American University Criminal Law Brief

Volume 4 | Issue 1 Article 4

2009

Unjustified Detention: The Excessive Bail Clause in Removal Proceedings

Kayla Gassman

Unjustified Detention:

The Excessive Bail Clause in Removal Proceedings

By: Kayla Gassman

Congress has ordered the mandatory detention of an entire class of non-citizens who have not yet been ordered deported, without a hearing and without a chance of bail. Such detention violates the Excessive Bail Clause. Less well-known than the Due Process Clause, the Bail Clause contains substantial protections against the unnecessary physical restraint of an individual. Though it does not guarantee release on bail in every case, the Excessive Bail Clause protects against arbitrary detention by requiring that individuals being detained for further proceedings, whether in the criminal or civil context, be released on bail, unless the denial of bail is reasonable and justified. This interpretation of the Eighth Amendment is consistent with both its English history, which the Court has deemed important, and with the Court's own past interpretation of the Clause. Furthermore, this interpretation of the Eighth Amendment is in line with the contemporary standards of the United States, as reflected in the laws and practices of the states.

To ensure that each denial of bail is reasonable, individualized determinations that detention is warranted and adequate procedural protections are required before someone can be locked away. When the Supreme Court has considered the Excessive Bail Clause in the context of government-mandated detention, it has recognized that individualized findings, procedural protections, and the discretionary nature of the denial of bail are important factors in upholding detention without bail.

None of these factors is present when individuals are detained pursuant to 8 U.S.C. § 1226(c), which provides that the Attorney General "shall take into custody any alien who"[1] may be removable because he has committed certain criminal offenses. Persons held in custody pursuant to this section are entitled to hearings, in order to guarantee that their detention is justified and reasonable; if the denial of bail is not reasonable, it is an excessive government action violative of the Excessive Bail Clause.

Under § 1226(c), non-citizens are subject to detention after completing their sentences for any one of a number of unrelated offenses including being "a drug abuser or addict,"[2] engaging in "terrorist activities,"[3] committing "an aggravated felony at any time after admission,"[4] and committing a "crime of moral turpitude" within five years of admission for which the non-citizen was sentenced to at least one year.[5] Those offenses defined as being an "aggravated felony"[6] alone includes such disparate acts as murder and rape,[7] petty theft,[8] gambling offenses,[9] document fraud,[10] perjury,[11] and conspiracy to commit any aggravated felony.[12] The only basis for § 1226(c) detention is commission, and completion of a sentence for, one of this wide variety of offenses, some of which involve violence, but many of which do not. The simple fact of conviction for an offense in the designated category does not prove that any person is either dangerous or at risk of not showing up for later proceedings. Thus, persons held in custody pursuant to this section are entitled to hearings, in order to guarantee that their detention is justified and reasonable.

Detention before a final judgment in the absence of evidence that a specific individual is either at risk of not appearing for later proceedings or is a danger to herself or others, is arbitrary and unconstitutional. Courts have repeatedly held that an individual cannot be locked up, unless it is punishment imposed after a criminal conviction,[13] without evidence personal to that person proving that detention is warranted.[14] Although most decisions so holding have relied on the Due Process Clause of the Fifth or Fourteenth Amendment, the Eighth Amendment also includes a limitation on detention in its mandate that "excessive bail shall not be required."[15] Because due process has been interpreted so expansively, the more precise limitation of the Eighth Amendment has not been necessary in order for the liberty rights of individuals to be adequately protected. Yet the Eighth Amendment still matters, particularly when due process requires less than what would be required under the Eighth Amendment.

Section I explains the relationship between due process and the Excessive Bail Clause. Sections II through IV argue that the meaning of the Bail Clause is an open question and use history and the Supreme Court's Eighth Amendment precedent to fill in the blanks. Section V asserts that the Eighth Amendment should apply in civil removal proceedings which involve detention. Finally, Section VI suggests that the evolving standards of decency test, developed in the context of the Cruel and Unusual Punishments Clause, might find some application in the interpretation of the Bail Clause.

Due Process and Civil Detention

Before they can be deported,[16] aliens are entitled to a hearing at which they can challenge the grounds for their deportation or appeal for discretionary relief.[17] For nearly a century, since *Yamataya v. Fisher*, the Supreme Court has recognized that aliens possess Constitutional rights in these proceedings, though they do not receive the full protections

found in a criminal trial.[19] The Due Process Clause controls deportation hearings because they have always been considered civil proceedings rather than criminal punishment.[20] The Due Process Clause has been interpreted to contain fairly significant protections for non-citizens who have been admitted to the United States,[21] if not necessarily for those who seek admission at the border.[22] The due process distinction between an alien who has been legally admitted and one who has not is well established.[23] The Court has explained that once an alien has gained admission and develops ties to the United States, his Constitutional status also changes. Thus, more process is due to an alien who has been properly admitted in a deportation proceeding than an alien seeking admission for the first time.[24] If Congress wishes to go beyond deportation and punish an alien for an offense, it can only do so after a judicial trial subject to the requirements of the Fifth and Sixth Amendments.[25]

