

2014

The Marriage of State Law and Individual Rights and a New Limit on the Federal Death Penalty

Jonathan Ross

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Jonathan Ross, *The Marriage of State Law and Individual Rights and a New Limit on the Federal Death Penalty*, 63 Clev. St. L. Rev. 101 (2014)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol63/iss1/9>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

THE MARRIAGE OF STATE LAW AND INDIVIDUAL RIGHTS AND A NEW LIMIT ON THE FEDERAL DEATH PENALTY

JONATHAN ROSS

ABSTRACT

Since the 1990s, federal prosecutors have, with increasing frequency, sought the death penalty for federal offenses committed in and also punishable under the laws of non-death penalty states. Critics of this practice have pointed out that federal prosecutors can use the federal death penalty to circumvent a state's abolition of capital punishment. Courts, however, have almost unanimously rejected arguments that state law should be a shield from federal punishment for federal offenses. This article proposes a novel way to challenge the federal death penalty's use in a non-death penalty state—the Supreme Court's reasoning in *United States v. Windsor*. In *Windsor*, the Court held that federal interference with a state law right arising in an area traditionally regulated by states is subject to heightened scrutiny under the Due Process Clause. In some instances, *Windsor* precludes federal capital prosecutions.

This article considers a *Windsor*-based motion to dismiss a notice of intent to seek the federal death penalty. The federal capital prosecution in a non-death penalty state interferes with a state law right to not be executed. As states have traditionally prosecuted violent murders, this right arises in an area traditionally regulated by states. Applying due process scrutiny, a court will ask whether a prosecutor's animus towards the state's lack of capital punishment motivated the prosecution in the first place, or whether there is an independent federal interest. If animus alone motivated the prosecution, then *Windsor* demands that the court reject the attempt to seek capital punishment.

I.	INTRODUCTION	102
II.	THE FEDERAL DEATH PENALTY IN NON-DEATH PENALTY JURISDICTIONS	105
	<i>A. Federal Capital Prosecutions in Non-Death Penalty Jurisdictions</i>	105
	<i>B. Locality-Based Challenges to Federal Death Sentences</i>	108
	1. Tenth Amendment/Federalism-Based Challenges	108
	2. Federal Constitutional Rights-Based Challenges	110
III.	SCHOLARS' PROPOSED SOLUTIONS: FEDERALISM AND THE EIGHTH AMENDMENT	112

A.	<i>Using Local Community Standards to Measure Cruel and Unusual Punishments</i>	113
B.	<i>Interpreting the Cruel and Unusual Punishments Clause as a Restraint on Federal Power</i>	115
IV.	A NEW APPROACH: UNITED STATES V. WINDSOR'S BROAD APPLICATIONS	120
V.	A HYPOTHETICAL WINDSOR-BASED CHALLENGE TO THE FEDERAL DEATH PENALTY	123
A.	<i>The Existence of a Fundamental State Law Right to Not Be Executed</i>	124
1.	The State Conferred a Personal Right to Not be Executed.....	124
2.	The State Law Right to Not Be Executed is Fundamental	126
B.	<i>The Right Not to Be Executed Exists in an Area Traditionally Regulated by States</i>	129
C.	<i>A Federal Death Penalty Notice Interfered With the State Law Right</i>	133
D.	<i>Animus Motivated the Federal Prosecutor's Charging Decision</i>	135
1.	The Animus Standard	135
2.	Possible Means of Proving Animus.....	140
VI.	CONCLUSION.....	145

I. INTRODUCTION

On April 19, 2013, law enforcement officials captured Dzhokhar Tsarnaev, suspecting that, four days earlier, Tsarnaev and his brother detonated bombs near the finish line of the Boston Marathon. More than a month later, on May 28, 2013, the Sixth Circuit issued an en banc opinion affirming the death sentence imposed by a federal district court on Marvin Gabrion for a murder Gabrion committed in a national forest in Michigan. Just under a month after that, on June 26, 2013, the Supreme Court decided *United States v. Windsor*, invalidating the federal Defense of Marriage Act and clearing the way for federal recognition of same-sex marriages. These three events, occurring within a span of approximately two months, seem to have little in common. The remainder of this Article explains why that is not the case.

One of the unexpected consequences of the Boston Marathon bombings was a reexamination of the federal death penalty's place in our federalist system.¹ There was never any doubt Tsarnaev would be charged federally even though his conduct also violated state law.² At the press conference where federal and state prosecutors

¹ David Abel & Martin Finucane, *Tsarnaev Indicted on 30 Counts*, BOS. GLOBE, June 28, 2013, at A1.

² Almost immediately after federal authorities apprehended Tsarnaev, the Suffolk County District Attorney's Office spokesman stated that attorneys in the office were reviewing the

announced the charges, the Suffolk County District Attorney stated that a parallel state prosecution for the same conduct would “only drag out the process” and be redundant of the federal charges.³ Although state prosecutors did not hesitate before deferring to the federal charges, their decision added a new complication to the case. In 1984, Massachusetts’s highest court held that the state’s death penalty statute violated the state constitution.⁴ Some of the federal offenses with which the indictment charged Tsarnaev, however, are punishable by death.⁵ Thus, the issue arose as to whether the federal death penalty should be imposed for an offense punishable under both state and federal law and committed in a state that does not authorize capital punishment.⁶ While commentators quickly noticed this anomaly, few were troubled by it. One Massachusetts newspaper praised the decision to indict Tsarnaev with death-eligible federal offenses, particularly in light of the unavailability of capital punishment under state law.⁷ A Massachusetts resident and family member of a victim stated she had previously opposed capital punishment, but, in Tsarnaev’s case, “an eye for an eye [felt] appropriate.”⁸

When the issue came up in another state and involved a crime that received less national attention, however, the responses to the federal charges were different. As mentioned, on May 28, 2013, the Sixth Circuit affirmed Marvin Gabrion’s federal death sentence.⁹ More than fifteen years earlier, Gabrion, a Michigan resident, had abducted and murdered a woman who was set to testify against him in a pending state prosecution for rape. Unbeknownst to him, Gabrion was within the confines of

case in the event that they decided to bring “any collateral state charges” related to the bombing. Prosecutors in the adjacent Middlesex County considered pursuing state murder charges based on the post-bombing murder of a university police officer. Dave Wedge & Erin Smith, *Bomb Suspect Faces Intense Questioning*, BOS. HERALD, Apr. 22, 2013, at 4 (internal quotation marks omitted).

³ Abel & Finucane, *supra* note 1.

⁴ See *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 134 (Mass. 1984). Even before that time, no one had been executed in the state since 1947. See David Abel & Martin Finucane, *As Kin, Survivors Watch, Tsarnaev Pleads Not Guilty*, BOS. GLOBE, July 11, 2013, at A1.

⁵ See Milton J. Valencia, *Saving Suspect From Death Penalty Will Be Defense Focus*, BOS. GLOBE, Apr. 24, 2013, at A1. The death-eligible charged offenses were: (1) conspiracy to use a weapon of mass destruction resulting in death in violation of 18 U.S.C. § 2332(a)(2), as well as five substantive counts of the same offense; (2) conspiracy to bomb a place of public use resulting in death, in violation of 18 U.S.C. § 2332f(a)(1) & (c), as well as two substantive counts of the same offense; and (3) conspiracy to maliciously destroy property resulting in personal injury and death, in violation of 18 U.S.C. § 844(i) & (n), as well as one substantive count of the same offense.

⁶ On January 30, 2014, Attorney General Eric Holder authorized federal prosecutors to seek the death penalty in Tsarnaev’s case. See *Death Penalty Sought in Boston Bombing*, CHI. SUN-TIMES, Jan. 31, 2014, at 20.

⁷ Editorial, *A Strong Week for Boston Justice System*, DAILY ITEM (Lynn, Mass.), June 28, 2013, at A4.

⁸ David Abel, *Dzhokhar Tsarnaev Faces Charges in April Attacks Today*, BOS. GLOBE, July 10, 2013, at A1.

⁹ *United States v. Gabrion*, 719 F.3d 511 (6th Cir. 2013) (en banc).

the Manistee National Forest when he disposed of the body.¹⁰ Thus, he was subject to federal prosecution and the federal death penalty.¹¹ Michigan, like Massachusetts, is a non-death penalty state—the first one, in fact.¹² Unlike Tsarnaev’s case, though, there was no obvious federal dimension to Gabrion’s crime. Gabrion’s motive was to thwart a pending state prosecution. The federal link—the crime’s location—was apparently unintended. Unsurprisingly, local reaction to the federal capital prosecution of Gabrion was strong and negative. A western Michigan newspaper published the following editorial:

Governments, whether state or federal, shouldn't be in the business of putting people to death. Michigan law has a far more reasonable and moral penalty: Murderers are jailed for life. One of the hallmarks of a civilized society is that it doesn't cater to a raw impulse for revenge, however deeply and understandably felt by the families of victims.¹³

Other local newspapers echoed these sentiments.¹⁴ A legal academic labeled Gabrion’s death sentence an affront to federalism.¹⁵

The juxtaposition of Gabrion’s and Tsarnaev’s cases exemplifies the divergent opinions on the federal death penalty’s use for crimes committed in and punishable under the law of non-death penalty states. The issue is not a new one. In a 1999 article, former Justice Department official Rory K. Little noted that “[s]ignificant federalism and state sovereignty issues lurk beneath the surface of a nationally uniform federal death penalty.”¹⁶ Two years later, a student commentator speculated that “an interesting sovereignty and federalism question would arise if a federal prosecution was undertaken in a state that affirmatively prohibited the death penalty as a matter of state law.”¹⁷ These scholars recognized the problem before any federal jury ever imposed a death sentence in a non-death penalty state. Their concern was hypothetical only.¹⁸ This changed in 2002 with Gabrion’s sentencing. As discussed

¹⁰ *Id.* at 515.

¹¹ *See* 18 U.S.C. § 1111 (2012).

¹² *See* Eugene G. Wanger, *Historical Reflections on Michigan’s Abolition of the Death Penalty*, 13 T.M. COOLEY L. REV. 755, 755 (1996).

¹³ Editorial, *Opening Death’s Door? GR’s First Capital Case Shouldn’t Lead to More in Michigan*, GRAND RAPIDS PRESS, Mar. 21, 2002, at A12.

¹⁴ Editorial, *A Tale of Two States, Juries*, SAGINAW NEWS, Mar. 20, 2002, at 7A (“Sending [Gabrion] to prison without the possibility of parole might not satisfy our sense of outrage, but emotions shouldn’t guide our system of law.”).

¹⁵ *See* Michael J. Zydney Mannheimer, *Face Federal Execution in Michigan? Let State’s Laws Decide*, DETROIT FREE PRESS, Oct. 5, 2011, at A9.

¹⁶ Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347, 356–57 (1999).

¹⁷ Sean M. Morton, Comment, *Death Isn’t Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 ALB. L. REV. 1435, 1436–37 (2001) (internal quotation marks and alterations omitted).

¹⁸ Between the reintroduction of the federal death penalty and 2002, no federal defendant received a death sentence in a district court located in a non-death penalty state or other jurisdiction. *See id.* at 1438–39; Little, *supra* note 16, at 355–58. In 2000, each of the twenty-

infra, since the issue became concrete, scholars and defense attorneys alike have argued at length that the federal death penalty is inappropriate in such cases. Regardless of the moral or federalism merits of their arguments, courts have eschewed holding that the federal government lacks the authority to seek a statutorily authorized sentence for a federal crime.

That could soon change. In addition to Tsarnaev's indictment and the en banc opinion in *Gabrion*, a third event occurred in 2013 that might provide the doctrinal basis for the strong prudential arguments put forward by these scholars and defendants. On June 26, 2013, the Supreme Court issued its decision in *Windsor v. United States*, invalidating the Defense of Marriage Act ("DOMA").¹⁹ Nothing in the opinion is remotely related to the death penalty, however, the Court's reasoning can be applied outside the facts of same-sex marriage—to challenges to the federal death penalty.

This Article explains how the *Windsor* Court provided a new framework for defendants to challenge the federal death penalty's use in non-death penalty states. Part II discusses the federal death penalty issue's history. Part III addresses the scholarly literature on the topic, and explains why each of the solutions put forward previously are foreclosed by precedent and would create greater problems than they would solve. Part IV turns to *Windsor*, and Part V demonstrates how that opinion can and should be extended to allow for state law-based challenges to the federal death penalty when the decision to bring federal charges was motivated by animus toward a state's lack of capital punishment.

II. THE FEDERAL DEATH PENALTY IN NON-DEATH PENALTY JURISDICTIONS

A. Federal Capital Prosecutions in Non-Death Penalty Jurisdictions

In 2002, *Gabrion* became the first person since the reintroduction of the federal death penalty to receive a death sentence for a crime committed in a non-death penalty state.²⁰ Subsequently, federal prosecutors in non-death penalty jurisdictions

one defendant on federal death row had been convicted in death-penalty states. Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 542–44 (2000). During the Clinton administration, federal prosecutors filed notices of intent to seek the death penalty in seventeen cases being prosecuted in non-death penalty jurisdictions (Michigan, Iowa, Alaska, and the District of Columbia). In none of those cases, however, did the federal juries ever actually make a capital sentence recommendation. Rather: (1) in one case, the government voluntarily dismissed the capital charges after determining that its evidence was insufficient to proceed; (2) in one case, the defendant was found shot to death after the government filed its notice of intent to seek the death penalty, but before the trial began; (3) in four cases, the government subsequently withdrew its notice of intent to seek the death penalty; (4) in nine cases, the government allowed the defendants to plead guilty and receive sentences short of death; and (5) in one case, the district court dismissed the capital charge after determining that the indictment had alleged an insufficient Commerce Clause nexus. See FEDERAL DEATH PENALTY RESEARCH COUNCIL, FEDERAL PROSECUTIONS ARISING IN NON-DEATH PENALTY STATES (Mar. 19, 2013) 1–4, available at http://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=96&folder_id=5120.

¹⁹ 133 S. Ct. 2675 (2013).

²⁰ Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57, 62 (2009).

have regularly sought capital punishment. In total, federal juries in these places have made capital sentencing recommendations in twenty-one cases.²¹ In nine of those cases (including Gabrion), juries have sentenced the defendants to death.²² There are multiple reasons for this rise in federal death sentences in non-death penalty jurisdictions.

First, the number of federal capital prosecutions has risen, regardless of where an offense occurred, since the 1994 enactment of the Federal Death Penalty Act (“FDPA”).²³ The FDPA ensured the federal death penalty complied with the due process requirements articulated by the Supreme Court in *Furman v. Georgia*.²⁴ The existence of the FDPA alone, however, does not account for the rise of death penalty prosecutions in non-death penalty jurisdictions. Notably, the increase did not occur until approximately five years after the statute’s enactment. Rather, this phenomenon is best explained by changes in Justice Department policy. Shortly after the FDPA’s passage, Attorney General Janet Reno amended the United States Attorneys’ Manual to add the “Capital Case Protocols.”²⁵ These provisions govern the Department’s administration of the death penalty. The original version of the Protocols made clear that the Attorney General is required to approve in writing all capital prosecutions.²⁶ The Protocols required a federal prosecutor planning to charge a defendant with a

²¹ FEDERAL DEATH PENALTY RESEARCH COUNSEL, *supra* note 18.

²² *Id.* at 4–24. Courts later vacated two of those death sentences, one on direct appeal, and one in a collateral attack under 28 U.S.C. § 2255. *Id.* at 11, 16; *see also* *United States v. Whitten*, 610 F.3d 168 (2d Cir. 2010) (on direct appeal, vacating a death sentence because a prosecutor’s closing argument violated the defendant’s Fifth and Sixth Amendment rights); *Johnson v. United States*, 860 F. Supp. 2d 663 (N.D. Iowa 2012) (in a section 2255 proceeding, vacating a death sentence based on a finding of ineffective assistance of counsel).

²³ *See* Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1959-82 (codified as amended at 18 U.S.C. §§ 3591–98). For a general discussion of the enactment of the FDPA, *see* Little, *supra* note 16, at 385–89 and Tirschwell & Hertzberg, *supra* note 20, at 75–77. Between 1990 and 1994, federal prosecutors filed death penalty notices in 36 cases. In the three following years, that number increased to 68. UNITED STATES COURTS, RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, EXECUTIVE SUMMARY, available at <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/RecommendationsCostQuality/ExecutiveSummary.aspx>.

²⁴ 408 U.S. 238 (1972) (invalidating state death penalty statute); *see* Little, *supra* note 16, at 392–406. The procedures for the federal death penalty generally are, a reasonable time before trial, the government must serve on the defendant a notice of intent to seek the death penalty upon conviction, setting forth the aggravating factors that the government will attempt to prove at sentencing. The notice can be subsequently amended only for good cause. *Id.* at 392–93; *see* 18 U.S.C. § 3593(a) (2012). After conviction, a separate capital sentencing proceeding is held before the same jury, during which the jury makes three determinations: (1) whether the defendant acted with the requisite mens rea to make his offense death-eligible; (2) what aggravating and mitigating circumstances are present; and (3) whether, in light of the circumstances present, a sentence of death is warranted. Little, *supra* note 16, at 393; *see* 18 U.S.C. § 3591(a)(2) (2012).

