

## SELF-GOVERNMENT, THE FEDERAL DEATH PENALTY, AND THE UNUSUAL CASE OF MICHAEL JACQUES

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*When we put our animals asleep, they go peacefully and quietly. This [piece of shit] doesn't deserve that. He needs to go in a painful way. A way fitting to the manner in which he brutally killed Brooke. Chopping off smaller parts of him at a time until he finally dies isn't good enough for him. Acid isn't good enough for him - maybe combined he will start to feel some measure of pain that he has inflicted on her and the family. CAN WE GET THE DEATH PENALTY BACK HERE IN VERMONT?????? PLEASE?!<sup>1</sup>*

### INTRODUCTION

The pending case of *United States v. Jacques* is troubling on multiple levels. Obviously, it is hard to overstate the horrific nature of the crime: Michael Jacques is accused of kidnapping, raping, and murdering his twelve-year-old niece, with the aid of another young girl he had been sexually assaulting on a regular basis.<sup>2</sup> Some might find it troubling that Jacques apparently served only four years of a six-year prison term for a previous kidnapping and rape, and that he was released from probation supervision seven years early, in late 2006, less than two years before Bennett's murder.<sup>3</sup> And some might be troubled by the vitriolic comments the case has evoked, such as the pseudonymous quote that begins this Article, which calls for the torture-killing of Jacques.<sup>4</sup>

But there is another troubling aspect of *United States v. Jacques*: that Jacques is being prosecuted by the United States rather than by the State of Vermont. After all, kidnapping, rape, and murder are quintessentially state crimes, typically prosecuted by state authorities. And the crimes alleged took place entirely in Vermont, within the close confines of Randolph and Randolph Center. Why, then, is this concededly heinous but otherwise unremarkable act of brutality a matter of national concern? Transparently,

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1. TwilightsRotten1, Comment to *Feds Defend Death Penalty in Michael Jacques Case*, BURLINGTON FREE PRESS (May 19, 2010, 3:05 AM), <http://www.burlingtonfreepress.com/article/20100518/NEWS02/100517019/Feds-defend-death-penalty-in-Michael-Jacques-case>.

2. See *infra* Part I.A.

3. See Brian Joyce, *Judge OKed Early Probation Release for Jacques*, WCAX.COM (July 3, 2008), <http://www.wcax.com/global/story.asp?s=8618279>.

4. See TwilightsRotten1, *supra* note 1.

the answer, as alluded to by the pseudonymous poster quoted above, is that Vermont does not authorize capital punishment for even the most brutal crime—but the United States does.

In prior work, I have argued that the Cruel and Unusual Punishments Clause of the Eighth Amendment should be read to prohibit the federal government from imposing the death penalty for crimes occurring within States that do not authorize capital punishment.<sup>5</sup> This Article elaborates upon that argument and situates it within the particular context of the *Jacques* case.<sup>6</sup> It suggests that the Anti-Federalist insistence in the founding period on local control of criminal justice, of which the Cruel and Unusual Punishments Clause was one aspect, is easily translatable into modern notions of political accountability and the complementarity of political power and political responsibility. The Anti-Federalists believed that political power was best exercised at the local level. To the extent they were willing to abide a delegation of that power, they demanded that the locus of political power not be too far from the people so that the political decision-makers be held accountable to their constituents. Only in that way can the people take on the benefits and burdens of self-government.

Self-government, like self-actualization, implicates both the right and the duty to make difficult decisions; the citizenry thus has both the opportunity and the obligation to participate in the decision-making process. And the more localized the decision-making process, the greater the opportunities for, and the obligations of, self-government. The chief benefit of localized self-government is that localized decisions most accurately reflect the needs and sentiments of the community, and are, in that sense, “better” than decisions made by more distant political actors.

But this benefit comes at a price: the burden of making difficult decisions. Among the most difficult decisions a polity can make is whether to authorize, seek, and impose the ultimate penalty for the worst criminal offenses. The value of self-government is diminished when those decisions are of no real-world consequence because other, more distant and less accountable officials ultimately decide whether the worst offenders should forfeit their lives. The result is a degradation of political power and the concomitant evaporation of political accountability. Such is the case where a State feels no need to visit or re-visit the difficult question of capital punishment because the federal government can be relied upon to handle the very worst cases.

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5. See generally Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is “Cruel and Unusual,”* 74 U. CIN. L. REV. 819 (2006).

6. In *Jacques* itself, the argument has, for the time being at least, been rejected. United States v. Jacques, No. 2:08-cr-117, 2011 WL 3881033, at \*2, \*4–5 (D. Vt. Sept. 2, 2011) (order and opinion extensively discussing, but ultimately rejecting, defendant’s argument that the federal death penalty for wholly intrastate conduct is barred by the Eighth and Tenth Amendments).

Little wonder, then, that the pseudonymous poster quoted above conjoins his or her puerile bloodlust with a seemingly futile plea for political change. The poster can safely express his or her darkest desires for vengeance not only because of the anonymity of the internet, but also because there is little chance that his or her views will be taken seriously. Likewise, the more restrained plea to “get the death penalty back . . . in Vermont” reads more like a child requesting dessert than a citizen moving his or her political equals to action.<sup>7</sup> The poster views his or her political world as top-down, not bottom-up.

Self-government, encompassing the intertwined concepts of power, accountability, and responsibility, was the ideal most cherished by the Anti-Federalists, those who most strongly pushed for the Bill of Rights. The criminal procedure protections of the Bill of Rights represent at their most fundamental level an effort to retain localized control over criminal justice, thereby ensuring that the States would enjoy the benefits and burdens of self-government at least in that narrow but critically important realm. These protections, and the Eighth Amendment in particular, should be read as embracing the requirement that the difficult questions of crime and punishment generally be reserved for the States.

Part I of this Article briefly discusses the facts and law of the *Jacques* case. Part II reviews the conventional account of the Eighth Amendment. Part III deconstructs that account and sets forth an alternative account of the Eighth Amendment, one concerned not only with individual rights but also with state sovereignty and self-government. It asserts that at their most fundamental level, the criminal procedure protections of the Bill of Rights are designed to preserve the autonomy of the States regarding issues of crime and punishment. Part III then explains the Anti-Federalist agenda in terms of political accountability, political responsibility, and political power. Part IV ties these threads together and uses the *Jacques* case in particular to show why the Cruel and Unusual Punishments Clause should be read as generally preserving state control of the outer bounds of criminal punishment.

#### I. *UNITED STATES V. JACQUES*

Michael Jacques is accused of kidnapping, raping, and murdering his twelve-year-old niece, Brooke Bennett. Because the crimes took place entirely within Vermont, one would think that Jacques’s conduct was not prohibited by federal law. Prior to 2006, one would have been correct. Since 2006, however, any kidnapping in which the actor utilizes any

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7. *TwilightRotten1*, *supra* note 1 (capitalization omitted).

“means, facility, or instrumentality of interstate . . . commerce” is a federal crime.<sup>8</sup> Thus, any kidnapping achieved by use of mail, telephone, or internet—perhaps even use of a car on the public highways—is punishable as a federal crime. Moreover, if the victim dies, the crime is punishable by death, even if, as in Vermont, the death penalty is unavailable for state crimes.

#### A. *The Murder of Brooke Bennett*

According to the indictment and other court documents, the story of the 2008 murder of Brooke Bennett began in 2003, when Michael Jacques convinced a nine-year-old girl, referred to as “J1,” that she had to engage in sex with him “or a powerful organization named ‘Breckenridge’ would kill her.”<sup>9</sup> For the next five years or so, Jacques continued his sexual abuse of J1.<sup>10</sup> As part of the overall scheme, he sent her fake e-mails and text messages purporting to be from Breckenridge and some of its members.<sup>11</sup> In about May 2008, Jacques sent J1 e-mail and text messages informing her that his twelve-year-old niece, Brooke Bennett, had been designated by Breckenridge for “termination” and that J1 was expected to assist in the “termination” of Bennett.<sup>12</sup> On June 20, 2008, J1 complied by sending Brooke four text messages inviting her to a pool party at the Jacques residence to be held on June 25, and informing her that a boy that Brooke liked would be there.<sup>13</sup> Jacques arranged for Brooke to spend the night before, June 24, 2008, at his residence.<sup>14</sup>

On June 25, 2008, Jacques, accompanied by J1, drove Bennett to a convenience store and temporarily left her there, intending to create the impression that that was his last contact with her before her death.<sup>15</sup> However, before leaving he instructed Brooke to walk into town after he left.<sup>16</sup> He soon picked her up again, drove her to his house, drugged her, sexually assaulted her, and then killed her.<sup>17</sup> He buried the body about a

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8. 18 U.S.C. § 1201(a)(1) (2006).

9. Indictment ¶ 1, *United States v. Jacques*, No. 2:08-cr-117-01 (D. Vt. Oct. 1, 2008) [hereinafter *Jacques Indictment*].

10. *See id.* ¶ 2.

11. *See id.*

12. *See id.* ¶¶ 3–5.

13. *See* Opp. of U.S. to Def.’s Mot. to Strike or Modify Notice of Intent to Seek Death Penalty at 2, *United States v. Jacques*, No. 2:08-cr-117-01 (D. Vt. May 17, 2010) [hereinafter *Government’s Opposition*].

14. *See id.* at 2.

15. *See Jacques Indictment*, *supra* note 9, ¶ 7.

16. *See Government’s Opposition*, *supra* note 13, at 2–3.

17. *See Jacques Indictment*, *supra* note 9, ¶ 7.

mile away from his home.<sup>18</sup> These activities took place entirely in or near the towns of Randolph and Randolph Center, Vermont.<sup>19</sup>

In addition to the ruse at the convenience store, Jacques constructed an elaborate plan to divert attention from himself, both before and after the crime took place. For example, the night before the murder, he posted a statement on Bennett's MySpace page, purporting to be from her, that she was planning to run away to meet a lover she had met on the internet.<sup>20</sup> In addition, following his arrest, Jacques coordinated with a friend by phone and letter to have a series of e-mails sent to J1, law enforcement, and the media to further cast blame on the fictitious Breckenridge organization and divert attention from himself.<sup>21</sup>

### *B. The Federal Kidnapping Act*

Jacques was indicted by the United States, as relevant here, on one count of violating the Federal Kidnapping Act. Prior to 2006, kidnapping was a federal crime only when the victim was taken across a state or international boundary.<sup>22</sup> In 2006, however, as part of the Adam Walsh Child Protection and Safety Act, Congress amended the federal kidnapping statute. It now provides, in relevant part, that a person commits kidnapping in violation of federal law when he "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away . . . any person . . . when . . . the offender . . . uses the mail or any means, facility, or instrumentality of interstate . . . commerce in committing or in furtherance of the commission of the offense."<sup>23</sup> The theory in *Jacques* apparently is that his use of e-mail and text messages to enlist J1's assistance in kidnapping Bennett, and J1's subsequent use of text messages to lure Bennett to his house at the latter's behest, constituted the use of the "means, facilit[ies], or instrumentalit[ies] of interstate . . . commerce . . . in furtherance of the commission of the offense."<sup>24</sup> In addition, Jacques's communication with his would-be cohort

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18. See Government's Opposition, *supra* note 13, at 3.

