

HARMELIN'S FAULTY ORIGINALISM

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Justice Thomas wrote in 2010: “It is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting [only] torturous ‘methods of punishment.’”¹ In the world of advertising, this might be called “puffery.”² In the academic world, there are stronger words for such a demonstrably untrue claim. It has been twenty-three years since Justice Scalia penned his plurality opinion in *Harmelin v. Michigan*,³ on which Justice Thomas’ claim is based, asserting that the Cruel and Unusual Punishments Clause was not understood in 1791 as encompassing a requirement of proportionality. Yet, since that time, no more than three of the sixteen Justices who have sat on the Court have adhered to this view.⁴ At the same time, however, the originalist arguments in Justice Scalia’s plurality opinion in *Harmelin* have gone virtually unchallenged by other Members of the Court.

Moreover, while Justice Scalia’s position has attracted only a smattering of support from the academic world,⁵ the issue was generally ignored by academics until recently. Commentators had all but ceded the originalism argument and had looked elsewhere for support for an Eighth Amendment proportionality principle. Since 2004, however, a handful of scholars have

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¹ *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 (1991) (plurality opinion)). I have added the word “only” to make explicit what Justice Thomas makes clear just four sentences later: his belief that “there is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing.” *Id.*

² See David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1400 (2006).

³ *Harmelin v. Michigan*, 501 U.S. at 961 (plurality opinion).

⁴ Only Chief Justice Rehnquist joined the relevant part of Justice Scalia’s opinion in *Harmelin*. *Id.* But see *infra* note 11 (observing that Chief Justice Rehnquist later joined the plurality opinion in *Ewing v. California*, 538 U.S. 11, 14 (2003), which recognized a narrow proportionality principle). Only Justice Scalia joined the relevant part of Justice Thomas’s opinion in *Graham*, 560 U.S. at 97. Thirteen other Members of the Court have either declined to express the opinion that the Cruel and Unusual Punishments Clause contains no proportionality principle or have expressly disagreed with that view. See *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (Kagan, J., joined by Kennedy, Ginsburg, Breyer & Sotomayor, JJ.); *id.* at 2487 (Alito, J., dissenting); *Graham*, 560 U.S. at 86 (Roberts, C.J., concurring in the judgment); *Ewing*, 538 U.S. at 35 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting); *Harmelin*, 501 U.S. at 996 (Kennedy, J., joined by O’Connor & Souter, JJ., concurring in part and concurring in the judgment); *id.* at 1009 (White, J., joined by Blackmun & Stevens, JJ., dissenting); *id.* at 1027 (Marshall, J., dissenting); see also *infra* note 20.

⁵ See, e.g., Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 43–49 (2000).

focused on constructing an originalist account of the Cruel and Unusual Punishments Clause that encompasses a proportionality component.⁶

This Article constitutes a point-by-point refutation of Justice Scalia's arguments in *Harmelin*. Part I briefly discusses *Harmelin* and its continuing influence, in order to demonstrate the danger of letting its faux originalism go unchallenged. Part II then outlines and explodes the four major arguments Justice Scalia set forth in his plurality opinion in *Harmelin*. With regard to some of these arguments, this Article demonstrates that the evidence is not entirely clear either way as to whether the Cruel and Unusual Punishments Clause was understood in 1791 as covering disproportionality of punishments. One could stop there and be satisfied that it is by no means "well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting [only] torturous methods of punishment."⁷ But other evidence that Justice Scalia chose to ignore flatly refutes the notion that the Clause was understood as covering only methods of punishment. Finally, Part III discusses state legislation during the brief period of the Articles of Confederation that uses the term "cruel or unusual" to constrain Congress' punishment power vis-à-vis violators of confederal customs legislation. It is reasonably clear that the term "cruel or unusual" in that context referred to punishment that was disproportionate in some way, not to punishment that was altogether forbidden under any circumstance. The use of that term in the brief period after similar language appeared in state bills of rights and before the Eighth Amendment was drafted strongly suggests that the latter was also understood as containing a proportionality component.

⁶ See generally Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004) [hereinafter Claus, *Antidiscrimination Eighth Amendment*]; Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL'Y 35 (2008) [hereinafter Claus, *Methodology*]; Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69 (2012) [hereinafter Mannheimer, *Federal Punishments*]; John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) [hereinafter Stinneford, *Original Meaning*]; John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011) [hereinafter Stinneford, *Rethinking Proportionality*]. A generation earlier, Anthony Granucci set forth perhaps the first originalist approach to the Cruel and Unusual Punishments Clause. See generally Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

Claus appears to disclaim the "proportionality" tag. See Claus, *Methodology*, *supra*, at 38 (setting forth disproportionality and "invidious discrimination" as "distinct moral" issues). However, his ultimate conclusion—that "the Eighth Amendment condemns punishing a person or class of persons more harshly than others for morally insufficient reason[s]," Claus, *Antidiscrimination Eighth Amendment*, *supra*, at 149—sets forth, as I read it, a type of proportionality requirement.

Stinneford's work has been particularly thorough, persuasive, and powerful in debunking the *Harmelin* myth. See Michael J. Zydney Mannheimer, *On Proportionality and Federalism: A Response to Professor Stinneford*, 97 VA. L. REV. (IN BRIEF) 51, 52 (2011) [hereinafter Mannheimer, *Response*] (praising Stinneford, *Rethinking Proportionality*, *supra*). Nevertheless, there are some flaws in Justice Scalia's claims and methodology that Stinneford does not address, and I disagree with a number of Stinneford's assertions and conclusions.

⁷ *Graham*, 560 U.S. at 99 (internal quotation marks and emphasis omitted).

I. THE ENDURING SIGNIFICANCE OF HARMELIN

In *Harmelin v. Michigan*, the petitioner claimed that his sentence of life imprisonment without parole for possession of more than 650 grams of cocaine violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, as incorporated by the Fourteenth Amendment, because it was disproportionate to the crime.⁸ The Court rejected that argument 5 to 4. However, no opinion commanded a majority of the Justices. Justice Kennedy, joined by Justices O'Connor and Souter, in a concurring opinion that later assumed the status of law,⁹ wrote that the Cruel and Unusual Punishments Clause encompassed a bar on carceral punishments that are “grossly disproportionate” to the crime of conviction, but that the punishment meted out to Harmelin did not violate that principle.¹⁰ In an opinion joined only by himself and Chief Justice Rehnquist,¹¹ Justice Scalia laid out the case for the position that the Clause does not encompass a proportionality requirement at all.¹² Rather, the argument goes, the Clause forbids only certain methods of punishment, which cannot be inflicted for any type of offense.¹³ The foundation of this argument is the claim that the Clause was not understood in 1791 as encompassing a principle of proportionality.

Justice Scalia's suggestion that the Eighth Amendment contains no proportionality requirement was a break with the past. Eleven years earlier, in *Rummel v. Estelle*, the Court rejected a claim that a prison sentence was unconstitutionally disproportionate but stopped short of concluding that the Cruel and Unusual Punishments Clause contains no proportionality principle whatsoever.¹⁴ Just three years after that, in *Solem v. Helm*, the Court found that the Clause did indeed contain such a precept when it held that a sentence of life imprisonment without parole was disproportionate to the crime of “uttering a ‘no account’ check for \$100” as a seventh felony.¹⁵ The Court has held on five

⁸ *Harmelin*, 501 U.S. at 961 (plurality opinion). Harmelin also claimed that the sentence violated the Eighth Amendment, as incorporated, because it was mandatory. *See id.* at 961–62. The Court rejected that claim. *See id.* at 994–96.