²⁵ *See* Tirschwell & Hertzberg, *supra* note 20, at 77; *see also* U.S. DEP’T OF JUSTICE, U.S. ATT’YS MANUAL § 9-10.000 (2014) available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm.

²⁶ Tirschwell & Hertzberg, *supra* note 20, at 77.

capital offense to submit a “Death Penalty Evaluation” form and a prosecution memorandum to Main Justice, evaluating the propriety of seeking the death penalty in that case. A committee at the Department reviewed the field prosecutor’s recommendation and advised the Attorney General.²⁷

In the 1995 version of the Protocols, one of the factors U.S. Attorneys and Main Justice officials considered was whether there was a “substantial federal interest” justifying federal, rather than state prosecution. The Protocols advised prosecutors that “[i]n states where the imposition of the death penalty is not authorized by law the fact that the maximum federal penalty is death is insufficient, standing alone, to show a more substantial interest in federal prosecution.”²⁸ In 2001, just before the end of the Clinton administration, the Justice Department issued a report documenting “‘geographic’ or ‘regional’ disparities” in the federal death penalty’s administration.²⁹ After the report’s publication and the change in administrations, the new Attorney General, John Ashcroft, revised the Protocols with an eye toward reducing these geographic disparities.³⁰ One of the changes directly resulted in the phenomenon at issue here. Ashcroft replaced the provision stating a state’s lack of the death penalty does not, standing alone, justify federal prosecution with a new one stating the “relative likelihood of . . . appropriate punishment upon conviction in the State and Federal jurisdictions should be considered.”³¹ Six years later, Justice Department officials again amended the Protocols—this time under the guidance of Attorney General Alberto Gonzales. The 2007 amendments clarified “national consistency” was one of the factors that informed a capital charging decision. “National consistency” meant: “treating similar cases similarly, when the only material difference is the location of the crime.”³²

Upon taking office, Attorney General Eric Holder did not further amend the Protocols, and the focus on national consistency in the administration of the federal death penalty remains in place. As of 2013, U.S. Attorneys in the Obama administration had filed death penalty notices in seven federal cases arising in non-death penalty jurisdictions.³³

²⁷ *Id.* at 78.

²⁸ *Id.* at 79.

²⁹ See U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (June 6, 2001), available at <http://www.justice.gov/dag/pubdoc/deathpenaltystudy.htm>.

³⁰ Tirschwell & Hertzberg, *supra* note 20, at 81.

³¹ *Id.* at 82 (internal quotation marks omitted). At that time, Attorney General Ashcroft also revised the Protocols to require the submission to Main Justice of any case involving conduct potentially chargeable as a capital offense, thus preventing U.S. Attorneys from evading Main Justice review by charging defendants with lesser offenses based on conduct that could also support capital charges. *Id.* at 81–82.

³² U.S. ATT’YS MANUAL at 9-10.130(A)–(B) (2007).

³³ FEDERAL DEATH PENALTY RESEARCH COUNSEL, *supra* note 18, at 23–24. In one case, prosecutors subsequently allowed the defendant to plead guilty. *Id.* at 23.

B. Locality-Based Challenges to Federal Death Sentences

In challenges to the federal death penalty, defendants have pointed to state law. These defendants (and, in one case, with a state governor's help) have made two general types of arguments: (1) Imposing the federal death penalty for a crime committed in a non-death penalty state violates the federalism principles reflected in the Tenth Amendment; and (2) imposing the federal death penalty for such a crime violates the defendant's own federal constitutional rights secured by the criminal procedure provisions in the Bill of Rights. As explained, courts have almost unanimously rejected both types of challenges.

1. Tenth Amendment/Federalism-Based Challenges

In several cases arising in non-death penalty jurisdictions, defendants filed pre-trial motions to dismiss the government's death penalty notices, arguing that seeking the death penalty in their cases violated the Tenth Amendment, or the general federalism principles embodied in that provision.³⁴ These challenges, however, have been unsuccessful. For example, in the 1999 case, *United States v. Tuck Chong*, the District of Hawaii held that the imposition of federal punishment for a federal offense does not violate the Tenth Amendment nor interfere with a state's sovereignty.³⁵ Because federal jurisdiction was not in dispute, the Supremacy Clause required that federal law prevail in any conflict with state law.³⁶ Eight years later, in *United States v. O'Reilly*, a district court in Michigan rejected similar arguments.³⁷

A recent First Circuit decision shows that even when a state joins its citizen in asserting federalism to thwart a federal death penalty prosecution, the challenge is likely to fail. In *United States v. Pleau*,³⁸ the First Circuit considered the extent to which a state governor may refuse to turn over a state detainee for federal prosecution. On September 20, 2010, Jason Pleau committed an armed robbery in Woonsocket, Rhode Island, during which he murdered a gas station manager making

³⁴ See, e.g., *United States v. O'Reilly*, No. 05-80025, 2007 WL 2421378 (E.D. Mich. Aug. 23, 2007); *United States v. Acosta Martinez*, 106 F. Supp. 2d 311 (D.P.R. 2000); *United States v. Tuck Chong*, 123 F. Supp. 2d 563 (D. Haw. 1999). The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. In *United States v. Darby*, Justice Stone famously labeled the Tenth Amendment a "truism that all is retained which has not been surrendered." 312 U.S. 100, 124 (1941). As one commentator notes, under this view, the Tenth Amendment "merely reinforces the parallel principles elsewhere reflected in the Constitution that (1) Congress may act only within its enumerated authority and (2) states may act unless the Constitution prohibits the conduct." David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1132 (2012). That commentator, however, points out that, in some cases post-*Darby*, the Court has "construed the Tenth Amendment as reserving an enclave of exclusive state sovereignty." *Id.* (citing *New York v. United States*, 505 U.S. 144, 167-68 (1992); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976)). This Article treats the Tenth Amendment arguments and the general federalism arguments as indistinguishable and does not wade into this interpretive debate.

³⁵ *Tuck Chong*, 123 F. Supp. 2d at 568.

³⁶ *Id.*

³⁷ *O'Reilly*, 2007 WL 2421378, at *3-4.

³⁸ 680 F.3d 1 (1st Cir. 2012) (en banc).

a bank deposit.³⁹ Approximately four months later, a federal grand jury in Rhode Island returned an indictment charging Pleau with three offenses, one of which was death-eligible.⁴⁰ By the time the indictment came down, however, Pleau had entered into state custody and begun serving an eighteen-year sentence on unrelated parole and probation violations.⁴¹ The state's governor, Lincoln Chafee, refused to surrender Pleau to federal authorities, citing Rhode Island's lack of a death penalty and the federal prosecutors' refusal to agree to not seek the federal death penalty.⁴² The district court issued a writ of habeas corpus ad prosequendum, which Pleau challenged. Governor Chafee intervened in the case, and the matter wound its way to an en banc First Circuit.⁴³ The specific issue before the en banc court was whether a state governor may disregard a federal writ of habeas corpus ad prosequendum.⁴⁴ The court reviewed the relevant cases and concluded there was no history establishing a governor's power to refuse a federal writ. Moreover, the court determined that the Supremacy Clause made the federal writ superior to any counter state statute or interests.⁴⁵ Lurking behind this analysis, however, was the court's fear that a governor in a non-death penalty state might interfere with federal administration of the federal death penalty. Judge Boudin concluded in the majority opinion,

Were Pleau and Governor Chafee to prevail, Pleau could be permanently immune from federal prosecution He is currently serving an 18-year term in Rhode Island prison and, if the writ were denied, might agree to a state sentence of life in Rhode Island for the robbery and murder Instead of a place of confinement, the state prison would become a refuge against federal charges.⁴⁶

³⁹ *Id.* at 3; *see* 18 U.S.C. § 924(c)(5)(B)(i) (2012).

⁴⁰ *Id.*

⁴¹ *Pleau*, 680 F.3d at 3.

⁴² *Id.* Prosecutors first filed a written request for custody under the Interstate Agreement on Detainers Act ("IAD") to secure Pleau's presence in federal court. *See* Pub. L. No. 91-538, 84 Stat. 1397 (1970) (codified as amended at 18 U.S.C. app. 2 § 2). The IAD, an agreement among the states and the federal government, "provides what is supposed to be an efficient shortcut to achieve extradition of a state prisoner to stand trial in another state, or in the event of a federal request, to make unnecessary the prior custom of federal habeas action." *Pleau*, 680 F.3d at 3. When Governor Chafee refused the written request, the federal court issued the traditional common law writ. *See id.*

⁴³ *Pleau*, 680 F.3d at 3–4.

⁴⁴ *Id.* at 4–8.

⁴⁵ *Id.* at 6–7 ("That there is an overriding federal interest in prosecuting defendants indicted on federal crimes needs no citation, and the habeas statute is an unqualified authorization for a federal court to insist that a defendant held elsewhere be produced for proceedings in federal court.").

⁴⁶ *Id.* at 7–8. In his brief, Governor Chafee acknowledged that Pleau had "offered to plead guilty to state murder and robbery charges and accept Rhode Island's harshest punishment: life in prison without the possibility of parole." Brief for Amicus Curiae Governor Lincoln D. Chafee in Support of Defendant-Appellant/Petitioner at 3, *United States v. Pleau*, 680 F.3d 1 (1st Cir. 2012) (Nos. 11-1775, 11-1782).

Thus, Pleau indicates that even when a state intervenes to protect its citizen from the federal death penalty, the state's interest in vindicating its own non-death penalty policy is insufficient to surmount the countervailing federal interest. In short, federalism (reflected in the Tenth Amendment), as a stand-alone argument, cannot overcome the Supremacy Clause's placement of federal statutes—including the FDPA—over conflicting state statutes. The reason these federalism-based challenges have failed is because courts have viewed the interests and prerogatives of states through a restrictive lens. These courts have rejected the argument that applying federal punishment for federal crimes prevents states from implementing their own sentencing policies.⁴⁷ In *United States v. Fell*,⁴⁸ a case discussed in detail, *infra*, Judge Raggi noted that, bringing federal capital charges in a non-death penalty state “involves the exercise of exclusive federal power.” She went on, “It does not intrude on any state function; much less does it trench on the exercise of any state power. It poses no interference with legitimate state activities.”⁴⁹ In essence, she implicitly reasoned that a state's legitimate functions, powers, or activities do not include the conferral of rights on their citizens, and the preservation of those rights against federal interference. As discussed in Part III, the Supreme Court recently called this assumption into question.

2. Federal Constitutional Rights-Based Challenges

The other type of challenge rests on the substantive criminal procedure rights provisions of the Bill of Rights, specifically the Eighth Amendment's prohibition on cruel and unusual punishments and the Sixth Amendment's guarantee of a right to trial by a jury of one's peers. As for the Eighth Amendment, defendants have pointed to both the Eighth Amendment's procedural and substantive protections.⁵⁰ For example, in *Gabrion*, the Defense pointed to the Eighth Amendment's procedural requirement he be allowed to present at sentencing all potentially mitigating evidence,⁵¹ and argued that Michigan's lack of a death penalty for state crimes was a mitigating circumstance that the district court should have allowed him to argue to

⁴⁷ See, e.g., *United States v. Acosta-Martinez*, 252 F.3d 13, 20 (1st Cir. 2001) (holding that the federal death penalty could be imposed for crime committed in Puerto Rico, despite Puerto Rico's constitutional prohibition on capital punishment: “This choice by Congress does not contravene Puerto Rico's decision to bar the death penalty in prosecutions for violations of crimes under the Puerto Rican criminal laws in the Commonwealth courts. The choice simply retains federal power over federal crimes.”).

⁴⁸ 571 F.3d 264 (2d Cir. 2009) (en banc) (order denying hearing).

⁴⁹ *Id.* at 269 (Raggi, J., concurring with denial of rehearing en banc) (citing *Younger v. Harris*, 401 U.S. 37, 44 (1971) (holding that federalism ensures “a proper respect for state functions” and that the federal government is not to “unduly interfere with the legitimate activities of the States.”)).

⁵⁰ See *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (noting that the Eighth Amendment has “been recognized to affect significantly both the procedural and substantive aspects of the death penalty”).

⁵¹ *United States v. Gabrion*, 719 F.3d 511, 520–21 (6th Cir. 2013) (en banc); see *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”).

the jury. The government's evidence had established that Gabrion was only two-hundred twenty-seven feet within the national forest and Gabrion maintained that "[t]he simple fact that [two-hundred twenty-seven] feet was the difference between a life sentence and a potential death sentence may have been viewed as mitigating by one or more jurors."⁵² The en banc Sixth Circuit disagreed, holding that the mitigating evidence a defendant is entitled to present "encompasses both culpability and character, all to the extent relevant to the defendant's 'personal responsibility and moral guilt.'"⁵³ As the location of Gabrion's offense and Michigan's approach to sentencing state law offenses had "nothing to do with these things," the district court had not erred.⁵⁴

Other defendants have argued that executing for a crime punishable under state law runs afoul of the Amendment's substantive ban on cruel and unusual punishment. *United States v. Fell* involved a double homicide in Vermont, followed by a carjacking and interstate kidnapping, which eventually resulted in a third murder.⁵⁵ After the Second Circuit denied *Fell*'s challenges to his federal death sentence for crimes committed mostly in Vermont, a non-death penalty state, the court declined to take up the case en banc.⁵⁶ Judge Calabresi dissented, pointing out the infrequency with which federal juries in non-death penalty jurisdictions had imposed the death penalty.⁵⁷ He concluded that "[w]hat is going on here is that the existence of certain local values makes imposition of the federal death penalty in states that do not have the death penalty truly uncommon." As a result, "the application of the death penalty in situations that involve predominately local crimes in non-death penalty states may be sufficiently rare as to be constitutionally prohibited."⁵⁸

Judge Raggi wrote separately to counter Judge Calabresi's Eighth Amendment argument.⁵⁹ Acknowledging that state practices are relevant in determining whether a type of punishment is "cruel and unusual" in light of "evolving standards of decency," she clarified such practices gain relevance only "because in the aggregate such practices serve as a proxy for the 'national consensus.'"⁶⁰ The Supreme Court's

⁵² *Gabrion*, 719 F.3d at 522 (internal quotation marks omitted).

⁵³ *Id.* at 524 (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

⁵⁴ *Id.* ("But mitigation under the Eighth Amendment is not a matter of geographic coordinates.").

⁵⁵ 531 F.3d 197, 205–06 (2d Cir. 2008) (panel opinion). *Fell* was prosecuted federally for the carjacking and kidnapping conduct that occurred after the first two murders. *See id.*

⁵⁶ *United States v. Fell*, 571 F.3d 264, 264 (denying rehearing en banc). The third murder took place in New York, which, at the time that *Fell* was indicted in 2001, still had capital punishment. *See People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004) (holding that New York's death penalty statute was unconstitutional under the state constitution). *Fell*, however, was indicted in federal court in the district of Vermont; therefore, the courts considered Vermont's lack of the death penalty.

⁵⁷ *Fell*, 571 F.3d at 289 (Calabresi, J., dissenting from denial of rehearing en banc).

⁵⁸ *Id.* at 289–90.

⁵⁹ *Id.* at 274 (Raggi, J., concurring with denial of rehearing en banc).

⁶⁰ *Id.*; *see, e.g., Graham v. Florida*, 560 U.S. 48, 61 (2010) (explaining that in Eighth Amendment cases "[t]he Court first considers 'objective indicia of society's standards, as

precedent establishing that a punishment either is or is not cruel and unusual based on the prevailing national consensus contradicted Judge Calabresi's proposal that cruelty and unusualness be assessed on a local level.⁶¹

In *Fell*, Judge Calabresi also suggested the Sixth Amendment's requirement that a defendant be tried "by an impartial jury of the State and district wherein the crime shall have been committed"—the "vicinage requirement"—might be a vehicle for avoiding the federal death penalty in a non-death penalty jurisdiction.⁶² He suggested the vicinage requirement might demand that federal juries in capital cases arising in non-death penalty states "though willing to follow the law . . . also [be] representative of a state's overall opposition to the death penalty."⁶³ Judge Calabresi offered that the district court may have violated the vicinage provision if, before striking the venire member, it did not consider her opposition to the death penalty in the context of the state's policy.⁶⁴ Judge Raggi also addressed this argument, contending that Judge Calabresi's view would result in the Sixth Amendment right meaning one thing in federal capital cases occurring in non-death penalty jurisdictions, and another thing in such trials occurring in places that do execute. In a non-death penalty state, a defendant would have a right to force the prosecutor to use a peremptory strike on a venire member opposed to the death penalty; in a death penalty state, such a venire member would be removed for cause.⁶⁵

III. SCHOLARS' PROPOSED SOLUTIONS: FEDERALISM AND THE EIGHTH AMENDMENT

In the cases discussed, precedent doomed the various arguments defendants (or judges, or governors) made. Nevertheless, two scholars have looked beyond precedent and offered solutions rooted in new interpretations of the Eighth Amendment's Cruel and Unusual Punishments Clause. The scholars read the Clause as a vehicle for advancing states' interests, and envision the Eighth Amendment playing a greater role in restricting federal action than has before been contemplated. The solutions they propose would make the Eighth Amendment an absolute bar to the federal death penalty in non-death penalty states. The following explains how these scholars' solutions are unworkable in addition to being contrary to the precedent just discussed mandating uniformly interpreted federal constitutional provisions.

expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue"); *Kennedy v. Louisiana*, 554 U.S. 407, 425 (2008) (considering "[t]he evidence of a national consensus with respect to the death penalty for child rapists"); *Thompson v. Oklahoma*, 487 U.S. 815, 848–49 (1988) (O'Connor, J., concurring) (acknowledging that the relevant inquiry was whether "a national consensus forbidding the execution of any person for a crime committed before the age of 16" existed).