19. See Jacques Indictment, *supra* note 9, ¶¶ 1–7.

20. See Government's Opposition, *supra* note 13, at 3.

21. See *id.* at 4.

22. See 18 U.S.C. § 1201(a)(1) (2000). The statute provided that a person is guilty of a federal crime when he or she

unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when the person is willfully transported in interstate or foreign commerce, regardless of whether [he or she] was alive when transported across a State boundary if the person was alive when the transportation began.

*Id.*

23. 18 U.S.C. § 1201(a)(1) (2006).

24. *Id.*

by telephone and mail to further the cover-up of the crime might satisfy this offense element as well. Finally, it may well be that Jacques's use of an automobile satisfies the statutory requirement of the use of an "instrumentality of interstate . . . commerce."<sup>25</sup>

Of course, virtually every kidnapping is perpetrated by use of a "means, facility, or instrumentality of interstate . . . commerce": ransom demands are mailed, victims are lured by e-mails, accomplices communicate by telephone.<sup>26</sup> This is especially true if automobiles are considered instrumentalities of interstate commerce. Why would the federal government have an interest in prosecuting this particular kidnapping? The most obvious answer is that while Vermont does not authorize capital punishment for Jacques's alleged offense,<sup>27</sup> the federal government does.<sup>28</sup>

The use of the federal death penalty for crimes occurring in non-death States has garnered a smattering of scholarly attention in the decade or so since Marvin Gabrion became the first person in the modern era to be so sentenced.<sup>29</sup> Most of the commentary has focused on whether this use of the federal death penalty constitutes good public policy.<sup>30</sup> In 2006, however, I

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25. See Colin V. Ram, Note, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What is Truly National and What is Truly Local*, 65 WASH. & LEE L. REV. 767, 778 (2008) (quoting 18 U.S.C. § 1201(a)(1)) (classifying an automobile as an instrumentality of interstate commerce). For this proposition, Ram relies on *United States v. Bishop*, where the court stated that "motor vehicles are instrumentalities of interstate commerce." 66 F.3d 569, 590 (3d Cir. 1995). This statement, however, is arguably dictum, as the *Bishop* court had already upheld the federal carjacking statute on a different ground: that carjacking has a substantial economic impact on interstate commerce. See *id.* at 580–81.

26. See Ram, *supra* note 25, at 794 (quoting 18 U.S.C. § 1201(a)(1)) (opining, hyperbolically, that "federal jurisdiction now extends to all kidnappings, except those transpiring exclusively on private property").

27. See VT. STAT. ANN. tit. 13, § 2301 (designating "[m]urder . . . by wilful, deliberate and premeditated killing, or committed in perpetrating or attempting to perpetrate . . . aggravated sexual assault . . . [as] murder in the first degree"); *id.* § 3253(a)(8) (defining "aggravated sexual assault" as the commission of a sexual assault where "[t]he victim is under the age of 13 and the actor is at least 18 years of age"); *id.* § 2303(a)(1)(B) (providing maximum penalty for first-degree murder as life imprisonment without parole).

28. See 18 U.S.C. § 1201(a) (2006) (providing that for kidnapping, "if the death of any person results, [the offender] shall be punished by death or life imprisonment").

29. See Mannheimer, *supra* note 5, at 828 (discussing Gabrion's March 16, 2002, federal death sentence for a crime committed in a national forest in Michigan). Gabrion's death sentence was recently vacated because the trial court refused to allow the jury to consider the absence of capital punishment in Michigan as a mitigating factor. *United States v. Gabrion*, 648 F.3d 307, 320–25 (6th Cir. 2011).

30. See Michele M. Campbell, *Federalism and Capital Punishment: New England Stories*, 36 VT. L. REV. 81 (2011); John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697 (2003); Paul Mysliwicz, *The Federal Death Penalty as Safety Valve*, 17 VA. J. SOC. POL'Y & L. 257 (2010); Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57 (2009). But see Sean M. Morton, Comment, *Death Isn't Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 ALB. L. REV. 1435 (2001) (arguing that state constitutional prohibition of capital

broke new ground on this issue by suggesting<sup>31</sup> that this use of the federal death penalty violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.<sup>32</sup> To understand why this proposition is not as controversial as it first appears, one must first take a step back and look at conventional Eighth Amendment jurisprudence. Only then can one appreciate my own unconventional account of the Eighth Amendment.

## II. THE CONVENTIONAL ACCOUNT OF THE EIGHTH AMENDMENT

Most of the Supreme Court's jurisprudence on the Cruel and Unusual Punishments Clause of the Eighth Amendment concerns state, not federal, punishments for crime. Thus, conventional Eighth Amendment jurisprudence stems not from the Eighth Amendment alone, but from that provision as it is incorporated against the States by the Due Process Clause of the Fourteenth Amendment.<sup>33</sup>

The U.S. Supreme Court addressed the Eighth Amendment only a handful of times before that provision was incorporated against the States via the Fourteenth Amendment. In *Wilkerson v. Utah*, the Court held that death by firing squad was not an unconstitutional method of execution.<sup>34</sup> Then, in *Weems v. United States*,<sup>35</sup> the Court introduced two important concepts in Eighth Amendment jurisprudence. First, the Court held that the Cruel and Unusual Punishments Clause bars punishments that are disproportionate to the crimes for which they are imposed.<sup>36</sup> Second, the Court adopted the view that the meaning of the Clause changes with the times and must mean more than what it was understood to mean in 1791.<sup>37</sup> Finally, in *Trop v. Dulles*, a plurality of the Court reiterated and cemented the latter aspect of *Weems* by famously asserting that the Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>38</sup>

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punishment should render use of federal death penalty within that state cruel and unusual punishment" in violation of Eighth Amendment).

31. See Mannheimer, *supra* note 5.

32. "[C]ruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII.

33. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

34. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878).

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

36. See *Weems*, 217 U.S. at 377.

37. *Id.* at 373. "[G]eneral language should not . . . be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.*

38. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Six years after *Weems*, the Court briefly addressed an Eighth Amendment claim in *Badders v. United States*. 240 U.S. 391 (1916).

Only four years after *Trop* was decided, in *Robinson v. California*, the Court applied the Cruel and Unusual Punishments Clause to the States for the first time.<sup>39</sup> Although *Robinson* itself was not a capital case,<sup>40</sup> since that time, the Court has read the Eighth and Fourteenth Amendments to impose on the States a complex web of constraints on the imposition of the death penalty.<sup>41</sup> These constraints can roughly be divided into two categories: procedural and substantive. The first set of constraints governs the procedures that must be undertaken before a person is sentenced to death. The second set consists of a number of categorical exclusions of offenses and offenders that cannot constitutionally be subject to capital punishment.

*A. Procedural Constraints on the Use of the Death Penalty: Guided Discretion and Individualized Treatment*

The Court has constructed an elaborate architecture of procedural constraints, grounded in the Eighth Amendment, on the ability of the States to impose capital punishment. The twin pillars of this architecture are the requirements of “guided discretion” of capital sentencers and individualization of capital sentences. The Court has held that the Eighth Amendment requires the States both to formulate a system of guided discretion to aid in the capital jury’s determination of who is to live and who is to die<sup>42</sup> and to allow the capital defendant to introduce,<sup>43</sup> and the capital sentence to consider and give effect to,<sup>44</sup> a wide variety of mitigating evidence.

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With his characteristic terseness, Justice Holmes brushed aside the claim for the Court, stating only that “there is no ground for declaring the punishment unconstitutional.” *Id.* at 394 (citing *Ebeling v. Morgan*, 237 U.S. 625 (1915); *Howard v. Fleming*, 191 U.S. 126, 135 (1903)).

39. *Robinson v. California*, 370 U.S. 660, 667 (1962).

40. In *Robinson*, the Court held that it violated the Eighth and Fourteenth Amendments to make addiction to narcotics a crime. *See id.* Ironically, the case that incorporated the Cruel and Unusual Punishments Clause against the States appears to have rested its holding, not on the punishment for the crime at hand, but on the fact that the State of California had made it a crime at all. *See id.* (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”); *id.* at 676 (Douglas, J., concurring) (“Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime.”). Thus, the case seems a prime candidate for application of the Due Process Clause standing alone. *See Mannheimer, supra* note 5, at 836 n.89.

41. The Eighth and Fourteenth Amendments have also been construed to impose constraints on disproportionate non-capital sentences, see, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010); *Solem v. Helm*, 463 U.S. 277, 286–90 (1983); on the intentional or reckless infliction of harm to an incarcerated person, see *Hope v. Pelzer*, 536 U.S. 730, 737–38 (2002); *Hudson v. McMillian*, 503 U.S. 1, 5–6 (1992); and on the substantive definition of a crime, see *Robinson v. California*, 370 U.S. 660, 667 (1962). *See also supra* text accompanying note 40. They have also been thought to forbid certain methods of execution of a death sentence, although the Supreme Court has never explicitly held this. *See Baze v. Rees*, 553 U.S. 35, 48–49 (2008) (plurality opinion).

42. *See Gregg v. Georgia*, 428 U.S. 153, 193 (1976).

43. *See, e.g., Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

44. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).



Adorning this structure is a multitude of subsidiary requirements. For example, the States may not exclude from capital juries those generally opposed to the death penalty unless their sentiments would significantly impair their ability to impose death as a punishment.<sup>45</sup> State courts may not instruct capital juries as to suggest in a misleading way that their life-or-death decision is not final.<sup>46</sup> They may not fail to instruct the jury on a lesser-included non-capital offense fairly presented by the evidence.<sup>47</sup> They may not sentence the defendant to death based on evidence he has had no chance to examine and respond to.<sup>48</sup>

As suggested in the preceding paragraphs, the Court has developed its Eighth Amendment jurisprudence in the context of the imposition of the death penalty by the *States*, not the federal government. To the extent that the Court has addressed the federal death penalty under the rubric of the Eighth Amendment, it has done so only sporadically, and has, in effect, applied its Eighth Amendment/Due Process jurisprudence “backwards” to federal capital cases.<sup>49</sup>

*B. Substantive Constraints on the Use of the Death Penalty: Categorical Bars for Certain Offenses and Offenders*

Separately, the Court has placed categorical limits on what offenders may be executed and what offenses may be punishable by death. The Court has held that the States may not impose the death penalty for most non-homicides<sup>50</sup> or for felony murder actually perpetrated by an accomplice unless the defendant was a major participant in the underlying felony and evinced reckless disregard for human life.<sup>51</sup> The States also may not execute

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45. *See, e.g.,* *Uttecht v. Brown*, 551 U.S. 1, 9 (2007).

46. *See Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985); *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).

47. *See Beck v. Alabama*, 447 U.S. 625, 637–38 (1980).

48. *See Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion).

49. *See Jones v. United States*, 527 U.S. 373, 381–82 (1999) (holding that the Eighth Amendment does not require a jury to be instructed regarding the consequences of a deadlock over the penalty phase verdict); *id.* at 398–402 (holding that non-statutory aggravating factors were not duplicative, vague, or overbroad so as to risk arbitrariness in imposition of death); *cf. Loving v. United States*, 517 U.S. 748, 755 (1996) (assuming without deciding “that *Furman* and the case law resulting from it are applicable to” the imposition of death by a federal court martial). In *United States v. Jackson*, the Court held that the then-extant version of the Federal Kidnapping Act unconstitutionally inhibited the right to a jury trial because it did not authorize the death penalty for those who pled guilty, reserving that punishment for those who insisted on going to trial. 390 U.S. 570, 581–83 (1968). However, the Court’s reasoning was based on the Fifth and Sixth Amendments, not the Eighth. *Id.*

50. *See Kennedy v. Louisiana*, 554 U.S. 407, 423, 434 (2008) (rape of a child); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (rape of an adult); *id.* at 600 (Brennan, J., concurring) (opining that the death penalty is always “cruel and unusual”); *see also id.* (Marshall, J., concurring).

51. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987); *Enmund v. Florida*, 458 U.S. 782, 787–88 (1982).

the insane,<sup>52</sup> the mentally retarded,<sup>53</sup> or those under the age of eighteen when they committed their crimes.<sup>54</sup>

The Court has developed a two-part test for determining whether the imposition of death on a particular offender or for a particular offense violates the Eighth Amendment. First, the Court conducts an inter-jurisdictional analysis, looking at how many jurisdictions authorize the death penalty for similar crimes or offenders<sup>55</sup> and at how often juries in those jurisdictions actually impose capital punishment under those circumstances.<sup>56</sup> Second, the Court brings its “own judgment . . . to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”<sup>57</sup> Here, the Court focuses on the two accepted goals of capital punishment: retribution and deterrence.<sup>58</sup> The Court considers whether, from a retributivist standpoint, the defendant is as culpable or has caused as much harm as the typical intentional murderer.<sup>59</sup> The Court also considers

52. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

53. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

54. *Roper v. Simmons*, 543 U.S. 551 (2005).

55. *See id.* at 564 (finding that twenty States allow execution for a crime committed while under age eighteen); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (finding that twenty-five States permitted execution of seventeen-year-old offenders and twenty-two permitted execution of sixteen-year-old offenders); *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988) (plurality opinion) (finding that of “the 18 States that have expressly established a minimum age in their death penalty statutes . . . all of them require that the defendant have attained at least the age of 16 at the time of the capital offense”); *Tison*, 481 U.S. at 154 (“[O]nly 11 States authorizing capital punishment forbid imposition of the death penalty even though the defendant’s participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness.”); *Ford*, 477 U.S. at 408 (“[N]o State in the Union permits the execution of the insane.”); *Enmund*, 458 U.S. at 789 (“[O]nly eight jurisdictions authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life.”); *Coker v. Georgia*, 433 U.S. 584, 595–96 (1977) (plurality opinion) (finding that only one jurisdiction authorized capital punishment for the rape of an adult woman). Beginning in *Atkins*, the Court also looked to “the consistency of the direction of change” among jurisdictions in limiting the death penalty to certain offenses and offenders; considered how “overwhelmingly” such limitations have been approved; and took into account “the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime.” 536 U.S. at 315–16; *see also Roper*, 543 U.S. at 565.

56. *See Roper*, 543 U.S. at 564 (“[E]ven in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent.”); *Atkins*, 536 U.S. at 316 (“[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon.”); *Enmund*, 458 U.S. at 795 (finding that only 41 of 796 then-current death row prisoners “did not participate in the fatal assault on the victim” and only three neither “hired [n]or solicited someone else to kill the victim [n]or participated in a scheme designed to kill the victim”). The Court in *Stanford* warned that care should be taken in relying too heavily on this factor, since “the very considerations which induce [some] to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed.” 492 U.S. at 374.

57. *Coker*, 433 U.S. at 597; *accord Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 313; *Thompson*, 487 U.S. at 833 (plurality); *Enmund*, 458 U.S. at 797.

58. *See Roper*, 543 U.S. at 569–71; *Atkins*, 536 U.S. at 318–20; *Penry v. Lynaugh*, 492 U.S. 302, 336 (1989) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)); *Thompson*, 487 U.S. at 833 (plurality opinion); *Enmund*, 458 U.S. at 798 (quoting *Gregg*, 428 U.S. at 183).

59. *See Roper*, 543 U.S. 569–71; *Thompson*, 487 U.S. at 834; *Tison*, 481 U.S. at 155–58; *Enmund*, 458 U.S. at 798 (quoting *Coker*, 433 U.S. at 592); *Coker*, 433 U.S. at 598.

whether the defendant is as deterrable as the typical intentional murderer. If not, then the imposition of death would not meaningfully advance the goals of retribution and deterrence and would be “nothing more than the purposeless and needless imposition of pain and suffering” forbidden by the Eighth Amendment.<sup>60</sup>

This line of jurisprudence, too, has developed entirely from cases involving state, not federal, imposition of the death penalty. Indeed, the methodology used is premised on the tallying up of jurisdictions on either side of the issue and comparing the totals.

### III. THE UNCONVENTIONAL ACCOUNT OF THE EIGHTH AMENDMENT

The conventional account of the Eighth Amendment, with its emphasis on setting minimum national procedural and substantive standards for the imposition of the death penalty, is inconsistent with the way the Amendment was understood in 1791. When first adopted, the Eighth Amendment, like the rest of the Bill of Rights, bound only the federal government.<sup>61</sup> The Bill was adopted at the insistence of the Anti-Federalists, those who opposed ratification of the Constitution, as a way of constraining the federal government, thereby protecting the autonomy and sovereignty of the States.<sup>62</sup> Of course, the protection of individual rights was the ultimate goal, but the means by which that goal was to be achieved was to carve out and preserve particular spheres of autonomy of the States, who were seen as far better protectors of individual rights than the new, powerful central government.<sup>63</sup> This was in large part because, as much smaller entities, the States were better able to further the values and obligations of self-government through participatory democracy.<sup>64</sup>

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60. *Coker*, 433 U.S. at 592; *see Roper*, 543 U.S. at 569–71; *Atkins*, 536 U.S. at 318–20; *Penry*, 492 U.S. at 335; *Thompson*, 487 U.S. at 833; *Enmund*, 458 U.S. at 798–801. In *Atkins*, the Court also looked to such indicia as the opinions of professional organizations, the stance of religious groups, and public opinion data. 536 U.S. at 316–17 n.21.

61. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 7 (1998).

62. Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1281 (1989). It bears noting at the outset that the Anti-Federalists were a remarkably diverse group in their thinking. *See, e.g.*, Herbert J. Storing, *What the Anti-Federalists Were For* (1981), reprinted in 1 THE COMPLETE ANTI-FEDERALIST 1, 5 (Herbert J. Storing ed., 1981) [hereinafter Storing] (“It would be difficult to find a single point about which *all* of the Anti-Federalists agreed.”). However, the Anti-Federalists were tied together by the goal of defeating ratification of the Constitution on the ground that it granted the federal government too much power at the expense of the States.

63. Wilmarth, *supra* note 62, at 1261, 1281.

64. *Id.* at 1277.

*A. Flaws in the Conventional Account*

There is something amiss about the conventional account of the Eighth Amendment. First, it is a stretch of the English language to claim that the prohibition on “cruel and unusual punishments” somehow regulates the process that governs when the government seeks to take a life.<sup>65</sup> Thus, the Eighth Amendment procedural constraints on the imposition of capital punishment sketched out above resemble more closely an application of the Due Process Clause of the Fourteenth Amendment.<sup>66</sup> Moreover, neither guided discretion nor individualized sentencing could possibly have been understood in 1791 as constitutional requirements stemming from the Eighth Amendment. Capital sentencing was mandatory at that time.<sup>67</sup> There was no discretion to guide; individualization was impossible. Sentencing discretion in capital cases, and therefore the concomitant notion of individualization, did not arise until Tennessee pioneered the practice in 1838,<sup>68</sup> forty-seven years after the Eighth Amendment was adopted. Likewise, the Eighth Amendment could not have been understood in 1791 as requiring the comparative analysis of the imposition of punishment in the several States, for the Amendment did not even arguably apply to the States until the Fourteenth Amendment was ratified in 1868.<sup>69</sup>

Of course, if one accepts the “evolving standards of decency” conception of the Eighth Amendment articulated in *Trop*, it might not seem so anomalous that the Amendment is read today in a way that would have been nonsensical in 1791. Yet, one need not fully reject the idea of “evolving standards of decency” in order to recognize that the Eighth Amendment might impose additional, or different, constraints on the federal government than it does on the States. After all, one need not conclude that the Amendment means exactly the same thing today that it was understood to mean in 1791 in order to conclude that the Clause was understood to mean *something* in 1791, and for seventy-seven years thereafter. And that

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65. See *Furman v. Georgia*, 408 U.S. 238, 397 (1972) (Burger, C.J., dissenting) (“The [Eighth] Amendment is not concerned with the process by which a State determines that a particular punishment is to be imposed in a particular case.”).

66. See generally Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) (advancing the claim that Court’s capital jurisprudence is more accurately viewed as stemming from due process constraints).

67. See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (“At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.”).

68. See *id.* at 291 (“Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first States to abandon mandatory death sentences in favor of discretionary death penalty statutes.”).

69. See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 180 (2001) (“Until the Fourteenth Amendment was ratified, the Constitution placed no limits on the power of the States to fashion their own criminal processes.”).

something likely had nothing to do with the process by which punishments are imposed and certainly had nothing to do with the imposition of punishment by the States.

*B. The Anti-Federalist Origins of the Bill of Rights*

The more fundamental problem with conventional Eighth Amendment jurisprudence is that, because it really stems from the Fourteenth Amendment, it assumes that the central concern of the Cruel and Unusual Punishments Clause is the rights of the individual criminal offender. After all, in 1868, the violent institution of human slavery had just come to a bloody end, and the prospects for protecting human liberty in the former slave States were dim. Accordingly, “the core concern[] of the Fourteenth Amendment” was to “protect[] vulnerable minorities from dominant social majorities.”<sup>70</sup> Thus, it is understandable that the Eighth Amendment, as refracted through the lens of the Fourteenth Amendment,<sup>71</sup> has been read to provide, on the one hand, procedural protections to ensure against the arbitrary imposition of capital punishment on the individual offender<sup>72</sup> and, on the other, to protect him from the imposition of capital punishment under circumstances where such a punishment is not regularly imposed across the nation.<sup>73</sup>

Yet the Bill of Rights was concerned primarily with ensuring individual liberty only by protecting the States’ autonomy and sovereignty vis-à-vis the new central government.<sup>74</sup> Those who demanded the Bill of Rights were the Anti-Federalists, who initially fought bitterly against the Constitution on the ground that it would consolidate power in the new central government and leave the States powerless and dependent.<sup>75</sup> They feared that the very broad provisions of the Constitution—especially the

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70. AMAR, *supra* note 61, at 7; *see also* Mannheimer, *supra* note 5, at 854 (“Given the focus of the framers and ratifiers of the Fourteenth Amendment on the protection of former slaves and other minorities—ethnic, religious, and political—from dominant local majorities, that Amendment has a distinctively individual-rights hue.”).

71. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1136–37 (1991) (“Like people with spectacles who often forget they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.”).

72. *See supra* Part II.A.

73. *See supra* Part II.B.

74. *See* Wilmarth, *supra* note 62, at 1262 (“[T]he original purpose of the Bill of Rights was to protect the states and their citizens against the potentially dangerous expansion of federal power . . .”).

75. *See* Calvin Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1231 (asserting that the “‘Anti-Federalist constitution[]’ [was] concerned with preserving the states as autonomous units of government and as structural bulwarks of human liberty”); Wilmarth, *supra* note 62, at 1263 (“The Antifederalists were convinced that the Constitution would ultimately destroy the power of the states and extinguish personal liberty by ‘consolidating’ the United States under one all-powerful central government.”).

