

THE ORIGINAL MEANING OF “UNUSUAL”: THE EIGHTH AMENDMENT AS A BAR TO CRUEL INNOVATION

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“Were your health in danger, would you take new medicine? I need not make use of these exclamations: for every member in this committee must be alarmed at making new and unusual experiments in government.”[†]

“It is the genius of the common law to resist innovation.”[‡]

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[†] Patrick Henry, Speech to the Virginia Ratifying Convention for the United States Constitution (June 9, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 172 (Jonathan Elliot ed., Philadelphia, J. B. Lippincott & Co. 2d ed. 1881) [hereinafter ELLIOTT’S DEBATES].

[‡] Centinel No. 1 (Oct. 5, 1787), reprinted in THE ANTIFEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 229 (Ralph Ketcham ed., 1986).

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I. INTRODUCTION

In recent years, both legal scholars and the American public have become aware that something is not quite right with the Supreme Court’s Eighth Amendment jurisprudence. Legal commentators from across the spectrum have described the Court’s treatment of the Cruel and Unusual Punishments Clause as “embarrassing,”¹ “ineffectual and incoherent,”² a “mess,”³ and a “train wreck.”⁴

The feeling that modern Eighth Amendment jurisprudence has gone off the rails has arisen, at least in part, from the wildly inconsistent rulings that have emanated from the Supreme Court over the past few decades, particularly regarding proportionality in sentencing and the death penalty. For example, in *Rummel v. Estelle*,⁵ the Court upheld a life sentence for a small-time recidivist who was convicted of obtaining \$120.75 by false pretenses. The Court brushed off the argument that the sentence was grossly disproportionate to the offense, stating that “one could argue without fear of contradiction by any decision of this Court” that the Cruel and Unusual Punishments Clause does not require any proportionality between crime and sentence outside the death penalty context.⁶ Three years later, in *Solem v. Helm*,⁷ the Court struck down a life sentence for another small-time recidivist who had been convicted of uttering a “no account” check for \$100.00 because the sentence was grossly disproportionate to the offense—the very ground the Court dismissed in *Rummel*. Finally, in *Ewing v. California*,⁸ the Court affirmed the reasoning of *Solem* but reached a *Rummel*-like result, holding that proportionality plays a role in determining whether a sentence

¹ Robert Weisberg, *Cruel and Unusual Jurisprudence*, N.Y. TIMES, Mar. 4, 2005, at A21.

² Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 684 (2005).

³ Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 475 (2005).

⁴ Benjamin Wittes, *What Is “Cruel and Unusual”?*, POL’Y REV., Dec. 2005–Jan. 2006, at 15, 16.

⁵ 445 U.S. 263, 285 (1980).

⁶ *Id.* at 274. The *Rummel* court does allow for the possibility that the proportionality principle may come into play in the “extreme example” of a legislature making a parking violation a felony punishable by life imprisonment. *Id.* at 274 n.11.

⁷ 463 U.S. 277, 303 (1983).

⁸ 538 U.S. 11, 30–31 (2003).

of imprisonment is cruel and unusual, but refusing to overturn a sentence of twenty-five years to life for a small-time recidivist who had been convicted of shoplifting three golf clubs.

The Court’s decisions with respect to the death penalty have been no more consistent than its non-death penalty proportionality jurisprudence. In *Stanford v. Kentucky*,⁹ for example, the Court ruled that execution of sixteen- or seventeen-year-old murderers was not cruel and unusual punishment per se. Sixteen years later, in *Roper v. Simmons*,¹⁰ the Court ruled that it was. Similarly, in *Penry v. Lynaugh*,¹¹ the Court held that execution of the mentally retarded was not necessarily cruel and unusual. Thirteen years later, in *Atkins v. Virginia*,¹² the Court held that it was. As these results indicate, in recent decades, the Supreme Court’s prior decisions as to the scope and application of the Cruel and Unusual Punishments Clause have been poor indicators of what the Court will do in the future.

Even more remarkably, in none of the cases mentioned above did the Court hold that the earlier cases were wrongly decided. In the non-death penalty proportionality cases, the Court stretched to distinguish the facts and recharacterize the holdings of the prior cases to make them appear consistent with the later rulings, despite the opposing results.¹³ In the death penalty cases, the Court did something different and far stranger. In *Atkins v. Virginia* and *Roper v. Simmons*, the Supreme Court appeared to agree that the imposition of the death penalty on the mentally retarded and on seventeen-year-olds respectively was *not* cruel and unusual punishment in 1989, when *Penry v. Lynaugh* and *Stanford v. Kentucky* were decided. Nonetheless, the Court held that such punishments *are* cruel and unusual today.¹⁴ As Justice Scalia stated in his *Roper* dissent, the decisions in *Atkins* and *Roper* are based on the proposition “that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court’s decision 15 years ago was *wrong*, but that the Constitution *has changed*.”¹⁵ And, indeed, Justice Scalia was correct. The *Atkins* and *Roper* decisions were based on the notion that the Cruel and Unusual Punishments Clause “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁶ As societal standards change, so do the punishments permitted by the Eighth Amendment. This approach to

⁹ 492 U.S. 361, 380 (1989).

¹⁰ 543 U.S. 551, 578 (2005).

¹¹ 492 U.S. 302, 340 (1989).

¹² 536 U.S. 304, 321 (2002).

¹³ See *Ewing*, 538 U.S. at 28–29; *Solem v. Helm*, 463 U.S. 277, 288 n.13 (1983).

¹⁴ See *Roper*, 543 U.S. at 574; *Atkins*, 536 U.S. at 316.

¹⁵ 543 U.S. at 608 (Scalia, J., dissenting).

¹⁶ *Atkins*, 536 U.S. at 311–12; see also *Roper*, 543 U.S. at 560–61. As discussed below, the *Atkins* and *Roper* Courts relied upon *Trop v. Dulles*, 356 U.S. 86, 101 (1958), the case in which the “evolving standards of decency” formulation was first employed. See *infra* Part II.A.

Eighth Amendment jurisprudence is known as the “evolving standards” approach.

In response to the instability of the Supreme Court’s evolving standards jurisprudence, Justice Scalia has formulated an originalist approach to the Cruel and Unusual Punishments Clause.¹⁷ Justice Scalia’s approach holds that the Clause was intended to prohibit only certain inherently cruel forms of punishment, such as the rack, that were already unacceptable by the end of the eighteenth century.¹⁸ This approach contends that because grossly disproportionate punishments were imposed at the end of the eighteenth century (at least in England), the Cruel and Unusual Punishments Clause must not have been intended to outlaw disproportionate sentencing.¹⁹ Similarly, because the death penalty was widely available at the end of the eighteenth century, the Cruel and Unusual Punishments Clause must not have been intended to restrict capital punishment significantly.²⁰

Although Justice Scalia’s approach to the Cruel and Unusual Punishments Clause promises much greater consistency than the evolving standards approach, it is a consistency that Justice Scalia himself seems unprepared to embrace wholly. Eighteenth-century notions of acceptable punishment were sometimes much more “robust” than those that prevail today. In eighteenth-century England, for example, it was legally permissible to publicly disembowel or burn traitors alive.²¹ In America, criminal offenders were subjected to public flogging, pillorying, or even mutilation.²² The First Congress authorized the death penalty for crimes we now consider relatively minor, such as counterfeiting.²³ Given the great contrast between these historical practices and modern sensibilities, Justice Scalia has announced that he would likely use the Cruel and Unusual Punishments Clause to strike down any attempt to revive punishments such as flogging, despite the fact that he would have to violate his own originalist principles to do so.²⁴

¹⁷ See *Harmelin v. Michigan*, 501 U.S. 957, 966–85 (1991) (Scalia, J.) (setting forth Justice Scalia’s discussion of the historical evidence regarding the original meaning of the Eighth Amendment).

¹⁸ See *Atkins*, 536 U.S. at 349 (Scalia, J., dissenting) (“The Eighth Amendment is addressed to always-and-everywhere ‘cruel’ punishments, such as the rack and the thumbscrew.”); Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION* 129, 145 (Amy Gutmann ed., 1997) (arguing that the Cruel and Unusual Punishments Clause does not mean “‘whatever may be considered cruel from one generation to the next,’ but ‘what we consider cruel today’; otherwise, it would be no protection against the moral perceptions of a future, more brutal, generation” (quoting Ronald Dworkin)).

¹⁹ *Harmelin*, 501 U.S. at 973–975.

²⁰ Scalia, *supra* note 18, at 145 (“[I]t is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment.”).

²¹ See 4 WILLIAM BLACKSTONE, COMMENTARIES *376–77.

²² See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 40 (1993).

²³ See Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 14, 1 Stat. 112 (1790).

²⁴ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

The dueling approaches to the Cruel and Unusual Punishments Clause described above are sometimes taken to be paradigmatic of the larger interpretive battle between the Court’s originalists and nonoriginalists, for it is in the context of the Eighth Amendment that the contrast between the two approaches seems most extreme.²⁵ The position staked out by the originalist dissenters is so far removed from modern sensibilities that the originalists themselves (or at least Justice Scalia) are unwilling to follow it in every case. The Court’s nonoriginalists, on the other hand, have steadfastly refused even to consult the original intent of the Cruel and Unusual Punishments Clause, holding that the Clause must be interpreted according to current standards, not those of the eighteenth century.

The majority’s nonoriginalist approach and Justice Scalia’s originalist approach to the Cruel and Unusual Punishments Clause are not nearly so different as they seem, however.²⁶ The two approaches share three key commonalities and have but one difference. First, both approaches essentially read the word “unusual” out of the Cruel and Unusual Punishments Clause, either characterizing it as meaningless boilerplate, or assigning it a weak meaning and then ignoring it. Second, both approaches treat the Cruel and Unusual Punishments Clause as if it stated a vague moral command (“Don’t Be Cruel”) that provides no concrete guidance as to its own interpretation and application. Third, both approaches assume—without making any effort to justify this assumption—that applying the “Don’t Be Cruel” principle is more or less a matter of discerning public opinion at a given point in time. The only difference between the two approaches is in the point in time chosen: The majority’s nonoriginalist approach looks to current public opinion in measuring the constitutionality of a given punishment, whereas Justice Scalia’s originalist approach looks to public opinion in 1790. As will be shown in Part II, both approaches are unworkable.

This Article will argue that the key to restoring both the effectiveness and stability of the Cruel and Unusual Punishments Clause is a renewed recognition of the original meaning of the word “unusual.” In making this argument, I do not intend to make any larger claim as to whether the “original meaning” of the constitutional text must always be dispositive in constitutional interpretation. Rather, I proceed from a more modest set of assumptions upon which most people will, I believe, agree: (1) that the original meaning of the text is relevant to constitutional interpretation, whatever one’s position in the larger originalism/nonoriginalism debate; (2) that it is therefore worthwhile to seek to determine the original meaning of constitutional text where that meaning has previously been ignored or underdeveloped; and (3) that if one can determine the original meaning of the

²⁵ See, e.g., William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1362–63 (2005) (identifying Eighth Amendment jurisprudence as indicative of a judicial debate between historicists and originalists).

²⁶ See *infra* Part II.

constitutional text, one should examine the effect one's conclusions may have on existing constitutional doctrine, particularly where the affected doctrinal area suffers from incoherence or instability—as does the Supreme Court's current Eighth Amendment jurisprudence.²⁷

As noted above, the original meaning of the word “unusual” has largely been ignored by both the originalist and the nonoriginalist members of the Supreme Court. While some have occasionally ventured an opinion about the word's meaning—or lack thereof²⁸—all have ignored the word in practice.²⁹ Scholars have also generally ignored the word in their treatment of the Cruel and Unusual Punishments Clause.³⁰ Those scholars who have taken a position on the word's meaning have generally followed the Court in arguing that the word is either meaningless³¹ or that it means “different from that which is generally done”—either in 1790 or today.³² One scholar

²⁷ Of course, a thoroughgoing originalist would hold that the original meaning of the constitutional text should govern, regardless of whether its application will yield desirable results. As noted above, I make no claims in this article regarding the “big picture” debate over originalism and constitutional interpretation.

²⁸ Chief Justice Warren, for example, has argued that the word “unusual” either has no independent meaning or else means “different from that which is generally done.” *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958). This reading of the word has dominated the Court's Eighth Amendment jurisprudence for the past fifty years. See *infra* Part II.A. Justice Scalia has argued that in the English Bill of Rights, the word “unusual” probably meant “contrary to precedent,” but that in its American context, the word meant “different from that which is generally done.” See *infra* Part II.B.3. A few other Justices have ventured opinions as to the meaning of the word “unusual.” For example, in *Furman v. Georgia*, Justice Stewart implied that the term applied to punishments that were “wanton and . . . freakishly imposed” and that were thus comparable to being “struck by lightning.” 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring). In the same case, Justice Douglas opined that “unusual” means “discriminatory”:

It would seem to be incontestable that the death penalty inflicted on one defendant is “unusual” if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

Id. at 242 (Douglas, J., concurring).

²⁹ See *infra* Part II.

³⁰ Even scholars who have focused on the original meaning of the Cruel and Unusual Punishments Clause have tended to ignore the meaning of the word “unusual.” See, e.g., Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661 (2004) (focusing on the word “punishment”).

³¹ See, e.g., Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969) (arguing that the phrase “cruel and unusual” was a kind of “constitutional ‘boilerplate’”).

³² See, e.g., RAOUL BERGER, *DEATH PENALTIES* 41 (1982) (agreeing with Chief Justice Warren's statement in *Trop* that “unusual” should be taken to mean “something different from that which [was] generally done,” but arguing that Chief Justice Warren had made a “mistake” in failing to recognize that the relevant time frame for determining unusualness was the year in which the Eighth Amendment was adopted, not the year in which *Trop* was decided); Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even if We Think It Is, Should We Want the Supreme Court to So Rule?*, 41 GA. L. REV. 867, 880 (2007) (arguing that the most likely meaning of the word “unusual” was that given in the most popular dictionary of the late eighteenth century, Samuel Johnson's *A Dictionary of the English Language*, first published in 1756, which defined “unusual” as “Not common; not frequent; rare”).

has recently argued that the word should be taken to mean “immorally discriminatory.”³³

In fact, the historical evidence shows that none of these arguments is entirely correct. As used in the Eighth Amendment, the word “unusual” was a term of art that referred to government practices that are contrary to “long usage” or “immemorial usage.”³⁴ Under the common law ideology that came to the founding generation through Coke, Blackstone, and various others, the best way to discern whether a government practice comported with principles of justice was to determine whether it was continuously employed throughout the jurisdiction for a very long time, and thus enjoyed “long usage.”³⁵ The opposite of a practice that enjoyed “long usage” was an “unusual” practice, or in other words, an innovation. For example, when the British Parliament sought, in 1769, to remove American protesters to England for trial—thus vitiating the traditional right of trial in the vicinage of the offense—the Virginia House of Burgesses complained that this threatened action was “new, unusual, . . . unconstitutional and illegal.”³⁶ Similarly, in 1788, Patrick Henry complained that the lack of common law constraints contained in the new United States Constitution would make the federal government itself nothing more than a series of “new and unusual experiments.”³⁷

The use of the word “unusual” in the Cruel and Unusual Punishments Clause indicates that at least two assumptions underlie the Clause: First, when the government introduces new or foreign punishment practices, such practices are often crueler than those that preceded them. Second, the best way to prevent cruel governmental innovation is to compare new punishment practices to traditional practices that enjoy long usage. If the new practice is significantly harsher than the traditional practice, then it is not merely unusual, but “cruel and unusual.”

The historical evidence indicates that “unusual” punishments fell into three main categories: (1) punishment practices that were either entirely new or were foreign to the common law system, including—perhaps primarily—those that were used in civil law jurisdictions;³⁸ (2) punishments

³³ Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y. 119, 122 (2004).

³⁴ See *infra* Part III.

³⁵ See *infra* Part III.B–C.

³⁶ JOURNALS OF THE HOUSE OF BURGESSES, 1766–1769, at 215 (John Pendleton Kennedy ed., 1906).

³⁷ Henry, *supra* note †, at 172.

³⁸ Anger at the English sovereign’s attempts to “innovate” by replacing common law practices with civil law practices, and the fear that the new federal government would do the same thing, is a theme that runs strongly throughout the history, and appears several times in the debates over the need for a Bill of Rights. See *infra* Part III.B.1, C.2, D.2, E.1–2. Indeed, Abraham Holmes’s complaint at the Massachusetts convention for ratifying the United States Constitution—that the new government would be permitted to impose “cruel and unheard-of punishments” including “racks and gibbets”—was part of a larger Antifederalist argument that the lack of common law constraints would permit the federal gov-

that were newly married to crimes with which they had not traditionally been associated—for example, Parliament’s decision to make it a capital offense “to cut down a cherry tree in an orchard,” among numerous other minor offenses;³⁹ and (3) traditional punishments that had fallen completely out of usage and were then revived, such as the practice of “ducking” in cold water a woman convicted of being a “common scold.”⁴⁰ In each case, the punishment was presumptively unjust because it attempted to replace “reasonable” punishment practices that had developed over a very long period of time with something that was either new, foreign, or previously tried and then rejected.⁴¹

Recognition of the original meaning of “unusual” will precisely invert the evolving standards of decency test. The evolving standards of decency test asks courts to judge traditional punishment practices in light of current standards of decency. By contrast, the word “unusual” directs courts to judge new punishment practices in light of our longstanding traditions. Thus, the benefit of recognizing the original meaning of “unusual” is that it will make the courts more effective in blocking governmental attempts to increase the harshness of punishment significantly beyond what has traditionally been permitted, rather than limiting their focus to those traditional punishments that are already on the way out. This approach also offers greater flexibility than Justice Scalia’s approach to original meaning because it recognizes that when a traditional punishment—such as flogging—falls out of usage, it loses the presumption of validity that comes with being “usual.” Any attempt to reintroduce the punishment would be an innovation, and the scrutiny the punishment would receive would be at least as great as—and perhaps greater than—the scrutiny given to entirely new punishments.⁴²

ernment to adopt the cruel practices of the civil law. Abraham Holmes, Speech to the Massachusetts Ratifying Convention for the United States Constitution (Jan. 30, 1788), in 2 ELLIOTT’S DEBATES, *supra* note †, at 111.

³⁹ 4 BLACKSTONE, *supra* note 21, at *4. Indeed, as discussed below, the “cruell and unusuall punishments” clause in the English Bill of Rights was directed primarily at the use of traditional punishment methods in new or unprecedented ways. *See infra* Part II.B.2.

⁴⁰ *See* James v. Commonwealth, 12 Serg. & Rawle 220 (Pa. 1825), discussed *infra* Part III.F.2.

⁴¹ *Cf.* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 329–30 (Boston, Little, Brown, & Co. 1868) (“It is somewhat difficult to determine precisely what is meant by cruel and unusual punishments. Probably a punishment declared by statute for an offence which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be made punishable to the extent permitted by the common law for similar offences. But those degrading punishments which in any state had become obsolete before its existing constitution was adopted, we think may well be held to be forbidden by it as cruel and unusual. We may well doubt the right to establish the whipping-post and the pillory in States where they were never recognized as instruments of punishment, or in States whose constitutions, revised since public opinion had banished them, had forbidden cruel and unusual punishments.”).

⁴² Some scholars have considered the possibility that the Cruel and Unusual Punishments Clause was originally intended to reflect changing societal standards to some degree. *See, e.g.*, Ronald

The implications of recognizing the original meaning of “unusual” are not merely academic. In recent decades, both Congress and numerous state legislatures have significantly increased the penalties imposed on criminal offenders for a wide range of crimes.⁴³ Seven states have imposed the previously unthinkable punishment of chemical castration on sex offenders, and several more are currently debating the imposition of surgical castration, a punishment practice that fell out of usage in England in the thirteenth century.⁴⁴ Such new punishments are often popular, and thus arguably comport with current standards of decency.⁴⁵ Without a renewed recognition of the significance of the word “unusual,” courts will be powerless when faced with the primary danger against which much of the Bill of Rights, including the Cruel and Unusual Punishments Clause, was designed to protect: the tyranny of enflamed majority opinion.

Part II of this Article describes the Supreme Court’s current Cruel and Unusual Punishments Clause jurisprudence in greater detail, and demonstrates that the decision to ignore the word “unusual” has led the Court’s nonoriginalist majority and originalist dissent to adopt untenable positions with respect to the meaning and application of the Clause. Part III demonstrates the original meaning of the word “unusual” and shows how the concept of long usage was integral to the development of Anglo American conceptions of rights in general, and of the right against cruel and unusual punishments in particular. Part IV discusses in greater detail the implications of recognizing the original meaning of “unusual” in the Court’s modern Eighth Amendment jurisprudence. Part V provides a brief conclusion.

II. CURRENT JURISPRUDENCE: MORAL PRINCIPLE, PUBLIC OPINION, AND THE ERASURE OF “UNUSUAL”

The phrase “cruel and unusual” is a common and familiar one.⁴⁶ We hear it all the time. When a prisoner is tortured, we denounce the practice

Dworkin, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 18, at 115, 120; Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 544–47 (2003).

⁴³ For example, in 1986, 21 U.S.C. § 841 was amended to include, among other things, a ten-year mandatory minimum sentence for the possession of fifty grams of a “mixture or substance” containing crack cocaine. Narcotics Penalties and Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-2 (codified as amended at 21 U.S.C. § 841(b)(1)(A)(iii) (2006)). *See generally* JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL JUSTICE AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003) (describing the increasingly severe approach to punishment that characterizes the American criminal justice system).

⁴⁴ *See generally* John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559 (2006) (cataloging, detailing, and criticizing these state proposals).

⁴⁵ At least one court has suggested that the popularity of laws imposing chemical castration on sex offenders may indicate an “emerging” societal consensus in favor of the practice that would preclude a finding that chemical castration violates evolving standards of decency. *See* *People v. Steele*, No. C044408, 2004 WL 2897955, at *2 n.1 (Cal. Ct. App. Dec. 15, 2004).

⁴⁶ A Google search for the phrase “cruel and unusual” turns up approximately one million results.

as “cruel and unusual.”⁴⁷ When an offender is sentenced to death or a long prison term, the sentence is often appealed on the ground that it is “cruel and unusual.”⁴⁸ When prison medical care is inadequate,⁴⁹ when force is used to subdue a prisoner,⁵⁰ or even when a prisoner is subjected to second-hand smoke,⁵¹ the prisoner may file suit claiming that he has been subjected to “cruel and unusual” punishment. The phrase is common even in every day life: When a child is told she has to eat her broccoli, when a football player has to do extra drills during preseason conditioning, or when a wedding guest is assigned a seat next to a boring, drunk, or obnoxious person, each is likely to describe his or her ordeal as “cruel and unusual.”

But even though the phrase “cruel and unusual” is quite common, its actual meaning is not entirely clear. The meaning of the word “unusual” seems particularly difficult. Does it mean rare? Out of the ordinary? Uncommon? Discriminatory? Illegal? Or perhaps the word has no meaning at all and is mere surplus verbiage.

Some things are known about the phrase “cruel and unusual punishments.” It first appeared in the English Bill of Rights of 1689, in response to the sentencing practices of royal judges in the reign of King James II.⁵² It appeared once again in 1776, across the Atlantic, in the Declaration of Rights George Mason drafted for the Commonwealth of Virginia.⁵³ It appeared a third time, in 1788, among the amendments recommended by the Virginia convention when it ratified the United States Constitution.⁵⁴ Finally, James Madison placed a proscription against “cruel and unusual punishments” in the Bill of Rights he drafted for the U.S. Constitution, and this language ultimately became part of the Eighth Amendment.⁵⁵

Despite this long pedigree, however, neither the Court’s nonoriginalist majority nor its originalist dissenters have been able to determine what the Cruel and Unusual Punishments Clause—and particularly the word “un-

⁴⁷ See, e.g., *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth] Amendment to the Constitution.”).

⁴⁸ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty for juveniles); *Ewing v. California*, 538 U.S. 11 (2003) (life sentence under three-strikes statute for offender convicted of shoplifting golf clubs).

⁴⁹ *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁵⁰ *Hudson v. McMillian*, 503 U.S. 1 (1992).

⁵¹ *Helling v. McKinney*, 509 U.S. 25 (1993).

⁵² See *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne* (1688), in 6 THE STATUTES OF THE REALM 143 (1819) [hereinafter *An Act Declaring*]; see also 4 BLACKSTONE, *supra* note 21, at *379 (noting that the “cruel and unusual punishments” clause in the English Bill of Rights “had a retrospect to some unprecedented proceedings in the court of king’s bench, in the reign of king James the second”).

⁵³ See *infra* Part III.D.4.

⁵⁴ See *infra* Part III.E.2–3.

⁵⁵ See *infra* Part III.E.3; see also ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 9 (1991).

usual”—meant to the generation of Americans that adopted the Eighth Amendment. Rather, as shown below, both groups have chosen to ignore the word “unusual” and have thus treated the Cruel and Unusual Punishments Clause as though it embodies a vague and abstract moral principle: “Don’t Be Cruel.” Moreover, both groups have assumed that applying this moral principle is more or less a matter of discerning public opinion at a given point in time. Nonoriginalists look to indicators of current public opinion, whereas originalists look to public opinion in 1790. This approach to the Clause has led the nonoriginalists to adopt a standard that is highly unstable and manipulable, and has led the originalists to adopt a standard that would make the Cruel and Unusual Punishments Clause virtually a dead letter if applied consistently. Section A will describe and critique the evolving standards approach currently followed by a majority of the court, and section B will describe and critique Justice Scalia’s originalist approach.

*A. Standardless Standards: Evolving Standards of Decency
and the Erasure of “Unusual”*

1. The Birth of the “Evolving Standards of Decency” Test.—The evolving standards of decency test, which has dominated the Supreme Court’s Cruel and Unusual Punishments Clause jurisprudence over the past fifty years, was first articulated by Chief Justice Warren in *Trop v. Dulles*.⁵⁶ In that case, the Court was called upon to decide whether denationalization was a “cruel and unusual punishment” for the crime of desertion.⁵⁷ But before making this decision, the Court had to decide what the Clause itself meant. Writing for a plurality of the Court, Chief Justice Warren surveyed Supreme Court caselaw dating back to 1878 and made the following conclusion regarding the meaning of the Cruel and Unusual Punishments Clause:

On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word “unusual.” If the word “unusual” is to have any meaning apart from the word “cruel,” however, the meaning should be the ordinary one, signifying something different from that which is generally done.⁵⁸

This two part formula—(a) the meaning of “unusual” probably does not matter, but (b) if the meaning does matter, “unusual” means “different from that which is generally done”—is notable for at least two reasons. First, in

⁵⁶ 356 U.S. 86, 101 (1958).

⁵⁷ *Id.* at 87.

⁵⁸ *Id.* at 100 n.32 (citations omitted).

arriving at this formula, Chief Justice Warren made no effort to discern the original meaning of the Clause. The earliest authority he cited was a case decided in 1878, nearly ninety years after the Eighth Amendment was adopted.⁵⁹ Second, the formula appears to be designedly ambiguous as to whether the word “unusual” should play any independent role in the interpretation of the Cruel and Unusual Punishments Clause. The key to the Cruel and Unusual Punishments Clause is its “basic prohibition against inhuman treatment.” The question of whether such treatment is “unusual” is either secondary or wholly irrelevant.