⁶¹ *Fell*, 571 F.3d at 274 (Raggi, J., concurring with denial of rehearing en banc).

⁶² See U.S. CONST. amend. VI.

⁶³ *Fell*, 571 F.3d at 284 (Calabresi, J., dissenting from denial of rehearing en banc).

⁶⁴ *Id.* at 284–85.

⁶⁵ *Id.* at 269–72 (Raggi, J., concurring with denial of rehearing en banc) ("[I]f a district court's decision to excuse a juror violates [Supreme Court precedent], it does so regardless of whether the *voir dire* occurred in a non-death penalty state such as Vermont, [or] a death penalty state such as Texas.").

A. Using Local Community Standards to Measure Cruel and Unusual Punishments

The student commentator who first identified the problem suggests the Eighth Amendment terms “cruel and unusual” should be construed in light of local values.⁶⁶ He rests his argument on prudential factors alone,⁶⁷ and points out that local community values already inform at least one corner of the Bill of Rights—the First Amendment obscenity doctrine.⁶⁸ Under that doctrine, what constitutes obscene material subject to state regulation depends on a community’s own standards.⁶⁹

The student commentator’s view would significantly restrict the ability of federal prosecutors to seek the federal death penalty. Of course, one might argue that subordinating federal authority to state policy in the area of death penalty prosecutions is not so great a loss for the federal government. After all, as discussed *infra*, states have traditionally played the primary role in prosecuting capital offenses. Although many federal capital prosecutions, however, involve offenses that could have been prosecuted by state officials, as Tsarnaev’s case shows, some do trigger strong federal interests. As discussed in Part IV, in some federal capital cases, the interest of the federal government in securing federal punishment is strong—perhaps even stronger than the state’s interest in punishing.

The proposed interpretation becomes even more problematic when one realizes it would have to apply to capital and non-capital sentences alike, as nothing in the Eighth Amendment’s text would support limiting its application to the death penalty. The Supreme Court has recognized that certain non-capital sentences, or the implementation thereof, can be so excessive as to constitute cruel and unusual punishment.⁷⁰ Unlike the Court’s death penalty jurisprudence, however, this area of the law is underdeveloped, and the Court has not identified a coherent framework for determining when a sentence is or is not excessive and thus in violation of the Eighth Amendment.⁷¹ Therefore, there is not much of a “federal floor” below which states

⁶⁶ See Morton, *supra* note 17, at 1463–65.

⁶⁷ See *id.* (arguing that a locality-based view of the Eighth Amendment is appropriate because “people in different states invariably express diverse attitudes as to what sanctions constitute ‘cruel and unusual punishment’” and because “[s]tates, as independent sovereigns, ‘evolve’ at different rates”).

⁶⁸ See *id.* at 1463 (“[J]ust as obscenity is reckoned with regard to ‘contemporary community standards,’ ‘cruel and unusual punishment’ should more properly be defined at the local level.”).

⁶⁹ *E.g.*, *Miller v. California*, 413 U.S. 15, 24–25 (1973).

⁷⁰ See *Solem v. Helm*, 463 U.S. 277, 303 (1983) (holding that life sentence without parole for passing a counterfeit check after previously incurring three felony convictions was disproportionate and in violation of the Eighth Amendment); see also *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 2024 (2010) (Eighth Amendment prohibits sentences of life without parole for defendants who committed offenses while minors). *But see Ewing v. California*, 538 U.S. 11, 29–31 (2003) (sentence of 25 years’ imprisonment for felony grand theft based on theft of golf clubs after defendant had previously been convicted of three felonies was not excessive under Eighth Amendment).

⁷¹ John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 900, 912 (2011) (noting that the Supreme Court has supported its view of the Cruel and Unusual Punishments Clause as imposing an excessiveness standard on both textual and historical grounds).

cannot go when it comes to determining the lengths of state prison sentences.⁷² As a result, under the proposed approach, novel proportionality challenges to state prison sentences would fail. A court would review any non-capital sentence that is not obviously excessive under the Supreme Court's precedent only to determine whether the sentence conforms to that locality's view of appropriate punishment. The inquiry would be little more than whether the sentence is lawful under the state's sentencing law, because a reviewing court would assume the state law reflects state values. In short, judicial review of non-capital state sentences would be rendered obsolete, other than in the few areas where the Court has previously identified a state sentence as being excessive.

While the proposed rule would create a hardship for state prisoners, it would also unintentionally benefit federal prisoners. If the Court adopted the proposed locality-based interpretation of the Cruel and Unusual Punishments Clause, an individual could challenge a federal sentence on Eighth Amendment grounds by arguing that the sentence is significantly longer than the maximum authorized for like criminal conduct under the law of the state where the prisoner committed the crime. Presently, federal courts reject arguments that they must avoid disparities between state and federal sentencing schemes.⁷³ The proposed interpretation, however, would require that federal courts either impose federal sentences that do not deviate from state sentencing law, or risk the sentence being invalidated as cruel and unusual because it exceeds what the community has determined to be an appropriate punishment. The problem would be even more pronounced in cases where a federal defendant is being sentenced for conduct a state has de-criminalized. In such instances, any federal punishment would be cruel and unusual.⁷⁴ As a result, the substantive federal law—not just the federal sentencing statute—would be nullified within the state's borders. Nullification would happen without any inquiry into whether the federal government has an interest in the consistent enforcement of

⁷² The only non-case specific rule that the Court has articulated regarding the proportionality of a non-capital sentence is the *Graham* rule – that a defendant cannot receive life without parole for a crime committed as a juvenile. See *Graham*, 130 S. Ct. at 2024. Thus, in all other cases, there is no federal constraint on what non-capital sentence a state may impose.

⁷³ See *United States v. Begin*, 696 F.3d 405, 412 (3d Cir. 2012) (collecting cases); *United States v. Docampo*, 573 F.3d 1091, 1102 (11th Cir. 2009) (“[T]o require parity in sentencing between state and federal defendants ‘would seriously undermine the goal of nationwide uniformity in the sentencing of similar defendants for similar federal offenses.’”) (citation omitted); *United States v. Branson*, 463 F.3d 1110, 1112 (10th Cir. 2006) (“Adjusting federal sentences to conform to those imposed by the states where the offenses occurred would not serve the purposes of § 3553(a)(6), but, rather, would create disparities within the federal system, which is what § 3553(a)(6) is designed to discourage.”).

⁷⁴ Consider a defendant being sentenced in federal court in Colorado for possession of less than fifty kilograms of marijuana. The defendant would be subject to a maximum federal sentence of five years' imprisonment. See 21 U.S.C. § 841(b)(1)(D) (2012). However, under Colorado law, possession of such a quantity of marijuana is not a criminal offense. See COLO. CONST. art. XVIII, § 16. The defendant would argue that local values in Colorado dictate that any punishment for possession of marijuana is excessive, and therefore cruel and unusual. Under the proposed interpretation of the Eighth Amendment, the argument would likely have merit and the district court would be unable to sentence the defendant to prison for violation of federal law.

federal laws that is independent of a state's interest in legalizing the conduct at issue.⁷⁵

B. Interpreting the Cruel and Unusual Punishments Clause as a Restraint on Federal Power

Professor Michael Mannheimer comes next with a more nuanced argument rooted in what he argues was the Framers' intent behind the Eighth Amendment. Mannheimer contends the Bill of Rights' criminal procedure provisions should be interpreted as their proponents, the Anti-Federalists, understood them.⁷⁶ The Anti-Federalists, Mannheimer argues, viewed these amendments as essential to preserving the traditional powers of the states by making "it more difficult for the federal government to investigate, prosecute, convict, and punish people for crime."⁷⁷ Specifically, Mannheimer identifies the Fourth, Fifth, Sixth, and Eighth Amendments as "procedural hurdles" the Anti-Federalists threw "in the paths of federal investigators, prosecutors and judges because . . . the power to prosecute is the power to persecute."⁷⁸ Mannheimer then turns to the Eighth Amendment specifically and argues that the Anti-Federalists intended for it to "reserve to the States the authority to determine what kind of punishment, and how much, each type of transgression would merit."⁷⁹ Mannheimer ultimately concludes the interpretation most faithful to the Anti-Federalists' purposes behind the Eighth Amendment, and

⁷⁵ Consider the above marijuana hypothetical. In an October 2009 memorandum to all United States Attorneys, a Deputy Attorney General noted that prosecuting individuals whose actions were in compliance with state medical marijuana laws was "unlikely to be an efficient use of limited federal resources." David Ogden, *Memorandum for Selected United States Attorneys*, U.S. DEPT OF JUSTICE (Oct. 19, 2009), <http://www.justice.gov/opa/documents/medical-marijuana.pdf>. However, he also observed that federal prosecution of marijuana trafficking crimes may be appropriate when there are certain elements present including: unlawful use of firearms, violence, sales to minors, money laundering activity, illegal sales of other controlled substances, or ties to other criminal enterprises. *Id.* at 2–3. Under the proposed interpretation of the Eighth Amendment, any punishment would be inappropriate, even if the presence of one or more of these elements trigger federal interests.

⁷⁶ Michael J. Zydney Mannheimer, *When the Federal Death Penalty is "Cruel and Unusual,"* 74 U. CIN. L. REV. 819, 849 (2006).

⁷⁷ *Id.* He writes, "[c]lose scrutiny of the Anti-Federalists' Bill of Rights reveals their profound concern with preserving state sovereignty as a means of furthering liberty. Though framed in terms of protecting the rights of individuals, the Bill of Rights was viewed in 1791 as a barrier between the States and the national government." *Id.* at 851. He further explains that his thesis "is not that the Bill of Rights was designed to protect collective rights *rather than* individual rights. To the contrary, the Anti-Federalists saw the two as fairly indistinguishable." *Id.* at 853 (emphasis added); *see also* George C. Thomas, III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 156 (2001) (arguing that "the Bill of Rights is a profoundly antigovernment document that sought to impose restrictions on the federal government without regard to the innocence of particular defendants.").

⁷⁸ Mannheimer, *supra* note 76, at 857.

⁷⁹ *Id.* at 864.

the Cruel and Unusual Punishments Clause specifically, is one that precludes federal punishment not permitted by the state in which the federal offense took place.⁸⁰

Mannheimer's thesis is also flawed. Like the student's argument, Mannheimer's proposed approach is not constrained to capital cases. Rather, his reading of the Eighth Amendment would invalidate all federal punishment not authorized by the law of the state where an offense occurred.⁸¹ Unlike the student's thesis, however, Mannheimer's view is also not constrained to the Eighth Amendment. If the Eighth Amendment should be interpreted to constrain the federal government's ability to prosecute crimes, then so should the Fourth, Fifth, and Sixth Amendments.⁸² Specifically, a court should read them as tying federal investigative and prosecutorial capabilities to state practices and standards. Thus, a significant reorienting of the balance of police power between the federal and state governments would follow if courts adopted Mannheimer's view.

For example, if courts construed the Fourth Amendment as constraining federal investigators to exercising the investigative abilities of their state counterparts, a federal official would only be able to perform a warrantless search in a situation where an official of that state would be able to do likewise. Significant federal interests would be undermined. International border searches conducted by federal officers lacking probable cause⁸³ would be unconstitutional, as state officials do not have a shared power to police international borders.⁸⁴ Likewise, the Foreign Intelligence Surveillance Act ("FISA"), which authorizes warrants for electronic

⁸⁰ *Id.* at 873–76 (arguing that the Cruel and Unusual Punishments Clause of the Eighth Amendment “naturally offers an interpretation that retains for each State the ultimate authority to decide whether a mode of punishment such as the death penalty will be carried out within its borders.”).

⁸¹ In another article, Mannheimer actually espouses this very result. *See* Michael J. Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69 (2012). He contends that whether any federal punishment violates the Eighth Amendment's proportionality principle should be determined by comparing the punishment to the punishment available for the same conduct under the law of the state where the conduct occurs. *Id.* at 123. Mannheimer argues that this would also be consistent with the Anti-Federalists' understanding of the Bill of Rights. *See id.* at 123–30. However, he does not consider the hypotheticals discussed *infra* involving federal offenses for conduct that is lawful under state law.

⁸² In fact, Mannheimer makes this very argument regarding the Fourth Amendment in a recent article. *See* Michael Z. Mannheimer, *The Contingent Fourth Amendment* (Feb. 10, 2014) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366486 (arguing that “at least from an originalist standpoint, the Fourth Amendment is best viewed as being largely contingent on state law.”).

⁸³ *See* *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

⁸⁴ It is well settled that a border search is only valid if it is conducted pursuant to federal statutory authorization. *See, e.g.*, *People of Territory of Guam v. Villacrusis*, 992 F.2d 886, 887 (9th Cir. 1993); *United States v. Victoria-Peguero*, 920 F.2d 77, 81 (1st Cir. 1990). Section 1581 of title 19 authorizes only customs officers to conduct border searches. Although courts have recognized that a border search is not invalid if it is conducted by a state official working in coordination with federal officials, for example, *United States v. Ivey*, 546 F.2d 139, 143 (5th Cir. 1977), no court has recognized a state official's free-standing authority to conduct a warrantless border search.

surveillance of foreign powers or their agents,⁸⁵ would likely be invalidated. As amended, a FISA warrant can issue even when the primary purpose is not to obtain foreign intelligence information, but rather to obtain evidence in a criminal prosecution.⁸⁶ State officials, however, cannot obtain FISA warrants.⁸⁷ Thus, FISA confers on federal officials an investigatory tool state officials do not possess; the Fourth Amendment, as Mannheim sees it, would render such a result unconstitutional.

Reading the Sixth Amendment's right to counsel as a constraint on federal power would also be problematic when a district court considered a federal prisoner's post-conviction claim of ineffective assistance of counsel. Under *Strickland v. Washington*'s⁸⁸ two-part inquiry, a court reviewing an ineffectiveness claim first considers whether an attorney's performance was objectively unreasonable based on "the practice and expectations of the legal community."⁸⁹ With increased frequency in recent years, the Court has indicated that "the legal community" refers to the national defense bar, thus holding criminal defense attorneys to a national standard of care.⁹⁰ Mannheim's version of the Sixth Amendment, however, would require displacing this national standard with one based on the common practices of defense attorneys within a state. In doing so, the Sixth Amendment would reserve for the states the power to determine the quality of legal representation a criminal defendant is entitled to. As a result, the constitutional right would lose its teeth in many cases. Nothing in Mannheim's proposal lends itself to federal courts creating "federal floor" for what constitutes reasonable performance.⁹¹ Thus, in a case where national professionalism standards require a defense attorney to do some act, but local custom shows that attorneys seldom actually do that thing, an attorney would not be held to have performed unreasonably when he acted in accordance with local custom. In

⁸⁵ See 50 U.S.C. §§ 1801–62 (2012).

⁸⁶ See *In re Sealed Case*, 310 F.3d 717, 728 (FISA Ct., 2002).

⁸⁷ See 50 U.S.C. § 1804(a) (2012) ("Each application for an order approving electronic surveillance under this subchapter shall be made by a Federal officer . . .").

⁸⁸ 466 U.S. 688 (1984).

⁸⁹ *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

⁹⁰ See John H. Blume & Stacey D. Neumann, "It's Like Déjà vu All Over Again": *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 155–57 (2007). The Court has looked to the American Bar Association's guidelines and statements for discerning this national standard of care. See *Padilla*, 559 U.S. 356 at 366; *Bobby v. Van Hook*, 589 U.S. 4, 7 (2009) ("Restatements of professional standards, we have recognized, can be useful as 'guides' to what reasonableness entails."); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) ("Counsel's conduct . . . fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we have long referred as 'guides to determining what is reasonable.'"); see also *Pinholster v. Ayers*, 590 F.3d 651, 691 (9th Cir. 2009) (Kozinski, J., dissenting) (observing that courts "have now adopted a national standard embodied in the ABA Guidelines" which was contrary to *Strickland*'s original language).

⁹¹ If federal courts created a minimal federal standard of reasonableness, then the Sixth Amendment would not reserve for the states the power to determine what constitutes minimally adequate performance.

other cases though, the Sixth Amendment would grow new teeth, as state practices can dictate a level of competency that exceeds what is common nationally. In either event—whether state practices exceed or fall below national standards—the state practices would be the standard against which an attorney’s performance is measured. The Sixth Amendment’s right to effective assistance would morph as a defendant crossed state lines.