Necessary and Proper Clause<sup>76</sup>—would be read to effect “sweeping changes in the balance of national versus state powers.”<sup>77</sup>

The Anti-Federalists were particularly concerned that Congress would create a new criminal code that would largely duplicate state criminal law. This fear is displayed in two of the very few extant ratification-era statements regarding the need for a ban on “unusual” punishments. George Mason, whose *Objections to the Constitution of Government formed by the Convention* became “the first salvo in the paper war over ratification,”<sup>78</sup> objected that Congress might invoke the Necessary and Proper Clause to “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.”<sup>79</sup> Similarly, Patrick Henry warned that

Congress from their general powers[,] may . . . legislate in criminal cases from treason to the lowest offence, petty larceny. They may define crimes and prescribe punishments. . . . [W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of Representatives. What says [the Virginia] Bill of Rights? “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Are you not therefore now calling on those Gentlemen who are to compose Congress, to prescribe trials and define punishments without this controul?<sup>80</sup>

The objections of these two Virginians bespeak the Anti-Federalist view of States’ rights and individual rights as being intertwined. Both Mason and Henry expressed the fear that a new federal law of crime would duplicate and overwhelm state criminal law, in derogation of the States’ sovereign authority over criminal justice. As a consequence, state bars on “cruel and unusual punishments” would be useless and Congress might punish however it saw fit. Mason, Henry, and other Anti-Federalists argued more broadly that Congress’s power pursuant to Article I, coupled with the

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76. 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 . . .”).

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

78. Robert A. Rutland, *Framing and Ratifying the First Ten Amendments*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 305, 305 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

79. George Mason, *Objections to the Constitution of Government formed by the Convention* (1787), reprinted in 2 Storing, *supra* note 62, at 11, 13 (emphasis added).

80. Speech of Patrick Henry (June 16, 1788), reprinted in 5 *id.* at 248 (footnote omitted).

Supremacy Clause,<sup>81</sup> would allow the federal government to supersede and replace state criminal law and, as a consequence, render irrelevant the various state protections for criminal defendants.<sup>82</sup> Thus, at the epicenter of the agenda of those who initially clamored for a Bill of Rights was “[t]he preservation of local autonomy,”<sup>83</sup> because they believed that state power was the principal protection for individual rights.<sup>84</sup> To the Anti-Federalist progenitors of the Bill of Rights, the States were “structural bulwarks of human liberty.”<sup>85</sup>

Eventually, many of the Anti-Federalists recognized that continuation of the status quo under the Articles of Confederation was untenable and that a stronger central government was needed.<sup>86</sup> As the ratification process wore on, these moderate Anti-Federalists softened their position and reluctantly accepted the Constitution but conditioned their reluctant

81. See U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

82. See Speech of Patrick Henry (June 16, 1788), reprinted in 5 Storing, *supra* note 62, at 246, 247 (asserting that the Virginia Bill of Rights would be “[p]ointed against your weakened, prostrated, enervated State Government!”); George Mason, *Objections to the Constitution of Government formed by the Convention* (1787), reprinted in 2 Storing, *supra* note 62, at 11, 11 (“There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declaration of Rights in the separate States are no Security.”); Letter of Centinel to the People of Pennsylvania, reprinted in 2 Storing, *supra* note 62, at 143, 152 (“[T]he general government would necessarily annihilate the particular [State] governments, and . . . the security of the personal rights of the people by the state constitutions is superseded and destroyed . . .”); *Essay by the Impartial Examiner*, Feb. 20, 1788, reprinted in 5 Storing, *supra* note 62, at 181, 185 (asserting that the Constitution “expunges your bill of rights by rendering ineffectual, all the state governments”); PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 287 (John Bach McMaster & Frederick D. Stone eds., 1888) (statement of Robert Whitehill) (“I consider [the Constitution] as the means of annihilating the constitutions of the several States, and consequently the liberties of the people . . .”).

83. Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74, 91–92 (1989).

84. See Robert C. Palmer, *Liberties as Constitutional Provisions, 1776–1791*, in CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55, 115 (Robert C. Palmer & William E. Nelson eds., 1987) (“[The Anti-Federalists] considered the states protectors, not opponents, of rights.”); Thomas, *supra* note 69, at 180 (“The anti-Federalists who pressed the Bill of Rights to limit federal power saw state legislatures and state courts as the protectors of citizens and not as threats.”); Wilmarth, *supra* note 62, at 1281 (observing that, according to the Anti-Federalists, “the states . . . were considered to be the true guardians of the people’s rights”).

85. Massey, *supra* note 75, at 1231; see also Mannheimer, *supra* note 5, at 851 (“Close scrutiny of the Anti-Federalists’ Bill of Rights reveals their profound concern with preserving state sovereignty as a means of furthering liberty.”).

86. See Wilmarth, *supra* note 62, at 1281 (discussing the “dilemma” for most Anti-Federalists, who “desired a ‘strong federal government’ but were determined not to ‘relinquish, beyond a certain medium, the rights of man for the dignity of government’” (quoting letter from Mercy Warren to Mrs. Macauley (Sept. 28, 1787))).

acquiescence on the adoption of a Bill of Rights.<sup>87</sup> The Bill of Rights, then, was the price paid by the Federalists, those in favor of the new Constitution, to gain ratification in key States where the Anti-Federalists initially were in the majority, such as Massachusetts, New York, and Virginia.<sup>88</sup> But for approval by these States, union might not have been achieved. At best, there was a distinct possibility of a union of ten States<sup>89</sup> broken geographically into four parts by these three land masses, which comprised approximately 42% of the total population of the country in 1790.<sup>90</sup> The Federalists did not relish this prospect.<sup>91</sup>

Ultimately, ratification was secured in each of these States, but not before the Federalists “pledg[ed] to work for the adoption of [recommended] amendments as soon as the new federal government was organized.”<sup>92</sup> James Madison himself believed that ratification by Virginia would have been impossible without a pledge to adopt the recommended amendments.<sup>93</sup> Thus, the Bill of Rights was, in Madison’s view, a concession to the moderate Anti-Federalists—including George Mason<sup>94</sup>—deeply suspicious of the new, powerful central government but reconciled

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

88. *See id.* at 1264 (“In order to overcome the Antifederalists’ opposition and to secure ratification of the Constitution in such key states as Massachusetts, Virginia and New York, the Federalists were obliged to promise that amendments protecting state autonomy interests would be made to the Constitution promptly after it became effective.”); *id.* at 1288 (observing that in the ratifying conventions in Massachusetts, New Hampshire, New York, and Virginia, “the Federalists at first found themselves in the minority”).

89. The Constitution expressly provides that ratification by as few as nine States would be sufficient to render it effective in those States. *See* U.S. CONST. art. VII. Virginia and New York were the tenth and eleventh States to ratify the Constitution, respectively. *See* JACKSON T. MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788, at 288 app. D (1961).

90. *See Schedule of the Whole Number of Persons Within the Several Districts of the United States* 3 (1791), available at <http://www2.census.gov/prod2/decennial/documents/1790a-02.pdf> (documenting the population of Maine (then part of Massachusetts) as 96,540; of Massachusetts as 378,787; of New York as 340,120; of Virginia as 747,610; and of Kentucky (then part of Virginia) as 73,677, for a total of 1,636,734, or 42.04% of the total population of all the States of 3,893,635).

91. *See* Cornell, *supra* note 77, at 70 (“Had New York not adopted the Constitution, the prospects for an enduring Union would have seemed bleak at best.”).

92. Wilmarth, *supra* note 62, at 1288; *accord* Cornell, *supra* note 77, at 66 (“[R]atification of the Constitution was only secured because Federalists agreed to consider subsequent amendments recommended by Anti-Federalists in various state conventions.”); Mannheim, *supra* note 5, at 851 (“The Constitution was ratified by many States on the implicit condition that a Bill of Rights be added . . .”).

93. *See* Cornell, *supra* note 77, at 66 (“As James Madison noted, ‘[i]n many states the Constitution was adopted under a tacit compact in favor of some subsequent provisions.’” (quoting 1 THE FOUNDERS’ CONSTITUTION 491 Phillip Kurland & Ralph Lerner eds., 1987)); Wilmarth, *supra* note 62, at 1292 (“Madison personally opposed many of the recommended amendments finally adopted by the Virginia convention as ‘highly objectionable,’ but he acceded to them because it was otherwise ‘impossible’ to secure ratification.” (footnote omitted)).

94. *See* MAIN, *supra* note 89, at 177.



to its necessity with appropriate and robust constraints.<sup>95</sup> Accordingly, “Anti-Federalist political thought is essential to understanding the meaning of the Bill of Rights.”<sup>96</sup>

By far, the one state prerogative the Anti-Federalists sought most to preserve was that of setting the parameters of crime and punishment. The bulk of the protections in the Bill of Rights address the federal government’s involvement in criminal investigations and prosecutions.<sup>97</sup> Without these protections, the Anti-Federalists feared, “the powerful federal government would seek to persecute its enemies through the use of federal law”<sup>98</sup> without being hemmed in by any of the constraints that the States placed upon themselves. The Fourth, Fifth, Sixth, and Eighth Amendments were adopted as a result.<sup>99</sup> The Fourth Amendment, by forbidding “unreasonable searches and seizures” and broadly written warrants, hems in the federal government’s ability to *investigate* alleged offenders. The Fifth Amendment, by making a criminal prosecution contingent upon a grand jury indictment and by prohibiting second or successive prosecutions for the “same offense,” hems in the federal government’s ability to *prosecute* alleged offenders. The Sixth Amendment’s familiar trial rights hems in the federal government’s ability to *convict* alleged offenders. And the Eighth Amendment hems in the federal government’s ability to *punish* alleged offenders.

Critically, these restrictions on the federal government’s ability to investigate, prosecute, convict, and punish were not motivated by a desire to ensure the reliability, accuracy, or legitimacy of the federal criminal justice system.<sup>100</sup> Instead, they were designed to create disincentives for its use. For if federal criminal cases could be investigated and prosecuted with none of the constraints that the States placed upon themselves, the federal government would have every incentive to create the parallel system of criminal justice the Anti-Federalists so feared and use it to the detriment of

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95. See Wilmarth, *supra* note 62, at 1305 (“Madison sponsored the Bill of Rights primarily to reconcile the moderate Antifederalists to the Constitution.”).

96. Cornell, *supra* note 77, at 67; see also Mannheimer, *supra* note 5, at 851 (“The underlying premises of the Anti-Federalists . . . are critical to an understanding of the Bill of Rights, because without their assent, the Constitution might never have been ratified.”); Palmer, *supra* note 84, at 105 (“The Antifederalist origin to the demand for a Bill of Rights dictates a state-oriented approach to the Bill of Rights.” (footnote omitted)).

97. See Mannheimer, *supra* note 5, at 858–59.

98. Thomas, *supra* note 69, at 152; see also Amar, *supra* note 71, at 1183 (“[C]riminal law inspired dread and jealousy.”).

99. See Mannheimer, *supra* note 5, at 857 (“The Anti-Federalists insisted on throwing the procedural hurdles of the Fourth, Fifth, Sixth and Eighth Amendments in the paths of federal investigators, prosecutors, and judges, because . . . the power to prosecute is the power to persecute.”).

