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Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty in American Democracy

Cover Page Footnote

Professors James Fleming, Robert Kaczorowski and Benjamin Zipursky.

CONSTITUTION NOTWITHSTANDING: THE POLITICAL ILLEGITIMACY OF THE DEATH PENALTY IN AMERICAN DEMOCRACY

Steven H. Jupiter*

Introduction

The United States Constitution sometimes allows for ugly things. Through the years, the Supreme Court has occasionally permitted intuitively impermissible practices, such as racism,¹ sexism,² homophobia,³ and xenophobia,⁴ because it found no objection within the four corners of the Constitution. While the Court recognizes most of these practices as constitutionally offensive today, it is usually the Justices' perspectives that have changed, rather than the Constitution's text.⁵ The death penalty has suffered the Court's ideological vagaries as well. It has been felled, revived and revised by a succession of benches whose politics have shifted with the arrival of every new Justice.⁶

Unlike many other controversial practices, however, there is explicit textual authorization of the death penalty within the Constitution. The Fifth Amendment provides that "[n]o person . . . shall be deprived of life, liberty, or property without due process of

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1. See *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (finding the separate-but-equal doctrine of racial segregation permissible under the Equal Protection Clause).

2. See *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (finding that the "difference between the sexes" justified limits on the number of hours women may work).

3. See *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (finding permissible the prohibition of homosexual sodomy between consenting adults in private).

4. See *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944), *reh'g denied*, 324 U.S. 885 (1945) (finding permissible the internment of Japanese-Americans during World War II).

5. Language that at one time allowed racial segregation, for example, was found by a later bench to forbid it. *Plessy* was overruled by *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954), in which the Court held that the Equal Protection Clause forbade the separate-but-equal doctrine.

6. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam) (effectively invalidating all death penalty schemes as violating due process); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (finding death penalty constitutional once again); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976) (same); *Jurek v. Texas*, 428 U.S. 262 (1976) (same). For further discussion of these cases, see *infra* notes 55-68 and accompanying text.

law.”⁷ The implication of this clause is unambiguous: it is not beyond our government’s power to take a citizen’s life if the government meets certain standards of “due process.”⁸ Because there is explicit authorization of the death penalty within the Constitution, blanket challenges⁹ to the constitutionality of capital punishment can prevail only if they demonstrate an inherent, irremediable contradiction between governmental execution and another clause or principle, such as due process itself, equal protection, or cruel and unusual punishment.

Challenges to the constitutionality of capital punishment, however, succeed only as appeals to the Justices’ own political philosophies. As the Constitution prescribes no methodology for its own interpretation, the Court has broad discretion in making “sense” of the text and applying it to the issues at hand. Judiciary and laity alike understand “due process,” “equal protection,” and “cruel and unusual punishment” through idiosyncratic filters, rendering these principles susceptible of inconsistent application over time. Abolition¹⁰ of the death penalty through judicial mandate will last only as long as the tenures of politically sympathetic Justices.

The fact that the government has the constitutional authority to enact the death penalty does not necessarily mean that every jurisdiction will do so, but capital punishment is experiencing a renaissance of sorts. 1995 saw a record number of executions nationwide.¹¹ The death penalty has become a mantra of politicians and a rallying cry of the electorate.¹² Thirty-eight states,¹³ the

7. U.S. CONST. amend. V.

8. Members of the Supreme Court have explicitly acknowledged the textual authorization of the death penalty within the Fifth Amendment. See *Gregg*, 428 U.S. at 177 (opinion of Stewart, Powell, and Stevens, JJ.).

9. “Blanket challenges” denotes those challenges that seek to abolish the death penalty altogether rather than to vacate only a particular sentence. Every appeal from a capital sentence does not necessarily intend to make such sweeping changes in the law.

10. The terms “abolition” and “abolitionist” herein refer to the movement to abolish the death penalty and not to their more common usages with respect to slavery.

11. There were fifty-six executions nationwide in 1995, breaking the previous annual record of thirty-eight, set in 1993. See James Brooke, *Utah Debates Firing Squads in Clash of Past and Present*, N.Y. TIMES, Jan. 14, 1996, at 16; *Man Executed for 1978 Killing*, N.Y. TIMES, Sept. 20, 1995, at A18. The National Coalition to Abolish the Death Penalty predicts an increase to 100 executions in 1996. Brooke, *supra*.

12. See, e.g., Dan Morain, *Governor OK’s Vote to Expand Executions*, L.A. TIMES, Sept. 27, 1995, at A3; Doris Sue Wong, *Governor Refiles Bill for Death Penalty: Says “Moral Consensus” Favors Its Reinstatement*, BOSTON GLOBE, Mar. 11, 1995, at 15; Maria Newman, *Vacco Savors Victory as a Mandate for the Death Penalty*, N.Y. TIMES, Nov. 10, 1994, at B16; Ian Fisher, *Clamor over Death Penalty Dominates Debate on Crime*, N.Y. TIMES, Oct. 9, 1994, at 45.

District of Columbia, and the federal government all currently have death-penalty provisions in their criminal codes.¹⁴ The renewed popular appeal of the death penalty has triggered extensive public discourse.¹⁵ The public debates have tended, though, to focus on only three aspects of the death penalty: penological, ethical, and religious. While all these arguments are valid in their own right, the public debate has ignored the specifically political implications of the death penalty.

"Political," in this context, is used to describe those implications of capital punishment relating to the structure and authority of government.¹⁶ Penological arguments, in contrast, treat the practical effects of capital punishment, such as deterrence, public safety and cost-benefit analyses.¹⁷ Ethical arguments involve questions of

13. Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

14. New York State, long one of the most stalwart hold-outs, recently reinstated capital punishment, riding the resurgent wave of popular demand. See James Dao, *Death Penalty in New York Is Reinstated after 18 Years: Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1. Massachusetts, another state with a long history of legislative opposition to the death penalty, has recently come close to reinstating capital punishment. See Peter J. Howe, *Senate Votes to Restore Capital Punishment*, BOSTON GLOBE, May 24, 1995, at 26. The federal government under President Clinton has also broadened the scope of its death penalty, now encompassing crimes such as child pornography and civil rights offenses, among many others. See Federal Death Penalty Act of 1994, Pub. L. No. 103-322, tit. 6, 108 Stat. 1959 (codified at 18 U.S.C. §§ 3591-3598 (1995)).

15. See, e.g., David A. Kaplan, *Anger and Ambivalence*, NEWSWEEK, Aug. 7, 1995, at 25; Jack Greenberg, *Perspective on the Death Penalty*, L.A. TIMES, June 26, 1995, at B5; Mike Royko, *Sobering Thoughts on the Death Penalty*, CHI. TRIB., Apr. 12, 1995, at 3; *With Death Penalty, Less Is More*, CHI. TRIB., Mar. 12, 1995, at 2; David Nyhan, *The Cost of Death Penalty — It's a Killer*, BOSTON GLOBE, Mar. 10, 1995, at 23; Fred Bruning, *Feeling Good about the Death Penalty*, NEWSDAY, Mar. 1, 1995, at B4.

16. There is certainly some overlap among these different species of argument, but "political" is used in this Comment to describe those arguments that do not draw their force from religious beliefs or tenets, are not concerned mainly with the fairness of the death penalty as a practice, and which are not preoccupied with whether the death penalty does the job it is "supposed" to do. Penological and ethical arguments take for granted that capital punishment is within the government's sphere of political power; it is the particular manifestation that is problematic. That is, if the death penalty were an effective crime-stopper, cheaper, capable of accurate, fair, and consistent application, then most penological and ethical arguments against it would lose their steam. The salience of political arguments, however, would not diminish. If the government does not have the power to impose capital punishment as a matter of structure and vested authority, no perfection of technique or effect can rectify the problem.

17. There are several "classic" bases for punishment: deterrence, retribution, rehabilitation and incapacitation. Rehabilitation is obviously irrelevant to the present dis-

arbitrariness, racial and economic prejudices and retribution.¹⁸ Religious arguments raise issues of religious propriety.¹⁹ These arguments, however, do not address the most basic problem of capital punishment: the source of the government's power to execute. Instead of asking whether the death penalty is effective in its osten-

cussion because a dead criminal cannot be reformed. Incapacitation, in its severest manifestation, has also been invoked to justify the death penalty. It has been argued that if someone is a continued and incorrigible danger to society, the state ought not expend resources to maintain him or her in prison because the person is not "worth" the effort and expense. Capital punishment, it is claimed, is a cheaper alternative. However, it is usually less expensive to maintain someone in prison for life than to prosecute a capital case through all phases of appeal. Cost-benefit analyses of capital punishment tip in favor of abolition. Incapacitation is not a major argument in the death-penalty debate and does not warrant extended discussion here. "Moral education" has also been suggested as a justification for punishment. See Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984). According to this theory, "punishment sends a message to criminals, giving moral reasons as to why they should not behave in the ways which have occasioned the punishments." Lisa Anne Smith, *The Moral Reform Theory of Punishment*, 37 ARIZ. L. REV. 197, 197 (1995). This theory is also inapplicable to capital punishment because even if the wrongdoer learns his or her "lesson," there is no opportunity to put this new understanding into effect.

18. For a detailed analysis of the ethical arguments against the death penalty, see CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974). Black argues that "mistake and arbitrariness in death-penalty cases . . . are not fringe problems, susceptible to being mopped up by minor refinements in concept and technique, but are at the very heart of the matter and are insoluble by any methods now known or now foreseeable." *Id.* at 9-10. However, see *infra* Part I for a discussion of the Supreme Court's apparent rejection of Black's claim.

19. Not all religious arguments oppose capital punishment. The Bible, particularly the Old Testament, condones the death penalty in several places. For example, *Exodus* states: "He that smiteth a man, so that he die, shall surely be put to death." *Exodus* 21:12. There are also politics-minded religious arguments for capital punishment. See, e.g., Thomas J. Riley, *The Right of the State to Inflict Capital Punishment*, 6 CATH. LAWYER 279 (1960). Riley argues:

Only God, Who created human life, has the right to take it away. Since, however, the authority of the state derives ultimately from God, and is exercised in God's name, it is not inconsistent to hold that the state may claim the right, in the name of God, to take away human life in circumstances in which this would appear clearly to be in accord with God's own will.

Id. at 280. The circumstances under which government execution accords with "God's will," in Riley's view, are those where "a man, through his own fault, has endangered the right of the state to carry on its appointed functions," which are to protect citizens from the harm of others. *Id.* So the death penalty is divinely mandated for "criminal attack which endangers [society's] very foundations." *Id.* First-degree murder is the only crime which Riley specifically enumerates, but he believes the death penalty is justified for all crimes of "serious proportions." *Id.* at 281. Riley does not offer any clearer criteria than that and it is difficult, using his analysis, to know which crimes offend "God's will" and thus merit the death penalty. His larger point regarding the religious propriety of the death penalty is beyond the scope of academic critique because it is a matter of faith, though it is, of course, open to criticism on religious grounds.

sible purposes, or whether it is fairly or properly imposed, the public ought to ask whether the government should, or does, have the power to impose the death penalty at all, regardless of the penalty's status in the judiciary.

"Constitutional" is not a synonym for "good" or "just."²⁰ For example, if the Supreme Court determined that the Constitution did not prevent a state from prohibiting the administration of first aid, the Court would have no authority to override such a prohibition and declare the medical procedures legal. Nevertheless, the public would surely raise an eyebrow at the legitimacy of such a prohibition, despite the Court's tolerance of it. Similarly, a judicial designation of "constitutional" ought not quell public unrest regarding the legitimacy of the death penalty.²¹ The broader political implications of capital punishment cast serious doubts on its place in our system of constitutional democracy. Specifically, capital punishment raises fundamental questions about the proper role of the government, the source of the government's authority and the rights of the individual.

This Comment argues that the death penalty is inconsistent with underlying principles of American democracy and is thus illegiti-

20. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Thayer claimed that judicial determinations of "constitutionality" find only that there is no contradiction between challenged legislation and the text of the Constitution. Such findings say nothing about the worth or desirability of the legislation. *Id.* at 135. *But see* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). Bickel argued that the Supreme Court's designation of "constitutional" indeed lends an air of "prestige" and legitimacy to legislation "that may have been tentative in the conception or that [is] on the verge of abandonment in the execution." *Id.* at 129. In not invalidating legislation as unconstitutional, the Court is saying that the challenged law is consonant with "the principles whose integrity the Court is charged with maintaining" and that such consonance "is something." *Id.* Such arguments, though, (1) assume the righteousness of the Court's positions and ignore the possibility that the Justices may be motivated by forces other than justice itself, and (2) assume that the "principles" of the Constitution, as expounded by the Supreme Court, are themselves inherently worthy of unquestioning respect and reverence. These are assumptions which this Comment rejects. See *infra* Part II for further development of this line of argument.