Other rights conferred by the Sixth Amendment would similarly vary in content from state to state. Under Mannheim’s view, federal courts would have to conform to state laws that overlap with the Sixth Amendment’s criminal procedure protections when those state laws are more generous to defendants than the existing interpretations of the federal rights.⁹² Doing so would ensure federal prosecutors could not enjoy procedural advantages over state prosecutors. For example, the federal standard under the Speedy Trial Clause for when a federal trial must occur would become whatever is required under the law of the state within which a federal court sits.⁹³ Currently, the Federal Speedy Trial Act⁹⁴ requires that a defendant’s trial commence not later than seventy days after the filing of the indictment or information and not sooner than thirty days after the defendant’s initial court appearance.⁹⁵ That federal statutory standard, however, would be rendered obsolete whenever a state law provided for a shorter period before trial, as the state requirement would become the federal constitutional standard.⁹⁶

⁹² *Stare decisis* would keep in place Supreme Court precedent regarding the scopes of Sixth Amendment rights in federal courts where those interpretations are more generous to defendants than state law. For example, the Sixth Amendment grants a federal criminal defendant the right to conviction by a unanimous jury. *See Johnson v. Louisiana*, 406 U.S. 356, 380 (1998) (Powell, J., concurring). However, the Sixth Amendment, as incorporated by the Fourteenth Amendment, does not require the states to adhere to the unanimity requirement in criminal trials. *See id.* at 366. If a state authorized conviction based on a 10-2 verdict, for example, federal courts would not have to disturb settled federal precedent and do likewise. The point of Mannheim’s thesis, as this Article understands it, is that the rights should be construed so as not to make federal prosecution an easier proposition than state prosecution. Therefore, when federal prosecutors are already required to clear greater prosecutorial hurdles than state prosecutors, Mannheim’s thesis would not cause a change in the law.

⁹³ Under current federal law, courts consider three factors to determine whether the Speedy Trial Clause has been violated: (1) the source of a delay; (2) the reasons for the delay; and (3) whether the defendant was prejudiced. *See Dickey v. Florida*, 398 U.S. 30, 48 (1970). If courts adopted Mannheim’s view, these factors would not lose their relevance when a trial occurs before the period provided for under state law. However, when a defendant’s trial was delayed beyond the date provided for under state law, the defendant’s federal constitutional right would necessarily have been violated.

⁹⁴ *See* 18 U.S.C. §§ 3161–3174 (2012).

⁹⁵ *Id.* at § 3161(c)(1)–(2).

⁹⁶ For example, under California law, a defendant charged with a felony must be tried within sixty days of arraignment absent “good cause to the contrary.” *See* CAL. PENAL CODE § 1382(a)(2) (2014). Nevada’s Speedy Trial Act also provides a sixty-day period for prosecution. *See* NEV. REV. STAT. § 178.556 (1991). Under Mannheim’s view, a federal defendant in California or Nevada would be *per se* deprived of his constitutional right to a speedy trial whenever his trial did not begin within sixty days of arraignment, regardless of whether his federal statutory speedy trial rights were also violated. *See United States v. Loud Hawk*, 474 U.S. 302, 304 n.1 (1986) (explaining that the Speedy Trial Clause and the Speedy

Similarly, the Supreme Court has interpreted the Sixth Amendment as only granting defendants a right to a jury trial when they are charged with “serious offenses,” defined as offenses punishable by more than six months’ imprisonment.⁹⁷ Some states, however, provide state constitutional rights to jury trials for all offenses, including “petty” offenses, to which the Court has previously held the Sixth Amendment right does not extend.⁹⁸ Applying Mannheimer’s thesis, the federal standard for when the jury trial right applies would not be the six month threshold—it will be the practices of the state where the federal court sits. Where a state provides an absolute right to a jury trial, the federal court will have to do likewise. In any of these situations, the procedural rights of federal defendants would be the same as those of their state court counterparts.

The same procedural rights of a federal defendant in one district, however, could be very different from those of a federal defendant in an adjacent district in a different state.⁹⁹ Fundamentally unfair results would follow, as the same federal constitutional provision would provide greater protection to a defendant in one court, than it would to a defendant in another.¹⁰⁰ These unequal outcomes in similar cases

Trial Act confer distinct rights and require separate inquiries). However, the Court’s existing Speedy Trial Clause standard would remain in place whenever a defendant alleges that his Speedy Trial Clause rights were violated, although he was tried within the period required under state law.

⁹⁷ *E.g.*, *Lewis v. United States*, 518 U.S. 322, 327–28 (1996).

⁹⁸ *E.g.*, *Woirhaye v. Montana Fourth Jud. Dist. Ct.*, 972 P.2d 800, 802 (Mont. 1998) (“The guarantees of the Montana Constitution are plain on their face in that an accused has an absolute right to a trial by jury ‘[i]n all criminal prosecutions.’”).

⁹⁹ Administrative concerns also counsel against Mannheimer’s thesis. First, Mannheimer’s proposed rule would force federal judges to look to state law, with which they are unfamiliar, to perform one of their most important tasks—ensuring the federal constitutional rights are correctly applied. Second, Mannheimer does not explain what effect a change in state law would have on an already sentenced federal defendant.

¹⁰⁰ *See United States v. Wurzinger*, 467 F.3d 649, 654 (7th Cir. 2006) (“Reducing a federal prisoner’s sentence to accord with that of a similarly situated state convict may decrease one sentencing disparity but simultaneously enlarges another: that between the federal convict and all similarly situated federal convicts.”); Sandra Day O’Connor, *Our Judicial Federalism*, 35 *CASE W. RES. L. REV.* 1, 4 (1984) (“[A] single sovereign’s laws should be applied equally to all”); *see also* Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 *WM. & MARY L. REV.* 143, 164 (2009) (“Making federal rights and protections available in principle to the nation as a whole, but in actuality having them rely on one’s particular geographic location within the nation, raises obvious fairness concerns.”). One student commentator recently pointed out that this problem would specifically follow Judge Calabresi’s view of the vicinage provision, writing that

[a]llowing a district court judge to sit a juror who categorically opposes the application of federal sentencing law on the basis of state legislation that abolishes capital punishment would, in effect, make the penalty phase of capital trials dependent on local law. By replacing consistent rules with expanding uncertainty, the resulting patchwork of districts with and without the death penalty would exacerbate the unjust sentencing disparities that Congress has repeatedly attempted to ameliorate.

Miguel A. Lopez, Note, *Federalism by Jury in Untied States v. Fell*, 571 *F.3d* 264 (2d Cir. 2009), 33 *HARV. J.L. PUB. POL’Y.* 375, 383 (2010).

run counter to the Fourteenth Amendment guarantee of equal protection, applicable to the federal government through the reverse incorporation doctrine.¹⁰¹ Therefore, even if the Anti-Federalist interpretation had merit at the time of ratification, it was displaced by the Reconstruction-era amendment, requiring that similarly situated criminal defendants enjoy similar legal rights. Furthermore, from a pragmatic standpoint, Mannheim's version of the Eighth Amendment would greatly hinder and make unpredictable all types of federal prosecutions in all jurisdictions.

In short, the Eighth Amendment is not the solution to the problem of the federal death penalty in non-death penalty jurisdictions. The provision cannot be implied to invalidate federal death sentences in non-death penalty states without disturbing other important areas of the law, creating disparate outcomes between all types of similarly situated federal defendants (not just those facing capital charges), and greatly impeding valid federal law enforcement objectives. What is needed is a doctrinal solution supported, rather than foreclosed, by the Supreme Court's precedent; one that is narrowly crafted to preclude only federal death penalty prosecutions when the state where the offense occurred has no death penalty, and there is no prevailing, distinctly federal, interest in the prosecution. *Windsor* provides just such a doctrinal framework.

IV. A NEW APPROACH: UNITED STATES V. WINDSOR'S BROAD APPLICATIONS

In *Windsor*, the Court held that DOMA was unconstitutional because it impeded on a liberty interest, or right, protected by the Fifth Amendment's Due Process Clause.¹⁰² The novel aspect of *Windsor* was the holding that a state law right can be fundamental and thereby protected by the Fifth Amendment's Due Process Clause. In such cases, federal interference with the state law right is reviewed like federal interference with an unenumerated right created by the due process provision itself.¹⁰³

The merits analysis portion of the opinion in *Windsor*, written by Justice Kennedy, consisted of four parts. First, the opinion discussed the fact that New York had conferred on its citizens a right to same-sex marriage. The right's status under state law and its significance to those who exercise it apparently made the New York same-sex marriage right a fundamental one protected by the Fifth Amendment.¹⁰⁴ Second, Justice Kennedy emphasized that by conferring the right, the state had acted in an area traditionally reserved for near-exclusive state regulation.¹⁰⁵ In the third

¹⁰¹ See *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954) (“But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive [D]iscrimination may be so unjustifiable as to be violative of due process.”).

¹⁰² 133 S. Ct. 2675, 2695 (2013).

¹⁰³ See Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, VOLOKH CONSPIRACY, available at <http://www.volokh.com/2013/06/26/federalism-marries-liberty-in-the-doma-decision/> (June 26, 2013). Professor Barnett, one of the federalism scholars who submitted an amicus brief in *Windsor*, writes that *Windsor* was the first time that the Court had used state law “to identify a protected liberty or right within its borders against a federal statute.” *Id.*

¹⁰⁴ 133 S. Ct. at 2689, 2692.

¹⁰⁵ *Id.* at 2689-92.

part, the majority turned to DOMA and explained how the federal statute interfered with the state law right.¹⁰⁶ Fourth, the Court held that because the federal government had interfered with an important state law right arising in an area traditionally controlled by the states, DOMA was subject to increased Fifth Amendment scrutiny—apparently heightened rational basis review.¹⁰⁷ DOMA failed this scrutiny because, when Congress enacted the statute, animus towards the ability of homosexuals to enter into state-recognized marriages had motivated its action.¹⁰⁸

In the majority opinion, Justice Kennedy never acknowledged the Court was applying substantive due process review based on interference with an extra-textual right. In fact, the opinion included language suggesting the Court's outcome rested as much on a denial of equal protection, as it did on the denial of a substantive due process right.¹⁰⁹ Justice Kennedy observed that DOMA identified "a subset of state-sanctioned marriages and ma[de] them unequal." He also labeled the statute's principal purpose as "to impose inequality."¹¹⁰ These references to DOMA's discriminatory effect, however, did not convert *Windsor* into an equal protection decision. Contrary to what these statements suggest, the Court could not have rested its decision on either equal protection or substantive due process principles. The equal protection aspect of the discussion was ancillary to and necessarily followed the Court's due process holding. As explained in Part IV, DOMA discriminated not between homosexual and heterosexual people; rather, it distinguished between those who wished to exercise a state law right to same-sex marriage, and those who did not. This point is important because it means whenever due process scrutiny applies based on federal interference with a state law right, the federal action will have necessarily discriminated. The federal government will have burdened those citizens who exercise the state law right, and not burdened those who do not. Absent a state law right entitled to due process protection, no constitutionally impermissible discrimination can occur.¹¹¹

Nevertheless, Justice Kennedy's failure to announce he was applying substantive due process review is troubling. In dissent, Justice Scalia suggested Justice Kennedy had refrained from doing so because a right to same-sex marriage did not fit into either of the tradition-based categories of fundamental rights the Court previously identified as both arising under the due process provisions and triggering substantive due process review.¹¹² Justice Kennedy did not argue with him on this point. Had the

¹⁰⁶ *Id.* at 2692-95.

¹⁰⁷ *Id.* at 2693-96.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2693 (holding that DOMA "violates basic due process and equal protection principles applicable to the Federal Government.").

¹¹⁰ *Id.* at 2694.

¹¹¹ Moreover, the parts of the opinion discussed closely track the Court's standard due process framework. For example, Justice Kennedy provided a "careful description" of the asserted liberty interest—the state law right to same-sex marriage. *See* *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("Our established method of substantive-due-process analysis has two primary features . . . we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest.").

¹¹² *Windsor*, 133 S. Ct. at 2706-07 (Scalia, J., dissenting) (citing *Glucksberg*, 521 U.S. at 721).

Windsor majority held a right to same-sex marriage arises under the Fifth Amendment (and thus the Fourteenth Amendment as well), then Windsor would have little precedential value outside the same-sex marriage context, but would have invalidated all state provisions prohibiting same-sex marriage.

The Court did not do this. It did not hold that anything inherent about same-sex marriage creates an unenumerated right under the Due Process Clauses themselves. Importantly, the asserted right to same-sex marriage did not arise from the Due Process Clauses at all, but rather from state law.¹¹³ Nevertheless, the right's importance—to the state and to the state's citizens—entitled the right to substantive due process protection.¹¹⁴ Thus, the Windsor Court broke new ground by delinking the dual aspects of the substantive due process doctrine. It recognized an unenumerated right can arise from some source other than the Fifth or Fourteenth Amendments, yet still be protected under those provisions' substantive prongs. In essence, the majority recognized a third category of fundamental rights entitled to due process protection—fundamental personal rights created under state law in areas traditionally regulated by states.

Importantly, applying heightened scrutiny to deprivations of rights that exist only under state law avoids one of the criticisms of the substantive due process doctrine. Scholars have objected to substantive due process on the grounds that the doctrine results in unelected judges relying on their subjective value choices to invalidate

¹¹³ Prior to *Windsor*, the Court had looked to state law, generally, to determine whether there was a sufficient tradition behind a right in order for the right to be a fundamental one arising under the Due Process Clauses. See, e.g., *Glucksberg*, 521 U.S. at 723 (holding that the Fourteenth Amendment does not give rise to a substantive due process right to physician-assisted suicide because the “considered policy choice of almost every State” rejected such a right); *In re Winship*, 397 U.S. 358, 361 (1970) (holding that a criminal defendant enjoyed a substantive due process right to have his guilt determined beyond a reasonable doubt in part because of “unanimous adherence to the reasonable doubt standard in common law jurisdictions”). However, the Court had not looked to the law of any one state and found a right entitled to substantive due process protection. Rather, it had looked to the law of all of the states collectively and found evidence (or a lack thereof) that a right was rooted in tradition, and therefore present under the Federal Constitution. The Court's previous decisions left open the possibility that a majority of states could come to a consensus and make their views federal constitutional law. See Carrie Leonetti, *Counting Heads: Does the Existence of a National Consensus Give Rise to a Substantive Due Process Right To a Particular Criminal Procedure?*, 35 AM. J. TRIAL ADVOC. 317 (2011) (arguing that consensus among most states about a state criminal procedure right should be binding on all states and the federal government pursuant to substantive due process). Unlike those cases, the *Windsor* approach does not invite federal courts to decree a national standard binding against the states (which, albeit, might be based on collective state consensus). It simply allows the states (as individual states) to make their own standards binding on the federal government.

¹¹⁴ Professor Ernie Young argues that *Windsor* rested primarily on equal protection grounds. However, he contends that the federal government's discrimination was invalid because it caused a state law right to be available to some citizens, but not to others. According to Professor Young, it was the fundamental nature of this state law right which protected it from federal interference: “[t]he right of ‘recognition’ in *Windsor*, then, was not some untethered judicial creation, but rather an entitlement to federal recognition of state law rights created in the democratic exercise of states’ reserved powers. That right is utterly familiar—and fundamental.” Ernest A. Young, Essay, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. 39, 47 (2013).

legislative action.¹¹⁵ The Court, however, did not do this in *Windsor*, and applying *Windsor* prospectively will not lead to such anti-democratic problems. Rather, the *Windsor* Court established a framework whereby, when two sovereign entities have made conflicting, mutually exclusive policy choices about a single issue, the policy choice of the entity traditionally tasked with regulating the field receives deference. Therefore, *Windsor* did not run counter to democratic values—it enhanced the effect of local democratic choices.

Windsor was novel because the Court relied on the individual rights guarantees of the Fifth Amendment, rather than the federalism requirements of the Tenth Amendment to enforce deference to state policymaking. By recognizing that the federal government can be constrained from interfering with a right that exists only under state law, the Court opened the door for individuals to pursue claims based on federal interference with state law rights, even when the federal action is not in excess of enumerated powers or an invalid interference with state sovereignty.

Like any new legal doctrine, the parameters of the *Windsor* framework will be determined through application to new facts. A right to not be executed by the state is, as this Article argues, one type of state law right entitled to protection from federal interference. The remainder of this Article considers what a *Windsor*-based challenge to the federal death penalty might look like. It explains why *Windsor* could prevent the federal government from executing for crimes committed in non-death penalty states where there is no strong federal interest in prosecuting for the offense. It also addresses why a *Windsor*-based solution to the problem set forth in Part I would avoid the overbreadth problems that would result from the previously proposed solutions described in Part II.

V. A HYPOTHETICAL WINDSOR-BASED CHALLENGE TO THE FEDERAL DEATH PENALTY

Currently, eighteen states (as well as the District of Columbia and Puerto Rico) do not have the death penalty.¹¹⁶ The following considers how a federal defendant might challenge a prosecutor's attempt to subject him to the federal death penalty by pointing to the lack of that punishment under the law of his state. It does so through the lens of a *Windsor*-based pre-trial motion to dismiss a notice of intent to seek the federal death penalty.

¹¹⁵ See Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 433 n.217 (“Early Supreme Court decisions striking down legislation under economic substantive due process, and more recent decisions striking down state regulation interfering with individual autonomy, have been criticized as undemocratic intervention by the Court in contravention of the will of the majority.”) (collecting sources).