100. See Thomas, *supra* note 69, at 152 (“[T]he Framers of the Bill of Rights intended them to be formidable barriers to the successful federal prosecution of criminal defendants, whether guilty or innocent.”); see also *id.* at 156 (“[T]he Bill of Rights . . . sought to impose restrictions on the federal government without regard to the innocence of particular defendants.”).

state criminal law. Subjecting federal officials to the same constraints as state officials removes this incentive and discourages the use of federal criminal law in the run of cases.<sup>101</sup> In this way, the criminal procedure protections of the Bill of Rights are primarily designed not to achieve reliable outcomes but to reserve the business of meting out criminal justice largely to the States.<sup>102</sup>

### C. The Anti-Federalist Conception of Accountability

The Anti-Federalists valued local self-determination regarding criminal justice in large part because of their conception of accountability. As Anti-Federalist writer Brutus put it: “[T]he true policy of a republican government is . . . that all persons who are concerned in the government, are made accountable to some superior for their conduct in office.—This responsibility should ultimately rest with the People.”<sup>103</sup> Local policy-makers would be closer to those whom they governed in a number of different respects than would the people’s agents in a distant central government. And a close relationship between governors and governed allowed for close scrutiny by the people of their agents in government. Luther Martin, for example, observed that in order that “the representative ought to be dependant on his constituents, and answerable to them . . . the connexion between the representative and the represented, ought to be as near and as close as possible.”<sup>104</sup> Greater accountability on the part of government officials, in turn, would lead to a better “fit” between the people and their laws.<sup>105</sup>

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101. See *id.* at 160 (“The principal concern in the Bill of Rights was not to protect innocent defendants. The Framers instead intended to create formidable obstacles to federal investigation and prosecution of crime.”); see also *id.* at 174–75 (“The Framers did not focus on separating the guilty from the innocent because they were concerned with curtailing the power of federal prosecutors and judges.”).

102. See *id.* at 149 (observing that, prior to incorporation of the Bill of Rights, “the States remain[ed] sovereign, free to conduct their affairs in most criminal matters”).

103. Essay of Brutus (Apr. 10, 1788), reprinted in 2 Storing, *supra* note 62, at 442, 442; see also Craig T. Borowiak, *Accountability Debates: The Federalists, The Anti-Federalists, and Democratic Deficits*, 69 J. POLITICS 998, 1006 (2007) (“In a republican government where citizens are considered the highest authority, they are the ones to whom officials should ultimately be accountable.”).

104. Luther Martin’s Information to the General Assembly of Maryland, reprinted in 2 Storing, *supra* note 62, at 27, 46 (emphasis omitted); see also Gary L. McDowell, *Federalism and Civic Virtue: The Antifederalists and the Constitution*, in HOW FEDERAL IS THE CONSTITUTION? 122, 127 (Robert A. Goldwin & William A. Schambra eds., 1987) (“The Antifederalists believed that the true foundation of public trust and confidence . . . was intimate government.”); Wilmarth, *supra* note 62, at 1277 (“[T]he Antifederalists demanded that representatives be closely connected to their constituents, and thus subject to close scrutiny.”).

105. See Letter of Agrippa to the Massachusetts Convention (Jan. 11, 1788), reprinted in 4 Storing, *supra* note 62, at 93, 93 (“It is much easier to adapt the laws to the manners of the people, than to make manners conform to laws.”); Letter from the Federal Farmer (Dec. 31, 1787), reprinted in 2 Storing, *supra* note 62, at 264, 266 (“Where the people, or their representatives, make the laws, it is

By contrast, according to the Anti-Federalists, the government contemplated by the Constitution was “devoid of all responsibility or accountability to the great body of the people.”<sup>106</sup> This, Patrick Henry declared in the Virginia ratifying convention, was his “great objection to the Constitution.”<sup>107</sup> Similarly, A Federal Republican proclaimed: “The want of responsibility to the people among the representatives in this constitution . . . is a grand and indeed a daring fault.”<sup>108</sup> The tension between the type of republican self-government to which the Anti-Federalists aspired and what they saw in the Constitution can best be articulated with reference to the number of spatial and psychological distances between the governors and the governed. Craig Borowiak has helpfully summarized and categorized these impediments to self-government in a representative democracy:

- “spatial gaps,” referring to the actual physical distance between the people and their representatives;
- “scalar gaps,” referring to the ratio of representatives to their constituents;
- “temporal gaps,” referring to the lapse of time between the representatives’ actions and their authorization by their constituents;
- “epistemological gaps,” referring to “the representative[s]’ ignorance about the needs, interests, and desires of constituents”; and
- “identity gaps,” referring to “differences in class, character, and experience” between representatives and constituents.<sup>109</sup>

Classical republican theory to which the Anti-Federalists subscribed taught that true self-government was possible only when the polity was small

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probable they will generally be fitted to the national character and circumstances, unless the representation be partial, and the imperfect substitute of the people.”)

106. Letter of Centinel to the Freemen of Pennsylvania, *reprinted in* 2 Storing, *supra* note 62, at 136, 142; *see also* The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787), *reprinted in* 3 Storing, *supra* note 62, at 145, 162–63 (“[T]hat strongest of all checks upon the conduct of administration, *responsibility to the people*, will not exist in this government.”).

107. Speech by Patrick Henry (June 5, 1788), *reprinted in* 5 Storing, *supra* note 62, at 211, 226.

108. Letter from A Federal Republican (Oct. 28, 1787), *reprinted in* 3 Storing, *supra* note 62, at 67, 78 (emphasis omitted).

109. Borowiak, *supra* note 103, at 1000. Borowiak also includes “competence gaps characterized by differences in governing capabilities.” *Id.* This impediment to self-government in a representative democracy was not emphasized by the Anti-Federalists.

enough to minimize if not eliminate these gaps.<sup>110</sup> Each of these “gaps” was emphasized by the Anti-Federalists in their arguments against the Constitution and in favor of a Bill of Rights.

### 1. Spatial Gaps

First and most obviously, there was the simple physical fact that representatives in the federal government would have to reside in the new federal district created by the Constitution. Luther Martin warned that representatives would become “estrang[e]d” from their own States and would begin to consider themselves citizens of their new home.<sup>111</sup> Brutus, too, reminded his readers that Senators would, for most of their six-year term, “be absent from the state they represent.”<sup>112</sup> And Agrippa complained that “when it is considered that their residence is from two hundred to five [hundred?] miles from their constituents, it is difficult to suppose that they will retain any great affection for the welfare of the people.”<sup>113</sup>

### 2. Scalar Gaps

The chief complaint of the Anti-Federalists was that the ratio of representatives to constituents was far too small for the former to be truly representative of the latter.<sup>114</sup> Cincinnatus characterized the representation in the House of Representatives as “remarkably feeble” as compared with representation in the British Parliament.<sup>115</sup> A Columbia Patriot wrote: “One Representative to thirty thousand inhabitants is a very inadequate representation . . .”<sup>116</sup> Melancton Smith observed that the smaller the number of representatives, the easier it would be for a majority to be

110. See McDowell, *supra* note 104, at 126–27 (observing that Anti-Federalists believed that “in small republics the government would be more responsive and responsible to the people”).

111. See Luther Martin’s Information to the General Assembly of Maryland, *reprinted in* 2 Storing, *supra* note 62, at 27, 46.

112. Essay of Brutus (Apr. 10, 1788), *reprinted in* 2 Storing, *supra* note 62, at 442, 444; see also Letter from the Federal Farmer (Jan. 10, 1788), *reprinted in* 2 Storing, *supra* note 62, at 286, 289 (observing the lack of “a sense of dependence and responsibility” of representatives serving “several hundred miles distant from their states”).

113. Letter from Agrippa to the People (Nov. 23, 1787), *reprinted in* 4 Storing, *supra* note 62, at 70, 71 (alteration in original); see also Cecilia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 41 (1955) (noting the “attitude of . . . fear and suspicion” on the part of Anti-Federalists regarding Congress in part because Congress “would meet . . . hundreds of miles from the homes of . . . its constituents”).

114. See Wilson C. McWilliams, *The Anti-Federalists, Representation, and Party*, 84 NW. U. L. REV. 12, 26–27 (1989) (“[N]o Anti-Federalist complaint against the Constitution popped up more frequently than the demand for ‘a more numerous representation.’”).

115. Essay by Cincinnatus to James Wilson, Esq. (Nov. 22, 1787), *reprinted in* 6 Storing, *supra* note 62, at 17, 19–20.

116. *Observations on the New Constitution and on the Federal and State Conventions by a Columbian Patriot*, *reprinted in* 4 Storing, *supra* note 62, at 271, 278.

corrupted by special interests.<sup>117</sup> He concluded: “Is it prudent to commit to so small a number the decision of the great questions which will come before them? Reason revolts at the idea.”<sup>118</sup>

This criticism, and the fear that Congress would reduce the scale of representation in the House even further, led to proposals for a constitutional amendment to set a minimum size for the House.<sup>119</sup> So important was this issue that five of the six state ratifying conventions that proposed amendments included such a proposal and placed it at or near the top of their list of proposed amendments.<sup>120</sup> An amendment to that effect was, in fact, passed by two-thirds of each house of Congress—the first proposed article in the Bill of Rights<sup>121</sup>—but failed to secure ratification by three-fourths of the States, by a single vote.<sup>122</sup>

### 3. Temporal Gaps

The Anti-Federalist arguments regarding the temporal gaps created by the Constitution centered around two points: the long terms for Representatives and (in particular) Senators, and the absence of a right of recall. Regarding the former, while the people’s Representatives would feel some restraint to defy their wishes by the very necessity of standing for re-election, there is a natural tendency to discount the adverse effects of far-off events.<sup>123</sup> Long election cycles thus might tend to lead Representatives to discount the risk of losing the next election and therefore to put their own interests ahead of their constituents.<sup>124</sup> These sentiments were expressed by the Anti-Federalists. Brutus, for example, wrote: “Men long in office are very apt to feel themselves independent [and] to form and pursue interests separate from those who appointed them.”<sup>125</sup>

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117. See Speech by Melancton Smith (June 21, 1788), *reprinted in* 6 Storing, *supra* note 62, at 155, 159–60 (“In so small a number of representatives, there is great danger from corruption and combination.”).

118. *Id.* at 160; see also Letter from the Federal Farmer (Oct. 10, 1787), *reprinted in* 2 Storing, *supra* note 62, at 234, 235 (“I have no idea that the interests, feelings, and opinions of three or four millions of people . . . can be collected in such a house.”).

119. See AMAR, *supra* note 61, at 14.

120. See *id.*

121. See *id.* at 8.

122. See *id.*; McWilliams, *supra* note 114, at 12–13 & n.5. For a fascinating discussion as to why the amendment might have failed, see AMAR, *supra* note 61, at 15–17.

123. See, e.g., Michael K. Block & Robert C. Lind, *An Economic Analysis of Crimes Punishable by Imprisonment*, 4 J. LEGAL STUD. 479, 481 (1975) (discussing “time discounts” by those weighing benefits of criminal behavior against the threat of a long prison term).

124. See Borowiak, *supra* note 103, at 1008 (“When terms in office are long, representatives have incentives to discount future electoral accountings and to pursue interests other than those of their constituents.”).