The *Trop* plurality’s reading of the word “unusual”—or, more accurately, its refusal to give a definite reading of this word—laid the essential groundwork for the Court’s modern Eighth Amendment jurisprudence. Without the word “unusual,” the Cruel and Unusual Punishments Clause becomes simply the “Cruel Punishments” Clause. It embodies a vague and abstract moral command: “Don’t Be Cruel.” If a punishment is cruel, we should not impose it. There is no point, this approach implies, in wasting time worrying about whether such a punishment is also “unusual,” whatever that word means.

After effectively removing the word “unusual” from the interpretive picture, the Court needed to set forth a standard for determining whether a punishment is impermissibly cruel. Defining such a standard was a problem with which the Supreme Court struggled for much of the twentieth century: Are we bound by the notions of cruelty that prevailed at the time the Eighth Amendment was adopted? Are we forbidden from taking into account the fact that eighteenth-century notions of acceptable punishment were sometimes much harsher than those that prevail today? In eighteenth-century England, it was legally acceptable to publicly disembowel or burn traitors alive.⁶⁰ In America, criminal offenders were subjected to public whipping, pillorying, or even mutilation.⁶¹ The First Congress authorized execution of those convicted of counterfeiting, among other things.⁶² If such punishments were acceptable at the time the Eighth Amendment was adopted, does this mean that the Eighth Amendment poses no bar to their use today?

To all of these questions, the *Trop* Court answered no. Rather, the Court looked to a case decided in 1910, *Weems v. United States*,⁶³ in which the Court had suggested that the meaning of the Cruel and Unusual Punishments Clause may be “progressive,” and “may acquire meaning as public

⁵⁹ *Id.* The earliest case cited by the Court in this context was *Wilkerson v. Utah*, 99 U.S. 130 (1878).

⁶⁰ 4 BLACKSTONE, *supra* note 21, at *376–77.

⁶¹ FRIEDMAN, *supra* note 22, at 40.

⁶² See Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 14, 1 Stat. 112 (1790).

⁶³ 217 U.S. 349 (1910).

opinion becomes enlightened by a humane justice.”⁶⁴ Chief Justice Warren adopted this suggestion as the basis for his new standard for determining whether a given punishment was impermissibly cruel. Rather than tying the Cruel and Unusual Punishments Clause to the outdated standards of the past, the *Trop* Court held that the Clause “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁶⁵

2. *The “Who Decides?” Problem.*—The evolving standards of decency test seemed, at first, to offer the possibility that the Eighth Amendment could be used by the courts to eliminate all the “barbaric” vestiges of an earlier and more vengeful time. As society “progresses,” and becomes kinder and more enlightened, so too does the Eighth Amendment. Indeed, in *Furman v. Georgia*, Justices Brennan and Marshall confidently asserted that the death penalty itself no longer comported with evolving standards of decency,⁶⁶ only to have their hopes dashed when thirty-five states reenacted death penalty laws immediately after *Furman* struck them down.⁶⁷

But from the beginning, there were deep practical and theoretical problems with the evolving standards of decency test. The first and most obvious of these was the “Who decides?” problem. In adopting the evolving standards of decency test, was the Supreme Court setting itself up as the ultimate arbiter of the nation’s evolving moral standards? Or is the Court required to look to external sources for these standards? If so, what sources? And what criteria should the Court use in examining them?

The Supreme Court has never answered any of these questions head-on. At times it has emphasized the need to rely upon “objective indicia” of current standards of decency, such as legislative enactments and jury-imposed sentences, in order to avoid transforming the evolving standards of decency test into a completely subjective standard.⁶⁸ At other times, it has emphasized its right to exercise its “own judgment,” even when that judgment is relatively unsupported by such “objective indicia” of current standards of decency.⁶⁹ In recent years, the Supreme Court has even shown

⁶⁴ *Id.* at 378.

⁶⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁶⁶ 408 U.S. 238, 295 (1972) (Brennan, J., concurring) (“An examination of the history and present operation of the American practice of punishing criminals by death reveals that this punishment has been almost totally rejected by contemporary society.”); *id.* at 360 (Marshall, J., concurring) (“[The death penalty] violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.”).

⁶⁷ *See Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976).

⁶⁸ *See, e.g., Stanford v. Kentucky*, 492 U.S. 361, 370, 373 (1989); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Gregg*, 428 U.S. at 181.

⁶⁹ *See, e.g., Roper v. Simmons*, 543 U.S. 551, 564 (2005) (“The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. . . . We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”); *Atkins v. Virginia*, 536 U.S.

willingness to consult controversial alternative sources—such as the policy preferences of foreign countries and international bodies, as well as private professional associations—in order to determine what current standards of decency require.⁷⁰ Without a clear answer to the “Who decides?” problem, none of these approaches is clearly right or clearly wrong. As will be demonstrated below, the Court’s vagueness in defining its own criteria for judgment makes the evolving standards of decency test inherently unstable and thus subject to manipulation.⁷¹

The problem deepens when one narrows the focus to the two most broadly agreed upon “objective indicia” of current moral standards: legislative enactments and jury verdicts. The Supreme Court has repeatedly stated that the actions of legislatures and juries are the best indicators of current standards of decency. Legislatures are composed of the people’s representatives and have a vested interest in accurately representing the community’s moral standards in the legislation they adopt.⁷² Similarly, juries are composed of the people themselves, and their collective judgments are likely to be representative of the community’s moral standards. Indeed, in *Witherspoon v. Illinois*,⁷³ the Supreme Court held that it was unconstitutional to disqualify jurors solely because they voice general opposition to the death penalty, since the remaining jurors would fail to represent the moral standards of society as a whole: “[O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’”⁷⁴

Legislative enactments and jury verdicts are an attractive resource for discerning current moral standards; but once one begins to examine them,

304, 313 (2002) (“[In] cases involving a consensus, our own judgment is ‘brought to bear,’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1997)).

⁷⁰ See *Roper*, 543 U.S. at 575–78; *Atkins*, 536 U.S. at 316 n.21.

⁷¹ The Supreme Court’s assertion of apparently unrestricted power to exercise its “own judgment” in determining the permissibility of a given punishment creates significant concerns relating to the separation of powers, among other issues. See generally Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149 (2006).

⁷² See *Gregg*, 428 U.S. at 175–76 (“[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.” (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting))); see also, e.g., *Stanford*, 492 U.S. at 371; *McCleskey*, 481 U.S. at 300.

⁷³ 391 U.S. 510 (1968).

⁷⁴ *Id.* at 519 n.15 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). The Supreme Court subsequently modified (and weakened) the standard announced in *Witherspoon*, holding that “a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.” *Adams v. Texas*, 448 U.S. 38, 45 (1980).

one discovers that they are remarkably opaque and resistant to authoritative moral interpretation. If juries sentence rapists to imprisonment rather than death in nine cases out of ten, does this mean that jurors overwhelmingly reject the death penalty for rape? Or does it mean that juries are going through a nuanced discernment process and are only sentencing defendants to death in the very worst cases?⁷⁵ Or does it mean that the juries are engaging in racial discrimination and punishing black defendants to death while merely sending white defendants to prison?⁷⁶ Legislative enactments are almost as difficult to decipher.⁷⁷ If a state legislature imposes the death penalty for murder but not for rape, does this mean that the legislature morally condemns the death penalty for rape? Or might such legislation reflect a relatively weak policy preference? Might it merely reflect the pragmatic judgment that imposition of the death penalty for rape is likely to be struck down by the Supreme Court?⁷⁸ Because the moral import of legislative judgments and jury verdicts is so difficult to discern, these “objective indicia” of current standards of decency are inherently—and perhaps unavoidably—subject to manipulation.⁷⁹

3. *Public Opinion and Individual Rights.*—Leaving aside these methodological problems, the evolving standards of decency test also suffers from a deeper theoretical problem, in that it appears to make the rights of

⁷⁵ See *Gregg*, 428 U.S. at 182 (“[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.”).

⁷⁶ See, e.g., Carol S. Steiker, *Remembering Race, Rape, and Capital Punishment*, 83 VA. L. REV. 693 (1997) (reviewing ERIC W. RISE, *THE MARTINSVILLE SEVEN: RACE, RAPE, AND CAPITAL PUNISHMENT* (1995)).

⁷⁷ For an interesting discussion of several types of incoherence surrounding the Supreme Court’s efforts to decipher the moral significance of legislative enactments, see Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. Rev. 1089 (2006).

⁷⁸ The difficulty of this problem may be seen in *Coker v. Georgia*, in which the Supreme Court struck down Georgia’s statute authorizing the death penalty for rape. 433 U.S. 584, 600 (1977). In making this decision, the Court relied on the fact that Georgia was the only state that still authorized the death penalty for the crime of simple rape. *Id.* at 595–96. But prior to the Court’s decision in *Furman* striking down all then-extant state death penalty laws, some sixteen states still authorized the death penalty for rape. *Id.* at 593. *Furman* was decided in 1972, a mere five years prior to *Coker*. It is not at all clear why most of the states that had imposed the death penalty for rape prior to *Furman* declined to do so when they reenacted their death penalty laws after *Furman*. Some may have considered *Furman* an opportunity to refine their death penalty statutes in light of contemporary standards of decency, but others may have excluded rape to make their death penalty statutes narrower and thus less vulnerable to being struck down again. Thus, the Court’s reliance on post-*Furman* actions of state legislatures as an index of current standards of decency is questionable.

⁷⁹ Cf. Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court’s Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455, 456–57 (1996) (arguing that the manipulability of the evolving standards of decency test has permitted the Supreme Court to slant its rulings to favor the death penalty).

criminal defendants dependent upon public opinion. Individual rights—the right to free exercise of religion and the right to free speech, for example—are typically thought to be necessary to protect unpopular individuals or groups when public opinion becomes enflamed against them.⁸⁰ By contrast, the evolving standards of decency test only lets the Cruel and Unusual Punishments Clause come into play after public opinion has already turned *in favor of*, not against, criminal defendants.⁸¹ Thus, for example, in *Coker v. Georgia*, the Supreme Court justified striking down the death penalty for simple rape largely because forty-nine states had already eliminated it.⁸² Similarly, in *Atkins* and *Roper*, the Court justified its decisions to strike down the death penalty for the mentally retarded and for minors largely on the basis that there was already a “trend” in state legislatures toward abolition.⁸³

Because the evolving standards of decency test ties the meaning of the Cruel and Unusual Punishments Clause to public opinion, the Eighth Amendment provides little protection when public opinion becomes enflamed and more prone to cruelty. For example, in recent years a number of states have enacted laws requiring that sex offenders be chemically castrated,⁸⁴ despite the fact that castration has been described by the Supreme

⁸⁰ See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 982, at 697 (Carolina Academic Press 1987) (1833) (“[A] bill of rights is an important protection against unjust and oppressive conduct on the part of the majority of the people themselves.”); cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

⁸¹ A number of scholars have previously pointed out the cruel irony inherent in the fact that the evolving standards of decency test ties the rights of criminal defendants to the very same majority opinion from which the Eighth Amendment is supposed to protect them. See, e.g., Jacobi, *supra* note 77, at 1113 (“[D]eclaring an action unconstitutional because a significant number of states prohibit the practice leaves the Supreme Court enforcing constitutional protections only in cases where they are least needed.”); Raeker-Jordan, *supra* note 79, at 556 (arguing that under the evolving standards of decency test, the Cruel and Unusual Punishments Clause “will degenerate into a tool to validate the whims of the masses”). But see Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 6 (2007) (arguing that “non-doctrinal majoritarian forces,” not the “majoritarian doctrine” underpinning the evolving standards of decency test, are the primary cause of the Supreme Court’s “majoritarian” approach to death penalty cases).

⁸² 433 U.S. at 595–96.

⁸³ See *Roper v. Simmons*, 543 U.S. 551, 566 (2005); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002).

⁸⁴ See CAL. PENAL CODE § 645 (West 2006); FLA. STAT. § 794.0235 (2007); GA. CODE ANN. § 16-6-4 (repealed 2006); IOWA CODE § 903B.10 (2007); LA. REV. STAT. ANN. § 15:538 (2008); MONT.

Court as a quintessential example of cruel and unusual punishment.⁸⁵ When California’s chemical castration law was challenged under the Eighth Amendment, however, the district court suggested that the very popularity of such laws likely insulated them from Eighth Amendment scrutiny because it indicated an “emerging” societal consensus in favor of chemical castration, which indicated that this punishment met current standards of decency.⁸⁶

In short, the evolving standards of decency test only operates to invalidate punishments that are already on the way out. It does virtually nothing to stop new forms of cruelty that are on the way in, so long as this cruelty is supported by public opinion.⁸⁷ Thus, if applied in good faith, the evolving standards of decency test leads to a Cruel and Unusual Punishments Clause that is nearly as much of a dead letter as it would be under Justice Scalia’s originalist approach, discussed below.⁸⁸

4. *The Manipulability of “Evolving Standards of Decency.”*—The evolving standards of decency test has not been applied consistently with its own premises, but has instead been subjected to fairly transparent manipulation by the Supreme Court. By refusing to answer the “Who decides?” question, and by refusing to acknowledge the moral opacity of the “objective indicia” it consults, the Supreme Court has permitted itself to indulge in

CODE ANN. § 45-5-512 (2006). OR. REV. STAT. § 144.625(1) (2007); WIS. STAT. § 304.06(1q) (2005–06); see also Stinneford, *supra* note 44, at 561–62.

⁸⁵ See *Furman v. Georgia*, 408 U.S. 238, 265 (1972); *Weems v. United States*, 217 U.S. 349, 377 (1910); see also Stinneford, *supra* note 44, at 588.

⁸⁶ *People v. Steele*, No. C044408, 2004 WL 2897955, at *2 (Cal. Ct. App. Dec. 15, 2004). The *Steele* court ultimately refrained from deciding the Eighth Amendment issue because it found that the defendant had waived it. *Id.*

⁸⁷ This potentially serious problem showed itself very recently in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008). In *Kennedy*, the State of Louisiana sought to justify the execution of a child rapist on the ground that in recent years, five states had enacted capital rape laws for child rapists, which showed a “consistent direction of change [in societal attitudes] in support of the death penalty for child rape.” *Id.* at 2656. The Court acknowledged that this was a good argument for supporting a punishment under the evolving standards of decency test, noting that “[c]onsistent change might counterbalance an otherwise weak demonstration of [societal] consensus” in favor of a given punishment. *Id.* Nonetheless, the Court struck down the punishment, in part because the absolute number of states approving of this punishment was too small to support the argument that societal attitudes are consistently moving toward approval. *Id.* at 2657–58. Later in the opinion, the Court made clear that its decision was based on the notion that the death penalty is different than other forms of punishment, *id.* at 2658 (“Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty.”), and that therefore the Court will be more willing to step in and prevent the emergence of a societal consensus in favor of a particular application of the death penalty than it would be in non-death penalty contexts. See *id.* at 2665 (noting that the evolving standards of decency principle “requires that use of the death penalty be restrained”). Thus, it appears that, outside of the death penalty context, the evolving standards of decency test continues to provide little protection against new forms of penal cruelty, so long as they are popular.

⁸⁸ See *infra* Part II.B.

an extraordinarily results-oriented approach to the Cruel and Unusual Punishments Clause.

This problem may be demonstrated in the Supreme Court's treatment of whether execution of sixteen- and seventeen-year-olds constitutes "cruel and unusual punishment." In 1989, in *Stanford v. Kentucky*, the Supreme Court first considered the question.⁸⁹ The Court noted that such punishments were permissible at the time the Eighth Amendment was adopted and that therefore the only question was whether the punishment ran afoul of evolving standards of decency.⁹⁰ To answer this question, the Court looked at legislative enactments and jury verdicts. With respect to legislative enactments, the Court found that of the thirty-seven states that permitted the death penalty, twenty-two allowed it to be imposed on sixteen-year-olds and twenty-five permitted it to be imposed on seventeen-year-olds.⁹¹ The court further noted that about two percent of all cases in which the death penalty had been imposed involved defendants who were under eighteen at the time of the offense.⁹² Taken together, the Court found these statistics failed to show that a societal consensus had developed against the execution of sixteen- and seventeen-year-olds.⁹³ A majority of death penalty states permitted the punishment, and juries continued to impose it. The relative rarity of such jury verdicts did not indicate that such executions were "categorically unacceptable" to juries and prosecutors, but rather reflected the belief that such executions should "rarely" be imposed.⁹⁴

The permissibility of executing seventeen-year-olds was presented once again sixteen years later, in *Roper v. Simmons*.⁹⁵ In the intervening years, four state legislatures abolished the death penalty for minors and one state court did so as a matter of statutory construction.⁹⁶ The Supreme Court held that this five-state shift, which still left twenty states authorizing the death penalty for seventeen-year-olds, demonstrated a "societal consensus" against such executions.⁹⁷ To bolster its conclusion, the Court noted that the majority of states did not permit execution of seventeen-year-olds (although the majority of death penalty states still did), and that the direction of change was consistently toward abolition.⁹⁸ The Court also held that such executions were impermissible in the Court's "own independent

⁸⁹ 492 U.S. 361 (1989).

⁹⁰ *Id.* at 369.

⁹¹ *Id.* at 370–71.

⁹² *Id.* at 373–74.

⁹³ *Id.* at 380.

⁹⁴ *Id.* at 374.

⁹⁵ 543 U.S. 551, 551 (2005).

⁹⁶ *Id.* at 565; see also *State v. Furman*, 858 P.2d 1092, 1103 (Wash. 1993) (construing the state of Washington's death penalty statute not to cover juveniles convicted of capital offenses).

⁹⁷ *Roper*, 543 U.S. at 567–68.

⁹⁸ *Id.* at 567.

judgment,⁹⁹ because younger people were generally more impulsive, more vulnerable, and less reflective than older people. Therefore, the Court reasoned, young people were generally less culpable.¹⁰⁰ Finally, the Court cited the fact that the death penalty for juveniles had been abolished in numerous foreign countries and disapproved in international human rights treaties—although the United States had not bound itself to any treaty provisions condemning this punishment.¹⁰¹

The differing outcomes in *Stanford* and *Roper* demonstrate the inherent instability and manipulability of the evolving standards of decency test. In both cases, a substantial proportion of state legislatures permitted execution of seventeen-year-olds, while a substantial proportion did not. In both cases, the evidence indicated that juries consistently but rarely imposed the death sentence on juvenile offenders. Any change in societal attitudes between *Stanford* and *Roper* was incremental at best; in both cases societal attitudes about the acceptability of executing seventeen-year-olds were split nearly down the middle.

The only real difference between these cases lies not in any “evolution” of societal standards, but in an increased assertiveness of judicial will. The *Roper* majority *wanted* to strike down the death penalty for seventeen-year-olds, despite the fact that the evidence did not demonstrate that such executions violated any societal moral consensus, at least within the United States, and so it simply pretended that the evidence supported the desired result. One may like the results of *Roper* and still find the case profoundly troubling. If evolving standards of decency is merely window-dressing for judicial will, then it is not merely an incorrect standard; it is not a standard at all. In the long run, a standardless standard will cause more harm than good to those criminal defendants who seek the protection of the Eighth Amendment.¹⁰²

B. *Dead Letters: Justice Scalia’s Originalist Reading of the Eighth Amendment*

If the Supreme Court’s nonoriginalist majority has adopted an unduly expansive reading of the Eighth Amendment, its dissenters, particularly Justice Scalia, have adopted a much more restrictive reading of the Cruel and Unusual Punishments Clause than the historical evidence warrants. Like the nonoriginalists, Justice Scalia has virtually read the word “unusual” out of the Cruel and Unusual Punishments Clause in order to justify his position that the clause was meant only to prohibit certain inherently cruel methods

⁹⁹ *Id.* at 564.

¹⁰⁰ *Id.* at 568–75.

¹⁰¹ *Id.* at 575–78.

¹⁰² For an excellent discussion of the problems inherent in grounding constitutional analysis purely on contemporary—and perhaps transitory—moral sentiment, see Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981).

of punishment that were already unacceptable in eighteenth-century America.

Justice Scalia's vision of the original meaning of the Cruel and Unusual Punishments Clause is set out most fully in his opinion in *Harmelin v. Michigan*.¹⁰³ In that case, the petitioner was convicted of possessing 672 grams of crack cocaine and was sentenced to a mandatory term of life imprisonment. The petitioner argued that the sentence was unconstitutional because it was grossly disproportionate to his offense, and because its mandatory nature prevented the trial court from taking into account mitigating factors, such as his lack of a prior felony record.¹⁰⁴ In a judgment announced by Justice Scalia, the Supreme Court rejected Harmelin's claim, holding that the sentence was not grossly disproportionate to the offense, and that the Constitution did not invalidate mandatory sentencing outside of the death penalty context.¹⁰⁵ But in a portion of the opinion joined only by Chief Justice Rehnquist, Justice Scalia went further and argued that the Eighth Amendment contained no proportionality principle whatsoever.¹⁰⁶ To support this argument, Justice Scalia laid out his understanding of the original meaning of the Cruel and Unusual Punishments Clause. The following sections will describe the historical materials upon which Justice Scalia relied in discerning the original meaning of the Cruel and Unusual Punishments Clause, and will demonstrate that certain flaws in his approach to these materials have led him to adopt an unduly harsh and narrow reading of the Clause—indeed, a reading so harsh and narrow that Justice Scalia has professed himself unwilling to follow it in every case. Because much of Justice Scalia's interpretation of the historical materials is consistent with my own, I will only differentiate between his view and mine where there is actual divergence.

I. The Background for Justice Scalia's Originalist Argument.—Justice Scalia's opinion was primarily written as a response to the Supreme Court's prior holding, in *Solem v. Helm*, that the Cruel and Unusual Punishments Clause required some proportionality between crime and sentence.¹⁰⁷ As Justice Scalia pointed out in *Harmelin*, the *Solem* Court performed only a cursory historical analysis to justify its holding. It noted that the language of the Eighth Amendment's Cruel and Unusual Punishments Clause came from the English Bill of Rights.¹⁰⁸ It also noted that the English common law had long reflected a principle of proportionality.¹⁰⁹ The Magna Carta required that "amerancements," a form of fine that was the

¹⁰³ 501 U.S. 957 (1991).

¹⁰⁴ *Id.* at 961–62, 994.

¹⁰⁵ *Id.* at 994–96.

¹⁰⁶ *Id.* at 965.

¹⁰⁷ 463 U.S. 277, 284 (1983).

¹⁰⁸ *Id.* at 285.

¹⁰⁹ *Id.* at 284.

most common criminal punishment in the thirteenth century, be proportioned to the offense.¹¹⁰ Similarly, English common law courts held that “imprisonment ought always to be according to the quality of the offence.”¹¹¹ Having established these two points, it asserted that the English Bill of Rights’ prohibitions against “excessive Baile,” “excessive Fines,” and “cruell and unusuall Punishments,” were all meant to incorporate the principle of proportionality.¹¹² It further asserted that because the American Framers of the Bill of Rights were generally concerned with preserving the “rights of English subjects,” they must have meant to incorporate the proportionality principle into the Cruel and Unusual Punishments Clause.¹¹³

In order to demonstrate the weakness of the *Solem* Court’s assertions, Justice Scalia performed two historical analyses in *Harmelin*: first, of the Cruel and Unusual Punishments Clause in the English Bill of Rights, and then, of the same in the Eighth Amendment. His analysis is compelling in many ways, but it is also deeply—even fatally—flawed.

2. *Titus Oates and Cruel and Unusual Punishments in the English Bill of Rights.*—Before discussing the original meaning of the Cruel and Unusual Punishments Clause in the Eighth Amendment, Justice Scalia described the historical background of this clause in the English Bill of Rights, from which the American version was taken.¹¹⁴

In 1688, in response to a variety of issues that had caused the English governing class to be unhappy with King James II, a group of nobility invited William of Orange and his wife Mary to invade England and depose James. William and Mary accepted the invitation and James fled England after putting up relatively little fight. William then convened a Convention Parliament in 1689 to decide upon succession to the throne. Parliament declared that by fleeing, James had abdicated the throne and that William and Mary were the rightful King and Queen of England.¹¹⁵

In conferring the crown upon William and Mary, however, Parliament also asked them to accept a Bill of Rights that was designed to limit the ar-

¹¹⁰ *Id.*

¹¹¹ *Id.* at 284–85.

¹¹² *Id.* at 285–86 (“Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.”).

¹¹³ *Id.* at 286.

¹¹⁴ The discussion that follows will largely track Justice Scalia’s, although other sources are also cited to provide context or highlight important points. As noted above, I will only differentiate between Justice Scalia’s reading of these materials and my own where there is an actual point of divergence or disagreement.

¹¹⁵ These events have been recounted by numerous sources. See, e.g., SIR DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 267–68 (9th ed. 1969); THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 507 (Philip A. Ashworth ed., 6th ed. 1905).

bitrary exercise of the monarch's prerogative power.¹¹⁶ The first part of the Bill of Rights complains of James II's purportedly lawless behavior, suspending laws by royal prerogative, creating new prerogative courts, levying taxes without the consent of Parliament, keeping a standing army in time of peace, billeting soldiers in the homes of subjects, interfering with Parliament in a variety of ways, and imposing "excessive bail," "excessive fines," and "illegall and cruell punishments."¹¹⁷ The second part of the Bill of Rights sets forth the legal principles that the monarch agrees to follow in the future. For the most part, these are simply a restatement of the principles James II was alleged to have violated. Instead of forbidding "illegall and cruell" punishments, however, the Bill of Rights forbids "cruell and unusuall punishments."¹¹⁸

As Justice Scalia noted in *Harmelin*, the English Bill of Rights' prohibition on "cruell and unusuall punishments" was tested in 1689, the very year in which it was enacted.¹¹⁹ In 1678, an Anglican cleric named Titus Oates, who had previously been disciplined for drunkenness, theft, and other criminal behavior, decided to take advantage of prevailing anti-Catholic sentiment by claiming that he knew of a "popish plot" to assassinate King Charles II. Oates swore out a statement to this effect before a London magistrate, and ten days later the magistrate was found murdered. It was assumed that the magistrate had been murdered by members of the popish plot, and in the hysteria that ensued, some fifteen people who had been accused by Oates were tried and executed. Oates' story ultimately unraveled, however, and it became clear that he had invented this "plot" out of whole cloth.¹²⁰

In 1685, Charles II died and was succeeded by James II. During that same year, Titus Oates was indicted and convicted of perjury.¹²¹ Chief Justice Jeffreys presided over the trial. After Oates was convicted, Jeffreys lamented the fact that the death penalty was not available for the crime of perjury, but announced that "it is left to the discretion of the court to inflict such punishment as they think fit,"¹²² so long as the punishment "extend not to life or member."¹²³ Oates was then sentenced to a fine of two thousand marks, pillorying four times a year, and to life imprisonment. He was also

¹¹⁶ See RUTLAND, *supra* note 55, at 9 (arguing that the English Bill of Rights set forth the "supreme law of the land, repeating and sanctifying the fundamental principles of English liberty as Englishmen then conceived them to be").

¹¹⁷ *An Act Declareing*, *supra* note 52, at 142-45.

¹¹⁸ *Id.*

¹¹⁹ *Harmelin v. Michigan*, 501 U.S. 957, 969-71 (1991).

¹²⁰ The trials arising out of Oates's false accusations of a popish plot against the king are described and critiqued in 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 383-404 (London, MacMillan & Co. 1883). See also *Harmelin*, 501 U.S. at 969.

¹²¹ Titus Oates's perjury trials are recounted in 10 How. St. Tr. 1079-1330 (K.B. 1685).

¹²² *Id.* at 1315.