⁹ *See Graham*, 560 U.S. at 59 (describing Justice Kennedy's separate opinion in *Harmelin* as “[t]he controlling opinion”); *Ewing*, 538 U.S. at 23–24 (plurality opinion) (utilizing Justice Kennedy's test in *Harmelin*); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 693 (2005) (noting that Justice Kennedy's separate opinion in *Harmelin* “eventually came to assume the status of law”).

¹⁰ *See Harmelin*, 501 U.S. at 1001–05 (Kennedy, J., concurring in part and concurring in the judgment).

¹¹ By later joining the plurality opinion in *Ewing*, 538 U.S. at 14, which recognized a narrow proportionality principle, *id.* at 21, Chief Justice Rehnquist distanced himself from the position expressed by Justice Scalia in *Harmelin*.

¹² *See Harmelin*, 501 U.S. at 993 (plurality opinion).

¹³ *See Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting) (“The Eighth Amendment is addressed to always-and-everywhere ‘cruel’ punishments, such as the rack and the thumbscrew.”).

¹⁴ *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (“[O]ne could argue without fear of contradiction by any decision of th[e] Court that for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative.”).

¹⁵ *Solem v. Helm*, 463 U.S. 277, 279–82, 303 (1983). The Court had recognized a proportionality principle in the Cruel and Unusual Punishments Clause as long ago as 1910. *See*

occasions, before and since *Harmelin*, that a death sentence was a disproportionate punishment, given the nature of the offense or the characteristics of the offender, in violation of the Eighth and Fourteenth Amendments.¹⁶ More recently, the Court held that the Cruel and Unusual Punishments Clause renders a sentence of life imprisonment without parole disproportionate to non-homicide crimes when committed by juvenile offenders,¹⁷ and that laws imposing a mandatory sentence of life imprisonment without parole on juvenile offenders violate the Constitution.¹⁸

Following *Harmelin*, Justice Thomas, who joined the Court subsequent to that case, has indicated his agreement with Justice Scalia's opinion in *Harmelin*.¹⁹ The opinion has been cited a number of times by Justices Scalia and Thomas—as recently as June 25, 2012—for the proposition that the Cruel and Unusual Punishments Clause, as originally understood, did not contain a proportionality requirement.²⁰ In short, *Harmelin* is not going away. It is therefore important that its faulty originalism be exposed.

II. DECONSTRUCTING HARMELIN

Justice Scalia's originalist arguments in *Harmelin* fall into four general categories. First, he looked at the origin and surrounding circumstances of the

Weems v. United States, 217 U.S. 349 (1910). However, it is unclear whether *Weems* rested entirely on that ground, and *Weems* is problematic as precedent, having arisen from the US Territory of the Philippines. See Mannheimer, *Federal Punishments*, *supra* note 6, at 81. For the definitive treatment of *Weems*, see Margaret Raymond, "No Fellow in American Legislation": *Weems v. United States and the Doctrine of Proportionality*, 30 VT. L. REV. 251, 267–301 (2006).

¹⁶ See *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008) (forbidding capital punishment for the rape of a child); *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (holding capital punishment unconstitutional for capital offenses committed by those under age eighteen); *Atkins*, 536 U.S. at 321 (holding capital punishment unconstitutional for intellectually disabled capital offenders); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (forbidding capital punishment for felony murderers whose participation in felony and culpability for killing fell below certain threshold levels); *Coker v. Georgia*, 433 U.S. 584, 595–96 (1977) (plurality opinion) (forbidding capital punishment for the rape of an adult woman). In *Harmelin*, Justice Scalia indicated that he would grudgingly accept this line of case law but would limit it to the capital context. See *Harmelin*, 501 U.S. at 994 (plurality opinion) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides.").

¹⁷ See *Graham v. Florida*, 560 U.S. 48, 82 (2010).

¹⁸ See *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

¹⁹ See *Graham*, 560 U.S. at 97 (Thomas, J., dissenting); *Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in the judgment).

²⁰ See *Miller*, 132 S. Ct. at 2483 (Thomas, J., joined by Scalia, J., dissenting); *Graham*, 560 U.S. at 97 (Thomas, J., joined by Scalia, J., dissenting); *Ewing*, 538 U.S. at 32 (Thomas, J., concurring in the judgment); *Atkins*, 536 U.S. at 349 (Scalia, J., joined by Rehnquist, C.J., & Thomas, J., dissenting). Neither Chief Justice Roberts nor Justice Alito has expressed a definitive opinion on this issue. In *Graham*, 560 U.S. at 86 (Roberts, C.J., concurring in the judgment), Chief Justice Roberts wrote that because "[n]either party here asks us to reexamine our precedents requiring . . . proportionality [pursuant to the Eighth Amendment,] . . . I approach this case by trying to apply our past decisions to the facts at hand." Justice Alito joined Parts I and III of Justice Thomas' dissent in that case, *id.* at 124 (Alito, J., dissenting), pointedly declining to join Part II, which disputed that the Eighth Amendment contains a proportionality principle, *id.* at 98.

English Bill of Rights of 1689, the progenitor of our own Cruel and Unusual Punishments Clause.²¹ Second, he discussed ratification era statements regarding cruel and unusual punishments.²² Third, he performed a textual analysis of the Clause, and a textual comparison between it and the analogous state constitutional provisions that were contemporaneous with the Clause.²³ Finally, he looked at nineteenth-century academic and state court interpretations of federal and state constitutional provisions forbidding cruel and unusual punishment.²⁴ While some of these arguments are better than others, Justice Scalia ultimately failed to carry the burden of showing that the Cruel and Unusual Punishments Clause was originally understood to address only methods of punishment.

A. *Origins of the 1689 English Bill of Rights*

In *Harmelin*, Justice Scalia recognized that the Cruel and Unusual Punishments Clause was taken from language in the Virginia Declaration of Rights, which in turn was taken verbatim from the English Bill of Rights of 1689.²⁵ Thus, the starting point for determining the meaning of our own Clause is the analogous Clause in the 1689 Bill and the circumstances surrounding its enactment.²⁶

It is well settled among courts and commentators that the Cruel and Unusual Punishments Clause of the 1689 Bill was a reaction to some of the excesses of Lord Chief Justice Jeffreys of King's Bench, and, in particular, the Titus Oates affair.²⁷ In 1679, Oates, a Protestant cleric, committed perjury in the treason trial of a number of Catholics who had supposedly plotted to assassinate King Charles II.²⁸ As a result of Oates' perjured testimony, more than a dozen innocent men were executed.²⁹ Six years later, Oates was convicted of perjury before Jeffreys.³⁰ Jeffreys sentenced Oates to defrocking and a fine of two thousand marks. In addition, he ordered that Oates be "whipped from

²¹ See *Harmelin*, 501 U.S. at 966–74.

²² See *id.* at 979–80.

²³ See *id.* at 975–78.

²⁴ See *id.* at 981–85.

²⁵ See *id.* at 966.

²⁶ See *id.* at 967.

²⁷ See *id.* at 969–74; Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual,"* 74 U. CIN. L. REV. 819, 833–34 (2006).