21. For a discussion of the judiciary's role in shaping American political life, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 123-161 (1993). Sunstein argues that "the courts should usually be reluctant to intrude into politics." *Id.* at 123. For Sunstein, excessive judicial activism usurps the role of the citizen in what he calls our "deliberative democracy" because it leaves all questions of constitutionality to the courts, more specifically to the insular Supreme Court, whereas Sunstein believes these questions are more rightly decided through inclusive public deliberation. *Id.* at 133-35. The Constitution, in Sunstein's view, is not an internal memo passed among the Justices in their chambers, but rather a public document demanding public interpretation.

mate as a matter of political philosophy, despite its conceded constitutionality.²² Part I analyzes the Supreme Court's idiosyncratic treatment of challenges to capital punishment on grounds of due process, equal protection and cruel and unusual punishment, demonstrating the unreliability of such challenges. Part II examines in detail the death penalty's political implications for the American system of democracy and why those implications render capital punishment illegitimate in our society.²³ Part III discusses the role of the political process in the abolition of the death penalty. This Comment concludes that the death penalty ought to be rejected as a matter of political philosophy and that permanent abolition cannot be achieved through the traditional courtroom attacks. Lasting repeal of death penalty provisions can be realized only through a critical re-evaluation of the proper role of government and by legislative and popular commitment to those principles.

I. The Death Penalty and the Constitution

The Supreme Court began only recently to question the constitutionality of the death penalty. Before the Civil War, the Court rarely considered challenges to the death penalty based on the federal constitution.²⁴ Constitutional challenges to the death penalty have relied upon three grounds: (1) due process; (2) equal protection; and (3) cruel and unusual punishment. None has succeeded in permanently abolishing capital punishment as a nationwide practice because such challenges cannot overcome the powerful combination of explicit textual authorization and idiosyncratic judicial review.

A. Due Process

The Due Process clauses of the Fifth and Fourteenth Amendments provide that the government may not deprive any person of

22. This Comment deals only with the legitimacy of capital punishment in the American system of constitutional democracy. It makes no claims regarding the legitimacy of capital punishment in other political systems. There may be valid penological, ethical, and religious arguments for and against capital punishment in those systems, but the political arguments laid out herein are intended to apply only to the United States.

23. "Illegitimate" is not the same as "unjust." "Illegitimate" is a political designation whereas "unjust" is an ethical one. Death may, in some people's minds, be just deserts for certain crimes and still be an illegitimate punishment in a particular political system.

24. Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 KAN. L. REV. 1039, 1044 (1995).

life, liberty, or property without "due process of law."²⁵ These clauses prohibit the federal and state governments from behaving arbitrarily and capriciously. Due process, in the Supreme Court's jurisprudence, has evolved into two distinct species: procedural and substantive. Procedural due process, as its name suggests, guarantees fair process in all dealings between the government and the citizenry. Procedural rights guaranteed under the Due Process Clause include many in the area of criminal law, such as the right of a defendant to obtain exculpatory evidence gathered by the prosecution²⁶ and the right not to be convicted of a crime except upon proof beyond a reasonable doubt.²⁷

Substantive due process, by contrast, "incorporat[es] a general mandate to review the substantive merits of legislative and other governmental action" rather than merely evaluate the fairness or necessity of a particular procedure.²⁸ Under this application of due process, the Supreme Court may strike down legislation that does not violate any explicit constitutional provision but nevertheless offends certain unenumerated substantive rights that are integral to the American political scheme.²⁹ Examples of unenumerated rights that have been protected under the Court's substantive due process jurisprudence include the rights to contract,³⁰ abortion,³¹ contraception,³² and educational choice.³³ None of these rights has explicit textual support in the Constitution, but the Court was will-

25. U.S. CONST. amend. V.; U.S. CONST. amend. XIV.

26. See *Brady v. Maryland*, 373 U.S. 83 (1963). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Id.* at 87.

27. See *In re Winship*, 397 U.S. 358 (1970). "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

28. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 15 (1980).

29. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (stating that the Due Process Clause protects only those substantive rights deemed "fundamental" and "implicit in the concept of ordered liberty").

30. See *Lochner v. New York*, 198 U.S. 45 (1905) (holding that the Due Process Clause protects a citizen's right to form contracts). *Lochner* was expressly overruled by *West Coast Hotel, Inc. v. Parrish*, 300 U.S. 379 (1937), in which the Court held that there was no fundamental right to contract under the Constitution.

31. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the Due Process Clause protects a woman's right to abortion during the first six months of pregnancy).

32. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that the Due Process Clause protects all citizens' right to use contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the Due Process Clause protects married couples' right to use contraceptives).

33. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that the Due Process Clause protects the right of parents to send their children to private schools);

ing to infer their existence from other constitutional provisions and historical practices. Because substantive due process allows courts considerable legal flexibility — it allows them to recognize rights that arguably have no basis in the Constitution — it has not been universally embraced as a valid exercise of the judiciary's power.³⁴

Substantive due process, however, is not relevant to the Court's capital jurisprudence. As the text of the Constitution allows governmental infringement of a citizen's right to live,³⁵ there is no need, or authority, for the Court to inquire whether such a power is beyond the government's scope. The inquiry then progresses along procedural lines: whether the death penalty is being fairly and properly imposed. In the first due process challenge to the death penalty, though, the Supreme Court "interpreted the Constitution to impose virtually no restraints on the states' administration of their capital punishment systems."³⁶

In *Francis v. Resweber*,³⁷ for example, the Court rejected the due process challenge of a death row inmate who had suffered a failed attempt at electrocution in Louisiana and was scheduled for another round in the chair. He claimed that a second attempt would violate the Due Process Clause because it would put him twice in jeopardy of his life and would offend the cruel and unusual punishment provision of the Eighth Amendment.³⁸ The Court rejected

Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the Due Process Clause protects the right of parents to teach their children foreign languages).

34. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting) (stating that the Court's liberal application of substantive due process leads it toward "systematically eliminating checks upon its own power . . ."); *In re Winship*, 397 U.S. 358, 384 (1970) (Black, J., dissenting) (stating that when the Court applies the Due Process Clause to the substance of legislation, "our Nation ceases to be governed according to the 'law of the land' and instead becomes one governed ultimately by the 'law of the judges'"); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 32 (1990) ("[T]he Supreme Court will not abandon the notion [of substantive due process], despite demonstrations of its utter illegitimacy, precisely because it is an ever flowing fount of judicial power."); ELY, *supra* note 28, at 19 ("[T]he proper function of the Due Process Clause . . . [is] that of guaranteeing fair procedures.").

35. The Fifth Amendment permits the government to execute citizens. It requires only that the government act in accordance with notions of "due process." See *supra* notes 7-8 and accompanying text.

36. *McAllister*, *supra* note 24, at 1045.

37. 329 U.S. 459, 466 (1947).

38. *Id.* at 461. At the time *Francis* was decided, the Court had not yet held that the Eighth Amendment's prohibition of cruel and unusual punishments was applicable to the states. Accordingly, *Francis* was decided under the Due Process Clause of the Fourteenth Amendment, which specifically targets the states, even though the issue — cruel and unusual punishment — was facially an Eighth Amendment question.

the claim by stating: "Accidents happen for which no man is to blame."³⁹ The significance of *Francis* lies in the Court's refusal to consider whether electrocution itself violated due process. Instead, it relied on a nineteenth-century case, *In re Kemmler*,⁴⁰ in which it had found electrocution constitutionally permissible. That the Court was willing to rely on fifty-year-old precedent in a case that demanded consideration of current mores suggests a lack of judicial interest in capital punishment at that time.⁴¹

In *Solesbee v. Balkcom*,⁴² the Court allowed Georgia's governor to continue to appoint physicians to evaluate the sanity of death-row inmates for purposes of granting stays of execution. The inmate in *Solesbee* claimed that such appointments deprived him of due process by preventing him from consulting his own doctors and presenting his own evidence at a hearing.⁴³ The Court held that it did not offend due process for a state "to deem its Governor an 'apt and special tribunal' to pass upon" a defendant's sanity.⁴⁴ Such delegation of power, the Court stated, was in keeping with Anglo-American legal traditions.⁴⁵

In later due process cases, the Court began to set higher standards for governmental action. In a 1968 case, *United States v. Jackson*,⁴⁶ the Court invalidated that part of the Federal Kidnapping Act⁴⁷ (the "Act") leaving the imposition of the death penalty to the jury's discretion while laying out no procedure for its imposition on a defendant who either waived the right to a jury trial or pled guilty.⁴⁸ The Act exposed a defendant to risk of death only upon assertion of her constitutional right to trial by jury. The

39. *Id.* at 462.

40. 136 U.S. 436 (1890).

41. Under the Court's "cruel and unusual" jurisprudence, the Court must make moral determinations regarding the current social status of the challenged practices. See *infra* Part I.C. for an extended discussion of the Court's role under the Eighth Amendment. For a more detailed analysis of electrocution specifically, see Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551 (1994) (arguing that contemporary scientific knowledge of electrocution's physical effects and the frequency of "botched" attempts ought to render it unacceptable under the Eighth Amendment).

42. 339 U.S. 9, 13-14 (1950).

43. *Id.* at 8.

44. *Id.* at 12 (quoting *Nobles v. Georgia*, 168 U.S. 398 (1897)).

45. *Id.* For further discussion of the propriety of government-conducted psychiatric examinations in capital cases, see Welsh S. White, *Government Psychiatric Examinations and the Death Penalty*, 37 ARIZ. L. REV. 869 (1995).

46. 390 U.S. 570, 585 (1968).

47. 18 U.S.C. § 1201(a).

48. *Jackson*, 390 U.S. at 571.

Court held that the Act's procedural inconsistency imposed an "impermissible burden" on the accused in violation of due process because it forced her to choose between possible death and the guaranteed right to jury trial.⁴⁹ In another 1968 case, *Witherspoon v. Illinois*,⁵⁰ the Court held that it was unconstitutional for Illinois to exclude from murder trials potential jurors who professed opposition to the death penalty, stating that the death penalty could not be imposed by "hanging juries" and still "be squared with the Constitution."⁵¹ The Court held that Illinois had "stacked the deck" against the defendant by seating only those potential jurors who were in favor of capital punishment.⁵²

These two groups of cases — the earlier, more deferential ones and the later, more stringent ones — were decided by largely the same two assemblages of Justices.⁵³ As the overall political temperament of the Justices shifted from deference to the legislatures in matters of criminal law to increasing skepticism of the government's commitment to "due process," the holdings of the Court followed suit.⁵⁴ There should be no surprise in the consistency of a

49. *Id.* at 572.

50. 391 U.S. 510, 523 (1968).

51. *Id.* The *Witherspoon* Court held that prospective jurors in capital cases could be struck for cause if the jurors made it unmistakably clear "(1) that they would *automatically* vote against the imposition of capital punishment without any regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Id.* at 522 n. 21. In 1985, however, the Court relaxed the *Witherspoon* standard by ruling that the prosecution no longer needed to prove with "unmistakable clarity" that a juror would "automatically" vote against the death penalty. *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985). The new standard is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (footnote omitted).

52. *Witherspoon*, 391 U.S. at 523.

53. From 1947-1950, the bench comprised Fred M. Vinson, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, Wiley Rutledge, Harold H. Burton, Tom C. Clark, and Sherman Minton. The latter two replaced Rutledge and Murphy. In 1968, the Court included Earl Warren, Hugo L. Black, William O. Douglas, John M. Harlan, William J. Brennan, Jr., Potter Stewart, Byron R. White, Abe Fortas, and Thurgood Marshall.

54. It is also significant that the later cases were decided by the Warren Court, which earned a reputation for its protective stance toward the procedural rights of criminal defendants. *See, e.g.,* ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 7 (1978).

[The Warren Court] reformed numerous aspects of state and federal criminal procedure, significantly enhancing the rights of the accused, including juvenile offenders; it held that wire-tapping and eavesdropping are subject to the Fourth Amendment's prohibition against unreasonable searches and seizures, and that evidence obtained in violation of that prohibition may not

particular bench's holdings, but inconsistent notions of "due process" from one bench to another highlight the weaknesses in such courtroom attacks on the death penalty. Ideological shifting is especially jarring when it occurs with very little change in the Court's composition.

The Burger Court, for example, experienced a swift turn-around regarding the constitutionality of capital punishment. In 1971, the Burger Court decided *McGautha v. California*,⁵⁵ in which it upheld California and Ohio laws permitting juries to impose the death penalty without any judicial or statutory guidance. The convicted defendants claimed that the juries' unfettered discretion violated the Fourteenth Amendment's guarantee of due process.⁵⁶ The Court, however, stated: "Despite the undeniable surface appeal of the proposition, we conclude that the courts below properly rejected it."⁵⁷ The Court noted that the same challenge had been brought in many federal and state courts and no court had ever found it to possess any merit.⁵⁸ Furthermore, the Court asserted that jury discretion in capital cases was an established legal tradition.⁵⁹ "In light of history, experience, and the present limitations of human knowledge," the Court stated, "[it is] impossible to say

be admitted in state or federal trials; and it laid down a whole set of new rules governing the admissibility of confessions, and, in effect, the conduct of police throughout the country toward persons arrested on suspicion of crime.

Id. (footnotes omitted).

