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Cruel and Unusual Federal Punishments

Michael J.Z. Mannheimer
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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.

The task of this Article is to re-discover the “pure” Eighth Amendment, unmediated by the Fourteenth. This task 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 they who won the concession of the adoption of the Bill as the price of union.

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**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 University of Indiana—Indianapolis 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 inflict punishment for crimes to the same extent that the States 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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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

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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 See Angelos, 345 F.Supp.2d at 1230.

3 See id. at 1259.

4 Id. at 1230.

5 See id. at 1230-31.

6 See Amici Curiae Br. in United States v. Angelos, No. 04-4282 (10th Cir.).
the U.S. Court of Appeals for the Tenth Circuit in affirming the sentence rejected this argument.\footnote{Angelos is discussed more fully infra Part II.B.2.}

\textit{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 in crack cocaine and marijuana, and receiving child pornography, were too high.\footnote{See U.S. Sentencing Comm'n, Results of Survey of United States District Judges, January 2010 Through March 2010, at 5 tbl. 1 (2010). Of the 942 federal district judges to whom the survey questions were directed, 639 responded, a response rate of 67.8%. \textit{See 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, P.L. 111-220 (Aug. 3, 2010), commonly known as the “Fair Sentencing Act of 2010,” section 2 of which lowered sentences for trafficking in crack cocaine.} Over 40\% thought the same of the mandatory minimum federal sentences for trafficking in 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.\footnote{See id. at 5 tbl. 1.} In addition, about 70\% believed that the federal sentencing guidelines ranges for trafficking in crack cocaine and possession or receipt of child pornography were too harsh.\footnote{See id. at 11 tbl. 8.}

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 established 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 that inadequacy is that all but one of the Supreme Court cases addressing disproportionality under the Cruel and Unusual Punishments Clause have concerned state, not federal, punishments. The one exception is truly an outlier that is now over a century old. Thus, strictly speaking, 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 77 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 suggested 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 look back to the origins of the Bill of Rights in the crucible of the struggles between Federalists and Anti-Federalists. The Anti-Federalists opposed ratification of the Constitution, because they felt that it granted the new central government too much power at the expense of the States and because they saw the absence of a Bill of Rights as 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 find expression in the Bill of Rights.

This way of looking at the origins of the Bill of Rights sheds new light on what the framers and ratifiers of the Eighth Amendment might have meant 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 intertwined, this Article suggests a reading of that 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 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 sort of 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, and in particular the Anti-Federalist opposition to the Constitution that resulted directly in the adoption of the Bill of Rights. 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.”

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).

possible understanding that history has overlooked and that is well worth re-discovering.

Part I briefly reviews the state of federal sentencing 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 established to review the proportionality of carceral sentences, the federalism concerns driving that extreme deference, and the predictable results when federal offenders challenge their sentences on Eighth Amendment grounds. Part III looks at and critiques the current popular view of the Cruel and Unusual Punishments Clause as a common-law constraint on the federal government’s power to punish. This Part largely accepts that view but takes it to task for failing to fully appreciate the extent to which concerns for state sovereignty in the criminal justice arena drove the adoption of 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 overlooked but which has the benefits of both administrability and fidelity to the federalism constraint contained in the Eighth Amendment, a view that requires that federal sentencing follow state sentencing for the same conduct.

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 the criminal law, criminalizing 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 criminal conduct.
A. The Federalization of Criminal Law

The Constitution names only four types of federal crimes: counterfeiting, piracy and felonies on the high seas, offenses against the law of nations, and treason. Ever since the Nation’s birth, however, the federal government has criminalized a range of other activity directly affecting the interests of the federal government. For example, the First Congress criminalized bribery of a federal official and perjury in federal court. 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 the federal territorial jurisdiction.” Following the Civil War, when Congress expanded the federal criminal law beyond these traditional areas, it typically did so because the States were either unwilling to prosecute harmful

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

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

\[16\] See U.S. CONST., art. I, § 8, cl. 10.

\[17\] See U.S. CONST., art. III, § 3.

\[18\] See Act of Apr. 30, 1790, ch. 9, § 21.

\[19\] See Act of Apr. 30, 1790, ch. 9, § 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 CRIMINAL JUSTICE ORGANIZATIONS 81, 83 (2000) (“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).
conduct, as with federal civil rights laws, or unable to do so, as with fraudulent activities that straddled State boundaries.\textsuperscript{21}

However, by the dawn of the twentieth century, Congress had begun to pass criminal statutes to regulate conduct traditionally regulated by state criminal law, notably in the areas of sexual activity, alcohol, and drugs.\textsuperscript{22} Then, the Prohibition era dramatically enhanced the presence of the federal criminal law enforcement apparatus in an area previously addressed only by state law.\textsuperscript{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.”\textsuperscript{24}

The final push toward federalization of the criminal law has occurred since the late 1960s.\textsuperscript{25} In this period, federal criminal legislation has been enacted to address firearms, loan sharking, gambling, 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.”\textsuperscript{26} The flurry of federal criminal provisions in the past four decades, according to one estimate, accounts for over forty percent of new federal criminal statutes enacted since 1865.\textsuperscript{27}

\begin{footnotesize}
\begin{enumerate}
\item Simons, \textit{supra} note 20, at 902-03.
\item See Richman, \textit{supra} note 20, at 85; Simons, \textit{supra} note 20, at 903-04.
\item See Richman, \textit{supra} note 20, at 85; Simons, \textit{supra} note 20, at 904.
\item Simons, \textit{supra} note 20, at 904-05 (footnotes omitted); see also Richman, \textit{supra} note 20, at 87.
\item O’Hear, \textit{supra} note 11, at 726.
\item Simons, \textit{supra} note 20, at 906-07; see also Clymer, \textit{supra} note 11, at 655.
\item O’Hear, \textit{supra} note 11, at 726 (citing \textsc{Task Force on Federalization of Crim. Law, Am. Bar Ass’n, Report on the Federalization of Criminal Law 7 (1998)}); see also See Richman, \textit{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
\end{enumerate}
\end{footnotesize}
As noted, much of the federal criminal legislation enacted in
the last century, and especially in the past forty years, covers conduct
previously addressed exclusively by state authorities.\textsuperscript{28} As a result,
the overlap between state and federal criminal law is now “virtually
complete.”\textsuperscript{29} Take, for instance, a recent amendment to the federal
kidnapping statute. Prior to 2006, kidnapping was a federal crime
only when the victim was taken across a state or international
boundary.\textsuperscript{30} This made some sense. While a State could prosecute a
kidnapping that took place within its borders, the movement of the
victim out of the State would render it difficult for state authorities to
investigate and prosecute such crimes.\textsuperscript{31} Indeed, the impetus for the
statute\textsuperscript{32} was a spate of such kidnappings in the early part of the

\textsuperscript{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.”).

\textsuperscript{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.”).

\textsuperscript{30} See 18 U.S.C. § 1201(a)(1) (2005) (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 wilfully
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”).

\textsuperscript{31} See Chatwin v. United States, 326 U.S. 455, 463 (1946) (observing that, prior to
enactment of 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. McQuire, Kidnapping and the So-Called Lindbergh Law,
12 N.Y.U. L.Q. REV. 646, 653 (1935))).

\textsuperscript{32} See Chatwin, 326 U.S. at 462-63.
twentieth century, typically for ransom and typically of the wealthy, that of the Lindbergh baby being the most famous.\textsuperscript{33}

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.”\textsuperscript{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 automobile\textsuperscript{35} – in the planning, commission, or cover-up of even a wholly intrastate kidnapping, the kidnapping is now a federal offense.\textsuperscript{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 the country.”\textsuperscript{37}

Similarly, the federal 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.”\textsuperscript{38}

\textsuperscript{33} Fisher & McQuire, \textit{supra} note 31, at 654; \textit{see also} Richman, \textit{supra} note 20, at 86 (observing that kidnapping statute was enacted a week after the Lindbergh baby’s body was discovered).; Simons, \textit{supra} note 20, at 904 n.45 (observing that the kidnapping statute was enacted several weeks after the Lindbergh kidnapping).

\textsuperscript{34} \textit{See} 18 U.S.C. § 1201(a)(1) (2010).

\textsuperscript{35} \textit{See} United States v. Bishop, 66 F.3d 569, 590 (3d Cir. 1995) (concluding that “motor vehicles are instrumentalities of interstate commerce”).


\textsuperscript{38} 18 U.S.C. § 1951(a).
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 the power of Congress 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 based on a gunpoint robbery of a gas station in Virginia that netted him $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 widely used federal offenses makes it a crime for anyone who has been convicted of any felony, state or federal, to possess 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 makes it a crime to manufacture, distribute, or even


40 388 Fed. Appx. 307, 308-10, 311 (4th Cir. 2010); see also United States v. Brown, 959 F.2d 63, 68 (6th Cir. 1992) (observing that “the United States could in theory prosecute virtually every would-be thief . . . no matter how trivial the amount at issue”); Richman, supra note 20, at 88 (noting that statute has been used to prosecute robberies of restaurants and grocery stores in federal court).

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


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.”).
possess any one of dozens of controlled substances.\textsuperscript{44} As one commentator remarked, with regard to drug offenses, “federal law overlaps almost completely with state law.”\textsuperscript{45}

**B. Skyrocketing Federal Sentences**

On average, since the advent of the federal sentencing guidelines in 1987, federal sentences have increased significantly.\textsuperscript{46} In that time period, “the average time served by federal defendants has increased by approximately thirty months.”\textsuperscript{47} This is, in part, a result of decisions made by the U.S. Sentencing Commission to raise guidelines sentences for crimes involving drugs and violence relative to pre-Guidelines sentences.\textsuperscript{48} It is also a result of the increasing prevalence of mandatory minimum sentences, such as for drug, gun, and sex crimes.\textsuperscript{49} By one estimate, Congress enacted or expanded 179 mandatory minimum provisions between 1987 and 2010.\textsuperscript{50}

\textsuperscript{44}See 21 U.S.C. §§ 812, 841(1)(a), 844(a).