²⁸ See *Harmelin*, 501 U.S. at 969; Claus, *Antidiscrimination Eighth Amendment*, *supra* note 6, at 136; Mannheimer, *supra* note 27, at 833; William Hughes Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 FORDHAM L. REV. 639, 640–41 (1979); Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 379 (1980); Chris Baniszewski, Comment, *Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment's Proportionality Requirement*, 25 ARIZ. ST. L.J. 929, 932 (1993).

²⁹ See *Harmelin*, 501 U.S. at 969; Baniszewski, *supra* note 28, at 932; Claus, *Antidiscrimination Eighth Amendment*, *supra* note 6, at 136; Granucci, *supra* note 6, at 857; Mannheimer, *supra* note 27, at 833; Mulligan, *supra* note 28, at 641; Schwartz, *supra* note 28, at 379.

³⁰ See *Harmelin*, 501 U.S. at 969; Baniszewski, *supra* note 28, at 932; Granucci, *supra* note 6, at 857; Mannheimer, *supra* note 27, at 833; Mulligan, *supra* note 28, at 641.

Aldgate to Newgate”³¹ the following Wednesday and “from Newgate to Tyburn”³² the following Friday, that he be pilloried four times a year, and that he be imprisoned for life.³³

After the Cruel and Unusual Punishments Clause of the English Bill was adopted in 1689, Oates asked Parliament to relieve him from his sentence.³⁴ The House of Commons voted to grant him relief and issued a report explaining their conclusion that the sentence violated the Cruel and Unusual Punishments Clause.³⁵ The House of Lords, however, disagreed and Oates was denied relief.³⁶ But the dissenters in the House of Lords also issued an opinion providing a number of reasons why the sentence violated the Clause.³⁷

According to Justice Scalia, these two documents demonstrate that a punishment was not considered to violate the 1689 Cruel and Unusual Punishments Clause based on its disproportionality. Rather, the argument goes, that Clause would forbid a punishment only “because it [wa]s ‘out of [the Judges’] Power,’ ‘contrary to Law and ancient practice,’ without ‘Precedents’ or ‘express Law to warrant,’ ‘unusual,’ ‘illegal,’ or imposed by ‘Pretence to a discretionary Power.’ ”³⁸ Thus, according to Justice Scalia, the Clause “was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition,” unless a deviation from the common law was authorized by Parliament.³⁹ He considered it “most unlikely” that the Clause forbade disproportionate punishments.⁴⁰

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

that the king’s bench, being a temporal court, made it part of the judgment, that Titus Oates, being a clerk, should for his said perjuries, be divested of his canonical and priestly habit, and to continue divested all his life; which is a matter wholly out of their power, belonging to the ecclesiastical courts only.⁴¹

³¹ This was a distance of about one-and-a-half miles. See LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 236–37 (1999).

³² This was a distance of about two miles. See *id.*

³³ The Second Trial of Titus Oates (1685), reprinted in 10 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 1227, 1316–17 (T.B. Howell ed., 1816) [hereinafter Second Trial of Titus Oates].

³⁴ See *id.* at 1317; see also Harmelin, 501 U.S. at 970; Baniszewski, *supra* note 28, at 933; Claus, *Antidiscrimination Eighth Amendment*, *supra* note 6, at 139; Mannheimer, *supra* note 27, at 834; Schwartz, *supra* note 28, at 379.

³⁵ See Harmelin, 501 U.S. at 971; Claus, *Antidiscrimination Eighth Amendment*, *supra* note 6, at 139; Mannheimer, *supra* note 27, at 834; Schwartz, *supra* note 28, at 379.

³⁶ See Baniszewski, *supra* note 28, at 933; Claus, *Antidiscrimination Eighth Amendment*, *supra* note 6, at 140; Mannheimer, *supra* note 27, at 834.

³⁷ See Second Trial of Titus Oates, *supra* note 33, at 1325.

³⁸ Harmelin, 501 U.S. at 973 (first alteration added).

³⁹ *Id.* at 974.

⁴⁰ *Id.*

⁴¹ See Second Trial of Titus Oates, *supra* note 33, at 1325.

The House of Commons likewise wrote in its report that “it was surely of ill Example for a Temporal Court to give Judgment, That a Clerk be divested of his Canonical Habits; and continue so divested during his Life.”⁴²

But a punishment might also be outside the statutory or common-law authority of a judge to impose *because it is excessive*. Many of the statements made in the two reports seem to point to this meaning. For example, the punishment was described as “extravagant” and “exorbitant” in the Commons report,⁴³ which indicates the view of the Commons that at least some aspects of the punishment violated the Clause because the punishment was excessive.⁴⁴ Moreover, the Commons report also complained that “[i]t was of ill Example, and unusual, [t]hat an Englishman should be exposed upon a Pillory, *so many times a Year, during his Life*.”⁴⁵ And Sir William Williams commented in the House of Commons that what was objectionable about Oates’ punishment was the accumulation of so many different aspects of punishment to be inflicted on one person.⁴⁶ Indeed, because fine, imprisonment, pillorying, and whipping were all commonly used punishments at the time,⁴⁷ the better view is that it was the *amount* of punishment and the *combination* of punishments that was thought contrary to the Clause. Accordingly, “Justice Scalia’s attempt to separate the unprecedented nature of Oates’s punishments from their excessiveness was mistaken.”⁴⁸ The punishments were beyond the judge’s power to impose *because* they were excessive.

In order to come to a contrary conclusion, Justice Scalia simply ignored five words from the statement of the dissenting Lords that show beyond peradventure that the Lords were objecting to the excessiveness of the punishment for the crime committed. The dissenting Lords wrote that “there is no precedents [sic] to warrant the punishments of whipping and committing to prison for life, *for the crime of perjury*.”⁴⁹ Thus, their complaint was not that whipping and life imprisonment were unauthorized modes of punishment, but only that the punishments were unauthorized—that is, excessive—for the crime of conviction.⁵⁰ Justice Scalia’s opinion in *Harmelin* simply ignored this.⁵¹

⁴² *Harmelin*, 501 U.S. at 972 (internal quotation marks omitted).

⁴³ *British History*, 10 H.C. JOUR. 249 (Aug. 2, 1689), available at <http://www.british-history.ac.uk/source.aspx?pubid=115>.

⁴⁴ Stinneford, *Rethinking Proportionality*, *supra* note 6, at 934.

⁴⁵ *British History*, *supra* note 43, at 247 (emphasis added).

⁴⁶ See Claus, *Antidiscrimination Eighth Amendment*, *supra* note 6, at 140 (“‘There may be a Precedent for whipping, but for all these parts in one Judgment, let any man give us a Precedent to square with that Judgment.’”) (quoting 9 DEBATES OF THE HOUSE OF COMMONS 291 (Anchitell Grey ed., 1763)).

⁴⁷ See *id.* at 143 (“The methods mandated by the Oates . . . judgments were wholly unremarkable.”); Granucci, *supra* note 6, at 859 (observing that life imprisonment, whipping, and fines were commonly imposed in 1689); Stinneford, *Original Meaning*, *supra* note 6, at 1820 (“The punishments inflicted on Oates—floggings, pillorying, imprisonment, and fines—were all methods of punishment that fell well within the common law tradition.”).

⁴⁸ Stinneford, *Rethinking Proportionality*, *supra* note 6, at 934.