The Warren Court did, however, reject some due process claims early on. In *Williams v. Oklahoma*, 358 U.S. 576 (1959), for example, the defendant had kidnapped and murdered an Oklahoma man and had been convicted separately of the two crimes. He received life imprisonment for the former and the death penalty for the latter. *Id.* at 587. The Court held that it did not violate due process for the trial court to take the murder into account as an aggravating factor when determining the sentence for the kidnapping conviction. *Id.* at 586-87. In fact, no Supreme Court bench has ever held on any ground that it is unconstitutional to impose the death penalty for felony-murder. Felony-murder seems to be a "growth area" in capital punishment. The federal government has recently added to a host of serious federal crimes capital punishment provisions that are triggered by even the unintentional killing of someone during the commission thereof. See Federal Death Penalty Act of 1994, *supra* note 14.

55. 402 U.S. 183 (1971).

56. *Id.* at 196.

57. *Id.* (footnote omitted).

58. *Id.* at 203.

59. *Id.* at 199-201. The Court cited to *Andres v. United States*, 333 U.S. 740 (1948), in which it had found unconstitutional a jury instruction that conferred upon capital juries total discretion as to sentencing, and to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), in which it had forbidden Illinois to seat in capital juries only prospective jurors who supported the death penalty. For a more detailed discussion of *Witherspoon*, see *supra* notes 50-52 and accompanying text.

that . . . untrammelled [jury] discretion . . . in capital cases is offensive to anything in the Constitution."⁶⁰

In *Furman v. Georgia*,⁶¹ decided the very next year, the Court found unconstitutional the capital punishment procedures of Georgia and Texas, which, like those at issue in *McGautha*, also left solely to jury discretion whether a convicted defendant should receive death or imprisonment.⁶² In several opinions, the Justices gave varied reasons for invalidating the procedures, including arbitrariness,⁶³ the potential for racial discrimination,⁶⁴ and its perceived inherent cruelty.⁶⁵ The composition of the bench had changed somewhat from the year before, with Justices Powell and Rehnquist replacing Justices Harlan and Black, but seven of the nine *McGautha* Justices were still sitting on the Court. *Furman* effectively invalidated all discretionary capital punishment schemes, not just those of Georgia and Texas.⁶⁶ In response, thirty-five states, including Georgia and Texas, adapted their death penalty provisions to accommodate the Court's expressed concerns about unlimited jury discretion.⁶⁷ In 1976, the Court upheld three of the revamped schemes as no longer constitutionally offensive.⁶⁸

60. *McGautha*, 402 U.S. at 207.

61. 408 U.S. 238 (1972) (per curiam).

62. The Court decided *Furman* on both Eighth Amendment and Fourteenth Amendment (due process) grounds.

63. *Furman*, 408 U.S. at 256 (Douglas, J., concurring). The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

Id.

64. *Id.* at 366 (Marshall, J., concurring). It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate *Id.*

65. *Id.* at 287 (Brennan, J., concurring). "Death today is an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." *Id.*

66. All capital punishment schemes at that time granted juries the discretion to impose or withhold the death penalty.

67. See *Gregg v. Georgia*, 428 U.S. 153, 179-180 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

68. *Id.* at 207; *Proffitt v. Florida*, 428 U.S. 242, 260 (1976); *Jurek v. Texas*, 428 U.S. 262, 277 (1976). It is not the goal of this Part to examine individually each Justice's rationales, or to examine the Court's capital jurisprudence *in toto*, only to demonstrate the inherent instability of the Court's determinations with regard to capital

Due process cannot permanently resolve questions of the death penalty's legitimacy.⁶⁹ The Due Process Clause's literal protections against procedural abuses or failures are curative by nature. Because the text of the Due Process Clause allows the government to deprive a citizen of life under certain circumstances,⁷⁰ the courts may consider only whether the criminal justice system has failed a particular defendant or whether a particular statutory scheme is incapable of fair application. Though it may be relatively easy to demonstrate a single instance of procedural failure, it is prohibitively difficult to prove that there is absolutely no feasible process

punishment. For more detailed analyses of the Court's capital jurisprudence, see Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995); McAllister, *supra* note 24; Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 591 (1995); MARK TUSHNET, *THE DEATH PENALTY* (1994); Samuel J. M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought of the Justices' Positions*, 24 ST. MARY'S L.J. 1 (1992); Stephen Reinhardt, *The Supreme Court, the Death Penalty and the Harris Case*, 102 YALE L.J. 205 (1992); Diane Wells, *Federal Habeas Corpus and the Death Penalty: A Need for a Return to the Principles of Furman*, 80 J. CRIM. L. & CRIMINOLOGY 427 (1989); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); and Michael W. Combs, *The Supreme Court and Capital Punishment: Uncertainty, Ambiguity, and Judicial Control*, 7 S. U. L. REV. 1 (1980).

Justice Blackmun has openly bemoaned the Court's unstable capital jurisprudence. See *Furman v. Georgia*, 408 U.S. 238, 410 (1972) (Blackmun, J., dissenting) (objecting to the "suddenness of the Court's perception of progress in the human attitude" toward capital punishment during the year between *Furman* and *McGautha*); *Callins v. Collins*, — U.S. —, 114 S.Ct. 1127, 1131 (1994) (Blackmun, J., dissenting) (calling the Burger Court's "abrupt change of position" toward capital punishment "objectionable"). For a detailed discussion of Justice Blackmun's attitude toward the death penalty, see Randall Coyne, *Marking the Progress of a Humane Justice: Harry Blackmun's Death Penalty Epiphany*, 43 KAN. L. REV. 367 (1995).

69. Commentators have also lamented that "[t]he due process romanticism of the [capital punishment] trial has enabled us to to avoid acknowledging the inevitably unsystematic, irreducibly personal moral elements of the choice to administer the death penalty." Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 393 (1983). The apparent objectivity of "due process" offers "the illusion of a legal rule, so that no actor at any point in the penalty procedure need feel he has chosen to kill any individual." *Id.* The danger here is that the law will allow government officials and jurors to escape what would be, in any other setting, the crushing moral weight of imposing a death sentence. They need not address the morality of their actions because the law has already exonerated them. In a sense, this echoes the "Nuremberg" defense: that one was "just following orders." If the law permits such acts, the public often assumes that those acts are just or moral or that they have a duty to comply with the law without any consideration of its legitimacy. See Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 102-03 (1995) (noting that people often impute morality and justice to "legal norms" rather than conduct independent evaluations of a law's legitimacy).

70. See *supra* notes 7-8 and accompanying text.

by which a jurisdiction can fairly impose the death penalty under any circumstances.⁷¹ A state may save its flawed death penalty scheme by curing whatever procedural ill the courts have found therein, as shown by the swift remedial actions of Georgia and Texas following *McGautha*.⁷²

B. Equal Protection

The Fourteenth Amendment provides that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁷³ Under this clause, the government is required to treat similarly-situated persons equally.⁷⁴ Arguably enacted to protect only racial minorities, most particularly African-Americans,⁷⁵ the Equal Protection Clause is now seen as a general mandate of equality for all persons. Nevertheless, the courts still provide the greatest relief under the clause to racial, religious, and ethnic groups.⁷⁶

71. It has been argued, though, that the Due Process Clause mandates a "presumption of life" analagous to the recognized "presumption of innocence." See, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L. J. 351 (1984). This presumption of life "guarantees a convicted defendant the right to live incarcerated for life unless the prosecution demonstrates beyond a reasonable doubt that death is the only appropriate penalty for the defendant." *Id.* at 353. In theory, such a notion could preclude all imposition of the death penalty because life imprisonment without parole achieves many of the "rational" goals of execution, such as deterrence and incapacitation. However, it cannot contend with society's powerful emotional and psychological need for retribution. If a defendant were convicted of raping and murdering several children, for example, it would be unrealistic to expect jurors to set aside their moral outrage in deciding whether to execute or imprison. Imprisonment may prevent the defendant from committing additional rapes and murders, but it would not satisfy many people's desire for vengeance. Given the choice to execute in such circumstances, many jurors would probably vote to do so, even if every "rational" penological goal could be achieved through imprisonment.

72. For a refutation of this claim, see BLACK, *supra* note 18. Black claims that no matter the scheme or procedure, there will always be an unacceptably great risk of error and an inevitable measure of caprice in capital punishment.

73. U.S. CONST., amend. XIV, § 1.

74. While the Equal Protection Clause of the Fourteenth Amendment applies in its terms only to the states, the Court has held that its principles apply to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (forbidding "separate-but-equal" public schooling in the District of Columbia).

75. The original purpose of the Equal Protection Clause has been a matter of debate; although in the *Slaughter-House Cases*, 83 U.S. 36 (1873), the Court held that the Fourteenth Amendment, as well as the Thirteenth and Fifteenth, had "one pervading purpose . . . the freedom of the slave race . . ." *Id.* at 71.

76. See *Plyler v. Doe*, 457 U.S. 202, 217 (1982) (invalidating Texas law preventing children of illegal immigrants from attending public school). The courts use three types of test to determine the constitutionality of a challenged statute or practice:

Racial equal protection challenges to the death penalty are a recent innovation. The Court's first and, so far, only case brought on these grounds, *McCleskey v. Kemp*,⁷⁷ was decided in 1987. The convicted defendant, a black man who had been sentenced to death in Georgia, claimed that the state's capital punishment procedure was racially discriminatory because "persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers."⁷⁸ Despite a concededly accurate statistical study supporting the defendant's allegations,⁷⁹ the Court rejected the claim in a 5-4 decision.⁸⁰ A majority of the Court held that evidence of general racial disparity was not sufficient to sustain a claim under the Equal Protection Clause in this instance. The Court further required that the convicted defendant

strict scrutiny, heightened scrutiny, and rational basis. The courts apply the strict scrutiny test when the statute or practice involves a "suspect class," such as racial, religious, or ethnic groups, or impinges a fundamental right, such as free speech. This test places the burden on the legislature "to demonstrate that its classification has been precisely tailored to serve a compelling state interest." *Id.* The heightened scrutiny test is applied when the statute or practice allegedly makes "quasi-suspect" classifications, such as gender and illegitimacy. *Id.* Under the heightened scrutiny test, the statute or practice need only have a "substantial" relation to an "important" governmental interest. *Id.* at 217-18. The rational basis test is used for legislation affecting economic or social interests and not involving a suspect or quasi-suspect class and not infringing any fundamental rights. *See, e.g.,* *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Under the rational basis test, the burden falls to the plaintiff to prove that the government has acted in an "arbitrary and irrational way" in singling out the affected group or class of people and that there is no rational basis for the challenged statute or practice. *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1509 (1984).

77. 481 U.S. 279 (1987).

78. *Id.* at 291 (footnote omitted).

79. The defendant relied upon "the Baldus study," which indicated that in more than 2,000 murder cases defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases." The study also found that "the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. Similarly, [the study] found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims. . . . Thus, the Baldus study indicates that black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty. *McCleskey*, 481 U.S. at 286-87 (footnote omitted).

80. *Id.* at 299.

demonstrate that "the decisionmakers in *his* case acted with discriminatory purpose."⁸¹

Given the Court's holding in *McCleskey*, it is unlikely that another such blanket challenge will be brought any time soon. While a capital defendant who can prove racial discrimination in his particular case may prevail on an equal protection claim, the Court seems unwilling to entertain sweeping challenges on racial grounds.⁸² In addressing racial grievances case by case, overturning only individual sentences, the Court can preserve the constitutionality of the death penalty as an institution.⁸³

81. *Id.* at 292. The Court refused to infer discriminatory treatment of the defendant from the broad findings of the study. *Id.* at 297.

82. The Supreme Court has resisted such broad-based claims of racial disparity despite acknowledgment from Congress itself that "[t]here is compelling evidence from certain jurisdictions that the race of a defendant may be a factor governing the imposition of the death sentence." H.R. REP. NO. 458, 103d Cong., 2d Sess. 3 (1994).

83. Scholars have argued that there is an "inescapable equal protection problem" with regard to capital punishment. ELY, *supra* note 28, at 176. For Ely, the theoretical impossibility of ensuring even-handed imposition of the death penalty makes judicial abolition more attractive because the political process is, he asserts, inaccessible to those disproportionately disadvantaged by death penalty statutes: racial minorities and the poor. See also BLACK, *supra* note 18. However, both Ely and Black expressed these concerns before *McCleskey* — Ely in 1980 and Black in 1974. It is not clear if the Court's decision took any wind out of their sails. Ely's argument seems the more vulnerable to discredit by *McCleskey*. That is, he advocated resort to the courts in cases where minorities would not be able to protect their rights through our exclusive political process because the courts would be, he asserted, more likely to see and redress legal inequities which the majoritarian electorate either embraced or ignored. As far as capital punishment is concerned, Ely acknowledged that proven discriminatory imposition thereof in Arkansas, for example, would have little to say about the constitutionality of capital punishment in Montana, ELY, *supra* note 28 at 173, which is precisely the sort of logic the *McCleskey* Court used to reject the equal protection claim before it. It seems, though, that Ely expected the Court to come to an additional conclusion: that the mere possibility of invidious discrimination ought compel invalidation, especially given the undeniable gravity of capital punishment. *Id.* at 176. But the Court was unwilling to take that extra step. In fact, *McCleskey* does little to boost Ely's theory that judicial activism is desirable when there are "failures of representation, in that those who make the laws (by refusing effectively to make the laws) have provided a buffer to ensure that they and theirs will not effectively be subjected to them." *Id.* at 177. It seemed the ideal opportunity for the Court to champion the political underdog, but the possibility, even probability, of discriminatory application was not enough to convince the Justices to abolish capital punishment.