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

\textsuperscript{47}Id. at 730 (citing KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING 63 (1998)).

\textsuperscript{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).

\textsuperscript{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, e.g., 18 U.S.C. § 924(c)(1)(C)(i) (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).

\textsuperscript{50}See FAMILIES AGAINST MANDATORY MINIMUMS, MANDATORY MINIMUM SENTENCES CREATED OR EXPANDED BY CONGRESS, 1987-2010, at 4 (2011).
These provisions have been applied in hundreds of thousands of federal cases.\(^5\)

As a result, “[i]n many cases, federal sentences far exceed state sentences for comparable conduct.”\(^5\) The available sentence in federal court can be “ten or even twenty times higher” than sentences available for the same conduct in state court.\(^5\) Indeed, the mandatory minimum sentence required by federal law sometimes exceeds the maximum allowable sentence available for the same conduct when punished by state authorities.\(^5\)

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 constitute state crimes because of the harsher penalties available in federal court.\(^5\) And the United States Attorneys manual itself directs federal prosecutors, when deciding whether to bring federal

\(^{5}\) 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 likely at least 240,000.

\(^{52}\) Simons, supra note 20, at 916; accord Rachel 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.”); O’Hear, supra note 11, at 730.

\(^{55}\) See Barkow, supra note 52, at 575; see also Smith, supra note 27, at 884 (observing that “federal 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”).
charges in such cases, to consider “[t]he probable sentence or other consequence if the person is convicted in the [state] jurisdiction.”

Indeed, that factor is considered “[t]he ultimate measure of the potential for effective prosecution in another jurisdiction.” The starkest example of this is where the federal government brings a prosecution for conduct otherwise punishable by state law in order to obtain a death sentence, where state law does not authorize capital punishment. Rachel Barkow has concluded that the existence of harsher federal sentences explains much of the federal government’s activity in prosecuting crime that could otherwise be prosecuted in state court.

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. Only in the last thirty years, however, has the Court enunciated a set of principles to guide the lower courts in their application of the proportionality principle. During this time, the Court has struggled to enunciate a conception of cruel and unusual punishments, using a mish-mash of different benchmarks of proportionality that result in a doctrine that, at least in the context of carceral sentences, is extraordinarily deferential to the sentencing


57 Id. § 9-27.240(B)(3).


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.”).
authority. Notably, all of the cases the Court has decided in this area come from the States, and so actually represent applications 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.

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. However, it is not altogether clear whether the decision rested on the ground that the punishment meted out was disproportionate to the crime of conviction, or, rather, that it was categorically barred for any crime. The opinion “contains language that will support either reading.” Moreover, although it was styled as a federal case, Weems arose from the Philippines. This means that, for one thing, 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. 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. To this date, the Supreme Court has never fully addressed a claim


62 217 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.”).
that a carceral sentence imposed for a federal crime violates the Eighth Amendment.\textsuperscript{64}

It took seven decades for the Court to fully address another Eighth Amendment challenge to the length of a prison sentence. In \textit{Rummel v. Estelle}, the Court came close to shutting the door on such challenges, 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.”\textsuperscript{65} In \textit{Rummel}, the Court rejected a challenge to a sentence of life imprisonment with a possibility of parole after “as little as 12 years” for the crime of receiving about $120 by false pretenses as a third felony.\textsuperscript{66} Likewise, in \textit{Hutto v. Davis}, the Court rejected an Eighth Amendment challenge to a sentence of 40 years imprisonment for the crime of possession and distribution of a small amount of marijuana.\textsuperscript{67} However, in \textit{Solem v. Helm}, the Court reversed course and held 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.\textsuperscript{68}

\textbf{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,}

\begin{itemize}
\item \textsuperscript{64} Six years after \textit{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, 394 (1916).
\item \textsuperscript{65} 445 U.S. 263, 274 (1980).
\item \textsuperscript{66} \textit{See id.} at 265-66, 280-81.
\item \textsuperscript{67} 454 U.S. 370, 370-71, 374-75 (1982) (per curiam).
\item \textsuperscript{68} 463 U.S. 277, 279-82, 303 (1983).
\end{itemize}
three-factor test to determine whether a carceral punishment is excessive in violation of the Eighth Amendment. 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.”

In its application, this first step provides for almost complete deference to legislative judgments about the severity of crime. For example, in *Harmelin*, Justice Kennedy compared the offense conduct at issue there, possession of 650 grams of cocaine, with that in *Solem v. Helm*, uttering a no account check after having committed six other non-violent felonies. In both cases, the defendant was sentenced to life imprisonment without parole. In *Solem*, the Court had held that this sentence violated the Eighth Amendment. Justice Kennedy in *Harmelin* concluded that

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70 *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment); *accord* *Graham*, 130 S.Ct at 2022; *Ewing*, 538 U.S. at 28 (plurality).

71 See Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 553 (2008) (observing that “[i]n 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).

72 *Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in the judgment).


74 See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment); *Solem*, 463 U.S. at 295-96.

75 See *Solem*, 463 U.S. at 303.
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. Justice Kennedy cited three dangers in particular: that a drug user might commit more crime while under the influence; that she might commit crime in order to pay for her drugs; or that violent crime may come about as a result of drug transactions. Helm’s crime, by contrast, “was `one of the most passive felonies a person could commit.’”

As in Harmelin, a plurality of the Court in Ewing v. California rejected the contention that a sentence of 25 years to life imprisonment for stealing $1200 worth of merchandise as a recidivist raised an inference of gross disproportionality. The plurality first noted the seriousness of the theft, observing that it would be treated as a felony in most American jurisdictions. The plurality further 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.

“[O]nly in the rare case” that “an inference of gross disproportionality” is raised by comparing the crime to the sentence should a court proceed to the second step of the analysis. This second step consists of consideration of two factors. First, the court

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76 Harmelin, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in the judgment).

77 Id. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

78 Solem, 463 U.S. at 296 (quoting State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting)).


80 Id. at 28 (plurality).

81 Id. at 29-30 (plurality).

engages in an intrajurisdictional analysis by determining whether the sentence imposed for the crime at issue is out-of-line with sentences imposed in the same jurisdiction for other offenses.\(^8\) If more serious offense conduct is punished as severely as or less severely than the conduct at issue, or if equally serious conduct is punished less severely, then the punishment fails such an intrajurisdictional analysis. Second, the court engages in interjurisdictional analysis, which asks whether “sentences imposed for the same crime in other jurisdictions” are less severe than the sentence at issue.\(^8\) These intra- and interjurisdictional analyses are designed to confirm or dispel the initial assessment of gross disproportionality,\(^8\) in a way that purports to rely on objective data.\(^8\)

The almost complete deference the Court has afforded to legislative decisions regarding punishment has engendered substantial criticism.\(^8\) This deference is the predictable, perhaps inexorable, result of a doctrine that allows legislative decisions on 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.\(^8\)

\(^8\)See Harmelin, 501 U.S. at 1004 (Kennedy, J., concurring in part and concurring in the judgment).

\(^8\)See id. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

\(^8\)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.”).

\(^8\)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 state legislatures”).

\(^8\)See, e.g., Lee, supra note 71, at 532 (proposing framework to give meaningful content to first prong of Harmelin test).

\(^8\)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 for a method of resolving concrete cases when these competing ends conflict.”).
As a consequence, while the Court continues to pay lip service to the notion that the Eighth Amendment forbids disproportionate carceral sentences, it has been observed that this line of jurisprudence exists only in theory.89 Indeed, Solem remains the only case in which the Court has used this type of framework to hold that a carceral sentence violates the Eighth Amendment.90

Arguably, this line might be re-invigorated after the recent case of Graham v. Florida, where the Court declared unconstitutional the practice of sentencing juveniles to life imprisonment without possibility of parole for non-homicide crimes.91 However, in Graham, the Court eschewed the two-step,
three-factor framework described here, designed for case-by-case review, and instead used the categorical analysis it had previously reserved for the capital context.\(^\text{92}\) And, even taking Graham into account, it can accurately be said that “[f]or all practical purposes, the Court is out of the business of using the Constitution to regulate the proportionality of prison sentences other than life imprisonment.”\(^\text{93}\)

B. Examples of Eighth Amendment Challenges to Federal Sentencing

In the past thirty years, the Supreme Court has addressed Eighth Amendment challenges to prison sentences on seven different occasions.\(^\text{94}\) Each time, the challenged sentence was imposed by a state court.\(^\text{95}\) The Court has never, with the possible and unusual exception of Weems,\(^\text{96}\) addressed an Eighth Amendment excessiveness challenge to a federally imposed sentence. To see 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.\(^\text{97}\) Two recent examples,

\(^{92}\) See id. at 2022-23.

\(^{93}\) Smith, supra note 27, at 892.


\(^{95}\) See Graham, 130 S.Ct. at 2018-20 (sentence imposed by Florida); Lockyer, 538 U.S. at 66-68 (sentence imposed by California); Ewing, 538 U.S. at 19-20 (plurality) (same); Harmelin, 501 U.S. at 961 (plurality) (sentence imposed by Michigan); Solem, 463 U.S. at 281-82 (sentence imposed by South Dakota); Hutto, 454 U.S. at 370-71 (sentence imposed by Virginia); Rummel, 445 U.S. at 264-66 (sentence imposed by Texas).

\(^{96}\) See supra text accompanying notes 60 to 63.

\(^{97}\) See Frank O. Bowman III & Michael Heise, Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data From the District
both involving conduct traditionally prosecutable pursuant to state law, will suffice.