¹¹⁶ Non-death penalty jurisdictions include: Alaska, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

A. The Existence of a Fundamental State Law Right to Not Be Executed

The first step of the Windsor Court's analysis was concluding that: (1) the state had conferred a personal, noneconomic right on its citizens;¹¹⁷ and (2) that right was fundamental in nature.¹¹⁸ By reaching these conclusions, Justice Kennedy tethered this new type of right protected under substantive due process—a right created by state law—to the existing substantive due process rights arising from the Fifth Amendment itself. Only alleged deprivations of fundamental personal rights are reviewed under substantive due process scrutiny.¹¹⁹ Therefore, in the hypothetical Windsor-based challenge, the defendant will need to establish these same two criteria—that there exists a personal state law right to not be executed, and that such a right is fundamental.¹²⁰

1. The State Conferred a Personal Right to Not be Executed

As for the first required showing, the defendant will have to concede the existence of the state law right to not be executed is not as straightforward as the existence of a state law right to same-sex marriage. In Windsor, the Court readily concluded New York's Marriage Equality Act—opening with the statement “Marriage is a fundamental human right. Same-sex couples should have the same

¹¹⁷ To reach this conclusion, Justice Kennedy discussed the definition of the right being asserted, stating:

For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgement of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

133 S. Ct. 2675, 2692-93 (2013).

¹¹⁸ As discussed, *infra*, Justice Kennedy implicitly required fundamentality by stressing both the right's categorical importance and evidence that New Yorkers valued the right, based on the broad public participation in its creation. *Id.* at 2692.

¹¹⁹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹²⁰ The defendant will, of course, first need to define the right as a state law right not to be executed, just as Justice Kennedy defined the state law right and thus established that it was a personal one. See *Washington v. Glucksberg* 521 U.S. 702, 721 (1997). Importantly, in defining the right, the defendant will need to emphasize that the right asserted arises from state law, not from the Fifth Amendment's guarantee of life or liberty. The Court has previously rejected defendants' invitations to apply heightened due process scrutiny in the criminal law context. However, it has done so when the defendant asserted that the right arose from the Fifth Amendment itself. See *United States v. Chapman*, 500 U.S. 453, 465 (1991) (explaining that “[e]very person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees.”). Specifically relevant here, lower federal courts have rejected Fifth Amendment, substantive due process, challenges to the FDPA. *United States v. Quinones*, 313 F.3d 49, 61-70 (2d Cir. 2002) (rejecting claim based on substantive due process right to possibility of exoneration during natural life); *United States v. Tisdale*, No. 07-10142-05-JTM, 2008 WL 5156426, at *2 (D. Kan. Dec. 8, 2008). Thus, it will be important for the defendant to distinguish his claimed state law right from one that arises directly under the Federal Constitution.

access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage¹²¹—conferred a personal right.¹²² When abolishing the death penalty, however, states have generally not included an explicit link between voluntarily restraining the state’s ability to impose a particular type of punishment and conferring an individual right. No state has explicitly conferred a personal right to not be subjected to state-sponsored execution. Instead, most states have abolished capital punishment simply by repealing the portions of statutes that previously authorized such a sanction.¹²³ Moreover, states have abolished capital punishment for reasons other than benefitting those convicted of crimes, such as evidence that the death penalty does not serve a strong deterrent purpose, or the death penalty’s high costs.¹²⁴ Thus, the defendant will likely have to acknowledge that, although he is benefitted by the state’s abolition of the death penalty—as a result of the state action, the state cannot execute him—the state may not have intended to bestow a right upon him by abolishing the death penalty.

This concession will not doom the defendant’s challenge, however. First, the defendant will point out that the Windsor Court’s analysis regarding the existence of a state law right will apply with equal force when a state recognizes same-sex marriage simply by repealing the legal prohibitions on doing so. As a second argument, the defendant will point to the unique life or death nature of the death penalty, and argue that a state’s decision to not execute its citizens, regardless of whether that decision results in an explicit individual right, necessarily bestows a new liberty on individuals in that state. By abolishing the death penalty, a state allows its citizens to act with the assurance that the state will seek to preserve their lives, no matter what they do, or are suspected of doing. Put differently, whether or

¹²¹ Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. Dom. Rel. Law §§ 10-a, 10-b, 13 (2013)).

¹²² *Windsor*, 133 S. Ct. at 2689 (“New York . . . decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”).

¹²³ See, e.g., S.B. 276, 2013 Leg. Sess. (Md. 2013); S.B. 280, 2012 Sess. (Conn. 2012); H.B. 285, 2009 Reg. Sess. (N.M. 2009). Michigan is the only state to have made the lack of the death penalty a matter of state constitutional law. However, the Michigan Constitution states only that “[n]o law shall be enacted providing for the penalty of death”; and that provision is located in Article IV, entitled “Legislative Branch,” not Article I, entitled “Declaration of Rights.” MICH. CONST. art. IV, § 46. The language and location of the Michigan provision suggest that, although Michigan gave elevated status to its abolition of capital punishment, it did not do so because it viewed the abolition as the conferral of an individual right.

¹²⁴ For example, in Maryland, the state senate voted to abolish capital punishment after a commission appointed to study the issue reported that the death penalty did not accomplish its deterrent purpose, was costlier than a life sentence, and risked executing the innocent. See Editorial, *Flawed ‘Compromise’*, BALT. SUN, Mar. 5, 2009, at 20A. In Connecticut, the *Hartford Courant* reported that death penalty repeal supporters gave the following reasons for their position to a legislative committee: “the enormous amount of time it takes to execute a prisoner . . . the painful toll that endless appeals take on the families of murder victims, instances of racial bias in implementing the death penalty and the fact that a mistake can lead to the execution of an innocent person.” Daniela Altimari, *Committee OK’s Death Penalty Repeal Bill, Which Calls for Maximum Sentence of Life Without Parole, Heads Next to House*, HARTFORD COURANT, Apr. 13, 2011, at B6.

not the state intends for this result, abolition of capital punishment necessarily entails the conferral of an absolute right to the preservation of one's life versus the state. Thus, the defendant will maintain, it is immaterial whether the state announces in its constitution or a statute that all citizens enjoy a personal right to not be executed. Abolition of the death penalty, standing alone, is sufficient to confer this right.

2. The State Law Right to Not Be Executed is Fundamental

As for the second requirement—the right's fundamentality—in *Windsor*, Justice Kennedy emphasized that the state law right to same-sex marriage came to exist after “a statewide deliberative process that enabled [New York] citizens to discuss and weigh arguments for and against same-sex marriage.”¹²⁵ Justice Kennedy did not explicitly state why the way the state conferred the right mattered. One possible explanation is that the “statewide deliberative process” was what made the right a fundamental one protected by the Fifth Amendment from federal interference.

This explanation makes sense. A court considering whether an asserted unenumerated right arises from the Due Process Clauses looks to the substantive nature of the right. The Court does so to determine whether the substance of the asserted right necessarily arises from the Constitution's inherent protection of liberty.¹²⁶ If it does, then the inherent constitutional protection of liberty extends to the asserted right, and requires heightened scrutiny of governmental action abridging the right.¹²⁷ In *Windsor*, however, the asserted right to same-sex marriage arose from state law—not the Federal Constitution. Thus, it was not the Constitution's protection of liberty that extended to cover the right: It was the Constitution's implicit requirement of respect for state policymaking that caused the right to receive Fifth Amendment protection. If this is so, then it would make little sense for a federal court to reserve for itself the role of evaluating the substantive nature of a state law right to determine whether the asserted right is protected. By stressing the way the state created the same-sex marriage right, rather than evaluating the qualitative aspects of the right, the *Windsor* Court left it to states to determine whether a state law right is important enough to receive Fifth Amendment protection. *Windsor* suggests when a state intentionally confers a personal right through some political process that involves a high-degree of public participation, then the very act of conferring the right makes it a fundamental one protected by the Fifth Amendment (provided the second step is satisfied—that the right arises in an area traditionally regulated by states).

At the same time, *Windsor* is notable for what it did not do. The Court did not leave room for future challenges to DOMA in which a court would consider the means by which some other state created a same-sex marriage right. Although just before the Court decided DOMA, eleven states (and the District of Columbia)

¹²⁵ *Windsor*, 133 S. Ct. at 2689 (“New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood.”) (citing Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. DOM. REL. LAW §§ 10-a, 10-b, 13 (2013))).

¹²⁶ *See Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) (explaining that the rights arising under the Fourteenth Amendment's Due Process Clause are only those that are “at the very essence of a scheme of ordered liberty” in light of “the meaning, the essential implications of, liberty itself”).

¹²⁷ *See id.*

recognized same-sex marriages, not all of them did so as a result of a “statewide deliberative process” like the one that occurred in New York. Instead, there were states where same-sex marriage gained legally protected status as a result of judicial decisions, some of which were deeply unpopular.¹²⁸ In those states, a court might have paused before concluding the importance of the right to the state and its citizens gave rise to federal constitutional protection. After Windsor, however, DOMA was void nationally—even in states where the means of conferring the state law right to same-sex marriage suggested public disregard for the right.

This aspect of the opinion is analytically troubling. If it is for states to determine for themselves the prominence of a state law right, then the fact that a right is important in one state should not mean a substantially identical right existing under the law of another state is per se prominent. Nevertheless, the majority’s not requiring a state-specific analysis each time a state recognizes same-sex marriage was pragmatic. First, it avoided the unseemly result of federal law recognizing same-sex marriages existing under one state’s law but not recognizing those that exist under the law of another state. Not only would such a result have raised fairness concerns, it would also have led to uncertainty in the administration of federal law. Moreover, if a state-specific assessment of the right’s importance was needed, a court might have determined that, although a right to same-sex marriage was important when it was created, its status under state law had shifted. All of these outcomes would have run counter to the individual-right affirming spirit of the opinion.

Thus, the Windsor Court apparently adopted an analysis whereby, to determine whether an asserted state law right is fundamental and thus protected by the Fifth Amendment (even though it arises under state law), a court looks to the means by which a state—any state, that is—created the right. If a state intentionally bestowed an individual right through a prominent political process, then the very act of creating the right establishes its fundamentality.

As for the second issue, the defendant will point to the means by which five states recently abolished capital punishment and argue the events in those states resembled the “deliberative process” that led to New York’s same-sex marriage right. Within the past six years, New Jersey,¹²⁹ New Mexico,¹³⁰ Illinois,¹³¹ Connecticut,¹³² and Maryland¹³³ have all abolished the death penalty through

¹²⁸ Consider states like Massachusetts, California, Iowa, and Connecticut, each of which recognize same-sex marriages as a result of opinions by state supreme courts. *See* Varum v. Brien, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 43 Cal. 4th 757 (2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003). The state courts’ decisions in those cases did not follow any public involvement or “statewide deliberative process.” In fact, in Iowa and California there was strong public backlash to the courts’ decisions. Californians responded to the judicially-created same-sex marriage right with Proposition 8, nullifying the court’s decision. Iowans responded by unseating several of the state supreme court justices who had signed on to the opinion. *See* A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to the Bench*, N.Y. TIMES, Nov. 3, 2010, at A1.

¹²⁹ *See* N.J. STAT. ANN. § 2C:11-3 (West 2007).

¹³⁰ *See* N.M. STAT. ANN. § 31-18-14 (West 2009).

¹³¹ *See* S.B. 3539, 96th Gen. Assemb., Reg. Sess. (Ill. 2011).

¹³² *See* Pub. Act No. 12-5 (Conn. 2012).

legislation that followed visible political campaigns, much like the campaign that led to New York's recognition of same-sex marriages.¹³⁴ The events occurring in those states will, standing alone, be enough to establish that a state law right to not be executed is a fundamental one whenever it exists under state law. This is true regardless of whether the state where the challenge occurs abolished capital punishment recently or long ago,¹³⁵ or whether it did so via a judicial decision or legislative action.¹³⁶ Even if the challenge occurs in a non-death penalty state other than the five that recently abolished capital punishment, Windsor makes clear that the right's continued existence under state law establishes that federalism is enhanced by federal observance of the right.¹³⁷

¹³³ See S.B. 276, 2013 Leg. Sess. (Md. 2013).

¹³⁴ See Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1240–41 (2013); see also Lyn Suzanne Entzeroth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 OR. L. REV. 797, 820–33 (2012) (describing the political movements that culminated in the abolition of the death penalty in New Mexico, New Jersey, and Illinois). For example, in Maryland, the governor made death penalty repeal a centerpiece of his legislative agenda, just as New York's governor made the passage of the Marriage Equality Act a centerpiece of his. See Michael Dresser, *O'Malley to Lead Move to Repeal Death Penalty*, BALT. SUN, Jan. 15, 2013, at 2A; Michael Barbaro & Nicholas Confessore, *Cuomo Vows Personal Push to Legalize Gay Marriage*, N.Y. TIMES, Mar. 10, 2011, at A25.

¹³⁵ Five states repealed their death penalty laws during the decades immediately before *Furman* (and did not subsequently reinstate them). These states include: Alaska (abolishing in 1957, two years before its admission to the union, see Melissa S. Green, *A History of the Death Penalty in Alaska*, Justice Center, University of Alaska at Anchorage, available at <http://justice.uaa.alaska.edu/death/alaska/history.html>); Hawaii (abolishing in 1957 while still a territory); Vermont (abolishing in 1964); Iowa (abolishing in 1965); and West Virginia (abolishing in 1965). See Lindsey S. Vann, *History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255, 1264 (2011). Four states abolished the death penalty between 1853 and 1911: Michigan (abolishing in 1846); Wisconsin (abolishing in 1853); Maine (abolishing in 1887); and Minnesota (abolishing in 1911). See DEATH PENALTY INFORMATION CENTER, *supra* note 116.

¹³⁶ State court decisions in Rhode Island and New York first repealed those states' death penalty statutes. See *State v. Cline*, 397 A.2d 1309, 1311 (R.I. 1979) (holding that state's mandatory death penalty statute was unconstitutional under Eighth Amendment); *People v. LaValle*, 817 N.E.2d 341, 350 (N.Y. 2004) (state death penalty statute requiring jury deadlock instruction violated state and federal constitutional due process rights and thus rendered death penalty statute unconstitutional). Moreover, the legislatures in both states subsequently formally repealed the unconstitutional statutes. See N.Y. PENAL LAW § 70.00 (McKinney 2009); R.I. GEN. LAWS § 11-23-2 (Supp. 1987).

¹³⁷ Recent history in one state will challenge this presumption of fundamentality. In 2006, Wisconsin voters supported reinstating the death penalty by a margin of 56 percent to 44 percent in a non-binding, advisory referendum. Gina Barton, *Wisconsin Voters Lean Toward Death Penalty*, MILWAUKEE J. & SENTINEL, Nov. 11, 2006. However, the referendum results did not spark legislative action, and since then there has been little effort to reintroduce capital punishment. Jason Stein, *Don't Look for Death Penalty Soon in Wisconsin*, WIS. ST. J., Mar. 28, 2007. Nevertheless, the vote followed a public campaign during which groups on both sides of the issue stirred strong public sentiment. E.g., Jocelyn Berkham, *Death Penalty Question Causes Stir Among Voters*, WAUSAU DAILY HERALD, Nov. 5, 2006, at A1. Therefore, in Wisconsin, there is some possibility that respecting the state law right to not be executed

B. The Right Not to Be Executed Exists in an Area Traditionally Regulated by States

Justice Kennedy's discussion of the states' traditional roles in defining legally recognized marriages makes clear that applying due process scrutiny will only be appropriate if the fundamental right to not be executed arises in an area traditionally regulated primarily by states. In *Windsor*, evidence of states' traditional primacy in the area of marital relations included: (1) the importance to state domestic relations law of statutes defining criteria for marriage recognition,¹³⁸ and (2) the long history of federal deference to state authority in the field of domestic relations.¹³⁹ Similar elements are present here.

As for this first principle, the ability to define punishments for violent offenses is central to giving effect to a state's general interests in criminal punishment.¹⁴⁰ From a retributivist perspective, a state's interest in affixing on an individual what it considers the appropriate type of punishment is at its height when the individual took the life of another.¹⁴¹ In a 1947 case, Justice Frankfurter explained in a concurrence why the Court, from a prudential standpoint, should not intervene to stop a state from carrying out an execution. He wrote, "this Court must abstain from interference

might actually offend the majority of the population. However, a court should not accept this argument. The fact that the institutional constraints placed by the state's citizens on the development of state policy have not led to the reintroduction of capital punishment suggests that the right to not be executed continues to demand respect.

¹³⁸ *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) ("The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens . . . The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations . . .").

¹³⁹ *Id.* ("Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.").

¹⁴⁰ *See Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power."); *see also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 30 S. Ct. 3020, 3113–14 (2010) (Breyer, J., dissenting) ("[T]he ability to respond to the social ills associated with dangerous weapons goes to the very core of the States' police powers.").

¹⁴¹ *See Carol S. Steiker, No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 *STAN. L. REV.* 751, 764 (2005). Professor Steiker writes,

When the government executes, it is not merely "killing" (though of course it is doing that); it is engaging in a distinctive governmental practice that we call criminal punishment, which involves the deliberate infliction of unpleasant consequences in response to an offender's wrongdoing. This purposefulness is one of the defining features of criminal punishment as a practice, along with the public affixing of blame and the solicitation of certain emotions, such as shame (on the part of the punished) and condemnation (on the part of the public). These features of punishment explain why it is viewed not merely as regulation by other means but rather as a problematic practice that requires some special justification. Being an act done by the state in the name of the collective, it requires not only moral but also political justification: we would appropriately characterize improper executions as not only morally wrong but also unjust.

