Introduction

The Eighth Amendment to the United States Constitution proscribes governments from imposing “cruel and unusual punishments,” as well as excessive bail and fines.\(^1\) The Amendment has roots in a similar provision in the English Bill of Rights, which historically sought to prevent extreme punishments like the whipping, pillorying, defrocking, and life imprisonment of Titus Oates for perjury. Despite the historical importance of the Amendment, U.S. courts and scholars have given the Amendment and its prohibitions relatively little attention. In particular, the Supreme Court has construed its text quite narrowly, especially outside of the capital context.

Although the Eighth Amendment has, for decades, remained largely a dead letter, during the past decade or two there have been signs that the U.S. Supreme Court and its litigants are awakening to the possibility of using the Eighth Amendment as a tool to counteract the punishment practices of federal and state governments. In 2002, the Supreme Court held that the Eighth Amendment bars death sentences for intellectually disabled offenders — a decision further clarified by the Court twice in the last four years.\(^2\) In 2005, the Court found that death sentences for juvenile offenders violate the Eighth Amendment.\(^3\) And three years later, the Court created an exception to the death penalty for virtually all non-homicide crimes against individuals.\(^4\) These developments limiting the imposition of capital punishment are important, but these cases affect only a small subset of offenders.\(^5\)

\(^1\) U.S. Const. amend. VIII.
\(^3\) Roper v. Simmons, 543 U.S. 551 (2005).
\(^5\) Although we use the term “offender,” it is of course important to remember that the Eighth Amendment regulates the punishment of people. Further, even if someone is a convicted offender, there may be a chance that the individual is actually innocent of the crimes for which he was convicted.
Continuing to revitalize the Eighth Amendment, the Court in recent years has expanded its analysis in this area beyond the boundaries of capital punishment. In 2010, for example, the Court held that juveniles could not receive life-without-parole (LWOP) sentences for non-homicide crimes, and the next year it found California prison conditions unconstitutional because of overcrowding. In 2012, the Court barred the imposition of mandatory juvenile life-without-parole (JLWOP) sentences. By placing real limitations on punishments outside of the capital arena, the Court has opened the door to broader inquiry into the reach of the Eighth Amendment — particularly now that litigants and the Court have recognized the Amendment’s vitality in this new line of cases.

The Court’s expanded view of the Eighth Amendment is consistent with the doctrine it has espoused since 1958 — that the meaning of the Amendment evolves over time as society advances. More specifically, in its landmark case of v. Dulles, a plurality of the Court explained that “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” While the Court has waffled in other legal areas about whether the Constitution stands still in time or whether it evolves to meet society’s changing needs, in the area of Eighth Amendment analysis, the Court seems to have explicitly endorsed the idea of a living Constitution.

In addition to the Court’s living constitutional basis for the Eighth Amendment, which has made the Amendment more broadly applicable in recent years, the Eighth Amendment and its protections are perhaps more necessary currently than they have been for a long time. The U.S. criminal justice system — and in particular its punishment system — is broken. Despite the Eighth Amendment prohibitions, the United States engages in punishment practices that are, by the standards of much of the rest of the world, draconian and excessive. The United States remains one of the few Western nations to still use capital punishment regularly. It has more than fifty thousand inmates serving life-without-parole sentences, while no other country in the world has more than five hundred people serving such a sentence. The United States currently is the only country in the world that permits LWOP sentences for juvenile offenders. And its prisons house more than 2.5 million people — a mass incarceration epidemic locking up twenty-five percent of the world’s prison population, even though the United States claims less than five percent of the world’s population. This proliferation of harsh

9 Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).
10 See, e.g., Roger Hood & Carolyn Hoyle, The Death Penalty: A Worldwide Perspec-
tive (5th ed. 2015).
11 See, e.g., Marc Mauer & Ashley Nellis, The Meaning of Life: The Case for Abolish-
ing Life Sentences (2019).
punishments has cemented America’s status as the country with the most incarcerated people on Earth.