1. United States v. Farley

On May 15, 2007, 37 year-old Kelly Farley flew from Dallas, Texas to Atlanta, Georgia, hoping to have sex with an eleven-year-old girl. Farley had spent the previous seven months setting up the arrangement with someone he believed to be the girl’s mother. Instead, Farley’s correspondent was an agent of the Federal Bureau of Investigation, and Farley ultimately was 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. The mandatory minimum term of imprisonment for the crime was thirty years. The U.S. District Court for the Northern District of Georgia held such a term of imprisonment constituted “cruel and unusual punishment” in violation of the Eighth Amendment of the U.S. Constitution, 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.”

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-

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

99 See id. at 1300-06.

100 See id. at 1306.

101 18 U.S.C. § 2241(c); see Farley, 607 F.3d at 1309, 1314.

102 See Farley, 607 F.3d at 1306.

The Court exhaustively surveyed the modern “Eighth Amendment” cases decided by the U.S. Supreme Court, 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.\(^{105}\)

**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.\(^{106}\) On two of those occasions, he carried a firearm.\(^{107}\) 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 would have required a mandatory term of imprisonment of at least five years.\(^{110}\) However, for a “second or subsequent” offense, the mandatory minimum sentence leaps to 25 years imprisonment.\(^{111}\) Because Angelos was convicted of three counts, two of them were deemed “second or subsequent” convictions, and he was sentenced to 55 years and a day in prison. The government conceded that this sentence was harsher than Angelos could have received in any State.

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104 See *Farley*, 607 F.3d at 1343-44.

105 See id. at 1336-44.

106 See *United States v. Angelos*, 345 F.Supp.2d 1227, 1231 (D. Utah 2004), aff’d, 433 F.3d 738 (10th Cir. 2006).

107 See id.

108 See id.


and that, in Utah, where the crimes occurred, Angelos would have been sentenced to serve no more than seven years.\textsuperscript{112}

The U.S. Court of Appeals for the Tenth Circuit rejected Angelos’ claim that his sentence violated the Cruel and Unusual Punishments Clause of the Eighth Amendment.\textsuperscript{113} Like the Eleventh Circuit in \textit{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.\textsuperscript{114} And, like the Eleventh Circuit in \textit{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.\textsuperscript{115}

C. \textbf{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 stringency of the standard for carceral sentences. What is perhaps surprising is that it appears that no one has challenged the assumption that that stringent standard applies in federal court. That standard, after all, was adopted in the context of review 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.

\begin{footnotes}
\item[112] See \textit{Angelos}, 345 F.Supp.2d at 1259.
\item[113] See \textit{Angelos}, 433 F.3d at 753.
\item[114] See \textit{id}.
\item[115] See \textit{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. \textit{See}, \textit{e.g.}, United States v. Porter, 293 Fed. Appx. 700, 702-03 (11th Cir. 2008) (defendant sentenced to 182 years imprisonment on seventeen gun- and narcotic-related counts did not raise Eighth Amendment challenge).
\end{footnotes}
All of the Supreme Court’s modern cases on proportionality arrived at the Court’s doorstep after a state judgment of conviction.\footnote{See supra text accompanying notes 94 to 96.} 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.”\footnote{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 deference to legislative choices regarding the proper length of prison sentences.”); Harmelin v. Michigan, 501 U.S. 957, 990 (1991) (plurality). (“Diversity not only in policy, but in the means of implementing policy, is the very raison d’etre of our federal system.”).}

Later, Justice Kennedy, in his controlling opinion in Harmelin, articulated four “common principles” that have appeared in the Court’s cases.\footnote{Harmelin, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment).} One of these core principles 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 the 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

\footnote{See supra text accompanying notes 94 to 96.}
local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes.\textsuperscript{119}

Thus, the deferential approach outlined in that opinion 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 justice systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”\textsuperscript{120} As if to hammer the point home, Justice Kennedy closed his \textit{Harmelin} opinion with a paean to Justice Brandeis’ oft-quoted dissent in \textit{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[i]es” to “try novel social and economic experiments without risk to the rest of the country.”\textsuperscript{121} Justice Kennedy not only cited the Brandeis dissent\textsuperscript{122} 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.\textsuperscript{123} Thus, the highly deferential standard stemming from \textit{Solem}, synthesized in \textit{Harmelin}, ratified in \textit{Ewing}, and in use today was designed with state, not federal, sentencing in mind.

Tellingly, the Court has used the language of its Fourteenth Amendment jurisprudence to justify the outcomes in “Eighth” Amendment cases. For example, in his controlling opinion in

\textsuperscript{119} \textit{Id.} at 999-1000 (Kennedy, J., concurring in part and concurring in the judgment).

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

\textsuperscript{122} \textit{See Harmelin}, 501 U.S. at 1009 (Kennedy, J., concurring in part and concurring in the judgment) (citing \textit{New State Ice Co.}, 285 U.S. at 311 (Brandeis, J., dissenting)).

\textsuperscript{123} \textit{Id.} at 1008 (Kennedy, J., concurring in part and concurring in the judgment).
Harmelin. Justice Kennedy wrote 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.”\(^{124}\) He also wrote that “the Michigan Legislature could with reason conclude that the threat posed to the individual and society by this large an amount of cocaine . . . is momentous enough to warrant the deterrence and retribution of a life sentence without parole.”\(^{125}\) Similarly, in her plurality opinion in Ewing, Justice O’Connor wrote: “It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons advances [sic] the goals of its criminal justice system in any substantial way.”\(^{126}\)

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.\(^{127}\) The “rational basis” test represents the

\(^{124}\) Id. at 1004 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added) (internal quotation marks omitted).

\(^{125}\) Id. at 1003 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). This passage was quoted in Angelos in upholding the sentence there. 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))).

\(^{126}\) Ewing v. California, 538 U.S. 11, 28 (2003) (plurality) (emphasis added) (internal quotation marks and alterations omitted). 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 (plurality) (emphasis added).

most deferential form of scrutiny applied to challenges to state legislation pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Whatever the merits of applying “rational basis” review of prison sentences when the Eighth Amendment applies only by virtue of its incorporation by the Fourteenth, 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. RE-DISCOVERING THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

One can take 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

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128 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.”).

129 See O’Shea, supra note 127, at 1086-94 (defending rational basis review for state prison sentences).
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. Thus, an understanding of the circumstances surrounding passage and initial use of that provision is critical. There is also an emerging consensus that that Clause was likely understood as imposing a prohibition tied to the common law of punishment. Thus, one can understand the Cruel and Unusual Punishments Clause of the Eighth Amendment 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 prerogatives in the criminal justice realm. Relatedly, one can approach a full 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.

A. Origins of the Cruel and Unusual Punishments Clause in the 1689 English Bill of Rights

Our Cruel and Unusual Punishments Clause tracks nearly verbatim the analogous provision of the Virginia Declaration of Rights, which in turn tracked the language of the English Bill of Rights of 1689. Thus, the circumstances surrounding the enactment of the 1689 Bill are highly relevant to the meaning of our own Clause. Specifically, those circumstances can give us a clue 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.


131 See id. at 967 (plurality).
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. Oates, a Protestant cleric, in 1679 claimed the existence of a “Popish Plot” by some Catholics to assassinate King Charles II. He testified at trial, perjuring himself, and at least fifteen innocent men were convicted and executed as a direct result. In 1685, after having been found out, Oates was convicted of perjury. He was sentenced by Lord Chief Justice Jeffreys of 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.” Jeffreys sentenced Oates to a fine of two-thousand marks, to be defrocked, to be “whipped from Aldgate to Newgate” the following Wednesday and “from Newgate to Tyburn” the following Friday, to be pilloried four times a year, and to be imprisoned for life.

132 See id. at 969-74 (plurality); Mannheimer, supra note 58, at 833-34.


134 See Harmelin, 501 U.S. at 969 (plurality); Claus, supra note 133, at 136; Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CAL. L. REV. 839, 857 (1969); Mannheimer, supra note 58, at 833; Mulligan, supra note 133, at 641; Schwartz, supra note 133, at 379.

135 See Harmelin, 501 U.S. at 969 (plurality); Granucci, supra note 134, at 857; Mannheimer, supra note 58, at 833; Mulligan, supra note 133, at 640-41.


137 Id. at col. 1316-17.
Four years later, just after the English Bill was adopted, Oates petitioned Parliament for relief from his sentence.\footnote{See id. at col. 1317; see also Harmelin, 501 U.S. at 970 (plurality); Claus, supra note 133, at 139; Schwartz, supra note 133, at 379.} The House of Lords rejected the petition.\footnote{See Claus, supra note 133, at 140.} However, a minority of Lords dissented, contending that the sentence violated the Cruel and Unusual Punishments provision of the 1689 Bill, and they provided an opinion with six somewhat overlapping reasons for granting Oates relief.\footnote{See Second Trial of Titus Oates, supra note 136, at col. 1325.} Oates had greater luck in the House of Commons, which voted to annul the sentence.\footnote{See Harmelin, 501 U.S. at 971 (plurality); Claus, supra note 133, at 139; Schwartz, supra note 133, at 379.} The Commons, however, were unsuccessful in getting their counterparts in the upper House to change their position.\footnote{See Harmelin, 501 U.S. at 971 (plurality); Claus, supra note 133, at 139; Schwartz, supra note 133, at 379.} The Commons also issued a report detailing their position.\footnote{See Harmelin, 501 U.S. at 971 (plurality); Claus, supra note 133, at 139; Schwartz, supra note 133, at 379.}

It is the language from these reports that have been considered most useful in recovering 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 what was objectionable about the sentence:

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. 144

That the punishment of Oates was “contrary to law and ancient practice” (paragraph five), violates the Cruel and Unusual Punishments provision of the 1689 Bill (paragraph six), and thus sets 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, defrocking, imprisonment, pillorying, or whipping) “contrary to law and ancient practice” because there was no law authorizing such a method? 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) 145 “contrary to law and ancient practice” because it was in some way disproportionate? These paragraphs could bear either meaning. However, given that fine, imprisonment, pillorying, and whipping were all commonly used punishments at the time, 146 the latter reading appears the more natural.