¹²³ *Id.* at 1314; see also 10 H.C. JOUR. 247; *Harmelin*, 501 U.S. at 970.

defrocked and was ordered to be whipped “from Aldgate to Newgate,” and then “from Newgate to Tyburn” two days later.¹²⁴ As Justice Scalia noted, some scholars have argued that the court believed it was sentencing Oates to be “scourged to death.”¹²⁵

In 1689, after the Bill of Rights was enacted, Oates petitioned both houses of Parliament for release from judgment. In the House of Lords, “there was not one Lord but thought the Judgments erroneous, and was fully satisfied, That such an extravagant Judgment ought not to have been given, or a Punishment so exorbitant inflicted upon an *English* subject.”¹²⁶ Nonetheless, the Lords affirmed the judgment, because they considered Oates to be “so ill a Man.”¹²⁷ A minority protested, however, on several grounds, most of which related to the cruel and unprecedented nature of the punishments imposed on Oates.¹²⁸ The punishments were “contrary to law and ancient practice.”¹²⁹ They were “barbarous, inhuman and unchristian.”¹³⁰ There was “no precedent” to support such punishments, and the House of Lords’ decision to affirm them would create a precedent “for giving the like cruel, barbarous and illegal Judgments hereafter.”¹³¹ Finally, the protesters asserted that the punishments imposed on Oates violated the command in the Bill of Rights that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.”¹³²

The House of Commons, however, did pass a bill to release Oates from the judgment.¹³³ Representatives from Commons then held a free conference with the Lords. Echoing the protesters from the House of Lords, the Commons representatives emphasized the fact that the cruel punishments imposed on Oates were beyond the bounds established by the common law and that affirmance of these punishments would set a precedent for even greater cruelty in the future. It was of “ill example” for a temporal court to exercise ecclesiastical jurisdiction by defrocking a cleric.¹³⁴ It was of “ill example, and illegal” to impose a sentence of life imprisonment without express statutory authorization because there was no common law prece-

¹²⁴ 10 How. St. Tr. at 1315–16; *see also Harmelin*, 501 U.S. at 970.

¹²⁵ *Harmelin*, 501 U.S. at 970 (quoting 2 T. MACAULAY, HISTORY OF ENGLAND 204 (1899)).

¹²⁶ 10 H.C. JOUR. 249 (1689).

¹²⁷ *Id.*

¹²⁸ The protesters also expressed doubt about the validity of Oates’ conviction, and argued that the Court of King’s Bench lacked jurisdiction to defrock an Anglican priest. 14 H.L. JOUR. 228 (1689).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ 10 H.C. JOUR. 246 (1689); *see also Harmelin v. Michigan*, 501 U.S. 957, 971 (1991).

¹³⁴ 10 H.C. JOUR. 247 (1689).

dent to support such a punishment.¹³⁵ It was “of ill example, and unusual” to sentence an Englishman to undergo pillorying four times a year for life.¹³⁶ It was “illegal, cruel, and of dangerous example” to impose such a severe whipping on an offender that it would likely result in death.¹³⁷ Moreover, the Commons representatives emphasized that Oates’s punishment violated the Cruel and Unusual Punishments Clause in the newly enacted Bill of Rights. The House of Commons had a “particular regard” to Oates’s sentence—among others—when it drafted the prohibition on cruel and unusual punishments.¹³⁸ If his punishment were affirmed, this would strip the prohibition of its meaning and eviscerate the “ancient Right of the People of *England* that they should not be subjected to cruel and unusual Punishments.”¹³⁹

As Justice Scalia noted, the primary thrust of the argument that Oates’s punishment was “cruel and unusual” was that it was contrary to precedent.¹⁴⁰ There was “no precedent to warrant” such punishments.¹⁴¹ They were “contrary to law and ancient practice.”¹⁴² Moreover, if allowed, such punishments would set a bad precedent for the future. They were an “ill

¹³⁵ *Id.* (“[I]t 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.”). This statement has led some commentators to conclude that under the English Bill of Rights, a punishment could only be cruel and unusual if it was *both* contrary to precedent *and* unauthorized by statute and that therefore the English version of the Cruel and Unusual Punishments Clause must not have been meant as a constraint on the power of the legislature to define punishments. *See, e.g.*, Granucci, *supra* note 31, at 859. Such a reading, however, ignores the context in which the statement was made. Because perpetual imprisonment was not a punishment known at common law, and was also not authorized by statute, the House of Commons asserted in this statement that the judges in Titus Oates’s case overstepped their authority by making up a new and unauthorized punishment. The Commons was *not* considering, however, whether the common law imposed any limit on the power of Parliament to create new punishments. As Part III, *infra*, will demonstrate, many prominent English legal figures—including Edward Coke and at least three subsequent Chief Justices—took the position that Parliament lacked the power to enact laws contrary to fundamental principles of justice embodied in the common law. *See infra* Part III.B.3, 5. Although this position was controversial in England, it was taken as a fundamental truth by the American colonists who protested Parliament’s various violations of common law principles in the run-up to the American Revolution. *See infra* Part III.D.2. Moreover, the evidence is clear that the founding generation saw the Cruel and Unusual Punishments Clause in the Eighth Amendment as being primarily designed to keep both Congress and individual judges within the constraints imposed by longstanding common law precedent. *See infra* Part III.E–F.

¹³⁶ 10 H.C. JOUR. 247 (1689) (“It was of ill Example, and unusual, That an Englishman should be exposed upon a Pillory, so many times a Year, during his Life.”).

¹³⁷ *Id.* (“[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.”).

¹³⁸ *Id.* (“[T]he Commons had a particular Regard to these Judgments, amongst others, when that Declaration [the Cruel and Unusual Punishments Clause] was first made; and must insist upon it, That they are erroneous, cruel, illegal, and of ill Example to future Ages.”).

¹³⁹ *Id.*

¹⁴⁰ *Harmelin v. Michigan*, 501 U.S. 957, 974 (1991).

¹⁴¹ 14 H.L. JOUR. 228 (1689).

¹⁴² *Id.*

example,”¹⁴³ a “dangerous example,”¹⁴⁴ and would ultimately be of “pernicious consequence to the People.”¹⁴⁵ After reviewing this history, Justice Scalia concluded that the words “illegal” and “unusual” in the English Bill of Rights were

identical for practical purposes. Not all punishments were specified by statute; many were determined by the common law. Departures from the common law were lawful only if authorized by statute. . . . A requirement that punishment not be “unusuall”—that is, not contrary to “usage” (Lat. “usus”) . . . or “precedent”—was primarily a requirement that judges pronouncing sentence remain within the bounds of the common law tradition.¹⁴⁶

Finally, Justice Scalia contended that Parliament could not have intended to outlaw disproportionate punishments in the English Bill of Rights.¹⁴⁷ He reasoned that the problem with Oates’s punishment was not that it was disproportionate; in fact, the punishment was arguably proportionate to Oates’s actual moral desert because Oates’s actions amounted to the premeditated killing of fifteen innocent people.¹⁴⁸ Rather, the problem was that the punishment was contrary to common law precedent.¹⁴⁹

Justice Scalia’s historical account is highly persuasive, as far as it goes. However, Justice Scalia inadvertently distorted the meaning of the Cruel and Unusual Punishments Clause by mistakenly contrasting the word “unusual” with “usage” rather than “long usage” or “immemorial usage.” As I will demonstrate below in Part III an “unusual” punishment does not simply violate precedent; it violates *longstanding* precedent.¹⁵⁰ It is contrary to “law and ancient practice,” and is thus presumptively incompatible with the reasonable customs and traditions of the people.¹⁵¹ The distinction between “usage” and “long usage” has significant consequences for Justice Scalia’s analysis of the American situation, as will be shown in the next section.

3. *Justice Scalia’s Erasure of “Unusual” in the Eighth Amendment.*—Justice Scalia’s analysis in *Harmelin* of the American version of the Cruel and Unusual Punishments Clause is much more problematic than his account of the English Bill of Rights. Once Justice Scalia’s opinion moves from seventeenth-century England to eighteenth-century America, it abandons any attempt to discern whether the founding generation of Americans shared the same understanding of the meaning of the word “unusual” as did

¹⁴³ 10 H.C. JOUR. 247 (1689).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Harmelin v. Michigan*, 501 U.S. 957, 974 (1991).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 973 n.4.

¹⁴⁹ *Id.* at 974.

¹⁵⁰ See *infra* Part III.A.

¹⁵¹ See *infra* Part III.B.

their English counterparts. Rather, Justice Scalia simply asserted that it would not make sense for “unusual” to have the same meaning in America as in England because federal punishments were defined by statute, not common law:

Wrenched out of its common law context, and applied to the actions of a legislature, the word “unusual” could hardly mean “contrary to law.” But it continued to mean (as it continues to mean today) “such as [does not] occur[r] in ordinary practice,” “[s]uch as is [not] in common use.” According to its terms, then, by forbidding “cruel *and unusual* punishments,” the Clause disables the Legislature from authorizing particular forms or “modes” of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.¹⁵²

This argument is a strange one to see in the middle of an historical analysis of the Cruel and Unusual Punishments Clause, for it eschews any historical analysis of the founding generation’s actual understanding of the word “unusual” and relies solely on abstract logic. It moves from major premise (in the English Bill of Rights, “unusual” meant “illegal”) to minor premise (every punishment authorized by a legislature must, by definition, be “legal”) to conclusion (the word “unusual” in the Eighth Amendment cannot mean the same thing it did in the English Bill of Rights, because the Eighth Amendment applies to legislatures as well as judges). Justice Scalia’s argument fails, however, as a matter of logic and of history.

Justice Scalia’s major premise is incorrect because the word “unusual” in seventeenth-century England was not identical to the word “illegal,” although there certainly was substantial overlap between the two words. As shown below—and indeed, as Justice Scalia’s own analysis tends to show—“unusual” meant “contrary to long usage,” that is, contrary to longstanding common law precedent.¹⁵³ “Illegal,” on the other hand, meant “contrary to law.” Where the law requires judges to follow longstanding precedent in imposing a sentence, then a given sentence can be illegal by virtue of being unusual. But where the law does not require judges to follow longstanding precedent—for example, where a court follows a new statute that calls for the imposition of a less severe punishment for a given crime than was imposed at common law—the sentence can be unusual without being illegal. As Justice Scalia himself observed, the Parliament of 1689 was primarily concerned about royal judges—especially Chief Justice Jeffreys—devising new or unprecedented punishments in a manner forbidden by law.¹⁵⁴ The punishments the judges imposed were “unusual” because they were innovations, and were “illegal” because the law forbade judges from cruel innovation in punishment. Under these circumstances, it

¹⁵² *Harmelin*, 501 U.S. at 976 (citations omitted).

¹⁵³ See *infra* Part III.A.

¹⁵⁴ *Harmelin*, 501 U.S. at 968 (“Jeffreys was widely accused of ‘inventing’ special penalties for the King’s enemies, penalties that were not authorized by common-law precedent or statute.”).

was perfectly appropriate and logical for the English Bill of Rights to use both the phrases “cruel and illegal” and “cruel and unusual” to describe the punishments it sought to condemn. But this does not mean that the words “unusual” and “illegal” were equivalent.

The minor premise is incorrect because it was quite possible in the eighteenth century for a punishment authorized by the legislature to be considered “unusual” because it violated longstanding precedent. As shown below, numerous American legal and political thinkers—as well as a number of English lawyers and statesmen—during this time period argued that Parliament lacked the power to enact laws contrary to the fundamental principles of reason embodied in the common law.¹⁵⁵ When Parliament did so in the 1760s and 1770s, American revolutionaries claimed that Parliament’s actions were “unusual,” and therefore void.¹⁵⁶ Indeed, one of the primary reasons for the enactment of the American Bill of Rights was the removal from Congress of any hint of power to violate certain fundamental principles embodied in the common law, including the ancient right to be free from cruel and unusual punishments.¹⁵⁷

4. *A Problem of Principle: Faint-Hearted Originalists and Eighteenth-Century Standards of Cruelty.*—In a speech he delivered to the University of Cincinnati Law School in 1989, Justice Scalia described the dilemma faced by an originalist when confronted with a constitutional provision whose original meaning seems starkly at odds with contemporary values. Justice Scalia chose the Cruel and Unusual Punishments Clause as his example:

What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an [E]ighth [A]mendment challenge. . . . [A]ny espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality.¹⁵⁸

In this passage, Justice Scalia acknowledges the force of the problem that led a majority of his colleagues to adopt the evolving standards of decency test for interpreting the Cruel and Unusual Punishments Clause. Some punishments that were acceptable at the end of the eighteenth century seem so harsh by modern standards that it is hard to imagine any court upholding them. Indeed, with admirable honesty, Justice Scalia acknowledges that he himself might have to part with his originalist principles if faced with such

¹⁵⁵ See *infra* Part III.A.5, D.2.

¹⁵⁶ See *infra* Part III.D.2.

¹⁵⁷ See *infra* Part III.E.

¹⁵⁸ Scalia, *supra* note 24, at 861.

a case: “I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.”¹⁵⁹

Generous though he is in making this acknowledgement, Justice Scalia has, by doing so, abandoned any pretext that his approach to the Cruel and Unusual Punishments Clause is more principled than the evolving standards of decency approach. If we are to follow the original meaning of the Clause in most—but not all—cases, how do we determine which cases get which treatment? Justice Scalia finds that modern sensibilities must trump original meaning with respect to flogging and hand-branding, but thinks that original meaning should prevail with respect to the death penalty, for example.¹⁶⁰ Justices Brennan and Marshall vehemently argued that modern sensibilities should trump original meaning with respect to the death penalty.¹⁶¹ Who is right? What principle do we use to determine which punishments should be evaluated according to original meaning, and which should get the benefit of “evolving standards of decency”? There is no answer to this question other than judicial will. Ultimately, Justice Scalia’s position suffers from the very same shortcomings that plague the evolving standards of decency test.

In Part III, I will demonstrate the original meaning of the word “unusual”—a word that has been largely ignored by the Supreme Court’s non-originalist majority and originalist dissent. In Part IV, I will show that recognition of the original meaning of “unusual” will make the Cruel and Unusual Punishments Clause stronger, more coherent, and more stable than the current approaches taken by the Court.

III. THE ORIGINAL MEANING OF “UNUSUAL”

When scholars discuss the original meaning of a constitutional provision, they generally focus on the “original public meaning”¹⁶²—the meaning that would have been inferred by readers of the text at the time of its enactment.¹⁶³ Original meaning questions arise most often when a constitutional provision is either ambiguous or vague. An ambiguous provision is one that is capable of several possible meanings.¹⁶⁴ A vague provision, by contrast, has a single but relatively “fuzzy” meaning. Vagueness questions

¹⁵⁹ *Id.* at 864.

¹⁶⁰ *See supra* note 20.

¹⁶¹ *See supra* note 66.

¹⁶² RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 105 (2004).

¹⁶³ *See, e.g., id.*; Scalia, *supra* note 18, at 17. *But see* Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 *CARDOZO L. REV.* 1109 (2008) (arguing for a theory of original meaning based on the subjective intent of the Framers, rather than merely the public meaning of the terms they employed).

¹⁶⁴ *See* BARNETT, *supra* note 162, at 119.

generally arise when there is a question as to whether a particular object comes within the scope of the vague term’s application.¹⁶⁵

Until now, the Supreme Court has treated the Cruel and Unusual Punishments Clause as though it presents two distinct but interrelated vagueness problems. First, as Part II demonstrates, both the originalists and the nonoriginalists on the Court treat the word “unusual” as being too vague to play any significant role in determining the meaning of the clause. Second, both groups treat what is left of the clause, the bare prohibition on “cruel punishments,” as a vague but not completely indeterminate provision, whose scope is the source of constant skirmishing: Is the execution of minors a “cruel punishment,” or is it not? What about the execution of the mentally retarded? What about life sentences for smalltime recidivists? Because the skirmishes over these issues are simply battles about the scope of a vague prohibition, their results have depended on little more than the ever-shifting composition of the Court itself.

In the two Parts that follow, I demonstrate that the central problem underlying the Court’s Cruel and Unusual Punishments Clause jurisprudence is not a double vagueness problem. Rather, it is a previously unrecognized ambiguity problem. At the time the Bill of Rights was adopted, the term “unusual” had at least two possible meanings: “out of the ordinary” and “contrary to long usage.” Unfortunately, the Supreme Court has not only chosen the wrong meaning by construing the term to mean “out of the ordinary,” it has failed even to recognize the existence of the correct meaning: “contrary to long usage.” As a result, what should be a relatively determinate constitutional provision has been treated as though it were impossibly vague. In this Part, I demonstrate that the original meaning of the word “unusual” in the Cruel and Unusual Punishments Clause was “contrary to long usage,” not “out of the ordinary.” In Part IV, I show that resolution of this ambiguity also goes a long way toward resolving the vagueness problem inherent in the Court’s current Eighth Amendment jurisprudence. The result is a Cruel and Unusual Punishments Clause that is both stronger and more coherent.

In the seventeenth and eighteenth centuries, the term “unusual” had many of the meanings we currently associate with the term: “rare,” “uncommon,” “out of the ordinary.”¹⁶⁶ The word also had a more specific meaning, however, as a legal term of art: “contrary to long usage” or “immemorial usage.” A review of seventeenth- and eighteenth-century legal and political history shows that this last meaning is the only one that may

¹⁶⁵ See *id.* at 118–19.

¹⁶⁶ The *Oxford English Dictionary* contains several examples in which the word “unusual” was given one of these meanings during the seventeenth and eighteenth centuries: “1682 *LISTER Godartius Of Insects* 28 This is a Rare and unusuall Catterpillar. 1724 *SWIFT Drapier’s Lett.* iv, A new governor, coming at an unusual time, must portend some unusual business. 1773 *Life N. Frowde* 56, I returned to my Book., in a Situation quite unusual to what I had ever before experienced.” *OXFORD ENGLISH DICTIONARY* 249 (2d ed. 1989) (entry for “unusual”).

plausibly be attributed to the term “unusual” in the Eighth Amendment’s Cruel and Unusual Punishments Clause. To demonstrate this point, this Part moves from the descriptive, to the normative, to the historical. Section A shows how the terms “long usage,” “use,” “usual,” and “unusual” were employed by English and American legal and political thinkers to describe the nature and function of the common law. Sections B and C show how Edward Coke and William Blackstone used “long usage” as the primary measuring stick for determining whether a given governmental practice accorded with principles of reason and justice. Both Coke and Blackstone contrasted the “reasonable” punishment practices associated with the common law with cruel innovations imposed by the king and by Parliament. Sections D and E show that the founding generation of Americans shared the English conception of the normative power of “long usage” and repeatedly used the term “unusual” to describe government actions that were contrary to fundamental principles of justice embodied in the common law. Finally, section F surveys American caselaw from the enactment of the Eighth Amendment through the first half of the nineteenth century, and demonstrates that American courts consistently interpreted “unusual” to mean contrary to the long usage of the common law.

A. *Long Usage, Use, Usual, and Unusual*

In seventeenth- and eighteenth-century England and eighteenth-century America, the most important source of law was the common law. Blackstone described it as “the first ground and chief corner stone of the laws of England.”¹⁶⁷ But what is the common law? Or more precisely, what did the English and American jurists of the seventeenth and eighteenth centuries believe it to be?

Today, we tend to see the common law as Oliver Wendell Holmes, Jr. and his contemporaries described it: a body of judge-made law, in which judges—acting within a broad framework of precedent—formulate legal principles that adapt to the changing circumstances of the times. In Holmes’s words, common law judges exercise a “legislative function,” formulating legal rules and principles based on their views of “what is expedient for the community concerned.”¹⁶⁸

Those who practiced and wrote about the common law in the seventeenth and eighteenth centuries had a decidedly different perspective. The common law was not regarded as judge-made law, but rather as customary law, the law of “long use” and “custom.”¹⁶⁹ Common law judges did not

¹⁶⁷ 1 BLACKSTONE, *supra* note 21, at *73.

¹⁶⁸ O.W. HOLMES, JR., *THE COMMON LAW* 35–36 (Boston, Little, Brown, & Co. 1881). For a fascinating analysis of Oliver Wendell Holmes’s impact on modern jurisprudence, see ALBERT ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* (2000).

¹⁶⁹ EDWARD COKE, *THE COMPLEAT COPYHOLDER* (1630) [hereinafter COKE, COPYHOLDER], *as reprinted in* 2 *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* § 33, at 563, 563 (Steve

see themselves as formulating public policy, but rather as identifying longstanding customary rules and applying them to particular cases.¹⁷⁰ Blackstone called these customary rules the *leges non scriptae*—the unwritten law of England.¹⁷¹

In English and American legal thought, the terms “custom” and “long usage” were tied closely together as a matter of both logic and grammar. Whereas today we normally say that we “follow” a custom, it was more common in the seventeenth and eighteenth century to say that we “use” a custom. Thus, for example, Edward Coke wrote: “And note that no custome is to bee allowed, but such custome as hath bin used by title of prescription, that is to say, from time out of minde.”¹⁷² A century and a half later, William Blackstone wrote that “in our law the goodness of a custom depends upon it’s [sic] having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary.”¹⁷³ Similarly, in America, James Wilson—one of the primary drafters of the United States Constitution—wrote: “[L]ong customs, approved by the consent of those who use them, acquire the qualities of a law.”¹⁷⁴

Sheppard ed., 2003) [hereinafter COKE, SELECTED WRITINGS] (“Customes are defined to be a Law, or Right not written, which being established by long use, and the consent of our Ancestors, hath been, and is daily practised.”). The notion that the common law is primarily a law of custom and long usage was expressed in writing as early as the fourteenth century. See THOMAS USK, TESTAMENT OF LOVE, bk. III, ch. 1, ll. 78–83 (R. Allen Shoaf ed., Medieval Inst. Pub. 1998) (c. 1380) (“But custome is a thyng that is accepted for right or for lawe, there as lawe and right faylen. . . . [C]ustome is of comen usage by length of tyme used, and custome nat writte is usage; and if it be writte, constituyon it is ywritten and ycleped.”); see also OXFORD ENGLISH DICTIONARY 167–68 (2d ed. 1989) (defining “custom” as “[a] habitual or usual practice; common way of acting; usage, fashion, habit (either of an individual or of a community)”).

¹⁷⁰ As Grant Gilmore and many others have observed, the idea that common law judges merely identified and applied longstanding custom was not entirely true by the end of the eighteenth century and may never have been entirely true. See, e.g., GRANT GILMORE, THE AGES OF AMERICAN LAW 5–7 (1977). For example, Gilmore argues that in response to the industrial revolution and the vast increase in the volume and complexity of commercial transactions, Lord Mansfield and other English judges at the end of the eighteenth century “were making law, new law, with a sort of joyous frenzy.” *Id.* Nonetheless, as the discussion below indicates, the common law was celebrated in seventeenth- and eighteenth-century England and America for its capacity simultaneously to adapt to changing circumstances while resisting governmental innovations, particularly innovations that tended to exalt the power of the state at the expense of individual liberty. The common law’s capacity to resist innovations like these derived from its dependence on “long use and custom” as a primary source of normative and actual authority. See 1 THE WORKS OF JAMES WILSON 186 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896); see also *infra* Part III.B; cf. *Hurtado v. California*, 110 U.S. 516, 530 (1884) (emphasizing the common law’s capacity to adapt to new circumstances as a source of its normative power).

¹⁷¹ 1 BLACKSTONE, *supra* note 21, at *64.

¹⁷² 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (1608) [hereinafter COKE, INSTITUTES], as reprinted in 2 COKE, SELECTED WRITINGS, *supra* note 169, § 170, at 701.

¹⁷³ 1 BLACKSTONE, *supra* note 21, at *67.

¹⁷⁴ 1 THE WORKS OF JAMES WILSON, *supra* note 170, at 435–36.

The binding authority of long usage applied both to private parties and to the government. With respect to private parties, long usage served to identify rights and duties. For example, where the tenant of a farm had continuously crossed another's land by "immemorial usage," that tenant developed a right of way across the land.¹⁷⁵ With respect to the government, on the other hand, long usage served as a basis and justification for state action, such as the imposition of a given punishment for a given crime. For example, Blackstone notes that it was an "ancient usage among the Goths" to punish a murder committed in secret by imposing a heavy amercement on the entire community in which it was committed.¹⁷⁶

Actions that comported with long usage were often said to be "usual." For example, the customary rules regarding royal succession were described as the "usual course of descent."¹⁷⁷ Mercantile towns that sent representatives to Parliament were expected to pay the "usual" fee to cover the expense of maintaining their representatives.¹⁷⁸ New laws were supposed to be announced to the public according to the "usual" manner.¹⁷⁹

Actions that were contrary to long usage, on the other hand, were described as "unusual." It was a violation of Magna Carta for the king to demand an "unusual" fee for issuing a royal writ.¹⁸⁰ A sheriff could be indicted for holding a Torn in an "unusual" place.¹⁸¹ An individual could be found guilty of the crime of affray for going about in public with "unusual"—that is, more than customary—weapons and attendance.¹⁸² During the development of the English feudal system, the lord of the manor lost the ability to interfere with the passage of an interest in land—a "feud"—from a feudatory to his heir because such interference became "unusual," that is, contrary to customary practice.¹⁸³ Conversely, the feudatory lacked any right to transfer his property interest without the consent of the lord, even by prescribing an "unusual path of descent" in his will; rather, the feud had to go to the feudatory's heir as determined under the "usual," customary line of descent.¹⁸⁴

As we will see below, Americans in the late eighteenth and early nineteenth centuries also used the term "unusual" to describe actions that were contrary to "long usage." For example, in 1769 the Virginia House of Burgesses described Parliament's attempt to revive a long-defunct statute that

¹⁷⁵ 2 BLACKSTONE, *supra* note 21, at *36.

¹⁷⁶ 4 BLACKSTONE, *supra* note 21, at *195.

¹⁷⁷ 1 BLACKSTONE, *supra* note 21, at *215.

¹⁷⁸ *Id.* at *174.

¹⁷⁹ *Id.* at *46.

¹⁸⁰ 3 BLACKSTONE, *supra* note 21, at *273.

¹⁸¹ See 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 91 (John Curwood ed., London, S. Sweet 1824).

¹⁸² See, e.g., 4 BLACKSTONE, *supra* note 21, at *148, *254–55; 1 HAWKINS, *supra* note 181, at 488.

¹⁸³ 2 BLACKSTONE, *supra* note 21, at *55–56.

¹⁸⁴ *Id.* at *287.

would permit the trial of American protesters in England as “new, unusual, . . . unconstitutional and illegal.”¹⁸⁵ In the Declaration of Independence, the Continental Congress complained of the recent English practice of calling colonial legislatures at “places unusual.”¹⁸⁶ In 1788, George Mason worried that the lack of common law constraints in the new Constitution would permit Congress to create “new crimes, inflict unusual and severe punishments, and extend their powers.”¹⁸⁷ Similarly, Patrick Henry argued that because the new federal government would not be bound by the common law, it would be nothing more than a series of “new and unusual experiments.”¹⁸⁸ Throughout the first half of the nineteenth century, American courts that were called upon to determine whether a punishment was “cruel and unusual” almost invariably noted that a punishment could only be “unusual” if it was contrary to the long usage of the common law.¹⁸⁹

Of course, these American examples differ from the English examples cited above in that they use the word “unusual” to denote government actions that were not merely contrary to long usage, but also fundamentally unjust. How the word “unusual” came to acquire this connotation will be discussed in the following sections, which describe the normative power of “long usage” and its practical role in the development of the English and American constitutional systems.

