

## ORIGINAL UNDERSTANDING, PUNISHMENT, AND COLLATERAL CONSEQUENCES

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*Can Founding-era understandings of punishment limit the reach of punitive state activity, specifically with respect to automatic collateral consequences? This Article begins to tackle that question. For over a century, the Supreme Court has struggled to define the boundaries of crime and punishment. Under current doctrine, a deprivation constitutes punishment when it furthers a legislatively assigned penal purpose. A retributive purpose is sufficient, whereas traditionally instrumentalist purposes, such as deterrence, rehabilitation, or incapacitation, are not. Scholars have criticized this framework for several reasons, highlighting its jurisprudential assumptions, philosophical confusion, historical inconsistency, unworkability, complexity, and failure to reflect the essentially punitive nature of many, if not most, of the “collateral consequences” that flow from a conviction.*

*This Article offers a different critique along methodological grounds, arguing that existing doctrine is divorced from core jurisprudential premises in the broader constitutional tradition and the original meaning and understanding of crime and punishment. First, while the American Constitution and legal tradition permit legislative determination of new types of crimes and the quantity of punishment, the understanding of crime and punishment at the time of the Founding was much simpler than the understanding reflected by existing doctrine. Current law mistakenly defers to legislative judgment for resolving the definitional question, all but guaranteeing legislative overreach. Second, the Court’s precedents have restricted the only sufficient penal purpose to retribution despite significant philosophical and legal history suggesting early American thinkers, reformers, and the Framers considered other purposes to be punitive. Founding era attitudes relating to the justifications for and purposes of punishment, and the types of deprivations carried out by the state in the wake of conviction, suggest a thicker understanding of punishment that contemplates both retributive and instrumentalist purposes.*

*Put simply, there is ample evidence that Founding-era thinkers understood punishment to include state-imposed suffering that served retributive and non-retributive purposes. The meaning of punishment was informed by an array of philosophical concepts, historical practices, and an understanding of criminal law and its enforcement built from liberal premises that also are instrumentalist. Many early punishments had stigmatic, incapacitative, or rehabilitative purposes, and reformers often pointed to instrumentalist purposes to justify modification of punishment practices, leaving room for the punishment label to apply to more state-sanctioned deprivations than are currently classified as punishment. By contrast, existing doctrine narrowly conceives the meaning of the term “punishment.” If “purpose” is the lodestar, then the definition*

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<https://doi.org/10.58112/jcl.26-4.2>

Professor of Law, Seton Hall Law School. Thank you to my research assistants, Christine Hoy and Jesse Leon, and librarian Sara Klein, for their assistance with this project. I also would like to thank Michael Coenen, David Opderbeck, Marc DeGirolami, John Stinneford, and Wayne Logan for conversing with me about the topics in this article and providing feedback. I would also like to thank my wife, Katherine, for her continuous support, and my children, Elizabeth, Eleanor, George, John, Lucy, and Anna, for their inspiring curiosity, endless questions, wonder, and zealous love for life.

*of punishment should be broader based on the historical evidence. In an era of overwhelming collateral consequences, lawmakers and judges who take the original meaning of terms seriously for purposes of constitutional interpretation should take note when either classifying or adjudicating the character of a deprivation carried out by the government. These findings furnish grounds for questioning the modern classification of many automatic collateral consequences as non-punitive measures, providing potential limits that are consistent with Founding-era conceptions of punishment.*

## INTRODUCTION

An original understanding of the meaning of punishment at the time of the Founding suggests existing Supreme Court doctrine too narrowly understands what punishment *is*. Current doctrine links whether a state action is punishment to whether the action serves a punitive purpose. This purpose might be determined by whether the legislature has labeled the measure punitive or whether the measure is so punitive in effect that a punitive purpose can be inferred.<sup>1</sup> Modern Supreme Court precedent has been exceptionally deferential to legislative labeling, and generally has found only retributive purposes to be sufficient to label a measure punishment. This categorically excludes lots of state-imposed suffering after a conviction from being labeled punishment.

This approach is partially correct, but altogether incomplete, especially when one considers the original meaning<sup>2</sup> of punishment at the time of the Founding. While it correctly focuses the inquiry on the purpose of a deprivation, it too narrowly defines the range of punitive purposes. The original meaning of punishment suggests a two-step analytical inquiry: (1) whether the state action responds to a finding of criminal wrongdoing (most typically in the form of a criminal conviction); and (2) whether the purpose behind the action was accepted by the Founders as punitive.<sup>3</sup> Or to put it differently, a state action is punishment when it automatically follows a criminal conviction and furthers a purpose considered punitive at the time of the Founding. Many modern-day purposes, such as deterrence,

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<sup>1</sup> Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

<sup>2</sup> Of course, there are different versions of originalism. My usage of the term in this article assumes two core ideas associated with nearly all versions of originalism: (1) the idea that the Constitution has a fixed meaning; and (2) the idea that the methodology of discerning that meaning and that meaning itself should contribute to resolution of legal questions implicating the Constitution. See Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, GEO. L. CTR. 1, 23-4 (2011), <https://perma.cc/M5BA-KB6H> (detailing typologies and core components of most originalist theories).

<sup>3</sup> To be clear, this is a different inquiry from whether the punishment is altogether justified, or as a legal matter, the validity of 8th Amendment challenges that rest on proportionality. John Stimmeford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653 (2012).

incapacitation, branding, or stigmatization—all of which the Court has expressly considered to be insufficiently punitive<sup>4</sup>—were considered punitive at the time of the Founding. Writings from that time and historical practice confirm this fact.

More specifically, determining *which* purposes count as punitive is where the Court has missed the boat as a matter of original meaning. While the Court, exactly twenty years ago in *Smith v. Doe*<sup>5</sup>, identified a retributive purpose as sufficient for labeling a state action that happens in the wake of a conviction to be punitive, it no longer considers other, non-retributive purposes as sufficient. This persists despite the historical reality that several prominent members of the Founding generation, during periods of reform and thereafter, and when discussing what constitutes punishment, considered non-retributive purposes underlying state action to be punitive and therefore indicative of punishment. What primarily distinguished punishment from other forceful state actions was its occurrence after a judgment of blameworthiness under the substantive criminal law. For example, for James Wilson, a state deprivation became punishment if it was handed out, for retributive or instrumental reasons, after a finding of blameworthiness.<sup>6</sup> Moral blameworthiness was the lodestar of crime and state reactions to such findings of blameworthiness, if they had a punitive purpose, whether retributivist or instrumental, were punishment.<sup>7</sup>

This Article, built from the understanding that current doctrine is defensible in holding that whether a state action amounts to punishment

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<sup>4</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997). Interestingly, this conflicts with sentencing codes and guidelines, which frequently list such purposes as aims for pursuing proportionate punishment.

<sup>5</sup> 538 U.S. 84 (2003).

<sup>6</sup> See *infra* Part III.E.

<sup>7</sup> Note what this suggests: what distinguishes criminal law from other forms of law is its link to a finding of moral wrongdoing that has personal and *societal* implications, thereby demanding a state response. Punishment occurs when the state reacts to violations of the substantive criminal law by imposing suffering or a deprivation in its wake. Punishment is therefore any measure, exacted by the state, in response to a finding of blameworthiness, that furthers a punitive purpose. That a finding of blameworthiness is a necessary condition means moral desert, steeped in the concept of retribution, underlies the criminal law, and justifies punishment. But *its* purpose can be multi-faceted. Current doctrine correctly identifies a finding of blameworthiness as a precondition for punishment; but it mistakenly only considers one purpose—retribution—to be sufficiently punitive when the historical evidence suggests otherwise. This has the effect of allowing many state actions, *automatically* imposed by virtue of a conviction, to be classified as regulatory rather than punitive merely because they have non-retributive purposes. See *infra* Part III.D. and Part III.E.

partially hinges on its purpose,<sup>8</sup> aims to answer the following question: “what constituted a *punitive purpose* at the time of the Founding?” The stakes in answering this question are significant, and framing the question in this way is valuable for a few reasons. First, it calls for a degree of completeness and coherence that is absent from existing doctrine, which has grown increasingly complex and difficult to apply, leading to confounding results at the Court and in lower courts.<sup>9</sup> Second, it reinforces earlier critiques, like those made by John Stinneford, that the Court’s precedent in this area primarily reflects functionalist pressures that came to the fore in the mid-20<sup>th</sup> century rather than other jurisprudential considerations that are more faithful to the legal principles that were foundational when the Constitution was created.<sup>10</sup>

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<sup>8</sup> I am aware that punishment theorists disagree about the definition and nature of punishment as a philosophical and legal matter. That is not the focus of this Article. Instead, my inquiry is focused on the meaning of punishment in the *American legal tradition*, not as a philosophical concept more broadly. For example, some theorists, like H.L.A. Hart, give certain features of punishment to distinguish it from other sanctions. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4–5 (1968). Others emphasize other aspects of punishment when searching for a definition. See, e.g., JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY (1970) (describing, in a series of essays, preliminary issues relating to blame, fault, and punishment); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFFS. 208 (1984) (developing a moral education theory of punishment that incorporates multiple purposes); R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001) (arguing for a “communicative” theory of punishment as an alternative to traditional theories); CHRISTOPHER BENNETT, THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT (2008) (linking a retributive theory of punishment to ideas about blame and apology). Zachary Hoskins, in the context of his discussion about collateral consequences, emphasizes that the most significant feature of punishment is that it is intentionally burdensome and condemnatory. ZACHARY HOSKINS, BEYOND PUNISHMENT? A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION 46 (2019). This Article does not examine the validity of any of these positions. Instead, it focuses on applying the search for original meaning *within* the existing doctrine, components of which are defensible as a philosophical and legal matter, while emphasizing whether the measure has a punitive purpose. That is, the Article assumes that the American legal tradition already has a definition of what punishment is, but this Article seeks to provide additional clarity as to that definition and why it needs updating given premises *within the American legal tradition itself*. Unsurprisingly, the American conception of punishment and its features differs from the standards announced by the above thinkers, as well as others. See, e.g., Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002).

<sup>9</sup> See, e.g., *Toth v. United States*, 598 U.S. 1, 3 (2023) (J. Gorsuch, dissenting) (stating that the Court should have granted writ of certiorari for this case because the First Circuit’s decision “clashes with the approach many other courts have taken in similar cases”); *United States v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000) (“Thus, where the consequence is contingent upon action taken by an individual or individuals other than [*sic*] the sentencing court—such as another governmental agency or the defendant himself—the consequence is generally ‘collateral.’”); *United States v. Nesbeth*, 188 F. Supp. 3d 179, 186–88 (E.D.N.Y. 2016) (discussing the circuit split surrounding collateral consequences); HOSKINS, *supra* note 8, at 32 (citing several circuit decisions); see also *infra* Part II.A.

<sup>10</sup> Stinneford, *Punishment Without Culpability*, *supra* note 3, at 669–70.

Similarly, Wayne Logan has shown how existing doctrine under the Ex Post Facto Clause, where this definitional question often arises, is historically inaccurate and violates the Framers' "disdain for burdensome retroactive laws."<sup>11</sup> Third, given the Court's recent originalist turn,<sup>12</sup> understanding the definition of punishment to be broader than existing doctrine could have significant implications for limiting state action that, to date, has been considered "civil," "regulatory," and altogether beyond the purview of constitutional protections for suspects, defendants, and those convicted of crimes.<sup>13</sup> This is especially true for the field of automatic deprivations now known as "collateral" consequences, which have been criticized by scholars on other grounds.<sup>14</sup> In short, locating the original meaning of punishment could bear fruit for criminal justice reformers who, mindful of the blessings and realities of the American constitutional experiment and legal tradition in which it exists, wish to rein in the punitive excesses of the past century or so.

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<sup>11</sup> WAYNE A. LOGAN, *THE EX POST FACTO CLAUSE: ITS HISTORY AND ROLE IN A PUNITIVE SOCIETY* 3 (2022). Logan, in calling for "removing the criminal-centric limit" that makes existing doctrine under the Ex Post Facto Clause exceedingly complex, focuses his study on whether the clause was understood to apply exclusively to criminal laws and whether existing doctrine comports with the "animating concerns of the clause and its basic structural purposes . . ." *Id.* at 3, 112; see also *id.* at 112–17 (focusing on the structural concerns underlying the Ex Post Facto Clause). He notes how abandoning the "criminal-centric" view of the clause would "align" with the "original understanding." This Article focuses on the broader issue of the original understanding of "punishment" and punitive purposes, rather than focusing exclusively on the doctrine relating to the Ex Post Facto Clause. Of course, as Logan forcefully shows, the definitional "punishment question" arises in many Ex Post Facto cases, some of which are discussed below. See *infra* Part I – II.A.

<sup>12</sup> Several of the current justices of the Supreme Court are either self-professed originalists or amenable to originalist methodology resolving constitutional disputes. See Adam Lamparello & Charles E. MacLean, *Originalism and the Criminal Law: Vindicating Justice Scalia's Jurisprudence—and the Constitution*, 50 AKRON L. REV. 227, 234 (2016). In fact, the three most "liberal" justices have agreed with the usage of the methodology. See, e.g., *Florida v. Jardines*, 569 U.S. 1 (2013) (noting J. Ginsburg, J. Sotomayor, and J. Kagan joined J. Scalia's majority opinion); *United States v. Jones*, 565 U.S. 400 (2012) (noting that while J. Sotomayor writes a concurring opinion, she joined J. Scalia's majority opinion).

<sup>13</sup> Of course, this depends on legal posture. Some challenges might be based in the constitution, whereas others might involve legislative decision-making that accords with constitutional traditions. See HOSKINS, *supra* note 8, at 36–37 (mentioning double jeopardy, ex post facto laws, notification requirements, and proportionality in the traditional "criminal" context, and employment, housing, and voting in the "civil" context).

<sup>14</sup> See, e.g., Travis, *supra* note 8; Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Face by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006); Margaret Colgate Love, *The Collateral Consequences of Padilla v. Kentucky: Is Forgiveness Now Constitutionally Required?*, 160 U. PA. L. REV. PENNUMBRA 113 (2011); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670 (2008); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

This Article therefore conducts a novel critique of existing doctrine from methodological premises *within* the American legal tradition,<sup>15</sup> rather than *external* criteria. Its focus is to highlight the original understanding of punishment, and it proceeds in three parts. Part I describes the state of existing doctrine on what types of state actions constitute punishment as a constitutional matter. It describes how this doctrine primarily considers whether the state action has a punitive purpose. Drawing from Stinneford's work, it also describes how the existing doctrine has developed from being primarily concerned with philosophical coherence to being reactive to the rise of instrumentalist jurisprudence in the criminal law and punishment field. Building from these observations, Part II indicates how the existing doctrine is vexing, historically problematic, and only partially complete. It canvasses a series of issues with the existing doctrine, including jurisprudential, philosophical, historical, practical, and methodological problems. Part II builds from the work of several scholars<sup>16</sup> in highlighting these issues.

Part III is the focal point of the Article and explains why this line of cases, in addition to suffering from all the problems canvassed in Part II, suffers from the additional problem of being unfaithful to *the original understanding of punishment*. First, it indicates why originalist methodology is not only useful, but likely to be used by the current Court when addressing criminal law and procedure matters.<sup>17</sup> Second, it demonstrates how Founding era thinkers conceived of punishment as the state response to a finding of moral blameworthiness, verified by a conviction under the criminal law. Punishment at that time could have both retributive and instrumental purposes and state action might be classified as punishment if the primary reason was instrumental, *as long as* a conviction preceded the deprivation. In short, some non-retributive purposes were sufficiently punitive. What mattered was

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<sup>15</sup> And shared by most of the current Supreme Court and utilized by all members at different moments in time, especially in the context of criminal procedure adjudication. See *infra*, Part III.B. For more discussion of the role of tradition in constitutional law, the work of Marc DeGirolami is instructive. Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020).

<sup>16</sup> See, e.g., Stinneford, *Punishment Without Culpability*, *supra* note 3; LOGAN, *supra* note 11; Joshua Kaiser, *We Know it When We See it: The Tenuous Line Between "Direct Punishment" and "Collateral Consequences"*, 59 HOWARD L.J. 341 (2016).

<sup>17</sup> I am mindful of disagreements among originalists, as well as with originalists, regarding the nature of originalism, its features and shortcomings, and its potential utility. This Article does not aim to resolve that debate. Instead, it builds from two realities: (1) that *some* version of originalist methodology is likely to be used by the Court for an extended period; and (2) the punitive excesses accompanying the enforcement of the criminal law do not seem consistent with notions of justice and limited government that were dominant at the time of the Founding.

whether the deprivation occurred after a finding of blameworthiness through a conviction.

In short, the original understanding of punishment suggests that what is punitive is not synonymous with what is exclusively retributive or classified as “criminal” by a legislature. While existing doctrine correctly identifies a conviction as a precondition for distinguishing a state action as punishment, it mistakenly holds that non-retributive purposes can render that state action automatically non-punitive. Part IV contains some preliminary observations about the implications of this methodological finding for the development of doctrine, protections of criminal procedure more broadly, and ability to reform the reach of the modern punitive state.

### I. THE DEFINITION OF PUNISHMENT UNDER EXISTING DOCTRINE

Whether a state action amounts to punishment generally requires examination of several factors, none of which are dispositive. In *Kennedy v. Mendoza-Martinez*,<sup>18</sup> the Court considered whether a statute that removed citizenship from parties who sought to avoid the draft was punishment under the Constitution.<sup>19</sup> The Court identified several factors as relevant to the question, including whether the measure (1) imposes “an affirmative disability or restraint”; (2) “has historically been regarded as a punishment”; (3) “comes into play only on a finding of scienter; (4) “promote[s] the traditional aims of punishment—retribution and deterrence”<sup>20</sup>; (5) is applicable to behavior that is “already a crime”; (6) “may rationally be connected” to an “alternative purpose”; and (7) “appears excessive in relation to the alternative purpose.”<sup>21</sup> In *Mendoza-Martinez*, the Court provided little guidance on whether certain factors bear more weight than others. More significantly for this Article, the framework represents a patchwork of methodologies bearing on the question, overcomplicating the question of what constitutes punishment.

As John Stinneford has noted, the first two factors relate to the actual governmental action, focusing on its effect and historical association with punishment.<sup>22</sup> The other factors, by contrast, focus on the measure’s purpose, specifically whether it targets culpable behavior, how the legislature

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<sup>18</sup> 372 U.S. 144 (1963).

<sup>19</sup> *Id.* at 165–66.

<sup>20</sup> *Id.* Logan makes the astute point that later cases, such as *Smith v. Doe*, mistakenly conflate this factor with a search for the *primary* aim of the measure. LOGAN, *supra* note 11, at 130.