At the same time, the criminal justice system and the harsh punishments it often imposes have become very expensive. This has propelled some jurisdictions to experiment in their approaches to punishment. While some of these approaches — such as eliminating LWOP sentences for juveniles — might be laudable, others — such as experimenting with drug cocktails to carry out executions — remain concerning and questionable. Concerns about the expense of punishment are especially true in the capital context. The constitutional protections that accompany the imposition of the death penalty and the fact that a life is at stake translate into numerous expensive legal fees, procedures, and appeals. In response to these spiraling expenses — and constrained resources among the states — a number of states have abandoned the death penalty altogether. Today, although the United States is one of only a handful of nations that regularly imposes capital punishment, and although twenty-nine U.S. states have technically retained it, most death sentences are imposed within just two percent of U.S. counties. They, alone, are almost entirely responsible for the death penalty retaining its vitality in the United States. This geographic rarity of the imposition of death sentences raises questions about the constitutionality of this ultimate punishment. Further, the diminished numbers of total death sentences imposed and of actual offender executions indicate that this punishment may have become too unusual to be constitutionally imposed.

Also, new evidence suggests that capital punishment has perhaps become too cruel to impose. New evidence from cognitive neuroscience, various fields of social science, and other disciplines suggest that this may be the case. Questions linger about the true culpability and deterrability of many defendants. Further, there are real questions about whether particular techniques for imposing lethal injection — the main way states carry out death sentences — are humane or actually impose torture, which the Eighth Amendment clearly prohibits.

In examining the applicability of the Eighth Amendment, questions likewise arise about how judges and litigants should interpret the individual terms of the Amendment — like “cruel” and “unusual” — and whether they should evolve with time under the “evolving standards of decency” test or whether they apply only to punishments prohibited at the time the Bill of Rights was ratified. These questions also speak to broader questions of federalism, including to what extent states are free to experiment with their punishments and to what extent states can prohibit punishments within their borders when imposed by the separate sovereign of the federal government.

In analyzing the Eighth Amendment, the Court has imbued its interpretation of the Amendment with several concepts that still guide its application. First, the Court has announced that the basic concept underlying the Eighth Amendment is “nothing less than the dignity of man.” The question of human dignity
undergirds the Court’s evolving standards of decency framework, with the clear import being that disproportionate punishments incongruent with societal standards threaten the human dignity of the punished. The Court has also embraced the concept of differentness with respect to its application of the Eighth Amendment. As “death is different” both in its severity and irrevocability, the Court has generally accorded capital cases a greater level of scrutiny than all other criminal cases. In its recent JLWOP cases, though, the Court has announced that juveniles are also different. This step may signal a willingness to broaden the application of the Eighth Amendment to additional categories of “different” offenders or offenses, or, alternatively, to migrate away from the differentness concept altogether. The Court has also concluded that capital punishment cannot be imposed arbitrarily — requiring some modicum of consistency in sentencing outcomes — a concept in tension with the idea that this unique punishment should be reserved for the worst offenders.

Despite looking to these Eighth Amendment values, the Court often heavily relies on its evolving standards of decency doctrine, which depends in part on counting state legislative enactments. This majoritarian practice thus may provide the substantive content for the Eighth Amendment. If the constitutional provision in theory exists to protect an individual right against excessive punishments imposed by a majority will as reflected in the legislature, it seems odd to define the scope of that right by the practices of the legislatures themselves. Under this scheme, the Eighth Amendment protects against outlier jurisdictions but provides little protection against excessive punishments adopted by a majority of jurisdictions. Although this practice may be contrary to most constitutional norms, the Court has applied a similar analysis in other areas of constitutional law, as under the doctrine of substantive due process. One might look for similarities in these other areas and question why they deserve this treatment. Also important is the Eighth Amendment’s interplay with other constitutional clauses, like the Fourteenth Amendment. Viewing the Eighth Amendment as part of a larger constitutional scheme, and viewing it through various lenses, may be enlightening.

Although most Eighth Amendment analysis focuses on this prohibition of cruel and unusual punishments, that amounts to only one-third of the Amendment. It also prohibits excessive bail and excessive fines. The meager case law that exists in these areas provides little limitation on bail and fines, but expansion of the prohibition of punishments might signal expansion of limitations in these other Eighth Amendment spheres as well. Considering the bail crisis in this nation, and the great number of criminal cases in which states impose fines, further exploring these lesser-examined areas of the Eighth Amendment is also important.