B. The Importance of Being “Usual”: Edward Coke and the Normative Power of “Long Usage”

Edward Coke has been described as the most important common law jurist in English history. As one scholar has proclaimed, “Coke’s works have been to the common law what Shakespeare has been to literature, and the King James Bible to religion.”¹⁹⁰ Coke’s career, which included prominent roles as a lawyer, judge, and Parliamentary leader, began during the reign of Elizabeth I, continued through the reign of James I, and concluded

¹⁸⁵ JOURNALS OF THE HOUSE OF BURGESSES, *supra* note 36, at 215.

¹⁸⁶ THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776). This complaint in the Declaration of Independence is strongly reminiscent of the common law principle, mentioned immediately above, that sheriffs were not permitted to hold Torns—a kind of local court—in “unusual” locations, lest the public be denied its right of access. England’s decision to call local legislatures in “unusual,” that is, noncustomary, locations thus violated basic common law principles and would arguably be a crime if done by an individual official.

¹⁸⁷ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 637 (Max Farrand ed., 1911) [hereinafter FARRAND].

¹⁸⁸ Henry, *supra* note †, at 172.

¹⁸⁹ See *infra* Part III.F.

¹⁹⁰ Allen D. Boyer, *Introduction* to LAW, LIBERTY AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE xiii–xiv (Allen D. Boyer ed., 2004) [hereinafter LAW, LIBERTY AND PARLIAMENT] (citing William Holdsworth); see also *id.* at xiii (“Wherever the common law has been applied, Coke’s influence has been monumental.”).

well into the ill-fated reign of Charles I.¹⁹¹ His writings on the common law, his judicial decisions, and his role in Parliament—particularly his influence in the drafting of the Petition of Right in 1628—decisively shaped English thought about the nature and function of the common law over the next two centuries.¹⁹² Coke also had great impact on American legal thought in the late eighteenth century, where his influence was comparable to that of William Blackstone—who was himself greatly indebted to Coke.¹⁹³

Coke established several important principles that were the basis for the common law ideology that would serve, much later, as the principal underpinning for both the American Revolution and the adoption of the Bill of Rights. Specifically, Coke argued that the common law consisted of customary practices that enjoyed “long” or “immemorial usage,” and that were therefore inherently just and reasonable.¹⁹⁴ These longstanding practices were not merely the primary source of positive law in England at that time, but were also the basis of fundamental individual rights against the state.¹⁹⁵ Coke further argued that government actions that deviated from long usage—in other words, “unusual” actions¹⁹⁶—were dangerous and presumptively unjust.¹⁹⁷ Finally, Coke argued that even acts of Parliament or king that deviated from fundamental common law principles were “void” because they were contrary to “common right or reason.”¹⁹⁸ Coke did not identify a remedy for royal or parliamentary deviations from long usage. Nonetheless, the principles he articulated set the terms of the debate

¹⁹¹ See generally CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE* (1957).

¹⁹² See STEPHEN D. WHITE, *SIR EDWARD COKE AND THE “GRIEVANCES OF THE COMMONWEALTH,” 1621–1628*, at 9–11 (1979); see also *infra* Part III.B.5, D, E.

¹⁹³ For example, Thomas Jefferson wrote: “[B]efore the revolution, Coke’s Littleton was the universal elementary book of law students, and a sounder [W]hig never wrote, nor of profounder learning in the orthodox doctrines of the British [C]onstitution, or in what were called British liberties.” 10 THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 376 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1899); see also EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 56–57 (1955). According to Corwin, two of Coke’s most important contributions to the development of American constitutional law were the notion that an act of Parliament that violates reason is void, and the notion that a fundamental law, embodied largely in a document—in Coke’s case, Magna Carta—was binding on both the king and Parliament. See *id.*

¹⁹⁴ See *infra* Part III.B.1.

¹⁹⁵ See *infra* Part III.B.2.

¹⁹⁶ Coke generally described such actions as “innovations” rather than “unusual.” See, e.g., 1 COKE, *INSTITUTES*, *supra* note 172, § 723, at 740 (comparing “innovations” unfavorably with the long usage of the common law). As will be shown below, however, later writers, including American revolutionaries and framers of the Bill of Rights, used the terms “innovation,” “unusual,” and “unconstitutional” interchangeably in describing government violations of rights established by “long usage.” See *infra* Part III.D–E.

¹⁹⁷ See *infra* Part III.B.1.

¹⁹⁸ See *infra* Part III.B.3–4.

throughout the upheavals of the next 150 years¹⁹⁹ and were crucial both to the American Revolution and to the adoption of the American Bill of Rights.²⁰⁰ More specifically, the principles Coke articulated demonstrate why the word “unusual” was included in the Cruel and Unusual Punishments Clause.²⁰¹

1. Reasonable Common Law Versus Cruel Innovation.—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.²⁰² This conception of law, which derived originally from classical Greek and Roman sources,²⁰³ was summarized by Thomas Aquinas in the thirteenth century: “Human law has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law, but of violence.”²⁰⁴

Despite the unitary foundation of all law, however, the immediate sources of the positive law in England were various and sometimes conflicting: custom, statute, decisions of common law courts, civil law courts, etc.²⁰⁵ Moreover, the Stuart kings under whom Coke served were adherents of the doctrine of absolute monarchy, which held that the king was the font of all law and that kings could suspend laws that were not to their liking.²⁰⁶ What should be done when there is a conflict between royal will and common or statutory law? More generally, how does one differentiate genuine

¹⁹⁹ See *infra* Part III.B.5.

²⁰⁰ See *infra* Part III.D–E.

²⁰¹ See *infra* Part III.E.

²⁰² See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L.J.* 1651, 1653 (1993) (“Natural law theory treats law essentially as the embodiment in rules and concepts of moral principles that are derived ultimately from reason and conscience.”); see also THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. II-I, Q. 90, art. 1 (Fathers of the English Dominican Province trans., 2d rev. ed. 1920), available at <http://www.newadvent.org/summa/2090.htm#article1> (“Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting: for ‘lex’ [law] is derived from ‘ligare’ [to bind], because it binds one to act. Now the rule and measure of human acts is the reason, which is the first principle of human acts.”).

²⁰³ See, e.g., ARISTOTLE, *POLITICS*, bk. 3, ch. 16 (Benjamin Jowett trans.), in 9 *GREAT BOOKS OF THE WESTERN WORLD: THE WORKS OF ARISTOTLE*, VOL. 2, 485 (Robert M. Hutchins ed., 1952) ([H]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.”); CICERO, *ON THE LAWS* 28, in 1 *ON THE COMMONWEALTH AND ON THE LAWS* 115 (James E.G. Zetzel ed., 1999) (“[W]e are born for justice, and . . . justice is established not by opinion but by nature.”).

²⁰⁴ THOMAS AQUINAS, *supra* note 202, pt. II-I, Q. 93, art. 3, reply 2, available at <http://www.newadvent.org/summa/2093.htm#article3>.

²⁰⁵ See Sir John Baker, *The Common Lawyers and the Chancery: 1616*, reprinted in *LAW, LIBERTY, AND PARLIAMENT*, *supra* note 190, at 254–55.

²⁰⁶ See KING JAMES I, *THE TRUE LAW OF FREE MONARCHIES* (1598), reprinted in *CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, A.D. 1603–1625*, at 9–10 (J.R. Tanner ed., 1960).

law—that is, law that conforms to basic principles of justice—from mere “violence”?

This difficult and highly charged problem would not work itself out completely until nearly a century and a half after Coke’s death. Nonetheless, Coke set forth the basic principles for solving the problem, in a manner that would be highly influential on the development of the English and American constitutions, and that would have particular relevance to the meaning of the Cruel and Unusual Punishments Clause.

As a starting point, Coke agreed with the proposition that basic principles of justice were built into the natural order itself, asserting that the “law of nature is part of the law of England.”²⁰⁷ Moreover, Coke agreed that the fundamental basis of law is reason rather than will, and that therefore laws that violate basic principles of justice may not properly be called “law” at all: “[N]othing that is contrarie to reason, is consonant to Law.”²⁰⁸ But Coke’s thought differed from the classical and medieval natural law traditions in one key respect. Rather than identifying “reason” directly with universal, abstract principles of justice, Coke identified it with a specific set of historically and culturally situated legal rules, the common law of England: “[R]eason is the life of the Law, nay the common Law it selfe is nothing else but reason.”²⁰⁹

The key to this identification was Coke’s conception of the normative power of “long usage.” If a given customary law was used over a long period of time, throughout the entire kingdom, Coke held that this process confirmed the law’s goodness and eliminated from the law anything that was bad or unreasonable. Thus he compared long usage to the refinement of gold: “[I]f all the reason that is dispersed into so many severall heads were united into one, yet could not make such a Law as the Law of England is, because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this Realme.”²¹⁰

Coke considered long usage to be the most reliable basis for determining the goodness of a law because it established both that the law was rea-

²⁰⁷ 7 EDWARD COKE, *Calvin’s Case, or the Case of the Postnati*, in REPORTS (1608), as reprinted in 1 COKE, SELECTED WRITINGS, *supra* note 169, at 166, 195.

²⁰⁸ 1 COKE, INSTITUTES, *supra* note 172, § 69, at 684.

²⁰⁹ *Id.* § 138, at 701.

²¹⁰ *Id.* Robert Lowry Clinton has recently described the strength of the common law in the seventeenth and eighteenth centuries in strikingly similar terms: “It was not the fabrication of a single individual or group working at a particular time or place, not a product of abstract reasoning. Rather, it was the product of countless experiences of both similar and varied kinds across vast reaches of time and space, absorbing essential continuities in a reality that can be known only historically.” ROBERT LOWRY CLINTON, *GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM* 92 (1997). Edward Corwin has noted that the idea of “immemorial usage as superior to human rule-making” dates back at least as far as Sophocles and that in England, the common law had been equated with “right reason” since at least the fourteenth century. CORWIN, *supra* note 193, at 6, 26.

sonable, and that it enjoyed the consent of the people. First, as the passage quoted above indicates, Coke saw long usage as representing a process of legal development that, like the refinement of gold in a fire, reliably separates the good from the bad. As 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. Second, Coke argued that legal practices that enjoy long usage must also enjoy the consent of the people, otherwise they would fall out of usage.²¹¹ This notion—that long usage establishes both the reasonableness and the consensual nature of the law—was highly influential and was repeated over the years by William Blackstone,²¹² James Wilson,²¹³ and many others.

Just as Coke identified long usage with principles of reason, he attacked innovations in the law as presumptively unreasonable and held that their falsity could easily be demonstrated by comparing such innovations to the longstanding rules of the common law:

[W]hen any innovation or new invention starts up, . . . trie it with the Rules of the common Law, . . . for these be true Touchstones to sever the pure gold from the drosse and sophistications of novelties and new inventions. And by this example you may perceive, That the rule of the old common Law being soundly . . . applied to such novelties, it doth utterly crush them and bring them to nothing.²¹⁴

The primary innovation Coke had in mind was the importation of civil law practices from continental Europe into England. As noted above, during Coke’s time, a variety of different sources of law coexisted in England. The common law was the oldest and most important source of law, dating back to pre-Norman times. But because the common law looked to long usage rather than sovereign will for its rules of decision, it was remarkably

²¹¹ See, e.g., COKE, COPYHOLDER *supra* note 169, § 33, at 563 (“Customes are defined to be a Law . . . which being established by long use, and the consent of our Ancestors, hath been, and is daily practiced.”).

²¹² See 1 BLACKSTONE, *supra* note 21, at *70, *74.

²¹³ On the capacity of the common law to maintain what is good, discard what is bad, and accommodate itself to changing circumstances, Wilson wrote: “It is the characteristic of a system of common law that it be accommodated to the circumstances, the exigencies, and the conveniences of the people, by whom it is appointed. Now, as these circumstances, and exigencies, and conveniences insensibly change; a proportionate change, in time and degree, must take place in the accommodated system. But though the system suffer these partial and successive alterations, yet it continues materially and substantially the same.” 1 THE WORKS OF JAMES WILSON, *supra* note 170, at 435–36. On the relationship between long usage and consent, Wilson wrote: “Some writers, when they describe that usage, which is the foundation of common law, characterize it by the epithet *immemorial*. The parliamentary description is not so strong. ‘Long use and custom’ is assigned as the criterion of law, ‘taken by the people at their free liberty, and by their own consent.’ And this criterion is surely sufficient to satisfy the principle: for consent is certainly proved by long, though it be not immemorial usage.” *Id.* at 186.

²¹⁴ 1 COKE, INSTITUTES, *supra* note 172, § 723, at 740.

difficult for kings to subject to royal control.²¹⁵ At least partly for this reason, a number of kings established specialized courts that followed the civil law practices of continental Europe rather than the common law. These specialized courts included the Star Chamber, the ecclesiastical Court of High Commission, and the Admiralty Court, among others.

Although Coke sometimes practiced before civil courts as an attorney, he came to see the imposition of the foreign practices of the civil law as a means of undermining the liberty of English subjects protected by the common law. Indeed, according to Coke, the very first act of those who wished to introduce the civil law system to England was to bring an instrument of torture—the “Rack”—into the Tower of London for use on prisoners:

John Holland Earle of Huntingdon, [who] was by King [Henry VI] created Duke of Exeter . . . and William De la Poole Duke of Suffolk, and others, intended to have brought in the Civill Lawes. For a beginning whereof, the Duke of Exeter being Constable of the Tower first brought into the Tower the Rack or Brake allowed in many cases by the Civill Law; and thereupon the Rack is called the Duke of Exeters Daughter, because he first brought it thither.²¹⁶

Moreover, Coke argued that the common law was the only effective source of resistance to the cruel new practices of the civil law:

[U]pon this occasion [the installation of the rack in the Tower of London], Sir John Fortescue Chiefe Justice of England, wrote his Book in commendation of the lawes of England; and therein preferreth the same for the government of this cuntry before the Civill Law; and particularly that all tortures and torments of parties accused were directly against the Common Lawes of England.²¹⁷

In this example, we see most starkly the contrast Coke drew between the “reason” embodied in the common law and the injustice and cruelty associated with efforts to institute unusual or innovative practices, particularly those associated with the civil law. For the crown, the introduction of instruments of torture was a necessary first step toward adopting the entire machinery of the civil law for prosecuting criminal cases, thus freeing itself from many of the constraints of the common law. For example, the Court of High Commission, which was England’s highest ecclesiastical court, instituted civil law practices such as trial by torture.²¹⁸ According to Coke, the inherent reasonableness of the common law—guaranteed by long us-

²¹⁵ See CLINTON, *supra* note 210, at 92; FREDERIC WILLIAM MAITLAND, *SELECTED HISTORICAL ESSAYS OF F. W. MAITLAND* 127 (Helen M. Cam ed., 1957).

²¹⁶ 3 COKE, *INSTITUTES*, *supra* note 172, ch. 2, at 1025.

²¹⁷ *Id.*

²¹⁸ See Granucci, *supra* note 31, at 848–49.

age—was the only thing that could stand in the way of cruel innovations imposed by sovereign will, such as the civil law practice of torture.

2. *The Common Law as Fundamental Law.*—Coke lived in an age of claims to total state power. The Tudors had vastly increased the power of the monarch over the preceding century, and when James I took the throne in 1603, he explicitly claimed the power of absolute monarchy.²¹⁹ Coke never openly disputed this claim, and indeed, he agreed that the king did possess a sort of absolute power, at least when sitting as head of the body politic represented by Parliament:

In this Court of Parliament the King is *Caput, principium & finis*. And as in the naturall body when all the sinews being joyned in the head do join their forces together for the strengthening of the body, there is *ultimum Potentiae*: so in the politique body when the King and the Lords Spirituall and Temporall, Knights, Citizens, and Burgesses, are all by the Kings command assembled and joyned together under the head in consultation for the common good of the whole Realm, there is *ultimum Sapientiae*.²²⁰

When king and Parliament operated within the framework defined by the common law, with head and body working together for the common good, Coke saw it as possessing the very same qualities of reasonableness he attributed to the common law itself. Indeed, Coke waxed poetic on the power of Parliament, affirming that “the power and jurisdiction of the Parliament for making of laws . . . is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds.”²²¹ Coke also acknowledged that Parliament possessed the power to change common law rules: “The Common Law hath no controller in any part of it, but the high Court of Parliament, and if it be not abrogated or altered by Parliament, it remains still.”²²²

Nonetheless, because Coke identified long usage so closely with fundamental principles of justice, the common law took on a kind of dual status in his writings, as a source of both positive law (which could presumably be altered by Parliament) and of fundamental law (which could not, or at least should not, be altered). Indeed, Coke argued that abrogating the common law—in its aspect as fundamental law—would threaten to destroy the kingdom itself: “So dangerous a thing it is, to make or alter any of the rules or fundamentall points of the Common law, which in truth are the maine pillars, and supporters of the fabrick of the Common-wealth.”²²³

²¹⁹ See KING JAMES I, *supra* note 206, at 9–10.

²²⁰ 4 COKE, INSTITUTES, *supra* note 172, ch.1, at 1067.

²²¹ *Id.* at 1133.

²²² 1 COKE, INSTITUTES, *supra* note 172, § 170, at 711.

²²³ 2 COKE, INSTITUTES, *supra* note 172, ch. 35, at 907; see also 4 EDWARD COKE, *Preface* to REPORTS (1602) [hereinafter COKE, *Preface*], as reprinted in 1 COKE, SELECTED WRITINGS, *supra* note 169, at 94, 95 (“For any fundamental point of the ancient Common Lawes and customes of the realme, it is a Maxime in policie, and a triall by experience, that the alteration of any of them is most dangerous;

The common law's status as a source of fundamental law gave it the potential to limit the arbitrary exercise of state power. Indeed, Coke asserted that the common law—as reflected in Magna Carta and elsewhere—was the source of numerous rights and liberties of citizens, including the right to due process of law,²²⁴ indictment by grand jury,²²⁵ habeas corpus,²²⁶ the right not to be subjected to double jeopardy,²²⁷ and the right to taxation only with the consent of Parliament.²²⁸ Although Coke found the basis for many of these rights in Magna Carta and other ancient statutes,²²⁹ he made clear that these written laws merely affirmed the existence of rights that had already developed through long usage. He described Magna Carta as “but a confirmation or restitution of the Common Law.”²³⁰ Elsewhere, he wrote that “[t]he Common Law appeareth in the Statute of Magna Charta and other ancient Statutes (which for the most part are affirmations of the Common Law) in the originall writs, in judicall Records, and in our bookes of termes and yeers.”²³¹

3. *The Common Law and Unreasonable Statutes.*—Because the common law was the primary source of fundamental law in England, Coke repeatedly asserted that Parliament lacked the authority to enact laws contrary to its most basic principles.²³² Coke's most famous assertion of this claim came as dicta in *Dr. Bonham's Case*,²³³ which involved a dispute over the powers of London's College of Physicians. Henry VIII had granted letters patent to the College—subsequently ratified by Parliament—giving the College power to license and regulate physicians who practiced medicine in London.²³⁴ Dr. Bonham was a physician who received his training and degree from Cambridge University and who insisted that his status as a Cam-

for that which hath beene refined and perfected by all the wisest men in former succession of ages and proved and approved by continuall experience to be good & profitable for the commonwealth, cannot without great hazard and danger be altered or changed.”)

²²⁴ 2 COKE, INSTITUTES, *supra* note 172, ch. 29, at 858.

²²⁵ *Id.*

²²⁶ *Id.* at 862–64.

²²⁷ See 8 EDWARD COKE, *Dr. Bonham's Case*, in REPORTS (1610) [hereinafter COKE, *Dr. Bonham's Case*], as reprinted in 1 COKE, SELECTED WRITINGS, *supra* note 169, at 264, 277 (articulating the right not to be subjected to double jeopardy: “Nemo debet bis puniri pro uno delicto”).

²²⁸ See *infra* Part III.B.4.

²²⁹ See, e.g., 1 COKE, INSTITUTES, *supra* note 172, § 108, at 697 (“Here it is called Magna Charta, not for the length or largeness of it . . . but it is called the great Charter in respect of the great weightiness and weightie greatnesse of the matter contained in it in few words, being the fountaine of all the fundamentall lawes of the Realme.”).

²³⁰ *Id.*

²³¹ 1 COKE, FIRST INSTITUTES, *supra* note 172, § 170, at 711.

²³² See *id.* § 108, at 697 (“If any Statute bee made against either of these Charters [Magna Charta and the Charta de Forests] it shall be voyd.”); 2 *id.* ch. 26, at 843 (“[I]t was it enacted, as often hath been said, that all Statutes made against Magna Charta . . . should be voyd.”).

²³³ COKE, *Dr. Bonham's Case*, *supra* note 227, at 264.

²³⁴ *Id.* at 265–267.

bridge graduate exempted him from the licensing authority of the College.²³⁵ When Bonham refused to stop practicing medicine in London, the College fined Bonham and also briefly imprisoned him.²³⁶ Bonham then sued for false imprisonment.²³⁷

Coke, who was then Chief Justice of the Court of Common Pleas, resolved the case in Bonham’s favor, holding that the College’s corporate charter did not authorize it to imprison Bonham.²³⁸ Having resolved the case on relatively narrow grounds, however, Coke went on to make a much broader statement about the limitations of parliamentary power. Specifically, Coke noted that if the College of Physicians actually had the power to fine and imprison unlicensed physicians, it would effectively be the judge in its own case because the College would first make a finding of liability and levy a fine—a judicial role—and then keep the resulting fine for itself. Such an arrangement would violate the longstanding common law rule that judges should not have a financial interest in the outcomes of the cases they decide.²³⁹ Thus, such an arrangement would be illegal even if directly authorized by an act of Parliament: “[I]n many Cases, the Common Law doth controll Acts of Parliament, and somtimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void.”²⁴⁰

Dr. Bonham’s Case is often taken to be a forerunner of the modern practice of judicial review.²⁴¹ In one sense this is true and in another it is not. Coke could not have meant to assert that the common law courts had the power to overturn acts of Parliament. As noted previously, Coke explicitly asserted that Parliament had supreme authority in England. Indeed, Parliament was not only a legislature but also the highest court in England, with power to correct the common law courts and all other lower courts in England.²⁴² This power flowed downhill, not up.

On the other hand, Coke does seem to have meant that it was possible for an act of Parliament to violate the fundamental principles of justice embodied in the common law through long usage. In asserting that such acts

²³⁵ *Id.* at 269–270.

²³⁶ *Id.* at 268–269.

²³⁷ *Id.* at 265.

²³⁸ *Id.* at 273.

²³⁹ *Id.* at 275.

²⁴⁰ *Id.* Coke’s notion that statutes contrary to reason were void continued to have vitality throughout the seventeenth century. See *infra* Part III.B.5. This notion would also play a major role in the American Revolution. See *infra* Part III.D.

²⁴¹ See, e.g., Edward S. Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 104 (1910); Theodore F.T. Plucknett, *Bonham’s Case and Judicial Review*, 40 HARV. L. REV. 30, 31 (1926).

²⁴² See CHARLES HOWARD MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: AN HISTORICAL ESSAY ON THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND* 109–246 (1910).

were “void,” Coke seems to be making a point similar to Thomas Aquinas’s distinction between “law” and “violence.” If a statute fails to comport with common right and reason, as reflected in the longstanding traditions embodied in the common law, then it is an act of mere power rather than law, and at least in this sense it is void.

Coke does not say what the remedy should be if Parliament enacts a statute that violates fundamental common law principles: An effort to repeal the law? Refusal to enforce the law? Armed revolution? As is discussed below, this remedy would be found, in America, with the adoption of the Bill of Rights and the institution of judicial review.²⁴³

4. *The Common Law and Royal Prerogative.*—Coke also repeatedly upheld the long usage of the common law against the absolutist Stuart kings. At first Coke did so cautiously, but he became much more strident by the end of his career. As noted above, Coke never directly denied the claims of James I to absolute monarchy. But in the preface to his fourth volume of *Reports*, Coke pointedly translated the following passage from a thirteenth-century legal treatise by the English judge Henry Bracton: “The King is under no man, but onely God and the Law, for the Law makes the King: Therefore let the king attribute that to the Law, which from the law he hath received, to wit, power and dominion: for where will, and not law doth sway there is no King.”²⁴⁴ Just as Coke had warned that Parliament could endanger the “fabrick of the Commonwealth” by altering fundamental common law rules, here Coke warned that the king endangers the very fact of kingship if he fails to subject himself to the laws and customs of the English people.

Once again, Coke’s writings do not suggest a remedy for royal breaches of the rule of law. Coke was personally involved, however, in one major parliamentary attempt to resolve such a breach, when he took a leading role in the passage of the Petition of Right.²⁴⁵ In 1628, Charles I convened Parliament to raise funds for a war effort. But before voting on whether to authorize such funds, Parliament focused on the fact that Charles had repeatedly violated the common law rights of English subjects. Parliament asserted that he abused the royal prerogative in a number of ways: imprisoning subjects without legal cause, imposing forced loans without the consent of Parliament, using martial law against English subjects in ordinary criminal cases, and billeting soldiers in the homes of English subjects. Under Coke’s leadership, Parliament drafted the Petition of Right, which declared these actions to violate the common law rights and liberties of

²⁴³ See *infra* Part III.E.

²⁴⁴ COKE, *Preface*, *supra* note 223, at 102.

²⁴⁵ See generally 3 COKE, *SELECTED WRITINGS*, *supra* note 169, at 1225–1303; CORWIN, *supra* note 193, at 53.

Englishmen, as declared in Magna Carta and other ancient statutes.²⁴⁶ The Petition asked Charles to direct his officers and ministers to stop the practices and further asked that he not use these practices in the future as precedent to justify similar actions.²⁴⁷ When the House of Lords sought to protect the king’s ability to exercise the royal prerogative by adding a clause “saving the sovereign power” to the Petition, Coke famously opposed the amendment, saying:

I know that prerogative is part of the law, but “Sovereign Power” is no parliamentary word. In my opinion it weakens Magna Charta, and all the statutes; for they are absolute, without any saving of “Sovereign Power”; and should we now add it, we shall weaken the foundation of law, and then the building must needs fall. Take we heed what we yield unto: Magna Charta is such a fellow, that he will have no “Sovereign.” I wonder this “Sovereign” was not in Magna Charta, or in the confirmations of it. If we grant this, by implication we give a “Sovereign Power” above all laws.²⁴⁸

Ultimately, the Petition of Right was sent to Charles without change, and he assented to it because this was the only way he could convince Parliament to provide the war funding he needed.²⁴⁹ Although he and subsequent kings sometimes ignored the Petition of Right, it served as the first major public document of the modern era setting forth some of the common law rights protected under the English Constitution.²⁵⁰ The Petition of Right would later serve as a model for the English Bill of Rights of 1689 and the American Declaration of Independence of 1776.

5. *Coke’s Principles in Practice: “Long Usage” and the Development of the English Constitution.*—Approximately a century and a half passed between the English Parliament’s adoption of the Petition of Right in 1628 and the Continental Congress’s issuance of the Declaration of Independence in 1776. This time period was one of great political upheaval. It began with the absolutist Stuart kings, whose claims of power to suspend laws by royal prerogative were among the major causes of the English Civil War.²⁵¹ The Stuarts were followed by the Long Parliament, which claimed absolute power for itself by abolishing the monarchy and the House of Lords.²⁵² After the Restoration, the Long Parliament was followed by a

²⁴⁶ See EDWARD COKE, PETITION OF RIGHT (1628), as reprinted in 3 COKE, SELECTED WRITINGS, *supra* note 169, at 1225, 1288–91.