<sup>21</sup> 372 U.S. 144, at 168–69.

<sup>22</sup> John F. Stinneford, *Is Solitary Confinement a Punishment?*, 115 NW. U. L. REV. 9, 17 (2020).

understands the purpose, and whether the effect implies a purpose that is different than the legislative label.<sup>23</sup> Stinneford suggests that these factors that scrutinize purpose are useful when the state action has not, historically, been associated with punishment.<sup>24</sup> That is, courts have essentially a two part inquiry. First, they should look to whether the “action has traditionally been used as a punishment or imposes pain or deprivation equivalent to a method traditionally used as a punishment.”<sup>25</sup> If the answer is no, then looking at the purpose is the next inquiry, and the Court has repeatedly suggested that retributive purposes are sufficient, whereas non-retributive purposes are not, despite the terms of the fourth factor above.<sup>26</sup> Further, the Court is extremely deferential to legislative labeling of the measure as punitive or not.<sup>27</sup>

The latter point arguably began to swallow the *Mendoza-Martinez* framework in *United States v. Salerno*.<sup>28</sup> The Court, while considering whether pre-trial detention amounted to punishment, held that the absence of a legislative label of punishment means state action will be considered non-punitive as long as it has a rational relationship to a non-punitive purpose and is not excessive in relation to that purpose.<sup>29</sup> In applying this principle, *Salerno* foreclosed the classification of pre-trial detention as punishment because the legislature did not label it as such and because a regulatory, public safety purpose could be alternatively rationalized.<sup>30</sup> This approach reflects the “lack of punitive purpose” or “alternative, non-punitive purpose” principle. If a state action does not have a punitive purpose, either explicitly or implicitly, and can be said to have a rational relationship to a non-penal purpose, it is not punishment.

Importantly, the Court has held this *even if* the measure is *only* applicable in the wake of a criminal conviction. This principle was broached in *Kansas v. Hendricks*,<sup>31</sup> where the Court determined that civil detention of convicted

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<sup>23</sup> *Id.* at 17–18.

<sup>24</sup> *Id.* at 18.

<sup>25</sup> *Id.* at 19.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 538–39, 546 (1979) as an example).

<sup>28</sup> 481 U.S. 739 (1987).

<sup>29</sup> *Id.* at 747. Stinneford phrases it this way: “It asserted that unless the government labels its action as a punishment, the action will be considered a nonpenal regulation so long as it has a rational relationship to a nonpenal purpose and is not excessive in relation to that purpose.” Stinneford, *Solitary Confinement*, *supra* note 22, at 20.

<sup>30</sup> *Id.* Per the findings of this Article, *Salerno*’s non-classification of pre-trial detention as punishment comports with the original meaning of punishment because no conviction preceded the detention.

<sup>31</sup> 521 U.S. 346 (1997).

sex-offenders was not a punishment.<sup>32</sup> Indeed, there is a direct line between *Hendricks* and earlier moments in constitutional history. Emphasis on the purpose to punish dates back all the way to *Calder v. Bull*,<sup>33</sup> where the Court declared that a state deprivation of property rights was not subject to the Ex Post Facto Clause unless the deprivation was imposed for the purpose of punishment.<sup>34</sup> Put differently, the Ex Post Facto Clause only applied to criminal laws.<sup>35</sup> Interestingly, however, *Calder* also suggested that a retroactive law that “increase[s] the degree of punishment” is problematic.<sup>36</sup> *Calder* has been criticized, including in later precedents of the Court.<sup>37</sup>

The obvious question then, is: which purposes are sufficiently punitive to allow a measure to be classified as punishment? The Court has never said which qualify, but it has, over time, suggested which do not.<sup>38</sup> Basically any purpose other than retribution is insufficient. *Hendricks* and *Doe*<sup>39</sup> are the most recent and well-known cases that illustrate this principle.

In *Hendricks*, the Court considered whether a man who was civilly committed under Kansas’ sexually violent predator statute was subject to punishment.<sup>40</sup> The Kansas statute allowed for indefinite civil detention for “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.”<sup>41</sup> *Hendricks* argued that the incapacitative purposes underlying the statute rendered his detention punitive, which would then implicate the

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<sup>32</sup> *Id.* at 366 (explaining that the Constitution does not prevent civil commitment for non-punitive purposes).

<sup>33</sup> 3 U.S. 386, 390 (1798).

<sup>34</sup> Of course, at the time, what a purpose of punishment was makes all the difference.

<sup>35</sup> See LOGAN, *supra* note 11, at 25–27 (noting how three justices determined this ruling).

<sup>36</sup> 3 U.S. at 398–400 (Iredell, J., concurring).

<sup>37</sup> See LOGAN, *supra* note 11, at 29–32 (describing Justice William Johnson’s critique that the purported restriction to only criminal laws was actually dicta and Justice John Marshall’s criticism that inflating pecuniary penalties retroactively implicated the Ex Post Facto Clause). Professor Logan also documents scholarly criticism, including historical sources that suggest James Madison, Patrick Henry, and other Founding-generation legal authorities considered the Clause to implicate both criminal and civil laws. *Id.* at 33–36.

<sup>38</sup> Stinneford, *Punishment Without Culpability*, *supra* note 3, at 679 (explaining that the Supreme Court has “avoided defining what a punitive purpose *is* . . . [and] has been less reluctant to say what a punitive purpose is *not*”).

<sup>39</sup> *Smith v. Doe*, 538 U.S. 84 (2003) *contra id.* at 113 (Stevens, J., dissenting) (“In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person’s liberty is punishment.”).

<sup>40</sup> *Kansas v. Hendricks*, 521 U.S. 346–48 (1997).

<sup>41</sup> *Id.* at 352 (citing KAN. STAT. ANN. §59-29a02(a) (1994)).

constitutional protections afforded by the Ex Post Facto and Double Jeopardy clauses.<sup>42</sup>

The Court rejected his arguments because in its eyes the statute furthered neither retribution nor deterrence. The statute was designed to protect rather than express blame, and it did not “affix culpability for prior criminal conduct.”<sup>43</sup> The statute’s purpose was not deterrence because sexually violent predators are largely undeterrable given their proclivities.<sup>44</sup> Significantly, for the purposes of the larger argument here, the Court noted that the statute did not require a conviction to achieve the commitment of someone deemed a predator. In other words, the absence of a criminal conviction and a retributive or deterrence purpose was fatal to the statute being classified as punitive.<sup>45</sup>

*Doe* dealt with a sex offender registration statute in Alaska that only applied if someone had been *convicted* of a qualifying sex offense.<sup>46</sup> A convicted sex offender who lived in the state had to provide several pieces of personal information to law enforcement authorities.<sup>47</sup> Unlike in *Hendricks*, where the Court emphasized the lack of a conviction requirement, in *Doe*, the Court held that the absence of a retributive purpose was fatal to classifying the statute as punitive.<sup>48</sup> Instead, because the purpose of the law was the protection of public safety through notice to the general public rather than the imposition of blame on the convicted person, it was not punitive. Interestingly, however, the Court did concede a deterrent purpose: registration would deter potential repeat offenders and others from committing sex crimes.<sup>49</sup> Nonetheless, the absence of a retributive purpose—defined as the expression or imposition of blame—was fatal to classifying the law as punitive. As the Court put it, “[t]o hold that the mere presence of a deterrent purpose renders such sanctions

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<sup>42</sup> *Id.* at 365.

<sup>43</sup> *Id.* at 362.

<sup>44</sup> *Id.* at 362–63 (referencing how committed persons, due to “mental abnormalit[ies]” or “personality disorder[s],” are not able to control their behavior).

<sup>45</sup> Justice Ginsburg raises this point in *Smith v. Doe*. For Ginsburg, the requirement of a prior conviction is indicative of retributive purpose. *See Smith v. Doe*, 538 U.S. 84, 116 (2003) (Ginsburg, J., dissenting).

<sup>46</sup> *Id.* at 89–92 (exploring “whether the registration requirement is a retroactive punishment prohibited by the *Ex Post Facto Clause*”).

<sup>47</sup> *Id.* at 89–94 (describing how the Alaska law had “two [retroactive] components: a registration requirement and a notification system” which required offenders to provide personal information).

<sup>48</sup> *Id.* at 94 (finding that while the notification provision of the Act was “intended as a nonpunitive regulatory measure” the registration provision “point[ed] in the opposite direction”).

<sup>49</sup> *Id.* at 102–03 (acknowledging the Court of Appeals’ finding that “the Act has a legitimate nonpunitive purpose of ‘public safety, which is advanced by alerting the public to the risk of sex offenders in their community[.]’”).

‘criminal’ . . . would severely undermine the Government’s ability to engage in effective regulation.<sup>50</sup> While that may be true, Part III suggests that functionalist principle itself is divorced from the original understanding of punishment, and more specifically, conflicts with the definition of punitive purpose contemplated at the time of the Founding.<sup>51</sup>

In sum, both *Hendricks* and *Doe*, following *Mendoza-Martinez*, entertained retribution and deterrence as the only punitive purposes. *Hendricks* suggested the absence of a conviction was even more fatal to labeling the statute punitive. But *Doe* goes one step further: in situations where a conviction is required for a consequence to occur, *only* a retributive purpose is sufficiently punitive to render a consequence punishment—despite *Mendoza-Martinez* referencing deterrence as a punitive aim. In other words, the following principles summarize the state of the definition of punishment as a constitutional matter:

(1) a state-imposed consequence without a retributive or deterrence purpose that can be imposed without a conviction is not punishment (*Hendricks*);

(2) a state-imposed consequence with a non-retributive purpose after a conviction (culpability) is not punishment (*Doe*); and

(3) a state-imposed consequence with a retributive purpose after a conviction (culpability) *is* punishment (*Doe*).

These principles all but guarantee that any consequence that is automatically imposed after a conviction is punishment only if it can be shown that its purpose is exclusively retributive. *Hendricks* made this burden great, requiring the “clearest proof” to overcome the legislature labeling the measure civil.<sup>52</sup> Based on the Court’s precedent, that showing effectively rests on the ability to show a legislative purpose other than the stated classification by the legislature. And the legislature that classifies an action as non-retributive essentially forecloses attachment of the punishment label.

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<sup>50</sup> *Id.* at 102 (quoting *Hudson v. United States*, 522 U.S. 93, 105 (1997)). *Hudson* itself noted that deterrence is a criminal and civil purpose, a principle the Court has repeatedly conveyed. *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (describing how forfeiture of property similarly “serves a deterrent purpose distinct from any punitive purpose” by “both . . . preventing future illicit use of the [property] and . . . imposing an economic penalty . . . rendering illegal behavior unprofitable”).

<sup>51</sup> Interestingly, Justice Stevens’ dissent gave the following formula for labeling a sanction punishment: (1) the measure is imposed on everyone who commits a criminal offense; (2) not imposed on anyone else; and (3) results in a severe impairment of a person’s liberty. 538 U.S. at 113 (Stevens, J., dissenting).

<sup>52</sup> *See* LOGAN, *supra* note 11, at 82 (demonstrating the “heavy burden” required to meet “the threshold statutory construction that a law is civil in nature”).

Scholars have pointed out why this doctrine is problematic on several grounds. Part II highlights these issues. Part III, cognizant of the current methodological preferences on the Supreme Court, will discuss why it is incomplete given original understandings of punishment.

## II. SOME PROBLEMS WITH THE EXISTING DOCTRINE

There are several problems with current doctrine. This Part recounts some of them but is by no means exhaustive. First, current law is the latest chapter in a story of historical inconsistency when it comes to defining punishment. The doctrine has developed, but it is not clear that what has been settled (to the extent it is even settled) is any better than the Court's decisions after the Civil War. Second, the "punitive effects" portion of the doctrine also begs questions and is not workable for lower courts. Third, the doctrine, when applied, nearly always results in legislative labels mattering more than practical realities or the experience of punishment.<sup>53</sup> This is especially true for the field of deprivations currently known as "collateral" consequences that are not considered punishment. Finally, existing doctrine is more positivist than warranted by the tradition of American jurisprudence.

### A. HISTORICAL INCONSISTENCY IN THE DOCTRINE

The current definition of punishment offered by the Court is the result of a long odyssey and is not consistent with earlier cases decided by the Court. The definition of punishment offered at earlier times in the Court's history was more philosophically straightforward, less deferential to the legislature, and much easier to understand in practice.<sup>54</sup>

The most notable cases that raise doubts about the soundness of existing doctrine—*Cummings v. Missouri*<sup>55</sup> and *Ex Parte Garland*<sup>56</sup>—occurred after the Civil War. Both *Cummings* and *Garland* held that constitutional provisions about bills of attainder and ex post facto laws only applied to punishments. This required the Court to determine what constitutes punishment. In both cases, the Court held that punishment amounts to a state-imposed deprivation

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<sup>53</sup> This contrasts with a broader focus that incorporates practical realities that inform meaning. See DeGirolami, *supra* note 15, at 1125 (noting how utilizing tradition for interpretive purposes lends itself to a focus on practices that convey meaning).

<sup>54</sup> Kaiser, *supra* note 16, at 345 ("Although the Court's original definition of punishment was easily applicable and consistent with commonsense and philosophical definitions, a number of doctrinal mistakes created the much more vague and unstable definition that exists today.").

<sup>55</sup> See generally *Cummings v. Missouri*, 71 U.S. 277 (1867).

<sup>56</sup> See generally *Ex Parte Garland*, 71 U.S. 333 (1866).

that occurred in response to past conduct considered to be wrongdoing, typically demonstrated by a criminal conviction. Both cases held that the collateral consequences at issue were punishment and therefore unconstitutional bills of attainder and ex post facto laws. As Joshua Kaiser has noted, neither case conflated the definition of punishment with whether the measure was justifiable or proportional.<sup>57</sup>

*Cummings* involved a set of loyalty oaths that were required in order to hold certain positions in the state government or engage in certain activities as part of one's livelihood.<sup>58</sup> One activity involved teaching; the defendant was a Roman Catholic priest who had not taken the oath but was preaching and engaging in other educational activities.<sup>59</sup> The question was whether the oaths, as applied to Cummings, amounted to punishment and therefore violated the constitutional provisions prohibiting bills of attainder and ex post facto laws.<sup>60</sup> Missouri argued that the oaths merely prescribed qualifications for office, which fell within the state's regulatory authority.<sup>61</sup> The Court conceded that Missouri had the power to regulate qualifications, but it could not do so by exacting punishments that violated the aforementioned constitutional provisions.<sup>62</sup>

More specifically, the Court held the purpose of oaths to be punitive because they were not, in all instances, tethered to the ability of individuals to engage in the prohibited activities. Instead, they were "exacted . . . because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen."<sup>63</sup> Then the Court emphatically declared "the disabilities created by the Constitution of Missouri" to be "punishment."<sup>64</sup> Going further, the Court stated that "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."<sup>65</sup> Preventing access to positions or livelihoods can be punishment according to *Cummings*.

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<sup>57</sup> Kaiser, *supra* note 16, at 345 (finding that, for the *Cummings* and *Garland* courts, "the idea of an unconstitutional *ex post facto* law or bill of attainder hinged on whether the law was punitive . . . not whether it was proportionately harsh or advisable").

<sup>58</sup> 71 U.S. at 279–82.

<sup>59</sup> *Id.* at 281–82.

<sup>60</sup> *Id.* at 318–20.

<sup>61</sup> *Id.* at 318.

<sup>62</sup> *Id.* at 282, 296, 316.

<sup>63</sup> *Id.* at 320.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

The Court did not stop there, however. It proceeded to place its decision in the context of the writings and practices of the legal tradition that informed the drafters of the Constitution. The Court cites Blackstone for the idea that punishment can take many forms, whether imprisonment, “exile or banishment,” “confiscation” of property, or “disability” relating to holding “offices or employments.”<sup>66</sup> Then the Court specifically cited the French code, which considers the taking of various civil rights to qualify as punishment.<sup>67</sup> And without leaving any doubt, the Court defined punishment as “[a]ny deprivation or suspension of . . . [civil] rights for past conduct.”<sup>68</sup> Finally, as Logan has noted, the Court fit its holding within *Calder* by noting how some of the offenses specified led to enhanced penalties.<sup>69</sup>

*Ex Parte Garland* expressed the same principle in a different context involving an oath for attorneys to be permitted to practice law in federal courts. The Court described the oaths as “legislative decree[s] of perpetual exclusion.”<sup>70</sup> Further, “exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment *for such conduct*.”<sup>71</sup> By imposing a punishment for some acts that were not punishable, and “*add[ing] a new punishment to that before prescribed*,” the oath requirement contravened the Ex Post Facto Clause.<sup>72</sup>

Further, the Court specifically addressed the issue of complete deference to the legislature for purposes of determining whether a measure is punishment. Legislative classification of the oath system that regulated access to the profession as “civil” did *not* prevent the measures from being labeled punishment in the cases at hand. In other words, measures that were labeled “civil” by the legislature could be punitive if they were exercised for punitive purposes, whether the legislature formally said so or not.<sup>73</sup> In *Garland*, the Court did not take issue with the legislature’s ability to prescribe qualifications; rather, it took issue with the legislature claiming it was prescribing

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<sup>66</sup> *Id.* at 321 (citing Blackstone).

<sup>67</sup> *Id.* at 321.

<sup>68</sup> *Id.* at 322, 327. Notably, the Court has this to add: “To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else.” *Id.* at 327.

<sup>69</sup> See LOGAN, *supra* note 11, at 45 (“[T]hey incurred ‘further penalty,’ satisfying *Calder*’s prohibition of ‘impos[ing] additional punishment to that prescribed when the act was committed.’”).

<sup>70</sup> *Ex parte Garland*, 71 U.S. 333, 377 (1866).

<sup>71</sup> *Id.* (emphasis added).

<sup>72</sup> *Id.* (emphasis added).