144 See Second Trial of Titus Oates, supra note 136, at col. 1325.

145 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.

146 See Claus, supra note 133, at 143 (“The methods mandated by the Oates . . . judgments were wholly unremarkable.”); Granucci, supra note 134, 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.”).
There is some agreement that the portion of the judgment stripping Oates of his Canonical habits was objectionable because the court had no power to impose this sentence, not because it was excessive. The dissenting Lords indeed gave this as their first objection to the 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.\textsuperscript{147}

The report of the Commons echoed this sentiment when it wrote: “[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.”\textsuperscript{148}

But other statements suggest that some aspects of the punishment of Oates 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.”\textsuperscript{149} The dissenting Lords likewise described the punishment as “barbarous, inhuman, and unchristian.”\textsuperscript{150} These objections go not to the punishment of whipping, which “continued as a punishment in

\textsuperscript{147} See Second Trial of Titus Oates, supra note 136, at col. 1325.

\textsuperscript{148} Harmelin, 501 U.S. at 972 (plurality) 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.”).

\textsuperscript{149} 10 JOURNAL OF THE HOUSE OF COMMONS 247 (Aug. 2, 1689).

\textsuperscript{150} See Second Trial of Titus Oates, supra note 136, at col. 1325.
England well into the twentieth century, but of whipping in an excessive manner. It is, of course, possible to read this portion of the objections as supporting the position that it goes to the form of punishment, not simply its extent. For if, as some have suggested, 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: “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 remarked on the floor of the House of Commons that there was no precedent for all of the different aspects of Oates’ punishment to be inflicted on one individual. Also notable is that the Commons used the words “extravagant” and “exorbitant,” which are synonyms for “excessive” or “disproportionate,” in describing Oates’ punishment. But the most persuasive evidence that the Clause was meant to house a proportionality constraint is that the dissenting Lords gave as one reason for annulling the sentence “that . . . there is no precedents [sic] to warrant the punishments of whipping and committing to prison for life, for the crime of perjury . . . .” Thus, the dissenting Lords’ complaint was not that whipping and life imprisonment were contrary to precedent as methods of punishment; it was that these

151 LEVY, supra note 145, at 237.

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


154 See Claus, supra note 133, 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)).


157 Second Trial of Titus Oates, supra note 136, at col. 1325.
punishments were contrary to precedent “for the crime of perjury.””\footnote{See Tom Stacy, \textit{Cleaning Up the Eighth Amendment Mess}, 14 WM. & MARY BILL RTS. J. 475, 510-11 (2005). In order to come to his conclusion, writing for the plurality in \textit{Harmelin v. Michigan}, 501 U.S. 957, 973 (1991) (plurality), that the English Cruel and Unusual Punishments Clause did not encompass a proportionality principle, Justice Scalia simply ignored these five words.} That is to say, the punishments were objectionable, in part, because they were unprecedented in their excessiveness for the crime of conviction.

Yet, establishing proportionality as a principle embedded in the Cruel and Unusual Punishments Clause is only the first step. Just as the related norm of equality is meaningless absent a substantive standard for determining which cases are alike and which unalike,\footnote{See generally Peter Westen, \textit{The Empty Idea of Equality}, 95 HARV. L. REV. 537 (1982).} so too is “disproportionality . . . meaningless . . . in the absence of a clearly defined and defensible normative framework.”\footnote{Richard S. Frase, \textit{Limiting Excessive Prison Sentences Under Federal and State Constitutions}, 11 U. PA. J. CONST. L. 39, 40 (2008); see also Lutz, supra note 88, 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.”).} The use of the word “unusual” cries out for a benchmark.\footnote{See Lutz, supra note 88, 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.”).} If the Clause forbids punishments unusual in their excessiveness, one must ask: “Excessive compared to what?”\footnote{See Frase, supra note 160, at 39 (“[A]ny judgment of excessiveness (or disproportionality) requires a normative framework – ‘excessive’ relative to what?”); Stinneford, \textit{ supra} note 146, at 904 (“When one says that a punishment must not be excessive, the natural next question is: ‘Relative to what standard?’”).} The answer lies in the common law of punishment.

For seventeenth-century Britons, the common law was regarded “as customary law, the law of ‘long use’ and ‘custom.’”\footnote{For seventeenth-century Britons, the common law was regarded “as customary law, the law of ‘long use’ and ‘custom.’”}
Judges viewed themselves as “identifying long-standing customary rules and applying them to particular cases.” At the time, the general consensus was that law consisted in a set of natural rules that was knowable through the exercise of pure reason. For Edward Coke, the greatest expositor of common-law principles of seventeenth century England, the key to the legitimating power of the common law was its “long usage,” its acceptance over a long period of time. That common-law rules survived after centuries of usage demonstrated to Coke that the law has been refined to eliminate unreasonable or bad rules and retain only the good, the pure, and the reasonable. Moreover, that these rules survive for centuries confirm their legitimacy, given the tacit consent bestowed upon them by the generations of those governed by those rules. Thus, a criminal punishment that is consistent with longstanding usage, both as to type and extent, would be considered “usual.” By contrast, a punishment at odds with longstanding usage in either of those respects, in the direction of greater harshness, is justifiably condemned as “cruel and unusual.”

163 Stinneford, supra note 146, at 1768; see also Claus, supra note 133, at 121 (positing that the common law was the repository of “the historic custom of the community”).

164 Stinneford, supra note 146, at 1769.

165 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.”).

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

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

168 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”).

169 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.”).
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.\(^{170}\) Seen in this light, what rendered punishments that were harsher than that permitted by the common law “cruel and unusual” was that they constituted an affront to the equality of treatment that the common law demanded.\(^{171}\)

Thus, when the English Bill of Rights barred “cruel and unusual punishments,” it was setting forth both a norm of equality and a related norm of continuity with past practices. The Clause barred “singl[ing] out an offender on a morally insufficient basis for more punishment than was customarily imposed.”\(^{172}\) In much the same way, the Clause was designed to prevent judges from imposing punishments harsher than that which was permitted by common law for the offense of conviction.\(^{173}\) These were precisely the defects in the punishment meted out to Titus Oates: it combined a number of otherwise acceptable punishments in a way that singled out Oates for special treatment,\(^{174}\) and “it was significantly harsher than the

\(^{170}\) See Claus, *supra* note 133, 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.”).

\(^{171}\) See *id.* at 121-22.

\(^{172}\) *Id.* at 136; 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.”).

\(^{173}\) See Stinneford, *supra* note 156, at 26 (“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.”).

\(^{174}\) See Claus, *supra* note 133, 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 172, at 40
punishments that had previously given for the crime of perjury.”\textsuperscript{175} In these ways, the punishments were outside of the legal authority of the judges to impose.

B. Transplanting the Cruel and Unusual Punishments Clause Into American Soil

As noted above, the main objection to the punishment of Titus Oates, for those who found it objectionable, was that it was beyond the legal authority of the judge to impose in both kind and extent. Accordingly, it appears that the English version of the Cruel and Unusual Punishments Clause was intended to ensure that judges 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 law 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 Cruel and Unusual Punishments Clause to Popular Sovereignty

If our 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 punishment are permissible for particular crimes, and legislatures can derogate from the common law at will. Yet it is clear that our Cruel and Unusual Punishments Clause was intended to bar not only

\textsuperscript{175} Stinneford, supra note 156, at 26; see also Stinneford, supra note 146, at 1762 (“[T]he primary thrust of the argument that Oates’s punishment was `cruel and unusual’ was that it was contrary to precedent.”).
federal judges from imposing, but also federal legislators from prescribing, unduly severe punishments.\textsuperscript{176} For one thing, the Eighth Amendment, as originally proposed, was to be inserted into the body of the Constitution in Article I, section 9, the section containing a number of prohibitions on Congress.\textsuperscript{177} 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.\textsuperscript{178} Perhaps most tellingly, all three members of the state ratifying 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.\textsuperscript{179}

\textsuperscript{176} \textit{See} Claus, \textit{supra} note 133, 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.”); \textit{see also} Harmelin v. Michigan, 501 U.S. 957, 975–76 (1991) (plurality) (“[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, \textit{supra} note 133, at 639 (“The . . . restriction binds both the legislative and judicial branches of the federal government . . .”).

\textsuperscript{177} \textit{See} \textbf{The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins} 605 (Neil H. Cogan ed. 1997) [hereinafter \textit{Cogan}].

\textsuperscript{178} \textit{See} \textit{id.} at 614 (quoting Md. Decl. of Rights § 22 (1776)) (“[C]ruel or unusual punishments [ought not be] inflicted by the courts of law.”); \textit{id.} (quoting MASS. Const. pt. I, art. XXVI (1780)) (“No magistrate or court of law, shall . . . inflict cruel or unusual punishments.”); \textit{id.} (N.H. Bill of Rights pt. I, art. XXXIII (1783)) (same).

\textsuperscript{179} \textit{See} Speech of Patrick Henry (June 16, 1788), reprinted in \textbf{5 The Complete Anti-Federalist} 248 (Herbert J. Storing ed. 1981) [hereinafter \textit{Storing}] (“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.”); George Mason, \textit{Objections to the Constitution of Government formed by the Convention} (1787), reprinted in \textit{2 id.} 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.”); 2
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, what was considered “cruel and unusual” could not be changed by Congress. 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 that benchmark.