⁴⁹ Second Trial of Titus Oates, *supra* note 33, at 1325 (emphasis added).

⁵⁰ See Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 510–11 (2005).

⁵¹ Similarly, Parr, *supra* note 5, at 44, entirely ignores five of the six paragraphs of the dissenting Lords’ statement.

Justice Scalia did make two trenchant points that tend to show that the 1689 Cruel and Unusual Punishments Clause did not forbid sentences that were disproportionately harsh in relation to the crimes committed. First, he suggested that, given that Oates' perjuries led to the deaths of at least fifteen innocent men, Oates' sentence, harsh as it was, was not disproportionate to the crime.⁵² Second, he observed that, for well over a century after 1689, England continued to punish over 200 crimes with death.⁵³ Justice Scalia was correct to suggest that these examples indicate that the 1689 Clause did not forbid punishment that was disproportionate to crime severity. Similarly, Justice Scalia keenly observed that the First Congress, after proposing the Eighth Amendment to the States, prescribed death as the penalty for such disparate crimes as forgery of United States securities and murder.⁵⁴ This, too, militates toward a conclusion that our Cruel and Unusual Punishments Clause was not understood as requiring proportionality between punishment severity and crime gravity. It does not rule out, however, a different type of proportionality principle, that a punishment must not be excessive compared to some benchmark other than the gravity of the crime.

For example, these observations are entirely consistent with Laurence Claus' thesis that the Clause "condemns punishing a person or class of persons more harshly than others for morally insufficient reason[s]."⁵⁵ That is to say, Claus' position is that the Cruel and Unusual Punishments Clause requires proportionality in sentencing among similarly situated offenders. Likewise, Justice Scalia's assertions are consistent with my own argument that the Clause is best understood as requiring proportionality between federal and state sentencing practices.⁵⁶ Thus, history does not support Justice Scalia's conclusion that "[t]he Eighth Amendment is addressed [only] to always-and-everywhere 'cruel' punishments, such as the rack and the thumbscrew."⁵⁷

B. Statements Made During the Ratification Process

Justice Scalia was on a somewhat surer footing when he asserted that statements made during the ratification process demonstrate that the framers and ratifiers of the Eighth Amendment understood the Cruel and Unusual Punishments Clause to forbid only certain methods of punishment. Yet, again, the few relevant statements made during the ratification period are not inconsistent with the Clause's encompassing some type of proportionality requirement.

Justice Scalia quoted Abraham Holmes' and Patrick Henry's comments opposing ratification of the Constitution in the Massachusetts and Virginia ratifying conventions, respectively. Holmes complained that

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

⁵² See Harmelin v. Michigan, 501 U.S. 957, 973 n.4 (1991) (plurality opinion).

⁵³ See *id.* at 975.

⁵⁴ See *id.* at 980–81.

⁵⁵ Claus, *Antidiscrimination Eighth Amendment*, *supra* note 6, at 149.

⁵⁶ Mannheimer, *Federal Punishments*, *supra* note 6, at 72.

⁵⁷ Atkins v. Virginia, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting).

What gives an additional glare of horror to these gloomy circumstances is . . . that Congress . . . [is] nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.⁵⁸

Similarly, Henry, after reminding his fellow delegates of Virginia's own provision against cruel and unusual punishments, lamented the absence of a similar provision in the proposed national Constitution: "In this business of legislation, your Members of Congress will lose the restriction of not . . . inflicting cruel and unusual punishments.—These are prohibited by your Declaration of Rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishments."⁵⁹

Yet neither of these statements can be read to *exclude* a proportionality principle. These statements suggest that forbidding certain methods of punishment was foremost in the minds of at least two members of the generation that framed and ratified the Eighth Amendment. But the statements do not exclude the possibility that the framers and ratifiers also were concerned with punishments that were excessive. Indeed, the statements fit comfortably with the idea that those who proposed and ratified the Eighth Amendment were mainly concerned with a type of proportionality principle: that federal punishments not be more severe than those meted out by the States, whether in the method of punishment or otherwise.⁶⁰ For example, by referring to "your Declaration of Rights," Henry was reminding his fellow Virginia delegates that the bar on cruel and unusual punishments applicable to them was specific to Virginia and was bemoaning the fact that the same constraint did not apply to the federal government.

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

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*.⁶¹

Henry thus equated "punishment" with the practice of torturing to extract a confession of a crime.⁶² Yet the Supreme Court has squarely rejected the

⁵⁸ Abraham Holmes, Address to the Commonwealth of Massachusetts (Jan. 9, 1788), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109, 111 (Jonathan Elliot ed., 2d ed. 1836) (emphasis omitted).

⁵⁹ Patrick Henry, Speech at the Virginia Ratifying Convention (June 1788), in 5 THE COMPLETE ANTI-FEDERALIST 207, 249 (Herbert J. Storing & Murray Dry, eds., 1981).

⁶⁰ See Mannheim, *Federal Punishments*, *supra* note 6, at 72.

⁶¹ Patrick Henry, Speech at the Virginia Ratifying Convention (June 1788), *supra* note 59 (emphasis added).

⁶² See Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 681 (2004).

notion that “punishment” within the meaning of the Cruel and Unusual Punishments Clause can occur before a criminal conviction is obtained.⁶³ Thus, if we limit our understanding of cruel and unusual punishments based on Henry’s remarks, we would be left with the paradox that the framers and ratifiers of the Clause meant it to apply primarily, or even exclusively, in a context in which the Supreme Court has firmly denied that the Clause has any application whatsoever.

C. *Textual Points*

Justice Scalia also relied on a number of textual points to show that the phrase “cruel and unusual” could not have encompassed a proportionality requirement. While these arguments appear at first blush to be persuasive, they crumble upon closer examination.

First, Justice Scalia observed that the constitutions of New Hampshire, Pennsylvania, and South Carolina each contained a provision requiring that punishments be made “ ‘in general more proportionate to the crimes’ ”⁶⁴ or “ ‘proportioned to the nature of the offence.’ ”⁶⁵ In addition, the New Hampshire Constitution, like the Ohio Constitution adopted only twelve years after the Eighth Amendment was ratified, contained both a proportionality provision and a ban on “cruel and unusual” (or “cruel or unusual”) punishments.⁶⁶ Had a ban on cruel and unusual punishments been thought to have encompassed a proportionality requirement, the argument goes, a separate such requirement would have been superfluous.

The fatal flaw of this argument is that it conceives of only one kind of excessiveness: excessiveness of the punishment when compared to the crime. But the Cruel and Unusual Punishments Clause might encompass a principle of proportionality that uses as its benchmark of excessiveness something other than the gravity of the offense. Again, for example, the Clause might demand proportionality among similarly situated offenders.⁶⁷ If so, then it would not be odd at all to include two separate provisions in a state constitution: one forbidding punishments disproportionate to the gravity of the offense and one forbidding punishments disproportionate in some other way.⁶⁸

Justice Scalia also pointed to the Excessive Fines Clause of the Eighth Amendment to show that the Cruel and Unusual Punishments Clause was not intended to address excessiveness of sentences. Because fines are a type of punishment, the argument goes, it would be superfluous to prohibit excessive

⁶³ *Ingraham v. Wright*, 430 U.S. 651, 671–72 n.40 (1977) (“[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt . . .”).