<sup>73</sup> See *id.* at 379–80 (“The question . . . is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment . . .”).

qualifications when it was actually punishing.<sup>74</sup> Most strikingly, the Court seemed to affirmatively declare that a formal civil/criminal distinction announced by the legislature as determinative of the issue would render the constitutional prohibitions on bills of attainder and ex post facto laws effectively subject to the whims of the legislature. The Court said in *Cummings*: “If the inhibition can be evaded by the *form* of the enactment, its insertion in the fundamental law [of the U.S. Constitution] was a vain and futile proceeding.”<sup>75</sup> Logan has noted how two additional cases, within approximately a decade of *Cummings* and *Garland*, affirmed these principles, and confirmed that “government prohibitions to pursue a professional calling” were punitive, and that the “formal designation or characterization” of the law could not be dispositive.<sup>76</sup>

Nearly a century later, the Court changed its tune. In *One Lot Emerald Cut Stones and One Ring v. United States*,<sup>77</sup> the Court held that a legislature’s labeling of a statutory penalty as “civil” established a presumption that it was not punitive. This development was long in the making. As Kaiser has noted, its seeds formed from an earlier move by the Court that distinguished between remedial and punitive actions, and loosely used “civil” and “criminal” as synonyms for those terms.<sup>78</sup>

This blurring of lines began to fully manifest when the Court had to decide whether laws the state considered clearly to be “regulatory” could be classified as punitive. The most notable case, *Hawker v. New York*,<sup>79</sup> effectively, despite the holdings in *Cummings* and *Garland*, changed the focus of the inquiry. *Hawker* accomplished this by reading into the statute in question—which retroactively declared it a crime for a felon to practice medicine—a character requirement that did not actually exist in the statute.<sup>80</sup> By making the case

<sup>74</sup> See *id.* (“The question . . . is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment . . .”).

<sup>75</sup> *Cummings v. Missouri*, 71 U.S. 277, 325 (1867).

<sup>76</sup> LOGAN, *supra* note 11, at 47–48 (discussing *Burgess v. Salmon* and *Pierce v. Carskadon*, specifically quoting *Burgess*, 97 U.S. 381, 385 (1878), stating, “the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal”).

<sup>77</sup> *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 236–37 (1972).

<sup>78</sup> See Kaiser, *supra* note 16, at 347–48 (“[W]hile the logic of the decision [in *United States ex rel. Marcus v. Hess*] was consistent with the remedy-punishment divide, the opinion used the language of a ‘civil’ and ‘criminal’ divide to signify it . . .”).

<sup>79</sup> *Hawker v. New York*, 170 U.S. 189 (1898).

<sup>80</sup> See Kaiser, *supra* note 16, at 348 (“*Hawker v. New York* addressed a New York collateral consequence that retroactively declared it a crime for any person convicted of a felony to practice medicine.”); Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1690–93 (2003) (discussing how the court in *Hawker* read in good moral character as a prerequisite to practicing medicine).

about character requirements, the Court could then ask whether the measure fell within the regulatory power of the state. Because the state's general police power involves the power to regulate professions to ensure public welfare, states can enact character requirements. Further, they can use past convictions as evidence of character. And as Logan notes, this permits all sorts of retroactive, "civil" laws that enhance punishment.<sup>81</sup>

Thus, *Hawker* moved the analysis. Instead of asking whether the measure was a state deprivation in response to past wrongful conduct, the Court asked whether the deprivation was within the field of permissible regulation. This, of course, begs the question because criminal law and punishment are within the field of permissible regulation, assuming regulation means more than civil law.<sup>82</sup> To put it differently, the criminal law and punishment can regulate for similar purposes as civil law.<sup>83</sup> What distinguishes punishment from civil deprivations is what preceded the deprivation, namely wrongful conduct resulting in a conviction, which is precisely what *Cummings* and *Garland* had held.<sup>84</sup> The *Hawker* Court considered usage of a past conviction as a triggering event for a deprivation to be indicative of concern about character and therefore the desire to regulate; *Cummings* and *Garland* considered state reaction to prior wrongdoing as indicative of an intent to punish. The purported regulatory purpose, deterrence, public safety, or whatever else, was only a secondary question and confirmed punitive action rather than determining it.

Despite the confusion engendered by the analytical move in *Hawker*, the pendulum seemingly swung back towards *Cummings* and *Garland* in *United States v. Lovett*,<sup>85</sup> where the Court invalidated adverse employment consequences for governmental employees who had engaged in disloyal or un-

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<sup>81</sup> See LOGAN, *supra* note 11, at 62 ("In modern parlance, such disabilities are known as 'collateral consequences,' which are not deemed punishment but rather 'civil' and 'regulatory,' and therefore lawfully imposed retroactively.").

<sup>82</sup> See Kaiser, *supra* note 16, at 349 (discussing the *Hawker* opinion's "drastic yet unrecognized shift from *Cummings/Garland*"). In other words, "criminal law" might be a sub-category of "regulation," if regulation is synonymous with law more generally.

<sup>83</sup> Tellingly, this was conceded by J. Kennedy in *Doce*, but not considered significant, a point emphasized by Logan in his book on the Ex Post Facto Clause. LOGAN, *supra* note 11, at 88 ("It was of no moment, Justice Kennedy wrote, that public protection was also a purpose of the state's criminal justice system; the state's 'pursuit of it in a regulatory scheme does not make the objective punitive.'").

<sup>84</sup> One could draw a distinction between wrongful conduct and wrongful conduct resulting in a conviction, which the Court in *Cummings* and *Garland* glosses over. That is to say, the Court could be accused of going further than the Founding idea of punishment, which assumed wrongful conduct, typically confirmed with a conviction.

<sup>85</sup> *United States v. Lovett*, 328 U.S. 303 (1946).

American activities.<sup>86</sup> Despite its holding in *Hawker*, which suggested that consequences that are rationally related to character determinations can be classified as regulatory even if imposed in the wake of a conviction, *Lovett* held that “a legislative decree of perpetual exclusion’ from a chosen vocation . . . is punishment.”<sup>87</sup> In sum, *Cummings*, *Garland*, and *Lovett* did not define punishment by focusing exclusively on whether there was a punitive purpose underlying the state action. They also did not prioritize retribution in the analysis. Instead, each case allowed the punitive label to attach to a state-imposed consequence that was automatically imposed for past wrongdoing or *in the wake of a criminal conviction*, which conveyed a finding of moral blameworthiness.

While *Hawker* signaled a move towards focusing on purpose, it was *Trop v. Dulles*<sup>88</sup> that actually made it the lodestar of the analysis and ripe for development in the later caselaw that was described in Part I. *Trop* involved a law that called for the stripping of U.S. citizenship in the wake of military conviction after court-martial.<sup>89</sup> The Court asserted—without reference to prior precedent—that “[i]n deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute.”<sup>90</sup> This assertion is completely inconsistent with the historical precedent summarized above. Neither *Cummings* nor *Garland* mention legislative purpose. *Trop* then restricted the penal purposes to retribution and deterrence, suggesting other purposes are *per se* non-punitive.<sup>91</sup> While the Court held denationalization to be punishment, it is not clear why the Court departed from the *Cummings* and *Garland* framework. As Kaiser notes, the *Trop* rule effectively boils down “to tautology: an act is punishment if it is intended to punish.”<sup>92</sup> Further, *Trop* signaled the intent to punish is the intent to be retributive or intent to deter. *Flemming v. Nestor*<sup>93</sup>, which followed, increased the burden for proving a deprivation amounted to punishment under the

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<sup>86</sup> *See id.* at 315–18 (“The effect was to inflict punishment without the safeguards of a judicial trial and ‘determined by no previous law or fixed rule.’ The Constitution declares that that cannot be done either by a State or by the United States.”).

<sup>87</sup> *Id.* at 316.

<sup>88</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>89</sup> *See id.* at 91 (“[T]he military has been given the power to grant or withhold citizenship”). Specifically, *Trop* was denationalized after being convicted of wartime desertion.

<sup>90</sup> *Id.* at 96.

<sup>91</sup> *See id.* (“If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has to be considered penal.”).

<sup>92</sup> Kaiser, *supra* note 16, at 351.

<sup>93</sup> *Flemming v. Nestor*, 363 U.S. 603 (1960).

Constitution, much to the chagrin of multiple dissenters who argued the *Cummings* and *Garland* framework was much clearer.<sup>94</sup>

All this back and forth preceded *Mendoza-Martinez*, which doubled down on the primacy of legislative purpose and labeling, while couching it in its own hard-to-administer seven-factor test.<sup>95</sup> As Kaiser notes, *Mendoza-Martinez* spoke of “affirmative restraints”, presumably building from *Cummings* and *Garland*, but neither case made a distinction between disabilities and restraints.<sup>96</sup> *Mendoza-Martinez* also allowed inquiry into the history behind the measure in question, as well as its severity. But the latter is separate from the definitional question: what counts as punishment does not depend on whether punishment is justified, too excessive, or severe. Nonetheless, the Court reiterated this conflation in *United States v. Ward*,<sup>97</sup> which essentially bars a civil law from being classified as punitive unless it is especially severe in proportion to its regulatory goals (as declared by the legislature). This directly contravenes the Court’s warning in *Cummings* that harshness and excessiveness are not primarily relevant to whether a deprivation is punitive.<sup>98</sup> Further, neither *Cummings* nor *Garland* considered whether a new deprivation precludes the deprivation from being classified as punishment. This, of course, follows from their core holding, namely that what matters is

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<sup>94</sup> See *id.* at 627–28 (Black, J., dissenting) (“It is true that the *Lovett*, *Cummings* and *Garland* Court opinions were not unanimous, but they nonetheless represent positive precedents on highly important questions . . . which should not be explained away with cobwebby refinements.”); *id.* at 630 (Douglas, J., dissenting) (noting the clarity of the *Cummings* rule that “[p]unishment . . . includes the ‘deprivation or suspension of political or civil rights’”); *id.* at 635, 640 (Brennan, J., dissenting) (stating, “[t]he common sense of it is that he has been punished severely for his past conduct” and that “[t]oday’s decision is to me a regretful retreat from *Lovett*, *Cummings* and *Garland*”). Wayne Logan also notes how *Nestor*, *Trop*, and *DeVeau v. Braisted* (1960) solidified the focus on legislative purpose in Ex Post Facto cases. See LOGAN, *supra* note 11, at 67 (“*Trop*, *DeVeau*, and especially *Nestor* are important decisions because they shifted ex post facto analysis in a fundamental way by creating a new test—one focusing on legislative intent and purpose, not the nature or effect of a government-imposed disability.”).

<sup>95</sup> See Kaiser, *supra* note 16, at 353 (“The *Mendoza-Martinez* (and *Flemming*) factors were an attempt to clarify the *Trop* test of punitive intent, but they moved even further from a coherent rule and an accurate understanding of prior cases.”).

<sup>96</sup> See *id.* (citing *Cummings v. Missouri*, 71 U.S. 277, 320 (1867); *United States v. Lovett*, 328 U.S. 303, 316 (1946)).

<sup>97</sup> *United States v. Ward*, 448 U.S. 242 (1980).

<sup>98</sup> See 71 U.S. at 308 (“[Those who oppose] do not mean, surely, no punishment in the general sense of the term; that he whose livelihood depending on his profession is not, in the general acceptance of the term, punished if he is not permitted to pursue it . . . [a] prohibition of the sort here enacted, operating to the extent that it does, is not only punishment but most severe punishment.”). Of course, a measure’s severity could signal an intent to punish.

whether the deprivation was imposed because of wrongful conduct or a conviction premised on moral blameworthiness.<sup>99</sup>

In contrast, existing doctrine only allows a measure to be classified as punishment when the legislature intended punishment or, if not, exacted excessive punishment that renders any regulatory purpose questionable. Both formulations, however, beg the question. *Doe* restricted the field of intended punishment even further, to only deprivations with retributive purposes that followed convictions. Both principles contrast with earlier decisions, indicating significant historical inconsistency in the doctrine. Part III will show that while the current doctrine's focus on purpose is defensible as a matter of original meaning, its significant departure from the core holdings of *Cummings* and *Garland*—that an acknowledgment of prior wrongdoing, preceding a deprivation, makes that deprivation presumptively punitive—is not.

#### B. THE “PUNITIVE IN EFFECT” PROBLEM WITH THE DOCTRINE

An additional problem with existing doctrine is that it conflates what punishment is with when a sanction is seemingly too severe to not be punishment. *Mendoza-Martinez* permits a court to find a state action to be punishment if its effects are unduly harsh. It is unclear whether this is a proxy for whether the action connotes an intent to punish by the legislature, or whether it is simply a matter of excessive severity. This ambiguity presents both logical and evidentiary problems.

First, whether a state deprivation is punitive in effect begs the question about *when* effects are punitive. To put it differently, to know whether effects are sufficiently punitive requires a definition of what is punitive in the first place. Further, that definition cannot reduce to whether the effect is harsh, which is what current doctrine seems to contemplate as a logical, but not practical matter.

A deprivation's severity or harshness does not bear on whether it is punishment. Put simply, they are two different things. For example, a \$10 fine calibrated to the degree of moral blameworthiness in a theft and exacted for either desert or deterrent purposes is punitive despite not being all that harsh. To put it differently, to define whether a state action is punishment according to whether it is proportionate to the offense or conduct preceding

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<sup>99</sup> See Kaiser, *supra* note 16, at 353 (stating the “*Cummings/Garland* rule that punishment had to be in response to past acts regardless of their character”).

the state action is to conflate what punishment *is* with whether the punishment fits the crime.

On the practical side, despite this confusion, the doctrine does *not* actually consider that many non-criminal or “civil” consequences are harsher than the direct consequences exacted on a criminal defendant. There are countless stories of defendants who are incarcerated for a short period of time only to learn that their conviction permanently bans them from a particular livelihood.<sup>100</sup> Further, the doctrine does not contemplate the subjective experience of those facing such consequences.<sup>101</sup> While there are good arguments that generally the subjective experiences of defendants should and do not convert non-punishment into punishment, there are countervailing arguments that the *degree* of suffering might be worthy of consideration as to the overall justice of the state action itself.<sup>102</sup>

The second difficulty with the “punitive in effect” portion of existing doctrine is primarily evidentiary. It is nearly impossible to demonstrate that a state deprivation is punitive in effect. This is because existing doctrine would essentially require absolute silence from the legislature about a measure’s purposes as well as the inability of a court to rationalize a purpose underlying the measure. While there are times when legislatures act without state purposes, or fail to state one, there are not many times where a court cannot think of a purpose for a legislative action.

More pointedly, *Mendoza-Martinez* and subsequent cases do not clarify the point at which effects *become* punitive. Put differently, one could read the “punitive in effect” doctrine to assume a threshold for the quantity and types of effects that could serve as proof of punishment. Take the example above about the fine but change a few facts. Instead of a \$10 fine as part of the criminal sentence, pretend that the state enacts a “civil” consequence that any person convicted of theft must pay a \$100 fee to enter any trade involving the handling of money. The fee is not applicable at the moment of conviction; its applicability arises once someone is about to be hired in a position involving

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<sup>100</sup> Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CENTER FOR JUST., June 21, 2021.

<sup>101</sup> See generally Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) (arguing that punishment is a subjective experience and should be adjusted based on how an individual can tolerate a certain punishment).

<sup>102</sup> See Kolber, *supra* note 101 at 182–84 (“For a purported justification of punishment to be successful, it must take account of offenders’ negative subjective experiences or else be vulnerable to the charge that it fails to justify the full magnitude of the punishments we impose.”).

the handling of money. This is what one might label an automatic collateral consequence. It only applies to those convicted of a certain crime, but it might not apply to all convicted of that crime because not all will attempt to enter such a trade. Let's say that Joe and Bill both have theft convictions, although Joe is wealthy. The \$100 fee is inconsequential for Joe, but Bill would have to scrimp and save to pay it. Is the fee, *as applied to Bill*, punitive in effect? Or is the analysis fully objective? Existing doctrine is silent on this question, only heightening the difficulty in challenging such a consequence as a practical matter.

In sum, the “punitive in effect” portion of the doctrine is problematic on two grounds. First, it raises the question of what counts as punitive. Second, in suggesting that a measure's severity bears on that question, it forecloses without explanation the consideration of experiences that would seem to be relevant.

### C. APPLICATION OF THE DOCTRINE TO COLLATERAL CONSEQUENCES

The inadequacy of the existing framework is partially shown through the fact that the Court, since *Mendoza-Martinez*, never has held a collateral consequence to be punishment. And this is the case despite considering several “civil” consequences that resemble historical practices that were considered punitive in an earlier time.

For example, the Court has held that civil forfeiture—in all instances—is regulatory and non-punitive<sup>103</sup> despite that forfeiture aims to deter illegal usage of property and effectively incapacitates the person whose property is being forfeited. In *Hudson v. United States*,<sup>104</sup> the Court held that exclusion from one's occupation after financial fraud is not punishment.<sup>105</sup> This seems to directly contradict *Cummings* and *Garland*. Further, monetary penalties handed out in the wake of federal banking violations were not punishment.<sup>106</sup> *Doe*, discussed above, held that mandatory sex offender registration and public notification, after conviction, is not punishment.<sup>107</sup> “Civil” confinement

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<sup>103</sup> See *United States v. Ursery*, 518 U.S. 267, 292 (1996) (“We hold that these *in rem* civil forfeitures are neither ‘punishment’ nor criminal for purposes of the Double Jeopardy Clause.”).

<sup>104</sup> See *Hudson v. United States*, 522 U.S. 93, 105 (1997) (holding that debarment sanctions with a “deterrent purpose” are not criminal).

<sup>105</sup> See *id.* (holding that debarment sanctions with a “deterrent purpose” are not criminal).

<sup>106</sup> See *id.* (noting that “debarment sanctions” having a deterrent effect is “insufficient to render a sanction criminal”).

<sup>107</sup> See *Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (“The [Alaska Sex Offender Registration] Act is non-punitive . . .”).

of sex offenders is generally not punishment despite its historical resemblance to banishment.<sup>108</sup>

Perhaps most confounding is that the Court, despite conceding retribution and deterrence as punitive purposes in its prior precedent, now considers only retribution to be exclusively punitive and presumptively holds that legislative classification of a sanction as civil indicates a non-punitive purpose. In *Ursery*, the Court functionally eliminated deterrence as indicative of a punitive purpose because it noted that civil actions also might have the same purpose.<sup>109</sup> The Court did the same move in *Hudson*, noting that deterrence is a non-punitive purpose<sup>110</sup> even though it is a classical purpose of punishment. This all but guarantees that “collateral” consequences will never be labeled punishment.

Lost in these cases is the fact that one of the *Mendoza-Martinez* factors—whether a past criminal act was involved—has been favorably referenced by the Court in cases involving collateral consequences. Recall that this factor is most closely connected to the holdings in *Cummings*, *Garland*, and *Lovett*. Yet despite its favorable treatment in specific cases, it is neither dispositive nor altogether significant nowadays.<sup>111</sup>

#### D. THE JURISPRUDENTIAL PROBLEMS WITH THE DOCTRINE

There are two major philosophical problems with the doctrine. The first problem is definitional and logical. The Court offers a definition of punishment without defining what makes something punitive. The second problem is more jurisprudential: the doctrine is overly positivist in a way that

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<sup>108</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 347 (1997) (“The confinement’s potentially indefinite duration is linked, not to any punitive objective, but to the purpose of holding a [sex offender] until his mental abnormality no longer causes him to be a threat to others.”).

