Another criticism concerns the rather dated sources which the authors rely on in many instances. Most of the sources on rural-urban differences, for example, are decades old.[16] These problems are rather minor, however, and the overall analysis is valid.

Policymaking and Politics in the Federal District Courts will be less useful to practicing attorneys than to political scientists and scholars of legal behavior. The latter groups are provided with a sophisticated empirical study of a relatively unexplored area; the analysis of the impact of the appointing president is especially important. Carp and Rowland have made a significant contribution to the judicial behavior literature; their book is an important study of the lower federal courts.

Neil D. McFeeley

DEATH PENALTIES, Raoul Berger. Harvard University Press, Cambridge, Mass., 1982. pp. 242. $17.50.

In *Death Penalties,*[1] noted constitutional scholar Raoul Berger critically analyzes the "abolitionist" thesis that capital punishment is "cruel and unusual" and therefore violative of the eighth and fourteenth amendments to the federal Constitution. Berger also criticizes the Supreme Court for finding support in the eighth amendment for judicial review of the proportionality of punishments to crimes. Before inquiring into the meaning of the "cruel and unusual punishments" clause, he decries the extension of the eighth amendment to the states, arguing that both the Supreme Court's selective incorporation doctrine and Justice Black's theory of en bloc incorporation are misguided.[2] Berger's view is that the due process clause of the fourteenth amendment—the vehicle of selective incorporation—is particularly ill-suited to carry the eighth amendment over to the states because due process is "procedural," whereas punishments are creatures of substantive law.[3]

Berger's analysis of the "cruel and unusual punishments" clause takes as its point of departure the fact that capital punishment was not understood to be cruel and unusual per se in 1791, the year of the ratifi-

16. *See id.* at 118-25.

1. R. BERGER, DEATH PENALTIES (1982).

2. *Id.* at 10-18.

3. *Id.* at 18-28.

cation of the Bill of Rights.[4] In addition to the fact that the states and the federal sovereign recognized numerous categories of capital offense in 1791, Berger cites the fifth-amendment guarantee that "no person shall be . . . deprived of life . . . without due process of law" as evidence that the Framers did not intend to disapprove the death penalty.[5] Although the colonies were considerably less draconian than the England of the "Bloody Code," the background against which the phrase "no cruel or unusual punishments" originated, Berger relies chiefly upon English history to support his claim that the eighth amendment contains no principle of proportionality in sentencing.[6] Two conclusions follow, in his view: First, capital punishment *cannot* be cruel and unusual in a constitutional sense; second, proportionality review of state sentences and sentencing procedures by the Supreme Court is an unconstitutional usurpation of legislative power by the federal judiciary. The first conclusion refutes the abolitionists on the Court, whose number has now dwindled to two; the second conclusion rebukes the Court itself for making proportionality review an element of its eighth-amendment jurisprudence.

Berger's conclusions are mediated by a theory of constitutional adjudication, which he expounds here and elsewhere.[7] The theory rests upon two premises. The first is that the Constitution is fundamentally an allocation of power, derived ultimately from the people, between competing entities: the states and the executive, legislative, and judicial branches of the federal government.[8] The second premise is that key phraseology in the Bill of Rights—"due process," "cruel and unusual

4. *Id.* at 43-49. Berger is not entirely clear as to the exact date with reference to which the meaning of the "no cruel and unusual punishments" clause is to be fixed. The years 1689, the year of the adoption of the English Bill of Rights, and 1790, the year in which the first Congress passed the Act of April 30, 1790, 1 Stat. 115, providing a death penalty for certain federal offenses, figure prominently in Berger's discussion. For the sake of convenience, I refer to the year 1791, the year that Bill of Rights was ratified, throughout.

5. *Id.* at 46-47. Berger argues that to deny that the death penalty is exempt from the eighth amendment "is to render those [fifth amendment due process] safeguards useless. For in the absence of death penalties there was no need for the safeguards." Berger overlooks the fact that the Constitution defines but one substantive offense, treason, U.S. CONST. art. III, § 3, cl. 1, and prescribes no punishment for it. Presumably, then, Congress might have elected not to define any substantive offenses and not to penalize the one substantive offense defined in the Constitution. Would that contingency have rendered the due process clause "useless"? Certainly not, for due process still would govern *in the event* that Congress chose to define crimes and enact punishments. Of course, if the Framers intended that it be conceptually impossible for the death penalty to withstand the prohibition against cruel and unusual punishments, then the reference in the fifth amendment to deprivation of life would have been otiose; but, as Berger would readily concede, such was not the Framers' intention.