⁶⁴ *Harmelin v. Michigan*, 501 U.S. 957, 977 (1991) (plurality opinion) (quoting PA. CONST. OF 1776, § 38; S.C. CONST. OF 1778, art. XL).

⁶⁵ *Id.* (quoting N.H. BILL OF RIGHTS OF 1784, art. XVIII).

⁶⁶ *Id.* at 977–78 (citing N.H. BILL OF RIGHTS OF 1784, arts. XVIII, XXXIII; OHIO CONST. OF 1802, art. VIII, §§ 13, 14).

⁶⁷ See Claus, *Antidiscrimination Eighth Amendment*, *supra* note 6, at 121.

⁶⁸ Stinneford, *Rethinking Proportionality*, *supra* note 6, at 955–58, provides an additional explanation for the two types of provisions: the “cruel and unusual punishments” provisions acted as constraints upon legislative excess in formulating punishments, while the “proportionate punishment” provisions acted as guides for further legislative reform.

finer and then go on to prohibit “cruel and unusual punishments” if that term itself forbade excessive sentences, including fines.⁶⁹ Thus, reading a proportionality principle into the Cruel and Unusual Punishments Clause would render the Excessive Fines Clause superfluous.⁷⁰

This argument is similarly flawed in that it conceives of excessiveness as necessarily using the gravity of the crime as its benchmark. It is true that the Excessive Fines Clause might be read to forbid this type of disproportionality. But there is persuasive evidence that that Clause was intended also to forbid a wholly different kind of disproportionality: excessiveness of fines *in relation to the defendant’s ability to pay*. At common law, one who could not pay a fine was imprisoned until he was able to pay. Thus, absent a ban on the imposition of fines that are beyond the ability of the defendant to pay, any offense for which a fine is a prescribed punishment could in reality be punished by indefinite—even perpetual—imprisonment.⁷¹ Indeed, the history of England is replete with such examples.⁷² The Excessive Fines Clause was meant, at least in part, to curb such practices.⁷³

Moreover, even a fine that could technically be satisfied by an offender might be deemed excessive if the offender were thereby ruined financially and unable to maintain his livelihood. Very recently, two commentators have demonstrated separately through exhaustive historical research that the Excessive Fines Clause was designed to calibrate fines, not only to the severity of the offense, but also to the offender’s ability to pay and maintain his livelihood thereafter.⁷⁴ Accordingly, reading the Cruel and Unusual Punishments Clause

⁶⁹ *Harmelin*, 501 U.S. at 978 n.9.

⁷⁰ *Id.*

⁷¹ See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *373 (1765) (“[C]orporal punishment, or a stated imprisonment . . . is better than an excessive fine, for that amounts to imprisonment for life.”).

⁷² See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989) (“In the 1680’s . . . some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed.”); Claus, *Antidiscrimination Eighth Amendment*, *supra* note 6, at 137–38 (discussing cases of Samuel Johnson and Sir Samuel Barnardiston in 1683 and 1684, respectively).

⁷³ See *United States v. Bajakajian*, 524 U.S. 321, 354–55 (1998) (Kennedy, J., dissenting) (“One of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor’s prison.”); *Browning-Ferris Indus.*, 492 U.S. at 267 (“The English version [of the excessive Fines Clause] . . . was intended to curb the excesses of English judges . . . [who] had imposed heavy fines on the King’s enemies . . .” (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (alteration added))). This explains why the ban on excessive fines is coupled in the Eighth Amendment with the ban on excessive bails, see *Bajakajian*, 524 U.S. at 355 (Kennedy, J., dissenting) (“Concern with imprisonment may explain why the Excessive Fines Clause is coupled with, and follows right after, the Excessive Bail Clause.”), given that the main function of bail is not to somehow approximate the gravity of the crime alleged but to assure the defendant’s return to court for trial. Only by calibrating bail with the defendant’s ability to pay can courts assure that it is high enough to discourage flight, and subsequent forfeiture of the bond, but not so high as to result in lengthy pre-trial detention. The Excessive Bail Clause, similarly to the Excessive Fines Clause, serves this purpose. Notably, Justice Kennedy’s dissent in *Bajakajian* was joined by Justice Scalia. *Id.* at 344.

⁷⁴ See Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. (forthcoming 2014); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 836–37 (2013); see also Calvin R.

to encompass a disproportionality component does not render the Excessive Fines Clause superfluous, as the two Clauses contemplate as evils two very different types of excessiveness.

As a final textual point, Justice Scalia contended that “it would seem quite peculiar to refer to cruelty and unusualness *for the offense in question*, in a provision having application only to a new government that had never before defined offenses, and that would be defining new and peculiarly national ones.”⁷⁵ However, as Tom Stacy aptly observed, “[t]his argument rests on an implausible view that, in the eyes of the Founders, new offenses enacted by the federal government would be incommensurable with existing offenses and their punishments.”⁷⁶ Indeed, of the offenses contained in the nation’s first crime act, most, if not all, were comparable to existing common-law crimes, such as running away with a ship or vessel⁷⁷ (comparable to common-law larceny), forgery of United States securities⁷⁸ (comparable to common-law larceny by trick), and murder on the high seas⁷⁹ (comparable to common-law murder).

Moreover, the Anti-Federalists, in demanding inclusion of what became the Eighth Amendment, did not seem concerned with “peculiarly national” crimes. To the contrary, as demonstrated by Patrick Henry’s memorable statements in the Virginia ratifying convention—again, in a portion of his speech omitted by Justice Scalia in *Harmelin*—some worried far more about Con-

Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1259–60 (1987) (observing that pursuant to English common law an amercement, or fine, was considered excessive if it “was still so large as to infringe upon a person’s means of earning a living or maintaining himself and his family,” even if not disproportionate to the gravity of the offense). Colgan asserts that the Clause was designed to encompass a requirement of proportionality taking into account not just the seriousness of the crime and the offender’s ability to pay, but also “a wide variety of [other] factors.” *Colgan, supra* (manuscript at 112). However, most of the considerations she mentions ultimately can be folded into by the concept of offense severity, broadly conceived. *See, e.g., id.* (manuscript at 156–58) (mentioning “a defendant’s culpability in relation to his co-defendant’s culpability . . . whether a defendant acted willfully, was ignorant of the law, committed the crime in the heat of passion or was under duress during the commission of the crime.” (footnotes omitted)); *id.* (manuscript at 158–59) (mentioning “whether the defendant . . . expressed remorse or humility, mitigated the resulting harm, or promised to abide by the law in the future.” (footnotes omitted)); *id.* (manuscript at 159) (mentioning “a defendant’s individual characteristics like his youth or mental and physical incapacity” (footnotes omitted)). Ultimately, she agrees with McLean that one non-offense-related factor stood out to bar fines above a certain amount: the ability of the offender to pay and still maintain a reasonable livelihood. *See id.* (manuscript at 154) (“[T]he record indicates that a fine’s proportionality depended on weighing the effect of the fine against aggravating and mitigating circumstances of the crime, and included an upward bound by which fines that serve to impoverish would be prohibited.”).

⁷⁵ *Harmelin*, 501 U.S. at 978.

⁷⁶ Stacy, *supra* note 50, at 513 n.215; *see also Harmelin*, 501 U.S. at 1011 (White, J., dissenting) (“[T]he people of the new Nation had been living under the criminal law regimes of the States, and there would have been no lack of benchmarks for determining unusualness.”).