C. Cruel and Unusual Punishment

1. An Eighth Amendment Overview

The Eighth Amendment prohibits “cruel and unusual punishments.”⁸⁴ Although, to some, this guarantee might seem to offer certain solace to those convicted of capital crimes, the odds of mounting a successful judicial campaign on these grounds wax or wane with every change in the composition of the Court. The perceived “cruelty” of capital punishment has indeed prompted some Justices to find it unconstitutional — in *Furman v. Georgia*,⁸⁵ for example — but, as discussed above, the ruling in *Furman* has not endured.

The problem with appealing to the Eighth Amendment is that “cruel” and “unusual” are devoid of intrinsic meaning. Their significances derive solely from the values of those who seek to interpret them. What is “cruel” to some may be “lenient” to others. Certain punishments, such as quartering⁸⁶ or confinement in an iron maiden,⁸⁷ would likely be of universal offense. No contemporary American court would uphold a sentence of quartering; no contemporary American legislature would authorize it. But such consensus is rare in the realities of our society. The Eighth Amendment, then, deals with punishments that fall in the spectrum between what is obviously too harsh and what is obviously appropriate. The prevalence of capital punishment in American jurisdictions pushes the death penalty from an extreme to somewhere in the middle range of acceptability.⁸⁸ In order to judge the constitutionality of the death penalty under the Eighth Amendment, the courts must gauge where exactly it falls within that range at the time of their review.

The Eighth Amendment has been interpreted to prohibit excessive or disproportionate sentences.⁸⁹ Is death, then, an inherently excessive penalty for all crimes, even murder? No state or federal court has ever held that it is. The death penalty has been invali-

84. U.S. CONST. amend. VIII.

85. See *supra* notes 61-68 and accompanying text.

86. The practice of tying the victim’s arms and legs separately to four horses and having the animals pull in different directions.

87. A medieval torture device resembling a sarcophagus lined with spikes.

88. See *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (“[I]n a day when [the death penalty] is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.”)

89. *E.g.*, *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (“[The Eighth Amendment] proscribes punishment grossly disproportionate to the severity of the crime.”) (citing *Weems v. United States*, 217 U.S. 349 (1910)).

dated for lesser crimes than murder,⁹⁰ but never with regard to that most serious offense. A blanket challenge on grounds of excessiveness would have to overcome a long-standing presumption of proportionality for murder. History has always held great sway over the Justices,⁹¹ and a claim of disproportionality would be undermined by the endurance of capital punishment in our society. In jurisdictions with the death penalty, concerns about proportionality spur statutory schemes limiting the number of capital crimes and enumerating aggravating and mitigating factors, to ensure that only those crimes deemed most serious are punishable by death.⁹² But

90. See *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (rape); *Collins v. State*, 236 S.E.2d 759 (Ga. 1977) (armed robbery, rape, and kidnapping); *Buford v. State*, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1981) (sexual assault).

91. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) (stating that there can be no fundamental right to engage in homosexual sodomy because prohibitions against it have existed "throughout the history of Western Civilization"); *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 678 (1970) ("[A]n unbroken practice of according the [property-tax] exemption to churches . . . is not something to be lightly cast aside."); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . .").

92. See, e.g., N.Y. CORRECT. LAW §§ 650-662 (McKinney 1995). Upon signing New York's new death penalty into law in 1995, Governor George E. Pataki wrote:

Under this legislation, those who murder a police officer, a probation, parole, court, or corrections officer, a judge, a witness or member of a witness' family can face the death penalty. Someone who murders while already serving life in prison or while escaping from prison, or who murders while committing other serious felonies can face the death penalty. Contract killers, serial murderers, those who torture their victims, or those who have murdered before can also be sentenced to death. And in determining whether the death penalty should be imposed on anyone convicted of first-degree murder, the [capital punishment statute] expressly authorizes juries to hear and consider additional evidence whenever the murder was committed as part of an act of terrorism or by someone with two or more prior serious felony convictions. . . .

Constitutional concerns and the infirmities contained in prior New York law are fully met in this [capital punishment statute], which establishes a bifurcated trial procedure and sets forth clear standards to narrow the scope of the death penalty and guide the jury in determining whether to impose the death penalty.

Upon the conviction of a defendant for first-degree murder, a separate sentencing proceeding is conducted before the jury to determine whether, in light of the aggravating and mitigating factors of the case, the death penalty should be imposed. . . . Mitigating factors include, but are not limited to, all relevant factors concerning the defendant's prior criminal history, mental capacity, character, background, state of mind, and extent of participation in the murder. . . . In order to direct imposition of the sentence of death, the jury must unanimously find beyond a reasonable doubt that the aggravating factors substantially outweigh any mitigating factors.

Governor's Memorandum of Approval of L.1995, c.1., N.Y. CORRECT. LAW, Art. 22-B.

the notion that murder deserves "murder," an eye for an eye, already exists. It would probably be ineffective, then, to insist that capital punishment is disproportionate or excessive in all circumstances.

2. *The Role of the Judiciary under the Eighth Amendment*

If the Court were to agree that capital punishment is by nature excessive, it would be going against the grain of current popular thought. Historically, the Court has been hesitant to nullify the people's will as apparently expressed through the legislature, unless such will implicates specific constitutional prohibitions.⁹³ Given the explicit textual authorization of the death penalty in the Fifth Amendment,⁹⁴ it is unlikely that a majority of the Court would be willing to substitute its own opinion for that of the general population. In *Furman*, however, Justice Thurgood Marshall concluded that "[t]he point has . . . been reached at which deference to the legislatures is tantamount to abdication of [the Justices'] judicial roles as factfinders, judges, and ultimate arbiters of the Constitution."⁹⁵ He stated that capital punishment was "morally unacceptable to the people of the United States at this time in their history."⁹⁶ Justice William Brennan agreed with Marshall, stating that capital punishment "has been almost totally rejected by contemporary society."⁹⁷ Brennan's and Marshall's strident declarations of America's moral distaste for capital punishment were proven misguided when thirty-five states reworked their death penalties in the wake of *Furman* so as to overcome the Court's holding.⁹⁸ And the Justices' respective qualifications, "at this time in their history" and "contemporary society," belied their certainty regarding the prospective truth of their statements. They seemed to understand the impossibility of a permanent judicial ban against capital punishment on such grounds. Any Justice claiming utter societal rejection of the death penalty would need to dismiss or overlook its legislative persistence.

93. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to invalidate anti-sodomy laws because their prevalence indicated popular approval and thus "disproved" respondent's claim of a fundamental right to engage in sodomy).

94. See *supra* notes 7-8 and accompanying text.

95. *Furman v. Georgia*, 408 U.S. 238, 359 (1972) (per curiam) (Marshall, J., concurring).

96. *Id.* at 360 (Marshall, J., concurring).

97. *Id.* at 295 (Brennan, J., concurring).

98. See *supra* note 68 and accompanying text. See also ELY, *supra* note 28, at 173 (calling Brennan's and Marshall's claims "nonsense" in light of the states' rush to revise their death penalty provisions after *Furman*).

Judicial pronouncements like Marshall's and Brennan's in *Furman* raise an issue not presented as clearly by due process or equal protection attacks on capital punishment: the "proper" role of the judiciary in assessing the compatibility of legislation with the mandates of the Constitution. "Cruel" and "unusual" are semantic Rorschach blots, open to varied interpretation. By contrast, "due process," in its procedural application, and "equal protection" are less amorphous and do not involve subjective judicial analysis to such a degree.⁹⁹ Neither implicates the Justices' moral faculties as necessarily as does the Eighth Amendment.¹⁰⁰ The question then becomes whether the Justices ought to follow their own moral codes in evaluating punishments under the Eighth Amendment or whether they ought to take their moral cues from the electorate, as expressed through the legislatures.

Over one hundred years ago James Bradley Thayer argued, in his landmark essay "The Origin and Scope of the American Doctrine of Constitutional Law,"¹⁰¹ that judicial activism — in this case, the primacy of the Justices' own moral codes over that of the electorate — denigrates representative democracy by rendering the political process ineffective as a means of expressing popular will.¹⁰² The "incidental and postponed control" which the judiciary exerts over legislative acts was evidence to Thayer of its intended secondary role in determinations of constitutionality.¹⁰³ The Framers understood that the judiciary would not be able, in all instances, to invalidate "much which is harmful and unconstitutional" because the scope of its power to review legislation is "narrow."¹⁰⁴

99. Under "cruel and unusual," the court seeks to determine whether a punishment offends moral sensibilities that are not defined anywhere in the Constitution. There is no resort to reason or logic. It is purely a matter of perception. Procedural due process and most equal protection challenges, however, are concerned with the rationality of legislation rather than its inherent moral acceptability. See ELY, *supra* note 28, at 20-21.

[T]he questions that are relevant [to procedural due process decisions] — how seriously the complainant is being hurt and how much it will cost to give him a more effective hearing — are importantly different from the question the Court makes relevant in 'substantive due process' decisions . . . namely how desirable or important the substantive policy the legislature has decided to follow is.

Id. at 21.

100. During the debates over the Eighth Amendment in the first Congress, one opponent of the clause asked "Who are to be the judges?", recognizing the inherent difficulties of interpreting the clause objectively. TUSHNET, *supra* note 68, at 13.

101. *Supra* note 20.

102. See Thayer, *supra* note 20.

103. *Id.* at 136.

104. *Id.* at 137-38.

The judiciary may review legislation only after its enactment and only in the context of a true “case” or “controversy.”¹⁰⁵ Limitations on judicial power are desirable because if the judiciary can at whim invalidate legislation that is presumably the product of popular demand, the people lose control of a government that supposedly derives its authority from them alone. Elected officials, then, should make their own analyses of a proposed law’s constitutionality. For Thayer, the judiciary should strike down legislation only when “those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question.”¹⁰⁶ To leave all determinations of constitutionality to the judiciary, on this view, is to shirk a sworn duty to respect and uphold the Constitution.

If the judiciary abstained from invalidating legislation except in instances of “clear” error, deferring instead to legislative determinations of constitutionality, it would be giving the people *carte blanche* to impose its will upon minorities. Suppose, for example, that Congress determined that it is constitutional to require all students to recite a prayer of their choosing every morning in school, because the First Amendment, in its opinion, mandates only that the government establish no single religion.¹⁰⁷ Those students who eschew religion altogether or have “exotic” religious beliefs might feel compelled to recite the majority’s prayer in order to escape peer mockery or more serious reprisal. If the legislature, as agent of the popular will, is unmoved by these students’ concerns, the students can appeal to the judiciary’s more “reasoned” constitutional interpretation and have the Court invalidate the law on the grounds that the First Amendment prohibits all establishment of religion in public schools.¹⁰⁸ The Court espouses this understanding of the First Amendment in the interest of protecting the liberty of the minority against the will of the majority, even when faced with contradictory public interpretation.

Alexander Bickel’s theory of judicial review embraces this conception of the Court as the ultimate arbiter of “true” constitutional

105. See U.S. CONST. art. III, § 2, cl. 1; see also *Muskrat v. United States*, 219 U.S. 346 (1911) (holding that the Supreme Court has the authority to decide only matters involving controversies between adverse parties).

106. See Thayer, *supra* note 20, at 144.

107. This interpretation of the First Amendment is not “clearly” erroneous. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting) (arguing that nonsectarian school prayer is acceptable under the First Amendment).

108. See, e.g., *id.* at 585.

principles.¹⁰⁹ The Court, in Bickel's view, is better situated than the legislature to determine the meaning of the Constitution's provisions because Article III judges are not subject to the vicissitudes of political life. They are appointed, not elected. They need not satisfy a constituency.¹¹⁰ Bickel assumes, of course, that appointed judges do not receive their appointments for reasons in addition to their wisdom and insight. Franklin D. Roosevelt's famous "court-packing plan" evidences the falsity of this assumption.¹¹¹ The fact that a Justice, once on the Court, might not turn out to be the anticipated political ally does not negate this point.¹¹² Justices come to the Court with well-formed political and social ideas and these ideas inevitably affect their interpretation of the law.

109. BICKEL, *supra* note 20.

110. Bickel has stated:

Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears. It calls for a habit of mind, and for undeviating institutional customs. Another advantage that courts have is that questions of principle never carry the same aspect for them as they did for the legislature or the executive Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry.

BICKEL, *supra* note 20, at 25-26.

111. FDR wanted to "pack" the bench with Justices who would give the Court's imprimatur to his innovative, and controversial, New Deal legislation. The Justices already on the bench at that time had regularly struck down both state and federal legislation aligned with the New Deal's economic goals. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 316-317 (1936) (invalidating the Bituminous Coal Conservation Act of 1935); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 374 (1935) (invalidating the Railroad Retirement Act of 1934); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550-51 (1935) (invalidating the National Industrial Recovery Act). FDR's court-packing plan became unnecessary, however, when changes in the composition and ideologies of the bench brought the Court largely into FDR's camp. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-6, at 580-81 (2d ed. 1988). The Court then began to uphold New Deal legislation that would have been rejected previously. *See, e.g., West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937) (upholding minimum-wage legislation). The approved legislation in *West Coast Hotel* was virtually identical to legislation rejected by the Court the previous year in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

112. Famous examples of Justices who came to diverge politically from the Presidents who appointed them include liberals Earl Warren and William Brennan, both appointed by conservative Dwight Eisenhower, and liberal Harry Blackmun, appointed by conservative Richard Nixon.