6. R. BERGER, *supra* note 1, at 40-41, 114-15.

7. *See, e.g.,* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

8. R. BERGER, *supra* note 1, at 78-79, 194.

punishments"—had a fixed, specifically ascertainable meaning at common law, which the Framers intended to incorporate into the Constitution with all its fixity and specificity,[9] and which the Framers of the fourteenth amendment had no wish to disturb.[10] Given that the death penalty was not considered in 1791 to be cruel and unusual, it follows, for Berger, that the death penalty is not so now. Given that the Constitution is essentially a scheme allocating power, it follows, for him, that a novel judicial reading of fixed common law phraseology is a usurpation.

The persuasiveness of Berger's conclusions rests heavily upon that of his second premise. His claim is that the Framers intended the phrase "cruel and unusual punishments" to apply to all and only those punishments thought to be "barbarous"[11] in 1791, that is, to a list which would include crucifixion and boiling in oil, but not disembowelment while alive.[12] The Framers chose to use the phrase "cruel and unusual," rather than to list punishments contemporaneously thought barbarous because, in Berger's view, "to express all that was implicated . . . would have required prolix detail unsuited to a Constitution."[13]

Berger's second premise is unconvincing for two reasons. The first is that it is inconsistent with the generality of application that principles must have. Berger is aware of the difficulty, but attempts to elude it by a distinction:

> Of course the Fourth Amendment "search and seizure" principle, for example, goes beyond physical searches to comprehend current wiretaps and electronic surveillance. They are analogous to what was prohibited and illustrate the application of a principle to similar facts. Very different is the abolitionist reading of the cruel and unusual punishments clause—that clause did not prohibit death penalties. . . . Consequently [the abolitionist is] not giving a "wider application" to an accepted principle but *replacing the principle* with its own opposite.[14]

Berger's reply is oblivious to the fact that what is not cruel and unusual at one time may become so later, and may become so not because the standard has been altered but because the properties of the punishment itself, in its social context, may change. The eighteenth century generally regarded death as but a passage to another and possibly quite pleasanter mode of existence; the twentieth century, on the other hand,

9. *Id.* at 59-76.
10. *Id.* at 50-58.
11. *Id.* at 44.
12. *Id.* at 41.
13. *Id.* at 62.
14. *Id.* at 73 (emphasis in original).

takes much more seriously the thought that individuals do not survive "biological" death.[15] Berger, at one point, betrays an awareness that what is *unusual* at one time need not be so at another, but insists that "unusual" in its constitutional sense must mean what was unusual in 1791.[16]

Another weakness in Berger's reply is that it approves judicial analogies to "similar facts" without acknowledging the depth of this concession. Is death by electrocution more like disembowelment while alive, or is it more like boiling in oil? If Berger intends to allow the Court to decide what is "analogous" to "similar facts" where post-1791 forms of punishment are concerned, then he must give up his claim that judicial review becomes usurpation as soon as it goes beyond the Framers' particular intentions. As it happens, the commonest means of execution today were unknown in 1791.

Berger's second premise is unconvincing for another reason. If Berger is right about the meaning of key constitutional phraseology, then it follows that the Framers intended to insulate their detailed governmental scheme both from interpretation in light of moral philosophy *and* from amendment by mere majorities. Berger is quick to fault activists for failing to confront the "countermajoritarian" difficulty[17] that besets their theory of judicial review, but he is not greatly troubled by the equally serious difficulty of rationalizing our constitutionalism, under which the wishes of a group of white males, numbering in the tens of thousands and now dead nearly two centuries, can override the preferences of diverse contemporary majorities numbering in the mil-

15. I owe this example to Professor Walter Dellinger. Ronald Dworkin would warn "abolitionists" not to ignore his distinction between "concepts" and "conceptions," R. DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977), for, otherwise, they "are forced to argue in a vulnerable way. They say that ideas of cruelty change over time . . . [but] this suggests that the Court must change what the Constitution enacted." *Id.* at 136. Dworkin anticipates Berger's argument, and appears to believe that the "concepts-conceptions" distinction is necessary in order to deflect it. The present point is that the death penalty must be measured anew because our knowledge of its causal powers, natural and supernatural, has changed. Dworkin might prefer to say that our secular metaphysics lends itself to a liberalized conception of cruelty, but this language suggests that a merely interior, subjective shift is at issue.

It should also be mentioned that in 1791 the penitentiary was at most an experimental alternative to corporal punishments. Market Hill, the first American prison, was founded in Philadelphia in 1790. As the colonies-turned-states enacted criminal codes more lenient than the British, they began in earnest to construct prisons. B. MCKELVEY, AMERICAN PRISONS 1-9 (1936). Life imprisonment, which today is the commonest alternative to execution, did not become feasible until the penitentiary movement had established itself. *See generally* M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 114-31 (A. Sheridan, trans. 1977).