<sup>109</sup> See *United States v. Ursery*, 518 U.S. 267, 312 (1996) (“It was a *premise* of the Court’s analysis in [*Harper*] that deterrence could not justify a penal sanction.”); 538 U.S. at 102 (“Any number of government programs might deter crime without imposing punishment.”); 522 U.S. at 105 (“[W]e recognize that the imposition . . . will deter others from emulating petitioner’s conduct . . .”); 521 U.S. at 362–63 (seeming to suggest the absence of a deterrent purpose indicated non-punitive intent, calling into question whether retribution is the *only* punitive purpose). Perhaps, as Stinneford suggests, it is the *only exclusively* punitive purpose, a position *Smith v. Doe* seems to support. See 538 U.S. at 102 (stating that it “proves too much” to say that “the law is punitive, because deterrence is one purpose of punishment” and “[a]ny number of government programs might deter crime without imposing punishment”).

<sup>110</sup> See 522 U.S. at 105 (stating that the presence of deterrent purposes can serve both civil and criminal purposes).

<sup>111</sup> See *Kaiser*, *supra* note 54, at 358 n.107 (noting how the *Ward*, *Doe*, and *Hudson* obfuscate this factor’s relevance without treating it negatively).

assumes too much authority for the legislature to define terms with ontological realities.

Stinneford has shown how the current doctrine represents an attempt to clarify *which* purposes are punitive without definitively declaring what “punitive” means.<sup>112</sup> This is a definitional endeavor that altogether communicates indeterminacy for an idea and practice—punishment—that has a concrete reality.<sup>113</sup> A second coherence problem has been expressed by Kaiser: defining punishment as a deprivation carried out with an intent to punish is tautological unless we know what “punishment” means. If punishment is defined according to its purpose, we need to know *which* purposes are punitive, not just that punishment is defined by reference to purpose. This effectively demands a definition of “punitive.” Part III supplies a definition from within the American legal tradition, through a search for the original understanding of the term, to make existing doctrine more complete.

But these concerns also point to a major jurisprudential criticism of existing doctrine: it assumes that what something *is*—both ontologically and as constitutional, legal question—can be determined by the legislature. This effectively concedes a positivist understanding of the meaning of terms in the written Constitution, inverting the reason for a written constitution. It also conflicts with how many Founders conceived the role of the written Constitution as well as the legal and philosophical backdrop predating the formation of the Constitution. To put it more starkly: legislative primacy of this sort was not the dominant legal philosophy at the time of the Founding. This is a double blow to existing doctrine and early caselaw confirms it.<sup>114</sup>

The Founders were, for the most part, believers in natural law, which implied checks on the powers of the legislature to alter the nature of human law. While they may have differed in their precise understanding of the

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<sup>112</sup> See Stinneford, *supra* note 3, at 678 “[T]he Court’s goal was to specify a method for determining whether a statute has a ‘punitive purpose’ without defining the term ‘punitive.’”

<sup>113</sup> I am aware that some scholars understand the criminal law and punishment to primarily reflect structures and relationships that reflect power dynamics unrelated to the idea that there is a moral and cultural reality underlying the law and punishment. See e.g., MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 215–16 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (discussing discipline as a type of power).

<sup>114</sup> See *Calder v. Bull*, 3 U.S. 386, 388 (1798) (“There are acts which the *Federal*, or *State*, Legislature cannot do, *without exceeding their authority*.”); see also *Fletcher v. Peck*, 10 U.S. 87, 135, 139 (1810) (discussing limitations on legislative power); *Terrett v. Taylor*, 13 U.S. 43, 52 (1815) (Justice Story referencing principles of natural justice); *Dash v. Van Kleeck*, 7 Johns. 477, 505 (1811) (noting implied limitations on legislative powers); BENJAMIN FLETCHER WRIGHT JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 293–99 (1931) (noting several examples in early courts that referenced implied legislative limits while using different terminology).

*content* of the natural law, few, if any, doubted its reality as an external standard and influence on the meaning of law. In this vein, the Revolution, Declaration of Independence, and crafting of the Constitution were both doctrinal and positive. They reaffirmed the existing set of presuppositions about the general nature of human law and its aspiration for justice, while recognizing the room for human creativity in the creation of positive law insofar as it aimed at certain goals.

Benjamin Fletcher Wright Jr., in *American Interpretations of Natural Law*, forcefully demonstrated the unavoidable influence of natural law concepts on the formation of state constitutions and statutes,<sup>115</sup> as well as the creation of the federal Constitution:

During the Revolution each of the states, except Rhode Island and Connecticut, framed and adopted at least one constitution. In nearly all of these documents there is explicit evidence that the natural law philosophy was widely accepted as an essential part of the fundamental principles of government.<sup>116</sup>

To be clear, the point here is not to argue for a particular version of natural law; rather, it is to demonstrate that *some version of natural law* contemplated restraint on the range of lawmaking discretion.<sup>117</sup> Further, an existing belief in an external standard indicates a reality beyond the pen of the lawmaker. Translated to the world of punishment, that means that there was an understanding of punishment *prior* to any legislative will to say otherwise and that understanding was informative as to the meaning of the expressly positive law produced by the legislature. Wright points to other sources to indicate this backdrop that contemplates jurisprudential principles constraining the power of legislatures. For instance, Edmund Randolph argued *against* the creation of a Preamble because the principles that might be contained in the Preamble were already in force because they were embedded in the existing state constitutions and laws.<sup>118</sup> So the ends contemplated were unspoken, but true and real, and part of the law.

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<sup>115</sup> See WRIGHT, *supra* note 114, at 119 (“[All of them make something more than a purely formal statement of allegiance to this concept of natural law.]”).

<sup>116</sup> *Id.* at 112.

<sup>117</sup> See *id.* at 114–15 (“Leaving aside the temporary documents of New Hampshire and South Carolina, none of these documents is entirely without references to the rights derived from nature’s laws.”).

<sup>118</sup> See *id.* at 127 (quote from Edmund Randolph) (“A preamble seems proper not for the purpose of designating the ends of government and human politics – This . . . display of theory, however proper in the first formation of state governments, is unfit here; since we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and *interwoven with* what we call the rights of states.”).

This understanding is perhaps most obvious in the arguments made by the anti-Federalists and Federalists about the need (or not) for a Bill of Rights. Both argued from natural law premises. The Federalists claimed that natural law concepts located sovereignty in the people and that all the Convention did was channel some of that to a structure of government while reserving the rest. The Anti-Federalists argued that without explication, this understanding would be lost on future generations. Wright puts it this way:

[F]or, when the Anti-Federalists contended that there are certain rights of man which would be endangered by the adoption of the Constitution, the Federalists could reply that to be sure there are certain rights which are natural to man, so natural in fact that provisions for their recognition are entirely unnecessary; their existence depends not on charters or constitutions.<sup>119</sup>

Notice that neither questioned the constraining power of fixed, albeit unwritten philosophical principles on the meaning of the Constitution.

For example, James Wilson thought a Bill of Rights unnecessary because a legislature never could explicate the range of rights already held, and in doing so, would risk circumscribing their reality by accident.<sup>120</sup> Madison essentially made the same point before coming around to the Bill of Rights as a political compromise.<sup>121</sup> But as Wright points out, it was actually Hamilton who drove home the point most clearly by emphasizing that the creation of a Bill of Rights was too much of a concession by the people to the government. For Hamilton, articulating a Bill of Rights implicitly confuses the question of whether the legislature could have trampled on unenumerated rights in the first place by muddying questions about delegated power that were otherwise clear.<sup>122</sup> He points to the Preamble to support the point: the People “ordain[ed] and establish[ed]” the Constitution, which implicitly assumes a limited grant. Hamilton already considered the original Constitution, without a Bill of Rights as we know it, to be a Bill of Rights.<sup>123</sup> In contrast, the Anti-Federalists fought the battle using the same terminology. Elbridge Gerry

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<sup>119</sup> *Id.* at 139.

<sup>120</sup> *See id.* at 139–40 (quote from James Wilson) (“[I]f the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted.”).

<sup>121</sup> *See id.* at 140 (“In almost the same words, James Madison in the Virginia convention defended the absence of a bill of rights . . .”).

<sup>122</sup> *See id.* at 140 (quote from Alexander Hamilton) (“Here, in strictness, the people surrender nothing; and, as they retain everything, they have no need of particular reservations.”).

<sup>123</sup> *See id.* at 141 (quote from Alexander Hamilton) (“The truth is, after all the declamations we have heard, that the Constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”). Wright also cites several other similar arguments made by other Founders at the time on p.142 n.1.

argued against ratification by reference to natural rights.<sup>124</sup> Luther Martin, a staunch proponent of state sovereignty, drew from similar concepts to argue against ratification.

Notice what both sides presuppose, however: that the terms in the Constitution matter, have real meanings for the application and practice of law, and those meanings are influenced by unwritten norms. Part III shares the implications of this approach to legal meaning when it comes to the question of punishment.

### III. ORIGINAL UNDERSTANDING AND PUNISHMENT

This Part examines the question of punishment by searching for the original meaning of the term. It utilizes the core of the methodology while acknowledging there may be disagreements about particulars. It demonstrates that existing doctrine is incomplete. While the *Mendoza-Martinez* factors and subsequent decisions allow for consideration of purpose, they mistakenly preclude non-retributive purposes from bearing on the question in particular cases.

#### A. ORIGINALISM'S CORE

Lawrence Solum has noted how originalism, as a phrase and a theory, means different things to different originalists. Indeed, when originalism first burst onto the scene and found its way into Supreme Court opinions, it seemed largely focused on original intent,<sup>125</sup> meaning the intentions of the Founders. This led to several methodological problems because deciphering intent is not easy and often depends on which sources are utilized to determine its content.<sup>126</sup> And which sources *should be included* became the subject of debate. Solum notes how Justice Scalia helped move the needle to a focus on

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<sup>124</sup> See *id.* at 131 (“In all of [Elbridge Gerry’s] speeches and writings during the ensuing controversy he appealed to the theory of natural rights.”).

<sup>125</sup> Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1085 (1989) (implying that the beginning presumption of originalism is justification “on the basis of original intent”).

<sup>126</sup> See generally Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 273–74 (1988) (arguing that it is possible to slant an interpretation by using only sources in your favor); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204–09 (1980) (discussing challenges to determining original meaning); See Solum, *supra* note 2 (detailing early criticisms of the quest for original intent).

original *meaning*,<sup>127</sup> which might be described as the dominant mode of originalist interpretation nowadays.<sup>128</sup> The basic goal is discovering the meaning of the “Constitution’s text that is consistent with its commonly understood meaning at the time the Constitution was adopted.”<sup>129</sup> Original understanding, rather than original intent, drives the endeavor.<sup>130</sup> Nonetheless, these ambiguities led to Solum’s inquiries into the typologies of originalism and how its core content contains a bundle of concepts.<sup>131</sup>

One notable distinction for purposes of this Article is what Solum points to in the work of Randy Barnett, Keith Whittington, and Jack Balkin, namely the distinction between constitutional interpretation and constitutional construction, with the latter occurring when the original public meaning is less clear due to under-determinacy in the law.<sup>132</sup> Balkin used this distinction to try to reconcile originalism with more modern theories of constitutional interpretation: the text provides boundaries for constitutional principles to operate within.<sup>133</sup> This approach is not without criticism.<sup>134</sup>

Another more recent development within originalist methodology is the idea that the *methods* that the Framers would have used to interpret texts are part of the analysis. Coined “original methods originalism,” Michael

<sup>127</sup> See Solum, *supra* note 2, at 15 (stating how the “foundation of ‘original public meaning’ . . . build upon the views of Scalia and Lawson in a variety of ways”); see also Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 186 (2005) (“Justice Scalia’s originalism rests upon the original meaning of the Constitution’s text . . . This inquiry is . . . an objective understanding of what the words themselves meant at the time.”); Notes, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279 (2007) (“Justice Scalia has prominently defended a version of originalism that demands adherence to the Constitution’s original meaning . . .”).

<sup>128</sup> See, e.g., Solum *supra* note 2, at 1 (“[T]he mainstream of originalist theory began with an emphasis on the original intentions of the framers but has gradually moved to the view that the ‘original meaning’ of the constitution is the ‘original public meaning’ of the text.”).

<sup>129</sup> Lamparello & MacLean, *supra* note 12, at 234. *But see* Notes, *supra* note 127, at 1280 (criticizing implied premise of originalism that applications of original meaning are in accordance with original meaning itself).

<sup>130</sup> See Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. JURIS. 255, 275 (2002) (“[T]he content of an authoritative directive contained in the Constitution is confined to what the Framers . . . managed to say through the appropriate institutionalized form.”).

<sup>131</sup> See, e.g., Solum, *supra* note 2, at 28–29 (listing different possible variants of originalism).

<sup>132</sup> See Solum, *supra* note 2, at 15–16 (“Once originalist theory (in some important instantiations) had acknowledged that vague constitutional provisions required construction, this step opened the door for reconciliation between originalism and living constitutionalism.”). For instance, after reading Part III, someone might suggest that the question of punishment involves a situation of construction, rather than interpretation.

<sup>133</sup> See generally Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 427 (2007) (“[E]ach generation makes the Constitution their constitution by calling upon its text and principles and arguing about what they mean in their own time.”).

<sup>134</sup> ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022) (on levels of abstraction).

Rappaport and John McGinnis note how “meaning . . . would depend on the interpretive rules that they thought would apply.”<sup>135</sup> Finally, and relevant to this Article, originalist commentators have grappled with how originalism relates to precedent, with several articulating that originalism leaves room for adherence to non-originalist precedent.<sup>136</sup>

All that said, what *is* originalism? While that question is beyond the scope of this Article, and arguably not even answerable,<sup>137</sup> scholars have pointed to some common attributes in nearly all originalist theories. First, originalist theories contemplate several determinants of original meaning at the time the Constitution was adopted, such as the (1) intentions of Founders, ratifiers, and other constitutional actors; (2) original understanding of the words in the text; and (3) acceptable interpretive methods used by Framers.<sup>138</sup> Solum, while recognizing the variation in the determinants of meaning, labels reliance on them the genesis of the idea that there is meaning to be discovered, which he calls the “fixation thesis.”<sup>139</sup> He notes how “almost all originalists agree that original meaning was *fixed* or determined at the time each provision of the constitution was framed and ratified.”<sup>140</sup>

Notably, however, the fixation thesis does *not* dictate legal results in all instances. Originalists disagree on how meaning informs legal content. Some originalists hold that constitutional doctrine “cannot contradict the original meaning”, but can “allow for the development of supplementary rules.”<sup>141</sup> Further, some originalists might consider originalism as a constraint but capable of exceptions, such as for *stare decisis* reasons.<sup>142</sup> But as Solum notes, regardless of the disagreement between originalists on the *degree of constraint*

<sup>135</sup> Solum, *supra* note 2 at 19.

<sup>136</sup> See, e.g., Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 156 (2006) (discussing the influence of legal realism and the Supreme Court’s ability to overrule its own prior decisions in current debates about the role of precedent); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 420 (2006) (arguing that “a limited respect is due some nonoriginalist constitutional precedent because of the larger societal and constitutional goal of effectively pursuing the common good”).

<sup>137</sup> Solum, *supra* note 2, at 27.

<sup>138</sup> *Id.* at 29 (“Originalists disagree about the question as to *what* determines original meaning (intentions, public meanings, methods), but all or almost all of the originalist writing with which I am familiar agrees on the question as to *when* meaning is fixed.”).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 31 (“[A] version of originalism might take the position that the original meaning should govern in cases of first impression, but sanction departures from original meaning whenever a question of legal doctrine has been settled.”).

<sup>142</sup> *Id.* at 32.

provided by originalism, nearly all consider original meaning to be the primary contributor to legal meaning. He calls this the “contribution thesis.”<sup>143</sup> In sum, while there is no “one originalism,” or unifying idea, nearly all agree that meaning was fixed and that such meaning should inform legal meaning, constraining and contributing to it at the same time.<sup>144</sup>

## B. THE RELEVANCE OF ORIGINAL MEANING TO CRIMINAL LAW AND PROCEDURE DOCTRINE

Originalist methodology is now an authoritative means of adjudicating constitutional and criminal procedure questions when they reach the Supreme Court. This is largely due to the outsized influence of Justice Scalia<sup>145</sup> and current Justice Clarence Thomas.<sup>146</sup> Scholars have commented on the significant effect that Justice Scalia’s preferred methodology has had on how the Supreme Court determines answers to pressing constitutional questions.<sup>147</sup> And while Justice Scalia is no longer on the Court, all members of the current Court have utilized originalist methods when deciding cases or writing opinions.<sup>148</sup> This makes it highly likely that the Court will utilize originalist methods if it reassesses its doctrine on the question of what types of sanctions constitute punishment, although it will have to reconcile any decision with the tortuous set of prior precedents mentioned above.

A few cases over the past twenty-five years indicate how the search for original public meaning has appeared in the world of criminal procedure. In the early 2000s, the Court utilized originalist methods in *Apprendi v. New Jersey*<sup>149</sup> to hold that juries must be involved in fact-finding for certain details

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<sup>143</sup> *Id.* at 32.

<sup>144</sup> *Id.* at 33 (“All or almost all originalists agree that the original meaning of the Constitution was fixed at the time each provision was framed and ratified. Almost all originalists agree that original meaning must make an important contribution to the content of constitutional doctrine: most originalists agree that courts should view themselves as constrained by original meaning and that very good reasons are required for legitimate departures from that constraint.”).

<sup>145</sup> See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (describing textualist statutory interpretation).

<sup>146</sup> William H. Pryor, Jr., *Justice Thomas, Criminal Justice, and Originalism’s Legitimacy*, *Y.L.J. FORUM* 173, 173 (2017).

<sup>147</sup> *Id.*; Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 *GEO. L.J.* 183, 184 (2005).

<sup>148</sup> Pryor, *supra* note 146, at 175 (citing Just. Thomas, Just. Scalia, and Just. Sotomayor in *Alleyne v. United States*, including Just. Sotomayor’s concurring opinion noting how the Court’s decision was consistent with “the original meaning of the Sixth Amendment” (quoting *Alleyne v. United States*, 133 S. Ct. 2151, 2164 (2013) (Sotomayor, J., concurring))).