⁷⁷ Act of April 30, 1790, ch. 9, 1 Stat. 112, 114 (providing punishment for certain crimes against the United States).

⁷⁸ *Id.* at 115.

⁷⁹ *Id.* at 113.

gress's potential creation of new crimes that mirrored those under state law but that would be punished more severely:

Congress from their general powers may fully go into the business of human legislation. They may legislate in criminal cases from treason to the lowest offence, petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise Representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of Representatives.⁸⁰

Likewise, George Mason appeared concerned that the "new crimes" created by Congress pursuant to the Necessary and Proper Clause⁸¹ would extend to virtually all matters traditionally governed by state law:

Under their own Construction of the general Clause at the End of the enumerated powers the Congress may grant Monopolies in Trade and Commerce, *constitute new Crimes, inflict unusual and severe Punishments, and extend their Power as far as they shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.*⁸²

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

D. Nineteenth-Century Interpretations of Federal and State "Cruel and Unusual Punishments" Clauses

Finally, Justice Scalia looked at the meaning of the Cruel and Unusual Punishments Clause according to nineteenth-century courts and commentators. He pointed to some "early judicial constructions of the Eighth Amendment and its state counterparts" as "[p]erhaps the most persuasive evidence" that the Cruel and Unusual Punishments Clause reached only inherently cruel methods of punishment.⁸³ The earliest case he cited, *Barker v. People*, was an 1823 decision of a New York trial court in a case involving the punishment of disenfranchisement for the crime of dueling.⁸⁴ The entirety of the trial court's holding on the Eighth Amendment point was as follows:

The supposed repugnancy of the act to the constitution of the *United States*, as it is urged, is to the eighth amendment, which declares, that cruel and unusual punishments shall not be inflicted. The disfranchisement of a citizen is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences.⁸⁵

⁸⁰ Patrick Henry, Speech at the Virginia Ratifying Convention (June 1788), *supra* note 59, at 248.

⁸¹ See U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .").

⁸² George Mason, *Objections to the Constitution of Government formed by the Convention* (1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 11, 13 (Herbert J. Storing & Murray Dry eds., 1981) (emphasis added).

⁸³ Harmelin v. Michigan, 501 U.S. 957, 982–83 (1991) (plurality opinion).

⁸⁴ *Barker v. People*, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823), *aff'd*, 3 Cow. 686 (N.Y. 1824).

⁸⁵ *Id.*

That the trial court came to this conclusion without undergoing any kind of proportionality analysis concededly supports Justice Scalia's claim.⁸⁶

Unfortunately for Justice Scalia, this holding did not last long. Justice Scalia failed to acknowledge that, the following year, the New York Court of Appeals, while affirming the judgment, discussed at great length why the trial court had erred on this point: the Eighth Amendment did not apply to the States.⁸⁷ This holding, of course, correctly predicted the US Supreme Court's decision in *Barron v. City of Baltimore*⁸⁸ nine years later. To the extent that the original public meaning of the Cruel and Unusual Punishments Clause can be discerned from one sentence in a decision of a state trial judge thirty-two years after the Clause was ratified—itsself a weak argument—any such reliance is heavily undercut by the fact that the decision on this point was soon rendered dicta by a higher court.

The other cases Justice Scalia cited⁸⁹ are equally unhelpful to his cause. Most of them construed state constitutional analogues to the federal Cruel and Unusual Punishments Clause.⁹⁰ But if, as I have argued elsewhere,⁹¹ the federal Cruel and Unusual Punishments Clause can be understood only as a unique restriction on federal power for the benefit of the States, then using state court construction of state constitutional provisions is of no help in ascertaining the meaning of a limitation on federal power. Just as Justice Scalia cautioned against “the notion of a blind incorporation” of the English Cruel and Unusual Punishments Clause into our own Constitution,⁹² we should be hesitant to simply assume that state constitutional provisions forbidding “cruel punishments” mean the same thing as the federal Eighth Amendment.

In addition, most of the cases Justice Scalia cited were decided long after the Clause was adopted. All except one were decided in 1855 or later.⁹³ Of those construing or purporting to construe the Cruel and Unusual Punishments Clause of the federal Constitution,⁹⁴ the earliest is from 1869. It is difficult to

⁸⁶ *But see* Stinneford, *Rethinking Proportionality*, *supra* note 6, at 950 (contending that the *Barker* court “engaged in . . . proportionality review . . . [by] compar[ing] the challenged punishment to prior punishments given for the same or similar crimes . . .”).

⁸⁷ *Barker v. People*, 3 Cow. 686, 701–702 (N.Y. 1824).

⁸⁸ *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247 (1833).

⁸⁹ *See Harmelin v. Michigan*, 501 U.S. 957, 983–84 (1991) (plurality opinion).

⁹⁰ *See* *Hobbs v. State*, 32 N.E. 1019, 1020–21 (Ind. 1893); *State v. White*, 25 P. 33, 35 (Kan. 1890); *Commonwealth v. Hitchings*, 71 Mass. (5 Gray) 482, 485–86 (1855); *People v. Morris*, 45 N.W. 591, 592–94 (Mich. 1890); *Cummins v. People*, 3 N.W. 305, 305–06 (Mich. 1879), *abrogated on other grounds* by *People v. Coles*, 339 N.W.2d 440 (Mich. 1983); *State v. Williams*, 77 Mo. 310, 312–13 (1883); *In re Bayard*, 63 How. Pr. 73, 76–78 (N.Y. Gen. Term 1881); *State v. Hogan*, 58 N.E. 572, 575 (Ohio 1900); *Aldridge v. Commonwealth*, 4 Va. Cas. 447, 449–51 (1824).

⁹¹ *See generally* Mannheimer, *Federal Punishments*, *supra* note 6; Mannheimer, *Response*, *supra* note 6.

⁹² *Harmelin*, 501 U.S. at 975.

⁹³ *See id.* at 983–84. The exception is *Aldridge*, 4 Va. Cas. 447, decided in 1824, which, again, interpreted a state constitutional provision.

⁹⁴ *See* *Whitten v. State*, 47 Ga. 297, 301 (1872); *Garcia v. Territory*, 1 N.M. 415, 417–19 (1869). *Whitten*, 47 Ga. at 301, is particularly unreliable, given that it purported to apply the Eighth Amendment to the State of Georgia some thirty-nine years after the U.S. Supreme Court ruled that the Bill of Rights had no application to the States. *See* *Barron v. Mayor & City Council of Balt.*, 32 U.S. (7 Pet.) 243, 247 (1833). If the *Whitten* court was implicitly

understand how a case decided six to eight decades after the adoption of a constitutional provision can shed any greater light on the original public meaning of that provision than can our own contemporary powers of investigation.⁹⁵ After all, when one attempts to discern what the framers and ratifiers of the Fourteenth Amendment meant by “due process of law,” one hardly looks to cases decided during the 1920s for “[p]erhaps the most persuasive evidence.”⁹⁶

Finally, Justice Scalia looked to four nineteenth-century legal commentators to support the proposition that the Clause encompassed no proportionality requirement.⁹⁷ Putting to one side the hazards just mentioned of looking to nineteenth-century sources to discern the meaning of an eighteenth-century text, not one of these commentators unambiguously supports Justice Scalia’s position. James Bayard simply did not address the issue.⁹⁸ Benjamin Oliver, as Justice Scalia acknowledged, contended that the Eighth Amendment *does* require proportionality in carceral sentences: “[I]t would seem, that imprisonment for an unreasonable length of time, is also contrary to the spirit of the constitution.”⁹⁹ Justice Scalia dismissed Oliver’s reasoning as “somewhat convoluted.”¹⁰⁰ Justice Scalia also acknowledged that James Kent asserted that “[t]he punishment of death . . . ought to be confined to the few cases of the most atrocious character,” in a paragraph whose topic sentence contains the

applying the Eighth Amendment as incorporated by the recently enacted Fourteenth Amendment, it was silent on the matter.