Id.

with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh."¹⁴² It was not the nature of the penalty that mandated deference; it was the state's interest in punishing for the crime and giving effect to its own retributive interest. That interest in retribution is as strong when the state seeks to impose a sanction other than death.¹⁴³ Punishing for the most severe crimes is also crucial to fulfilling the state's interest in deterrence. If legally authorized punishments for the most severe offenses do not serve their deterrent purpose, then violent crimes will occur. Studies suggest an increase in violent crime often is accompanied by an increase in other crimes.¹⁴⁴ Therefore, deterring the most severe offenses is essential to protecting citizens from all crime.

Consistent with the states' interests in accomplishing their penological objectives, the federal government defers to the states when it comes to prosecuting and punishing violent offenders. In an 1821 decision, Chief Justice Marshall declared that, although Congress may punish for murders committed on federal property, it possesses "no general right to punish murder committed within any of the States."¹⁴⁵ Since then, the Supreme Court has reaffirmed the primacy of state law when it comes to defining and punishing for violent crimes.¹⁴⁶

¹⁴² *State ex rel. Francis v. Resweber*, 329 U.S. 459, 470-71 (1947) (Frankfurter, J., concurring). In *Francis*, the Court rejected a Louisiana death row inmate's challenge to the state's second attempt to execute him after a malfunction of the electrocution device at the first attempt. *Id.* at 465-66.

¹⁴³ See Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C. R.-C. L. L. REV. 407, 464-68 (2005) (explaining that capital punishment offends the dignity of the accused and the society as a whole, and, a retributivist has an interest in refraining from imposing death as punishment) ("Opposition to the death penalty arises, then, not only because of our fundamental commitment to respect the basic dignity of the offender, notwithstanding his past offense, but also our own dignity . . . [H]uman dignity is a value whose strength in the moral life is more vividly experienced the more vigilant we are in protecting and nurturing it.").

¹⁴⁴ See, e.g., Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL'Y REV. 293, 337 (2009) (noting that "there is an inverse relationship between drug control and both property and violent crime rates"); Joan McCord, *Confounding Factors and Fictions of Counting*, 69 U. COLO. L. REV. 927, 943 (1998) (suggesting that the causes of nonviolent crimes are also "among the necessary causes of violent crimes"); Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-In-Sentencing Laws*, 45 J.L. & ECON. 509, 529 (2002) (noting that "violent and property crime rates tend to move in the same direction."); Kristen Bolden, Note, *DNA Fabrication, A Wake Up Call: The Need to Reevaluate the Admissibility and Reliability of DNA Evidence*, 27 GA. ST. U. L. REV. 409, 417 n.62 (2011) (noting that studies show "a high recidivism rate for individuals who commit nonviolent crimes and then progress to commit violent crimes" (internal quotation marks omitted)).

¹⁴⁵ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821). Although the first Congress enacted a murder statute, it limited the effect of that statute to areas "under the sole and exclusive jurisdiction of the United States." See Act of Apr. 30, 1790, 3, reprinted in 2 Annals of Cong. 2215 (1970). A similar provision now exists in the United States Code. See 18 U.S.C. § 1111 (2012).

¹⁴⁶ See *United States v. Morrison*, 529 U.S. 598, 618 (2000) ("Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.") (holding that the federal statute authorizing a civil remedy for victims of gender-motivated

The Windsor Court provided specific examples of federal deference to state regulation of domestic relations. Similar examples exist when it comes to federal deference to state prosecution of violent crime. Justice Kennedy noted that federal courts, as a prudential matter, decline to hear cases otherwise arising under diversity jurisdiction, involving domestic relations.¹⁴⁷ Similarly, the Justice Department's Petite Policy requires authorization from the appropriate Assistant Attorney General before a federal prosecutor commences a federal prosecution based on conduct for which a state court has already tried an individual.¹⁴⁸ This practice, although not required by the Double Jeopardy Clause or statute, ensures that, for most crimes punishable under state law, federal officials will defer to their state counterparts.¹⁴⁹ The Capital Case Protocols, even after the recent amendments, work in tandem with the Petite Policy and counsel federal deference to state prosecutions for violent crimes. They require that federal prosecutors, before charging a federal offense punishable by death, consider whether there is a "substantial federal interest" in the prosecution. When specific factors indicate a state's interests are stronger, federal prosecution—seeking the death penalty or some lesser sanction—is inappropriate.¹⁵⁰ Thus, just as a discretionary doctrine ensures domestic relations matters stay out of federal courts, a discretionary federal practice ensures most violent crimes are prosecuted in state, rather than federal, court.¹⁵¹

violence exceeded Congress's enumerated powers in part because preventing violent crimes is traditionally regulated by states); *see also* *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("[T]he structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." (internal quotation marks omitted) (construing the Federal Controlled Substances Act as not regulating the practice of medicine generally, because that area was one traditionally regulated by the states)); *United States v. Comstock*, 560 U.S. 126, 130 S. Ct. 1949, 1982 (2010) (Thomas, J., dissenting) ("Absent congressional action that is in accordance with, or necessary and proper to, an enumerated power, the duty to protect citizens from violent crime, including acts of sexual violence, belongs solely to the States.").

¹⁴⁷ *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992)).

¹⁴⁸ *See* Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 851–54 (2009) (describing the *Petite* Policy as requiring deference to state prosecution unless the federal interest is strong or the state outcome was unsatisfying). Notably, the *Petite* Policy applies to constrain federal prosecution, even where the Double Jeopardy Clause does not do so. *Id.* at 851–52.

¹⁴⁹ *See* Little, *supra* note 16, at 414–15.

¹⁵⁰ U.S. ATT'YS MANUAL at 9-10.010 (2014). Factors relevant in determining whether the federal interest outweighs the state interest in prosecution include: (1) characteristics of the offense, including the identity of the offender, victim, and primary investigators; (2) extent to which the criminal conduct was interstate in nature; and (3) ability and willingness of the state to prosecute effectively. *Id.*

¹⁵¹ Federal deference to state criminal proceedings also extends to the federal judiciary. The federal habeas corpus statute, as amended, significantly limits the instances when a federal court may grant a writ of habeas corpus to a state prisoner—doing so in an effort to promote federalism. *See* 28 U.S.C. § 2254(d) (2012); *see also* *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (provision limiting district court's discretion to consider new evidence "carries out [statute's] goal of promoting comity, finality, and federalism by giving state

Additionally, Justice Kennedy noted that federal statutes, like the Copyright Act, look to state domestic relations law to determine relationships having legal significance under federal law.¹⁵² Similarly, federal criminal statutes incorporate state criminal law. Many federal statutes include felony recidivist provisions, which allow for punishment whenever an individual commits a prohibited act after having been convicted of a felony offense—either under state or federal law.¹⁵³ Federal law does provide a standard definition of a felony—a crime punishable by more than one year imprisonment.¹⁵⁴ To determine whether a state offense was punishable by more than one year imprisonment, however, federal courts do not consider the penalty an individual would have faced had his offense been prosecuted under federal law.¹⁵⁵ Rather, they look to the maximum penalty the person could have received under the law of the state at the time the state court sentenced him, in light of the specific facts presented to the state court.¹⁵⁶ This principle ensures that when federal law requires an assessment of the severity of conduct already punished under state law, federal courts defer to states' determinations of how severe the conduct was. The principle is parallel to copyright law's deference to state law's determination of who is and who is not the heir of a copyright holder.

These anecdotes, like the ones Justice Kennedy pointed to in *Windsor*, will establish a tradition of federal deference to state action. It is important to note, however, just what this tradition entails. There is not a tradition of federal deference to state prosecution in all cases punishable by death under federal law. The opposite is true. There is a long history, dating to the early Congresses, of federal capital punishment for exclusively federal offenses or federal offenses punishable under state law, but historically prosecuted with frequency in federal courts.¹⁵⁷ Because

courts the first opportunity to review a claim, and to correct any constitutional violation in the first instance.” (internal quotation marks and alterations omitted)).

¹⁵² *Windsor*, 133 S. Ct. at 2691 (citing *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) (holding that state law is used to identify next of kin inheriting federal copyright)).

¹⁵³ 21 U.S.C. §841(b) (2012) (providing for enhanced penalties for various drug offenses if the defendant committed the offense after committing a felony); 18 U.S.C. § 922(g) (2012) (prohibiting the possession of a firearm after having been convicted of a felony); see Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 78–84 (2006) (discussing federal reliance on state law for predicate felony offenses) (“[S]tates play a significant role in the federal criminal justice system.”).

¹⁵⁴ See 18 U.S.C. § 3559(a) (2012).

¹⁵⁵ See *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 582 (2010) (“The mere possibility that the defendant’s conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be ‘convicted of a[n] aggravated felony’ before he loses the opportunity to seek cancellation of removal.”).

¹⁵⁶ See *United States v. Simmons*, 649 F.3d 237, 243 (4th Cir. 2011) (en banc) (because the state court did not make the findings necessary to subject the federal defendant to an enhanced, greater than one-year state sentence for a prior state offense, the federal court could not conclude that the defendant’s prior state offense was punishable by more than one year imprisonment); *United States v. Haltiwanger*, 637 F.3d 881, 884 (8th Cir. 2011) (same).

¹⁵⁷ See Little, *supra* note 16, at 360–71 (describing the history of the federal death penalty from the Constitutional Convention through *Furman*) (“The federal death penalty thus has

there is no tradition of states determining the appropriate punishments for offenses that invoke federal interests, Windsor will not apply if the defendant is charged with such an offense, regardless of the law of the state in which he is alleged to have committed his crime. The solution, in short, does not encroach on federal interests like the solutions discussed in Part II.

C. A Federal Death Penalty Notice Interfered With the State Law Right

If the prerequisites to applying Windsor are satisfied, the court will move on to the third step—determining whether the filing of the death penalty notice interfered with the state law right to avoid execution. The defendant will need to show the federal action in a federal prosecution for a federal crime actually interfered with a state law right applicable only to violations of state law. As discussed, previously, when defendants have made such arguments (in the context of Tenth Amendment/state sovereignty challenges), courts have pointed out that a federal death penalty prosecution does not prevent a state from seeking a lesser form of punishment under state law for the same or similar conduct.¹⁵⁸ In Windsor, however, Justice Kennedy recognized that when federal law exists in an area typically regulated by states, application of the federal law can result in the state law not achieving its animating purposes. This is true even if actual preemption does not occur. In such cases, federal interference with a state law right is cognizable.¹⁵⁹ The Windsor Court pointed out the ways DOMA interfered with the intended policy goals lying behind the state same-sex marriage law without actually interfering with the state law’s legal effect—by placing a “stigma” on those who exercised the same-sex marriage right; by diminishing the “stability and predictability” of same-sex marriages recognized by the state; by “humiliat[ing]” children being raised by

been part of our national structure since our country's earliest origins.”). Capital offenses that are punishable only under federal law include: murder of an American national on foreign soil, see 18 U.S.C. §§ 1119, 2332 (2012); murder related to maritime navigation, see 18 U.S.C. § 2280 (2012); and treason, see 18 U.S.C. § 2381 (2012). Capital offenses that, though punishable under state law, are typically prosecuted federally include: murder involving a weapon of mass destruction, see 18 U.S.C. § 2332(a); murder by a federal prisoner, see 18 U.S.C. § 1118 (2012); and murder during a bank robbery, see 18 U.S.C. § 2113 (2012). For example, between 1927 and 1963, only twenty-four federal executions occurred. See DEATH PENALTY INFORMATION CENTER, *Federal Executions 1927–2003*, available at <http://www.deathpenaltyinfo.org/federal-executions-1927-2003>. Eight of these executions were for exclusively federal offenses related to wartime espionage or sabotage. *Id.* The other executions were mostly for offenses involving strong federal interests, including: interstate kidnapping, murdering federal law enforcement agents, murder committed while robbing a federally insured bank, murder on the high seas, and murder on federal property. *Id.*

¹⁵⁸ See *United States v. Tuck Chong*, 123 F. Supp. 2d 563, 567 (“Sentencing . . . according to federal law for a federal crime neither violates Hawaii State sovereignty nor the Tenth Amendment, under the doctrine of dual sovereignty.”); *United States v. O’Reilly*, No. 05-80025, 2007 WL 2421378, at *3 (E.D. Mich. Aug. 23, 2007) (same).

¹⁵⁹ See *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). The amicus appointed to defend DOMA argued that DOMA and a state law right to same-sex marriage could coexist because DOMA did not technically preempt the state law. Brief of Respondents, at 32, *Windsor*, 133 S. Ct. at 2692 (2013) (No. 12-307) (“DOMA permitted states to perform their role as “laboratories of democracy,” while at the same time ensuring that no one state’s experiment would be imposed on other states or on the federal government.”).

homosexual couples; and by denying homosexual couples federal benefits and protections normally triggered when individuals enter into valid marriages under state law.¹⁶⁰

A federal death penalty prosecution in a non-death penalty state similarly interferes with the policy purposes behind a state's abolition of the death penalty, even if it does not technically preempt state law. First, and most obviously, it eventually results in the death of an individual as punishment for conduct the state determined does not warrant death. The state's policy choice and the federal death penalty prosecution's intended end are mutually exclusive.

Additionally, the existence of the federal death penalty in a non-death penalty state injects the potential for arbitrariness after a state has endeavored to create certainty and predictability in punishment. The danger that the death penalty is applied arbitrarily has long been considered a chief problem with the punishment.¹⁶¹ Death penalty opponents contend that crime is at least as effectively deterred by less severe punishments certain to be imposed as by more severe punishments administered arbitrarily.¹⁶² Abolitionist states have accepted this argument. Thus, were it not for the federal death penalty, an individual in a non-death penalty state could know before committing a premeditated murder the punishment he will face if apprehended, prosecuted, and convicted. A federal death penalty notice filed in one of these states reintroduces the possibility for arbitrary punishment. To the extent the

¹⁶⁰ See *id.* at 2693.

¹⁶¹ E.g., *California and Pennsylvania Courts Divide on Question of Admissibility of Details of Prior Unrelated Offenses at Hearing on Sentencing Under Split Verdict Statutes*, 110 U. PA. L. REV. 1036, 1040 (1962) (arguing that the death penalty cannot be justified by retribution because “[w]hen the death penalty is imposed as a gratification of this retributive impulse, the process of decision necessarily becomes arbitrary and irrational”); Book Note, *Strategies of Abolition*, 84 YALE L.J. 1769, 1774 (1975) (reviewing CHARLES L. BLACK CAPITAL PUNISHMENT THE INEVITABILITY OF CAPRICE AND MISTAKE (“If the penalty of death cannot be imposed . . . without considerable measures of arbitrariness and mistake, does the execution of citizens, some for the wrong reason, some wrongly, and some for no reason at all, deter other citizens sufficiently better than long imprisonment?”); see also *Callins v. Collins*, 510 U.S. 1141, 1159 (1994) (Blackmun, J., dissenting) (“I am . . . optimistic . . . that this Court will eventually conclude that the effort to eliminate arbitrariness while preserving fairness in the infliction of death is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.” (internal quotation marks and alterations omitted))).

¹⁶² Italian philosopher Cesare Beccaria first made this point, maintaining that the deterrent value of the death penalty was so low that it did not justify its costs, and that certain, swiftly executed punishment better deterred crime than a more severe, arbitrary punishment. See John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, *44 (2009). More recently, various studies have shown that the death penalty's deterrent effect is insignificant. E.g., Earl F. Martin, *Masking the Evil of Capital Punishment*, 10 VA. J. SOC. POL'Y & L. 179, 199 (2002) (“If we are searching for affirmative proof that the death penalty accomplishes an accepted purpose of criminal punishment, the record on deterrence is lacking to the point of nonexistence.”); Michael L. Radelet & Traci L. Lacoock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 504 (2009) (“[T]he vast majority of the world's top criminologists believe that the empirical research has revealed the deterrence hypothesis for a myth.”).

certainty of a particular punishment promotes deterrence,¹⁶³ that deterrence is lost due to the federal death penalty's use.¹⁶⁴ Moreover, to the extent that the state sought to benefit its citizens who might commit crimes by giving them advance knowledge of what punishment they might face, the federal death penalty renders that benefit null.

Third, just as DOMA interfered with the ability of secondary beneficiaries of the same-sex marriage right to enjoy that right (the children of same-sex couples), so too does the existence of the federal death penalty interfere with the ability of individuals other than those who commit crimes to enjoy the benefit of the state's vow not to execute its citizens.¹⁶⁵ When a state abolishes the death penalty, it ensures none of its citizens will have to participate—as jurors, witnesses, court personnel, journalists, prison officials, pharmacists (preparing lethal drugs), or simply concerned members of the community—in a process about which many have moral objections. The federal death penalty cannot be administered without the involvement of these very individuals. Whether a defendant is being prosecuted in state court and facing life imprisonment, or in federal court and facing death, the same witnesses will be called on to testify at sentencing; the same locality will provide the basis for the jury pool; the same journalists will cover the case; and the same community that prided itself on not executing its citizens will have its dignity insulted by legal “machinery of death” being tinkered with in its midst.¹⁶⁶

D. Animus Motivated the Federal Prosecutor's Charging Decision

1. The Animus Standard

The final step in analyzing the Windsor-based challenge will be applying due process scrutiny. In Windsor, this step entailed asking whether a legitimate federal

¹⁶³ E.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 n.21 (1963) (“It is of course a commonplace of classical criminal-law theory that certainty and immediacy of punishment are more crucial elements of effective deterrence than its severity.”).