²⁴⁷ *Id.* at 1290–91.

²⁴⁸ *Id.* at 1285.

²⁴⁹ *Id.* at 1295.

²⁵⁰ See, e.g., TASWELL-LANGMEAD, *supra* note 115, at 430 (calling the Petition of Right “the second great fundamental compact between the Crown and the Nation,” the first such compact being Magna Carta).

²⁵¹ See generally *id.* at 385–476 (describing the power struggles between king and Parliament that led to the English Civil War).

²⁵² See *id.* at 477–81.

somewhat milder form of Stuart absolutism, including a renewed claim of royal power to suspend laws.²⁵³ Finally, after the Glorious Revolution, England ultimately returned to a system of parliamentary supremacy, albeit milder than it had seen under Cromwell.²⁵⁴ Parliament's claim to supremacy led directly to the American Revolution.²⁵⁵

Throughout this period of conflict, two views of the nature of government power vied with each other for dominance. The first view held that some institution, whether it be the monarch or the Parliament, must hold absolute, arbitrary sovereign power, and therefore must itself be above the law. Writers as diverse as King James I,²⁵⁶ Thomas Hobbes,²⁵⁷ John Milton,²⁵⁸ Lord Halifax,²⁵⁹ and William Blackstone²⁶⁰ held this view. The second view followed Coke in holding that sovereign power was limited by the rule of law, specifically the fundamental rules of the common law embodied by long usage.²⁶¹

²⁵³ See *id.* at 498–99.

²⁵⁴ See generally *id.* at 565–87.

²⁵⁵ See *infra* Part III.D.

²⁵⁶ KING JAMES I, *supra* note 206, at 9–10 (“Kings [are] the authors and makers of the laws and not the laws of the Kings. . . . [T]he King is above the law as both the author and giver of strength thereto.”).

²⁵⁷ THOMAS HOBBS, *LEVIATHAN*, ch. XVIII (C.B. Macpherson ed., 1968) (1651) (arguing that the sovereign possesses “the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy and what Actions he may doe, without being molested by any of his fellow Subjects”). By virtue of his role as sovereign, “whatsoever he doth, it can be no injury to any of his Subjects. . . . It is true that they that have Sovereigne power, may commit iniquity; but not Injustice, or Injury in the proper signification.” *Id.*

²⁵⁸ John Milton, *Brief Notes Upon on a Late Sermon, Titl'd The Fear of God and the King*, at 11 (London, Mathew Griffith, D.D. 1660) (“The parliament is above all positive law . . . whether civil or common, makes or unmakes them both.”).

²⁵⁹ See GEORGE SAVILE, *POLITICAL THOUGHTS AND REFLECTIONS* (1750), reprinted in *THE COMPLETE WORKS OF GEORGE SAVILE, FIRST MARQUESS OF HALIFAX* 214 (Walter Raleigh ed., 1912) (“If the Common Law is Supream, then those are so who judge what is the Common Law; and if none but the Parliament can judge so, there is an end of the Controversy; there is no *Fundamental*; for the Parliament may judge as they please, that is, they have the Authority, but they may judge against Right, their Power is good, though their Act is ill; no good man will outwardly resist the one, or inwardly approve the other. There is, then, no other *Fundamental*, but that *every Supream Power must be Arbitrary*.”).

²⁶⁰ See *infra* Part III.C.3.

²⁶¹ For example, Charles Herle wrote in 1642 that laws such as Magna Carta, which were declaratory of preexisting common law principles, could not be repealed by Parliament: “[A] foundation must not be stirred while the building stands. . . . *Magna Charta*, where most of these fundamentals are (at least) implied, was law before 'twas written, and but there collected for easier conservation and use.” J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 88 & n.4 (1955) (quoting CHARLES HERLE, *A FULLER ANSWER TO A TREATISE WRITTEN BY DR. FERNE* 3, 8 (1642)). Similarly, in 1679 John Whitehall published a pamphlet entitled *Leviathan Found Out*, in which he attacked Hobbes's argument that sovereign will is the basis for all law. By making this argument, Whitehall asserted, “Mr. Hobbes principally aimed at the supplanting of our Common Law.” If the basis for the law's authority is not the “length of time” a custom is used, but rather the current will of the sovereign, then

Throughout this period, conflicts between these two views of government tended to arise when the holder of sovereign power (whether it be the monarch or the Parliament) tried to innovate in one of three ways: by changing the longstanding structure of the government itself, by raising revenue from English citizens without proper authorization, or by trying and punishing English citizens in a manner contrary to the common law. In each case, the innovation was protested on the ground that it was contrary to long usage, and therefore contrary to reason and destructive of the fabric of society. For example:

- As noted above, in 1628, Parliament issued the Petition of Right,²⁶² which declared that King Charles I lacked the power to impose taxes without the consent of Parliament or to imprison subjects without cause, because such actions violated rights declared in Magna Carta and established through long usage.²⁶³
- After the Long Parliament voted in 1641 to make itself perpetual, both royalists and radical democrats condemned the action because it was contrary to long usage. Royalist judge David Jenkins quoted Coke in arguing that this act was “against common right or reason” and thus “the common law shall control it, and adjudge this act to be void.”²⁶⁴ Similarly, John Lilburne, the most influential of the Levellers, wrote that Parliament’s decision to make itself perpetual was legally “void” because it was contrary to “common right or reason.”²⁶⁵
- When Parliament moved toward abolishing the monarchy in the 1640s, David Jenkins argued that Parliament lacked this power, because monarchy had existed since before there were written records and “usage so practiced makes therein a fundamental law.”²⁶⁶
- In 1647, when the parliamentary army tried a mutinous soldier under martial law and without common law protections, the Levellers protested that “neither [by] Act nor by Ordinance can [Parliament] justly or warrantably destroy the fundamental liberties and principles of the

“down goes the Common Law, . . . and then let the strongest take all.” *Id.* at 235 (quoting JOHN WHITEHALL, *LEVIATHAN FOUND OUT* 53 (1679)).

²⁶² See *supra* Part III.B.4.

²⁶³ See COKE, *supra* note 246, at 1288–89 (“Your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent in parliament. . . . And . . . also, by the statute called, ‘The Great Charter of the Liberties of England,’ it is declared and enacted, that no freeman may be taken or imprisoned . . . but by the lawful judgment of his peers, or by the law of the land.”).

²⁶⁴ GOUGH, *supra* note 261, at 104 (quoting DAVID JENKINS, *DISCOURSE TOUCHING THE INCONVENIENCES OF A LONG-CONTINUED PARLIAMENT* 123 (1647)).

²⁶⁵ *Id.* at 111 n.2 (quoting JOHN LILBURNE, *LEGAL FUNDAMENTAL LIBERTIES OF THE PEOPLE OF ENGLAND* 55 (2d ed. 1649)). Indeed, Lilburne’s view of the common law derived directly from Coke: “The Fundamental Law of the Land is the perfection of reason, consisting of lawful and reasonable customs, received and approved by the people.” *Id.* at 110 (quoting JOHN LILBURNE, *LONDON’S LIBERTY IN CHAINS DISCOVERED* (1646)).

²⁶⁶ *Id.* at 103–04 (quoting DAVID JENKINS, *LEX TERRAE; OR LAWS OF THE LAND* (1647)).

common law of England, it being a maxim in law and reason both, that all such Acts and Ordinances are ipso facto null and void in law, and bind not at all, but ought to be resisted and stood against to the death.”²⁶⁷

- In 1659, during the debate over restoring the House of Lords, Nathaniel Bacon argued that the Lords should not have been abolished, for it had a right to exist “from long continuance. It hath been so for many hundred years. Long usage hath so settled it, as Acts of Parliament cannot alter it. No Act of Parliament can take it away.”²⁶⁸
- In 1679, opponents of the Exclusion Bill, which would have excluded all Catholics—including James, the brother and heir of Charles II—from taking the throne, argued that the customary rules of succession were part of the fundamental common law of England and that therefore Parliament lacked the power to change them: “[I]t was a great maxim among our lawyers, that even an act of parliament against Magna Charta was null of itself.”²⁶⁹
- In 1689, Parliament enacted the Bill of Rights,²⁷⁰ which declared that the king’s prerogative did not extend to the suspension of laws, creation of new prerogative courts, levying of taxes without the consent of Parliament, keeping of a standing army in time of peace, billeting of soldiers in the homes of subjects, interference with Parliament, and imposition of “excessive bail,” “excessive fines,” and “cruel and unusual punishments.” The Bill of Rights asserted that any attempt to extend his prerogative to these matters violated “the true, ancient and indubitable rights and liberties of the people of this kingdom.”²⁷¹
- In 1701, the House of Commons ordered the summary imprisonment of citizens who had petitioned Parliament on a question of war funding. As a result Daniel Defoe lambasted the Commons for violating the longstanding common law right to petition Parliament and the right to be free from imprisonment contrary to the law of the land: “[The Commons] have no legal power to suspend or dispense with the laws of the land, any more than the king has by his prerogative . . . [and] the House of Commons has no legal power to imprison anyone.”²⁷²

²⁶⁷ *Id.* at 114–15 (quoting a “manifesto” dated December 14, 1647, titled *England’s Freedom, Souldiers’ Rights*).

²⁶⁸ 3 DIARY OF THOMAS BURTON, ESQ. 357 (John Towill Rutt, ed., London, Henry Colburn 1828).

²⁶⁹ GOUGH, *supra* note 261, at 148 (quoting GILBERT BURNET, HISTORY OF HIS OWN TIME (Oxford, 1823 ed.)). One of the most prominent expositors of this view was Sir Leoline Jenkins, who argued in parliamentary debates that the exclusion bill was contrary to “the Law of the Land,” and that “if such an Act should pass, it would be invalid in itself.” 1 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS FROM THE RESTORATION TO THE PRESENT TIME 404 (London, Richard Chandler 1742).

²⁷⁰ See *An Act Declareing*, *supra* note 52, at 143.

²⁷¹ *Id.*

²⁷² GOUGH, *supra* note 261, at 175 (quoting DANIEL DEFOE, LEGION’S MEMORIAL 4 (1701)).

- In 1716, after Parliament passed the Septennial Act, in which it extended its own tenure from three to seven years, the dissenting Lords argued that this action violated fundamental rights evidenced by long custom and usage: “[F]requent and new Parliaments are required by the fundamental Constitution of the Kingdom; and the practice thereof for many Ages . . . is a sufficient Evidence and Proof of this Constitution.”²⁷³

Similarly, during this time period, a number of prominent English judges affirmed Coke’s assertion that acts of Parliament that violated fundamental common law principles were void. For example, in *Day v. Savadge*,²⁷⁴ Chief Justice Hobart of the Court of King’s Bench repeated Coke’s assertion that “even an Act of Parliament, made against Natural Equity . . . is void in it self.”²⁷⁵ Similarly, in *Thomas v. Sorrell*,²⁷⁶ Chief Justice John Vaughan of the Court of Common Pleas asserted that both the king and Parliament lacked the power to legalize actions that were *malum in se*, like “murder, stealing, perjury, trespass.”²⁷⁷ Any law that sought to legalize such actions “would be a void law in itself,” for “the same thing, at the same time, would be both lawful and unlawful.”²⁷⁸ In *City of London v. Wood*,²⁷⁹ Chief Justice John Holt of the Court of King’s Bench held that a lawsuit brought by the Mayor of London in the mayor’s court to collect a fine from the defendant should be dismissed on the ground that the mayor would be—at least nominally—both judge and party in the case:

And what my Lord Coke says in *Dr. Bonham’s case* . . . is far from any extravagancy, for it is a very reasonable and true saying, That if an act of parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one should be judge and party.²⁸⁰

As these examples indicate, by the eighteenth century, Coke’s ideas regarding the inherent reasonableness of the common law had achieved a great deal of acceptance throughout English legal and political culture. Coke’s reasoning served as the primary basis for the notion that government

²⁷³ 20 H.L. JOUR. 331 (1716), available at <http://www.british-history.ac.uk/report.aspx?compid=38557>. Similarly, Archibald Hutcheson declared that even if the Septennial Act should “go through all the forms of an Act of Parliament, pass both Houses, and have the Royal assent . . . it will still remain a dead letter and not obtain the force of a law.” He further argued that he was “warranted by one of our greatest lawyers to affirm ‘that an act of parliament may be void of itself.’” *Mr Hutcheson’s Speech Against Repealing the Triennial Act* (1716), in 9 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS, at add. 1–32 (n.p., 1742).

²⁷⁴ (1614) 80 Eng. Rep. 235 (K.B.).

²⁷⁵ *Id.* at 237.

²⁷⁶ (1673) 124 Eng. Rep. 1098 (C.P.).

²⁷⁷ *Id.* at 1102.

²⁷⁸ *Id.*

²⁷⁹ (1701) 88 Eng. Rep. 1592 (K.B.).

²⁸⁰ *Id.* at 1602.

power was limited by an unwritten constitution whose principles were embodied by long usage. Nonetheless, it was also true that when there was a direct conflict between a constitutional principle and an act of a state power-holder—whether it be Parliament or the king—the power-holder generally won out, at least in the short term. Thus there was a growing sense of divergence between the normative power of the common law and the actual power of government.

As the following section reveals, this divergence was spelled out quite explicitly by Blackstone, particularly in his discussion of Parliament's abuse of its power to define punishments for crimes. Moreover, the sections that follow will show that the divergence between common law principles and actual parliamentary practice served as a primary motivation for the American Revolution, and later for the enactment of a written Bill of Rights that would constrain the power of the federal government within the normative limits the Bill of Rights prescribed. Many of these normative limits—including the proscription against cruel and unusual punishments—were based directly on the long usage of the common law.

C. William Blackstone and the Divergence Between Normative and Actual Power

If Coke was the most important seventeenth-century expositor of the common law, William Blackstone filled that role in the eighteenth and nineteenth centuries, particularly in America. His *Commentaries on the Laws of England* have been called the “handbook of the American revolutionary,”²⁸¹ and “the bible of American jurisprudence in the 19th century.”²⁸² More specifically, Blackstone's description of common law rights and liberties was one of the key resources upon which Americans relied in formulating their reasons for seeking independence from England.²⁸³ But American attitudes toward Blackstone were not uniformly positive. Thomas Jefferson, for example, praised Coke by saying that “a sounder Whig never wrote,” but condemned Blackstone as a source of “honeyed Mansfieldism” who led young lawyers to “forget what whiggism or republicanism means.”²⁸⁴

Blackstone's dual status as friend and foe of the American Revolution arose from the fact that the *Commentaries* upheld and celebrated the normative power of the common law, while simultaneously affirming the supreme

²⁸¹ RUTLAND, *supra* note 55, at 11.

²⁸² CLINTON, *supra* note 210, at 92.

²⁸³ FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 37 n.35 (1985).

²⁸⁴ JEFFERSON, *supra* note 193, at 376; *see also* CORWIN, *supra* note 193, at 86 (“[B]y phraseology drawn from Locke and Coke themselves, [Blackstone] paves the way to the entirely opposed position of Hobbes and Mansfield.”); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 299 n.66 (1972).

actual power of Parliament.²⁸⁵ Blackstone exalted Coke’s vision of the common law, waxing poetic on the inherent reasonableness and compatibility with liberty that were assured by “long usage.”²⁸⁶ At the same time, however, Blackstone asserted that Parliament possessed supreme sovereign power and that in the event of a conflict between a fundamental common law principle and an act of Parliament, the common law must yield.²⁸⁷ Blackstone saw that his position—which reflected the orthodox English legal thought of the time—created the potential for Parliament to enact unreasonable and oppressive laws. Indeed, Blackstone harshly criticized Parliament for deviating from the reason of the common law in the area of criminal punishment.²⁸⁸ Nonetheless, because he affirmed that Parliament possessed absolute power, he denied that Parliament’s unreasonable innovations could be considered void.²⁸⁹

1. The Normative Force of the Common Law.—In his introduction to the *Commentaries*, Blackstone followed Coke in equating the common law with customary law. He wrote that “the first ground and chief corner stone of the laws of England” was “general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice.”²⁹⁰ Of course, not all customs were part of the common law. Rather, the only customs that had “binding power, and the force of laws” were those that enjoyed “long and immemorial usage” and “universal reception throughout the kingdom.”²⁹¹ Customs that were relatively new—that had not “been used time out of mind”²⁹²—were not part of the common law.

According to Blackstone, the requirement of long usage gave the common law two primary advantages over positive law. First, Blackstone asserted that customary laws supported by long usage possessed “internal evidence of freedom,” for they arose through “the voluntary consent of the people”²⁹³ rather than through the imposition of sovereign will. Thus, the common law was more reliably consistent with “English liberty”²⁹⁴ than positive law. Second, Blackstone followed Coke in affirming that common

²⁸⁵ For a nuanced description of Blackstone’s influence in America during and after the revolutionary period, see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4–19 (1996).

²⁸⁶ See *infra* Part III.C.1.

²⁸⁷ See *infra* Part III.C.3.

²⁸⁸ See *infra* Part III.C.4.

²⁸⁹ See *infra* Part III.C.4.

²⁹⁰ 1 BLACKSTONE, *supra* note 21, at *73.

²⁹¹ *Id.* at *64.

²⁹² *Id.* at *67.

²⁹³ *Id.* at *74.

²⁹⁴ *Id.*

law supported by long usage must accord with the basic principles of reason and justice embodied in the natural law.²⁹⁵

In other words, Blackstone shared Coke's conviction that the customs of the English people were inherently reasonable and that if a given customary law enjoyed long usage and universal reception, it comported with the fundamental principles of the natural law. Blackstone also followed Coke in declaring that the common law was the source of the fundamental rights of English citizens. Blackstone included among these the right to trial by jury in the vicinage of the offense,²⁹⁶ habeas corpus,²⁹⁷ the right not to be subjected to double jeopardy,²⁹⁸ and the right not to be taxed without the consent of the people's representatives in Parliament.²⁹⁹ And of course, Blackstone also found in the common law the right to be free from "cruel and unusual punishments."³⁰⁰

2. *The Common Law and Innovation.*—Blackstone also shared Coke's distrust of legal innovation that deviated from the common law, although he generally stated his distrust more mildly. Whereas Coke extravagantly claimed that the common law could always be relied upon to "utterly crush" the "dross and sophistications of novelties and new inventions,"³⁰¹ Blackstone merely stated that when new statutes changed an ancient common law rule whose purpose has been forgotten, the usual result was that "the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation."³⁰²

Blackstone shared Coke's vehemence, however, with respect to the "innovations" arising from attempts to introduce the continental civil law system into England. Blackstone described the civil law as an enslaving force that established a "new Roman empire" over continental Europe and caused the people of Europe to lose their "political liberties."³⁰³ According to Blackstone, a cabal of foreigners and "popish clergy" conspired to bring the civil law to England and used it to make "repeated attacks" on the common law.³⁰⁴ In attacking the common law, the supporters of the civil law were actually attacking the rights and liberties of English citizens. For example, Blackstone repeated Coke's assertion that those who sought to in-

²⁹⁵ *Id.* at *70 ("[O]ur lawyers are with justice so copious in their encomiums on the reason of the common law; . . . the law is the perfection of reason, . . . it always intends to conform thereto, and . . . what is not reason is not law.").

²⁹⁶ 3 *id.* at *349–50.

²⁹⁷ *Id.* at *129.

²⁹⁸ 4 *id.* at *335.

²⁹⁹ 1 *id.* at *169.

³⁰⁰ 4 *id.* at *379.

³⁰¹ 1 COKE, INSTITUTES, *supra* note 172, § 723, at 740.

³⁰² 1 BLACKSTONE, *supra* note 21, at *70.

³⁰³ *Id.* at *67.

³⁰⁴ *Id.*

roduce the civil law system started by bringing the Rack into the Tower of London.³⁰⁵ It was only because the common law had “vigorously withstood” such attacks by proponents of the civil law that the liberties of the English people had been preserved.³⁰⁶

3. *The Common Law and Parliamentary Power.*—If Blackstone was aligned with Coke by his devotion to the “reason” of the common law—not to mention his hostility to the innovations of the civil law—he was separated from him by his belief in the supremacy of parliamentary power. As described above, Coke’s idea of parliamentary supremacy depended upon the organic unity he saw between the “reason” of the common law and the “wisdom” of Parliament.³⁰⁷ Coming after a hundred years of civil wars, executions, restorations, abdications, and “glorious” revolutions, Blackstone did not share Coke’s vision of the organic unity of king, Parliament, and common law. Rather, Blackstone saw a need to identify a particular organ of government as the locus of supreme power to which the others must bend. He found that locus of power in Parliament. Thus, he stated that “the legislature, being in truth the sovereign power, is always . . . of absolute authority.”³⁰⁸ Later, he made this claim even more strongly:

[Parliament] hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution.³⁰⁹

Like James I, Milton, Halifax, and Hobbes, Blackstone asserted that, as a matter of logic, the sovereign must possess uncontrolled, absolute, and arbitrary power.³¹⁰ Sovereign power could not be constrained by law because the sovereign is both the source and the ultimate interpreter of law. Nothing outside the sovereign can constrain the sovereign, and therefore whoever possesses sovereignty—in this case, Parliament—has absolute despotic power.

Because Parliament possessed supreme sovereign power, Blackstone took the position that Parliament could not be constrained even by the common law: “Where the common law and a statute differ, the common law gives place to the statute.”³¹¹ In making this assertion, Blackstone was

³⁰⁵ 4 *id.* at *325–26.

³⁰⁶ 1 *id.* at *67.

³⁰⁷ See *supra* Part III.B.2.

³⁰⁸ 1 BLACKSTONE, *supra* note 21, at *90.

³⁰⁹ *Id.* at *160. Of course, later in the *Commentaries*, Blackstone contradicts his own claim that every state needs a source of absolute, despotic power, saying instead that “the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power, of the sovereign.” 4 *id.* at *426.

³¹⁰ See *supra* Part III.B.5.

³¹¹ 1 BLACKSTONE, *supra* note 21, at *89.

not merely referring to specific common law rules, which everyone agreed Parliament could change, but also to fundamental common law principles such as those articulated in Magna Carta, the Petition of Right, and the Bill of Rights. For example, as noted above, Coke asserted in *Dr. Bonham's Case* that Parliament lacked power to violate the common law by making a party judge in its own case.³¹² This assertion received sufficient acceptance that two subsequent Chief Justices, Holt and Vaughan, repeated it in their opinions as a settled matter of law.³¹³ But when Blackstone came to this assertion, he wrote the following:

[I]f we could conceive it possible for the Parliament to enact that [a judge] should try as well his own causes as those of other persons, there is no court that has the power to defeat the intent of the legislature, when couched in such evident and express words as to leave no doubt whether it was the intent of the legislature or no.³¹⁴

In Blackstone's view nothing, not even fundamental and long-established principles of justice, could constrain Parliament's power to exercise its own will. As discussed below, the American colonists who revolted against England a little over a decade after the *Commentaries* was published vehemently disagreed with Blackstone regarding this point. Indeed, both the American Revolution and the adoption of the Bill of Rights were motivated by the desire to ensure that government *would* be restrained by fundamental principles of justice such as those embodied in the common law.

4. *Criminal Punishment and the Misuse of Parliamentary Power.*—Although Blackstone believed in the supreme power of Parliament, he did not believe in the supreme wisdom of all of its acts. As discussed above, Blackstone made a distinction between the normative power of the common law and the actual power of Parliament. In other words, he followed Coke in believing that the common law embodied fundamental principles of justice, but did not believe that acts of Parliament, whose authority was based on the will of the sovereign rather than custom and long usage, possessed the same qualities. Although Parliament was free to ignore the principles of the common law and enact whatever law it pleased, the results of such innovations were usually at least “inconvenient,”³¹⁵ and often unjust.³¹⁶

Nowhere is Blackstone's distinction between normative and actual power clearer than in his discussion of the English criminal justice system. Blackstone praised the English system of criminal prosecution—in comparison to the systems prevalent in continental Europe—because of the common law protections that were afforded to criminal defendants. In Eng-

³¹² See *supra* Part III.B.3.

³¹³ See *supra* Part III.B.5.

³¹⁴ 1 BLACKSTONE, *supra* note 21, at *91.

³¹⁵ *Id.* at *70.

³¹⁶ See *infra* Part III.D.

land, “crimes are more accurately defined, and penalties less uncertain and arbitrary; . . . all our accusations are public, and our trials in the face of the world; . . . torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception, nor even a personal dislike.”³¹⁷

Blackstone also generally praised the English system of criminal punishment, which was much fairer and more merciful than “the shocking apparatus of death and torment” that prevailed in the countries of continental Europe.³¹⁸ The English system of punishment was fairer than that in Europe because “the nature, though not always the quantity or degree, of punishment is *ascertained* for every offense; and . . . it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons.”³¹⁹ Although English judges had discretion in sentencing, “[their] discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king’s bench, in the reign of king James the second).”³²⁰ Finally, although the law permitted horrific punishments for crimes such as treason, including burning at the stake, drawing and quartering, and disemboweling, “the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savour of torture or cruelty.”³²¹ In other words, according to Blackstone, the cruellest forms of punishment traditionally employed in England were falling out of usage by the middle of the eighteenth century.

Even as Blackstone celebrated the relative fairness and mercifulness of England’s common law system of criminal justice, however, he harshly criticized the fact that over the course of the eighteenth century, Parliament had deviated from the common law and transformed over one hundred and fifty crimes into capital offenses.³²² Blackstone argued that Parliament had acted irrationally—and often to benefit “the passions or interests of a few”³²³—by making numerous minor crimes capital offenses, including, for example, the crimes of “break[ing] down . . . the mound of a fishpond, whereby any fish shall escape; or . . . cut[ting] down a cherry tree in an orchard.”³²⁴

³¹⁷ 4 BLACKSTONE, *supra* note 21, at *3–4.

³¹⁸ *Id.* at *377.

³¹⁹ *Id.*

³²⁰ *Id.* at *378.

³²¹ *Id.* at *376.

³²² *Id.* at *18 (“It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death.”).

³²³ *Id.* at *4.

³²⁴ *Id.*

Blackstone further condemned Parliament for failing to make any distinction between greater and lesser offenses in assigning capital punishments, and even implied that Parliament's approach to this issue showed it to be incompetent and tyrannical:

[S]anguinary laws are a bad symptom of the distemper in any state. . . . It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure.³²⁵

This is a remarkable passage by any measure, particularly when one considers that it was written by a noted champion of parliamentary supremacy. Blackstone here describes Parliament's actions as "absurd and impolitic," demonstrating a "defect in legislative wisdom," and constituting "quackery in government" performed by a "weak and cruel surgeon." According to Blackstone, Parliament had departed from the rule of reason represented by the common law tradition by wantonly expanding the scope of capital punishment to include major and minor offenses without reference to customary notions of proportionality and desert, and had thus begun to exercise power in a tyrannical manner. Blackstone went so far as to imply that Parliament may have exceeded its legitimate power in enacting these laws, saying, "I would not be understood to *deny* the right of the legislature in any country to enforce its own laws by the death of the transgressor, though persons of some abilities have *doubted* it."³²⁶ In sum, Blackstone seems to accuse Parliament of having enacted laws that deviated from the long usage of the common law in a manner directly contrary to basic principles of justice. These laws were thus—for lack of a better term—"cruel and unusual." He stops short of making this last claim, however, because according to his own view of the English Constitution, the constraints of the common law did not apply to Parliament.