John Hart Ely has criticized Bickel's approach to judicial activism.¹¹³ In *Democracy and Distrust*, Ely states that Bickel's claim that "our 'insulated' judiciary has done a better job of speaking for our better moral selves turns out to be historically shaky."¹¹⁴ According to Ely, there is no way of knowing if even the Court's most celebrated moral judgments are products of their own standards or only the result of exposure to outside pressures.¹¹⁵ It is also unclear how the Justices are supposed to arrive at sound moral judgments if they are not attuned to the morality of the society in which they live. "One might . . . question[] the alleged incompatibility between popular input on moral questions and 'correct' moral judgment."¹¹⁶ Justices may be just as likely to resort to their own biases when faced with particularly contentious issues as are any other government officials. In fact, they may be even more likely to do so because their decisions are not subject to further review, except for the occasional re-appraisal of their own precedent.¹¹⁷

In light of these theories, it is perhaps not the Court's proper role to divine America's moral position regarding capital punishment when there is ample legislative proof that it is morally accept-

113. Ely would probably argue, however, that in cases involving "discrete and insular minorities," the Court has a special obligation to ensure liberty because the political process would not afford such opportunities. That is, minorities would never be able to muster enough votes to overturn discriminatory or oppressive legislation and so the Court ought to step in to protect their constitutionally guaranteed liberty interests. It is not a matter of finding "new" unenumerated rights for minorities but of sidestepping a hopelessly uncompromising political process.

114. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 57 (1980).

115. *Id.* (quoting McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 360 (1966)).

116. *Id.*

117. Explicit overruling of existing precedent is rare. There are famous examples, such as *Lochner v. New York/West Coast Hotel Co. v. Parrish* (fundamental right to contract) and *Plessy v. Ferguson/Brown v. Board of Education* (constitutionality of "separate-but-equal" doctrine), but they are few and far between. The Court is generally quite hesitant to question the validity of its own precedent for fear of losing public confidence. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (reaffirming fundamental right to choose abortion during first six months of pregnancy). The *Casey* Court stated:

There is . . . a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. . . . There is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

Id. at 866. In his concurrence in *Brown v. Allen*, 344 U.S. 443, 540 (1953), Justice Jackson wrote: "We are not final because we are infallible, but we are infallible because we are final."

able to most people. In the absence of a flagrant constitutional violation, on this view, the Court ought to assume that the political process works well enough.¹¹⁸ Even if one's position on capital punishment favors abolition through judicial mandate — because one finds it inherently cruel or incapable of fair application despite its widespread acceptance — such abolition would have wider implications for our system of representative democracy. It places the ultimate power to make law in the hands of the judiciary rather than reserving it for the people as represented by the legislatures.¹¹⁹

3. "Dignity" and the Eighth Amendment

Some have argued that the Constitution guarantees the right to "human dignity."¹²⁰ This right, especially as protected by the Eighth Amendment, would prohibit the government from imposing any punishment that degrades one's basic humanity. Proponents of this theory maintain that the Eighth Amendment's prohibition against cruel and unusual punishments is predicated upon the inherence and inviolability of human dignity, regardless of one's criminal standing.¹²¹ On this view, the Eighth Amendment makes no sense unless human dignity forms its theoretical core.¹²² The death penalty, from this perspective, violates the Eighth

118. This argument does not fail when applied to cases such as *Brown v. Board of Education*, 347, U.S. 483 (1954), in which the Court struck down popular legislation. The Court in *Brown* did not invalidate the "separate but equal" doctrine because of evolving public standards regarding segregation, but rather because the Court found that segregated schooling deprived minority children of equal educational opportunities in explicit violation of the Fourteenth Amendment. *Id.* at 493. The *Brown* Court did not presume to know what Americans really thought about racial segregation. In fact, the Court was completely unconcerned with popular approval of its actions. In *Furman*, by contrast, Marshall and Brennan sought to voice what they perceived to be the people's true moral opinion of capital punishment, despite the prevalence of contradictory legislation.

119. This point is related but not equivalent to the argument laid out in Part II of this Comment.

120. See THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, (Michael J. Meyer & William A. Parent eds. 1992); Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) (arguing that the Eighth Amendment requires recognition of each citizen's inherent dignity).

121. See Hugo Adam Bedau, *The Eighth Amendment, Dignity, and the Death Penalty*, in THE CONSTITUTION OF RIGHTS, *supra* note 120, at 145. Some Supreme Court Justices, among them Earl Warren and William Brennan, have accepted the view that the Eighth Amendment contemplates some kind of basic human dignity. See *Trop*, 356 U.S. at 100 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

122. Bedau, *supra* note 121.

Amendment because it is inherently dehumanizing. But as the Constitution makes no textual mention of such concepts, the adoption of this position is entirely a matter of interpretive technique.

Originalists¹²³ — those who adhere to the “original intent” of the Constitution as expressed in its black letter¹²⁴ — will reject any claim to a constitutional right to dignity. It is not for the judiciary to “invent” the content of the Constitution’s clauses; it may only interpret what is actually on paper. If there is no explicit mention of “human dignity” within the Constitution, or within the extant documents of the Framers, one cannot pencil it in to arrive at one’s political or social goals. Doing so, according to originalists, compromises the integrity of the document and renders it meaningless.

By contrast, those who also appeal to the “spirit” of the Constitution, rather than to its text alone, claim that the Constitution is one of “principles” rather than of “rules.”¹²⁵ It is thus permissible, perhaps even obligatory, for the judiciary to look beyond the Constitution’s text and history to determine what its clauses contemplate in today’s society. This methodology would not necessitate that an adherent find a guarantee of human dignity within the Eighth Amendment, only that he or she not deny it solely because of its textual omission from the clause.

These two camps have spawned a variety of approaches and it is rare to find a Justice who plants his or her flag at either extreme. Justice Scalia, for example, is perhaps the most steadfast originalist on the current Court, yet he has said that at times he would infer extratextual meaning if refusing to do so would result in actions abhorrent to our most basic notions of decency.¹²⁶ For example, Scalia claims that most originalists would probably impute an evolutionary meaning to the Eighth Amendment in order to outlaw penalties such as public flogging and handbranding, which would

123. “Originalists” are also referred to as “interpretivists” and “strict constructionists” in legal scholarship and literature.

124. For a detailed discussion of this approach, see BORK, *supra* note 34, at 143-160. See also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

125. See, e.g., RONALD DWORKIN, *LIFE'S DOMINION* (1993). Dworkin is perhaps the preeminent proponent of the “constitution of principles.” He believes that the Constitution’s very text mandates that it be interpreted broadly and abstractly. He claims that “the [constitutional] rights that proved most important[, the First, Fifth, Eighth, and Fourteenth,] were written in very abstract language” and that such language, “read in the most natural way[,] . . . do[es] seem to create a breathtakingly abstract, principled constitution.” *Id.* at 127-28.

126. See Scalia, *supra* note 124, at 861.

otherwise be permissible if one looks only to original understanding for guidance.¹²⁷

Even if one assumes the Constitution's evolutionary character, however, Scalia sees "no basis for believing that supervision of the evolution would have been committed to the courts."¹²⁸ This assertion combines textual and legislative deference in denouncing judicial activism. Scalia would say that because the Constitution textually authorizes capital punishment, the courts lack the justification to override legislative (popular) will by invalidating it as a general practice.¹²⁹ In fact, the death penalty's continued existence in the criminal codes of most jurisdictions persuades Scalia that its imposition does not offend any "fundamental value" of American society.¹³⁰ Justices aligning themselves with this view would be quite unlikely to rule that capital punishment offends any Eighth Amendment guarantee of "human dignity."

Furthermore, Justices amenable to extratextual interpretations of the Eighth Amendment would not necessarily invalidate capital punishment on the grounds that "human dignity" inheres in that clause.¹³¹ It is conceivable, for example, that the theoretical predicate of the Eighth Amendment is not the inviolability of "human dignity" but rather the right to be free of political tyranny. This right is not explicit in the text of the Eighth Amendment, or in any surviving historical document, yet it could be easily inferred from other provisions of the Constitution, such as the First or the Fourth Amendment.¹³² On this view, the Eighth Amendment concerns

127. *Id.* at 861-62.

128. *Id.* at 862.

129. For Scalia, it is "clear" that the Eighth Amendment does not prohibit capital punishment because the death penalty "is referred to in the Constitution itself." *Id.* at 863.

130. *Id.* As a sitting Justice of the Supreme Court, Scalia's recognition of the death penalty's constitutionality has special weight. He is not merely a theoretician beating his breast in some dim and distant realm of ideas, he is a practitioner who has daily the opportunity to make the law.

131. It has been said that even if one concedes certain implicit values in the Eighth Amendment, such "talk about human dignity . . . is empty rhetoric and arrant nonsense." RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 118 (1982).

132. These two amendments prevent the government from restricting political opposition through censorship or warrantless searches of one's home to confiscate political materials. Similarly, the Eighth Amendment could be seen to broaden this freedom from political tyranny by preventing the government from inflicting "cruel and unusual punishments" on members of opposing political groups only. Today such disparate punishment would be impermissible under the Equal Protection Clause as well, but the Fourteenth Amendment was ratified almost eighty years after the original Bill of Rights containing the Eighth Amendment.

the political process rather than some more intangible, humanistic guarantee.¹³³

The right to be free from political tyranny could, however, contemplate a right to one's human dignity, a guarantee "that all persons are of equal worth insofar as the law is concerned, whatever their variable merits and usefulness may be, and whatever their socioeconomic or political status."¹³⁴ A constitutional guarantee of "dignity," though, does not automatically preclude capital punishment. "Dignity" is itself subject to varied interpretations. Perhaps execution by particularly gruesome means offends one's dignity whereas a quiet, painless death does not.¹³⁵ "Dignity," as a constitutional guarantee, suffers from the same semantic difficulties as other imprecise concepts.¹³⁶ Accordingly, even if "dignity" were established as a constitutional value, it would not be an invulnerable ground for a blanket challenge to the death penalty. In sum, the Eighth Amendment seems to offer little lasting comfort to the abolitionist.

II. The Implications of the Death Penalty for American Democracy

Because the Constitution offers no sustainable basis for abolition of the death penalty, abolitionists must look elsewhere. The political implications of capital punishment provide ample grounds to deny the legitimacy of governmental executions. Much of the popular appeal of the death penalty results from ignorance of its implications for our system of constitutional democracy in favor of the seductive, emotional rhetoric of politicians¹³⁷ and the sensationalist exaggerations of the media. It is indeed difficult not to be horrified and angered by the likes of Susan Smith,¹³⁸ Jeffrey Dahmer,¹³⁹

133. See ELY, *supra* note 28, for Ely's argument against the death penalty on the grounds that it unfairly affects certain politically disadvantaged groups.

134. Bedau, *supra* note 121, at 156.

135. One might also question whether execution offends or flatters the dignity of political martyrs who are willing to die for their beliefs.

136. For a discussion of other semantically imprecise terms, see the discussion of "cruel" and "unusual" in Part I.C.1., *supra*.

137. The Constitution grants the government the power to impose the death penalty but sets no limits on the type or number of crimes that can be punished by execution. For examples of the increasing number of crimes punishable by death, see Federal Death Penalty Act of 1994, *supra* note 14.

138. Smith was convicted of drowning her two infant sons by strapping them into car seats and letting the car roll into a lake in South Carolina.

139. In Wisconsin, Dahmer was convicted of murdering several young men, dismembering them, and eating some of them.

Colin Ferguson¹⁴⁰ and the Menendez brothers,¹⁴¹ but neither intense moral indignation nor justifiable concerns about personal safety can overcome the political ramifications of capital punishment. The death penalty is fundamentally incompatible with American democracy.

A. The Social Contract as Source of Governmental Authority

A basic problem with the death penalty is justifying the government's authority to impose it. Pointing to the Constitution merely begs the question: it is like saying that the government has the power to impose the death penalty because the government has given itself that power. The standard answer to this inquiry has been the "social contract." That is, the government derives its power from a compact to which every member of society is a figurative signatory. According to contractarian theories, the subjugation of one's absolute autonomy to the greater good provides the source of the government's power to impose law and inflict penalties. Law and punishment are necessary to maintain order and a peaceful society.

The two theorists of the social contract who have had the greatest influence on the development of our own political system are Thomas Hobbes and John Locke. Hobbes, writing in the seventeenth century, claimed that "every individual always seeks to avoid his own death, for each individual regards his own preservation as his greatest good."¹⁴² In order to ensure this preservation, the individual has an "unconditional obligation" to obey the law.¹⁴³ For Hobbes, the surest route to death is absolute autonomy. Because humans are inherently selfish, they would fight ceaselessly with one another in order to achieve their personal goals. Hobbes feared that a lawless society would result in civil war, which is an

140. In New York, Ferguson was convicted of shooting and killing several people on a crowded commuter train. Ferguson claimed in his defense that he suffered from "black rage," the result of years of prejudice and discrimination against him as an African-American. For an account of the crime by one of Ferguson's victims, see Thomas McDermott, *Are Executions in New York Inevitable?*, 22 *FORDHAM URB. L.J.* 557, 578-583 (1995).