⁹⁵ The same can be said for the cases cited in Stinneford, *Rethinking Proportionality*, *supra* note 6, at 939–41, for the notion that “cruel and unusual” and “cruel or unusual” referred to excessiveness in 1791. Stinneford cites cases from two separate common-law contexts: the law of homicide, which sometimes referred to beatings in an excessive manner, resulting in death, as “cruel and unusual”; and the law of “private punishment”—parent/child, master/servant, and teacher/student—which also sometimes referred to excessive beatings as “cruel and unusual” punishment. *Id.* Yet, the earliest case Stinneford cites from the private punishment context was decided in 1827, and he cites cases decided as late as 1892. *Id.* at 941 nn.193, 195. And other than a single 1796 North Carolina case, the earliest case he cites from the homicide context was decided in 1838. *Id.* at 939–40 nn.190–91. Thus, regarding virtually all the cases he cites, which post-date ratification of the Eighth Amendment by at least a generation, there is something of a chicken-and-egg puzzle: did the state and federal cruel and unusual punishments clauses draw their meaning from the use elsewhere in the common law of the phrase “cruel and unusual” as a synonym for “excessive,” as Stinneford claims? Or did later common-law judges borrow from state and federal constitutions the handy catchphrase “cruel and unusual” and use it as a synonym for “excessive” regardless of whether that is what those constitutions meant by that phrase?

⁹⁶ *Cf.* *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 1, 6, 9 (1927) (interpreting Due Process Clause of Fourteenth Amendment as granting individuals the right to freely bargain over the price of cream).

⁹⁷ *Harmelin*, 501 U.S. at 981–82 (plurality opinion) (citing JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840); BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 185 (1832); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 10–11 (1827); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896 (Leonard W. Levy ed., 1970) (1833)).

⁹⁸ BAYARD, *supra* note 97, at 153–54; *accord* Stinneford, *Rethinking Proportionality*, *supra* note 6, at 961 (“James Bayard . . . did not consider whether the Cruel and Unusual Punishments Clause was meant to prohibit excessive punishments.”).

⁹⁹ OLIVER, *supra* note 97, at 185.

¹⁰⁰ *Harmelin*, 501 U.S. at 981.

words “cruel and unusual punishments are universally condemned.”¹⁰¹ It is possible, as Justice Scalia suggested, that Kent’s views on limiting capital punishment were a simple policy preference rather than a position on constitutional requirements.¹⁰² However, given that the contents of a paragraph typically relate in some way to the paragraph’s topic sentence, the passage is at least ambiguous in this regard.

With regard to Justice Story, Justice Scalia once again committed a sin of omission by failing to acknowledge a relevant excerpt that undercut his claim. Justice Scalia cited Justice Story’s *Commentaries* for the proposition that the Cruel and Unusual Punishments Clause was “adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts.”¹⁰³ After this passage, however, Justice Story continued: “*Upon this subject*, Mr. Justice Blackstone has wisely remarked that sanguinary laws are a bad symptom of the distemper of any state”¹⁰⁴ Blackstone had little problem with capital punishment in itself, but complained that it was an excessive punishment for some crimes.¹⁰⁵ That Justice Story began this observation with the words “[u]pon this subject,” having just discussed the Cruel and Unusual Punishments Clause, demonstrates that, in his view, the Clause does address disproportionality.

Justice Scalia also curiously ignored Thomas Cooley, who suggested in 1868 that state constitutional provisions forbidding cruel and unusual punishments do, in fact, prohibit punishments excessive in a particular way: in relation to that permitted under common law. Cooley wrote that “probably any new statutory offence may be punished *to the extent* and in the mode permitted by the common law for offences of similar nature.”¹⁰⁶ While Cooley was discussing state constitutional provisions rather than the federal Cruel and Unusual Punishments Clause, elsewhere in his *Harmelin* opinion,¹⁰⁷ as previously noted, Justice Scalia indicated his position that nineteenth-century views on the former informed the meaning of the latter.

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

¹⁰¹ 2 KENT, *supra* note 97, at 10.

¹⁰² See *Harmelin*, 501 U.S. at 982.

¹⁰³ 3 STORY, *supra* note 97, § 1896.

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ See John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL’Y 195, 206 (2009) (“Blackstone favored the death penalty in only limited circumstances.”).

¹⁰⁶ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 472 (7th ed. 1903) (emphasis added); see also *Weems v. United States*, 217 U.S. 349, 375 (1910) (quoting this passage).

¹⁰⁷ See *Harmelin*, 501 U.S. at 982–83.

III. USE OF THE TERM “CRUEL OR UNUSUAL” IN STATE LEGISLATION RATIFYING THE 1783 CONFEDERAL IMPOST RESOLUTION

The sources Justice Scalia cited in *Harmelin* fail to show that “cruel and unusual punishment” in 1791 referred only to methods of punishment and not excessiveness of punishment. If anything, they point in the other direction. There is one source, however, overlooked by Justice Scalia—indeed, overlooked by virtually everyone until now¹⁰⁸—that suggests that the similar term “cruel or unusual” was understood in 1791 as referring to punishment that was excessive in some way.

On April 18, 1783, the Articles of Confederation Congress “recommended to the several states” that Congress be vested with the power to levy duties on certain imported goods, such as rum, tea, sugar, coffee, wine, and molasses.¹⁰⁹ By its terms, and because the creation of a new power in Congress was, in effect, an amendment to the Articles, the resolution could not take effect unless and until it was ratified by every State.¹¹⁰ Ultimately, the 1783 Impost Resolution did not take effect because New York refused to ratify it in a manner acceptable to Congress.¹¹¹

But the other States did pass legislation ratifying the 1783 Impost Resolution. And a majority—eight of thirteen—included in their ratifying legislation what can be characterized as a “mini-bill of rights.”¹¹² These mini-bills contained provisions that would protect their citizenry from the confederal government in investigating, prosecuting, and punishing for violations of the proposed impost. They contained many of the provisions, such as a bar on general warrants, that appeared in state bills of rights and would in short order become part of the federal Bill of Rights.

Importantly, six of these eight States—Georgia, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, and South Carolina—included in their ratifying legislation a precursor to the Eighth Amendment’s Cruel and Unusual

¹⁰⁸ I have uncovered no law review article that even mentions the “cruel or unusual” punishments clauses of the state legislation discussed below. I have discussed this topic previously in a less formal setting. Michael J.Z. Mannheimer, *The “Mini-Cruel and Unusual Punishments Clauses” of the 1783 State Customs Legislation*, PRAWFSBLAWG (Feb. 25, 2013), <http://prawfsblawg.blogs.com/prawfsblawg/2013/02/the-mini-cruel-and-unusual-punishments-clauses-of-the-1783-state-customs-legislation.html>.