<sup>149</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

to be lawfully included in sentencing determinations.<sup>150</sup> J. Scalia clearly stated the Constitution “means what it says.”<sup>151</sup> The Court continued this trend in *United States v. Booker*<sup>152</sup>, *Blakely v. Washington*,<sup>153</sup> and *Alleyne v. United States*.<sup>154</sup> In *Alleyne*, J. Thomas authored the majority opinion that overruled *Harris v. United States*<sup>155</sup> for several reasons, including that it was “inconsistent . . . with the original meaning of the Sixth Amendment.”<sup>156</sup>

Similarly, originalist methodology is largely responsible for the Court’s revamping of Confrontation Clause jurisprudence under the Sixth Amendment. Justice Scalia emphasized the text of the Sixth Amendment in *Maryland v. Craig*<sup>157</sup> when he dissented from J. O’Connor’s majority opinion that had characterized the confrontation right as preferable but not absolute.<sup>158</sup> Notably, he noted how the Court cannot “conduct a cost-benefit analysis of clear and explicit constitutional guarantees . . . .”<sup>159</sup> *Crawford v. Washington*<sup>160</sup> rested on originalist grounds when overruling the decision *Craig* relied on, *Ohio v. Roberts*.<sup>161</sup> Specifically, the Court in *Crawford* criticized *Roberts* and the balancing tests it generated as being “[un]faithful to the original meaning of the Confrontation Clause.”<sup>162</sup> In *Crawford*, Justice Scalia conceded that the plain text of the Confrontation Clause was not entirely clear; however, he then turned to historical context to discern the original meaning of the provision.<sup>163</sup> Interestingly, originalists split over the application of *Crawford* in later cases.<sup>164</sup>

The relevance of original meaning also has appeared in the Fourth Amendment context. While originalists split on the application of doctrine relating to reasonable suspicion in *Prado Navarette v. California*,<sup>165</sup> as well as

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<sup>150</sup> *Id.* at 490.

<sup>151</sup> *Id.* at 499.

<sup>152</sup> *United States v. Booker*, 543 U.S. 220, 244 (2005).

<sup>153</sup> *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004).

<sup>154</sup> *Alleyne v. United States*, 570 U.S. 99 (2013).

<sup>155</sup> *Harris v. United States*, 536 U.S. 545 (2002).

<sup>156</sup> 570 U.S. at 103.

<sup>157</sup> *Maryland v. Craig*, 497 U.S. 836 (1990).

<sup>158</sup> *Id.* at 857.

<sup>159</sup> *Id.* at 870 (Scalia, J., dissenting).

<sup>160</sup> *Crawford v. Washington*, 541 U.S. 36, 60–62 (2004).

<sup>161</sup> *Ohio v. Roberts*, 448 U.S. 56 (1980).

<sup>162</sup> 541 U.S. at 60; *see also* Bibas, *supra* note 127, at 189 (describing the shortcomings of *Roberts* according to Just. Scalia).

<sup>163</sup> 541 U.S. at 44.

<sup>164</sup> Pryor, *supra* note 146, at 176–77 (summarizing disagreement between Just. Thomas and Just. Scalia in Confrontation Clause cases after *Crawford*).

<sup>165</sup> *Prado Navarette v. California*, 572 U.S. 393, 395 (2014) (holding that a stop complied with the Fourth Amendment because the officer had reasonable suspicion that the driver was intoxicated); *id.* at 410

on what constitutes a search in cases like *Florida v. Jardines*<sup>166</sup> and *United States v. Jones*,<sup>167</sup> the overarching takeaway is that the search for original meaning has come to dominate questions relating to the nature and propriety of searches and seizures. In *Kyllo v. United States*<sup>168</sup>, which determined the boundaries of using technology to gain information from inside the home, J. Scalia referenced focusing on the “original meaning of the Fourth Amendment.”<sup>169</sup> Later, in *Jones*, the Court held that usage of a GPS tracking device, attached to a car for an extended period, amounted to a search.<sup>170</sup> Writing for the majority, J. Scalia noted how “physically occup[ying] private property for the purpose of obtaining information” was a “physical intrusion” that would have been “considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”<sup>171</sup> The rationale for J. Scalia’s opinion was largely based on common law notions of property and trespass understood at the time of the Founding.<sup>172</sup> While J. Alito differed in his application of originalist principles, his concurring opinion confirmed that originalism was the terrain for the adjudication.<sup>173</sup> Similarly, the recent cases involving the definition of “seizure” have entertained understandings of the term during the Founding-era and even earlier.<sup>174</sup>

Another Fourth Amendment context involving original meaning laid bare divisions on the Court that conveyed skepticism of deference to governmental stated purposes. In *Maryland v. King*<sup>175</sup>, the Court determined that a mandatory cheek swab of those arrested and suspected of certain felonies, pursuant to a state statute, was for the purpose of identification, not investigation.<sup>176</sup> In J. Scalia’s mind, this concession by the Court all but

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(Scalia, J., dissenting) (“[T]he Court . . . has no grounds for its unsupported assertion that the tipster’s report . . . gave rise to a *reasonable suspicion* of drunken driving.”).

<sup>166</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1421 (2013) (Alito, J., dissenting) (“The Court concludes that the conduct in this case was a search . . . but the Court’s interpretation . . . is unfounded.”).

<sup>167</sup> *United States v. Jones*, 565 U.S. 400, 402 (2012) (deciding whether the attachment of a Global Positioning System (GPS) tracking device to an individual’s vehicle constitutes a search or seizure within the meaning of the Fourth Amendment).

<sup>168</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>169</sup> *Id.* at 40.

<sup>170</sup> 565 U.S. at 404–05.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 405.

<sup>173</sup> *Id.* at 420 (Alito, J., dissenting).

<sup>174</sup> *See, e.g.*, *Torres v. Madrid*, 592 U.S. \_ (2021) (deciding if a seizure occurred when an officer shot a person who temporarily eluded capture after the shooting); *California v. Hodari*, 499 U.S. 621, 624 (1991) (“From the time of the founding to the present, the word ‘seizure’ has meant a ‘taking possession’ . . .”).

<sup>175</sup> *Maryland v. King*, 569 U.S. 435 (2013).

<sup>176</sup> *Id.* at 441–45.

guaranteed the constitutionality of the statute under the Fourth Amendment.<sup>177</sup> Instead, he argued the Founding preference under the Fourth Amendment is for showings of individualized suspicion except for a limited class of cases involving non-investigative purposes.<sup>178</sup> While it would be tempting to think that J. Scalia's originalist methodology always results in clear rules like those alluded to in *King*, Judge Stephanos Bibas has pointed out how sometimes a judicial inquiry into original meaning leads to balancing tests rather than bright line rules.<sup>179</sup>

The search for original meaning also has appeared in debates over the scope of the Eighth Amendment and the meaning of the Cruel and Unusual Punishment and Excessive Fine clauses.<sup>180</sup> J. Scalia's position was that the Eighth Amendment prohibited punishments that were considered cruel and unusual at the time of the Founding.<sup>181</sup> In his mind, the Court's jurisprudence in the death penalty context had veered terribly off course, in pursuit of preferred policy outcomes, and arbitrarily enhancing the role of the judiciary in the constitutional system.<sup>182</sup> More recently, circuit courts have turned to discerning original meaning in the context of examining the constitutionality of felon-in-possession statutes<sup>183</sup> in the wake of the Court's originalist opinion in *New York Rifle & Pistol Association, Inc. v. Bruen*.<sup>184</sup>

While the Court has repeatedly acknowledged originalism as an authoritative methodology in matters involving the criminal law and criminal

<sup>177</sup> See *id.* at 466 (Scalia, J., dissenting) (“The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment.”).

<sup>178</sup> See *id.* at 469 (Scalia, J., dissenting) (“No matter the degree of invasiveness, suspicionless searches are *never* allowed if their principal end is ordinary crime-solving.”).

<sup>179</sup> Bibas, *supra* note 127, at 200 (noting how as an originalist matter, the Fourth Amendment only requires that searches and seizures be reasonable).

<sup>180</sup> See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) (explaining how the word “fine” was understood at the time the Constitution was adopted when considering the Excessive Fines Clause of the Eighth Amendment); *Timbs v. Indiana*, 586 U.S. 682 (2019) (holding that the Excessive Fines Clause enforceable against the States under the Due Process Clause given historical context of the Fourth Amendment); *Roper v. Simmons*, 543 U.S. 551, 609 n.1 (2005) (Scalia, J., dissenting) (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)) (“The Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment: whether it is one of the ‘modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.’”).

<sup>181</sup> 543 U.S. at 609 n. 1 (Scalia, J., dissenting).

<sup>182</sup> *Id.* at 607–08 (Scalia, J., dissenting) (quoting THE FEDERALIST, NO. 78 (Alexander Hamilton)) (discussing Hamilton's vision in interpreting the Eighth Amendment).

<sup>183</sup> See, e.g., *Range v. United States*, 69 F.4th 96, 98 (3d. Cir. 2023) (holding that the Second Amendment included felons in its right to keep and bear arms).

<sup>184</sup> *N.Y. Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

procedure, it does not guarantee results that all originalists would agree with in every case. As mentioned above, J. Scalia and J. Alito differed when applying originalist principles, and Judge William Pryor has commented on how J. Scalia and J. Thomas disagreed on originalist grounds in major criminal procedure cases.<sup>185</sup> Internal disagreements among originalists—whether on the Court or in academic commentary—tend to stem from two primary causes: (1) differences in *application* of the same principles; and/or (2) differences in first premises about the nature of originalism itself.<sup>186</sup> While the former type of disagreement seems to explain many of the differences between J. Scalia and J. Thomas in well-known cases,<sup>187</sup> the latter relates to definitional issues endemic to many methods of constitutional interpretation.

### C. THE AMERICAN CONSTITUTION, LEGAL TRADITION, AND THE MEANING OF CRIME AND PUNISHMENT

An inquiry focused on determining the original meaning of the term punishment might begin with any one of the three determinants of original meaning: the original understanding of the constitutional text, intentions of the Framers, and the interpretive methods of those Framers. It also would show deference to tradition and precedent that accords with original meaning even if that precedent is not complete. In this context, both the text and the tradition point to a common theme: that usage of the term punishment in the Constitution implies a definition beyond the reach of legislative definition, something current doctrine undeniably permits and essentially incentivizes. The same holds for the many references in the Constitution to the word “crime” or its variants.

“Punishment” or its root “punish” appeared in five places in the original Constitution before it was amended several times: (1) the Impeachment Clause<sup>188</sup>; (2) the legislative chamber punishment provision<sup>189</sup>; (3) Congress’

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<sup>185</sup> Pryor, *supra* note 146, at 176.

<sup>186</sup> Vermeule describes the difference between “expected applications” originalism and semantic meaning originalism. Both also struggle with determining the level of abstraction for the inquiry which, depending on the case, can drastically alter outcomes. VERMEULE, *supra* note 134, at 94-97.

<sup>187</sup> Pryor, *supra* note 146, at 177 (noting how “their disagreements instead stemmed from differences in applying shared first principles”).

<sup>188</sup> U.S. CONST. Art. I, § 3 (“[T]he Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.”).

<sup>189</sup> U.S. CONST. Art. I, § 5 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

legislative power over counterfeiting currency<sup>190</sup>; (4) Congress' power to punish offenses on the high seas and against the law of nations<sup>191</sup>; and (5) Congress' power to declare the punishment for treason.<sup>192</sup> "Punishment" appears in two constitutional amendments. The Eighth Amendment prohibits cruel and unusual punishments.<sup>193</sup> The Thirteenth Amendment references types of permissible punishment after being convicted of a crime.<sup>194</sup>

Similarly, the word "crime" appears throughout the Constitution and the Amendments. Article II, Section Four provides for removal of executive officials convicted of "high Crimes and Misdemeanors."<sup>195</sup> Article III contains two references in Section Two, noting the jury trial mandate for federal cases and the venue of such trials in the state where the crime had been committed.<sup>196</sup> Article IV, Section Two requires states to deliver fugitives to the state where a crime was committed.<sup>197</sup> The Fifth Amendment bars charging for a federal capital or infamous crime without presentment or indictment of a grand jury, except in limited cases.<sup>198</sup> This provision has not been incorporated against the states.<sup>199</sup> The Sixth Amendment guarantees a "right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."<sup>200</sup> The Thirteenth Amendment limits punishment in the form of slavery or involuntary servitude to after conviction of a crime.<sup>201</sup> Finally, the Fourteenth Amendment, in Section Two, references the effect of "participation in . . . crime" on apportionment.<sup>202</sup>

<sup>190</sup> U.S. CONST. Art. I, § 8 ("To provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . . .").

<sup>191</sup> *Id.* ("To define and punish Piracies and Felonies committed on the high Seas . . . .").

<sup>192</sup> U.S. CONST. Art. III, § 3 ("The Congress shall have Power to declare the Punishment of Treason . . . .").

<sup>193</sup> U.S. CONST. amend. VIII.

<sup>194</sup> U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

<sup>195</sup> U.S. CONST. Art. II, § 4.

<sup>196</sup> U.S. CONST. Art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . .").

<sup>197</sup> U.S. CONST. Art. IV, § 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall . . . be delivered up, to be removed to the State having Jurisdiction of the Crime.").

<sup>198</sup> U.S. CONST. amend. V.

<sup>199</sup> *Hurtado v. California*, 110 U.S. 516 (1884) (holding that a state court did not have to provide indictment by grand jury as provided by the Fifth Amendment in order to meet the minimum Due Process requirements of the Fourteenth Amendment).

<sup>200</sup> U.S. CONST., amend. VI.

<sup>201</sup> U.S. CONST., amend. XIII.

<sup>202</sup> U.S. CONST., amend. XIV, § 2.

The word “criminal” appears twice in the Constitution. The Fifth Amendment contains the privilege against self-incrimination, which bars compelling someone “in any criminal case to be a witness against himself . . . .”<sup>203</sup> The Sixth Amendment limits its protections to “all criminal prosecutions.”<sup>204</sup>

According to originalist theory, these words have distinct meanings that are discoverable. Their inclusion in a written Constitution means that this meaning is fixed and contributory to the overall meaning of the Constitution. While some of the references in the Constitution implicate congressional authority as to prescribing punishments for crimes, none of them contemplate congressional ability to *define* the terms in the Constitution. This implies that in these contexts, the Framers had a particular understanding of punishment in mind. And while the Framers permitted Congress to create crimes that would be subject to punishment, what constitutes a crime in a general sense would appear to have some core content, regardless of legislative classification.

More specifically, there is good reason to believe that the Founders, when utilizing these words, sought to incorporate their meanings at common law, which built, to use Stinneford’s terms, from a “synthesis of morality and tradition.”<sup>205</sup> For instance, after the Declaration of Independence, but prior to the creation of the Constitution, several states referenced criminal justice principles inherited from English common law.<sup>206</sup> This directly contrasts with the claim that the definition of crime is subject to legislative whim. If that were true, then the various provisions in the Constitution and Bill of Rights that restrain governmental authority would be meaningless as soon as the legislature chose otherwise.<sup>207</sup>

The key inquiries for the originalist are (1) what constitutes crime; and (2) what constitutes punishment. Part III.D will take up the first question,

<sup>203</sup> U.S. CONST., amend. V.

<sup>204</sup> U.S. CONST., amend. VI.

<sup>205</sup> Stinneford, *supra* note 3, at 656.

<sup>206</sup> RONALD PESTRITTO, *FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA* 110 (2000) (“When America declared its independence, most states transferred the English common law to their citizens.”) (citing ELIZABETH GASPER BROWN, *BRITISH STATUTES IN AMERICAN LAW, 1776-1836* 23-24 (Ann Arbor: U. of Mich. L. Sch., 1964) (“Rather than devise completely new statutes to deal with all anticipated contingencies, delegates to constitutional conventions and state general assemblies found it expedient to utilize existing and familiar bodies of law.”)); JAMES R. STONER, JR., *COMMON LAW AND LIBERAL THEORY* 1-5 (Lawrence: University Press of Kansas, 1992).

<sup>207</sup> Stinneford, *supra* note 3, at 657 (“The Constitution imposes a wide variety of limits on government power that only apply in criminal cases . . . . These limits presuppose a substantive constitutional definition of crime; otherwise they would be meaningless. A legislature could always evade them simply by reclassifying a criminal statute as civil.”).

concluding that the crucial element of crime is moral blameworthiness and that such a finding is a necessary condition for a state-imposed consequence to count as punishment. Part III.E. takes the analysis one step further, noting that while crime must precede a state sanction for it to amount to punishment, the sanction can serve different punitive purposes than simply redressing the moral disorder caused by the crime, which is traditionally the purpose of retribution. The writings of the Founders and their contemporaries contemplate punitive state action that serves purposes other than retribution, meaning instrumentalist purposes do not preclude a finding that the sanction is, in fact, punishment. Put simply, the original understanding of punishment is a state-imposed sanction, in response to a crime, that serves a punitive purpose.

These sections also indicate how punitive practices at the time of the Founding and the aims of punishment reformers confirm this original understanding. Such practices often served purposes other than retribution, and reformers held that a state response to crime can serve multiple purposes and remain fundamentally punitive because of its entwining with the original finding of moral blameworthiness. A conviction that results in a state sanction in pursuit of a punitive purpose, including those other than retribution, *is* punishment. The conviction justifies the state action; the state action in response to the conviction, if it serves a punitive purpose, *is* punishment.

#### D. MORAL BLAMEWORTHINESS AND CRIME AS THE ORIGINAL PRECONDITION FOR PUNISHMENT

The original understanding of the word crime is a morally blameworthy action that offends the state. While this understanding predates Blackstone, he suggests as much when he refers to “punishment” as the response for “abuse of . . . free will” and that a “vicious will” distinguishes criminal from merely wrongful acts.<sup>208</sup> Stinneford notes how this definition “was universally held for more than five hundred years, dating back at least as far medieval jurist Henry de Bracton.”<sup>209</sup> De Bracton had written that “crime is not committed unless the intention to injure exists” and that “will and purpose . . . mark *maleficia*.”<sup>210</sup> This was a position held by the Supreme Court for nearly 100 years.<sup>211</sup>

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<sup>208</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*21-27.

<sup>209</sup> Stinneford, *supra* note 3, at 659.

<sup>210</sup> HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Harvard University Press 1968) (c. 1300).

<sup>211</sup> *See, e.g.*, *Felton v. United States*, 96 U.S. 699, 703 (1877) (holding that punishment is linked to guilt).