¹⁶⁴ Although the literature focuses primarily on the lack of the death penalty's deterrent effect, as opposed to the possibility that a certain punishment of life without parole carries with it greater deterrent effect than a possible death sentence, there is research suggestive of this latter conclusion. See William C. Bailey & Ruth D. Peterson, *Murder and Capital Punishment in the Evolving Context of the Post-Furman Era*, 66 SOC. FORCES 774, 784 (1988) (reporting that a study of murder rates between 1973 and 1984 demonstrated that fewer murders occurred in abolitionist states than in death penalty states).

¹⁶⁵ The defendant in *O'Reilly*, discussed in Part I, made this argument to no avail. *United States v. O'Reilly*, No. 05-80025, 2007 WL 2421378, at *3-4 (E.D. Mich. Aug. 23, 2007).

¹⁶⁶ See *Collins*, 510 U.S. at 1143 (Blackmun, J., dissenting). Notably, the FDPA requires that federal executions be carried out in accordance with “the manner prescribed by the law of the State in which the sentence is imposed.” 18 U.S.C. § 3596(a) (2012). When a federal death sentence is imposed in a non-death penalty state, “the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.” *Id.* Admittedly, this provision does spare a non-death penalty state the indignity of an execution occurring within its borders. However, it does not spare the citizens from participating in all phases of the death penalty prosecution up until the individual is actually executed.

interest or animus motivated the federal action.¹⁶⁷ Importantly, the animus the Court apparently found to have motivated DOMA (and which thus rendered DOMA invalid) was not animus towards homosexuals. Had Congress exhibited individual-directed animus, the analysis would have been much simpler. It was nothing new that a statute motivated by animus towards individuals lacks a rational basis and thus violates the Equal Protection Clause. Prior to *Windsor*, the Court held that a federal statute failed rational basis review and denied equal protection when the legislative history revealed Congress's "bare desire to harm a politically unpopular group."¹⁶⁸ If it had been individuals Congress directed animus towards, the Court could have rested its decision on equal protection grounds and omitted any discussion of the way New York conferred an important new right on its citizens and the way the federal government interfered with that right.¹⁶⁹ The Court did not do this. Instead of searching for evidence of Congress's ill will towards homosexuals, Justice Kennedy identified evidence of Congress's disdain for the right to same-sex marriage.¹⁷⁰

¹⁶⁷ *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("DOMA seeks to injure the very class New York seeks to protect.").

¹⁶⁸ *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973). Justice O'Connor described this principle as "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring); see also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 763 (2011) (arguing that the rational basis "with bite" standard "depends on the idea that governmental 'animus' alone is never enough to sustain legislation"). The Court has applied this "more searching form of rational basis review" to federal and state action alike whenever there was strong evidence that a statute had resulted from legislative dislike of an unpopular group. See *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (a state constitutional provision prohibiting any state law entitling homosexuals to any preferred treatment was invalid because it was motivated only by animus); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (a state law requiring permitting for a mentally handicapped home when other apartments did not require same permit was invalid when the requirement rested on "an irrational prejudice against the mentally retarded"); *Moreno*, 413 U.S. at 533 (a federal law that precluded households containing a member unrelated to other members of the household from receiving food stamps was invalid because the legislative history showed that the purpose of the law was to discriminate against hippies).

¹⁶⁹ Before *Windsor*, some scholars argued that the Court should invalidate DOMA on equal protection grounds using this heightened form of rational basis review. E.g., Eric Berger, *Lawrence's Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 802 (2013) ("Of course, given that same-sex marriage bans penalize an unpopular group, the Court should, at a minimum, apply heightened rational basis review . . ."); Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 931–32 (2010) ("The analogy to the earlier cases makes sense. DOMA cuts off federal benefits to a targeted, politically unpopular group—just like the law in *Moreno*—and it does so in a remarkably broad and undifferentiated way—just like the law in *Romer*."). Lower federal courts had even done so. E.g., *Gill v. Office of Pers. Mgmt.*, 669 F. Supp. 2d 374, 389–90 (D. Mass. 2010).

¹⁷⁰ See *Windsor*, 133 S. Ct. at 2963 ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."); *id.* ("The congressional goal was to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws." (internal quotation marks omitted)); *id.* at 2693–4 ("The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law."); *id.* ("The principal purpose is to impose inequality, not for other reasons like

Accordingly, the Court borrowed the animus principle from equal protection and applied it in a substantive due process case. In the wake of *Windsor*, also invalid is a federal action that interferes with a fundamental state law right in an area traditionally regulated by states when animus toward the right motivated the action.¹⁷¹

This distinction will be crucial here. All charging decisions are motivated, to some extent, by animus towards an individual defendant, or at least towards the actions the prosecutor believes the defendant undertook. Thus, a standard that searches for impermissible animus towards a defendant would be unhelpful in a context where the government is expected to be its citizen's adversary. *Windsor*'s review for animus towards a right (rather than towards individuals), however, is precisely on point in the context of a state law-based challenge to the federal death penalty's use. At the fourth step, the court will consider whether animus toward a state's decision to abolish the death penalty motivated the federal prosecutor to bring charges and to then seek the death penalty in a particular case. In essence, the court will ask whether, but for the state's lack of a death penalty, the federal prosecutor would have not filed federal charges in the first place and instead allowed state officials to prosecute the defendant.¹⁷²

This fourth step will do more than give constitutional status to the now-repealed provision of the Capital Case Protocols providing that "[i]n states where the imposition of the death penalty is not authorized by law the fact that the maximum federal penalty is death is insufficient, standing alone, to show a more substantial

governmental efficiency."). Admittedly, some language in the opinion refers to animus towards those who enter into same-sex marriages. *See, e.g., id.* at 2695 ("[T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage."); *id.* at 2694 ("[P]urpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."). However, these statements suggest that Congress targeted these individuals not because they were homosexuals, but rather because they either did or could exercise the state law right to engage in same-sex marriage.

¹⁷¹ Prior to *Windsor*, at least one scholar anticipated such a rule. *See* Jeffrey D. Jackson, *Putting Rationality Back Into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 541–42 (2011) (suggesting that courts should look to a legislature's actual motives when to determine whether animus exists when applying substantive due process because "[i]n the same way that majorities can discriminate against minorities in singling them out for discriminatory treatment, majorities can also fail to recognize or infringe upon politically unpopular rights.>").

¹⁷² Importantly, the relevant inquiry is whether animus motivated the decision to seek the death penalty, not necessarily the decision to indict the defendant federally. However, when there is no legitimate federal interest in the prosecution and the prosecutor has no animosity towards a state's lack of the death penalty, then he will likely not seek a federal indictment in the first place.

By focusing on whether animus motivated the federal prosecution, this inquiry ensures that a federal defendant sentenced to death cannot bring a post-conviction claim based on a change in state law. If a state provided for capital punishment at the time of the defendant's prosecution, then a defendant would have no basis for asserting that prosecutors, at the time that they charged him, were motivated by animus toward a state law right that was, at that time, nonexistent.

interest in federal prosecution.”¹⁷³ Under this provision, a state’s lack of a death penalty, coupled with some other federal interest, could support seeking the federal death penalty in a particular case. However, Justice Kennedy’s opinion in *Windsor* made clear that when federal action would not have occurred but for animus, the existence of a legitimate federal interest is immaterial.¹⁷⁴ Therefore, the court will ask whether a state’s lack of the death penalty in any way, or at any point in the Justice Department’s death penalty charging process, determined the ultimate decision. If so, then the court will dismiss the death penalty notice.

Importantly, though, the court will also not adopt a rule making an attempt to seek the federal death penalty a per se substantive due process deprivation when an offense was committed in and punishable under the law of a non-death penalty state. *Windsor* does not require so much. Justice Kennedy’s analysis suggests that, had the record indicated a legitimate federal interest actually led Congress to enact DOMA, the Court would have upheld the statute. It was the evidence of a contrary subjective intent that doomed the provision. Likewise here, if a federal interest other than the punishments available under state law motivated the federal action, then a court will reject the defendant’s challenge. This is true without regard to the strength of the federal interest. As discussed, *Windsor* did not apply a form of heightened scrutiny that required weighing the federal interest against the burden on the right. The Court’s heightened review involved simply asking whether some federal interest actually motivated the action.¹⁷⁵ The court will do the same here. So long as an

¹⁷³ Tirschwell & Hertzberg, *supra* note 20, at 79.

¹⁷⁴ See *Windsor*, 133 S. Ct. at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”). Importantly, as Justice Scalia pointed out in his dissent, in *Romer*, there was evidence that the statute at issue was motivated, at least in part, by permissible moral disapproval of homosexual conduct. See *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting). Nevertheless, the Court did not consider whether a permissible motive based on moral disapproval salvaged the statute from being invalidated based on its impermissible, animus-related motive (assuming that moral disapproval and animus constitute separate reasons, as Justice Scalia suggested). See Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL OF RTS. J. 89, 115–16, 132 (1997) (arguing that morals-driven legislation and animus-driven legislation are separate and distinct, and that the *Romer* Court did not try to sift through innocent motivations from impermissible ones).

¹⁷⁵ See *Windsor*, 133 S. Ct. at 2696; see also *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1958) (applying rational basis review and holding “[t]hat a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy.”); Laura C. Bornstein, *Contextualizing Cleburne*, 41 GOLDEN GATE U. L. REV. 91, 113 (2010) (noting that, in the wake of *Cleburne* (which applied heightened rational basis review courts upheld other restrictions on rights of mentally disabled by applying rational basis review and finding a legitimate governmental objective); Michael Kent Curtis & Shannon Gilreath, *Transforming Teenagers Into Oral Sex Felons: The Persistence of the Crime Against Nature After Lawrence v. Texas*, 43 WAKE FOREST L. REV. 155, 196 (2008) (stating that heightened rational basis review applies when a governmental action “disadvantages a historically unpopular or vulnerable group . . . when it is based on animus or prejudice, when justifications for singling out the group and not others similarly situated are weak—suggesting mere hostility, and when the classification is irrational when looked at clearly and without the benefit of naked disapproval.”).

actual federal interest prompted the decision to seek the death penalty, meaning the federal prosecution would have occurred regardless of whether the defendant would have been subject to the death penalty in a state prosecution, then the court will allow the death penalty prosecution to proceed.¹⁷⁶

Thus, even if the defendant's crime is one traditionally punished by states alone—thus the challenge gets past the second step—this fourth step will further preserve federal authority to punish for federal crimes. This is important, because, without doubt, there are cases where a defendant's crime, although looking at face value like a typical murder, involves significant federal interests. For example, a federal jury in Iowa sentenced Daniel Honken to death after Honken was involved in five murders.¹⁷⁷ Honken's murders were not unlike others prosecuted routinely by states; however, they triggered federal interests. Honken committed the offenses while on pre-trial release after being charged with federal methamphetamine manufacturing and distribution offenses.¹⁷⁸ Two of the people he killed were drug dealers who had purchased methamphetamine from him, and were preparing to testify against him.¹⁷⁹ Thus, at the charging stage, federal prosecutors suspected Honken of committing multiple murders to thwart a pending federal prosecution. In the face of such strong federal interests, it is safe to assume the prosecutors would have indicted Honken and filed a death penalty notice in his case regardless of the state where the offenses occurred. Windsor-based scrutiny, unlike the Eighth Amendment-based proposals offered by Mannheimer and the student commentator, assures a defendant like Honken will not arbitrarily benefit from state law when his crime had an obvious federal dimension.

¹⁷⁶ In a case where both a federal interest and animus motivated the federal charges, the court will consider whether the federal interest would have justified the federal prosecution even if there had been no improper animus. If so, then the death penalty notice challenge will fail despite the animus showing. This assumes that the court adopts the "but for" causation framework endorsed by the Supreme Court for mixed-motive Title VII discrimination claims. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 241–42 (1989).

¹⁷⁷ *United States v. Honken*, 541 F.3d 1146, 1149 (8th Cir. 2008).

¹⁷⁸ *Id.* at 1149–50. In fact, there was an interstate dimension to Honken's methamphetamine distribution activities, and, thus, to his related murders. Honken first produced methamphetamine in Arizona and sold it to an Iowa dealer. *Id.* Iowa law enforcement officers arrested Honken during a visit to his dealer's Iowa home. Thereafter, Honken moved to Iowa. *Id.*

¹⁷⁹ *Id.* at 1151. Another example of a federal death sentence handed down in a non-death penalty state where there was no evidence of animus and a strong federal interest readily apparent is the case of Gary Lee Sampson. *See United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007). Sampson first committed several bank robberies in North Carolina and then drove to Massachusetts. *Id.* at 18. There, he committed two gruesome carjackings and murders. *Id.* After the second murder, he drove to New Hampshire and then to Vermont before being apprehended. *Id.* Although Sampson's murders occurred in Massachusetts (a non-death penalty state) and were punishable under Massachusetts law, Sampson committed his crimes while on an interstate flight from federal authorities after having committed federal crimes. *Id.* Thus, the federal interest behind the federal death notice in his case was obvious.

2. Possible Means of Proving Animus

Although Windsor dictates the substantive analysis to be applied to the hypothetical motion to dismiss, it offers less guidance on how a defendant can prove animus. Windsor involved a challenge to legislative action, and the Court had before it an extensive legislative record from which it could glean repeated examples of legislators giving voice to the impermissible motivation behind the statute. Executive action like the type that the defendant will object to here, however, does not take place in such daylight. A prosecutor makes charging decisions away from public scrutiny, and her decisions are generally immune from judicial review. During the capital case review process, field prosecutors and Main Justice officials produce documents revealing their subjective motivations.¹⁸⁰ Those documents, however, are not discoverable by a criminal defendant during the normal course of discovery.¹⁸¹ Therefore, when a defendant attempts to establish his claim that animus motivated the federal death penalty prosecution, an informational disparity will exist. It will be the rare case when a defendant will be able to rely on circumstantial evidence alone to establish animus, without case-specific documents shedding light on the Justice Department's internal deliberations.¹⁸²

There are a few ways a court could remedy this disparity. First, the court could apply a presumption of animus whenever a defendant seeks to dismiss a federal death penalty notice in a case arising in a non-death penalty jurisdiction (when the crime is punishable under state law). Such a presumption would shift the burden to

¹⁸⁰ Relevant documents are those prepared by the United States Attorney and submitted to Main Justice, including, *inter alia*: (1) a prosecution memorandum, making a recommendation for or against seeking the death penalty and setting forth the prosecutor's basis for the recommendation (in light of the facts of the offense, the victim, and the defendant); (2) a standardized death penalty evaluation form; (3) "non-decisional information"; and (4) a draft notice of intent to seek the death penalty. See U.S. ATT'YS MANUAL § 9-10.080 (2014). Additionally, a defendant may seek to discover the written recommendation of the Capital Case Review Committee prepared based on the U.S. Attorney's submission and transmitted to the Attorney General. See *id.* at § 9-10.130.

¹⁸¹ See FED. R. CRIM. P. 16(2); see also *United States v. Fernandez*, 231 F.3d 1240, 1246–47 (9th Cir. 2000) (federal prosecutors' death penalty evaluation form and prosecution memorandum were not subject to discovery and protected by the work product doctrine because they were "internal government documents prepared by the U.S. Attorney in anticipation of litigation"); *Amobi v. Dist. of Col. Dep't of Corr.*, 262 F.R.D. 45, 57 (D.D.C. 2009) (prosecutor's notes and other documents relevant to her decision to charge defendant were "pre-decisional and deliberative" and therefore not subject to discovery); U.S. ATT'YS MANUAL § 9-10.050 (2014) ("The decision-making process preliminary to the Attorney General's final decision is confidential. Information concerning the deliberative process may only be disclosed within the Department and its investigative agencies as necessary to assist the review and decision-making.").