141. In California, Lyle and Erik Menendez, adult brothers, confessed to killing their wealthy parents. They claimed that their father had sexually abused them both for years and that they had feared for their lives even though they were no longer living at home. They were tried separately and each trial ended in a hung jury. They are currently being retried.

142. JULES STEINBERG, *LOCKE, ROUSSEAU, AND THE IDEA OF CONSENT* 55-56 (1978).

143. *Id.* at 56.

“unmitigated evil” as it increases one’s chances of dying prematurely.¹⁴⁴ The only means of avoiding such societal implosion is absolute adherence to the sovereign will.¹⁴⁵ Hobbes lived under a form of government in which execution was a given of sovereign power. Hobbes argued, therefore, that in order to preserve one’s life, one ought to accept unquestioningly a political system in which the sovereign may take life away.¹⁴⁶ Hobbes did not demand of the sovereign any guarantee of due process because he did not believe that political power could ever be exercised unjustly. The sovereign was the source of all authority and thus incapable of illegitimate conduct.¹⁴⁷ Hobbesian theories, then, do not adequately address the problem of political authority in American society because of our rejection of absolute governmental power.¹⁴⁸ Hobbes is important, however, as background for later conceptions of the social contract.

144. *Id.*

145. *Id.* “And though of so unlimited a power, men may fancy many evil consequences, yet the consequences of the want of it, which is perpetual war of every man against his neighbour, are much worse.” THOMAS HOBBS, *LEVIATHAN*, Part II, chapter 10.

146. Capital punishment was not beyond the scope of sovereign authority in Hobbes’s contractarian scheme. One could not deny the right of the sovereign to inflict the death penalty, but one could refuse to be the executioner either of oneself or of another to whom one’s relationship precluded execution as a matter of natural law, such as a parent. This is not a denial of sovereign authority because there are other people who can perform the duty who do not have the same problematic relationship to the condemned. THOMAS HOBBS, *DE CIVI* 98 (H. Warrender, ed. 1983).

147. Hobbes believed that once individuals gave up their autonomy to the sovereign, thus forming the social contract, all sovereign acts were really acts of those individuals.

[B]ecause every subject is by this institution author of all the actions, and judgments of the sovereign instituted; it follows, that whatsoever he doth, it can be no injury to any of his subjects; nor ought he to be by any of them accused of injustice. For he that doth anything by authority from another, doth therein no injury to him by whose authority he acteth: but by this institution of a commonwealth, every particular man is author of all the sovereign doth: and consequently he that complaineth of injury from his sovereign, complaineth of what whereof he himself is author . . .

HOBBS, *supra* note 145, Part II, chapter 18.

148. Hobbes did concede, however, that “[t]he obligation of subjects to the sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them.” HOBBS, *supra* note 145, Part II, chapter 21. While this acknowledges the right of the people to depose sovereigns incapable of defending the people against foreign invaders, or against one another, it does not modify his absolutist stance regarding obligatory deference to competent sovereigns.

John Locke's philosophies have been interpreted as attacks on Hobbes' defense of political absolutism.¹⁴⁹ Locke did not believe that all governmental action is inherently just. For Locke, political authority has its source only in popular consent. If the people object to a particular method of governance, they have the right to replace the governing body because the people, as individuals, are imbued with certain natural rights that cannot be infringed or diminished on human authority. For Locke, the ability to replace the government does not depend, as it would for Hobbes, solely on the government's inability to protect the people.¹⁵⁰ If the government violates the natural rights of the people, they may seek redress against it.

Locke stated that all humans are in a "state of perfect freedom to order their actions and dispose of their possessions and persons as they see fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."¹⁵¹ This notion guarantees to the people a sphere of autonomy beyond the reach of governmental authority. However, Locke did not find criminal penalties, including capital punishment, beyond the scope of sovereign power.¹⁵² Violation of the natural law could justify, for Locke, imposition of punishment that would not be justified by mere violation of sovereign will. That is, people have a natural right to their lives. If someone deprives another of life, the offender may be punished, even killed — but the government would not have the right to execute someone solely for cultivating oats or breeding hogs because such action is within one's natural right to livelihood and its criminalization would be an arbitrary imposition of sovereign power. Even Locke's more "liberal" version of the social contract does not preclude imposition of the death penalty altogether, though it does set limits on the sovereign's ability to impose it. This is the conceptualization of the contract that oper-

149. See STEINBERG, *supra* note 142. "Locke's political thought may . . . be thought of as a response to Hobbes in that the latter argues that citizens never have a legitimate right to disobey the laws of civil society and thus do not have a right to rebel against civil authority, whereas Locke specifically attempts to justify a citizen's right of rebellion." *Id.* at 55.

150. See *supra* note 147.

151. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287 (Peter Laslett ed., 2d ed. 1967).

152. "Every one as he is bound to preserve himself, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb, or Goods of another." *Id.* at 289.

ates, at least on a theoretical level, in the American political system. Our government has the power to impose capital punishment, for example, but only within the constraints of guarantees such as “due process” and “equal protection,” and only in keeping with the prohibition against “cruel and unusual punishments.”

Nevertheless, the social contract, even in a Lockean formulation, is troubling when used to justify capital punishment. The social contract is, on some accounts, merely “the sum of the least portions of the private liberty of each person.”¹⁵³ As early as the mid-eighteenth century, political philosophers, such as Cesare Beccaria, doubted that “the least sacrifice of each person’s liberty should include sacrifice of the greatest of all goods, life”¹⁵⁴ One might question whether a sane person would willingly “leave to other men the choice of killing him”¹⁵⁵ In fact, the social contract has seemed a myth to some. In the United States, it has been called a “convenient fiction.”¹⁵⁶

153. *Id.*

154. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 45 (Henry Paolucci ed., 1963). This work was originally published in 1764 and has been one of the most influential philosophical works on crime and criminal procedure in the Western world.

155. *Id.*

156. Robert Rantoul, Jr., *Has Society the Right to Take Away Life?*, in MEMOIRS, SPEECHES, AND WRITINGS OF ROBERT RANTOUL, JR., (Luther Hamilton, ed. 1854), pp. 436-492, reprinted in VOICES AGAINST DEATH 34, 39, (Phillip English Mackey, ed. 1976). Rantoul was, at various points in his career, U.S. Attorney for Massachusetts, U.S. Senator, and Member of the House of Representatives. He was an ardent abolitionist as well. The essay cited herein, originally written in 1836, is an outright rejection of the death penalty. While much of his argument rests on political grounds, his ultimate conclusion is based on religious conviction:

Not only has no man actually given up to society the right to put an end to his life, not only is no surrender of this right under a social compact ever to be implied, but no man can, under a social contract, or any other contract, give up this right to society, or to any constituent part of society, for this conclusive reason, that the right is not his to be conveyed. Has a man a right to commit suicide? Every Christian must answer no. A man holds his life as a tenant at will, - not indeed of society, who did not and cannot give it, or renew it, and have therefore no right to take it away, - but of that Almighty Being whose gift life is, who sustains and continues it, to whom it belongs, and who alone has the right to reclaim his gift whenever it shall seem good in his sight.

Id. at 40-41.

Rantoul also argued that we are parties to the contract only by “accident of birth.” *Id.* at 39. One could argue that continued habitation in the United States is evidence of one’s active and voluntary compliance with the covenants of our society’s contract — the laws of the state and federal governments — but people do not often conceptualize their lives in such a way. *But see* PLATO, DIALOGUES OF PLATO 45, 58 (J.D. Kaplan, ed. 1950) (arguing in his dialogue with Crito that “he who has experience of

If the social contract is intended to secure the life of every "party" thereto, how can it provide that some may be killed? It seems paradoxical that the very contract that pretends to protect one's safe existence in reality jeopardizes it by refusing the right to object to one of its underlying terms: the power of the government to execute. Even if one accepts the social contract, it does not follow that it would comprise the right to take another's life. If people cede to the contract that part of their liberty necessary to prevent others from doing harm to them, it would be sufficient to grant only the power of lifetime incarceration.¹⁵⁷ Given contractarian assumptions about human self-interest, it is only rational to draw the line at life imprisonment.

Though most people truly do not believe they will ever face the death penalty, the surrender to the compact of even part of one's absolute right to live gives the sovereign the power to decide the circumstances under which it can revoke one's diminished right entirely. While the courts and legislatures have generally conformed to prevailing notions of proportionality, there is no constitutional guarantee that the category of crimes punishable by death will not expand.¹⁵⁸ The broadened category could include crimes of which many "respectable" people will be guilty. There is nothing in the

the manner in which we order justice and administer the State, and still remains, has entered into an implied contract that he will do as we command him"). That is, it would be rare for an American citizen to consider residence in the land of her birth as even a limited concession to the government of her right to live. Yet, under the contractarian view, it is indeed so. Merely existing in a society signifies one's acceptance of the terms of its contract, whether one knows them or not. But this acceptance is itself a "fiction" as well because there is no alternative. One cannot effectively renounce one's accession to the contract. Even an open rejection of its terms does not render one exempt from them. No judge or jury would even pause to ponder the defense that one is no longer a party to the social contract and therefore free to do as one wishes.

157. However, in some conceptualizations of the social contract, Rousseau's for example, "every malefactor who attacks the social right becomes through his transgressions a rebel and a traitor to the homeland; in violating its laws, he ceases to be a member, and he even wages war with it. In that case the preservation of the state is incompatible with his own." ROUSSEAU, ON THE SOCIAL CONTRACT AND DISCOURSES 35 (D.A. Cress, ed. 1983). However, Rousseau also believed that "[o]ne has the right to put to death, even as an example, only someone who cannot be preserved without danger." *Id.* at 36. Rousseau, then, seemed to reject both deterrent, in an absolute sense, and retributivist theories of capital punishment in favor of incapacitation. That is, capital punishment is justified only to remove a public danger rather than to teach a general lesson or to exact public revenge.

158. The Constitution grants the government the power to impose the death penalty but sets no limits on the type or number of crimes that can be punished by execution. For examples of the increasing number of crimes punishable by death, see Federal Death Penalty Act of 1994, *supra* note 14.

text of the Constitution that would prevent tax evasion, for example, from becoming a capital crime. Many powerful people, determined to save a few dollars, might then be eligible for the death penalty. Surely these people would never have considered themselves likely candidates for capital punishment because such penalties had always been reserved exclusively for physically violent offenders. But, however unlikely, it is still a legal possibility. In light of this, one cannot assume that capital punishment is without personal consequences for every member of society. The rules of the game could change at any time.¹⁵⁹

John Rawls's "veil of ignorance"¹⁶⁰ illustrates this point. If all members of society were to convene behind the "veil" to decide whether to institute the death penalty, without knowing who among them would end up facing it, it seems almost certain that no one would agree to it, even on Hobbesian and Lockean accounts of the social contract.¹⁶¹ Capital punishment is acceptable only to

159. See ELY, *supra*, note 28, at 172-77, for a discussion of the political "buffer" built into the death penalty to ensure that those in power will "run no realistic risk of such punishment." *Id.* at 173. Ely argues that the Supreme Court ought to prohibit the death penalty because our majoritarian political process almost guarantees that minority groups will be disproportionately affected by it.

160. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-142 (1971). Behind the "veil," no one knows his or her place in society, or even what kind of society he or she comes from. They are completely unencumbered by sociocultural baggage like economic status, race, religion, sexual orientation, gender, age, etc. Rawls calls this the "original position." It is, more or less, a blank slate upon which people draw the parameters of the society in which they will live. They do know, however, "the general facts about human society," which include, according to Rawls, an understanding of politics and economic theory, social organization and human psychology, and "whatever general facts affect the choice of principles of justice." *Id.* at 137. Rawls's basic assumption is that when we deliberate schemes of justice in the "real world," those in power are motivated by selfish interest to maintain the *status quo* hegemony in which they are supreme. In such an order, it is impossible to achieve "true justice" because the powerful refuse to accommodate the powerless.

It is possible to argue, though, that even if we were all to convene behind the veil, stripped of our former identities, we might not deliberate in the way that Rawls assumes. Perhaps Rawls ignores the possibility that we, as humans, may be inherently hegemonic and would construct hierarchies from scratch if we had to. However, behind the veil no one has the power to subjugate others and the same inescapable self-interest that skeptics might guess would lead to the creation of a pecking order could just as easily prevent one. That is, if no one has the power to impose his or her will on others, then people will strive to make sure that there are no inherent imbalances in whatever societal scheme they create because no one will voluntarily accept a smaller slice of the pie. For a more thorough Rawlsian analysis of capital punishment, see Donnelly, *supra* note 68.