In civil proceedings, the Due Process Clause has long been interpreted to prohibit unjustified civil detention. As a "'general rule' . . . the government may not detain a person prior to a judgment of guilt in a criminal trial."[26] Only in special, limited situations, may the government detain an individual except as punishment inflicted after a criminal conviction.[27] Specifically, detention predicated on future behavior has been held unconstitutional unless there is a "special justification," outweighing the individual's interest in physical freedom, such a mental illness, which renders that person particularly dangerous.[28] For example, the Supreme Court has held that the government cannot detain a predatory sex criminal in civil detention by simply establishing that the individual is dangerous. In addition to "proof of dangerousness," the evidence must also establish "proof of some additional factor, such as 'mental illness' or 'mental abnormality'" before civil confinement, accompanied by adequate procedures, is permissible.[29] Even in immigration proceedings, the Court has noted that civil detention without a special justification and without procedural protections would raise serious Constitutional problems.[30] This interpretation of due process as requiring both specific findings and sufficient procedures, familiar and long applicable in civil proceedings which result in detention, has usually rendered null the need for any possible additional protections that might be afforded by the Excessive Bail Clause.

For example, in *Zadvydas v. Davis* the Supreme Court applied a long line of due process precedent in the immigration context to find that indefinite detention of criminal aliens awaiting deportation was not authorized.[31] The non-citizen in *Zadvyas* had already been issued a final order of removal after a full hearing but the United States was unable to find another country to accept him. This inability to actually deport the petitioner threatened to make his detention indefinite. The Court, applying general due process standards, noted that physical detention even in this context would require a "special justification" and "adequate procedural protections."[32] Finding serious doubt about the statute's constitutionality, the Court read it as authorizing detention after an order of removal only as long as actual removal was "reasonably foreseeable."[33] In *Zadvyas*, the petitioner was not being held for further proceedings. Instead, he had been issued a final order of removal and had exhausted his appeals. Had he been detained for further proceedings, however, the Bail Clause might have applied but would have been unnecessary, as due process supplied adequate constitutional protections.

In a turnaround, the Court held two years later in *Demore v. Kim* that due process did not require any finding of dangerousness or other justification for § 1226(c) detention of a legal permanent resident prior to his removal hearing, even though he had not yet been issued a final removal order.[34] A striking departure from the longstanding requirement that individualized evidence must justify detention, *Demore* allows individual non-citizens who have committed certain crimes to be detained under § 1226(c) while awaiting further proceedings, without a hearing, and regardless of whether they are a risk of flight or danger to the community. These potential due process defects of *Demore* are documented elsewhere.[35] But undoubtedly the Court in *Demore* construed the Due Process Clause as requiring much less in the immigration context than it had previously held to be required in other contexts. Justice Souter in dissent pointed out that the majority ignored the clear rule that "[d]ue process calls for an individual determination before someone is locked away."[36] The only procedure given aliens before they are detained, Justice Souter noted, are "mechanisms for testing group membership."[37] After *Demore*, membership in the group subject to § 1226(c) is a sufficient basis for detention under due process standards. No other findings are necessary and no hearing is required.

This Note contends that the government actions in *Demore* which the Court found to satisfy due process would not have passed muster under the Excessive Bail Clause. However, the Demore Court did not have to confront the issue because the petitioner did not raise an Eighth Amendment argument. In reaching its decision, the *Demore* majority relied heavily on *Carlson v. Landon*[38] and *United States v. Salerno*.[39] The majority's analysis of both precedents left much to be desired, which is discussed in depth below.[40] However, the Eighth Amendment was briefly discussed in the both of the older cases after lengthy due process analyses. In both *Carlson* and *Salerno*, the Court treated the Due Process Clause as requiring both individualized findings and procedural protections, but found both requirements satisfied in each case. Therefore, the requirements of the Eighth Amendment, as argued below, were also satisfied and its protections were superfluous.

Though not coextensive, the Due Process Clause and the Excessive Bail Clause can be construed to contain overlapping protections in certain situations. The Bail Clause is much more specific in its application. Bail, by definition, is payment made to guarantee a future appearance at future proceedings.[41] Thus, the Bail Clause is implicated only when the government holds an individual in custody awaiting further proceedings. To illustrate, it would have found application in *Demore*, where the petitioner was being held in order to appear at his deportation hearing, but probably not in

Zadvydas, where the petitioner's final removal order had been issued and his appeals exhausted. But due process has also been applied to situations which involve civil detention where individuals are held to await further proceedings. Because the Due Process Clause has been interpreted to require the safeguards that the Eighth Amendment would require in such situations, application of the more specific Eighth Amendment has not been necessary. However, when the more familiar Due Process Clause offers less protection than the Bail Clause would provide, application of the Eighth Amendment becomes essential. Though it may be employed more rarely, the Bail Clause is neither less stringent nor less important than the Due Process Clause.