There are plenty of determinants of this understanding. First, the common law basis of the criminal law inherited at the time of the Founding considered crime to indicate morally blameworthy action that injured the state. Founding-era dictionaries<sup>212</sup> confirm this understanding. Barclay's Universal English Dictionary defines "crime" as the "voluntary breach of any known law,"<sup>213</sup> "criminal" as "worthy of blame" and "faulty"<sup>214</sup> and "criminally" as a "manner which implies guilt . . . which deserves blame or punishment."<sup>215</sup> Similarly, Samuel Johnson's A Dictionary of the English Language defines "crime" as an "act contrary to law and right; an offense; a great fault; an act of wickedness."<sup>216</sup> This understanding was built from centuries of custom and tradition that acknowledged the affirmative responsibility of the government to respond to intrinsic moral wrongs that undercut the social fabric, namely the list of crimes now known as common law felonies.<sup>217</sup> Such crimes include murder and other forms of homicide<sup>218</sup>; other well-known common law crimes include rape, robbery, and other non-violent thefts. These crimes all contained serious moral infractions, coupled with an intention to harm and serious social harm. Hence, *mens rea*, or moral blameworthiness, was a cornerstone of criminal law<sup>219</sup>, as well as voluntariness.<sup>220</sup>

The writings of major figures at the time, such as the American Founder James Wilson, are illustrative on this point. Wilson constantly referenced key thinkers, such as Locke, Blackstone, Hooker, Cicero, and others,<sup>221</sup> and in a series of lectures, offered his views on the nature of the criminal law and punishment. Wilson's definition of crime looked like this:

A crime is an injury, so atrocious in its nature, or so dangerous in its example, besides the loss which it occasions to the individual who suffers by it, it affects,

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<sup>212</sup> Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 382-93 (2014) (displaying an appendix with common dictionaries from the time of the Founding).

<sup>213</sup> BARCLAY'S UNIVERSAL ENGLISH DICTIONARY (1792).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792). The Royal Standard English Dictionary defines crime as "a great fault; an offence" and "criminally" as "wickedly; guiltily." WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (1788).

<sup>217</sup> Stunneford, *supra* note 3, at 662-63 (noting the "affirmative obligations of the government.").

<sup>218</sup> *Id.* (citing Coke).

<sup>219</sup> 3 COKE, INSTITUTES (1644), ch. 1, at 961 ("The act does not make one guilty unless the mind is also guilty.").

<sup>220</sup> 4 BLACKSTONE, 20-21 (focusing on will as crucial to wrongdoing).

<sup>221</sup> WRIGHT, *supra* note 114, at 282 (noting how Wilson's work "indicate[s] that his chief sources for the general principles of law were much the same as those from which he and other leaders of the Revolution had drawn their philosophical weapons during the years of that controversy").

in its immediate operation or in its consequences, the interest, the peace, the dignity, or the security of the publi[c].<sup>222</sup>

Wilson added, in the context of the crime of battery, that in addition to inflicting a “private wrong,” “[v]iolence against the person of an individual is a disturbance of the publi[c] peace.”<sup>223</sup> Wilson distinguished this understanding from other types of wrongs, including in legal systems that preceded the Anglo-American tradition, noting that “[i]n those ages, the conceptions of men were too crude to consider an injury done to an individual, as a crime committed against the publi[c]; they viewed it only as a prejudice to the party, or the relations of the party, who were immediately affected.”<sup>224</sup> Crime is therefore an injury that is inherently public and is indicative of a form of malice present within the offender.

Further, Wilson’s understanding of crime as a public wrong is evident in his discussion of the term “felony.”<sup>225</sup> Wilson discusses how the term felony has reputational and property interest roots linked to pre-liberal societies.<sup>226</sup> To act feloniously was to intentionally deprive someone of his property interests and potentially his station. This contrasts with committing a wrong accidentally. Thus, crime is distinct because it marks a disruption in baseline expectations of members of a political society:

Without mutual confidence between its members, society, it is evident, could not exist. This mutual and pervading confidence may well be considered as the attractive principle of the associating contract. To place that confidence in all the others is the social right, to deserve that confidence from all the others is the social duty, of every member. To entertain a disposition, in which that confidence cannot with propriety be placed, is a breach of the social duty, and a violation of the social right: *it is a crime inchoate*. When an injury, atrocious in its nature, or evil in its example, is committed voluntarily against any one member, the author of that voluntary injury has, by his conduct, shown to all, that their right is violated; that his duty is broken; that they cannot enjoy any longer their right of placing confidence in him; that he entertains a disposition unworthy of this confidence; that he is false, deceitful, and treacherous: the *crime is now completed*.<sup>227</sup>

Wilson summarizes crime as “[a] disposition, regardless of social duty to all, and discovered by an injury, voluntary, and atrocious or dangerous,

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<sup>222</sup> JAMES WILSON, ET AL., COLLECTED WORKS OF JAMES WILSON 1088 (ed. Liberty Fund, 2007).

<sup>223</sup> *Id.* at 1089.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 1096.

<sup>226</sup> *Id.* at 1096-99 (discussing how the etymology of the word felony is rooted in the word feud, ion, pretium feudi, and others).

<sup>227</sup> *Id.* at 1101 (emphasis added in italics).

committed against one—this is a crime against society.”<sup>228</sup> Wilson’s emphasis on wrongful disposition— “[i]n the consideration of crimes, the intention is chiefly to be regarded”<sup>229</sup>—is the key to defining crime. A wrongful disposition plus an injury that breaches the social bargain equals crime.

A second determinant of the notion that the definition of crime has a fixed core is the idea that the Constitution’s written character was a reaction to perceived governmental excess that transgressed the common law.<sup>230</sup> First, Parliament had, in the Framers’ eyes, violated core protections of the common law.<sup>231</sup> Second, the Framers took the time to enshrine several common law protections into the constitutional text to “prevent punishment without culpability.”<sup>232</sup> Several of these protections contain popular components, insulating criminal defendants from tyrannical action through normative checks from popular participation.<sup>233</sup> Put simply, the Constitution implies a definition of crime, which in turn suggests substantive limits on the power to define crime and punishment.<sup>234</sup> And the sense of community members—because of their unique insight into the moral underpinnings of the political society—was baked in to ensure the law remained tethered to its moral roots.<sup>235</sup>

Further, as Stinneford has shown, the practices of early American courts suggest that the linchpin of crime is moral blameworthiness.<sup>236</sup> Early American criminal codes and Founding-era codes indicate that moral wrongdoing underlies the meaning of crime. In the mid-1600s, Massachusetts linked its capital offenses to grave moral wrongs.<sup>237</sup> Some of this was undoubtedly due to the influence of Protestant ethics; equating sin and crime allowed for

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<sup>228</sup> *Id.* at 1101.

<sup>229</sup> *Id.* at 1101.

<sup>230</sup> Stinneford, *supra* note 3, at 665 (describing how the Constitution resulted from opposition to actions in England).

<sup>231</sup> *Id.* (“In fact, Americans justified revolt against England largely on the basis of Parliament’s violation of their common law rights.”).

<sup>232</sup> *Id.*

<sup>233</sup> LAURA I. APPLEMAN, *DEFENDING THE JURY* (2015) at 30–33 (describing the role of the community in adjudication).

<sup>234</sup> Stinneford, *supra* note 3, at 666 (“Although the Constitution does not explicitly mention substantive limits to Congress’s power to define crime, the various provisions . . . imply such a limit.”).

<sup>235</sup> APPLEMAN, *supra* note 233, at 13–38.

<sup>236</sup> Stinneford, *supra* note 3, at 666 (“Taken together, [the laws] were supposed to ensure that punishment is not imposed in the absence or in excess of culpability.”).

<sup>237</sup> William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 451–52 (1967).

enforcement of the moral law.<sup>238</sup> Other states concerned themselves with proportionality in the wake of serious and less serious crimes.<sup>239</sup> Reformers, when seeking to soften severe punishments, drew from religious and moral concepts.<sup>240</sup> Proportionality is a concept of criminal *justice*, not efficiency, which suggests an underlying moral component to the notion of crime.

*The Federalist Papers* suggest an understanding of crime that recognizes moral foundations. For Alexander Hamilton, writing as “Publius,” punishment was a reaction to moral transgressions that tore at the fabric of the otherwise existing political and legal relationships that were necessary for the happiness and security of a community.<sup>241</sup>

This understanding of what crime *is* elucidates the truth that punishment required culpability. Culpability was a precondition for state action to be labeled punishment and possibly just. While state action against a non-convicted defendant might be *punitive*, it is not criminal punishment. Wilson confirmed this himself when discussing detention without bail, which has the purpose of “keeping, not for that of punishing the prisoner.”<sup>242</sup> The conviction, because it rests on a finding of moral blameworthiness, transforms the potential character of the state action. State action against a convicted defendant can equal criminal punishment if it furthers a punitive purpose. This naturally leads to the next question crucial to the focus of this Article: which *purposes*, in the wake of a conviction, were originally understood as *punitive*?

#### E. THE ORIGINAL UNDERSTANDING OF THE PURPOSES OF PUNISHMENT: MORE THAN RETRIBUTION

The foregoing now centralizes the crux of the analysis for determining what constitutes punishment in the wake of a conviction: which purposes were considered punitive at the time of the Founding? The original meaning of punishment includes those state actions following a conviction that furthered

<sup>238</sup> David Flaherty, *Law and the Enforcement of Morals in Early America*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES (Cambridge: Harvard University Press, 1978); see also William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER.

<sup>239</sup> PESTRITTO, *supra* note 206, at 110–11 (discussing New Jersey, Virginia, and New England’s approach to crime generally, and efforts to exact more proportionate punishment).

<sup>240</sup> *Id.* at 113 (discussing influence of Quakerism on penal reform in Pennsylvania, with specific references to the moral and religious code and its connection to criminal justice).

<sup>241</sup> *Id.* at 137 (“For Publius, punishment meant that crimes are moral violations, and humans are held morally accountable for criminal behavior.”).

<sup>242</sup> WILSON, *supra* note 222, at 1178.

a punitive purpose. This section demonstrates the varied purposes recognized as punitive by Founding-era thinkers, including retribution and other goals. This understanding is reflected in the writings of Founders, the actions of reformers, the general philosophical milieu relating to punishment, and the punitive practices that existed at the time.

James Wilson's writings are a good starting place to illustrate this point. Wilson held that the purpose of criminal law and punishment was the "*prevention of crimes.*"<sup>243</sup> But Wilson also had a definition of what punishment *is*. Punishment is responsive to the public "disturbance" created by crime.<sup>244</sup> Wilson defined punishment as "the infliction of that evil, superadded to the reparation, which the crime, superadded to the injury, renders necessary, *for the purposes of wise and good administration of government.*"<sup>245</sup> In short, punishment was the reaction, by the state, to the public injury inflicted by crime, which is distinct from the private injury suffered by the particular victim. The public aspect of the injury relates directly to the distinguishing feature of criminal law—its connection to moral blameworthiness and the offender's willingness to transgress public order. As such, the distinct nature of the injury that is crime justifies punishment on this basis.

That said, punishment does not lose its punitive character when it serves purposes other than remediating this transgression. This is because it responds to a public wrong and public responses by the state serve many purposes. In other words, while a need to redress the moral transgression underlying the criminal law necessarily leads to punishment and sounds in desert—it is only *one* defining feature of punishment. Punishment, while justified in this fashion, has *many* purposes and can take many forms.<sup>246</sup> Many purposes serve the "wise and good administration of government."<sup>247</sup>

Wilson's discussion of the concept of proportionality, which he concedes is a quite difficult question whether considered on desert or utilitarian grounds,<sup>248</sup> illustrates this idea further. Wilson, reacting to the Beccarian idea

<sup>243</sup> *Id.* at 1087.

<sup>244</sup> *Id.* at 1089 ("On this disturbance punishment may be inflicted.").

<sup>245</sup> *Id.* at 1088 (emphasis added).

<sup>246</sup> It is important to note that retribution can serve as the justification and primary purpose of punishment. What the evidence suggests, however, is that some Founders conceded that retribution justified punishment (given the criminal conviction and need for moral redress), but that the primary purpose of the punishment could be instrumental. Alternatively, retribution might justify punishment and serve as its chief purpose, although instrumental purposes might be more publicly observed.

<sup>247</sup> WILSON, *supra* note 222, at 1178.

<sup>248</sup> WILSON, *supra* note 222 at 1092–94 (discussing Framing era thinkers, such as Beccaria, and how they would measure proportionality, while conceding the concept's elusive nature).

that punishment should be calibrated only according to the social harm stemming from the criminal action, held fast to the idea that considering the *wrongful intent* is relevant to proportionality.<sup>249</sup> But this was not only because punishment needed to redress the wrongful disposition that characterizes crime; it was also because the measure of punishment could have positive effects on public safety. That is to say, the proportionate punishment was mindful of non-retributive purposes.

More specifically, Wilson considered the primary task of punishment to be “reparation for the included injury” in the crime itself. And because the crime involved both private and public wrongdoing, the punishment could serve multiple purposes. Thus, for instance, Wilson describes “banishment” in reaction to theft crimes as punishment.<sup>250</sup> The banishment is both responsive to the moral wrong and preventative. Similarly, he mentions three punishments, each with different purposes, in the wake of riotous crimes: fines, imprisonment, and the pillory.<sup>251</sup> Fines make reparation, imprisonment incapacitates, and the pillory shames. Punishment was thus characterized by two attributes: being preceded by a crime and exacted in furtherance of purposes that accord with the nature of crime itself, namely being responsive to types of injuries inherent in crime. Punishment might repair the individual victim, protect society, or incapacitate or shame the offender.

There is other evidence bearing on the original meaning of punishment than the writings and lectures of James Wilson. Ronald Pestritto, in his book *Founding the Criminal Law*, argued that Founding-era views on punishment were a synthesis of ancient, medieval, and Enlightenment thought, leaving room for concepts of just deserts and utilitarian purposes for punishment.<sup>252</sup> Even measures that *singularly* pursued utilitarian purposes were still considered punishment. For instance, Thomas Jefferson, and criminal law

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<sup>249</sup> *Id.* at 1104 (“If, indeed, it is an error [sic], as the Marquis of Beccaria alleges it to be, to think a crime greater or less according to the intention of him by whom it is committed, it is, in the common law, an error [sic] of the most inveterate kind; it is an error [sic] which the experience of ages has not been able to correct.”).

<sup>250</sup> *Id.* at 1119 (“In Lorraine, so long ago as the fourteenth century, forgery was punished with banishment.”).

<sup>251</sup> *Id.* at 1140 (“The punishment of these offences, at the common law, has generally been fine and imprisonment only: cases, however, very enormous have been punished by the pillory also.”).

<sup>252</sup> PESTRITTO, *supra* note 206, at 8 (“Although it is certainly the case that the politics of punishment during the American founding was influenced by Beccaria [an enlightenment thinker], many have overlooked the importance of other approaches—just deserts, in particular.”). Pestritto’s work situates contemporary debates about the nature of punishment and the role of the state within broader conversations about the political philosophy of the Founding generation.

reformers like Dr. Benjamin Rush, critiqued the criminal law and punishment on both desert-based and utilitarian grounds.

Pestritto uses the fluctuation in Pennsylvania's penal apparatus to convey how Founding-era thinkers varied in their views on punishment. Pennsylvania's criminal code and punishment practices went from extremely harsh in the 1700s to mild and back to harsh prior to the Revolution.<sup>253</sup> Harsh penalties were often corporal, building from retributive and incapacitative purposes. A period of severity preceded the Founding, opening the door to public critique by reformers like Rush and William Bradford, who in turn cited Beccaria and others for inspiration.

Rush's view of the criminal law was instrumentalist. Rush viewed punishment as a means "to deter future crime and to reform criminals."<sup>254</sup> Rush explicitly rejected retribution, associating it with "revenge."<sup>255</sup> Instead, he advocated for penitentiaries geared towards character reform.<sup>256</sup> As Pestritto notes, Rush "viewed punishment as a means to prepare the individual for a return to society."<sup>257</sup> This is one reason why Rush vehemently opposed public punishments. Because public punishment could shame beyond repair and destroy one's reputation, it could undercut the reformative potential of punishment.<sup>258</sup> But even in critique of punishment practices, utility was the primary aim of punishment for Rush.<sup>259</sup> Notably, however, Rush never declared that reforming existing punishment practices to better tailor them to instrumentalist goals changed the practices from punitive to non-punitive.

Bradford, a politician concerned with criminal reform, considered deterrence—both specific and general—to be the purpose of punishment.<sup>260</sup> To

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<sup>253</sup> *Id.* at 15–19 (describing the variation over time between harsh penal laws inherited from the English common law and more lenient approaches adopted expressly by the colonies).

<sup>254</sup> *Id.* at 21.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* ("Rush [was] a proponent of the penitentiary, which placed an emphasis upon the inner conversion of criminals.").

<sup>257</sup> *Id.* at 22 (citing Benjamin Rush, *An Enquiry into the Effects of Public Punishments upon Criminals, and upon Society*, ESSAYS, 79).

<sup>258</sup> *Id.* at 27.

<sup>259</sup> *Id.* at 22–24. Pestritto has pointed out that there might be an internal contradiction in Rush's views on punishment given Rush's other statements relating to the causes of crime. In some writings, Rush suggests that criminal activity is not always completely voluntary. *See id.* at 24 (referencing how at times Rush appears to follow Beccaria and utilitarian thought, whereas other times he references criminal behavior caused by "physiological elements"). This, of course, would then imply that punishment geared towards rational calculation or personal development (e.g., deterrence or rehabilitation) might be misplaced.

<sup>260</sup> PESTRITTO, *supra* note 206, at 30 (citing William Bradford, *An Enquiry how far the Punishment of Death is Necessary in Pennsylvania*, 4) (describing how Bradford saw death as the only deterrence for repeat offending).

be clear, Bradford left room for retribution; but he viewed deterrence and retribution as dual purposes, with the former determining content and the latter determining parameters and preventing excess.<sup>261</sup> In his penal reform advocacy, Bradford referred to the “severity of our criminal law” as “an exotic plant and not the native growth of Pennsylvania,” which instead was “soil” prepared to receive the “principles of Beccaria.”<sup>262</sup> Pestritto notes how post-Revolution, but pre-Founding, Pennsylvania passed “An Act Amending the Penal Laws of This State,” with a preamble that listed the purposes of the criminal law and punishment as “to correct and reform the offenders, and to produce such strong impression upon the minds of others as to deter them from committing the like offenses.”<sup>263</sup> Later Pennsylvania reforms, moderating punishment for certain crimes, conceded that branding was punishment.<sup>264</sup> They also reiterated that measures for prevention and reparation were the appropriate responses to crime.<sup>265</sup> Massachusetts’ Governor John Hancock explicitly referenced instrumental aims for punishment without suggesting that pursuing them would be insufficiently punitive.<sup>266</sup>

Pestritto’s work indicates that Pennsylvania’s reform experience was not unique in its indication that deprivations in the wake of convictions can serve several purposes and remain punitive. Virginia, through Framers like Jefferson, also aimed to moderate its severe criminal code by pointing to utilitarian purposes.<sup>267</sup> Jefferson frequently cited Beccaria in his writings on criminal matters.<sup>268</sup> When asked to contemplate a new prison in Virginia, he noted how hard labor and solitary confinement would “best serve the ends of deterrence and reform.”<sup>269</sup> While conceding the legitimacy of the *lex talionis*, he wrote about its need to be balanced with instrumentalist principles.<sup>270</sup> His

<sup>261</sup> *Id.* at 30–31.

