evidence that is, at best, ambiguous as to whether the Cruel and Unusual Punishments Clause was understood in 1791 to encompass a principle that demanded proportionality. More importantly, the weight of the evidence supports the notion that the Clause did encompass some requirement of proportionality, though not necessarily between crime gravity and punishment severity. Thus, several questions remain. What type of proportionality does the Clause require? And to what extent, if at all, is the Clause’s proportionality requirement incorporated against the States by the Fourteenth Amendment. Scholars are busy trying to formulate answers to these questions. But to say that “[i]t is . . . well established that the Cruel and Unusual Punishments Clause was

375 (1910) (quoting this passage).

96 See *supra* text accompanying note 80.

97 See generally Claus, *supra* note 24 (asserting that the Eighth Amendment requires proportionality among similarly-situated offenders and classes of offenders); Mannheimer, *supra* note 13 (asserting that Eighth Amendment requires proportionality between federal and state sentencing); Stinneford, *supra* note 5 (asserting that Eighth Amendment requires proportionality based on punishments that have historically been administered for the same or similar offense).
originally understood as prohibiting [only] torturous `methods of punishment’"98 is flatly and demonstrably wrong.