125. Essay of Brutus (Apr. 10, 1788), *reprinted in* 2 Storing, *supra* note 62, at 442, 444.

The Anti-Federalists pointed to long election cycles as a flaw in the new Constitution. Centinel, for example, considered “the term for which [Representatives] are to be chosen, too long to preserve a due dependence and accountability to their constituents.”<sup>126</sup> Likewise, the Federal Farmer wrote of the terms for Senators: “Men six years in office absolutely contract callous habits, and cease, in too great a degree, to feel their dependance, and for the condition of their constituents.”<sup>127</sup> By contrast, representatives in state governments were generally elected annually, as were members of Congress under the Articles of Confederation.<sup>128</sup>

Widening the temporal gap was the inability of the States or the people to recall their Senators or Representatives. Without such power, a Representative could go two years, and a Senator six, in defying the will of the people of his State before being called to account. As Luther Martin stated:

[F]or six years the senators are rendered totally and absolutely independent of their States, of whom they ought to be the representatives, without any bond or tie between them: During that time they may join in measures ruinous and destructive to their States, even such as should totally annihilate their State governments, and their States cannot recall them, nor exercise any controul over them.<sup>129</sup>

The power of recall existed under the Articles of Confederation and some state constitutions.<sup>130</sup> Its absence from the Constitution was noted and criticized by many Anti-Federalists.<sup>131</sup> As Federal Farmer put it: “[T]he principle of responsibility is strongly felt in men who are liable to be

126. Letter from Centinel to the Freemen of Pennsylvania, *reprinted in* 2 Storing, *supra* note 62, at 136, 142.

127. Letter from the Federal Farmer (Jan. 10, 1788), *reprinted in* 2 Storing, *supra* note 62, at 286, 288; *see also* A Friend to the Rights of the People, *Anti-Federalist, No. 1* (Feb. 8, 1788), *reprinted in* 4 Storing, *supra* note 62, at 235, 236 (“[W]hen public officers are chosen annually, or only for a short time at once; they naturally feel themselves more dependent upon the people, and consequently their obligations will be stronger to fidelity in their public trust . . .”).

128. Letter from the Federal Farmer (Jan. 10, 1788), *reprinted in* 2 Storing, *supra* note 62, at 286, 288; *see also* *Observations on the New Constitution and on the Federal and State Conventions by a Columbian Patriot*, *reprinted in* 4 Storing, *supra* note 62, at 271, 275 (“[R]esponsibility is the great security of integrity and honour; and . . . annual election is the basis of responsibility.”). According to the Federal Farmer, annual elections were the norm everywhere except South Carolina. *See* Letter from the Federal Farmer (Jan. 12, 1788), *reprinted in* 2 Storing, *supra* note 62, at 294, 299.

129. Luther Martin’s Information to the General Assembly of Maryland, *reprinted in* 2 Storing, *supra* note 62, at 27, 46; *see also* Essay by Cornelius (Dec. 11, 1787), *reprinted in* 4 Storing, *supra* note 62, at 139, 140 (observing that a lack of recall mechanism leaves no way for “the citizens or the legislature of any particular State . . . to call [a member of Congress] to account” (emphasis omitted)).

130. *See* Borowiak, *supra* note 103, at 1008.

131. *See id.* (“[M]any Anti-Federalists . . . argued that states should retain the authority to recall senators.”).

recalled and censured for their misconduct . . . .”<sup>132</sup> Agrippa expressed the fear that foreign nations would be able to purchase the votes of members of any legislative assembly not “continually exposed to a recall.”<sup>133</sup> In short, the state power to recall its Senators would be an antidote to the “small degree of responsibility” produced by the Constitution.<sup>134</sup>

#### 4. Epistemological and Identity Gaps

Most important for purposes of enhancing accountability is the reduction of the gap between governors and governed with respect to the transfer of knowledge between them.<sup>135</sup> In order to hold their elected officials to account, the people must first know what their representatives are doing.<sup>136</sup> In order to properly serve their constituents in a way that makes them accountable, representatives must know of their needs and wants.<sup>137</sup> This understanding must be deep and profound, not superficial.<sup>138</sup> Differences of class, background, and experience can be insuperable obstacles to the acquisition of knowledge in both directions.

The Anti-Federalists predicted that such obstacles would necessarily arise from the structure of representation under the Constitution. They feared that the only people who could get elected in the large districts necessary in an extended polity would not be truly representative of their constituents. Instead, “men of the elevated classes in the community only can be chosen.”<sup>139</sup> This “natural aristocracy” would be out of touch with the

132. Letter from the Federal Farmer (Jan. 10, 1788), *reprinted in* 2 Storing, *supra* note 62, at 286, 289; *see also* Essay of Brutus (Apr. 10, 1788), *reprinted in* 2 Storing, *supra* note 62, at 442, 445 (“It seems an evident dictate of reason, that when a person authorises another to do a piece of business for him, he should retain the power to displace him, when he does not conduct according to his pleasure.”).

133. Letter of Agrippa to the People of Massachusetts (Jan. 8, 1788), *reprinted in* 4 Storing, *supra* note 62, at 91, 91–92.

134. Speech by Melancton Smith (June 25, 1788), *reprinted in* 6 Storing, *supra* note 62, at 164, 165–66.

135. *See* Borowiak, *supra* note 103, at 1009 (“Accountability institutions are bound up with the production and transmission of knowledge.”).

136. *See id.* (“Whatever their skills and good intentions, leaders depend upon citizens to detect abuses . . . .”).

137. *See* Speech by Melancton Smith (June 21, 1788), *reprinted in* 6 Storing, *supra* note 62, at 155, 157 (asserting that representatives should “resemble those they represent; they should . . . possess the knowledge of their circumstances and their wants; sympathize in all their distresses, and be disposed to seek their true interests.”); *see also* Daniel Walker Howe, *Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding*, 84 NW. U.L. REV. 1, 4 (1990) (“Anti-Federalists thought a representative should resemble his constituents, to make sure he shared their concerns.” (footnote omitted)).

138. *See* McWilliams, *supra* note 114, at 27 (“Mere information did not substitute for common experience and shared understandings.”).

139. Letter from the Federal Farmer (Oct. 10, 1787), *reprinted in* 2 Storing, *supra* note 62, at 234, 235; *see* Letter from the Federal Farmer (Jan. 4, 1788), *reprinted in* 2 Storing, *supra* note 62, at 275, 276 (“[W]hen we call on thirty or forty thousand inhabitants to unite in giving their votes for one

poor and middling classes; it “could have no real understanding of the needs and interests of the ordinary people.”<sup>140</sup> Instead, representatives would work to further only the interests of their own social and economic class.<sup>141</sup>

Indeed, all of the other gaps in representation were considered problematic precisely because they led to the gaping epistemological and identity divide between the aristocratic representatives and their middling constituents. Thus, Brutus decried the sheer physical distance between representatives and represented because it would lead the former to become alienated to the sensibilities “of the middling class of people.”<sup>142</sup> Regarding the scale of representation, Federal Farmer summarized the prevailing view well:

[A] small representation can never be well informed as to the circumstances of the people, the members of it must be too far removed from the people, in general, to sympathize with them, and too few to communicate with them: a representation must be extremely imperfect where the representatives are not circumstanced to make the proper communications to their constituents, and where the constituents in turn cannot, with

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man, it will be uniformly impracticable for them to unite in any men, except those few who have become [sic] eminent for their civil or military rank, or their popular legal abilities . . . .”); Speech by Melancton Smith (June 21, 1788), *reprinted in* 6 Storing, *supra* note 62, at 155, 157 (observing that the Constitution was so structured that representatives would come from “the natural aristocracy” rather than “the middling class”); *see also* Kenyon, *supra* note 113, at 11 (“It was the contention of the Anti-Federalists that because of the small size of the House of Representatives, the middle and lower orders in society would not be elected to that body, and that consequently this, the only popular organ of the government, would not be democratic at all.”); Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 343–44 (1982) (book review) (“[R]epresentatives from the middle class, the Anti-Federalists believed, could be elected only in a system that relied on real knowledge of the character of candidates, rather than on reputation across a large district.”).

140. Wilmarth, *supra* note 62, at 1278; *see* Letter of Centinel to the Freemen of Pennsylvania, *reprinted in* 2 Storing, *supra* note 62, at 136, 142 (decrying the ability of representatives to learn “of the wants, local circumstances and sentiments of so extensive an empire”); John DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts*, *reprinted in* 4 Storing, *supra* note 62, at 24, 27. “Can this Assembly be said to contain the sense of the people? . . . Can [your representative] be presumed knowing to your different, peculiar situations . . . ? Or is there any possibility of giving him information? All these questions must be answered in the negative.” *Id.* at 27; *see also* MAIN, *supra* note 89, at 129 (“[I]f a state included a large area, the representatives could not know the minds of the people, the local conditions and needs.”); Rose, *supra* note 83, at 90 (citing Anti-Federalist concern that only members of the “wellborn and influential upper class” could be elected in large districts and that they would have “no feel for the ordinary citizen’s needs and wishes”).

141. *See* Wilmarth, *supra* note 62, at 1278; *see also* Nedelsky, *supra* note 139, at 346 (“[T]he Anti-Federalists had no confidence that the ‘few’ would serve the interests of all.”).

142. Essay of Brutus (Apr. 10, 1788), *reprinted in* 2 Storing, *supra* note 62, at 442, 444; *see also* Letter from the Federal Farmer (Jan. 10, 1788), *reprinted in* 2 Storing, *supra* note 62, at 286, 289 (observing lack of “a sense of dependence and responsibility” of representatives serving “several hundred miles distant from their states”).



tolerable convenience, make known their wants, circumstances,  
and opinions, to their representatives . . . .<sup>143</sup>

And even if some common persons might manage to gain election to Congress, they would “become strangers to the very people choosing them” during the relatively long terms of office provided for in the Constitution.<sup>144</sup>

#### *D. The Anti-Federalists and the Obligations of Self-Government*

It follows from the Anti-Federalist vision of accountability as a necessary concomitant to self-government that they saw active engagement in the polity not only as a right but as a responsibility. Indeed, citizen participation in government is the flipside of accountability: for representatives to be held to account by their constituents, citizens owe it to themselves, to each other, and to the polity to be engaged enough politically to hold their representatives to account.<sup>145</sup> The Anti-Federalists recognized the operation of accountability mechanisms upon both governors and governed as “thoroughly intertwined.”<sup>146</sup> Such mechanisms not only hold representatives responsible to the people, but they cause the people “to engage or disengage from politics, and they can develop or leave undeveloped the skills of collective political action.”<sup>147</sup>

Thus, the Anti-Federalists believed that “accountability depends upon the active and meaningful participation of citizens,”<sup>148</sup> and they sought governmental structures that facilitated participatory government. As Jennifer Nedelsky has written:

The Anti-Federalists . . . saw that an actively engaged citizenry could govern and be governed very differently from a citizenry confined to the relatively passive role of periodically selecting representatives. Engaged citizens could be expected both to understand the issues of public policy confronting government and to act on them in a spirit of commitment to the

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143. Letter from The Federal Farmer (Dec. 31, 1787), *reprinted in* 2 Storing, *supra* note 62, at 264, 268–69; *see also* Letter from Centinel to the Freemen of Pennsylvania, *reprinted in* 2 Storing, *supra* note 62, at 136, 142 (“The number of representatives (being only one for every 30,000 inhabitants) appears to be too few, either to communicate the requisite information, of the wants, local circumstances and sentiments of so extensive an empire.”); Borowiak, *supra* note 103, at 1009 (“A relatively small number of representatives would mean a greater knowledge gap between individual citizens and their representatives . . .”).