<sup>262</sup> *Id.* at 36 (citing Bradford, *An Enquiry*, 26).

<sup>263</sup> *Id.* at 37 (citing Statutes at Large of Pennsylvania 12:280).

<sup>264</sup> *Id.* at 39.

<sup>265</sup> *Id.* at 39 (discussing “An Act for the Better Preventing of Crimes, and for Abolishing the Punishment of Death in Certain Cases”).

<sup>266</sup> Address by Governor John Hancock to a Joint Session of the Massachusetts Legislature, Jan. 31, 1793 (referencing “prevent[ing] the commission of crimes” and what is “absolutely necessary to the good order of Government, or to the security of the People”).

<sup>267</sup> PESTRITTO, *supra* note 206, at 45–46 (describing how Jefferson took the approach of Pennsylvania by making severe penalties milder).

<sup>268</sup> CESARE BECCARIA, 141–42; EDWARD DUMBAULD, THOMAS JEFFERSON AND THE LAW, 135–39. I do not mean to suggest that Jefferson was exclusively an instrumentalist when it came to punishment. His writings are littered with references to just deserts. For purposes of this Article, my contention is that he considered instrumental purposes to be punitive.

<sup>269</sup> PESTRITTO, *supra* note 206, at 123.

<sup>270</sup> Letter from Thomas Jefferson to George Wythe (Nov. 1, 1778).

writings relating to his “Bill for proportioning Crimes and Punishments” indicate balancing and mixing retributive and utilitarian principles.<sup>271</sup> New York, through Thomas Eddy, prioritized reforms like those pushed in Pennsylvania and Virginia.<sup>272</sup> Eddy’s writing emphasized deterrence: “The peace, security, and happiness, of society depend on the wisdom and justice of the means devised for the *prevention* of crimes.”<sup>273</sup> For Eddy, punishment did not lose its punitive character when it pursued non-retributive ends; rather, utilitarian ends made punishment carefully tailored and therefore more just. Eddy considered prevention of crimes, character reformation, deterrence, and reparation as the concern of punishment.<sup>274</sup> Those purposes were all punitive.

The positions expressed above were indicative of the broader cultural milieu and philosophical understandings of the nature of punishment. While Pestritto’s work argues that it is a mistake to think reform in the revolutionary era was exclusively based on utilitarian grounds<sup>275</sup>, the focus here is different. Instead, the question is whether the positions of the reformers indicate, to some degree, how Founding-era thinkers thought about the definition of punishment itself and how that informs the *legal* meaning of the term.

The philosophical and cultural background at the time of the Founding suggests that punishment was first understood as a state reaction to moral wrongdoing (acknowledged by the criminal law) to convey societal disapproval and to achieve punitive ends. Some Enlightenment philosophers disconnected the criminal and moral law<sup>276</sup>, but they did not sever conviction from punishment. Accordingly, the list of punitive ends was lengthy regardless of philosophical presuppositions about the nature of the criminal law or crime. State imposed deprivations that served utilitarian purposes in the wake of a conviction were still punishment, meaning a utilitarian purpose, *itself*, was sufficient to label a deprivation punishment. The punitive character of the

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<sup>271</sup> PESTRITTO, *supra* note 206, at 124 (quoting Thomas Jefferson, Autobiography, Writings, 1:63-64 (Lipscomb)) (“In forming a scale of crimes and punishments, two considerations have principal weight. 1. The atrocity of the crime. 2 The peculiar circumstances of a country, which furnish greater temptations to commit it, or greater facilities for escaping detection. The punishment must be heavier to counterbalance this.”).

<sup>272</sup> *Id.* at 54 (describing Thomas Eddy’s interest in bringing Pennsylvania-style reforms to New York).

<sup>273</sup> Thomas Eddy, An Account of the State Prison or Penitentiary House, in the City of New-York, 5 (New York: Isaac Colins and Son, 1801).

<sup>274</sup> PESTRITTO, *supra* note 206, at 55 (illustrating Eddy’s view that reformation and deterrence are closely linked in preventing future crime).

<sup>275</sup> *Id.* at 109 (noting how penal reform during the Founding seemed inspired by a variety of ideas, including those of the Enlightenment era, utilitarian thought, and a more careful application of ancient and medieval principles).

<sup>276</sup> *Id.* at 65 (referencing Beccaria, amongst others, who doubted the moral component to the criminal law).

state deprivation stemmed from its origin in reacting to the conviction—based on moral wrongdoing—and the purpose of the deprivation, whether retributive *or* utilitarian.

This is evident in the philosophical writings that influenced the reformers and the practices underlying enforcement of the criminal law at the time. State-imposed consequences that are not responses to a conviction are not considered punishment. But state-imposed consequences that respond to convictions are punishment if they pursue punitive purposes. The common law expressions of strands of retributivism—that writers like Wilson referenced—confirm this position. So do the writings of reformers like Beccaria, Bentham, and Blackstone, where the finding of conviction is presumed before discussing the proportionality of punishment, on either retributive *or* utilitarian grounds.

The political theorists that influenced the Founders<sup>277</sup> illustrate this as well. At the top of the list is John Locke, whose social contract theory informed the thinking of many Founders.<sup>278</sup> Locke's theory of punishment builds from the primary premise supporting his political theory, namely that the first law of nature is self-preservation and that individuals, when entering society, cede most of the authority to exact force against others to the state.<sup>279</sup> Individuals have the natural right to protect others and restrain offenders.<sup>280</sup> Interestingly, both purposes are instrumentalist.<sup>281</sup> Protection promotes self-preservation and other aspects of order. Restraining the dangerous essentially licenses incapacitation. Locke makes this even clearer when discussing the right to kill murderers, noting the need “to deter others from doing the like injury” and to

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<sup>277</sup> WRIGHT, *supra* note 114, at 281 (referencing “Pufendorf, Locke, Blackstone, Paley, Hooker, Rutherford, [and] Cicero”).

<sup>278</sup> Alex Tuckness, *Discourses of Resistance in the American Revolution*, 64 J. HIST. IDEAS 547, 547 (2003) (noting the influence of Lockean ideas on pamphlets circulating around the time of the Revolution and Founding).

<sup>279</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, ¶ 7 (referring to the right of individuals to “preserve the innocent and restrain offenders”).

<sup>280</sup> See, e.g., PESTRITTO, *supra* note 206, at 65; A. John Simmons, *Locke on the Death Penalty*, 69 PHIL. 471, 474 (1994) (describing Locke's view that any duty to punish in the state of nature flows from man's comprehensive duty to preserve mankind); Brian Calvert, *Locke on Punishment and the Death Penalty*, 68 PHIL. 211, 219 (1993) (discussing Locke's theory on the right to defend oneself in the state of nature and in political society).

<sup>281</sup> Alex Tuckness, *Retribution and Restitution in Locke's Theory of Punishment*, 72 J. OF POL. 720, 721 (2010) (“Locke identifies two distinct grounds for punishment: the protection of society (including deterrence) and restitution (or ‘reparation’ as Locke sometimes says).”); Matthew K. Suess, *Punishment in the State of Nature: John Locke and Criminal Punishment in the United States of America*, 7 WASH. U. JURIS. REV. 367, 379 (2015) (describing Locke's view of the purpose of punishment in the state of nature as mutual protection through deterrence).

“secure men.”<sup>282</sup> In the *Second Letter Concerning Toleration*, he says punishment should be “directly useful for . . . procuring some greater good.”<sup>283</sup> Foreshadowing Bentham, Locke says lesser crimes should be punished to make would be offenders think twice.<sup>284</sup> Deterrence and safety are the primary punitive purposes for Locke.<sup>285</sup>

Interestingly, for Locke, restitution was not exclusively “civil” or non-punitive. Instead, because it had a forward-looking dimension by assisting with reparation of the injury, it was punishment.<sup>286</sup> Locke, after identifying deterrence and seeking security as one purpose of punishment, identified “taking reparation” as the other.<sup>287</sup> Locke considered forms of compensation mandated by the state after wrongdoing to be punishment.

There are other influential thinkers who had conceptions of punishment broader than retribution. Grotius, Hobbes, and Pufendorf all fall into this category. All three thinkers conceded the existence of a natural law that informed the nature of punishment. All three thinkers conceptualized punishment as fundamentally related to ensuring security and deterrence of future offenders.<sup>288</sup> Grotius argued that punishment is “chastisement” in order to make the offender more “useful to humanity” and to deter future crime.<sup>289</sup> Hobbes, in *Leviathan*, argued for punishment that pursued the “good to follow.”<sup>290</sup> Pufendorf identified the purposes of punishment as “the good of the criminal, or the interest of the person . . . injured . . . , or [by] everyone’s interest . . . .”<sup>291</sup>

The roots of modern-day rehabilitation theory were present at the Founding as well. Theories about the origins of crime, free will, and the formation of character supported many of the reform movements mentioned

<sup>282</sup> Locke, *supra* note 279, at paragraphs 8–11 (discussing the rights of man in the state of nature to punish offenders).

<sup>283</sup> JOHN LOCKE, A SECOND LETTER CONCERNING TOLERATION (1690) (offering justifications for the relative evil that is punishment).

<sup>284</sup> LOCKE, *supra* note 279, at paragraph 12 (referencing making punishment so severe as to make the crime an “ill bargain for the offender”).

<sup>285</sup> PESTRITTO, *supra* note 206, at 76 (exploring the degree of utilitarianism in Locke’s theory of punishment).

<sup>286</sup> Tuckness, *supra* note 281, at 721–31 (expressing Locke’s grounding of punishment in the protection of society and restitution for victims).

<sup>287</sup> *Id.* at 728 (articulating Locke’s two distinct foundations for the right to punish).

<sup>288</sup> *Id.* at 721–28 (describing the relationship between Locke’s theory of punishment and that of Hobbes, Pufendorf, and Grotius).

<sup>289</sup> *Id.* at 722 (quoting Hugo Grotius, *Commentary on the Law of Prize and Booty* (1603)).

<sup>290</sup> *Id.* (citing THOMAS HOBBS, *LEVIATHAN*, 106 (ed. Richard Tuck) (1991)).

<sup>291</sup> SAMUEL PUFENDORF, ON THE DUTIES OF MAN AND CITIZEN ACCORDING TO NATURAL LAW, 2.13.7 (1673).

above. While the work of Jean Jacques Rousseau is traditionally cited as instrumental to the development of modern rehabilitative theory,<sup>292</sup> Pestritto highlights the work of William Godwin, whose essay *An Enquiry Concerning Political Justice and Its Influence on General Virtue and Happiness* in 1793 articulated how “circumstances and [one’s] environment”, and “man’s economic condition” caused crime.<sup>293</sup> Accordingly, punishment should be oriented to the “good of the offender”<sup>294</sup> as “[t]he only true end of punishment is correction.”<sup>295</sup> Notice how even Godwin, who questioned the notion of criminal responsibility itself given his beliefs about social determinism, considers state imposed sanctions in response to violations of the criminal law, for the purpose of *rehabilitation*, to still be punishment.

As alluded to earlier in this sub-section, the Founding era was characterized by a multiplicity of views about the purposes of punishment. Historical practice relating to the enforcement of the criminal law at the time seems to confirm this idea. William Nelson documented some of these facts when he noted the transition from enforcement of the criminal law to support morality to enforcement for the protection of property.<sup>296</sup> The latter became more prevalent in the period between the American Revolution and the Founding. Figures like John Adams and Thomas Hutchinson emphasized deterring disorder rather than merely responding to the moral wrongdoing underlying crime.<sup>297</sup> Judge William Cushing, in a grand jury charge noted the function of the criminal law “to discourage vice . . . and disorders in society.”<sup>298</sup> Governor Hancock’s address, alluded to above, suggested punishment should attain “the good order of government . . . and the security of the people.”<sup>299</sup> The reasons for this shift are multi-faceted and too complicated to explore here. Nelson proposes the rise of theft and the desire to deter it as the primary

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<sup>292</sup> PESTRITTO, *supra* note 206, at 80–83 (noting how Rousseau’s philosophy is used to support rehabilitative theory, although the logical extension of his premises suggests instrumental purposes like those favored by utilitarian thinkers).

<sup>293</sup> *Id.* at 79.

<sup>294</sup> *Id.* at 81.

<sup>295</sup> WILLIAM GODWIN, AN ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON GENERAL VIRTUE AND HAPPINESS, 81 (Raymond A. Preston ed., 1926) (1793).

<sup>296</sup> William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 458–63 (1967) (highlighting an increase in prosecutions for offenses against private property as part of a significant transformation of ideas underlying American criminal law in the late eighteenth and early nineteenth centuries).

<sup>297</sup> *Id.* at 463 (“Adams and Hutchinson were not worried that *sinners* would break into their homes and take away their property . . . they feared organized groups of malcontents bent upon the reconstruction of society.”).

<sup>298</sup> Draft of Grand Jury Charge by Cushing, C.J., 1783, in William Cushing Papers, 21.

<sup>299</sup> Message from Governor Hancock to the General Court, 1793, at 193.

factor. Regardless, no one seemed to doubt that such thefts were crimes; and no one seemed to doubt that state action in response to *deter* such acts from happening again, regardless of form, was punishment.

The broader understanding of punishment and its purposes put forth above is reflected in the definitions of the relevant terms in dictionaries in circulation at the time of the Founding. All presupposed a violation of law. For instance, *Barclay's Universal English Dictionary* defined punishment as “any penalty or pain inflicted on account of violation of *some law*.”<sup>300</sup> William Perry’s *The Royal Standard English Dictionary* noted punishment is a “thing imposed for a crime.”<sup>301</sup> John Ash’s *New and Complete Dictionary of the English Language* had a similar definition, but restricted to the field of crime: “the pain or penalty inflicted for a crime.”<sup>302</sup> Samuel Johnson’s *A Dictionary of the English Language* defined punishment as “any infliction of pain imposed in vengeance of a crime.”<sup>303</sup> Put simply, the fixation on *purpose*, and only retributive ones at that, and the other considerations in existing doctrine, are much narrower than the original meaning of punishment, whether reflected in the writings of the Founders and reformers, the broader philosophical and cultural backdrop, the practices of punishment at the time, or the bare definitions themselves.

This sub-section indicates that the original meaning of punitive purpose extended beyond retribution, contra the holding of *Doe* mentioned in Part I. There were many punitive purposes at the time of the Founding. The philosophical context, writings and communications of Founding era figures, and criminal law practices confirm that instrumental purposes were sufficiently punitive. And when they were pursued in a response to a conviction, the measure amounted to punishment. The original understanding of punishment was much simpler *and* inclusive.

#### IV. IMPLICATIONS OF THE ORIGINAL UNDERSTANDING OF PUNISHMENT

The previous analysis indicates that the original meaning of punishment suggests three conditions for a state action to amount to punishment: (1) a criminal conviction; (2) a state consequence automatically imposed in response to that conviction; and (3) the state action serves a punitive purpose

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<sup>300</sup> BARCLAY’S, *supra* note 213.

<sup>301</sup> WILLIAM PERRY, *THE ROYAL STANDARD ENGLISH DICTIONARY* (1788).

<sup>302</sup> JOHN ASH, *NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (1775).

<sup>303</sup> SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE*, *supra* note 216.

recognized as such at the time of the Founding. Punishment therefore *is* a penalty inflicted by the state for a punitive purpose after a conviction. An alternative formulation might be this: punishment occurs when the state responds to crime with a measure that intends to punish. The intent to punish includes the intent to repair or mete out desert, as well as the intent to deter, reform, shame, or incapacitate. The absence of a clear intent to exact desert is not fatal to classifying the state action as punishment given that other purposes are sufficiently punitive.

#### A. METHODOLOGICAL AND DOCTRINAL IMPLICATIONS

The original meaning of punishment does not indicate that existing doctrine is *entirely* problematic. First, existing doctrine does necessitate that a conviction has occurred before a state action can be labeled punishment.<sup>304</sup> Second, existing doctrine concedes that a state action in response to a conviction for the purpose of punishing is punishment.<sup>305</sup> Further, it holds that exacting retribution is a punitive purpose.<sup>306</sup> Retribution was a punitive purpose at the time of the Founding. These principles are embedded within the three principles articulated in the previous paragraph.

Similarities aside, the original understanding suggests tweaks to existing doctrine in three major ways. First, it broadens the range of automatic consequences premised on a conviction that might be labeled punishment. Consequences imposed by the state that automatically flow by virtue of a conviction are potentially punishment, regardless of their classification by the legislature as criminal or civil. What matters is whether they serve a punitive purpose recognized as such at the time of the Founding.

Second, the search for the original meaning of punishment answers the “*which* purposes” question in a straightforward way: it broadens the range of purposes that might be labeled punitive. This is because the primary *necessary* condition for punishment is a criminal conviction. After that condition is met, several purposes are considered punitive, and therefore *sufficient*, when attached to the conviction, to allow the state response to be labeled punishment. This contrasts directly with the Court’s suggestion in *Hendricks*

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<sup>304</sup> See 521 U.S. 346, 361–62 (1997) (holding that criminal responsibility is required to deem civil commitment a form of punishment).

<sup>305</sup> See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 145 (1963) (holding that an Act that is “penal in character and would inflict severe punishment without due process of law and without the safeguards which must attend a criminal prosecution” are unconstitutional).

<sup>306</sup> See 538 U.S. 84, 114 (2003) (stating that a traditional aim of punishment is retribution). *Cummings* also used the phrase “deserved punishment.” 71 U.S. 277, 320 (1866).

that only retribution and deterrence are punitive purposes and, more recently, with *Doe* that suggested that only retributive purposes are punitive. Put simply, the original meaning of punishment contemplates a necessary condition in the form of a conviction and multiple sufficient conditions when it comes to the purpose of the consequence.<sup>307</sup> Existing doctrine is too narrow on the latter point, arbitrarily limiting which automatic consequences that flow from a conviction can be labeled punishment.

Third, the original public meaning of punishment precludes legislative control over *which* consequences are definitively punishment or not in a specific way. While legislatures are free to choose *which* consequences might flow from conviction and when to pursue different purposes, legislatures are not free to determine which purposes are in fact *punitive*. A punitive purpose is a purpose that was considered punitive at the time of the Founding whether the current legislature thinks so or not or hides behind the “civil” label.<sup>308</sup> That is, legislatures can choose from a range of purposes when making policy; but if they make a consequence applicable upon conviction, they do not have the authority to alter whether such purposes are in fact *punitive*. To allow that would essentially permit the legislature to declare what is intrinsically criminal, punitive, or not, which undercuts the idea that the words in the Constitution have a distinct meaning beyond the reach of the legislature. In sum, once legislatures attach automatic consequences to convictions by virtue of the conviction, the consequence is punishment if it pursues a punitive purpose as they were understood at the time of the Founding. If it only pursues a non-punitive purpose, then the measure is not punishment.