161. See *supra* note 160 for an explanation of why notions of inherent selfishness, such as those of Locke and Hobbes, may prevent implementation of the death penalty.

those who are sure that they will never suffer for it. Tax evasion will probably never be a capital offense because those most likely to commit the crime to any significant degree are also those who have the influence to shape the laws punishing it. Beccaria acknowledged as much: "If we glance at the pages of history, we will find that laws, which surely are, or ought to be, compacts of free men, have been, for the most part, a mere tool of the passions of some" ¹⁶² The "social contract," then, is not a voluntary pact but rather an imposition of oligarchical will. ¹⁶³

B. The Death Penalty and American Democracy

The arguments against the contractarian justification of capital punishment have special importance in American society because our form of government is based on popular sovereignty. Our government derives its authority exclusively from the people. Such a system presupposes the supremacy of individual existence over collective government. ¹⁶⁴ Government is not a fixture of nature; it is instead an artificial construct with specific purposes and of limited powers. Therefore, governmental authority to impose the death penalty, which presumes the supremacy of government over individual existence, contradicts the precepts of American popular sovereignty. ¹⁶⁵ One's continued existence as an individual depends

162. BECCARIA, *supra* note 154, at 8.

163. Rousseau also believed that, in practical application, the social contract "was a trick by which the rich were able to fasten their rule on the poor." Michael Lessnoff, *Introduction: The Social Contract*, in *SOCIAL CONTRACT THEORY* 14 (M. Lessnoff, ed. 1990); ROUSSEAU, *supra* note 157, at 149-50.

164. While this is true of the American scheme of popular sovereignty, the contrary is true in some other accounts of it. Rousseau, for example, believed that the sovereign could derive its authority only from popular consent, but he also believed that once people band together to form a government, their individual identities are subsumed and melded into that of a single political entity whose existence supercedes that of any individual member. For Rousseau, no individual member of a community can have any interest that is not shared by its other members because all citizens work toward preserving the common good. "Clearly, then, Rousseau's formulation of the idea of general will is intended to eliminate those inequalities which result from citizens enacting law on the basis of private interest." STEINBERG, *supra* note 142, at 86 (footnote omitted). This is in contrast to Hobbesian and Lockean formulations in that the latter two view community as necessary to protect discrete, individual interest from interference by others. Rousseau's idea of the general will, however, is not consonant with American constitutional democracy, which is intended to guarantee certain individual, private rights and interests from encroachment and infringement by others.

165. Traditional conceptualizations of the social contract, Locke's and Hobbes's for example, do not take into account that individuals may belong to many groups, of which the polity is not necessarily the most important one. They assume the primacy of the polity as a defining characteristic of individual identity, that any accession to

entirely on one's compliance with the government's laws.¹⁶⁶ Under this scheme, life becomes a revocable privilege of American citizenship granted by the government rather than a right inherent in us as humans without whose consent the government itself cannot exist in the first place.¹⁶⁷

It is also striking that our government, as a collective of individual citizens, has a right which one would assume each individual also possesses but does not: the absolute right to one's life. That is, the government, in certain circumstances, may exercise complete and utter control over a citizen's life but a citizen, regardless of the circumstances, never enjoys such authority over herself. For example, if a competent citizen commits premeditated murder of a government official — a sure-fire bid for capital punishment in most jurisdictions — the government may execute her. But if a healthy, competent citizen no longer wishes to live, she does not have the right to end her life.¹⁶⁸ If a citizen does not have an absolute right

collective security is a wholesale commitment of one's entire identity thereto. Their acceptance of the death penalty is evidence of this. That is, if we cede to the government the right to kill us in the event that we violate certain covenants of the social contract, then our identities become coterminous with our citizenship, if citizenship is the benefit gained from membership in the compact. The traditional social contract reduces an individual to his or her status as an American, for example, because it equates breach of certain conditions of American citizenship with one's complete obliteration. It thus refuses to recognize the manifold quality of individual identity. One may feel, as just one permutation, that at the core of one's identity is religion, the race, then gender, then sexual orientation, then family relationships, then profession, with "American" occupying some far outer ring of identity. To grant the government the power to execute is to subordinate all other aspects of one's being to the fact of political citizenship.

166. One might wonder how the government's power to send citizens into war fits into this scheme. After all, people often die during combat, perhaps even expect to do so in many instances. Yet, although the people have granted the government the power to declare war and assemble troops, they have not granted it the power to send citizens into war expressly to be killed. That is, death of citizens as a result of legitimate combat is acceptable, but death of citizens as the *goal* of combat is not.

167. This argument, carried to an extreme, may lead one to question whether the death penalty implicates the Thirteenth Amendment's prohibition against slavery and involuntary servitude. That is, if the government has ultimate control over our very lives, then perhaps we are in some sense enslaved by the state. While such a radical argument may appeal to one's philosophical faculties, it would almost certainly be dismissed out of hand by the courts.

168. See *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 295 (1990) (Scalia, J., concurring) (stating that suicide cannot be considered a fundamental right, in the Court's view, because it has been historically and traditionally prohibited); *Compassion in Dying v. State of Washington*, 49 F.3d 586, 590-91 (9th Cir. 1995) (finding that there is no general right to suicide under the Due Process Clause). The Due Process Clause protects only those substantive rights that are "fundamental" and "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). If the general right to suicide is not protected under the Due Process Clause,

to her life, then how can she cede to the government the right to take it away? This is not a religious argument, though some have phrased it in those terms.¹⁶⁹ It is a political argument: a citizen can cede to the government only those rights which she possesses as a matter of natural law because the formation of our government did not create new rights but protected inherent rights instead.

The Declaration of Independence reflects this quite clearly:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

Therefore, our government was founded to ensure these “certain unalienable Rights” rather than to give rise to a new set of rights dependent on governmental largesse. Our lives, liberty, and happiness are ours because we are human, not because we are American. Being American, on the contractarian view expressed in the Declaration of Independence, is simply a means of protecting our natural rights against the will of other individuals.

The Declaration of Independence also states that “liberty” and “the pursuit of happiness” are inalienable rights. Incarceration would seem to violate the guarantee of inalienable liberty. The absolute right to liberty, however, is the absolute right not to be forced into servitude.¹⁷⁰ One can be jailed without being deprived of one’s *absolute* right to liberty because one retains one’s basic

then it cannot be considered a fundamental right implicit in the concept of ordered liberty, which seems to imply that it is not a right inherent in us as human beings. This, in turn, seems to imply that it is not a natural right. If it is not a natural right, then we do not, as a matter of natural law, possess an absolute right to our lives, for an absolute right to our lives would include the right to end it. If we do not possess this right, we cannot cede to the government, according to the scheme laid out in the Declaration of Independence. Of course, even if one recognizes this contradiction, it is still unclear that it must be resolved in favor of abolition of capital punishment. One could just as easily agree that there is an inconsistency and find that the proper answer is that “we the people” indeed have the right to suicide and the government indeed has the power to execute.

169. See Rantoul, *supra* note 156. Rantoul believed that because Christianity prohibits suicide, Christians cannot cede the right to one’s life to the government.

170. One might point out that there were indeed many slaves in the colonies at the time of the Revolution. However, those slaves were not citizens for whose benefit the Declaration of Independence and, later, the Constitution were drafted. While this certainly changed over time, it took a constitutional grant of full citizenship to former slaves — the Thirteenth, Fourteenth, and Fifteenth Amendments — to draw them into the fold of those documents’ protections.

rights, such as those guaranteed by the Bill of Rights, while in prison. In addition, the “right to pursue happiness,” a gloss for the right to own property, cannot be fully alienated in our current scheme either. That is, one may be deprived of particular material things for particular reasons, but one’s *absolute* right to own property cannot be denied.

C. The Political Philosophies of the Founders

If we possess an “unalienable” right to life, how then to explain the Constitution’s textual authorization of the death penalty? That is, if our right to life supercedes governmental authority as a necessary condition of popular sovereignty, why did the same generation of people who signed the Declaration of Independence proceed to draft a document wherein that supposedly inalienable right is explicitly compromised? An examination of the legal history of the colonial era, as well as of the founding documents, shows that the apparent contradiction between the Declaration of Independence and the Constitution was the result of pragmatism rather than principle. The political scheme envisioned by those Founders striving toward a unified nation differed significantly from that envisioned by those who sought merely a loose confederation of sovereign states.

The criminal law of early America was inherited largely from English traditions. Capital punishment was an integral part of the British system. Though in some respects our criminal law evolved or mutated from its original British form between the time of the first settlements and the Revolution, much of it remained the same.¹⁷¹ “Rather than being unique to the New World, then, the institution of capital punishment in the colonies was merely an extension of an English legal tradition.”¹⁷² The Fifth Amendment was meant to guarantee to all citizens the protections of the common-law criminal and civil procedure as against violation by federal sovereign authority.¹⁷³ Thus, the Bill of Rights guarantees such rights as the right to trial,¹⁷⁴ the right to refuse to incriminate

171. See RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 4-5 (1991).

172. *Id.*

173. See LUCIUS POLK MCGEHEE, *DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION* 15-19 (1906) (stating that “due process of law” was universally understood in colonial America to mean the common law).

174. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy trial . . .”).

oneself,¹⁷⁵ and the right not to be tried twice for the same offense.¹⁷⁶ The pre-amendment text of the Constitution already prohibited certain sovereign acts — *ex post facto* laws¹⁷⁷ and bills of attainder¹⁷⁸ — which had historically been seen by some as violating common-law due process guarantees.¹⁷⁹ The rejection of British “despotism”¹⁸⁰ did not necessarily entail a rejection of all British legal customs; it required only that such customs be codified through popular consent rather than by royal or parliamentary decree. If the colonists sought self-government and freedom from British tyranny, realization of those goals did not necessitate a complete reinvention of the criminal code. The guarantee of due process permitted the Founders to keep the baby while throwing out the bathwater.

The Constitution also envisioned the federal government as ensuring the collective safety and prosperity of member states while leaving to each state considerable legislative autonomy to regulate its internal affairs.¹⁸¹ Under this scheme, the individual states continued to design their own criminal codes and practices. For most of our history, state criminal proceedings were not controlled by the Constitution.¹⁸² The language of the Due Process Clause of the Federal Constitution echoed many state constitutions of the time, which were offered as models for the Fifth Amendment and which authorized, or assumed the legitimacy of, capital punishment.¹⁸³ It

175. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

176. U.S. CONST. amend. V (“No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

177. U.S. CONST., art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).

178. *Id.*

179. See MCGEHEE, *supra* note 173, at 16-17 (“As early as the fourteenth century the idea was advanced, though only by the victims, that a bill of attainder without any opportunity for hearing granted to the person attainted was not in accordance with the law of the land or due process of law.”).

180. DECLARATION OF INDEPENDENCE.

181. This conceptualization of the Constitution has remained constant over time, but its application has changed as the Court has delimited state sovereignty differently at different points in our history.

182. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (holding that the Double Jeopardy Clause of the Fifth Amendment did not apply to the states); *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (asserting that states have authority to develop and implement their own judicial procedures and systems); *Hurtado v. California*, 110 U.S. 516, 537 (1884) (holding that the Due Process Clause did not require indictment by a grand jury in state prosecutions for murder although it would for federal prosecution).

183. See RODNEY L. MOTT, *DUE PROCESS OF LAW* 152-53 (1926). New York, North Carolina, Rhode Island, and Virginia all offered clauses from their own consti-

is not surprising, then, that the Bill of Rights, which was itself a concession to state legislatures as a means of assuring them that the federal government could not act arbitrarily, reflects many criminal practices of the several states at that time.

Other Founding-era documents that were not products of state-federal compromise, being wholly of federal invention instead, offer a different view of “due process” that does not contemplate the power to execute. For example, the Northwest Ordinance (the “Ordinance”), enacted in 1787 to lay down rules for lands ceded by the states to the federal government, provides that “[n]o man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land”¹⁸⁴ Regarding American Indians, called “merciless . . . savages” in the Declaration of Independence, the Ordinance states that “in their property, rights, and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress”¹⁸⁵ Notably missing from both these clauses is the third element of the usual due-process trinity: life.¹⁸⁶

tutions that were virtual transcriptions of the thirty-ninth article of the Magna Carta. *Id.* New York: “That no person ought to be taken, imprisoned or disseized of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty, or property, but by due process of law.” *Id.* at 153. North Carolina: “That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed or exiled, or in any manner, destroyed, or deprived of his life, liberty, or property, but by the law of the land.” *Id.* at 152. Rhode Island: “That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the trial by jury, or by the law of the land.” *Id.* at 153. Virginia’s offering was identical to North Carolina’s. *Id.* at 152.