¹⁸² Others have recognized that the same is true in the context of other Due Process and Equal Protection Clause challenges to charging decisions. See Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1092 (1997) ("The evidence necessary to substantiate a selective prosecution claim is frequently hidden in prosecution or law enforcement files."); *id.* at 1102 ("To gather evidence [of selective prosecution] with limited or no court-ordered discovery requires not only ingenuity but also resources unavailable to many defendants.").

the government to come forward with evidence showing no improper animus motivated its charging decision.¹⁸³ The U.S. Attorney would, therefore, offer the documents prepared in the defendant's case to show a legitimate federal interest behind the prosecution, thus rebutting the presumption.¹⁸⁴

There is precedent for such a presumption. In *Blackledge v. Perry*,¹⁸⁵ the Supreme Court held that a prosecutor's charging decision cannot be motivated by vindictiveness towards a defendant for exercising a procedural right.¹⁸⁶ The Court then applied a presumption of vindictiveness to the state prosecutor's charging of the defendant with a felony offense after the prosecutor first obtained a conviction on a misdemeanor charge and the defendant exercised a state statutory right to a new trial *de novo*.¹⁸⁷ Since *Blackledge*, however, the Court has declined to extend the presumption of vindictiveness beyond instances where there is an obvious and strong likelihood the prosecutor's action was vindictive.¹⁸⁸ In other circumstances, the Court has applied a "presumption of regularity" to charging decisions, citing the executive branch's constitutionally assigned duty to ensure the laws are faithfully executed,¹⁸⁹ and the fact that charging decisions are "particularly ill-suited to judicial review."¹⁹⁰ As discussed, there are a range of legitimate reasons for a federal

¹⁸³ See *Wasman v. United States*, 468 U.S. 559, 569 (1984) (explaining, in the context of a vindictive prosecution claim "where the presumption [of vindictiveness] applies, the . . . prosecutor must rebut the presumption that an increased . . . charge resulted from vindictiveness; where the presumption does not apply, the defendant must affirmatively prove actual vindictiveness" (alteration to original)).

¹⁸⁴ See, e.g., *United States v. King*, 126 F.3d 394, 399–400 (2d Cir. 1997) (*Blackledge* presumption of prosecutorial vindictiveness rebutted when government came forward with a legitimate basis for the additional charges following a mistrial and developed a record to support its asserted justification).

¹⁸⁵ *Blackledge v. Perry*, 417 U.S. 21, 27 (1974).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 28 (noting that there was "no evidence that the prosecutor . . . acted in bad faith or maliciously" but that a presumption of vindictiveness applied because "[a] person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one").

¹⁸⁸ See *United States v. Goodwin*, 457 U.S. 368, 380–81 (1982) (declining to apply a presumption of vindictiveness to the pretrial obtaining of a felony indictment after a prosecutor initially sought only misdemeanor charges and the defendant refused to engage in plea bargaining and insisted on going to trial); see also *Wasman*, 468 U.S. at 566 (acknowledging that "the Court has been chary about extending the . . . presumption of vindictiveness"). Since *Goodwin*, lower courts have generally held that the presumption of vindictiveness applies only where the circumstances objectively establish "a realistic likelihood" of vindictiveness. See, e.g., *United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2001); *United States v. King*, 126 F.3d 394, 397–98 (2d Cir. 1997).

¹⁸⁹ See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citing U.S. CONST. art. II § 3).

¹⁹⁰ See *United States v. Wayte*, 470 U.S. 598, 607 (1985) (observing that charging decisions involve the weighing of factors like "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan" which "are not readily susceptible to the kind of analysis the courts are competent to undertake."); see also Robert Heller, Comment,

prosecutor's seeking the federal death penalty even for a crime committed in and punishable under the laws of a state that does not execute its citizens. The mere fact that a capital federal case arises in a non-death penalty state does not, by itself, constitute circumstances establishing a substantial likelihood that animus motivated the prosecutorial decision. In light of the Court's avowed fear of disturbing prosecutorial discretion in other circumstances, the presumption of animus will likely be too costly a prophylactic measure to prevent animus-motivated federal death penalty prosecutions.¹⁹¹

The better solution will be for courts to allow defendants, in limited circumstances, access to the Justice Department's documents relevant to the charging decision in their cases. Discovery will not be appropriate in all cases. For the same reasons courts are reluctant to review charging decisions at all, they are also reluctant to allow defendants access to the materials that facilitate those charging decisions.¹⁹² Thus, in the contexts of other types of due process or equal protection challenges to a charging decision, courts require a defendant seeking discovery to make a threshold showing (based on the evidence in his possession) of an improper prosecutorial motive. For a selective prosecution claim, the Supreme Court has described the showing required of a defendant as "some evidence tending

Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion, 145 U. PA. L. REV. 1309, 1325–28 (1997) (discussing the commonly stated rationales for limiting judicial review of executive branch charging decisions, namely, "(1) promoting prosecutorial and judicial economy and avoiding delay; (2) preventing the chilling of law enforcement; (3) avoiding the undermining of prosecutorial effectiveness; and (4) adhering to the constitutional principle of separation of powers and assessing the relative competence of the executive and judicial branches of government regarding the prosecutorial function." (footnote omitted)).

¹⁹¹ Moreover, it is not even clear that a presumption of animus would actually help defendants at all. Justice Department officials could easily circumvent such a presumption by adopting an official policy prohibiting written discussion of state death penalty policy in any official communication. A policy like that would ensure that prosecutors do not produce evidence helpful to establishing a *Windsor*-based claim of animus, but it would not necessarily eradicate state law-directed animus from capital charging decisions. The policy would allow informal consideration of state policies to persist, even if formal consideration abated.

¹⁹² See, e.g., *United States v. Heidecke*, 900 F.2d 1155, 1158 (7th Cir. 1990) (holding that not allowing a defendant claiming vindictive prosecution automatic discovery "protects the interests in open and frank discussions within prosecutorial offices; protects the government from harassment or delay by criminal defendants; and frees the judicial system of criminal trials with irrelevant massive discovery" (internal citations omitted)); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (concluding that allowing discovery whenever a claim of selective prosecution is asserted would "encourage use of the defense of selective prosecution, however baseless, as a means of obtaining discovery to which the defense would not otherwise be entitled."); see also Poulin, *supra* note 182, at 1096 ("A barrier to discovery . . . is appropriate only when necessary to protect truly sensitive government information. For example, to establish a meritorious selective prosecution claim, the defendant may seek internal memoranda discussing decisions to prosecute particular cases. While this evidence may provide an essential window into the prosecutor's motivation, it implicates the greatest governmental interest in confidentiality, reflecting the detailed thought process of the executive branch.").

to show the existence of the essential elements of the defense.”¹⁹³ Courts generally treat the “some evidence” standard as requiring enough circumstantial evidence to suggest an improper motive, while not demanding so much evidence as would establish improper motive.¹⁹⁴ The court will likely apply this same standard here and require the defendant to come forward with enough circumstantial evidence to suggest animus in his case. If he does so, then the court will allow him access to the documents prosecutors prepared in his case.¹⁹⁵ At minimum, the court will conclude that, in light of the circumstantial evidence of animus, the government must submit relevant charging documents for *in camera* review and possible discovery by the defendant if the documents do reveal animus towards the state law right factored into the charging decision.¹⁹⁶

First, a defendant might show that federal prosecutors do not generally charge individuals who commit similar actions in other states that do have the death penalty.¹⁹⁷ For example, Gabrion, who, as discussed in Part I, received a federal

¹⁹³ *Armstrong*, 517 U.S. at 468 (internal quotation marks omitted). Lower courts have applied this same standard to vindictive prosecution claims. See *United States v. Bucci*, 582 F.3d 108, 113 (1st Cir. 2009); *United States v. Sanders*, 211 F.3d 711, 717 (2d Cir. 2000); *United States v. One 1985 Mercedes*, 917 F.2d 415, 421 (9th Cir. 1990).

¹⁹⁴ See *United States v. Thorpe*, 471 F.3d 652, 657 (6th Cir. 2006) (“Although the ‘some evidence’ standard is rigorous, it is still relatively light, because obviously, a defendant need not prove his case in order to justify discovery on an issue.” (internal citation, alteration, and quotation marks omitted)); *United States v. James*, 257 F.3d 1173, 1178 (10th Cir. 2001) (“In light of [the Supreme Court’s] seemingly less stringent ‘some evidence tending to show’ standard, the defendants need not establish a *prima facie* case of selective prosecution to obtain discovery on these issues. Nevertheless, given the heavy burden that discovery can impose on the government, the showing necessary to obtain discovery for a selective prosecution defense must itself be a significant barrier to the litigation of insubstantial claims.” (internal citations and quotation marks omitted)).

¹⁹⁵ The “some evidence” discovery standard will not only preserve the secrecy of prosecutorial decision - making, it will also maintain the evidentiary value of Justice Department’s charging documents. So long as prosecutors know that charging documents will only be subject to discovery in a rare case, they are unlikely to manipulate the documents’ content. Thus, if federal prosecutors charged a defendant based on a belief that his crime warranted the death penalty, and that punishment was not available under state law, then this fact will likely appear in the charging documents.

¹⁹⁶ *In camera* review might further preserve the secrecy of the government’s decision-making process while still allowing the defendant to access the relevant documents. In some selective prosecution cases, courts have ordered *in camera* review before allowing the defendant to receive the relevant documents. See *United States v. Oaks*, 508 F.2d 1403, 1405 (1974) (in case involving selective prosecution claim, explaining that the defendant can access charging memoranda upon a threshold showing of discrimination, “[b]ut even then the court can minimize the risk to the government by holding the proceedings *in camera*” (citing FED. R. CRIM. P. 16(e))).

¹⁹⁷ *Armstrong*, 517 U.S. at 470. Since the *Windsor*-based challenge will arise under the Due Process Clause, rather than the Equal Protection Clause, a court will not require the defendant to show discriminatory effect. However, the existence of similarly situated individuals who were not prosecuted or prosecuted differently can also be relevant in showing discriminatory motive. See *United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1987) (defendant made a showing of discriminatory motive where via evidence the prosecutor had targeted black

death sentence for committing a murder while within the boundaries of a national forest, could have relied on this type of evidence.¹⁹⁸ Gabrion could have pointed out that states which have the death penalty routinely prosecute those who commit murders on federal lands.¹⁹⁹

Second, a defendant might rely on statements made by a prosecutor—either state or federal—insinuating, if not actually stating, that federal prosecution was commenced because the prosecutor believed state law would not provide for an adequate punishment. Ronell Wilson, for example, might have used this type of evidence to challenge the death penalty notice in his federal case. In 2004, a federal grand jury indicted Wilson for the murder of two New York police detectives.²⁰⁰ A state grand jury had previously indicted Wilson for the offense, but, after the state indictment issued, the New York high court invalidated the state's death penalty statute.²⁰¹ The federal prosecution began thereafter, and the state prosecutors sought to dismiss the state indictment. At that time, the New York City police commissioner shared with reporters his opinion that the case warranted capital punishment.²⁰² Similarly, the state district attorney acknowledged that, after the high court ruled, state and federal prosecutors had met and discerned a previously undiscovered federal interest in the case—insinuating, if not acknowledging the need for capital punishment.²⁰³

elected officials for voter fraud, but had not prosecuted similarly situated white elected officials), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir. 1988).

¹⁹⁸ See *supra*, Part I.

¹⁹⁹ See *State v. Allen*, 626 S.E.2d 271, 276–79 (N.C. 2006) (state death sentence imposed for a murder committed by an escaped state prisoner within boundaries of the Uhwarrie National Forest); *Swearingen v. State*, 303 S.W.3d 1728, 729–39 (Tex. Crim. App. 2003) (state death sentence imposed after the victim's body was found within boundary of the Sam Houston National Forest, and evidence suggested that defendant committed crime there). Importantly, some states retain concurrent jurisdiction over crimes committed on federal lands, while other states do not. Compare N.C. GEN. STAT. § 104-32 (1979) (reserving “over any lands as to which any legislative jurisdiction may be ceded to the United States . . . concurrent power to enforce the criminal law”), with *State v. Lane*, 771 P.2d 1150, 1153 (Wash. 1989) (concluding state had ceded exclusive jurisdiction over crimes committed at federal fort). The district court in Gabrion's case acknowledged that Michigan had retained concurrent jurisdiction over the Manistee National Forest (where Gabrion committed his offense), and therefore Gabrion could have been prosecuted under state law. See *United States v. Gabrion*, No. 1:99-CR-76, 2006 WL 2473978, at *1 (Aug. 25, 2006).

²⁰⁰ *United States v. Whitten*, 610 F.3d 168, 172 (2d Cir. 2010).

²⁰¹ *Id.* at 175.

²⁰² See Bill Farrell & John Marzulli, *Feds Aim to Fry Cop-Slay Suspect*, N.Y. DAILY NEWS, Nov. 23, 2004, at 22 (“If anyone ever needed a justification for the death penalty, this case is it.” Police Commissioner Raymond Kelly said, “Anyone responsible for the cold-blooded assassination of a police officer should forfeit his life.”).

²⁰³ See Shalia K. Dewan, *U.S. Indicts Man in Death of Detectives in Gun Buy*, N.Y. TIMES, Nov. 23, 2004, at B5 (“Daniel M. Donovan Jr., the Staten Island district attorney, conferred with Roslynn Mauskopf, the United States attorney in Brooklyn, on the case. ‘Collectively, we have now come to the conclusion that there is a legitimate federal, as well as state, interest in the prosecution of this case,’ Mr. Donovan said at a news conference yesterday.”).

Wilson's case also suggests that the factual circumstances of how a federal indictment originated can be relevant, even absent prosecutors' statements in the media. Wilson would have had a strong basis for asserting animus based merely on the sequence of events that occurred—a state indictment, then a state court's invalidation of the death penalty, followed by a federal indictment and an agreement by the state not to proceed with the state prosecution.²⁰⁴

Of course, in Wilson's case, the state prosecutors joined their federal counterparts in exhibiting animus toward the state law right. In other instances, however, state prosecutors might feel differently. Evidence of tension between state and federal prosecutors' offices over whether death is appropriate for certain conduct might also be relevant here. For example, Pleau, the Rhode Island citizen discussed in Part I, could have established animus based on the pretrial wrangling between state and federal authorities, had the federal prosecutor sought the death penalty. By noting that federal authorities had gone to great lengths to prosecute him, even though state prosecutors had offered and Pleau had agreed to accept state punishment for his crimes, Pleau would have had a strong argument that animus towards the available state punishment motivated the federal prosecutors.

The foregoing merely speculates as to how a court could analyze a Windsor-based challenge to the federal death penalty. Admittedly, before any of this occurs, the legal community will have to recognize that Windsor has something to say in this context at all. Thereafter, courts will grapple in different ways with how to apply the Windsor Court's federalism-based vision of individual rights to the context of federal charging decisions. This Part offers one version of how to do so in a way that—adheres to Windsor and the Court's prior substantive due process precedent; allows room for the Justice Department to seek the full range of punishment available for an offense when legitimate federal interests justify doing so; and otherwise ensures defendants can exercise the rights provided by their states.

Importantly, the framework described here does not result in the Federal Constitution meaning one thing in one state, and another thing in another state. Under Windsor, the Fifth Amendment's Due Process Clause means the same thing in all states—federal prosecutors cannot initiate prosecutions based on animus towards how states choose to punish crimes traditionally subject to state punishment. Although a defendant in a non-death penalty state will have a Windsor-based challenge available to him, while one in another state will not, it is the difference in state law that will lead to this result. Uniformity in the Federal Constitution's meaning will remain.

VI. CONCLUSION

This Article's primary purpose was two-fold. First, it sought to provide a novel legal framework for analyzing an issue that has bedeviled courts and commentators—the existence of the federal death penalty in non-death penalty states. Even the most ardent proponents of the federalization of criminal law will

²⁰⁴ *Whitten*, 610 F.3d at 175. The timing in Wilson's case strongly suggests that animus to the state court's decision motivated the federal prosecution. In March 2003, the state grand jury indicted Wilson of first-degree murder. *Id.* The state prosecution continued for more than a year. In June 2004, the state court ruled, and in November 2004, the federal grand jury returned its indictment. *Id.* The fact that the federal government did not act in the case for more than a year, until after the state court ruled, suggests strongly that the federal indictment came down solely as a means of circumventing the state court's ruling.

likely concede that, in at least some instances, there is something unsettling about life or death hinging on whether a creative federal prosecutor can discern a federal nexus from a crime which, had it occurred in a death penalty state, would have been punished under state law. Second, this Article attempted to demonstrate the malleability of the Windsor Court's analysis.

In truth, these goals were really two ways of proving a single point. As one commentator notes, Windsor, along with other cases from the Court's most recent term, "are fundamentally about how constitutional principles interact with social conditions."²⁰⁵ Society's values change. Confronted with such changes, a court has a few options. It can ignore social change entirely, holding that the Constitution protects nothing more today than it did centuries ago. It can engraft into the Constitution's text every new moral principle to gain popular approval. Or, it can choose a middle route. It can leave adequate room for social innovation at the local level in areas of local concern, free of a national entity forcefully imposing traditional values. The Windsor Court chose this middle route. It held that when society's thinking is in a state of flux about a matter traditionally resolved at a local level, the Constitution demands the national government leave localities alone to sort through the difficult social issue. This holds true for the issue of same-sex marriage, it also holds true for the issue of capital punishment.

By requiring the federal government to keep out of these intrinsically local debates, the Court leaves room for national consensus to develop organically. Perhaps states will come to some agreement that same-sex marriage is appropriate. Around that time, the Court might determine that state laws distinguishing based on sexual orientation are subject to heightened equal protection scrutiny. Likewise, there might come a day when the Court determines the nation's evolving standards of decency have reached a point where the Eighth Amendment no longer tolerates capital punishment. Only by the federal government staying out of the states' evolutions on difficult social issues like these will such consensus ever emerge—in the area of homosexual rights, capital punishment, or the next important social issue about which local communities will bestow new rights.

²⁰⁵ Pamela S. Karlan, Essay, *A Moveable Court*, BOS. REV., Sept. 23, 2010, at 3.