That benchmark was longstanding practice. Again, the constraint against “unusual” punishments assured both equality among similarly situated offenders and continuity with past practices by looking to longstanding practice as the guide. In the pre-Revolutionary period, Americans had consistently argued that some “fundamental common law rules embodied by long usage” could not be abrogated by Parliament.\(^{180}\) Moreover, they sometimes used the epithet “unusual” to refer to practices authorized by Parliament yet contrary to longstanding practice.\(^{181}\) The use of this word indicates that “unusual” during that period meant primarily “contrary to long

\(^{180}\) Stinneford, supra note 146, at 1794.

\(^{181}\) Id. at 1795 (“Americans repeatedly condemned Parliament’s actions during this times period as ‘innovations’ and ‘usurpations’ that were ‘unusual,’ ‘unconstitutional,’ and ‘void’ because they were contrary to ‘common right or reason.’”); id. at 1797 (discussing protest by Virginia House of Burgesses that proposed practice of removing American protestors to England for trial would be “‘new, unusual . . . unconstitutional and illegal’” (quoting JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA, 1766-69, at 215 (John Pendleton Kennedy ed. 1906)) (alteration in original)); id. at 1797-98 (observing complaint in 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 DECLARATION OF INDEPENDENCE para. 2 (1776))).
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usage.” By engrafting 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.

2. Adapting the Cruel and Unusual Punishments Clause to Dual Sovereignty

The account developed above is adequate to explain the appearance of provisions forbidding cruel and unusual punishments (or, alternatively, cruel or unusual punishments) in various state constitutions after 1776. Both in Britain in 1689 and the States immediately after independence, one was subject to only a single criminal lawmaking sovereign. The only necessary modification, as discussed, was in positing the Clause as a constraint not only on judges but on legislators as well.

The more difficult task is in understanding the adaptation of the constraint on cruel and unusual punishments 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.” In order to gain a fuller understanding of the role of the

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

183 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 Claus, supra note 133, at 147 (concluding that framers and ratifiers of Cruel and Unusual Punishments Clause likely viewed it as encapsulating common-law precepts that constrained Congress as well as federal courts).

184 See Cogan, supra note 177, at 613 (quoting Del. Decl. of Rights § 16 (1776)); id. at 615 (quoting N.Y. Bill of Rights § 8 (1787)); id. (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)).

185 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); see Preyer, supra note 13, at 224 (“[G]eneral problems of sovereignty and the particular problem of the reception of English [common] law were further
Cruel and Unusual Punishments Clause in this novel federal system, one
must adequately appreciate the role of the Anti-Federalists in
demanding a Bill of Rights as the price of their reluctant
acquiescence to union. Two distinct but related points are critical
here: 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 the Anti-Federalists viewed
the common law, not as uniform, but as varying from State to State.

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. The champions of a 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 crush the autonomy of the States. They presciently predicted
that the more general provisions of the Constitution, such as the
Necessary and Proper Clause, could be read to effect “sweeping

186 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 . . . .”).

187 See Calvin 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] concerned with preserving the states as
autonomous units of government and as structural bulwarks of human liberty”);
Wilmarch, supra note 186, 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.”).

188 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 . . . .”).
changes in the balance of national versus state powers.” 189 Most Anti-Federalists, however, came to realize the need for the strong central government lacking from the Articles of Confederation. 190 They reluctantly accepted the inevitability of the Constitution, provided that a Bill of Rights be adopted soon thereafter. 191

To be sure, the ultimate goal of the Bill of Rights, was to protect individual rights. But it did so by means of 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. 192 As Wilson Carey McWilliams


190 See Wilmarth, *supra* note 186, at 1280-81 (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 Mrs. Macauley (Sept. 28, 1787)).

191 See id. at 1281 (“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.”).

put it: “Individuality is possible only because political society protects and nurtures our individual strengths and attributes . . . .” 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. The states were considered “structural bulwarks of human liberty.”

There were only a handful of framing-era statements regarding the danger of the imposition of “unusual” punishments, a criticism that led to the adoption of the Eighth Amendment, and two of them manifest a fear of Congress’ power to 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, published his Objections to the Constitution of Government formed by the Convention. In that document, he expressly invoked the danger to both State power and individual rights, from Congress’s power, pursuant to the Necessary and Proper Clause, to create “new crimes” and assign punishments therefor that would extend to matters traditionally governed by state law:

rights preserved against the federal government were those who were supporting a state government’s policy at odds with federal policy.”).


194 See Palmer, supra note 192, 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.”); Wilmeth, supra note 186, at 1281 (observing that, according to the Anti-Federalists, “the states . . . were considered to be the true guardians of the people’s rights”).

195 Massey, supra note 187, 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.”).

196 See 2 STORING, SUPRA NOTE 179, at 9.
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.\(^\text{197}\)

Notice how the concern that Congress might “inflict unusual and severe Punishments” goes hand-in-hand with the concern that Congress will create “new Crimes.” The obvious connection is that both concerns are threatening to the then-existing State monopoly on criminal justice. Notice also that Mason mentions Congress’ 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 the intertwined nature of state power and individual rights according to Anti-Federalist ideology.

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[jon of] unusual and severe Punishments.” But, of course, Mason could not have meant that the State legislatures should retain

\(^{197}\) George Mason, Objections to the Constitution of Government formed by the Convention (1787) (emphasis added), reprinted in 2 id. at 13. Mason’s Objections are particularly significant for two reasons. First, they were written before the Constitution was even signed and they “became 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 192, at 305, 305. Moreover, Mason’s Objections were second only to Hon. Mr. [Elbridge] Gerry’s Objections to Signing the National Constitution, reprinted in 2 STORING, SUPRA NOTE 179, at 6, in their influence over the later writings and speeches of other Anti-Federalists. See CORNELL, supra note 192, at 29.
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.” This passage makes little sense unless Mason believed that the 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 those that were more severe than those authorized by the State legislatures.

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

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 control?

198 See Stinneford, supra note 146, at 1798.

199 Speech of Patrick Henry (June 16, 1788), reprinted in 5 STORING, SUPRA NOTE 179, at 248.
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 procedure by which crimes would be tried (addressed in the same speech) and the punishments to be meted out. 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. As Henry’s statements demonstrate, the Anti-Federalists were concerned that federal criminal law would largely preempt state criminal law, leaving state Bills of Rights useless, with nothing in their place. He saw the Constitution as “superced[ing]” and “annihilat[ing]” Virginia’s current arrangement with her people.

He worried that the State government, in adopting the Constitution, would “abandon[] all its powers . . . of direct taxation, the sword, and the purse.” 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 your weakened, prostrated, enervated State Government!” 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.”

200 See Kurland, supra note 20, at 88 (“[A] jurisdictional overlap was contemplated by the Framers.”); see also Jackson T. Main, The Anti-Federalists: 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 . . . .”).

201 Speech of Patrick Henry (June 16, 1788), reprinted in 5 Storing, supra note 179, at 247.

202 Id.

203 Id.

204 George Mason, Objections to the Constitution of Government formed by the Convention (1787), reprinted in 2 id. at 13.
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Centinel echoed these thoughts when he wrote the federal government would “annihilate the particular [State] governments,” which would lead to the destruction of individual rights because “the security of personal rights of the people by the state governments [would be] superseded.” 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 of ordinary state crime even without Congressional legislation to create new federal crime. Agrippa read Article III, allowing for federal court jurisdiction over “controversies . . . between a State and Citizens of another State,” to extend to all criminal cases where a State law is violated by a citizen of another State. 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 . . . .”

Of course, Centinel was spectacularly wrong, for Article III

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205 Letter of Centinel to the People of Pennsylvania, reprinted in 2 id. at 143, 152; see also Essay by the Impartial Examiner, Feb. 20, 1788, reprinted in 5 id. at 185 (asserting that the Constitution “expunges your bill of rights by rendering ineffectual, all the state governments”); PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 287 (John B. McMaster & Frederick D. Stone eds. 1888) (statement of Robert Whitehill) (“I consider [the Constitution] as the means of annihilating the constitutions of the several States, and consequently the liberties of the people.”).

206 U.S. CONST., art. III, sec. 2.

207 Letter by Agrippa to the Massachusetts Convention (Jan. 14, 1788), reprinted in 4 STORING, SUPRA NOTE 179, at 94, 97 (“Th[e] right to try causes between a state and citizens of another state, involves in it all criminal causes . . . .”).

208 Letter of Centinel to the People of Pennsylvania, reprinted in 2 id. at 143, 148.
does not even purport to grant federal jurisdiction in cases between a State and its own citizens.\textsuperscript{209} And both Agrippa and Centinel had to finesse the fact that “controversies,” as used in Article III, may have meant only civil cases.\textsuperscript{210} Indeed, they may not have even believed their own arguments.\textsuperscript{211} 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 broad popular audience.”\textsuperscript{212} And the letter in which Centinel’s erroneous charge appears was particularly widely published. It was reprinted eleven times, making it among the most widely read ten percent of Anti-Federalist writings of the period.\textsuperscript{213}

A primary concern, therefore, of the Anti-Federalists was the continuing prerogative of the States to set their own parameters of 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.\textsuperscript{214} 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.”\textsuperscript{215} Without certain protections, the Anti-Federalists feared, “the powerful federal government would seek to persecute its enemies

\textsuperscript{209} See U.S. CONST., art. III, sec. 2.


\textsuperscript{211} See id. (“Centinel and Agrippa opposed ratification and were clearly reaching for anything they could find.”).

\textsuperscript{212} \textsc{Cornell}, supra note 192, at 46.

\textsuperscript{213} See id. at 25, app. 1.

\textsuperscript{214} See Mannheimer, supra note 58, at 858-59.

\textsuperscript{215} See Kurland, supra note 20, at 21.
through the use of federal law.”