D. Long Usage and the American Revolution

The American Revolution is perhaps unique among the revolutions of modern times, in that those who conducted it saw themselves as fighting to preserve, rather than throw off, the legal traditions of the government against which they rebelled. As Gordon Wood has written, American devo-

³²⁵ *Id.* at *17.

³²⁶ *Id.* at *11.

tion to English legal tradition was “what made their Revolution seem so unusual, for they revolted not against the English constitution but on behalf of it.”³²⁷ John Adams expressed mainstream American opinion when he wrote that “the liberty, the unalienable, indefeasible rights of men, the honor and dignity of human nature, the grandeur and glory of the public, and the universal happiness of individuals, were never so skillfully and successfully consulted as in that most excellent monument of human art, the common law of England.”³²⁸ As demonstrated below, the American revolutionaries saw themselves as fighting for the rights embodied in this “monument of human art,”³²⁹ against an English Parliament that seemed bent on depriving them of such rights.³³⁰

1. *The Common Law in the Early American Colonies.*—When the American colonies were first settled in the seventeenth century, the common law did not have a strong or universal hold within them. Rather, the legal system in most early American colonies was based on relatively simple legal codes that were meant to regulate day-to-day life among the colonists.³³¹ As the colonists became more numerous and more prosperous over the course of the eighteenth century, however, and as the numbers of trained lawyers increased, the American colonies came to receive the common law as part of their own system of laws.³³² By the end of the eighteenth century, reception of the common law was so universal that Chief Justice Oliver Ellsworth could tell a grand jury that the common law “as brought from the country of our ancestors, with here and there an accommodating exception, in nature of local customs, was the law of every part of the union at the formation of the national compact.”³³³ In all the colonies where the common law was received, however, it was adapted to meet American circum-

³²⁷ WOOD, *supra* note 284, at 10. The American colonists recognized that the English Constitution was itself founded upon the common law. For example, Noah Webster wrote that the English Constitution “consists rather of practice, or of common law, with some statutes of Parliament.” *Id.* at 261 n.4 (quoting Noah Webster, 1 AM. MAG. 77 (1787–1788)).

³²⁸ John Adams, *On Private Revenge*, BOSTON GAZETTE, Sept. 5, 1763, reprinted in 3 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 438, 440 (Boston, Charles C. Little & James Brown 1851) [hereinafter THE WORKS OF JOHN ADAMS].

³²⁹ *Id.*

³³⁰ See generally Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

³³¹ See PAUL SAMUEL REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 53 (Lawbook Exch., Ltd. 2004) (1898).

³³² *Id.* at 7–8.

³³³ *Oliver Ellsworth’s Charge to the Grand Jury of the Circuit Court for the District of South Carolina, 7 May 1799*, in 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 358 (Maeva Marcus ed., 1990); see also REINSCH, *supra* note 331, at 8–9 (“[D]uring the decade immediately preceding Independence, the English common law was generally praised and apparently most readily received by the larger part of American courts,” although the courts also retained many of the “marks of the old popular law.”).

stances. As John Adams wrote in 1774: “Our ancestors were entitled to the common law of England when they emigrated; that is to say, to as much of it as they pleased to adopt and no more.”³³⁴

Even where the common law was not initially received as a source of positive law, American colonists tended to draw on it as a source of fundamental rights and liberties against the state.³³⁵ For example, the common law practice of trial by jury was adopted throughout the colonies early on,³³⁶ even in colonies such as Massachusetts, which claimed to look to the Bible rather than the common law as the primary source of fundamental law.³³⁷ Similarly, seventeenth-century colonists reacted to perceived unfairness in colonial government by asking for the protections of the common law.³³⁸ In seventeenth-century Massachusetts, the requests for implementation of the common law were so strong that the Puritan government issued a point-by-point comparison of Massachusetts law and Magna Carta, designed to show that colonial government provided essentially the same rights and protections as the English common law.³³⁹ Starting in the seventeenth century and continuing through the eighteenth century, colonial governments frequently declared that the colonists possessed the same common law rights as other English citizens.³⁴⁰

2. *Pre-Revolutionary Conflicts.*—The period from 1760 to 1776 was a time of conflict between the American colonies and the British Parliament. This conflict resembled England’s own seventeenth-century constitutional conflicts in at least three ways. First, as in seventeenth-century England, the holder of state power—in this case, Parliament—claimed absolute power, unconstrained by fundamental common law limits. Second, American protesters, like their seventeenth-century English counterparts, argued that Parliament did not hold absolute power because it lacked the authority to abrogate fundamental common law rules embodied by long usage.

³³⁴ JOHN ADAMS, *NOVANGLUS: OR, A HISTORY OF THE DISPUTE WITH AMERICA, FROM ITS ORIGIN, IN 1754, TO THE PRESENT TIME (1819)*, reprinted in 4 *THE WORKS OF JOHN ADAMS*, *supra* note 328, at 3, 122. Justice Story expressed the same view fifty years later in *Van Ness v. Pacard*, 27 U.S. 137 (1829): “The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their condition.” *Id.* at 7.

³³⁵ See REINSCH, *supra* note 331, at 58 (“Most of the colonies made their earliest appeals to the common law in its character of a muniment of English liberty.”).

³³⁶ See *id.* at 55.

³³⁷ See *id.* at 17–18.

³³⁸ See *id.* at 23.

³³⁹ See *A Declaration of the General Court Holden at Boston 4(9) 1646, Concerning a Remonstrance and Petition Exhibited at Last Session of this Court by Doctor Child, Thomas Fowle, Samuel Maverick, Thomas Burton, John Smith, David Yale, and John Dand*, in *A COLLECTION OF ORIGINAL PAPERS RELATIVE TO THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY 196–208* (Thomas Hutchinson ed., Boston, Thomas & John Fleet 1769).

³⁴⁰ See REINSCH, *supra* note 331, at 27, 28, 34, 36, 41, 43, 50.

Indeed, Americans repeatedly condemned Parliament's actions during this time period as "innovations" and "usurpations" that were "unusual," "un-constitutional," and "void" because they were contrary to "common right or reason." Third, many of the same conflicts that had dominated seventeenth-century constitutional battles reappeared in the eighteenth-century conflict between England and America: taxation without the consent of one's representatives in Parliament, the interference with the functioning of legislatures, the denial of common law protections in criminal trials, and the replacement of the common law with the civil law.

Like King James I, John Milton, Thomas Hobbes, and numerous other proponents of absolute sovereignty,³⁴¹ the Parliament of the 1760s and 1770s claimed that the state possessed total power to act and to make new law, unconstrained by the limits of the common law. Thus, for example, the Declaratory Act of 1766 stated that Parliament had "full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America . . . in all cases whatsoever."³⁴²

The Americans who opposed Parliament's actions during this period claimed that Parliament's power was limited by the rights American colonists held as British subjects. These rights, in turn, were based on the long usage of the common law. For example, Richard Henry Lee argued that American rights "are built upon a fourfold foundation, namely natural law, the British constitution, the charters of the several colonies, and 'immemorial usage.'"³⁴³ Similarly, Roger Sherman asserted that American rights were based on the common law: "The Colonies adopt the common Law, not as the common Law, but as the highest Reason."³⁴⁴ Indeed, the 1774 Declaration and Resolves of the Continental Congress stated that American rights were based on "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts" of the various colonies; that the colonists retained the "rights, liberties, and immunities of free and natural born subjects, within the realm of England"; and that these rights included the right to "the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."³⁴⁵

Americans used the Cokean vision of the common law to protest every act of Parliament that they believed violated their rights. For example, Americans and their English allies argued that the common law forbade Parliament from taxing Americans because they were not represented in

³⁴¹ See *supra* Part III.B.5.

³⁴² The Declaratory Act, 1766, 6 Geo. 3, c. 12 (Gr. Brit.), available at http://www.yale.edu/lawweb/avalon/amerrev/parliament/declaratory_act_1766.htm.

³⁴³ John Adams, Notes of Debates (Sept. 8, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 46 (Paul H. Smith ed., 1976).

³⁴⁴ *Id.* at 47.

³⁴⁵ DECLARATIONS AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (Oct. 14, 1774), available at <http://www.yale.edu/lawweb/avalon/resolves.htm>.

Parliament. Thus, John Dickinson wrote in his *Letters from a Farmer in Pennsylvania* that Parliament's claim of power to tax the colonies was "an innovation; and a most dangerous innovation."³⁴⁶ Similarly, Lord Camden, Chief Justice of England, condemned such taxation as "illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this constitution . . . for whatever is a man's own is absolutely his own; no man hath a right to take it from him without his consent, either expressed by himself or [his] representative."³⁴⁷

Americans also argued that Parliament lacked the authority to subject them to criminal trial without the protections of the common law. Parliament threatened this right in two ways. First, under the Stamp Act, Parliament gave the admiralty court jurisdiction over criminal prosecutions "relating to the trade or revenues of the said colonies or plantations."³⁴⁸ Because the admiralty court employed civil law procedures, Americans saw the Stamp Act as an attempt to deny them their common law right to trial by jury.³⁴⁹ Indeed, Americans saw themselves as reenacting the English constitutional struggles of the seventeenth century, in which parliamentarians and common lawyers opposed royal attempts to exert control through the cruel practices of civil law courts, such as the Star Chamber and Court of High Commission. "Can you recollect the complaints and clamors," wrote John Adams to a supporter of the Stamp Act, "which were sounded with such industry, and supported by such a profusion of law and history, and such invincible reasoning . . . against the Star Chamber and High Commission, and yet remain an advocate for the newly formed courts of admiralty in America?"³⁵⁰

³⁴⁶ John Dickinson, *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies*, in *SOURCES & DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764–1788*, at 34, 40 (Samuel Eliot Morison ed., 1967).

³⁴⁷ Similarly, in a speech before the House of Lords, Lord Chatham asserted that "[it] has always been my received and unalterable opinion . . . that this country had no right under heaven to tax America." *THE DEBATE ON THE AMERICAN REVOLUTION, 1761–1783*, at 151, 155 (Max Beloff ed., 3d ed. 1989).

³⁴⁸ Stamp Act, 1765, 5 Geo. 3, c. 12 (Gr. Brit.), available at http://www.yale.edu/lawweb/avalon/amerrev/parliament/stamp_act_1765.htm.

³⁴⁹ See John Adams, *Instructions of the Town of Braintree to Their Representative, 1765*, *BOSTON GAZETTE*, Oct. 14, 1765, reprinted in 3 *THE WORKS OF JOHN ADAMS*, *supra* note 328, at 465, 466–67.

[T]he most grievous innovation of all, is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! . . . [T]he Stamp Act has opened a vast number of sources of new crimes, which may be committed by any man . . . and prodigious penalties are annexed, and all these are to be tried by such a judge of such a court!

These instructions were drafted by John Adams and adopted by the town without amendment. See JOHN ADAMS, *Diary*, with Sections from an Autobiography, in 2 *THE WORKS OF JOHN ADAMS*, *supra* note 328, at 2, 153.

³⁵⁰ John Adams, *The Earl of Clarendon to William Pym*, *BOSTON GAZETTE (SUPPLEMENT)*, Jan. 13, 1766, reprinted in 3 *THE WORKS OF JOHN ADAMS*, *supra* note 328, at 469, 470.

Parliament threatened Americans’ common law rights in a second way by making several efforts to provide for the removal of rebellious Americans to England for trial, a practice that would violate the common law right to trial by jury in the vicinage of the offense.³⁵¹ When Parliament proposed that the king revive a long-dormant statute that would permit England to ship American protesters to England to be tried for treason, the Virginia House of Burgesses issued two separate protests: On May 16, 1769, it resolved that Parliament’s suggestion was “highly derogatory of the Rights of British subjects; as thereby the inestimable privilege of being tried by a jury from the vicinage, as well as the liberty of summoning and producing witnesses on such trial, will be taken away from the party accused.”³⁵² Then, on May 17, 1769, it sent forth a separate address to the king, calling Parliament’s plan “new, unusual . . . unconstitutional and illegal.”³⁵³

3. *The Declaration of Independence.*—Even at the moment the Continental Congress decided to sever America’s ties to England, it relied in part on common law principles in justifying its decision. Indeed, the Declaration of Independence was self-consciously modeled after two key parliamentary documents setting forth the fundamental common law principles underlying the English constitution: the Petition of Right of 1628 and the Bill of Rights of 1689. The most obvious similarity is in the Declaration’s rhetorical stance. Like those seventeenth-century parliamentary documents, the Declaration is structured primarily as a set of complaints regarding a series of listed “injuries and usurpations.”³⁵⁴ Moreover, the Declaration describes most of these “injuries and usurpations” in common law language already familiar from the Petition of Right and the English Bill of Rights. For example, the Declaration complains that the Crown has undermined the common law right of legislative representation by suspending operation of laws passed by the colonial legislatures, by dissolving colonial legislatures and refusing to call new ones, and by disrupting the legislative process through “call[ing] together legislative bodies at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures.”³⁵⁵ The Declaration also lists a variety of other “injuries and usurpations,” many of which were familiar from past conflicts between Parliament and the Stuart

³⁵¹ For a discussion of the historical development in America of the right to trial by jury in the vicinage of the offense, see Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658 (2000).

³⁵² JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1766–1769, *supra* note 36, at 214.

³⁵³ *Id.* at 215.

³⁵⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³⁵⁵ *Id.* para. 6.

kings, including taxation without representation,³⁵⁶ quartering of soldiers in civilian homes,³⁵⁷ denial of the right to trial by jury,³⁵⁸ and so forth.

It is worth noting that the Declaration's complaint about the calling of legislative bodies in "unusual" places—meaning places different from the ones designated by long usage—was a common one throughout English history. It was considered a violation of the common law for the king or royal officials to arbitrarily vary the location of parliaments, courts, or other official proceedings in order to discourage attendance. Indeed, as we have seen above, under the English common law, a sheriff could be indicted for holding a Term in an "unusual" location.³⁵⁹ The Continental Congress's use of the word "unusual" in the Declaration of Independence indicates that at the moment America formally separated itself from all legal ties to England, it saw long usage as a relevant source of standards for judging government actions.

4. *Formation of State Governments and State Declarations of Rights.*—After declaring independence from Great Britain, the Continental Congress directed the colonies to form state governments.³⁶⁰ Virginia was the first to do so, adopting not only a state constitution, but also a Declaration of Rights.³⁶¹ The purpose of the Declaration of Rights was to ensure that the state government could not do what England had done and declare its own power to be supreme, arbitrary, and above even fundamental principles of justice. To accomplish this result, the Declaration of Rights—drafted primarily by George Mason³⁶²—listed a set of fundamental rights that were beyond the power of the legislature to violate. Among these rights was the right not to be subjected to "cruel and unusual punishments."³⁶³

Other states quickly followed Virginia's lead. By 1784, every state had adopted a state constitution.³⁶⁴ A majority of these states adopted bills of rights that contained provisions that more or less echoed Virginia's Declaration of Rights.³⁶⁵ Twelve states provided, by statute or constitution, for continuation of the common law.³⁶⁶ By 1790, nine states had constitutional

³⁵⁶ *Id.* para. 19.

³⁵⁷ *Id.* para. 16.

³⁵⁸ *Id.* para. 20.

³⁵⁹ See HAWKINS, *supra* note 181, at 91.

³⁶⁰ See RUTLAND, *supra* note 55, at 30.

³⁶¹ *Id.* at 39.

³⁶² *Id.* at 35–36.

³⁶³ VA. DECLARATION OF RIGHTS art. IX (June 12, 1776), available at <http://www.yale.edu/lawweb/avalon/virginia.htm>.

³⁶⁴ RUTLAND, *supra* note 55, at 41.

³⁶⁵ *Id.* at 44. The states were Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire.

³⁶⁶ See McDONALD, *supra* note 283, at 46; CLINTON, *supra* note 210, at 91.

provisions prohibiting “cruel and unusual,”³⁶⁷ “cruel or unusual,”³⁶⁸ or merely “cruel” punishments.³⁶⁹

The provisions in the various state constitutions and bills of rights for preserving the common law and prohibiting cruel punishments reflected a general consensus on two points: First, the government should not impose cruel punishments. Second, the common law was essentially reasonable, so that governmental efforts to “ratchet up” punishment beyond what was permitted by the common law were presumptively contrary to reason. Given this dual consensus, the words “cruel” and “unusual” acted as synonyms when employed in the context of punishment. The word “cruel” stated the abstract moral principle, and the word “unusual” provided a concrete reference point for determining whether that principle had been violated. Thus, it makes sense that some states outlawed “cruel punishments,” some outlawed “cruel and unusual punishments,” and some outlawed “cruel or unusual punishments.” Each formulation is simply a different way of saying the same thing.³⁷⁰

5. *Conclusions Regarding the Common Law and the American Revolution.*—As the section above indicates, American colonists rebelled against England largely because they believed that the English Parliament had denied them basic common law rights. In articulating the basis for their rights, the American colonists used the terms “immemorial usage,” “common law,” “constitution,” “reason,” and “natural equity” virtually interchangeably.³⁷¹ Similarly, when complaining about Parliament’s violations of their rights, the colonists used the terms “innovation,” “usurpation,” “un-

³⁶⁷ “Cruel and unusual” punishments were forbidden by New York and Virginia. See N.Y. BILL OF RIGHTS (1787), as reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 615 (Neil H. Cogan ed., 1997); VA. CONST. § 9 (1776), available at <http://www.yale.edu/lawweb/avalon/states/va05.htm>. In addition, the Maryland Constitution contained both a prohibition on “cruel or unusual punishments” as well as the following prohibition on legislative enactments: “[N]o law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter.” MD. CONST. para. XIV (1776), available at <http://www.yale.edu/lawweb/avalon/states/ma02.htm>.

³⁶⁸ “Cruel or unusual” punishments were forbidden by Delaware, Massachusetts, Maryland, New Hampshire, and North Carolina. See DEL. DECLARATION OF RIGHTS § 16 (1776), reprinted in 2 THE ROOTS OF THE BILL OF RIGHTS 278 (Bernard Schwartz ed., 1980); MD. CONST. para. XXII (1776), available at <http://www.yale.edu/lawweb/avalon/states/ma02.htm>; MASS. DECLARATION OF RIGHTS para. XXVI (1780), reprinted in THE ROOTS OF THE BILL OF RIGHTS, *supra*, at 343; N.H. BILL OF RIGHTS para. XXXIII (1783), reprinted in THE ROOTS OF THE BILL OF RIGHTS, *supra*, at 379; N.C. DECLARATION OF RIGHTS para. X (1776), reprinted in THE ROOTS OF THE BILL OF RIGHTS, *supra*, at 287.

³⁶⁹ “Cruel punishments” were forbidden by Pennsylvania and South Carolina. See PA. CONST. art. IX, § 13 (1790), as reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 367, at 615; S.C. CONST. art. IX, § 4 (1790), as reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 367, at 616.

³⁷⁰ After reviewing the historical evidence from various states, Tom Stacy has observed that “the available evidence indicates that the Founders understood [the formulations “cruel and unusual,” “cruel or unusual” and “cruel”] to capture the same meaning.” Stacy, *supra* note 3, at 503.

³⁷¹ See *supra* Part III.D.2–4.

constitutional,” and “unusual” virtually interchangeably.³⁷² Because American rights were based on long usage, parliamentary acts that deviated from it—“innovative” or “unusual” acts—were presumptively unconstitutional. Indeed, as John Adams’s critique of the Stamp Act indicates, Americans saw such innovations as a precursor to the introduction of the cruel practices of the civil law, including trial by torture.³⁷³ In enacting state declarations of rights, the various states sought to ensure that state governments would not emulate Parliament by attempting to extend their power in such a way as to violate fundamental rights, most of which were defined by the common law.

E. Long Usage and the Eighth Amendment

1. *The Common Law and the Constitution.*—In the summer of 1787, some eleven years after the Declaration of Independence, a group of delegates from the thirteen states who had been sent to Philadelphia to amend and strengthen the Articles of Confederation decided instead to adopt a new constitution that would make the federal government stronger.³⁷⁴ The new government was not meant to replace state governments; rather, it was to be a limited government of enumerated powers whose authority would be supreme within its proper sphere but would not exist at all outside of that sphere.³⁷⁵ Nonetheless, the new Constitution would vastly expand the power of the federal government, in part by giving it direct power to regulate the lives of United States citizens and to prosecute those who violated federal law.³⁷⁶

From the very moment the Constitution was adopted by the convention in Philadelphia, it came under withering criticism for failing either to include a bill of rights or to acknowledge that the new federal government would be bound by the constraints of the common law. George Mason, who was a delegate to the Constitutional Convention, led the charge in this regard. In the final week of the convention, Mason first proposed that a bill of rights be attached.³⁷⁷ When the other delegates—who had struggled over

³⁷² See *supra* Part III.D.2–4.

³⁷³ See *supra* Part III.D.2.

³⁷⁴ See generally RUTLAND, *supra* note 55, at 106–25.

³⁷⁵ For example, James Wilson, one of the primary drafters of the United States Constitution, stated that the Constitution created a government whose “powers are particularly enumerated. In [such a] case, the implied result is, that nothing more is intended to be given than what is so enumerated, unless it results from the nature of the government itself.” James Wilson, Speech Before the Pennsylvania Convention for Ratification of the United States Constitution (Nov. 20, 1787), in 2 ELLIOT’S DEBATES, *supra* note †, at 454.

³⁷⁶ Cf. THE FEDERALIST NO. 21, at 130 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (complaining that under the Articles of Confederation, “the United States afford the extraordinary spectacle of a government, destitute even of the shadow of constitutional power to enforce the execution of its own laws”).

³⁷⁷ FARRAND, *supra* note 187, at 587.

the Constitution all summer and wanted to go home—refused Mason’s proposal, he refused to vote for the Constitution.³⁷⁸ Furthermore, shortly after the convention concluded, he published a series of “Objections to this Constitution of Government,” which prominently included the complaint that

[t]here is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security. Nor are the people secured even in the enjoyment of the benefit of the common law which stands here upon no other foundation than its having been adopted by the respective acts forming the constitutions of the several States.³⁷⁹

Because the Constitution did not include a Declaration of Rights and because the new federal government would not be bound by the common law, Mason feared that the federal government would be able to take unlimited and tyrannical powers unto itself.³⁸⁰ In particular, he worried that under the Necessary and Proper Clause in Article I, Section 8, “Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their powers 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.”³⁸¹

Mason’s claim that the new federal government would not be bound by the common law was not entirely accurate. The Constitution contained some traditional common law protections, including, for example, the privilege of habeas corpus,³⁸² the right of criminal defendants to trial by jury within the state where the offense was committed,³⁸³ and the invalidity of ex post facto laws.³⁸⁴ But these protections were not enough for the Antifederalists who opposed the Constitution.³⁸⁵ The Constitution only preserved the right to a jury trial in criminal cases, not civil ones. Thus, the Antifederalists feared that it left room for the adoption of the cruel and corrupt prac-

³⁷⁸ *Id.* at 649. Elbridge Gerry and Edmond Randolph also refused to vote for the Constitution.

³⁷⁹ *Id.* at 637–40.

³⁸⁰ Mason’s concerns about the lack of common law restraints on the new federal government were echoed by other opponents of the Constitution, who collectively became known as the Antifederalists. For example, the “Federal Farmer” wrote: “I confess in the constitution of this supreme court, as left by the constitution, I do not see a spark of freedom or a shadow of our own or the British common law.” Letter from the Federal Farmer to the Republican No. 3 (Oct. 10, 1787), reprinted in LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 13, 24 (Walter Hartwell Bennett ed., 1978) [hereinafter LETTERS].

³⁸¹ FARRAND, *supra* note 187, at 640.

³⁸² U.S. CONST. art. I, § 9, cl. 2.

³⁸³ *Id.* art. III, § 2, cl. 3.

³⁸⁴ *Id.* art. I, § 9, cl. 3.

³⁸⁵ For example, the influential *Letters from the Federal Farmer* maintained that “[s]ecurity against ex post facto laws, the trial by jury, and the benefits of the writ of habeas corpus, are but a part of those inestimable rights the people of the United States are entitled to, even in judicial proceedings, by the course of the common law.” Letter from the Federal Farmer to the Republican No. 16 (Jan. 20, 1788), reprinted in LETTERS, *supra* note 380, at 105, 109.

tices of the European civil law system.³⁸⁶ Moreover, the Antifederalists were concerned that even the guarantee of trial by jury in criminal cases could be avoided by a future tyrannical government. Because Article III, Section 2 gave the Supreme Court appellate jurisdiction “both as to Law and Fact,” they argued that some future Court might discard jury acquittals in criminal cases and conduct its own proceedings according to the tyrannical practices of the civil law.³⁸⁷ The Constitution also failed to provide for a variety of other common law rights, including the defendant’s right to be informed of the charges against him, to confront his accuser, to call witnesses, to have assistance of counsel, and to be free from cruel and unusual punishments, and thus the Antifederalists believed it left too much room for future federal tyranny.³⁸⁸

In the Massachusetts ratifying convention, Abraham Holmes provided perhaps the most colorful vision of the tyranny that the Constitution’s gaps in common law protection might permit:

On the whole, when we fully consider this matter, and fully investigate the powers granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*.

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.³⁸⁹

Just as John Adams, two decades earlier, had accused England of seeking to revive the Star Chamber and Court of High Commission by extending the jurisdiction of the admiralty court, so Abraham Holmes raised the spectacle of a future federal government exploiting the gaps in common law protec-

³⁸⁶ See Letter from the Federal Farmer to the Republican No. 15 (Jan. 18, 1788), reprinted in LETTERS, *supra* note 380, at 97, 103 (“In the civil law process the trial by jury is unknown; the consequence is, that a few judges and dependent officers, possess all the power in the judicial department. Instead of the open fair proceedings of the common law, where witnesses are examined in open court, and may be cross examined by the parties concerned—where council is allowed, &c. we see in the civil law process judges alone, who always, long previous to the trial, are known and often corrupted by ministerial influence, or by parties. Judges once influenced, soon become inclined to yield to temptations, and to decree for him who will pay the most for their partiality.”).

³⁸⁷ See, e.g., Brutus No. 14 (Feb. 28, 1788), in THE ANTIFEDERALIST PAPERS 234–39 (Morton Borden ed., 1965); Luther Martin, *Genuine Information* (1788), in 4 THE FOUNDERS’ CONSTITUTION 234 (Philip B. Kurland & Ralph Lerner eds., 1987).

³⁸⁸ See Letter from the Federal Farmer to the Republican No. 16 (Jan. 20, 1788), reprinted in LETTERS, *supra* note 380.

³⁸⁹ 2 ELLIOTT’S DEBATES, *supra* note †, at 111.

tion left open by the federal Constitution to create a new Inquisition that would use implements of torture to try and punish defendants.

Underlying all of these Antifederalist arguments was a deep distrust of governmental power unrestrained by specific, enforceable, fundamental rights.³⁹⁰ Thus, several Antifederalists proposed that the Constitution should be amended to include a bill of rights that would explicitly bind the federal government not to violate common law rights, particularly in the area of judicial process.³⁹¹ For example, Richard Henry Lee proposed adoption of a federal bill of rights that would include a variety of common law protections, including a requirement that “excessive Bail, excessive Fines, or cruel and unusual punishments should not be demanded or inflicted.”³⁹² Similarly, the dissenting delegates to Pennsylvania’s convention for ratifying the Constitution argued that it should not be adopted without a bill of rights that provided, among other things, that “excessive bail ought not to be required, nor excessive fines imposed nor cruel nor unusual punishments inflicted.”³⁹³ Without a bill of rights of sufficient breadth and specificity to restrain some future government’s impulses toward cruelty and tyranny—particularly in the area of criminal trials and punishments—the Antifederalists held that it should not be adopted.