144. John DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts*, *reprinted in* 4 Storing, *supra* note 62, at 24, 28.

145. *See* Borowiak, *supra* note 103, at 1010 (“[G]overnment is not the only object of control: accountability institutions can also have controlling effects on citizens.”).

146. *Id.*

147. *Id.*

148. *Id.* at 999.

public good—a public good which they had helped shape and thus would see as including them.<sup>149</sup>

Seen in this light, active participation in government is not only a benefit of living in a republican society but also an obligation.<sup>150</sup> The responsibility of active participation in government affairs forces us into a communal relationship with others who are also seeking their vision of the public good.<sup>151</sup> Thus, political activity not only forces us to “think about the public interest and how a certain view of the public interest may better serve one’s private interest,” but also requires that we engage in “a kind of communal dialogue” with others.<sup>152</sup>

But the obligation to engage in participatory democracy goes beyond the mere requirement that we talk about the issues with others, for self-government is often neither easy nor enjoyable.<sup>153</sup> Rather, true self-government is messy, contentious, and uncomfortable. Political debate often centers around “basic moral questions about which citizens typically hold rather strong opinions.”<sup>154</sup> Self-government forces us to “think[] through tough moral choices,”<sup>155</sup> to articulate the reasons for our positions, to confront others who hold opposite views, to evaluate and re-evaluate our own positions, and—what is sometimes most difficult of all—to change our minds.<sup>156</sup> In short, self-government forces us, to put a spin on Rousseau’s trenchant epigram, to be free.<sup>157</sup>

The benefit of taking up these obligations is the cultivation of the civic virtue necessary to continue to be a free and participating member of a community.<sup>158</sup> Members of the polity benefit from “having . . . to puzzle

149. Jennifer Nedelsky, *Democracy, Justice, and the Multiplicity of Voices: Alternatives to the Federalist Vision*, 84 NW. U. L. REV. 232, 234 (1989); see also Borowiak, *supra* note 103, at 1010 (“[F]rom the perspective of institutional efficacy and good governance, maintaining a culture of citizen involvement is crucial.”); Nedelsky, *supra* note 139, at 344 (“The Anti-Federalists wanted a government in which the people would take an active, responsible part.”).

150. See Murray Dry, *The Case Against Ratification: Anti-Federalist Constitutional Thought*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION, *supra* note 78, at 271, 276 (“The citizenship requirement suggests the need for actual participation in government by all citizens . . .”).

151. See McDowell, *supra* note 104, at 135 (observing that “the activity of politics” results in “each man [being] forced into community with other individuals”).

152. *Id.*

153. See *id.* at 140. “By leaving certain areas of public policy to the states and local communities, federalism forces us to be self-governing. That is not to say it is easy or enjoyable . . .” *Id.*

154. *Id.* at 141.

155. *Id.*

156. See *id.* at 141–42 (“[P]ublic debate forces a person to hone his arguments and bring his deeply held convictions into contact with others with similarly deeply held convictions on the other side.”).

157. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 26 (Rose M. Harrington trans., New York, G.P. Putnam’s Sons 1893) (1762).

158. See Howe, *supra* note 137, at 2 (relating Anti-Federalist thought to classic republicanism, which “taught that the health of a free commonwealth was based on the ‘virtue’ of its citizens, that is, their public spirit.”).

through some of the most vexing issues of political life.”<sup>159</sup> This benefit takes the form of “moral development and civic virtue.”<sup>160</sup> Thus, Anti-Federalist thought centered around the “deeply rooted conviction . . . that the direct participation of citizens in self-government is essential to the preservation of republican values and civic virtue.”<sup>161</sup> This vision of self-government encompasses, but goes far beyond, the instrumental claim that participatory government benefits the individual by tending to protect his or her interests.<sup>162</sup>

The cultivation of civic virtue, in turn, is instrumental to preserving political liberty.<sup>163</sup> Indeed, the Anti-Federalists thought civic virtue, self-government, and political liberty to be inextricably intertwined.<sup>164</sup> By stark contrast, a form of government that did not include strong participatory elements would erode civic virtue, leading to “an unhealthy dependence among the people on the government.”<sup>165</sup> Thus, “[t]he true foundation of individual liberty . . . lay in a structure of government that demanded a more immediate involvement in the political affairs of the community.”<sup>166</sup>

The Anti-Federalists believed that the type and extent of political participation necessary to cultivate civic virtue, and secure liberty, could be achieved only on a small scale.<sup>167</sup> State and local government offer far more opportunities for participation than does a distant central government.<sup>168</sup> Moreover, as one engages in political participation, one forms ties with

159. McDowell, *supra* note 104, at 142.

160. *Id.*

161. Wilmarth, *supra* note 62, at 1318; *see also* Cornell, *supra* note 77, at 54–55 (“The defining characteristic of civic republicanism was the defense of virtue, exemplified by active participation in the public sphere . . .”); Nedelsky, *supra* note 149, at 234 (noting the “important links between the Anti-Federalists’ understanding of civic virtue and their commitment to a participatory form of republican government”).

162. *See* Nedelsky, *supra* note 149, at 239 (“[F]or the Anti-Federalists, participation was not merely instrumental to the end of protecting private rights.”).

163. *See* McDowell, *supra* note 104, at 125. One should recognize, however, that the Anti-Federalists saw civic engagement not merely as instrumental to political liberty but also as a good in itself. *See* Nedelsky, *supra* note 139, at 345 (“The responsibility of the people for their own collective welfare and government was necessary for the security of individual rights but also had intrinsic value.”).

164. *See* McDowell, *supra* note 104, at 126 (observing that to the Anti-Federalists “political liberty and civic virtue were inseparable”); Nedelsky, *supra* note 139, at 345 (“[T]ruly free men control their own destiny and govern their own affairs, both public and private.”).

165. McDowell, *supra* note 104, at 128.

166. *Id.*

167. *See id.* at 127 (noting Anti-Federalist belief that the “opportunity for involvement” and “participatory administration” were possible only in small republics); Nedelsky, *supra* note 139, at 345 (observing that the values of political engagement, leading to the cultivation of civic virtue, “could be realized only in a relatively small community”); Rose, *supra* note 83, at 90 (“Republics . . . which depended on civic participation, were necessarily small.”); *see also* Kenyon, *supra* note 113, at 6 (stating Anti-Federalist “belief that republican government was possible only for a relatively small territory”).

168. McDowell, *supra* note 104, at 140–41.

one's neighbors and with the community as a whole.<sup>169</sup> The public-spiritedness that springs from these ties “is far more easily cultivated in a small republic than in a large one.”<sup>170</sup> In a larger political community, participation is limited to voting every several years, and the skills associated with public debate and with holding government officials to account become atrophied.<sup>171</sup> Ties among individuals and between individuals and the polity are lost, and the people become passive and begin to consider themselves as subjects rather than citizens.<sup>172</sup> The greater the distance—both literally and figuratively—between the governors and the governed, the greater the risk that civic virtue would wither and die.<sup>173</sup> And where civic virtue dies, governments could rule only by force, not persuasion,<sup>174</sup> “and both justice and republican liberty would be lost.”<sup>175</sup>

Their focus on the rights and responsibilities of self-government explains why the Anti-Federalists struggled so mightily to retain state autonomy. A political structure that allowed for active and sustained political engagement by the citizenry, the Anti-Federalists contended, would not be possible “in a nation as large as the United States.”<sup>176</sup> Thus, the fundamental flaw in the Constitution was in “shifting the locus of power from the States, where genuine republican government was possible, to a central government, where it was not.”<sup>177</sup> Only the preservation of state autonomy vis-à-vis the federal government could be reliably thought to also preserve local self-determination.<sup>178</sup>

One could argue that, even during the ratification period, the States were far too big to effectively foster the type of robust civic republicanism

169. *See id.* at 135 (noting the Anti-Federalist belief that as one engages in civic participation, “the individual is pulled closer both to his fellows and to his polity,” resulting in a “welding of man to man, and of citizen to country”).

170. *Id.*

171. *See* Borowiak, *supra* note 103, at 1010 (“When citizens are expected to engage with government only by voting every two or four years, the skills of demanding that government account for its activities go underdeveloped.”).

172. *See* McDowell, *supra* note 104, at 139–40 (“The people will cease to feel much a part of public affairs; they will come to consider themselves . . . more as the subjects of a sovereignty than as members of a political community.”); McWilliams, *supra* note 114, at 30 (“[L]arge-scale politics tended to produce . . . passive citizens pre-occupied with private life.”).

173. *See* Nedelsky, *supra* note 149, at 241 (“The Anti-Federalists focused on the threat to justice and liberty posed by a government so distant from its citizens that civic spirit could not thrive.”); *see also* CRAIG T. BOROWIAK, ACCOUNTABILITY & DEMOCRACY: THE PITFALLS AND PROMISE OF POPULAR CONTROL 43 (2011) (“[T]he Anti-Federalists feared that a more distant government would eviscerate the participatory energies necessary for upholding and defending the republican spirit.”).

174. *See* Nedelsky, *supra* note 149, at 234 (“The failure to [foster civic spirit] could only lead to a government based on force rather than persuasion.”).

175. *Id.* at 241.

176. Wilmarth, *supra* note 62, at 1277.

177. Nedelsky, *supra* note 139, at 345.

178. McDowell, *supra* note 104, at 126 (“[T]he Antifederalists urged the maintenance of the states with sovereignty sufficient to be truly self-governing communities.”).

the Anti-Federalists had in mind.<sup>179</sup> Indeed, Alexander Hamilton made that very point.<sup>180</sup> However, this misconceives the Anti-Federalist criticism of the Constitution. They recognized that the type of direct democracy that would optimize both accountability and civic virtue was impossible, even on a state-wide level.<sup>181</sup> But they asserted that leaving the locus of power generally at the state level would be a closer approximation to direct democracy than reposing that power in a distant central government.<sup>182</sup> For them, representative democracy, even at the state level, was, “at best, a necessary evil.”<sup>183</sup> It was, in short, “a second-best substitute for local self-government,”<sup>184</sup> but better than the Federalist alternative.

In sum, the Anti-Federalist’s plan A—direct democracy—was impracticable. Their plan B—maintenance of a confederal system that reposed ultimate political authority in the several States—was narrowly defeated in the key States of Massachusetts, New York, and Virginia. But their plan C was adoption of the Constitution with a Bill of Rights that would tie federal liberties to state norms, at least with respect to the sensitive and quintessentially local issue of crime and punishment.<sup>185</sup> Here, the Anti-Federalists finally succeeded.