The Fourth, Fifth, Sixth, and Eighth Amendments were adopted largely to obviate these concerns. The Fourth Amendment hinders the federal government in investigating alleged offenders: it may not search or seize unreasonably or rely on too-broad warrants. 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 offense,” nor may it prosecute unless a panel of ordinary citizens has chosen to indict, nor may it force the criminal suspect to provide his own testimony in furtherance of such indictment. 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 a means to require the production of witnesses favorable to his defense; and it must allow the defendant to cross-examine the witnesses against him. And the Eighth Amendment hinders the federal government in punishing alleged offenders.

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. Indeed, many of the framers and ratifiers of the Bill of


217 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.”).

218 See Thomas, supra note 194, 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.”).
Rights had themselves been “smugglers, tax evaders, seditionists, and traitors to the regime of George III.” 219 The point of the criminal procedure protections of the Bill of Rights was not to reliably convict the guilty and acquit the innocent. The point was to subject federal prosecutors to many of the same constraints that applied to their state counterparts, 220 thereby removing any comparative advantage to federal prosecution in the hopes that the sphere of criminal justice would remain largely reserved to the States. 221

It is only because we are used 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. 222 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. 223 To use Akhil Amar’s trenchant analogy: “Like people


220 See Thomas, supra note 194, 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.”).

221 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”).

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

223 See id. (asserting that “[n]o 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 Q. Rosenkranz, The Objects of the Constitution, 63 STAN. L. REV. 1005, 1054 (2011) (“[T]he Bill of Rights is not strictly, or even primarily,
with spectacles who often forget they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.  

For example, it is difficult to explain one of the rights most strenuously pressed by the Anti-Federalists for inclusion in the Bill of Rights – the right to a trial by a jury of the vicinage\textsuperscript{225} – 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. What juries are better at is channeling the moral sensibilities of the community in order to nullify unjust laws,\textsuperscript{226} judging the character of their neighbors as defendants, accusers, and witnesses,\textsuperscript{227} adapting generally-applicable law to idiosyncratic local conditions,\textsuperscript{228} and providing an opportunity for active civic engagement by the ordinary individualistic and countermajoritarian. In many respects, it is as much about structure as it is about rights . . . .

\textsuperscript{224} Amar, \textit{supra} note 216, at 1136-37.

\textsuperscript{225} \textit{See} GEORGE C. THOMAS, \textit{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.”); CORNELL, \textit{supra} note 192, at 60 (“It would be difficult to overstate the importance of trial by jury in the minds of [some] Anti-Federalists.”).

\textsuperscript{226} \textit{See} Thomas, \textit{supra note 194}, 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.”).

\textsuperscript{227} \textit{See} THOMAS, \textit{supra} note 225, at 99 (“The Anti-Federalists preferred the judgment of a community [as to] the characters of the accused, the accuser, and the witnesses.”).

\textsuperscript{228} \textit{See} Carol M. Rose, \textit{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 Anti-Federalist conception of jury was one 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”).
citizen. 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 outlook of the Anti-Federalists requires that we take an approach that recognizes that they were principally concerned with preserving state primacy in the criminal justice arena. Such an approach would read the Eighth Amendment as imposing a constraint on the federal government’s power to punish that is different from that imposed on 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 punishments is largely about local control of criminal justice.

It is arguable that the state norms to which the Eighth Amendment is tied are those contained in state constitutional provisions forbidding cruel and unusual punishments, rather than those encompassed by sub-constitutional state law. That is to say, arguably, 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 new 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 increased punishments for the same offenses. And George Mason’s warnings that Congress’ power to “inflict unusual and severe Punishments” would threaten the “Security for the Powers now presumed to remain” with “the State Legislatures” makes little sense if the Eighth Amendment was meant only to duplicate state constitutional provisions against cruel and unusual

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229 See Herbert Storing, What the Anti-Federalists Were For, in 1 STORING, SUPRA NOTE 179, 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)).

230 See supra text accompanying note 197.
punishment, and not that Congress had to respect state legislative prerogatives in calibrating punishments to crimes.

The question remaining is why we should look to the Anti-Federalists in 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 the Constitution altogether, the Bill of Rights represents a victory, not a defeat, 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 gain ratification in the States of Massachusetts, New York, and Virginia. 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. 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. Ultimately, the Federalists won narrow victories in these States, but not before “accepting recommended amendments and pledging to work for the adoption of such amendments as soon as the new federal government was organized.”

231 See Wilmarth, supra note 186, 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.”).

232 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 200, at 286 (estimating that at least 60% of eligible voters in Virginia were Anti-Federalists during the ratification period); Cecilia 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)).

233 See Main, supra note 200, at 288.

234 Wilmarth, supra note 186, at 1288; accord Cornell, supra note 189, at 66 (“[R]atification of the Constitution was only secured because Federalists agreed to consider subsequent amendments recommended by Anti-Federalists in various
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. \(^{235}\) Their concession worked, and a sufficient number of moderate Anti-Federalists ultimately voted in favor of ratification. \(^{236}\) For these reasons, “Anti-Federalist political thought is essential to understanding the meaning of the Bill of Rights.” \(^{237}\)

\(^{235}\) See Wilmarth, \textit{supra} note 186, at 1305 (“Madison sponsored the Bill of Rights primarily to reconcile the moderate Antifederalists to the Constitution.”).

\(^{236}\) See \textit{Main}, \textit{supra} note 200, at 177.

\(^{237}\) Cornell, \textit{supra} note 189, at 67; see also Palmer, \textit{supra} note 192, 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)); \textit{see generally} Robert G. Natelson, \textit{The Original Meaning of the Establishment Clause}, 14 WM. & MARY BILL RTS. J. 73, 84-88 (2005) (discussing “Gentlemen’s Agreement” between 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 “\textit{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 . . .”’ \cite{Marks} . 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 a Bill of Rights attached. Accordingly, their motivations for demanding the Bill should be given considerable weight in its interpretation.

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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 the way in which the Anti-Federalists viewed the common law. Recall that the constraint on legislative bodies as well as courts from imposing harsher punishment than was customarily permitted was a necessary accommodation to the demands of a system of popular sovereignty. In its original iteration, the constraint used 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?

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. Laurence Claus, for example, has asserted that American thought of the 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.” And John Stinneford has asserted: “Common law judges did not see themselves as formulating policy, but rather as identifying long-standing customary rules and applying them to particular cases.” Thus, in their view, the framers and ratifiers conceived of a common law that was uniform, declaratory, and regardless of sovereignty.

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238 Claus, supra note 133, at 147; see also id. (discussing “[t]he founding generation’s pre-realist vision of law”).

239 See Stinneford, supra note 146, at 1768-69. While Stinneford is referring here to judges of an earlier period, he claims that it is this conception of the common law that the framers and ratifiers of the Eighth Amendment had in mind in advocating common-law constraints on punishments. See id. at 1793-1807.

240 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
Yet the views of the common law in the new American States were hardly uniform. Around this time period, a rift formed in the way lawyers and jurists conceived of the common law, as “the instrumental (rather than the declaratory) nature of the common law increasingly began to take hold in legal thinking.” 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. Peter Du Ponceau later characterized the schism as representing “the distinction between the common law considered as a source of jurisdiction, and as a means for exercising it.” 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.


242 See GRANT GILMORE, THE AGES OF AMERICAN LAW 20 (1977); see also Monaghan, supra note 241, at 769 (“Throughout the first two decades of our national existence, intense debate occurred over the relationship between the new national courts and an ‘American’ common law.”).


Moreover, this rift corresponded generally with political affiliation, the Federalists generally retaining a pre-realist approach and the Anti-Federalists, and their political descendants, the Republicans, generally adopting the more modern way of thinking about common law. On the Federalist side, perhaps no example is better than Alexander Hamilton’s famous assertion that federal judges would exercise “neither force nor will, but merely judgment.” On the other side, James Madison, in his 1800 manifesto on States’ rights, the Report on the Virginia Resolutions, articulated the Republican view that the common law was different in each colony before 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.

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.

245 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 192, at 173, the former absorbed many of the leaders and much of the ideology of the latter, especially as regards the doctrine of states’ rights and the notion of a limited federal government. See id. at 147-218; see also infra note 247.

246 THE FEDERALIST No. 78; see Laurence Claus, Montesquieu’s Mistake 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 this 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’”).

247 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
Likewise, Republican St. George Tucker, in his American edition of Blackstone’s work, recognized in 1803 the incoherency of maintaining that a single uniform common law governed the disparate States at the moment of independence:

[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 . . . .

The Federalist Papers, obviously was a Federalist during the ratification debates, the split among Federalists soon after 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 192, 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 Republican’s vision of limited government for decades to come. See id. at 245 (noting that “Madison appropriated and reshaped Anti-Federalist ideas” in his 1800 Report and that “[f]or much of the next two decades, dissent would build on the foundations laid by Madison”); see also Kurt T. Lash, James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment, 74 G.W.U. 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”).

One does find some Federalist support for this view as well. Zephaniah Swift, while serving as Federalist Representative from Connecticut in the U.S. Congress, see http://bioguide.congress.gov/scripts/biodisplay.pl?index=S001119 (last visited
It is true that, at the brink of the Revolution, the newly independent States adopted reception provisions, generally receiving English common law as the law of each State. Yet each reception provision differed widely in its particulars. For example, New York’s adopted English common law as of the date of the Battles of Lexington and Concord, but only “such parts” as were already in effect as of that date. Massachusetts’ reception provision did not even explicitly mention the common law. And Connecticut did not enact a reception provision at all. 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.” Far from enacting all of the English common law bag and baggage on the eve of the States’ irrevocable break with the mother country, then, the reception provisions did quite the opposite: they preserved as the status quo the systems of law that had developed for over a century as major deviations from the common law. The reception statutes thus served to make English common law, with its local emendations, a mere placeholder.

July 21, 2011), wrote that, in that State, “the English common law [was] binding where it has not been superseded by statute, or varied by custom, and where it is founded in reason, and consonant to the genius and manners of the people.” 1 ZEPHANIAH H. SWIFT, A SYSTEM OF THE LAWS IN THE STATE OF CONNECTICUT 42-43 (1795).