¹⁰⁹ 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 256, 256–57 (Gaillard Hunt ed., 1922).

¹¹⁰ *Id.* at 259; see also Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1113 (2013) (discussing similar 1781 resolution); JACKSON TURNER MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788*, at 73 (1961) (same).

¹¹¹ See Campbell, *supra* note 110, at 1120, 1124–26.

¹¹² See THE RESOLUTIONS OF CONGRESS OF THE 18TH OF APRIL, 1783: RECOMMENDING THE STATES TO INVEST CONGRESS WITH THE POWER TO LEVY AN IMPOST, FOR THE USE OF THE STATES; AND THE LAWS OF THE RESPECTIVE STATES, PASSED IN PURSUANCE OF THE SAID RECOMMENDATION 6 (New Hampshire), 9–10 (Massachusetts), 11–13 (Rhode Island), 27, 30–31 (Pennsylvania), 38, 40 (Virginia), 40, 42 (North Carolina), 43–45 (South Carolina), 46, 48 (Georgia) (1787). Additionally, Delaware required that all confederal “rules and ordinances be not repugnant to the constitution and laws of [Delaware],” *id.* at 32, and Maryland similarly required that all confederal “ordinances, regulations and arrangements shall not be repugnant to the [Maryland] constitution” *Id.* at 37.

Punishments Clause. Rhode Island provided that Congress must not “inflict punishments which are cruel or unusual” for violations of any impost.¹¹³ Similarly, Pennsylvania required that Congress not “impos[e] any unusual punishments or penalty.”¹¹⁴ Georgia,¹¹⁵ Massachusetts,¹¹⁶ New Hampshire,¹¹⁷ and South Carolina¹¹⁸ each forbade Congress from “inflict[ing] punishments which are either cruel or unusual in this State” (or in Massachusetts, “in this commonwealth”).

Given this, Justice Scalia’s and Justice Thomas’s view that “cruel and unusual” and “cruel or unusual” referred only to methods of punishment¹¹⁹ is highly implausible. If that view were correct, the “cruel or unusual” language was included in the state legislation discussed above because of a concern that the confederal government would punish those who evaded the impost with torturous corporal or capital punishments. Yet history is bereft of any examples of smugglers being treated in such fashion. To the contrary, the primary penalty for smugglers was economic: fines and forfeiture of the uncustomed goods and the vessel in which they were transported.

Legislation enacted by the First Congress is indicative of how evaders of customs and imposts were punished at the time. For failure to report promptly to the collector of duties for the district, the master of a vessel was subject to a fine of \$500.¹²⁰ For unloading a ship at nighttime or without a permit from the collector, the master of the vessel and any accomplices were to be fined \$400 and disqualified for seven years “from holding any office of trust or profit under the United States.” In addition, the ship and its goods were to be forfeited.¹²¹ The punishment for concealing goods potentially subject to forfeiture was a sum equal to twice the value of the goods.¹²² Offering a bribe to a collection officer would result in a fine of between \$200 and \$2,000.¹²³ Swearing falsely regarding dutiable goods was punished most harshly: a fine of up to \$1,000 and imprisonment of up to one year.¹²⁴

To be sure, smuggling was treated more harshly under English law. According to Blackstone, “clandestine smuggling” was generally punished through economic sanctions of fine and forfeiture.¹²⁵ For “more open, daring, and avowed” smuggling, however, the punishment was transportation to the

¹¹³ See *id.* at 13.

¹¹⁴ *Id.* at 31.

¹¹⁵ See *id.* at 48.

¹¹⁶ See *id.* at 10.

¹¹⁷ See *id.* at 7.

¹¹⁸ See *id.* at 44.

¹¹⁹ See *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., joined by Scalia, J., dissenting) (“[T]he Cruel and Unusual Punishments Clause was originally understood as prohibiting [only] torturous ‘methods of punishment’ . . . specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted.” (citations and internal quotation marks omitted)).

¹²⁰ Regulation of the Collection of Duties on Tonnage and on Merchandise, ch. 5, sec. 11, 1 Stat. 29, 39 (1789).

¹²¹ *Id.*

¹²² *Id.* at 43.

¹²³ *Id.* at 46.

¹²⁴ *Id.* at 47.

¹²⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *155.

new world for seven years.¹²⁶ And smuggling could be punished by death, if performed forcibly: if three or more persons assembled together with weapons to assist in the smuggling, or in retrieving seized goods or smugglers; or if one wounded or shot at a revenue officer in the course of smuggling.¹²⁷ Yet neither transportation—that is, temporary banishment—nor death would have been considered an “unusual” method of punishment in 1783.¹²⁸ And there is no indication that anyone feared that Congress would punish smugglers with the only types of punishment Justices Scalia and Thomas believe would have been characterized as “cruel and unusual” in 1783: those capital punishments “purposefully designed to inflict pain and suffering beyond that necessary to cause death.”¹²⁹

It is thus inconceivable that six States forbade the confederal government from inflicting “cruel or unusual” punishments on evaders of the proposed 1783 impost because they feared that smugglers would be drawn and quartered, burned at the stake, or whipped to death. To the contrary, it is far more likely that the concern was that smugglers would be punished excessively. This is especially so in light of England’s prescription of capital punishment for “forcible” smuggling. Death was a widely accepted punishment for some crimes, but the impost legislation in Georgia, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, and South Carolina strongly suggests that these States did not consider death acceptable punishment for mere smuggling. Accordingly, not only do Justice Scalia’s arguments in *Harmelin* fall of their own weight, there is strong evidence that the term “cruel or unusual” was understood at the time of the framing as going to the excessiveness of punishments.

CONCLUSION

In his influential plurality opinion in *Harmelin v. Michigan*, Justice Scalia offered evidence that is, at best, ambiguous as to whether the Cruel and Unusual Punishments Clause was understood in 1791 to encompass a principle that demanded proportionality. More importantly, the weight of the evidence supports the notion that the Clause did encompass some requirement of proportionality, though not necessarily between crime gravity and punishment severity. Thus, several questions remain. What type of proportionality does the Clause require? And to what extent, if at all, is the Clause’s proportionality requirement incorporated against the States by the Fourteenth Amendment? Scholars are busy trying to formulate answers to these questions.¹³⁰ But to say that “[i]t

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 23 (2002) (noting that the death penalty was administered in every State at the founding); LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 40 (1993) (observing that banishment was a common punishment in the eighteenth century).

¹²⁹ *Baze v. Rees*, 553 U.S. 35, 96 (2008) (Thomas, J., joined by Scalia, J., concurring in the judgment).

¹³⁰ See Claus, *Antidiscrimination Eighth Amendment*, *supra* note 6, at 122–24 (asserting that the Eighth Amendment requires proportionality among similarly situated offenders and classes of offenders); see Mannheimer, *Federal Punishments*, *supra* note 6, at 123–26 (asserting that Eighth Amendment requires proportionality between federal and state sen-

is . . . well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting [only] torturous 'methods of punishment' ”¹³¹ is flatly and demonstrably wrong.

tencing); Stinneford, *Rethinking Proportionality*, *supra* note 6, at 899 (asserting that Eighth Amendment requires proportionality based on punishments that have historically been administered for the same or similar offense).

¹³¹ *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 (1991) (plurality opinion)).