This in turn puts courts in an interesting interpretive position vis-à-vis the legislature. It means that courts must decipher whether a state-imposed consequence after a conviction was exacted for a punitive purpose. This is another way that existing doctrine is synergistic, but not completely on par with the conclusions proposed here. Whereas existing doctrine overwhelmingly concedes this finding to legislative declaration, originalist methods would

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<sup>307</sup> A formulaic representation of this finding might look like this:  $C + PP = P$ . C is a conviction, PP is a punitive purpose, and P is punishment. Under current doctrine, PP only includes retribution (R). The original understanding suggests PP should include other non-retributive purposes, such as deterrence (D), incapacitation (I), or rehabilitation (RH).

<sup>308</sup> See e.g., *Rogers v. Maryland*, No. C-02-CV-17-000296, at 38 (Md. Cir. Ct. App. March 31, 2020) (holding that a “sex offender registration under the current statutory scheme is sufficiently punitive, i.e., serving as more than a mere civil regulation”). *Mendoza-Martínez* got this partially correct when it referenced the promotion of the “traditional aims of punishment” in its fourth factor; the problem was that it added “retribution and deterrence” and then subsequent caselaw narrowed the factor even further. 372 U.S. at 168.

*require more* judicial scrutiny of the legislature's labeling and stated purposes and then a comparison of those stated objectives with the original understanding. In a sense, using the original meaning of punishment makes more work for courts than existing doctrine requires. Existing doctrine essentially allows legislatures to subvert the meaning of punishment through legislative declaration to the contrary, which is a position that is problematic on both methodological and historical grounds.

Interestingly, then, an analysis of the original public meaning of punishment means that courts cannot punt to legislatures in this area. But this is nothing new; in fact, this is precisely what the Founding-era Court did in *Calder* when confronted with a challenge under the Ex Post Facto Clause. It engaged in precisely this type of scrutiny, and no one questioned the Court's ability to do so.<sup>309</sup> Courts must engage in searching analyses—through texts of provisions and other legislative sources—to determine if the legislature chose to pursue a purpose considered punitive at the time of the Founding when it crafted the consequence in question. If the answer to that question is yes, then the consequence can be labeled punishment. Thus, there is *less* room for legislatures to declare what is punishment, and *more* room for courts to determine whether legislatures are, in fact, pursuing punitive purposes as they were understood at the time of the Founding. This approach invites judicial scrutiny of legislative actions that smell and look like punishment, but the legislature chooses to not consider punishment.<sup>310</sup>

There is room for methodological distinction here between originalists. After all, if different originalists utilize alternative determinants of the original meaning, the precise contours of this framework and the role-play of legislatures and judges will look different. But even if there is variation between originalists depending on the *type* of originalist methodology that is used, it seems to be the case that most, if not all, would acknowledge the core theses mentioned above, including the fixation thesis. This means that the original meaning of punishment is fixed, but broader than currently conceived.

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<sup>309</sup> LOGAN, *supra* note 11, at 7–28 (detailing history around the creation of the Ex Post Facto Clause and early judicial decisions implying judicial power to review its applicability in certain circumstances).

<sup>310</sup> *Rogers v. Maryland* is a good example of this. The Maryland Court of Appeal (highest court in Maryland) initially classified sex-offender registries as non-punitive due to legislative labeling. When the Maryland legislature updated the statute, the court scrutinized how the revisions were emblematic of punitive purposes. *Rogers*, No. C-02-CV-17-000296, at 38-48. The 5<sup>th</sup> Circuit also recently determined that a legislative measure resulting in permanent felon disenfranchisement amounted to punishment under the 8<sup>th</sup> Amendment by pointing to the legislature's "intent to punish." *Hopkins v. Hosemann*, No. 19-60662, at 61 (5<sup>th</sup> Cir. August 4, 2023).

And this meaning of punishment seems to acknowledge a pre-legislative definition enmeshed with broader cultural and moral principles that were instantiated in law.<sup>311</sup> And those principles are broader than current doctrine allows in application. In short, originalist methods suggest that what amounts to punishment is not primarily a question of positivist jurisprudence and thereby legislative preference, even if originalism, itself, is arguably a creature of positivism, a charge made by some.<sup>312</sup> That is to say, the original meaning of punishment seems to contemplate a definition that resembles the classical understanding of punishment that preceded the formal creation of the American Constitution. There are boundaries that legislatures cannot transgress and that judges must discern in concrete cases.

## B. PRACTICAL IMPLICATIONS

How this understanding plays out—both as a substantive doctrinal matter and with respect to the judicial role—becomes apparent once it is applied to cases already decided by the Court, and to some automatic collateral consequences that exist nowadays.

The outcomes in *Hendricks* and *Doe* are instructive on this point. The original meaning of punishment leaves room for *Hendricks* to stand because the consequence in question was applicable regardless of conviction status. In contrast, *Doe* would need to be revisited for at least three reasons. First, *Doe* is not fully clear on the fact that a conviction is a necessary precondition for punishment. Second, *Doe* rests on the Court's contention that the purpose was not retributive, and therefore not definitively punitive. This is more complicated than necessary based on the above framework. Instead, a conviction plus a consequence with a punitive purpose from the time of the Founding equals punishment. The fact that the sex-offender registry served instrumental, public safety style purposes would still allow for classification as punishment.<sup>313</sup> Third, the Court is too deferential to the legislature's intent to

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<sup>311</sup> In this vein, the debate between originalists and “common good constitutionalists” is probably mostly moot here as the original methods discover the definition of punishment present within the classical legal tradition that was part of the cultural and philosophical milieu present at the time of the Founding and in the writings of the Founders. While each approach might have different *determinants* of meaning, here they end up in essentially the same place and there is no reason why the original meaning as a principle cannot be applied to new circumstances without altering the original meaning.

<sup>312</sup> VERMEULE, *supra* note 134, at 125.

<sup>313</sup> Logan points out how state courts have held this to be the case. LOGAN, *supra* note 11, at 126–36. Further, Logan argues that the Supreme Court already has affirmed this point in the Bill of Attainder

declare the measure “civil” and thereby preclude consideration as punishment.

*Doe* emphasized repeatedly how the Alaska legislature crafted the registration requirement due to a judgment about the “risk of reoffending”, and “protecting the public from sex offenders.”<sup>314</sup> Publishing registration information also would aid public safety. These are Founding-era punitive purposes. But the Court mistakenly relied on precedents such as *Flemming* and *Hawker* to suggest that the exercise of state power to regulate “health and safety” cannot, itself, render a deprivation punishment.<sup>315</sup> This begs the question about what counts as punishment and whether the legislature gets to decide the question at all, which the Court essentially conceded by emphasizing the placement of the relevant provisions in portions of the civil code in Alaska.<sup>316</sup> Founding-era understandings of punishment conceive, by definition, punishment as a reaction to a transgression against the community.

In the licensing context, recall that the Supreme Court held in *Hudson* and *Hawker* that an exclusion from one’s occupation was not punishment. There are tons of collateral consequences that bar continuing in one’s trade or prevent entry into a profession due to a prior conviction.<sup>317</sup> The deprivation might be experienced immediately or later, depending on the circumstances. Highlighting the experience of California prisoners a few years ago is instructive. Thousands were enlisted to help fight wildfires *while in prison*.<sup>318</sup> But that profession was off-limits after release. The legislature, having conceptualized the restriction as non-punitive, would almost certainly have avoided problems had the matter been litigated under existing doctrine.<sup>319</sup> Foreclosing a career opportunity after the direct punishment is meted out is not punitive under existing law. But that is what happened in the post-Civil War cases in *Cummings* and *Garland*.

That is just one example of the myriad laws and regulations that prohibit those with convictions from pursuing certain occupations or obtaining

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context in *United States v. Brown*, 381 U.S. 437 (1965), which recognized incapacitation as a punitive aim. LOGAN, *supra* note 11, at 138–39. That said, the original meaning of punishment suggests that a court would need to determine whether the public-safety purposes provided by the state mirrored those at the time of the Founding.

<sup>314</sup> 538 U.S. 84, 93 (2003).

<sup>315</sup> *Id.* at 93–94.

<sup>316</sup> *Id.* at 92–95.

<sup>317</sup> Kimble & Grawert, *supra* note 100 (noting that “more than 45,000 state and local laws and regulations”).

<sup>318</sup> Kimble & Grawert, *supra* note 100.

<sup>319</sup> As Kimble and Grawert acknowledge, the legislature did change the law eventually. Kimble & Grawert, *supra* note 100.

professional licenses.<sup>320</sup> These are normally cast as public safety measures, meaning they have instrumental purposes. The underlying logic seems to be a mix of incapacitation and general deterrence. They apply to convicted persons way more than those who simply engage in questionable behavior. The conviction is the justification for pursuing the proffered regulatory but real punitive purpose. In many instances, they are automatically applicable.<sup>321</sup>

Under existing doctrine, a state can argue they are not punishment because they further purposes that are not exclusively retributive and they align with traditional regulatory goals like pursuing “health and safety.” This move has provoked reformers to argue against them as a matter of poor social or economic policy.<sup>322</sup> But under the original meaning of punishment as highlighted by Part III, if a court can determine that they were enacted to further a punitive purpose, then they are punishment. For instance, perhaps the restriction is supposed to further public safety by deterring other would-be offenders from engaging in wrongdoing that would risk their livelihood. Alternatively, perhaps the restriction furthers public safety by incapacitating convicted individuals from being in situations where they could harm again. Concerns about on-the-job reoffending and other criminal proclivities inspire these restrictions.

Recent action at the Supreme Court relating to forfeiture and fines also indicates an interest in the broader question of the meaning of punishment. In *Ursery*, the Court had reiterated that forfeiture was not a punishment.<sup>323</sup> But the Court’s recent decision in *Timbs v. Indiana*,<sup>324</sup> and statements in other cases, suggest the issue is ripe for revisiting. Justice Gorsuch, in a recent dissent

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<sup>320</sup> See generally Jonathan Haggerty, *How Occupational Licensing Laws Harm Public Safety and the Formerly Incarcerated*, R STREET POL’Y STUDY (May 2018) (discussing how statutory provisions have affected the licensing of persons with an arrest or conviction record).

<sup>321</sup> See generally Beth Avery, Maurice Emsellem & Han Lu, *Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions*, NAT’L EMP. L. PROJ. (Oct. 2017) (suggesting state policy reforms to avoid automatic bans or rejections of applicants with convictions); Michelle Natividad Rodriguez & Beth Avery, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records*, NAT’L EMP. L. PROJ. (Apr. 26, 2016) (providing examples of statutory provisions that automatically disqualify or ban people with convictions).

<sup>322</sup> See, e.g., Stephen Slivinski, *Turning Shackles into Bootstraps: Why Occupational Licensing Reform is the Missing Piece of Criminal Justice Reform*, ARIZ. STATE UNIV. CTR. FOR THE STUDY OF ECON. LIBERTY 8 (Nov. 7, 2016) (arguing that “high occupational licensing burdens in the real world do indeed make it harder for ex-prisoners to re-enter the workforce and does seem to increase the odds that those ex-prisoners will turn back to crime instead”).

<sup>323</sup> See *United States v. Ursery*, 518 U.S. 267, 292 (1996) (“We hold that these *in rem* civil forfeitures are neither ‘punishment’ nor criminal for purposes of the Double Jeopardy Clause.”).

<sup>324</sup> *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019) (holding, in a case about an excessive forfeiture, that the Eighth Amendment’s Excessive Fines Clause is an incorporated protection applicable to the states).

from a denial of a writ of certiorari, noted how fines were classified as punishment in earlier times.<sup>325</sup> This followed his reasoning in *Sessions v. Dimaya*.<sup>326</sup> More pointedly, he has questioned why the legislature's decision to characterize a fine as "civil" was dispositive, and called the "the notion of 'nonpunitive penalties' a 'contradiction in terms.'"<sup>327</sup> Interestingly, he referenced the instrumental purpose of deterrence behind a fine as indicative of punishment.<sup>328</sup> More recently, the 5<sup>th</sup> Circuit held permanent disenfranchisement to amount to punishment under the 8<sup>th</sup> Amendment by referencing the Missouri legislature's "intent to punish."<sup>329</sup>

Besides reexamining existing types of collateral consequences, this reemergence of the old understanding has implications relating to the world of criminal procedure, and more broadly, with respect to the reach of the carceral state. How this understanding bears on the legal question of punishment will, in many instances, relate to the posture of a case or practice of the government. For instance, many challenges regarding the definition of punishment involve the Ex Post Facto Clause or prohibition on bills of attainder. More recently, they have followed the cases involving the role of juries in finding facts to determine whether a sentence or consequence is legally applied to the defendant.<sup>330</sup> Finally, there is a subset of caselaw in the field of constitutional criminal procedure that relates to matters under the 5<sup>th</sup> and 6<sup>th</sup> Amendment: the applicability of the privilege against self-incrimination, the extent of the right to counsel, and the responsibilities of counsel in the plea-bargaining space.<sup>331</sup> This new understanding can help inform the development of doctrine in those areas.

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<sup>325</sup> *Toth v. United States*, No. 22-177 (S. Ct. Jan. 23, 2023) (Gorsuch, J., dissenting).

<sup>326</sup> *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) ("Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's 'civil' penalties . . . are routinely imposed . . . and often harsher than the punishment imposed for felonies.").

<sup>327</sup> *Toth*, No. 22-177 at 2 ("[T]he question is not, as the United States would have it, whether [a monetary penalty] is civil or criminal, but rather whether it is punishment.") (citing *Austin v. United States*, 509 U.S. 602, 610 (1993)).

<sup>328</sup> *Id.* at 3.

<sup>329</sup> *Hopkins v. Hosemann*, No. 19-60662, at 61 (5th Cir. August 4, 2023).

<sup>330</sup> *See, e.g., Apprendi v. New Jersey*, 120 S.Ct. 2348, 2350 (2000) (holding that "[t]he Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt").

<sup>331</sup> *See, e.g., Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) ("[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.").

Further, the original meaning of punishment calls legislatures to task in two ways. First, it indicates a robust understanding of the nature of crime that emphasizes the problem of over-criminalization but from a different angle. Others have focused on the reach of the criminal law, its exponential growth, and seeming formless expansion.<sup>332</sup> Still others have situated this apparatus in the broader context of the American experiment, including its original sins relating to slavery, and the development of Jim Crow laws, as well as the surveillance state. The original meaning of crime exposes just how expansive the definition of crime is under modern law. There are countless examples of laws—federal, state, and local—enforced by police and prosecutors that do not seem to contain the kernel of guilt or blame that Founding-era thinkers seemed to think defined the core of what makes an action wrong.<sup>333</sup>

Second, legislatures contemplating punishment—whether new measures or when revising existing codes—need to take the original meaning of punishment seriously. For too long legislatures have been able to write consequences that apply to those who have been convicted without thinking clearly about whether those consequences simply amounted to extra punishment. Attaching the label “civil” licensed extra punishment. But when the nature of the thing is apparent, legislatures that ignore the reality need to be reined in by courts who take the original meaning seriously. There is potential for cutting down the punitive state by referencing the original meaning.

This, in the end, brings the discussion to the role of courts. If some collateral consequences are indeed punishment, then sentencing courts will need to consider them when aiming for proportionate punishment. This is exactly what happened in *United States v. Nesbeth*,<sup>334</sup> when U.S. District Court Judge Frederic Block did not impose a guidelines recommendation of 3-4 years. Instead, he opted for a shorter term of probation, while recognizing the collateral consequences that the defendant would face that simply amount to “further punish[ment] . . . after . . . complet[ion] . . . [of] court-imposed

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<sup>332</sup> See, e.g., HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011) (describing the growth of federal criminal laws and arguing that this expansion threatens the U.S. democracy).

<sup>333</sup> See Michael Serota, *How Criminal Law Lost Its Mind*, BOSTON REV. (Oct. 27, 2020), <https://www.bostonreview.net/articles/michael-serota-mens-rea-reform/> (arguing that the principle of mens rea is “all too often . . . ignored by our criminal justice system”).

<sup>334</sup> *United States v. Nesbeth*, 188 F. Supp. 3d 179, 180 (E.D.N.Y. May 25, 2016).

sentences.”<sup>335</sup> As mentioned elsewhere,<sup>336</sup> there might be some collateral consequences that are deserved in concrete cases, but many likely are not. The original meaning of punishment is one way to have sentencing judges begin to make that consideration.

### CONCLUSION

Criminal justice reformers are constantly looking for ways to limit the reach of the punitive state as experienced by individuals convicted of crimes, whether during formal punishment or afterwards. To date, Supreme Court doctrine on the definition of punishment has left little wiggle room to do so with respect to collateral consequences. This Article challenges that notion by revisiting the meaning of punishment at the time of the Founding.

It suggests that the current doctrine is unnecessarily complex in both principle and application and altogether incomplete. Put simply, the original meaning of punishment is broader than what current doctrine recognizes. Whereas the Court has appropriately limited punishment to those instances where the state responds to crime, it has confusingly restricted the number of sufficient punitive purposes to one: retribution. This effectively turns the question of whether a collateral consequence is punishment into whether it was exacted for retributive purposes. If the answer is no, then the measure is not punishment. The doctrine thereby conflates what is retributive with what is punitive. And when the definition of punishment hinges on whether a punitive purpose exists, this all but guarantees that any measure promoting public safety and labeled non-punitive by a legislature is not punishment, *even if* it is only applicable in the wake of a conviction.

These developments unnecessarily complicate the matter. The original meaning of punishment is much simpler and easier to apply. At the time of the Founding, punishment was a state-imposed deprivation in response to crime that furthered a punitive purpose. Punitive purposes included retribution, deterrence, incapacitation, rehabilitation, and others. The question, as always, is whether the Court, legislatures, and other actors have the will to adhere to the original meaning, even if it means disrupting conventional and modern definitions that have become entrenched. Doing

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<sup>335</sup> *Id.*

<sup>336</sup> See generally Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 NOTRE DAME L. REV. 1031 (2020) (discussing the collateral consequences faced by those who have been convicted or arrested and arguing that current reform efforts should shift their focus to whether these consequences are deserved).

so would be original and groundbreaking, and likely allow for trimming collateral consequences by referencing the American constitutional tradition.