16. *Id.* at 41.

17. *Id.* at 103-04.

lions.[18] Berger recognizes that constitutional provisions impose restraints on the freedom to govern, but he appears to believe that adherence to the narrowest canons of construction removes the difficulty.[19] It does not, for the difficulty is in fact aggravated if the expounders of a constitution are denied the resources of the subsequent moral and political experience of the culture. The idea that legitimacy of positive law is ultimately drawn from something beyond itself is hardly novel.[20] Berger's belief is that the "Constitution is certain and *fixed*; it contains the *permanent* will of the people."[21] He derides Justice McKenna's concept of "public opinion . . . enlightened by a humane justice"[22] as mysticism, yet his own notion of a "permanent will of the people" seems no less mystical and fails to explain why the "will of the people" in 1791 should command the obedience of contrary-minded majorities today, or even that of contrary-minded minorities in 1791. The difficulty is at least somewhat mitigated if the Framers are understood to have intended—by their audacity in proposing a constitution, if by nothing else—that the document be read by the light of the accumulated experience and emerging conscience of humankind.

Berger is most convincing in his criticism[23] of the Supreme Court's tortuous route from *McGautha v. California*,[24] which held that the fourteenth amendment does not permit unguided jury discretion in choosing to impose a death sentence, to *Lockett v. Ohio*,[25] in which the plurality wrote that the eighth amendment requires that the jury be able to consider *any* mitigating factor or circumstance in exercising its discretion. The moral Berger draws from the story is that the Court is incapable practically, as well as incompetent constitutionally, to deter-

18. *See* J. ELY, DEMOCRACY AND DISTRUST (1980) 11; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980); *See also* Oliphant, *Toward a New ERA?* 35 NAT'L REV. 742, 742 (1983) ("Amending the Constitution is just shy of impossible. Of some nine thousand constitutional amendments that have been introduced in Congress, only 26 have been ratified—11 of them in the Eighteenth Century)."

19. R. BERGER, *supra* note 1, at 49.

20. *See, e.g.,* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 638-48 (1958). *Cf.* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19-20 (1959) (legitimacy of judicial review inheres in principled quality of the Court's decision—a "principled decision" being one that "rests on reasons that in their generality and their neutrality transcend any immediate result").

21. R. BERGER, *supra* note 1, at 66 (quoting Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 303, 308 (C.C.D. Pa. 1795)) (Berger's emphasis).

22. R. BERGER, *supra* note 1, at 59-60 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

23. *Id.* at 127-52.

24. 402 U.S. 183 (1971).

25. 438 U.S. 586 (1978).

mine what is demanded by the society's "evolving sense of decency."[26] An abolitionist does not concede much, however, by confessing that the formula "no cruel and unusual punishments" does not gain anything from the gloss, "as measured by society's 'evolving sense of decency.' "[27] After all, *Brown v. Board of Education*[28] reached its result by measuring segregation directly against the standard of equal protection, without explicitly considering whether society's sense of decency had sufficiently evolved to dictate the same answer. Arguably, it had not. If the Supreme Court ever does hold the death penalty to be unconstitutional, it could well do so by directly confronting the simple question, "Is this cruel and unusual punishment?", leaving society's sense of decency to catch up if necessary.

Berger argues that it would be proper under the exceptions clause[29] for Congress to curb the Court's excesses by removing state punishments, and proportionality review thereof, from the Court's jurisdiction.[30] This raises constitutional issues that range far beyond the specific question of capital punishment, but here, as elsewhere, the author's analysis is provocative, abundantly researched, and, in certain respects, unquestionably sound.[31]

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26. R. BERGER, *supra* note 1, at 152 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

27. Trop v. Dulles, 356 U.S. 86, 101 (1958).

28. 347 U.S. 483 (1954).

29. U.S. CONST. Art. III, § 2, cl. 2. Berger's view of the exceptions clause has been in flux. *Compare* R. BERGER, CONGRESS V. THE SUPREME COURT 289 (1969) ("[D]iscussion of the exceptions power in the Ratification conventions revolved almost exclusively about the retrial of facts found by a jury. . . . There was not the faintest intimation . . . that the 'exceptions' clause was designed to enable Congress to withdraw jurisdiction to declare an Act of Congress void.") *with* R. BERGER, *supra* note 1, at 162 ("The Framers preoccupation with safeguarding jury findings from revision by the court is unaccompanied by overtones of exclusivity.").

30. R. BERGER, *supra* note 1, at 153-72, 201-04.

31. Thanks are due to Professor Walter Pratt, who commented on an early draft of this review.