2. “Unusual” in the Virginia Convention for Ratification of the United States Constitution.—The Antifederalist challenge to the new Constitution came to a head at the Virginia ratification convention. When the Virginia delegates met, nine states had already ratified the new Constitution, which was technically enough to put it into effect. It was generally believed, however, that the new system could not work without the participation of Virginia, which was one of the two largest and most prosperous states.³⁹⁴

³⁹⁰ As the *Letters from the Federal Farmer* put it, “We are not to suppose all our people are attached to free government, and the principles of the common law.” Letter from the Federal Farmer to the Republican No.18 (Jan. 25, 1788), reprinted in *LETTERS*, *supra* note 380, at 122, 130. Unless common law rights were stated specifically in an enforceable, written constitution, there was every reason to suppose that the federal government would abandon common law constraints and begin acting in a tyrannical manner.

³⁹¹ See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 157–60 (2001).

³⁹² Letter from Richard Henry Lee to Elbridge Gerry (Sept. 29, 1787), in 24 *LETTERS OF DELEGATES TO CONGRESS, 1774–1789*, *supra* note 343, at 451, 452. Lee also sought to ensure “[t]hat the trial by Jury in Criminal and Civil cases, and the modes prescribed by the Common Law for safety of Life in Criminal prosecutions shall be held sacred.” *Id.*

³⁹³ THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION, OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS 1, col. 3 (Dec. 12, 1787), available at <http://memory.loc.gov/service/rbc/bdsdcc/c0401/0001.jpg>. The dissenting delegates also sought to ensure that the right to “jury trial in criminal and civil cases, by an impartial jury of the vicinage or county, with the common law proceedings, for the safety of the accused in criminal prosecutions” would be protected. *Id.* at 2, col. 3, available at <http://memory.loc.gov/service/rbc/bdsdcc/c0401/0002.jpg>.

³⁹⁴ See RUTLAND, *supra* note 55, at 162.

The leaders of the Antifederalists in the Virginia ratifying convention were Patrick Henry and George Mason.³⁹⁵ As noted above, Mason had refused to vote for the Constitution because it neither provided a bill of rights nor gave the American people the protection of the common law. Henry had been prominent in the American Revolution and in Virginia government, and his prestige within the state was second only to that of George Washington.³⁹⁶ Henry had been offered a place in the Virginia delegation to the Constitutional Convention but turned it down, declaring that he “smelt a rat.”³⁹⁷

The primary Antifederalist strategy at the Virginia ratifying convention was to attack the Federalist claim that the limited, enumerated powers in the Constitution were not broad enough to create a real danger of federal tyranny. More specifically, during the ratification debate, the Antifederalists went through the Constitution phrase by phrase and clause by clause, with the purpose of demonstrating that the seemingly bland, straightforward text was actually awash with implied powers and dangerous implications.³⁹⁸

Patrick Henry was particularly effective at this mode of constitutional critique. Throughout the debates, Henry repeatedly returned to the theme that the Constitution gave the federal government powers not known at common law and was thus a dangerous authorization for “new and unusual experiments in government.”³⁹⁹ Specifically, Henry identified three powers that would enable the federal government to engage in unusual, and therefore tyrannical, activities: the treaty power, the power to call forth the militia, and the power to punish crime.

a. “Unusual punishments” and the treaty power.—The treaty power granted to the federal government under the Constitution was a source of particular concern for the Antifederalists, because it raised the possibility that the President and a majority of the Senate could collude with each other and with a foreign government to the detriment of states, or even to the detriment of individual rights.⁴⁰⁰ Under Article II, Section 2, the President of the United States was given the power to enter into treaties with foreign nations, with the advice and consent of two-thirds of the Senate.⁴⁰¹ Under Article VI, treaties were held to be part of the “supreme Law

³⁹⁵ See *id.* at 167.

³⁹⁶ See *id.* at 165.

³⁹⁷ See *id.*

³⁹⁸ See generally 3 ELLIOTT’S DEBATES, *supra* note †.

³⁹⁹ *Id.* at 172.

⁴⁰⁰ See *id.* at 500 (“Mr. HENRY begged gentlemen to consider the condition this country would be in if two thirds of a quorum should be empowered to make a treaty: they might relinquish and alienate territorial rights, and our most valuable commercial advantages. In short, if any thing should be left us, it would be because the President and senators were pleased to admit it. The power of making treaties, by this Constitution, ill-guarded as it is, extended farther than it did in any country in the world.”).

⁴⁰¹ U.S. CONST. art. II, § 2.

of the Land” that must be given effect even if it conflicts with state law or a state constitution.⁴⁰² Thus, the President and the Senate alone could enter into binding agreements with foreign governments that had the effect of nullifying state law.

Although the Antifederalists were mainly concerned about the potential of the treaty power to harm states’ rights, Henry focused his argument largely on the possibility that the treaty power could subject individual citizens to “unusual punishments.”⁴⁰³ Specifically, he referred to an incident from the reign of Queen Anne, which was described in Blackstone’s *Commentaries*. The Russian ambassador to England at that time was a profligate spender who ran up debts he could not pay back. Ultimately, he was publicly arrested and imprisoned for debt. When the Czar learned of this, he angrily demanded that the person responsible for arresting the ambassador be handed over for execution. Queen Anne apologized that she could not do this because there was no preexisting law of ambassadorial immunity, and therefore it was not illegal to arrest the ambassador. Thus, the law would not permit the Queen to punish the man responsible for the arrest.⁴⁰⁴ Things would be different, Henry argued, under the new federal treaty power:

But how is it here? Treaties are binding, notwithstanding our laws and constitutions. Let us illustrate this fatal instance. Suppose the case of the Russian ambassador to happen here. The President can settle it by a treaty, and have the man arrested, and punished according to the Russian manner. The constitutions of these states may be most flagrantly violated without remedy. . . . A treaty may be made giving away your rights, and inflicting unusual punishments on its violators. It is contended that, if the king of Great Britain makes a treaty within the line of his prerogative, it is the law of the land. I agree that this is proper, and, if I could see the same checks in that paper which I see in the British government, I would consent to it. Can the English monarch make a treaty which shall subvert the common law of England, and the constitution? Dare he make a treaty that shall violate Magna Charta, or the bill of rights? Dare he do any thing derogatory to the honor, or subversive of the great privileges, of his people? No, sir. If he did, it would be nugatory, and the attempt would endanger his existence.⁴⁰⁵

Because the federal government—unlike the kings and queens of England—would not be bound by the common law, there was nothing to restrain it from entering into treaties calling for “unusual punishments,” that is, punishments that were contrary to long usage. As the story of the Rus-

⁴⁰² U.S. CONST. art. VI, cl. 2.

⁴⁰³ 3 ELLIOTT’S DEBATES, *supra* note †, at 503.

⁴⁰⁴ See 1 BLACKSTONE, *supra* note 21, at *254–55.

⁴⁰⁵ 3 ELLIOTT’S DEBATES, *supra* note †, at 503–04.

sian ambassador indicates, one form of “unusual” punishment could be punishment for conduct that was legal at the time it was committed.⁴⁰⁶

b. “Unusual and severe punishments” and the power to call forth the militia.—Henry also expressed concern that Congress’s power under Article I, Section 8 to “raise and support armies,” to “[call] forth the Militia to execute the Laws of the Union,” and to “provide for . . . disciplining, the Militia” would enable the federal government to use military force to enslave the American people. More specifically, Henry asserted that the federal government could use “unusual and severe” methods to discipline the militia, and thus turn it into a willing tool of despotism:

Your men who go to Congress are not restrained by a bill of rights. They are not restrained from inflicting unusual and severe punishments, though the bill of rights of Virginia forbids it. What will be the consequence? They may inflict the most cruel and ignominious punishments on the militia, and they will tell you that it is necessary for their discipline.⁴⁰⁷

Under such discipline, Henry contended, the militia could be “enslave[d]” and could then be used to enslave the American people.⁴⁰⁸ Because Congress’s power over the militia would not be confined by the “usual” restraints in punishing soldiers,⁴⁰⁹ Congress could use the militia to transform the United States into a “government of force.”⁴¹⁰

c. “Cruel and unusual punishments” and the power to prosecute crime.—Finally, and most importantly for our purposes, Henry asserted that the federal government’s power to try and punish those accused of crime was dangerous because the federal government was not required to conform either to common law principles or to a bill of rights. Therefore, in criminal trials, Congress would be free to discard common law protec-

⁴⁰⁶ George Mason supported Henry’s argument, asserting that in England, “[t]he common law . . . has prevented the power of the crown from destroying the immunities of the people,” but that no such common law restraint would apply to the President’s exercise of the treaty power. *Id.* at 508. Of course, a punishment for conduct that was legal at the time it was committed would arguably violate the prohibition on ex post facto laws, stated in Article I, Section 9. But since the ex post facto prohibition is stated as a limitation on the legislative power of Congress and not on the President’s treaty power, it is not entirely clear that this prohibition would cover treaties.

⁴⁰⁷ *Id.* at 412.

⁴⁰⁸ *Id.* at 411 (“We are told, we are afraid to trust ourselves; that our own representatives—Congress—will not exercise their powers oppressively; that we shall not enslave ourselves; that the militia cannot enslave themselves, &c. Who has enslaved France, Spain, Germany, Turkey, and other countries which groan under tyranny? They have been enslaved by the hands of their own people. If it will be so in America, it will be only as it has been every where else.”).

⁴⁰⁹ *Cf.* WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 398 (2d ed. 1920) (noting that the discretion exercised by courts martial in imposing punishments on soldiers is generally limited by the United States Constitution, statutory law, and “military usage”).

⁴¹⁰ 3 ELLIOTT’S DEBATES, *supra* note †, at 411.

tions, such as the right to trial before an impartial jury in the vicinage.⁴¹¹ Defendants would also lose the right to be free from cruel and unusual punishments, which was an ancient common law right that was also protected in the Virginia Declaration of Rights:

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.⁴¹²

Henry’s argument is notable for its consistency with the arguments we have seen above regarding the inherent reasonableness of the common law and the close association of innovation with cruelty. Like Coke, Blackstone, Adams, Abraham Holmes, and others, Henry argued that the custom and long usage of the common law—on its own and as reflected in state bills of rights—was the best source of protection for individual liberty during the criminal process, for it ensured fair trial procedures and forbids torture as well as cruel and barbarous punishments. Also like Coke, Blackstone, Adams, and Holmes, Henry argued that if Congress is left free to experiment and innovate in the realm of criminal punishment, it might well adopt the cruel civil law system of Europe, with its propensity for “torture” and “relentless severity.”⁴¹³

Henry and Mason were so successful in arguing against ratification of the Constitution in Virginia that the Federalists ultimately offered a compromise, much like the compromise that had been reached earlier by the Massachusetts ratifying convention: Virginia would ratify the Constitution and simultaneously recommend adoption of a bill of rights.⁴¹⁴ This compromise was sufficient to assure ratification within Virginia, which occurred on June 25, 1788. Immediately thereafter, a committee was chosen to propose amendments to the Constitution, and both Mason and Henry were given places on the committee. Ultimately, the committee adopted a proposed bill of rights that included virtually the entire contents of the Vir-

⁴¹¹ Although the Constitution required that criminal trials take place before a jury in the state where the crime was committed, Henry was concerned that the defendant might be taken to a far distant part of the state where he would be a stranger to the jury and where the jury might even have a bias against him. *Id.* at 447.

⁴¹² *Id.* at 447–48.

⁴¹³ *Id.*

⁴¹⁴ See RUTLAND, *supra* note 55, at 171.

ginia Declaration of Rights, including the prohibition on cruel and unusual punishments, as well as numerous other proposed amendments.⁴¹⁵

3. *Adoption of the Cruel and Unusual Punishments Clause in the United States Constitution.*—The Virginia convention for ratifying the United States Constitution was the first state convention to propose that the Constitution be amended to include a prohibition on cruel and unusual punishments. The states that followed Virginia in ratifying the Constitution—New York,⁴¹⁶ North Carolina,⁴¹⁷ and Rhode Island⁴¹⁸—all repeated Virginia’s recommendation, but none of these states debated the matter.

Although James Madison had opposed a bill of rights in the Virginia ratifying convention, he came around to the view of the Antifederalists that a bill of rights would empower the Judiciary to act as a watchdog against federal violations of individual rights.⁴¹⁹ Madison ultimately drafted and presented to the First Congress a bill of rights that closely followed Virginia’s Declaration of Rights⁴²⁰ and included many of the recommendations of the Virginia ratifying convention, including the recommendation that the Constitution include a prohibition on cruel and unusual punishments. In proposing his plan to the House of Representatives, Madison noted that after enactment of the Bill of Rights, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . [and] resist every encroachment upon rights expressly stipulated . . . by the declaration of rights.”⁴²¹ Most of Madison’s proposal, including the prohibition on cruel and unusual punishments, was adopted verbatim.

Almost none of the debate over the Bill of Rights in the First Congress focused specifically on the Cruel and Unusual Punishments Clause. Indeed, the only substantive commentary came from Samuel Livermore, who remarked: “The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel?”⁴²² Representative Smith also made a brief objection that the clause was too

⁴¹⁵ See *id.* at 174.

⁴¹⁶ See 1 ELLIOTT’S DEBATES, *supra* note †, at 328.

⁴¹⁷ See 4 *id.* at 244.

⁴¹⁸ See 1 *id.* at 335.

⁴¹⁹ Thomas Jefferson shared this view as well. See Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION 161–63 (1905) (noting that one of the attractions of a bill of rights was “the legal check which it puts into the hands of the judiciary”).

⁴²⁰ See RUTLAND, *supra* note 55, at 202.

⁴²¹ 1 ANNALS OF CONGRESS 439 (Joseph Gales ed., Washington, Gales & Seaton 1834).

⁴²² *Id.* at 754.

“indefinite.”⁴²³ After this, the Eighth Amendment was passed without further debate.

The remarks of Smith and Livermore about the Cruel and Unusual Punishments Clause’s supposed vagueness are sometimes taken as evidence to support the notion that even the Framers of the Bill of Rights had no clear idea what it meant, and that we should therefore feel free to depart from textual interpretation when considering whether a given punishment violates the Eighth Amendment. But at least two key facts about the debate in the First Congress tend to undercut this notion.

First, the statements of Representatives Livermore and Smith merely represent the views of two members of the First Congress (out of a total of ninety-one members of the House and Senate). There is no evidence that any other member of Congress shared their concern regarding the possible vagueness of the Cruel and Unusual Punishments Clause.

Second, Livermore himself does not appear to have been within the mainstream of eighteenth-century thought regarding the usefulness of common law precedent generally. In deciding cases as a justice of the New Hampshire Supreme Court, Livermore reportedly refused to recognize the authority of precedent—despite the fact that the common law applied in New Hampshire—holding instead that “every tub should stand on its own bottom.”⁴²⁴ Given that Livermore’s general position was that common law precedent was of limited efficacy at best, it is not surprising that he considered the Cruel and Unusual Punishments Clause, which requires courts to compare new punishments to those accepted at common law, to be unacceptably vague. Given the apparently exceptional nature of his thoughts on the common law, Livermore’s views should not be mistaken for those of most of his contemporaries.

Ultimately, the most significant evidence we have regarding the publicly understood meaning of the word “unusual” in the Cruel and Unusual Punishments Clause comes from the Virginia convention for ratifying the United States Constitution. In that debate, the term “unusual” was used generally to signify the Antifederalists’ concern that the federal government would not be bound by the constraints of the common law and might exercise new and tyrannical powers. In the context of criminal punishment, the term “unusual” signified the danger that the federal government might innovate or experiment in criminal punishment—a process that had often led to greater cruelty in the past and that might lead in the same direction in the future. Indeed, the Framers shared with Coke the opinion that innovation in punishment often led to torture and barbarity.⁴²⁵ The word “unusual” in the

⁴²³ *Id.*

⁴²⁴ REINSCH, *supra* note 331, at 27–28.

⁴²⁵ For example, Abraham Holmes’s fear that the new federal government would employ “cruel and unheard-of punishments” such as those associated with the Inquisition, including “racks and gibbets,”

Cruel and Unusual Punishments Clause was meant to be a check on the federal government's ability to innovate in punishment. This is the only plausible meaning of the word as used in the Eighth Amendment.

F. The Meaning of "Unusual" in the Early Caselaw

In the first half-century after adoption of the Eighth Amendment, only a few published cases concerned the meaning of the Cruel and Unusual Punishments Clause. All of these cases were decided in state court, and many of them concerned state, rather than federal, bills of rights. Still, a number of these cases shed important light on the publicly understood meaning of the word "unusual" in the decades after adoption of the Eighth Amendment. In particular, they demonstrate that courts interpreting the phrase "cruel and unusual" in the early Republic nearly universally interpreted the word "unusual" to mean contrary to the long usage of the common law.

1. Unusual Punishments and Common Law Precedent.—In a number of cases during the first half of the nineteenth century, state courts held that a punishment could not be "unusual" within the meaning of the phrase "cruel and unusual punishments" if the punishment was permissible at common law. For example, in *Barker v. People*⁴²⁶ the Supreme Court of New York upheld a New York statute that disenfranchised those convicted of dueling, noting that "[t]he disfranchisement of a citizen is not an unusual punishment; [at common law] it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences."⁴²⁷ Similarly, in *Commonwealth v. Wyatt*,⁴²⁸ the General Court of Virginia upheld a statute that gave the court discretion to order the whipping of those convicted of setting up illegal gaming operations against an Eighth Amendment challenge: "The punishment of offences by stripes is certainly odious, but cannot be said to be *unusual*," because the discretion to impose whipping under the statute was "of the same character with the discretion always exercised by Common Law Courts to inflict fine and imprisonment, and subject to be restrained by the same considerations."⁴²⁹ In *People v. Potter*,⁴³⁰ the Supreme Court of New

strongly echoes Coke's assertion that the Rack was introduced to England by those who sought to innovate by introducing the civil law into a common law country. See *supra* Part III.B.1, E.1.

⁴²⁶ 20 Johns. 457 (N.Y. Sup. Ct. 1823).

⁴²⁷ *Id.* at 459. In a later opinion, the court clarified that the plaintiff's claim should also be rejected because the Eighth Amendment did not apply to the states: "The provision in the constitution of the United States, that cruel and unusual punishments shall not be inflicted, is a restriction upon the government of the United States only; and not upon the government of any state." *Barker v. People*, 3 Cow. 686, 686 (N.Y. Sup. Ct. 1824).

⁴²⁸ 27 Va. (6 Rand.) 694 (Va. Gen. Ct. 1828).

⁴²⁹ *Id.* at 701.

⁴³⁰ 1 Edm. Sel. Cas. 235, 245 (N.Y. Sup. Ct. 1846).

York upheld the validity of the governor’s decision to require the defendant to accept banishment as a condition of pardon for the crime of larceny because banishment was a traditional, common law punishment: “[T]he governor may grant a pardon on a condition which does not subject the prisoner to an unusual or cruel punishment. Banishment is neither. It is sanctioned by authority, and has been inflicted, in this form, from the foundation of our government.”⁴³¹ In each of these cases, the punishment was upheld simply because it was “usual”; that is, it was consistent with the long usage of the common law.

Similarly, early American courts sometimes struck down punishments as cruel and unusual precisely because they violated common law standards, even though the punishments did not involve the infliction of pain or degradation. For example, in *Jones v. Commonwealth*,⁴³² the district court had imposed a joint fine as punishment on four defendants who had been convicted of assaulting a magistrate in the performance of his duties. The Supreme Court of Appeals of Virginia struck down this punishment, holding that it violated the requirement in the Virginia Declaration of Rights “that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁴³³ Specifically, the Court held that under the common law

where there are several defendants a joint award of one fine against all is erroneous, as it ought to be several against each defendant; for otherwise he who hath paid his proportionable part might be continued in prison until all the others had paid theirs. Which would be, in fact, to punish him for the offence of another.⁴³⁴

Because the joint fine violated this basic common law precept, it constituted an “excessive fine” and a “cruel and unusual punishment.”⁴³⁵

In only one instance did a court from the first half of the nineteenth century appear not to realize that “unusual” means “contrary to long usage.” In *Aldridge v. Commonwealth*,⁴³⁶ the General Court of Virginia considered a challenge to a state larceny law that had been recently amended to increase the punishment that could be imposed on a “free person of color” convicted of this offense. Whereas the statute had previously authorized a sentence of

⁴³¹ *Id.* at 245.

⁴³² 5 Va. (1 Call) 555 (1799).

⁴³³ *Id.* at 557. The *Jones* court also held that the joint fine violated a Virginia statute that required that in all indictments, “the fine or amercement ought to be according to the degree of the fault and the estate of the defendant.” *Id.*

⁴³⁴ *Id.* at 558.

⁴³⁵ *Id.* The *Jones* court did not distinguish between “fines” and “punishments,” probably because in the eighteenth century, fines were themselves an extremely common form of punishment, and because the failure to pay a fine could result in lengthy imprisonment, which is itself a quintessential form of punishment.

⁴³⁶ 4 Va. (2 Va. Cas.) 447 (Va. Gen. Ct. 1824).

up to three years imprisonment on all offenders, it was amended to permit a “free person of color” who committed larceny to be whipped, “sold as a slave, and transported and banished beyond the limits of the United States.”⁴³⁷ The defendant—a free person of color—challenged the statute as imposing cruel and unusual punishment in violation of Virginia’s Declaration of Rights. The court rejected this claim, holding that the Declaration of Rights only applied to white people, not to blacks.⁴³⁸ Then, in dicta, the court went on to say that even if the Declaration of Rights applied to free blacks, the Cruel and Unusual Punishments Clause would not forbid this punishment:

That provision was never designed to control the Legislative right to determine *ad libitum* upon the *adequacy* of punishment, but is merely applicable to the modes of punishment. . . . [W]hen this Bill of Rights was declared . . . we knew that the best heads and hearts of the land of our ancestors, had long and loudly declaimed against the wanton cruelty of many of the punishments practised in other countries; and this section in the Bill of Rights, was framed effectually to exclude these, so that no future Legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment.⁴³⁹

The *Aldridge* court’s reading of Virginia’s Cruel and Unusual Punishments Clause to cover only the “odious modes of punishment”⁴⁴⁰ employed in the European civil law system is not justifiable in light of the publicly understood meaning of the word “unusual” at the time the Eighth Amendment was adopted. Indeed, the *Aldridge* dicta is inconsistent with other cases decided in Virginia both before and after *Aldridge* was decided. As noted above, in both *Jones v. Commonwealth*⁴⁴¹ and *Commonwealth v. Wyatt*,⁴⁴² the court considered whether the challenged punishment was consistent with common law principles, not whether the punishment involved an inherently cruel method. Indeed, in *Jones* (decided a mere nine years after the Eighth Amendment was adopted) the Supreme Court of Appeals of Virginia struck down the imposition of a joint fine—which was not even arguably an inherently cruel mode of punishment—because it violated the common law principle that a person should only be punished for his own crimes.⁴⁴³

The transformation of larceny from a crime punishable by a maximum three years imprisonment into a crime permitting certain offenders to be whipped, sold as slaves, and banished is clearly innovative, and thus un-

⁴³⁷ *Id.* at 447–48.

⁴³⁸ *Id.* at 449.

⁴³⁹ *Id.* at 450.

⁴⁴⁰ *Id.*

⁴⁴¹ 5 Va. (1 Call) 555 (1799).

⁴⁴² 27 Va. (6 Rand.) 694 (Va. Gen. Ct. 1828).

⁴⁴³ 5 Va. (1 Call) at 558.

usual. By any reasonable standard, it is also profoundly cruel. Indeed, the punishment approved in *Aldridge* is strongly analogous to that paradigm of cruel and unusual punishment, the judgment imposed on Titus Oates. In both cases, the defendant was given a new combination of traditional punishments that, taken together, exceeded the scope of any punishment previously permitted for the crime.⁴⁴⁴ For Oates, the punishment consisted of whipping, life imprisonment, fines, pillorying, and defrocking.⁴⁴⁵ For *Aldridge*, the punishment consisted of whipping, enslavement, and banishment.⁴⁴⁶ Both defendants received punishment far in excess of what had previously been permitted for the crime. In short, *Aldridge* presents a classic example of cruel and unusual punishment, and the contrary dicta in that case is plainly incorrect.

2. *Becoming Unusual: Traditional Punishments that Fall Out of Usage.*—Although American courts in the first half of the nineteenth century recognized that a punishment could only be “usual” if it enjoyed long usage, they did not make the mistake of presuming that every punishment that was used long ago must still be considered acceptable. In the seventeenth century, Coke wrote: “Custom . . . lose[s its] . . . being, if usage faile.”⁴⁴⁷ Similarly, American courts in the first half of the nineteenth century recognized that when a traditional common law punishment falls completely out of usage, it loses the presumption of validity that comes with being usual.

This issue was treated extensively in *James v. Commonwealth*,⁴⁴⁸ in which the Pennsylvania Supreme Court had to consider whether a woman convicted of being a common scold⁴⁴⁹ could be subjected to the ducking stool⁴⁵⁰ as a punishment.⁴⁵¹ The ducking stool was not authorized by statute in Pennsylvania, but it had been the traditional common law punishment for

⁴⁴⁴ See *supra* Part II.B.2.

⁴⁴⁵ See *id.*

⁴⁴⁶ See *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 447–48 (Va. Gen. Ct. 1824).

⁴⁴⁷ COKE, COPYHOLDER, *supra* note 169, at 564.

⁴⁴⁸ 12 Serg. & Rawle 220 (Pa. 1825).

⁴⁴⁹ A scold was traditionally defined as “[a] person who regularly breaks the peace by scolding people, increasing discord, and generally being a public nuisance to the neighborhood.” BLACK’S LAW DICTIONARY 1374 (8th ed. 2004) (entry for “scold”).

⁴⁵⁰ “Ducking stool” is synonymous with “castigatory,” which is defined as “[a] device for punishing scolds by repeatedly plunging them underwater.” *Id.* at 231 (entry for “castigatory”).

⁴⁵¹ 12 Serg. & Rawle 220. The defendant argued that the punishment violated the Eighth Amendment’s prohibition on cruel and unusual punishments and the Pennsylvania Constitution’s ban on “cruel punishments.” The court held that the Eighth Amendment did not apply to the states and that therefore there was no need to inquire whether the punishment was “cruel and unusual.” Nonetheless, because the punishment for scolding was not specified by statute, the court was required to ask whether the ducking stool was permitted by the usage of the common law. In other words, despite the fact that the Pennsylvania Constitution outlawed simply cruel punishments, the court devoted all of its analysis to the question of whether the punishment was unusual. Indeed, since the court found that the common law did not justify the use of this punishment, it explicitly refrained from deciding whether the punishment was cruel.

this crime. Thus, the court was required to consider whether this punishment continued to be permitted by the common law of Pennsylvania.