#### IV. “CAN WE GET THE DEATH PENALTY BACK HERE IN VERMONT?”

*United States v. Jacques* is precisely the type of case the Anti-Federalists feared when they opposed the Constitution: the use of broad, sweeping, and nebulous constitutional language to support federal jurisdiction over an essentially intrastate crime in order to impose a punishment of a kind not authorized by the people of the State. This assumption of federal power over what is in essence a state crime results in a shift of political power from local, more accountable representatives to more distant, less accountable representatives. And this shift in power

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179. See Nedelsky, *supra* note 149, at 237 (“One criticism of the Anti-Federalists is that their argument that republican governments require small scale political units was self-defeating because even in 1787 the states already were too big for the Anti-Federalist program to work.” (footnote omitted)); see also Kenyon, *supra* note 113, at 39 (“Th[e] Rousseauistic vision of a small, simple, and homogeneous democracy may have been a fine ideal, but it *was* an ideal even then.”).

180. See THE FEDERALIST NO. 9 (Alexander Hamilton); see also Rose, *supra* note 83, at 94 (“[A]s Hamilton quite trenchantly pointed out, the states were themselves too large for the kind of republicanism that the Anti-Federalists seemed to have in mind.”).

181. See, e.g., Letter from Cato to the Citizens of the State of New York, *reprinted in* 2 Storing, *supra* note 62, at 109, 111 (“The extent of many states in the Union, is at this time, almost too great for the superintendence of a republican form of government . . .”).

182. See Nedelsky, *supra* note 139, at 343 (“The Anti-Federalists acknowledged that direct democracy was not practicable, but they wanted representation to approximate it as closely as possible.”).

183. Wilmarth, *supra* note 62, at 1277.

184. McWilliams, *supra* note 114, at 12.

185. See *supra* Part III.B.

occurs in the context of one of the great moral issues of this or any other age, the death penalty, removing from the local polity the responsibility of making this tough moral call for itself. The result is the degradation of civic virtue and, with it, political liberty.

Let us begin with the Federal Kidnapping Act. The Act renders a kidnapping, traditionally a local concern, a federal crime on the flimsiest of connections to any national interest: use of any “means, facility, or instrumentality of interstate . . . commerce.”<sup>186</sup> Thus, purely intrastate kidnappings become federal crimes by virtue merely of the perpetrator’s use of the mail, telephone, wireless communications, or internet, or perhaps even an automobile.<sup>187</sup> Pursuant to current Commerce Clause<sup>188</sup> jurisprudence, this may well be within Congress’s power.<sup>189</sup>

But it is precisely this use of federal power that most concerned the Anti-Federalists and that prompted them to carve out criminal justice as a state prerogative. They feared the use of some of the more sweeping language of the Constitution to create a parallel universe of federal criminal law.<sup>190</sup> Recall Patrick Henry’s warning that “Congress[,] from their general powers[,] may . . . legislate in criminal cases, from treason to the lowest offense, petty larceny.”<sup>191</sup> But it was not simply the existence of this parallel system of criminal law that worried Henry and others like him; it was the fact that in this parallel system, the constraints developed by the States would not apply. Two types of constraints, in particular, were absent and were placed in the Bill of Rights precisely to placate the Anti-Federalists: constraints on the procedures by which crimes would be tried and constraints on the punishments to be meted out.<sup>192</sup> *Jacques* represents the sum of the Anti-Federalists’ fears: use of sweeping congressional power to impose death upon a Vermont citizen when the people of Vermont have rejected that punishment wholesale.

186. 18 U.S.C. § 1201(a)(1) (2006).

187. See *supra* text accompanying note 25.

188. See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power [t]o regulate Commerce . . . among the several States . . .”).

189. See generally Michele M. Campbell, *The Kids Are Online: The Internet, the Commerce Clause, and the Amended Federal Kidnapping Act*, 14 U. PA. J. CONST. L. (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1837631](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1837631) (defending the constitutionality of the 2006 amendments to Federal Kidnapping Act). The district court in *Jacques* itself has ruled that the Act is a legitimate exercise of Congress’s Commerce Clause power. See *United States v. Jacques*, No. 2:08-cr-117-01, 2011 WL 1706765, at \*7–12 (D. Vt. May 4, 2011) (order denying motion to dismiss count one).

190. See Herbert Storing, *What the Anti-Federalists Were For*, in 1 Storing, *supra* note 62, at 1, 28 (“The broad grants of power, taken together with the ‘supremacy’ and ‘necessary and proper’ clauses, amounted, the Anti-Federalists contended, to an unlimited grant of power to the general government to do whatever it might choose to do.”).

191. Speech of Patrick Henry (June 16, 1788), reprinted in 5 Storing, *supra* note 62, at 246, 248.

192. See *supra* text accompanying notes 97–102.

But that begs the question whether the people of Vermont *have* rejected capital punishment. Certainly, there are some, such as the pseudonymous internet poster whose quote begins this piece, who embrace capital punishment. Who, then, best represents the majority sentiment in Vermont? Vermonters are represented in their state legislature by 180 people: 150 in the House of Representatives<sup>193</sup> and 30 in the Senate.<sup>194</sup> Given Vermont's 2010 population of 625,741,<sup>195</sup> there is one Senator for every 20,858 Vermonters and one House member for every 4,172 Vermonters. Senators and members of the Vermont House are each elected for two-year terms.<sup>196</sup> They meet in Montpelier,<sup>197</sup> about a two-hour drive from either Norton in the northeast corner of the State or Brattleboro in the south.<sup>198</sup>

By contrast, Vermonters are represented by a single member of the U.S. House of Representatives<sup>199</sup> and two U.S. Senators.<sup>200</sup> Accordingly, the ratio of representation is 625,741 to one in the House and 312,871 to one in the Senate. However, this last figure is somewhat misleading because each of Vermont's two U.S. Senators is elected at large from the entire State and so each represents all 625,741 Vermonters simultaneously. Like Vermont's state senators and representatives, its sole Representative in the U.S. House is elected biennially.<sup>201</sup> Its two U.S. Senators, however, are elected to six-year terms.<sup>202</sup> It is over 500 miles—more than a nine-hour drive—from Randolph, Vermont, where Brooke Bennett was murdered, to Washington, DC.<sup>203</sup>

On every objective measure, therefore, Vermonters' representation in the central government suffers from far greater accountability deficits than their representation in Vermont. Their federal representatives represent 150 times as many people, are about 4.5 times more physically distant, and two

193. See VT. CONST. ch. II, § 13.

194. See *id.* ch. II, § 18.

195. See U.S. CENSUS BUREAU, 2010 CENSUS: VERMONT PROFILE 1 (2010), available at [http://www2.census.gov/geo/maps/dc10\\_thematic/2010\\_Profile/2010\\_Profile\\_Map\\_Vermont.pdf](http://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_Vermont.pdf). It is worthwhile noting that Vermont's 2010 population (625,741) is *smaller* than the 1790 population of Virginia (747,610), home of George Mason and Patrick Henry. See *Schedule of the Whole Number of Persons Within the Several Districts of the United States*, *supra* note 85, at 3.

196. See VT. CONST. ch. II, § 46.

197. See *Welcome to Vermont's Historic State House*, VERMONT STATE LEGISLATURE, <http://www.leg.state.vt.us/sthouse/sthouse.htm> (last visited Nov. 26, 2011).

198. Calculating Driving Time from Montpelier, VT to Norton, VT and Brattleboro, VT, MAPQUEST, <http://www.mapquest.com> (follow "Get Directions" hyperlink; then search "A" for "Montpelier, VT" and search "B" for "Norton, VT"; then follow "Get Directions" hyperlink; then search "A" for "Montpelier, VT" and search "B" for "Brattleboro, VT"; then follow "Get Directions" hyperlink).

199. See *Directory of Representatives*, UNITED STATES HOUSE OF REPRESENTATIVES, [http://www.house.gov/representatives/#state\\_vt](http://www.house.gov/representatives/#state_vt) (last visited Nov. 26, 2011).

200. See U.S. CONST. art. I, § 3, cl. 1.

201. See U.S. CONST. art. I, § 2, cl. 1.

202. See U.S. CONST. art. I, § 3, cl. 1.

203. See MAPQUEST, *supra* note 199.

of the three serve terms that are three times longer. While a determination of the relative epistemological and identity gaps of Vermont's state and federal representatives would be far more complex, and is far beyond the modest aims of this Article, there is little reason to doubt the Anti-Federalist insight that these gaps follow inexorably from the other three just mentioned.

The point here is not that Vermont's federal representatives do not adequately represent their constituents' interests on this particular issue. It may well be that those three individuals have not acquiesced in the reintroduction of the death penalty in Vermont by the federal government but that their votes have been overwhelmed by those of their 532 colleagues. The point is the more modest one that the absence of the death penalty in Vermont is far more likely to be indicative of the views of the majority of Vermonters than is the presence of the death penalty at the national level. There is powerful evidence that Vermont does not have the death penalty because the people of that State, by and large, do not want it.

Whether the murder of Brooke Bennett would have spurred political action on the part of some Vermonters to seek a change in the law can never be known. Vermont is to have the death penalty in any event, at least in that growing category of cases that are prosecutable as federal murders. At least as to such cases, the sentiments of Vermonters on the death penalty—for or against, static or changing—are utterly irrelevant. As long as the federal government can step in and seek to impose the death penalty on the State's worst killers, there is no need for Vermonters to consider, or reconsider, this most vexing of legal and moral issues. Civic engagement on the part of those against the death penalty is futile; on the part of those in favor of the death penalty, it is unnecessary. It is little wonder that the pseudonymous poster quoted at the beginning of this piece makes a plea for the return of the death penalty to Vermont into the echo chamber of the internet rather than the legislative chamber in Montpelier.

*United States v. Jacques*, then, ultimately represents a loss of political responsibility for the people of Vermont. The responsibility for making one of the most important—and therefore, most difficult—decisions regarding crime and punishment has been taken from them. Vermonters are left with the responsibility of “regulating the height of . . . fences and the repairing of . . . roads.”<sup>204</sup> This is precisely the result the Anti-Federalists sought to avoid by demanding, as a concession for the price of union, a Bill of Rights filled with high hurdles to federal prosecution, including a provision that ties federal punishment practices to state norms.<sup>205</sup> Only by reading the

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204. Speech by Melancton Smith (June 25, 1788), *reprinted in* 6 Storing, *supra* note 62, at 164, 166.

205. A complete defense of this position, as well as a complete response to all possible objections, are beyond the modest aims of this Article. More elaborate discussions are contained in Mannheim,



Cruel and Unusual Punishments Clause in the context of the full Anti-Federalist agenda can we come to see that imposing the death penalty upon Michael Jacques would be paradigmatically “unusual.”

#### CONCLUSION

There is something to be said for capital punishment. For some, the retributivist function of the criminal law demands that the very worst crimes—those which cause the greatest harm to society and for which the offender is most culpable—be punished with the ultimate sanction. Moreover, some econometric studies have shown that the death penalty does deter, saving perhaps as many as eighteen lives for each offender executed.<sup>206</sup> On the other hand, there is also something to be said for the abolition of the death penalty. The aforementioned studies are in sharp dispute.<sup>207</sup> Furthermore, whatever the retributivist benefit of capital punishment, it might be thought to be outweighed by the danger of wrongful executions and the simple moral sense that the intentional taking of a life is always wrong. There is something to be said, that is, for both sides. There is, however, little to be said for a looming, distant, central government imposing capital punishment where a majority of the local polity has rejected it.

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*supra* note 5, and in a forthcoming piece, Michael J.Z. Mannheimer, *Cruel and Unusual Federal Punishments*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1875868](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1875868).

206. See, e.g., Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

207. See generally Michael L. Radelet & Traci L. Lacoock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489 (2009).