A Right to Bail?

The Supreme Court has never definitively answered the questions of what the Bail Clause means or when it applies. There are two main obstacles for the argument that the Eighth Amendment prohibits mandatory detention without bail hearings in immigration cases. First, the Bail Clause limits only the amount of bail, when it is proper to set bail, and says nothing about whether bail shall ever be available at all. Second, it is often assumed that the Bail Clause applies only to criminal cases. This section and the next two will show that not only is the question of whether the Eighth Amendment speaks to the question of when bail shall be available an open one, but also that Supreme Court precedent and the English history of bail can be used to fill in the blanks that the Court has seemingly left open. Part V will address the question of the application of the Bail Clause to civil cases.

An analysis of the two Supreme Court cases that are cited most often to make the point that the Eighth Amendment does not apply to the question of the availability of bail, *Carlson v. Landon*[42] and *United States v. Salerno*,[43] reveals that the Court's supposed answers to this question have in fact only been obfuscations. In both *Carlson* and *Salerno*, where the Court had seemed to suggest that the Bail Clause has no application to the question of whether bail should be available, the statements were not dispositive. First, as delineated below, in both cases, the statements were either vague or dicta, or both. Second, in each case, the petitioners were seeking actual release on bail as a matter of right under the Eighth Amendment. Hearings had already occurred and reasons for the denial of bail had been given. Thus, any holding that the Bail Clause required nothing further in those instances would not have covered the question at issue now. And finally in both cases, a requirement that bail be reasonable would have already been satisfied, because the Court found that the Due Process Clause required it.[44] Thus, no Eighth Amendment holding on the issue was necessary.

The defining, if confusing, passage of the Court's interpretation of the Bail Clause can be found in *Carlson v. Landon,* when the Court reasons:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.[45]

Although this passage has often been cited as the Court's definitive statement that there is no right to bail and that the Bail Clause applies to no more than the decision about the amount of bail, upon closer examination it is unclear what the Court thought it was saying here. The Court argues that "[i]n England that [excessive bail] clause has never been thought to accord a right to bail in all cases," but cites a section of a bail treatise dealing with the historically unlimited bailing power of the Court of King's Bench.[46] It is possible that the Court thought that all English judges had complete discretion to grant bail or not, but this was not true at the time.[47] Even if true, that fact would support the idea that there was no absolute right to bail but it would not support the kind of mandatory detention without a bail hearing at issue currently. The opposite is true; if the question of bail was entirely discretionary, every individual at least received a bail hearing in front of a judicial officer and bail was granted or denied according to the specifics of each case. The precise question of whether such a hearing is required did not arise in *Carlson* because the detained aliens had already received full hearings. The Court finishes this sentence by noting that the prohibition on excessive bail in England was only meant to "provide that bail shall not be excessive in those cases where it is proper to grant bail," but "proper" is sufficiently ambiguous to beg the question.

Furthermore, in this *Carlson* passage, the Court does not explicitly suggest that its historical reading of the Bail Clause means that Congress can *prohibit* the bailing of entire classes of offenders, even alien Communists, noting that "[t]he Eighth Amendment has not prevented Congress from defining the classes of cases in which bail *shall be allowed* in this country," and that "bail is not *compulsory*" in capital cases.[48] Thus, bail may not be mandatory and might be left to the discretion of the justice system, but still is not necessarily prohibited. The difference between "not compulsory" and being prohibited is not just semantic. If Congress provides that bail is compulsory in certain cases, it takes the option of *denying* bail away from the judiciary, preventing any judge from keeping an individual in custody because of the particular circumstances. In this situation, the legislature tips the scale towards individual liberty, not towards the state; the state can make no showing that would require an individual to be longer detained. On the other hand, when Congress prohibits bail in an entire class of cases, it takes the option of *granting* bail away from the judiciary, preventing any judge from releasing an individual according to her particular circumstances, creating an irrefutable presumption that detention is warranted and irrevocably tipping the balance away from individual liberty. A judge in this situation is barred from taking account of the particular circumstances of the case or of the characteristics of the individual. An individual can offer no proof that would allow a judge to release him.

but a particular denial of bail to specific individuals after full hearings. Thus, the distinction was not drawn.