184. THE NORTHWEST ORDINANCE, Article II.

185. THE NORTHWEST ORDINANCE, Article III.

186. The Ordinance does mention “capital offense,” however, stating that those accused of them shall be bailable unless “the proof [of their guilt] shall be evident, or the presumption great.” THE NORTHWEST ORDINANCE, Article II. It is unclear why there is a reference to capital offenses in one clause of Article II when the “due process” clauses of the same article does not seem to protect life against arbitrary governmental deprivation. It could perhaps mean that the Framers understood “life” to be protected by “liberty.” The Ordinance, however, contains many other provisions that seem to parallel the Bill of Rights. For example, Article I of the Ordinance guarantees freedom of religion and Article II, in addition to due process, also guarantees the right to habeas corpus, trial by jury, republican government, and the right to be free from cruel and unusual punishments. If “life” had been understood in “liberty,” it would have been unnecessary for the Framers of the Fifth Amendment to include it expressly. This seems particularly unlikely since so many state constitutions mentioned “life” explicitly in their due process clauses, including that of New York State, where the Ordinance was drafted. *See* MOTT, *supra* note 183. Perhaps the drafters of the Ordinance intended “capital” to refer only to the gravity of the offense rather than to its punishment, as they had no way of knowing if any crimes would be punishable by death in the territories. Section 8 of the Ordinance states: “For the pre-

As the Declaration of Independence holds life inalienable, the Ordinance also places life beyond the reach of government infringement. The drafters of the Declaration of Independence and the Ordinance differed from their constitution-drafting colleagues in their treatment of slavery as well.¹⁸⁷ The Ordinance explicitly prohibits it,¹⁸⁸ while the Declaration of Independence had initially done so until Thomas Jefferson struck the anti-slavery clause "in complaisance to South Carolina and Georgia, who had never attempted to restrain the importation of slaves and who on the contrary wished to continue it."¹⁸⁹ It is plausible, then, that the Fifth Amendment's textual authorization of the death penalty was indeed a capitulation to state interests that contradicted what might have been a founding principle of the federal government.¹⁹⁰

Thomas Jefferson was also a modified death-penalty abolitionist: he opposed the death penalty for all crimes other than murder and treason.¹⁹¹ These two crimes, he and other signers of the Declaration of Independence believed, violated the social contract, causing the perpetrator to forfeit the protections and benefits of citizenship, among which was the right to one's life.¹⁹² Today, however,

vention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district" THE NORTHWEST ORDINANCE, § 8. Thus, the drafters did not take it upon themselves to impose a criminal code on the territory but rather left it to the future inhabitants to construct one.

187. The Constitution contains three concessions to the slave states: (1) the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, which authorized the return of runaway slaves to their owners; (2) the Three-Fifths Clause, U.S. CONST. art. I, § 2, which counted each slave as three-fifths of a person for purposes of determining the number of representatives from the states; and (3) Section nine of Article I, which prohibited Congress from passing any law outlawing the importation of slaves until 1808 at the earliest. U.S. CONST. art. I, § 9.

188. THE NORTHWEST ORDINANCE, Article VI. "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." *Id.*

189. THOMAS JEFFERSON, AUTOBIOGRAPHY OF THOMAS JEFFERSON 33 (P.L. Ford ed. 1945).

190. See the discussion of Benjamin Rush, *infra* note 198, for evidence suggesting that perhaps some of those who signed the Declaration of Independence believed that it contemplated prohibition of capital punishment.

191. Just before the signing of the Declaration of Independence, Jefferson drafted three proposals for Virginia's constitution. In each draft, Jefferson proposed that the General Assembly of the state "have no power to pass any law inflicting death for any crime, excepting murder, and those offenses in the military service for which they shall think punishment by death absolutely necessary: and all capital punishments in other cases are hereby abolished . . ." Thomas Jefferson, *Third Draft of the Virginia Constitution* (1776), reprinted in 1 THE PAPERS OF THOMAS JEFFERSON 359 (Julian P. Boyd ed. 1950).

192. In 1779, Jefferson and George Wythe, who had also signed the Declaration of Independence, collaborated with several other men in the preparation of a bill to the

this is not the case. Even murderers and traitors retain the benefits of the American "social contract" as guaranteed by the Constitution.¹⁹³ Jefferson also believed that "[t]he *lex talionis* . . . will be revolting to the humanised feelings of modern times. An eye for an eye, and a hand for a hand will exhibit spectacles in execution whose moral effect would be questionable"¹⁹⁴ The purpose of punishment, for Jefferson, was not to exact revenge, but to protect citizens from harm. Capital punishment should be used only as "the last melancholy resource against those whose existence is [sic] become inconsistent with the safety of their fellow citizens"¹⁹⁵ This compromised abolitionist view was practical, given the virtual lack of penitentiaries capable of holding long-term inmates at that time.¹⁹⁶ If there had been effective penal alternatives, such as life imprisonment, Jefferson would probably have opposed the death penalty altogether.¹⁹⁷

General Assembly of Virginia that urged the abolition of capital punishment for all crimes other than murder and treason. See Bill. no. 64, *A Bill for Proportioning Crimes and Punishment* [hereinafter the "Bill"], *Report of the Committee of Revisors*, June 18, 1779, reprinted in WRITINGS OF THOMAS JEFFERSON 203-20 (Paul L. Ford ed. 1893). In the Bill, Jefferson and his colleagues argued that only murderers and traitors ought to be executed because "it appears . . . deducible from the purposes of society, that a member thereof, committing an inferior injury, does not wholly forfeit the protection of his fellow citizens" *Id.* at 204. Jefferson seemed to believe that treason was an especially abhorrent act, that "only those who swore loyalty to American Independence should enjoy the rights of citizenship" LEONARD L. LEVY, *JEFFERSON AND CIVIL LIBERTIES* 30 (1963).

193. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality) (holding that American citizens cannot be involuntarily stripped of their citizenship as punishment for a crime) (opinion of Warren, C. J.).

194. Letter from Thomas Jefferson to George Wythe (1778), in 2 THE PAPERS OF THOMAS JEFFERSON 230 (Julian P. Boyd ed. 1950). "*Lex talionis*" is Latin for retaliative, or retributive, law.

195. The Bill, *supra* note 192. Jefferson's view of punishment, especially those expressed in the Bill, were greatly influenced by Beccaria. NOBLE E. CUNNINGHAM, JR., *IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON* 60 (1987).

196. See Michael Sherman & Gordon Hawkins, *Imprisonment in America* (1981):

In American criminal justice before the Revolution, incarceration seems to be much less prominent than it is today. The jail was used to detain those awaiting trial, when it was feared they might otherwise run away. It also held offenders who had been convicted but not yet sentenced, and others who were detained while obligations such as debts were settled. But major offenders were rarely sent there as a sentence, and . . . the practice of locking up serious criminals in order to reform them through social services was virtually unknown.

Id. at 79.

197. As incarceration became increasingly used as a punishment in itself in post-Revolutionary America, on account of the increasing number and capacity of jails, the imposition of the death penalty decreased accordingly. This inverse relationship has been attributed to the reluctance of Americans at that time to execute criminals when

In light of the fact that several of the signers of the Declaration of Independence were opposed to the death penalty, either wholly¹⁹⁸ or in part,¹⁹⁹ the document's designation of life as "unalienable" is not mere rhetoric, especially when the drafter himself, Thomas Jefferson, expressed such views. In addition, the absence of "life" from the due process clauses of the Northwest Ordinance also suggests that the political philosophy of the federal government generally opposed governmental deprivation of life. The inclusion of "life" in the Due Process Clause of the Fifth Amendment was likely the product of federal concession to state pressure, in the interest of securing the ratification of the Constitution as a whole.²⁰⁰

there were other effective means of achieving society's penological goals. *See id.* at 82-83.

198. Dr. Benjamin Rush was a nother signer of the Declaration of Independence as well as one of the Revolutionary era's most ardent abolitionists. His support of the Declaration's provisions and his subsequent attacks on the death penalty, some of which were published before the drafting of the Bill of Rights, suggest that perhaps he, too, understood the Declaration to preclude the imposition of capital punishment. Rush claimed in his writings that "[t]he punishment of murder by death has been proved to be contrary to the order and happiness of society . . ." Benjamin Rush, *On Punishing Murder by Death*, reprinted in *SELECTED WRITINGS OF BENJAMIN RUSH* 36 (Dagobert D. Runes ed. 1947). Rush also stated:

Every man possesses an absolute power over his own liberty and property, but not over his own life. When he becomes a member of political society, he commits the disposal of his liberty and property to his fellow citizens; but as he has no right to dispose of his life, he cannot commit the power over it to any body of men. To take away life, therefore, for any crime, is a violation of the first political compact.

Id. at 35. Rush's claim that we do not have an "absolute power" over our lives was not a matter of political philosophy but rather one of religion, as was the case with so many abolitionists of that era. *See id.* at 36.

199. *See supra* notes 189-197 and accompanying text discussing Thomas Jefferson and other signers of the Declaration of Independence.

200. It is interesting that the Treason Clause of the Constitution does not mandate that the crime be punished by death, although even Jefferson would have approved, providing only that "Congress shall have Power to declare the Punishment of Treason . . ." U.S. CONST. art. III, § 3. If the adaptation for the Fifth Amendment of the due process clauses of the states was a hasty, conciliatory gesture on the part of the federalists, and if the Treason Clause did not mandate death despite the history and acceptance of executing traitors at that time, then perhaps the death penalty was not seen by federalists as a necessary power of sovereignty. It has even been argued that execution for treason is unconstitutional. *See* James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99 (1983) (arguing that execution for treason violates the Eighth Amendment because the elements of the crime are especially difficult to prove and are open to misinterpretation).

III. A Political Approach to the Abolition of Capital Punishment

The Supreme Court can judge only the compatibility of laws or practices with the provisions of the Constitution. It cannot question them purely as matters of political philosophy. Reliance on the determinations of the Court with regard to the death penalty, then, cannot address the concerns presented in this Comment. Political matters are properly the domain of the legislature. As capital punishment contradicts the foundations of our political system without offending the text of the Constitution, its abolition ought to be achieved through the political process. Resort to the legislatures also forces the people to assume an active role in shaping the political structure of the country. The Constitution is a public document and the public ought to be responsible for its interpretation to the greatest possible extent.²⁰¹

Neither the Declaration of Independence nor the Northwest Ordinance has the force of law, but we can draw guidance and counsel from these founding documents in deciding whether to implement the death penalty.²⁰² The Declaration of Independence in particular has inspired many scholars.²⁰³ It has been invoked to argue, for example, that slavery had been unconstitutional even before the ratification of the Thirteenth Amendment. The claims of inalienable liberty and equality among all people in the Declaration of Independence have been proof, to some, that slavery was indeed

201. See SUNSTEIN, *supra* note 21.

202. Although the Declaration of Independence holds a special place in our political history, the Northwest Ordinance is unknown to many people. It has been claimed, however, that the Ordinance is as deserving of respect as any other Founding-era document. See Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995) (arguing that the Northwest Ordinance ought to be considered on a par with the Declaration of Independence and the Federalist Papers as expressing "the set of principles according to which [the American] political community governs itself").

203. "Law ought to be seen to contain not only the means of striving toward rational consistency, not only the means of keeping the rules of legal decision in tune with society's structures and relationships, but also the means — the methods for reaching toward higher goals. . . . The two best sources for such concepts are the Declaration of Independence and the Preamble to the Constitution." Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in *POWER AND POLICY IN QUEST OF LAW* 192 (M.S. McDouglas & W.M. Reisman eds. 1985). It is notable that Black has also written a book on the "inevitability of caprice and mistake" in the imposition of capital punishment." See BLACK, *supra* note 18.

Ely notes as well that the Declaration of Independence is, in a sense, the theoretical mate of the practical Constitution, calling the Declaration of Independence "our foremost 'natural law' statement" and asserting that the Constitution is, by contrast, "devoted almost entirely to structure . . ." ELY, *supra* note 28, at 89-90.

incompatible with the Constitution because the latter document comprehended the former's philosophies.²⁰⁴

Invocation of the Declaration of Independence is not merely a crafty tactic cooked up in the halls of academe. The document has indeed been applied practically. In a nineteenth-century case, for example, the Supreme Court stated that "[i]t is always safe to read the letter of the constitution [sic] in the spirit of the Declaration of Independence."²⁰⁵ Surely the Declaration of Independence has not become, during the course of the twentieth century, any less relevant or important a source of our founding principles. If the spirit of the Declaration of Independence holds life "unalienable," we ought to interpret the Constitution in that light. The permissive language of the Due Process Clause does not prove the legitimacy of capital punishment any more than the Fugitive Slave Clause proved the legitimacy of slavery.

Appeal to the legislatures is a tougher route than resorting to the Court. It requires the consensus of millions of people rather than just the five needed to achieve ultimate judicial success. The legislative endurance of capital punishment results, however, from the continued, erroneous belief that it is a legitimate choice in our political system. An understanding of the implications of the death penalty for our political system and for ourselves ought to spur a critical re-evaluation, and ultimate rejection, of its place in American democracy.

Conclusion

Notwithstanding its textual authorization within the Constitution, the death penalty is incompatible with the American system of constitutional democracy in which the government derives its limited powers through express consent of the people and in which life is to be held "unalienable." The death penalty contradicts these principles by reversing the flow of authority, so that the government grants citizens a conditional privilege which they already possess as a natural right: life itself. Successful judicial challenges to the death penalty are temporary victories at best. The surest

204. See, e.g., Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 892 (1986) (noting that many politicians of the pre-Reconstruction era believed that the Declaration of Independence prohibited slavery even though the Constitution permitted it).

205. *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897) (finding invalid under the Equal Protection Clause a Texas statute requiring only railroad companies to pay adverse party's attorney's fees when they lose lawsuits).

way to secure permanent abolition is through the political process. As the Constitution merely authorizes capital punishment rather than mandating it, legislatures have the power to abolish it completely. The American people must come to understand that capital punishment is in complete opposition to one of the most fundamental principles of American democracy: the supremacy of individual existence over collective government.