Beyond the many questions highlighted so far, shifts in the types and amounts of punishments regularly imposed in criminal cases raise a series of interesting considerations. Imposition of death sentences and JLWOP sentences are waning, but adult
LWOP sentences continue to balloon. The Eighth Amendment has something to say about these shifts and potentially could mandate additional punishment prohibitions. These could occur on the micro level — prohibiting punishments for particular offenses or offenders — or on the macro level — prohibiting entire categories of punishments. For example, the Court could expand its limitation on JLWOP to include even juvenile offenders who committed homicides. Or, the Court could prohibit imposing LWOP sentences on offenders with intellectual disabilities. Pushing further, one might fathom the Court prohibiting altogether the use of JLWOP or even capital punishment. Indeed, with states abandoning these practices, the evolving standards of decency could lead the Court in these directions.

To be sure, the Eighth Amendment has historically been an under-litigated, under-studied, and under-theorized area of constitutional law. The Court’s limits on punishment are often unclear, the doctrine has recently shifted to accompany new lethal injection techniques, and there are parts of the Amendment on which there is very little case law — like bail and fines. Yet, the Eighth Amendment, in addition to continuously evolving, is becoming increasingly relevant to our complex and broken punishment system.

This book attempts to depict the landscape of the Eighth Amendment — from its history to its current state — and, along the way, explain how the Amendment can help sort out the boundaries of permissible punishment and address new issues that are yet to emerge. It aims to take a step toward remedying the dearth of understanding and study related to the Amendment by engaging with a number of underlying Eighth Amendment principles and offering several avenues by which to explore future litigation strategies.

At its core, the central thesis of this book is that the Eighth Amendment has increasing value and application in the modern criminal justice system, and the Court’s decisions continue to confirm this constitutional expansion. The chapters that follow explore the Amendment — past, present, and particularly future — to assess the many applications of the Amendment to the governments and punishments it regulates.

Part I of the book explores the broader historical context of the Eighth Amendment. In Chapter 1, “From the Founding to the Present: An Overview of Legal Thought and the Eighth Amendment’s Evolution,” John Bessler describes the origins of the Eighth Amendment and their connection to its modern interpretation. Chapter 2, “Back to the Future: Originalism and the Eighth Amendment,” written by John Stinneford, provides an originalist account of the Eighth Amendment and argues for its incorporation into the Court’s current doctrine. Further, in Chapter 3, “Eighth Amendment Federalism,” Michael Mannheimer explains the historical connection between federalism and the Eighth Amendment, and suggests some modern applications in light of this history.

Part II of the book assesses the current landscape of the Eighth Amendment, particularly its doctrinal underpinnings and applications. In Chapter 4, “Eighth
Amendment Values,” Will Berry and Meghan Ryan provide an overview of the values inherent in the Court’s Eighth Amendment cases, both implicit and explicit, and map possible implications of these values. Chapter 5, “The Power, Problems, and Potential of ‘Evolving Standards of Decency,’” written by Corinna Lain, connects the history of the evolving standards of decency doctrine, what the doctrine has accomplished, and the potential of the doctrine to shape the application of the Eighth Amendment. In Chapter 6, “Judicial Hesitancy and Majoritarianism,” Will Berry describes the judicial hesitancy toward applying the Eighth Amendment and argues that the majoritarian component of the Court’s doctrine offers an invitation for increased Court intervention. Chapter 7, “Punishment Purposes and Eighth Amendment Disproportionality” by Richard Frase, analyzes the connection between proportionality and the Eighth Amendment and the role that the purposes of punishment should play in the Court’s application of the Amendment. In Chapter 8, “The Administrative Law of the Eighth (and Sixth) Amendment,” Rick Bierschbach explores the hidden connection between administrative law and sentencing in the context of Eighth Amendment limitations. Chapter 9, “Evading the Eighth Amendment: Prison Conditions and the Courts,” written by Sharon Dolovich, assesses the scope of Eighth Amendment limitations on the conditions of confinement. In Chapter 10, “Excessive Deference — The Eighth Amendment Bail Clause,” Sam Wiseman explores the consequences of the Court’s excessive deference to states in the context of bail in applying the Eighth Amendment. Finally, in Chapter 11, “Nor Excessive Fines Imposed,” Beth Colgan makes the case for expanding the Excessive Fines Clause under the Eighth Amendment.

the role that science has played in the Court’s Eighth Amendment decision-making and suggests how new science can further shape the Court’s Eighth Amendment jurisprudence.

Together, these chapters endeavor to explore the past, present, and future of the Eighth Amendment. Over time, the Eighth Amendment has grown in importance and will likely continue to shape punishment practices in the United States.