249 See Goebel, supra note 248, 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.”).

250 See id.


252 Binder, supra note 251, at 113-14 (emphasis added) (footnote omitted).

253 See Goebel, supra note 248, at 467 (“The practical purpose of the reception statutes was to make provision during the alarums of the Revolution for the continuance, so far as possible, of existing systems of law.”).
in anticipation of the revision of the laws to follow the cessation of hostilities.\textsuperscript{254}

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 was granted in the Constitution. Since the common law, built up over the centuries, 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 allowed the same power to seep in through Article III? As Madison put it, if there were a federal common law,

\begin{quote}

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 longer under the limitations marked out in the Constitution. They would be authorized to legislate in all cases whatsoever.\textsuperscript{255}
\end{quote}

And Thomas Jefferson denounced the “new doctrine” that there was a federal common law as an “audacious, barefaced and sweeping pretension” that threatened the existence of independent state courts

\textsuperscript{254} See generally Charles T. Cullen, \textit{Completing the Revisal of Laws in Post-Revolutionary Virginia}, 82 VA. MAG. HIST. & BIOGRAPHY 84 (1974) (documenting revision of Virginia’s laws from the passage of the reception statute in 1776 to ultimate revision in 1792).

\textsuperscript{255} Madison’s Report, \textit{supra} note 247, at 33. \textit{See also} Bradford R. Clark, \textit{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”); Rowe, \textit{supra} note 244, 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.”).
and legal systems.\textsuperscript{256} Compared to the assertion of a federal common law, even the hated Alien and Sedition Acts were “unconsequential” and “timid things.”\textsuperscript{257}

This political and legal debate around the framing period over the nature of the common law first manifested itself in the hotly disputed topic of whether there was a federal criminal common law. Again, because the two main political parties stood on opposite ends of this divide,\textsuperscript{258} the issue remained unresolved during the first generation of the Republic.\textsuperscript{259} The dispute over the existence of a federal criminal common law was publically aired for the first time by Justice Samuel Chase of the U.S. Supreme Court in \textit{United States v. Worrall},\textsuperscript{260} a scant seven years after the Bill of Rights was ratified.

\textsuperscript{256} Letter from Thomas Jefferson to Edmund Randolph, Aug. 18, 1799, reprinted in 4 \textsc{The Writing of Thomas Jefferson} 301, 301-02 (1859) [hereinafter Jefferson-Randolph Letter]. \textit{See also} Du Ponceau, supra note 243, 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 . . . .”); \textit{Instruction from the General Assembly of Virginia to the Senators from that State in Congress} (Jan. 11, 1800), reprinted in \textit{id.} 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”).

\textsuperscript{257} Jefferson-Randolph Letter, supra note 256, at 301-02.

\textsuperscript{258} \textit{See} 1 Charles Warren, \textsc{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 244, 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.”).

\textsuperscript{259} \textit{See Preyer, supra note 13, at 263 (describing issue as “muddled”).}

\textsuperscript{260} 28 F.Cas. 774 (C.C.D. Pa. 1798).
Worrall had been charged with attempting to bribe a federal Commissioner of Revenue.\footnote{\textit{See Francis Wharton, State Trials of the United States During the Administrations of Washington and Adams} 189-91 (1849).} 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. 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.\footnote{\textit{Id.} at 196.} 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.”\footnote{\textit{Id.} at 196-98.} 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.\footnote{\textit{Id.}}

Chase opined that “the United States, as a Federal government, have no common law.”\footnote{\textit{Id.} at 197.} Although each of the former colonies had adopted English common law, each adopted only “so much of the common law as was applicable to their local situation and change of circumstances.”\footnote{\textit{Id.}} Chase then provided an account of the common law as instrumental and divagated, not declaratory and uniform, that encapsulated the Anti-Federalist and Republican views of the matter:

\begin{quote}
[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,
\end{quote}
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?

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 common law of crime. There is some dispute

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267 See id. at 197-98. See also Goebel, supra note 248, at 464-65 (documenting “some very bold and drastic divagations from the common law practice [that] were pursued” in the colonies); Monaghan, supra note 241, 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 . . . .”).

268 See 1 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY (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 common law of crimes); accord Monaghan, supra note 241, 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 258, 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-Constiution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer, 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-statutorily-defined crimes”). In addition, Judge Peters
But 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. Chase, too, was a Federalist at the time of the Worrall case. 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.”

Chase switched parties for political expediency after ratification. Worrall allowed Chase one final opportunity to show his true colors “as a popular states-rights advocate.” Justice Chase’s opinion in Worrall would become the cornerstone of the Republican position against a federal common law of crimes and laid the groundwork for disagreed with Chase on the Worrall case. See Wharton, supra note 261, 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.”).

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 took seriously 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 313 to 323.

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.”); see, e.g., Samuel Chase, Notes of Speeches Delivered to the Maryland Ratifying Convention (Apr. 1788), reprinted in 5 STORING, SUPRA NOTE 179, at 79-91 (articulating arguments against proposed Constitution).

See Presser, supra note 270, 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).

Presser, supra note 270, at 73.
Jefferson’s, Madison’s, and Tucker’s later statements on federal common law generally.  

Critically, Republicans made the explicit connection between the recognition of a federal criminal common law and the imposition of harsh punishments rejected by many of the States. 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.” Also in 1800, the Republican-held General Assembly of Virginia instructed its U.S. Senators that a recognition that the doctrine “[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.” Attorney General Richard Rush, in instructing United States Attorney George Blake not to proceed with common-law criminal prosecutions, later echoed these sentiments when he explained 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.” And a

273 See id. 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”); see also Warren, supra note 258, at 434 (observing that Chase’s decision “was regarded by the Federalists as embodying a disastrous doctrine”); Presser, supra note 268, at 329 (“[T]he Jeffersonians . . . took their cue on federal common law of crimes jurisdiction . . . from . . . Samuel Chase . . . .”).

274 See Presser, supra note 268, 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.”).

275 Madison’s Report, supra note 247, at 33.

276 Instruction from the General Assembly of Virginia to the Senators from that State in Congress (Jan. 11, 1800), reprinted in Duponceau, supra note 243, at 225.

277 Preyer, supra note 13, at 257 (quoting Letter from Richard Rush, U.S. Att’y Gen’l, to George Blake, U.S. Att’y (July 28, 1814)).
decade later, Rep. Edward Livingston would reiterate these sentiments when he stated: “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.”

Of course, these statements on their face show only that the Republicans bristled at the thought of application of the entirety of English common law absent statutory enactment. But at a deeper level, they show us something significant about the Republican understanding of the nature of the common-law constraints encompassed by the Cruel and Unusual Punishments Clause. For if it was understood that the Clause embodied common-law constraints, and if the common law incorporated by the Clause were the full English version, 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 more sanguinary than those meted out by English common law, the Clause would be utterly toothless.

The dispute over the existence of a federal criminal common law culminated in the decision in United States v. Hudson, 279 which resolved the issue in the negative. Echoing Justice Chase in Worrall, the Court rejected the notion of a general federal common law of crimes by noting that the common law “var[ied] in every state in the Union.” 280 Given the political nature of the inquiry, this result was all but foreordained. By 1812, when Hudson was decided, only two Federalist judges were left on the Court. 281 One of them, Justice

278 Rowe, supra note 244, at 932 n.65 (quoting 1 CONG. DEB. 349 (1825)).

279 7 Cranch (11 U.S.) 32 (1812).

280 Id. at 33-34 (“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.”).

281 See Clark, supra note 255, at 1177 (“By [1812], Republican appointees constituted a majority of the Court for the first time . . . .”).
Bushrod Washington, was absent from the bench when *Hudson* was decided and the other, Chief Justice John Marshall, apparently joined the opinion. And even before *Hudson*, the matter was “long since settled in public opinion.” Indeed, the Federalists’ advocacy of a federal criminal common law was a major cause of the downfall and extinction of the Federalist Party as a political force in America.

What is critical for purposes of isolating the common-law constraints encapsulated by the Cruel and Unusual Punishments Clause is not simply that the Anti-Federalist position on the existence of a federal criminal common law ultimately won out, though that is important as well. 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 perfect and 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.

IV. RESUSCITATING THE ANTI-FEDERALISTS’ EIGHTH AMENDMENT

The Eighth Amendment was motivated by a desire to constrain the new federal government within the common law

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282 *See* 7 Cranch (11 U.S.) 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. *But see* Rowe, *supra* note 244, at 927 (“The weight of the evidence . . . ultimately suggests that the opinion was . . . unanimous.”).

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

284 *Hudson*, 7 Cranch (11 U.S.) at 32; *see* Rowe, *supra* note 244, 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)).

285 *See* Presser, *supra* note 270, at 47.
tradition of punishing only to the extent permitted by existing practice and only to the extent that others similarly situated are treated. That account, however, is incomplete. A respect for the state sovereignty concerns that underlay the Anti-Federalist push for a Bill of Rights points to the use of state law as a benchmark for what makes federal punishments “cruel and unusual.” This encompasses the use of pre-existing punishment practices as the metric but demands that the focus be on the punishment practices of the States. The use of state norms as a baseline for 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 punishments. Developed largely out of concerns of comity and respect for the autonomy of the States in our federal system, application of the standard to federal punishments is positively perverse. Use of the standard in that context is an excellent example of what George Thomas meant when described how the process of incorporation of 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. After the Supreme Court has incorporated a criminal procedure right against the States, the recognition that the States deal with the overwhelming majority of serious criminal activity causes the Court to lose the will to apply that protection robustly as to state defendants. Once these rights are diluted in state court, the same weak standard is then used when those protections are invoked by federal defendants.