As a starting point, the court recognized that the common law was constituted by usage, and that therefore, if a traditional punishment ceases to be used, it also ceases to be part of the common law.⁴⁵² The court then found three separate reasons for concluding that the ducking stool lacked usage and was thus not authorized by the common law. First, it appeared that in England, no one had been subjected to ducking since the middle of the seventeenth century. Just as English laws calling for the execution of witches and gypsies had gone unused for over one hundred years and had thus been effectively “repealed by the voice of humanity, and not by positive law,”⁴⁵³ similarly the common law punishment of ducking had lost its validity because it fell into long disuse: “The long disuetude of any law amounts to its repeal.”⁴⁵⁴ Second, the court held that although ducking was used in England, it had never become part of the common law usage of Pennsylvania.⁴⁵⁵ Third, the court held that even if ducking had somehow been part of the Pennsylvania common law, it was implicitly disallowed in 1790, when the Pennsylvania legislature outlawed the pillory and the whipping post.⁴⁵⁶

As *James* demonstrates, there were three primary ways in which a traditional common law punishment could cease to be authorized by the common law (and thus become “unusual”). The punishment could fall completely out of usage for a long period of time; it could be used in England, but not America (and thus never attain “usual” status on this side of the Atlantic); or it could be disallowed by legislative reform. Should any of these three events occur, a punishment formerly authorized by the common law would become unusual and would lose its presumption of reasonableness and validity.

In conclusion, American courts of the first half of the nineteenth century shared the Framers’ understanding that the word “unusual” in the Cruel and Unusual Punishments Clause meant “contrary to long usage.” They generally upheld punishments that were consonant with common law precedent and were willing to strike down those that were not, even if such

⁴⁵² *Id.* at 228 (“The common law . . . what is it, but common usage?”).

⁴⁵³ *Id.* at 227.

⁴⁵⁴ *Id.* at 228.

⁴⁵⁵ *Id.* at 233 (“[T]he common-law punishment of ducking was not received nor embodied by usage so as to become a part of the common law of Pennsylvania. It was rejected, as not accommodated to the circumstances of the country, and against all the notions of punishment entertained by this primitive and humane community.”).

⁴⁵⁶ *See id.* at 231 (noting that “[t]he object of the framers of the act of 1790, was the abolition of all infamous, disgraceful, public punishments—all cruel and unnatural punishments—for all the classes of minor offences and misdemeanors, to which they had been before applied.” Because ducking was, like whipping and the pillory, an “infamous, disgraceful, public punishment,” the court reasoned that the legislature would have forbidden it had it known that the punishment was still permitted by the common law.).

punishments did not involve the infliction of physical pain or degradation. Moreover, American courts in this period demonstrated awareness that even traditional common law punishments could become unusual if they actually fell out of usage. Only one early case took the position—and only in dicta—that the Cruel and Unusual Punishments Clause was limited to inherently cruel modes of punishment, such as those used in the European civil law system that were already unthinkable in eighteenth-century America. This dictum should be accorded little weight, however, as it was inconsistent with the great weight of authority regarding the meaning of the text, including two other cases decided in the same general time period by the highest court of the same state.⁴⁵⁷

IV. THE IMPLICATIONS OF RECOGNIZING THE ORIGINAL MEANING OF “UNUSUAL”

In this final Part, I briefly sketch out the jurisprudential implications of recognizing the original meaning of unusual. Section A demonstrates the key differences between a test that focuses on whether a given punishment accords with evolving standards of decency and a test that asks whether the punishment is contrary to long usage. Sections B and C briefly discuss the implications of this newly recognized standard for the Court’s proportionality and death penalty jurisprudence, respectively. Section D touches upon some of the implications of this standard for state constitutions that include prohibitions on cruel and unusual punishments. Finally, section E identifies several unresolved issues that are beyond the scope of this article.

A. Evolving Standards Versus Long Usage

Recognition of the original meaning of the word “unusual” in the Cruel and Unusual Punishments Clause resolves a major, previously unrecognized ambiguity that has underlain the Supreme Court’s Eighth Amendment jurisprudence. Such recognition establishes that the phrase “unusual Punishments” does not refer to punishments that are rare or out of the ordinary, but rather to punishments that are contrary to long usage. To put it in somewhat more familiar language, an unusual punishment is one that is “contrary to our longstanding traditions.”

The resolution of this ambiguity goes a long way toward resolving the vagueness problems that have bedeviled the Supreme Court’s Eighth Amendment jurisprudence under the current evolving standards of decency test, and thus permits the Cruel and Unusual Punishments Clause to provide a firmer foundation for protecting the rights of persons convicted of crimes.

⁴⁵⁷ Ultimately, *Aldridge* is only explicable as an expression of racial animus. The opinion may appropriately be summarized as follows: “Free persons of color have no rights, and even if they do, defendants here still lose.”

As noted above, there are two major flaws inherent in the evolving standards of decency test. First, it is irredeemably vague. Who decides what comports with current standards of decency and what does not? Should the Court rely upon objective criteria or its own subjective judgment? If it relies on objective criteria, which criteria should it use, and how should such criteria be employed? These questions have never been answered adequately and may be unanswerable. Thus, the evolving standards of decency test has left the Cruel and Unusual Punishments Clause as a vague provision that is highly subject to judicial manipulation.

The second major flaw underlying the evolving standards of decency test is that it is not designed to protect criminal defendants when public opinion becomes enflamed against them. The evolving standards of decency test relies upon the presumption that history is inherently “progressive.”⁴⁵⁸ Indeed, the very words of this test repeatedly evoke such a worldview: “evolving,” “progress,” “maturing society.”⁴⁵⁹ The test presumes that that which is “newer” can also be expected to be kinder, gentler, and possessed of more “decency.”⁴⁶⁰ The history of criminal punishment has not borne out this view of the world. Societal moral standards do not necessarily get more humane and decent over time. Sometimes they move in the opposite direction. When public opinion becomes enflamed and prone to cruelty, the evolving standards of decency test can do little to stop the resulting cruel punishments, for the very popularity of such punishments is a strong indicator that they comport with current standards of decency.

The original meaning of “unusual” leads us in the opposite direction. The evolving standards of decency test directs courts’ attention toward traditional punishments and asks them to decide whether such punishments still comply with current standards of decency. By contrast, the original meaning of “unusual” directs courts’ attention toward new punishments and asks them to decide whether such punishments are consonant with our long-standing traditions. In other words, the Clause reflects the profound commitment to traditional practice and the profound distrust of innovation reflected in the writings of Edward Coke and other proponents of the common law.

The Cokean notion of long usage does provide for the development of the law, but a different sort of development than envisioned by Chief Justice Warren in *Trop*. In contrast to Warren’s notion of the evolutionary movement from primitive to modern, Coke saw legal development as being like the refinement of gold in a fire. As the metal is worked in the fire over time, the gold separates from the dross—the pure from the impure—and the

⁴⁵⁸ Cf. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000).

⁴⁵⁹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁴⁶⁰ *Id.*

dross falls away. Legal practices that have been used for a long time, and that continue to be used, are the pure gold of the law: beautiful, durable, strong, and useful. Examples of such gold include the right to habeas corpus, due process of law, trial by jury in the vicinage of the offense, and the right to be free from cruel and unusual punishments. The dross of the law, on the other hand, consists both of old legal practices that ultimately came to be rejected or discarded—such as the ducking stool⁴⁶¹—and of new or “innovative” legal practices that tend to undermine the rights protected by long usage—for example, the attempt by British authorities in the 1770s to try Americans before the admiralty court in order to avoid giving American defendants the benefit of trial before sympathetic local juries.

Recognizing that the word “unusual” in the Cruel and Unusual Punishments Clause means “contrary to long usage” will greatly reduce the vagueness problem that is currently associated with the clause. It is a relatively simple task to determine whether or not the imposition of a given punishment for a given crime is significantly harsher than the punishments that have preceded it—indeed, a much simpler task than determining whether a punishment complies with current standards of decency. Because this task is relatively simple and determinate, it reduces the vagueness associated with the Cruel and Unusual Punishments Clause. Before considering whether a given punishment is unacceptably cruel, the court must first decide whether it is contrary to long usage. If not, the analysis ends there. If so, the court must decide whether it is also cruel. If the harshness associated with the new punishment is equal to or lesser than the harshness associated with the traditional punishment, then the new punishment is unusual but not cruel. If the harshness associated with the new punishment is significantly greater than the punishment practices authorized by tradition, then it may be both cruel and unusual.

Proper recognition of the original meaning of “unusual” will make the Eighth Amendment a much better and more coherent source of protection for criminal offenders than it is under the evolving standards of decency test, because offenders’ rights will no longer depend upon the vicissitudes of public opinion. Criminals are among the most despised of all groups in society, and if their safety depends on current public opinion as to which punishments are acceptable, they will receive very little protection from the Eighth Amendment. When public opinion turns against a certain group of offenders—as it has currently turned against sex offenders, for example—and the legislature responds by inventing new forms of penal cruelty, the Eighth Amendment will provide no bar. The popularity of such laws will be evidence that they meet current standards of decency. If courts are required to compare new punishments to the long usage of the common law, on the other hand, criminal laws that result from temporarily enflamed public opinion are much more likely to be struck down.

⁴⁶¹ See *supra* Part III.F.2

Recognition of the original meaning of the word “unusual” would also potentially bring a broader range of punishments within the scope of Eighth Amendment review. The modern practice of imprisonment is itself a profound innovation.⁴⁶² In the eighteenth century, crimes were typically punished with fines, corporal punishment, public humiliation, banishment, or execution. Imprisonment was rarely used and sentences of more than a few years were almost never imposed. Moreover, the modern prison, in which prisoners are completely segregated from society and sometimes subjected to coercive “treatment” for their criminogenic characteristics,⁴⁶³ was not born until 1790 and did not achieve anything like its current form until the end of the nineteenth century.⁴⁶⁴ And certainly, the current regime of long mandatory minimum sentences, life sentences for some first-time drug offenders, chemical castration and similar indignities for sex offenders, as well as assorted other punishments, are all new. These changes reflect certain fundamental reorientations in criminal punishment: from public to private, from short-term pain or humiliation to long-term incapacitation and segregation, from retributive justice to social control.⁴⁶⁵ These changes have all been made in the name of “reform” and under the “progressive” assumptions of nineteenth- and twentieth-century scientism. Although some of these reforms have clearly bettered the lot of criminal offenders, it is not clear that they all have done so. It would be extraordinarily useful to compare current penological theory and practice to the principles and precedents underlying the common law to determine whether some of our “reforms” have actually pushed us in the direction of unacceptable cruelty.

Finally, a proper recognition of the original meaning of “unusual” will permit an interpretation of the Cruel and Unusual Punishments Clause that is not inexorably tied to the standards of the eighteenth century, unlike the originalist account provided by Justice Scalia. Under Justice Scalia’s reading of the clause, any punishment that was permitted at the time of the Eighth Amendment’s ratification must necessarily be permitted today because Justice Scalia sees the clause as embodying the standards of decency that prevailed in 1790. But as is shown above, the word “unusual” is not di-

⁴⁶² See generally THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY (Norval Morris & David J. Rothman eds., 1995).

⁴⁶³ For a discussion of some of the most predominant “treatments” for criminogenic characteristics of one major class of criminal offenders, see generally PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE AND THERAPY 99–147, 211–81 (Bruce J. Winick & John Q. LaFond eds., 2003). See also Stinneford, *supra* note 44, and sources cited therein.

⁴⁶⁴ See NICOLE HAHN RAFTER & DEBRA STANLEY, PRISONS IN AMERICA: A REFERENCE HANDBOOK (1999); Matthew W. Meskell, *An American Revolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839 (1999); David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in THE OXFORD HISTORY OF THE PRISON 111 (Norval Morris & David J. Rothman eds., 1995).

⁴⁶⁵ See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003).

rected toward the question of whether a punishment comports with public opinion at any given point in time. Rather, it is directed toward the question of whether a punishment is inherently reasonable as measured against the long usage of the common law. If a punishment enjoys long usage, this is powerful evidence of reasonableness because it has enjoyed the consent of the people over a long period of time. If a punishment does not enjoy long usage, either because it is completely new or because it is being reintroduced after having fallen out of usage for a significant period of time, then it does not enjoy any presumption of reasonableness. Not only the ducking stool, but also the whipping post, the pillory, mutilation, and execution for anything but the most serious offenses have all fallen completely out of usage. These punishments are now unusual because they have not continued to withstand the test of time. In Cokean terms, they are now presumptively dross rather than gold. If any legislature sought to reintroduce such punishments, its effort should be greeted with the same judicial skepticism that should meet any other form of legal innovation in punishment.

B. Long Usage and Proportionality in Sentencing

As noted above, the Supreme Court concluded in *Solem v. Helm*⁴⁶⁶ that the Cruel and Unusual Punishments Clause does not merely prohibit inherently cruel methods of punishment, but also punishments that are grossly disproportionate to the offense.⁴⁶⁷ The Court based its conclusion largely on the fact that the English common law contains a principle of proportionality and that the American Bill of Rights was generally concerned with preserving the "rights of Englishmen."⁴⁶⁸ Therefore, the Court concluded, one of the rights protected by the Cruel and Unusual Punishments Clause was the right not to be subjected to punishments that are grossly disproportionate to the offense.⁴⁶⁹

As further noted above, Justice Scalia wrote an opinion in *Harmelin v. Michigan* that took the *Solem* Court to task for its cursory historical analysis. After reviewing the English and American historical materials, Justice Scalia concluded that the Cruel and Unusual Punishments Clause in the Eighth Amendment was only intended to prohibit inherently cruel methods of punishment, not grossly disproportionate punishments.⁴⁷⁰

Justice Scalia's conclusion was faulty, however, because it was based upon a misreading of the word "unusual." Justice Scalia, like Chief Justice Warren, mistakenly believed that the word "unusual" meant "different from that which is generally done." Therefore, he concluded that because grossly disproportionate punishments were often imposed in England during the

⁴⁶⁶ 463 U.S. 277 (1983).

⁴⁶⁷ See *supra* Part II.B.1.

⁴⁶⁸ See *supra* Part II.B.1.

⁴⁶⁹ See *supra* Part II.B.1.

⁴⁷⁰ See *supra* Part II.B.3.

eighteenth century, the Cruel and Unusual Punishments Clause cannot have been meant to prohibit grossly disproportionate punishments.⁴⁷¹

Once one recognizes that “unusual” actually means “contrary to long usage,” however, one realizes that the Cruel and Unusual Punishments Clause almost certainly *was* intended to cover grossly disproportionate punishments. As the *Solem* Court demonstrated, numerous common law sources, from the Magna Carta on, state that the common law requires the punishment to be proportionate to the offense.⁴⁷² If proportionality is part of the common law, then one way—although not the only way—to be “unusual” is to be disproportionate. If the disproportion between crime and sentence becomes very great, the punishment may be considered to be not merely “unusual,” but “cruel and unusual.”

Indeed, the punishment inflicted on Titus Oates—the first and quintessential example of a cruel and unusual punishment—demonstrates that the Cruel and Unusual Punishments Clause in the English Bill of Rights was not limited to inherently cruel methods of punishment. The punishments inflicted on Oates—floggings, pillorying, imprisonment, and fines⁴⁷³—were all methods of punishment that fell well within the common law tradition. They were not considered inherently cruel by the standards of the seventeenth century. Moreover, Oates’s punishment was less cruel in an absolute sense than, for example, the punishments of drawing and quartering or burning at the stake, both of which were permissible for the crime of treason.⁴⁷⁴ Thus, if Oates’s punishment was cruel and unusual, this was only because the punishment was both unprecedented and grossly disproportionate to the crime of perjury, the crime for which he was convicted.⁴⁷⁵

Justice Scalia’s conclusion that the Cruel and Unusual Punishments Clause was intended to outlaw only inherently cruel methods of punishment seems to be based less on the meaning of the Clause itself and more on the fact that disproportionate punishments were actually permitted at the end of the eighteenth century, at least in England. For example, as discussed above, the death penalty was imposed in England for nearly two hundred crimes, including minor crimes such as the cutting down of a cherry tree.⁴⁷⁶

⁴⁷¹ See *Harmelin v. Michigan*, 501 U.S. 957, 975 (1991) (“[I]n 1791, England punished over 200 crimes with death.”).

⁴⁷² See *supra* Part II.B.1.

⁴⁷³ See *supra* Part II.B.2.

⁴⁷⁴ See 4 BLACKSTONE, *supra* note 21, at *376–77.

⁴⁷⁵ Justice Scalia argued that Oates’s punishment arguably *was* proportionate to his “real crime,” which amounted to the premeditated killing of fifteen innocent people. See *Harmelin*, 501 U.S. at 973 n.4. This may be true if proportionality were to be measured against a defendant’s actual moral desert, but this is not the standard of proportionality that seems to have been employed in Oates’s case and presumably under the Cruel and Unusual Punishments Clause generally. In Oates’s case, proportionality appears to have been measured against his crime of conviction, not his “real crime” in some absolute moral sense. His punishment was cruel and unusual as applied to his crime, although it was objectively less cruel than some punishments authorized for more serious crimes.

⁴⁷⁶ See 4 BLACKSTONE, *supra* note 21, at *4.

Although it is true that the “bloody code” of the eighteenth century permitted numerous instances of grossly disproportionate punishment, this fact is not relevant to the meaning of the Cruel and Unusual Punishments Clause, either in England or America. England punished so many minor crimes with death primarily because Parliament had spent a century enacting new statutory penalties, most of which deviated from common law precedent.⁴⁷⁷ Blackstone himself bitterly complained about Parliament’s numerous deviations from the “reason” of the common law in this area.⁴⁷⁸ Although Parliament’s actions in this area were clearly both “cruel” and “unusual”—contrary to long usage—the doctrine of parliamentary supremacy precluded any challenge against them on this ground.

Because the Eighth Amendment was intended to constrain Congress as well as the courts, there is no reason to suppose that the founding generation wished Congress to have the same power to impose arbitrary and disproportionate punishments as was then enjoyed by Parliament. Indeed, the very purpose of the Bill of Rights was to ensure that Congress did not assume such arbitrary power unto itself.

Of course, it is still an open question as to whether there is a workable standard for measuring proportionality,⁴⁷⁹ but the notion of long usage at least reduces the potential vagueness associated with efforts to create a reliable measure for proportionality. It may not be practicable to measure how much punishment a given crime “deserves” in an absolute sense, but it may be possible to measure the punishment for a given crime against the punishments given for similar crimes over the course of this country’s history. If a punishment is so harsh in relation to the crime for which it is imposed that it can reasonably be said to be contrary to our longstanding traditions, then it could potentially be found to be cruel and unusual because it is grossly disproportionate to the offense.

C. Long Usage and the Death Penalty

The impact that proper recognition of the original meaning of “unusual” would have on the Supreme Court’s death penalty jurisprudence is somewhat more difficult to predict. To the extent that the death penalty has been continuously imposed for a given crime—murder, for example—over a very long period of time, then it could not properly be found to be unusual. But to the extent that capital punishment has fallen out of usage for a given crime—such as burglary or counterfeiting—any attempt to revive

⁴⁷⁷ See *supra* Part III.C.4.

⁴⁷⁸ See *id.*

⁴⁷⁹ Once one reaches the conclusion that the Cruel and Unusual Punishments Clause encompasses some kind of proportionality requirement, one faces the much more daunting challenge of determining how to measure it. For an interesting discussion of this issue, see Richard S. Frase, *Excessive Prison Sentences, Punishment Goals and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571 (2005).

such a punishment would be unusual, and at least arguably cruel.⁴⁸⁰ And if the state seeks to employ a more painful method of execution than has traditionally been permitted, such method could be found to be cruel and unusual. Thus, an innovation such as lethal injection may not pass constitutional muster if it is shown to significantly increase the pain suffered by the person being executed.⁴⁸¹

On the other hand, the Supreme Court's current practice of selectively striking down traditional applications of the death penalty that have simply become relatively less common—the death penalty for seventeen-year-old murderers, for example—is almost certainly not justifiable under the original meaning of the Cruel and Unusual Punishments Clause. But of course, these are also cases where judicial intervention may be least necessary, because they involve punishments that are rarely imposed, and that appear to be on the road toward elimination by the democratic process. Indeed, were they not rarely imposed and not on the road toward elimination, the evolving standards of decency test would not permit the Court to strike them down.

D. Long Usage and State Constitutions

State law prohibitions on cruel punishments present at least two distinct questions. First, should state law prohibitions that were roughly contemporaneous with the Eighth Amendment be interpreted to have the same original meaning as the federal Cruel and Unusual Punishments Clause, even though some were worded differently (forbidding “cruel *or* unusual punishments,” or simply “cruel punishments”)? Second, should current state prohibitions on cruel and unusual punishments be interpreted to cover precisely the same punishments as the federal prohibition, at least where the state provision contains the same wording as the federal provision? My answer to the first question is yes, and my answer to the second question is no.

The first question is partially discussed above in Part III.D.4. As described above, at the end of the eighteenth century, the words “cruel” and “unusual” were synonyms when employed in the context of punishment. The word “cruel” stated the abstract moral principle, and the word “unusual” provided a concrete reference point for determining whether that principle had been violated. Thus, it makes sense that some states prohibited “cruel punishments,” some prohibited “cruel and unusual punish-

⁴⁸⁰ The question of whether such a punishment would be cruel and unusual would be determined by a variety of factors, including the reason it was abolished in the first place, the length of time during which it has remained in disuse, and the relative harshness of the punishment that has replaced it.

⁴⁸¹ The Supreme Court's recent decision upholding death by lethal injection in *Baze v. Rees*, 128 S. Ct. 1520 (2008), demonstrates the continued doctrinal chaos surrounding the Court's treatment of the Cruel and Unusual Punishments Clause. In a demonstration of near-*Furman*-level confusion, seven separate opinions were filed, and no opinion attracted the concurrence of more than two Justices.

ments,” and some prohibited “cruel or unusual punishments.” Each formulation is simply a different way of saying essentially the same thing.

With respect to the second question, given the meaning and function of the term “unusual,” it is to be expected that over time, the scope of state prohibitions on “cruel and unusual punishments” would come to vary from the federal provision and from each other. If a given practice falls out of usage in a given jurisdiction over a long period of time, then it becomes “unusual” in that jurisdiction, even if it remains “usual” in others. Thus, over time, the precise scope of the prohibition on “cruel and unusual punishments” is likely to diverge in the various jurisdictions that employ this standard. A good example of this likely divergence may be seen by looking briefly at *Coker v. Georgia*.⁴⁸²

In *Coker*, as noted above, the Supreme Court struck down the Georgia statute authorizing the death penalty for simple rape, in large part because Georgia was the only state that continued to impose this punishment for this crime.⁴⁸³ This decision seems fairly certain to have been incorrect. If Georgia had a long and unbroken tradition of executing rapists, there is no reasonable way to characterize that practice as “contrary to long usage,” at least in Georgia. A longstanding, traditional punishment is simply not the same thing as an “innovation.” The same conclusion holds true if one broadens the scope to the United States as a whole. The long continuation of the practice of executing rapists in Georgia, a state which is part of the national moral community encompassed by the federal Constitution, means that the practice is not an “innovation” from a federal constitutional perspective either.⁴⁸⁴

There is, however, a strong basis for concluding that the execution of rapists is contrary to long usage in those states that have banned it for a considerable period of time. As noted in Part III.F.2, when a traditional punishment falls out of usage for a long time, it ceases to enjoy the presumption of validity that comes with being “usual.” Thus, if it were reintroduced in those states, it might be considered “cruel and unusual” under the constitution of those states. This is an area where it is particularly appropriate for state courts to follow Justice Brennan’s suggestion to interpret state bills of rights in a manner that is more protective of individual rights than the federal Constitution.⁴⁸⁵

⁴⁸² 433 U.S. 584 (1977).

⁴⁸³ *Id.* at 595–96.

⁴⁸⁴ This effect may be thought of as the “dark side” of the Supreme Court’s incorporation doctrine. By moving state punishment practices into the purview of the Eighth Amendment, the Court has also moved the Eighth Amendment into the purview of state punishment practices.

⁴⁸⁵ See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

E. Open Questions

Before concluding, I should make brief note of what this Article has *not* covered. Most obviously, it has not covered the original meaning of the words “cruel” and “punishment.” Both of these topics need considerable exploration because the Supreme Court has adopted a reading of both words that does not seem to square with the Framers’ understanding. Regarding the word “cruel,” the Supreme Court’s current approach is almost completely incoherent. Specifically, the Court has said that a punishment is unacceptably cruel if it involves the “unnecessary and wanton infliction of pain”⁴⁸⁶—pain that completely fails to further any legitimate penological goal.⁴⁸⁷ But the Court has also said that the states are free to choose from any of the four major justifications for punishment—retribution, deterrence, incapacitation, and rehabilitation—in defining punishments for criminal offenders.⁴⁸⁸ If both of these propositions are true, then the word “cruel” has no meaning, as the most barbaric forms of punishment will always further *some* penological goal. Public torture of criminals, for example, would likely serve as a powerful deterrent, even though such punishment is far beyond the offender’s desert. Similarly, a life sentence for a person convicted of repeated parking violations might not run afoul of the Cruel and Unusual Punishments Clause because it furthers the goal of incapacitation.

The word “punishment” provides its own set of problems. The Court has narrowly defined the term to include only the penalties inflicted on criminal offenders as the result of criminal convictions, not other forms of state coercion, such as civil commitment.⁴⁸⁹ As Celia Rumann has shown, however, the evidence indicates that the Framers had a broader notion of “punishment.”⁴⁹⁰ For example, George Mason observed that Virginia’s prohibition on cruel and unusual punishments worked in conjunction with its privilege against self-incrimination to prevent the use of torture to obtain

⁴⁸⁶ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

⁴⁸⁷ *See Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (reiterating that “unnecessary and wanton infliction of pain” means pain inflicted “totally without penological justification”)

⁴⁸⁸ *Ewing v. California*, 538 U.S. 11, 25 (2003) (“Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution ‘does not mandate adoption of any one penological theory.’ A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State’s sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.” (citations omitted)).

⁴⁸⁹ *See Ingraham v. Wright*, 430 U.S. 651, 667–68 (1977) (“‘The primary purpose of (the Cruel and Unusual Punishments Clause) has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes’ In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable.” (quoting *Powell v. Texas*, 392 U.S. 514, 531–32 (1968))); *cf. Kansas v. Crane*, 534 U.S. 407 (2002) (distinguishing civil commitment of sex offenders from incarceration for general deterrence or retributive purposes).

⁴⁹⁰ *See Rumann, supra* note 30, at 673.

evidence prior to trial.⁴⁹¹ Under current caselaw, such torture would not technically be punishment because it is not inflicted as the result of a criminal conviction. In short, the original meanings of the words “cruel” and “punishment” need further exploration, and may yield results that help put the Court’s Eighth Amendment jurisprudence back on track.

V. CONCLUSION

The framers of the Bill of Rights understood the word “unusual” to mean “contrary to long usage.” Recognition of the word’s original meaning will precisely invert the “evolving standards of decency” test and ask the Court to compare challenged punishments with the longstanding principles and precedents of the common law, rather than shifting and nebulous notions of “societal consensus” and contemporary “standards of decency.” This shift in focus will tie the Court’s Eighth Amendment jurisprudence more firmly to the text and make the Cruel and Unusual Punishments Clause a better source of protection for criminal defendants against the whims of temporarily enflamed public opinion. Finally, it will permit the Court to refocus its attention away from traditional punishments that are already on the way out and toward the much graver danger posed by legislative attempts to enact cruel innovations in punishment.

⁴⁹¹ 3 ELLIOTT’S DEBATES, *supra* note †, at 452.