286 See Thomas, supra note 194, 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.”).

287 See id. (“[T]he Court later follows the new and narrower precedents when the issue arises in federal court.”).
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. A comparison of crime gravity and punishment severity in the abstract is inherently subjective and, more importantly, has nothing to do with the proportionality principle embedded in the Cruel and Unusual Punishments Clause. The same is true of the intra-jurisdictional analysis, which looks at how different crimes are punished in the jurisdiction in question. The Clause’s proportionality principle ought to be understood instead as using as its comparator other instances of punishment for the same offense conduct. By requiring a rough calibration of offense gravity and punishment severity in the abstract, these two factors each use the wrong benchmark.

Within the current 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 currently residing at step two asks how the punishment in question fares as compared to the punishment meted out in other jurisdictions for the same offense conduct. 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 doled out by the federal government and that doled out by other jurisdictions – the States – for the same offense. Accordingly, in this context, the two-step, three-factor standard should be boiled 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, the Clause commands that punishments not be excessive in relation to that typically and historically administered. Second, the Clause requires that State policy regarding 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 be to 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 in the capital punishment sphere and ask whether a national consensus has developed against a harsh federal sentence even if one or more States also punish just as harshly for the same offense.\textsuperscript{288} The most robust form of the standard, the 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

\textsuperscript{288} See Kennedy v. Louisiana, 554 U.S. 407, 423, 434 (2008) (forbidding capital punishment for rape of 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 of eighteen where 20 States allow practice); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding capital punishment unconstitutional for mentally retarded capital offenders where 20 States allow practice); Stanford v. Kentucky, 492 U.S. 361, 370–71 (1989) (holding capital punishment permissible for capital offenses committed by those under age of eighteen where 25 States permitted execution of seventeen year-old offenders and 22 permitted execution of sixteen year-old offenders); Thompson v. Oklahoma, 487 U.S. 815, 829 (1988) (plurality) (holding capital punishment unconstitutional for capital offenses committed by those under age of 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 (1988) (holding capital punishment permissible for felony murder by major participants in 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 insane where “no State in the Union permits the execution of the insane.”); Enmund v. Florida, 458 U.S. 782, 789 (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) (forbidding capital punishment for rape of adult woman where only one jurisdiction authorized such punishment).
against a particular sentencing practice. In two recent cases, for example, the Court determined that a national consensus had developed against the imposition of the death penalty for the mentally retarded and juveniles under the age of eighteen, respectively, and therefore that these sentencing practices violated the Eighth and Fourteenth Amendments. The Court so held even though only 60% of the States, and only 47% of the States that authorize the death penalty, forbade each practice. If the latter figure is the appropriate one, the idea of 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, 60% can hardly be described as a consensus. In order to manufacture a consensus 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; “the consistency of the direction of change” among jurisdictions in limiting the death penalty to certain offenses and offenders; how “overwhelmingly” such limitations have been approved; and “the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime.” The values of predictability and easy administrability are greatly diminished if the standard is so readily manipulable.


290 *Roper*, 541 U.S. at 565.

291 *Atkins*, 536 U.S. at 315–16; *Roper*, 541 U.S. at 565.

292 *Roper*, 541 U.S. at 565.

293 *Id.*

294 See *Atkins*, 536 U.S. at 349 (Scalia, J., dissenting) (characterizing the “consensus” the Court recognized as “contrived”).
The state-specific approach, while the most novel, is probably also closest to what the Anti-Federalists supposed that they were doing. 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 State by State, then the Anti-Federalists contemplated that the meaning of “cruel and unusual” punishments might vary according to the locale. This is akin to the approach that Akhil Amar has taken regarding the Seventh Amendment right to a jury trial in civil cases.295 Because the common-law “right of trial by jury” varied from State to State,296 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.297 The right guaranteed by the Seventh Amendment, according to Amar, “shifts as state law shifts,” across boundaries and over time.298

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 usage in the Seventh Amendment refers specifically to the jury-trial right itself. The first usage 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

295 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.”).

296 See AMAR, supra note 192, 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”).

297 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.”).

298 Id.
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).”

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.” 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 English criminal law. In 1682, under the leadership of William Penn, Pennsylvania colony restricted the imposition of capital 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. 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.

299 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.”).

300 Goebel, supra note 248, at 464.


302 See STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 8, 89 (2002); Barnes, supra note 301, at 13-15; Bradford, supra note 301, at 16; Keedy,
However, the most significant attempts to make the criminal law less sanguinary in the colonies than the central government preferred were done on a less systematic basis, by the institution of the jury. 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. 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.” This took the form of acquitting against the evidence in some cases and finding defendants guilty of non-capital offenses in others. 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.” The practice was so widespread that it effectively acted as a veto upon some criminal statutes providing for capital punishment. And the practice of the jury using its fact-finding power to make a normative determination as to whether death was an appropriate punishment “was even more entrenched in America than in England.” 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 in such matters.


303 See Banner, *supra* note 302, at 7-9.


305 See Banner, *supra* note 302, at 89-90.

306 Id. at 91.


308 Id. at 2014.
It is true that juries did not exercise such a veto power in non-capital cases. In such cases, judges had wide-ranging powers to determine the appropriate punishment less than death, without input from the jury. 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 essentially to 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. But where the judge sentenced without any input from the jury, additional constraints were required. The main source of that constraint was the Cruel and Unusual Punishments Clause, which in capital cases supplemented, and in non-capital cases stood in 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.

309 See id. at 2016-17.

310 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 . . . .”).

311 See AMAR, supra note 192, 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.”).
In 1781, ten years before the Bill of Rights was adopted, the Congress under the Articles of Confederation passed a statute providing for the trial and punishment of piracies on the high seas. But proceedings 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.’” Of course, it is easier to imagine such a thing under 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 seismic shift that the Bill of Rights was adopted in an attempt to shift 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. According to Palmer, section 34 of the Judiciary Act of 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,” was originally read as referring not only to civil suits but to criminal actions as well. Thus, United States v. Henfield, a prosecution for a violation of the neutrality the U.S. 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. Because the

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312 Goebel, supra note 248, at 482 (quoting 19 JOURNALS OF THE CONTINENTAL CONGRESS 354 (Ford ed. 1904) (alteration added)); see also Palmer, supra note 269, at 298 (“[P]rior to the Constitution . . . the states justifiably prosecuted crimes against the confederacy.”).

313 See Palmer, supra note 269, at 272.

314 Act of Sept. 24, 1789, ch. 20, § 34.

315 See Palmer, supra note 269, 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 243, at 36-39 (contending that § 34 was meant to apply to criminal matters).

316 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360).

317 See Palmer, supra note 269, at 291.
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,” according to Palmer, *Henfield* was actually brought pursuant to Pennsylvania common law. For instance, on a critical point of law, prosecutors cited *Respublica v. De Longchamps*, a 1784 Pennsylvania case, which stood for the proposition that “the law of nations was part of the law of Pennsylvania.” Additionally, the parties and the court all considered binding a provision of the Pennsylvania Constitution. 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.

The incorporation of state criminal law to govern federal criminal actions was formalized in 1825 with the Assimilative Crimes Act (ACA). 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. Although the ACA is rarely used today because of the large number of specific federal criminal

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318 Id.

319 See id. at 294-97.

320 1 Dall. (1 U.S.) 111 (Pa. 1784).

321 Palmer, supra note 269, at 294.

322 See id. at 295-96.

323 See MONCURE D. 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 269, at 295.

324 Act of Mar. 3, 1825, ch. 65, § 3.
provisions,325 it is still in effect.326 Thus, from 1825 onward, and even in our own 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.327 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.328 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

325 See supra Part I.A.


327 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.”).

328 See Herbert Storing, What the Anti-Federalists Were For, in 1 STORING, SUPRA NOTE 179, 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.”); Address of the Albany Antifederal Committee (Apr. 26, 1788), reprinted in 6 id. at 122, 123 (characterizing the Supremacy Clause as “[a] sweeping clause, which subjects every thing to the control of the new government”); A Review of the Constitution Proposed by the Late Convention by a Federal Republican (1787), reprinted in 3 id. 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 id. at 191, 194 (characterizing the Supremacy Clause as “a bold and decisive stroke, whereby all State authority is at once absorbed or annihilated”).
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].

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 protect their citizenry. 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 declarations of rights . . . .” 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 offenses[,] and annex penalties.” The Bill of Rights was a hedge against this awesome power, a “reservation,” as Centinel put it just after the above-quoted passage, “in favor of the rights of the separate states.” That is to say, to the extent that the Cruel and Unusual Punishments Clause – or any provision in the Bill

329 Letter from Centinel to the People of Pennsylvania (Nov. 30, 1787), reprinted in 2 id. at 166, 168.

330 Essay by Cincinnatus (Nov. 8, 1787), reprinted in 6 id. at 10, 13; see also Essay by the Impartial Examiner to the Free People of Virginia (Feb. 20, 1788), reprinted in 5 id. 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 id. 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”).

331 Letter from Brutus to the Citizens of the State of New York (Oct. 18, 1787), reprinted in 2 id. at 363, 365.

332 Letter from Centinel to the People of Pennsylvania (Nov. 30, 1787), reprinted in 2 id. at 166, 169.
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.” 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. 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 such an argument misses the essential point that even the structural constraints embedded in the Constitution exist only to further the end of human liberty. 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.

For this proposition, one need go no further than last Term’s unanimous decision in Bond v. United States. 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

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

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

336 Id.
impingement upon that residuum of State sovereignty protected by the Tenth Amendment.337 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.338

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, those primarily responsible for the administration of criminal justice in this country, what their criminal justice policy should look like. 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.

337 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.”).

338 Bond, 131 S.Ct. at 2364 (citation omitted).
These very same concerns undergird the Eighth Amendment itself. At its core is a judgment that criminal justice is better left largely to the States, that variations among the States are a given, and that when the federal government must step in to prosecute 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.

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 central 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.