Finally, the Court's interpretation of the Eighth Amendment is anything but clear when it concludes "clearly, here that the Eighth Amendment does not require that bail be allowed *under the circumstances of these cases*."[49] Unfortunately "[i]f what is said is clear, then clearly is not needed, and if it is not clear, then clearly will not make it so,"[50] and it is far from clear whether "the circumstances of these cases" means circumstances involving Communists, circumstances involving non-citizens, circumstances involving civil proceedings, or all three.

The language of this passage from *Carlson* renders it doubtful whether the Court even intended to lay out a binding interpretation of the Bail Clause. The Court was instead quite narrowly focused on the situation at hand and in the end merely held that the Bail Clause does not guarantee release on bail in every case. Furthermore, even if the Court intended to expound the meaning of the Bail Clause for all time, the vagueness and outright errors contained in this passage make it extremely difficult to decide what was meant.

Finally, in *Salerno*, the Court did say in dicta that the Eighth Amendment "of course, says nothing about whether bail shall be available at all."[51] However, in that case the Court later made clear that it was not holding that there is no right to bail at all in the Eighth Amendment. First, the Court went on to quote in full the confusing paragraph from *Carlson*.[52] As noted above, it is difficult to rely on this paragraph to explain the meaning of the Bail Clause. The Court then clearly stated that "we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail."[53] So in *Salerno*, despite the dicta, the Court did not in fact answer the question of whether the Eighth Amendment speaks at all to whether bail shall ever be available. Regardless of whether that is true or not, the Court said, the Bail Reform Act at issue passed muster under the Eighth Amendment.[54]

Thus, neither *Carlson* nor *Salerno* precludes the finding of a right to bail. The Court has relied heavily on history in finding no absolute right to release on bail, but in dicta and vague passages that should not be taken out of context to permanently restrict the meaning of the Bail Clause. In fact, the Court has never definitively held that the Eighth Amendment applies only to the amount of bail or that there is no form of a right to bail under the Eighth Amendment.

The English History of Bail

The Excessive Bail Clause of the Eighth Amendment provides only that "excessive bail shall not be required."[55] These words mirror those of clause 10 of the English Bill of Rights of 1689, on which the Bail Clause was purposely modeled.[56] The English version provided that "excessive bail ought not to be required."[57] The American Founders changed only the aspirational "ought not" of the English version to the prohibitory "shall not" when they imported the clause into the Eighth Amendment. In England at the time the American Bill of Rights was written, bail was largely regulated by statutes which specified whether bail was available or not for a host of offenses. But even if bail was not allowed by statute, the highest level of the English judiciary, the Court of King's Bench, could always grant bail according to the circumstances of each case. Therefore, bail could never be completely foreclosed by statute, as the King's Bench could always examine each individual case to ensure that the denial of bail was reasonable and warranted.

The English history of the Bail Clause is relevant, first because history always plays an important role in the interpretation of the Eighth Amendment. The Supreme Court has explained that the "basic mode of inquiry" in considering the applicability of the various clauses of the Eighth Amendment is to "look to the origins of the Clause and the purposes which directed its framers."[58] The history of the Bail Clause is doubly important because it has often been wrongly interpreted. In the past, the Court has relied heavily upon English history in defining the scope of the Bail Clause and finding that it does not guarantee a right to release on bail in all cases.[59] Yet this same history has been suggested to extend beyond its actual historical meaning to support the additional proposition that the Bail Clause only prevents a judge from setting bail at an unreasonably high amount when she has already decided to grant bail, but says nothing about whether bail must ever be available at all.[60] There is an important difference, however, between arguing that the Bail Clause guarantees a right to release on bail in every case (an argument which the Court has rejected more than once) and arguing that the Bail Clause requires that the denial of bail be reasonable (an argument which the Court has not addressed). If the former were true, then bail must always be set, regardless of the situation. If the latter is true, on the other hand, bail must simply be available; it can be denied, but it must be denied according to the circumstances of the particular case.

In actuality, a scheme of mandatory detention, like that created by § 1226(c), with no chance of bail was unheard of at common law. The assertion in *Carlson* that clause 10 of the English Bill of Rights, on which the Excessive Bail Clause is based, did not grant an absolute right to bail is true, because in England, the prohibition on excessive bail was only one part of the protections against pre-trial detention. Protection against unwarranted pretrial detention had three essential elements; 1) a determination of whether the detained had a right to bail, answered by various statues detailing who justices of the peace could and could not bail and by the Petition of Right; 2) habeas corpus procedures developed to guarantee these statutory rights, which might otherwise be thwarted; and, 3) a prohibition on excessive bail as protection against judicial abuse.[61] The excessive bail clause of the English Bill of Rights Act of 1689, the English precursor of the Eighth Amendment, does not accord a right to bail because it was the last piece in the long progression towards the prevention of pretrial detention. Thus, the right to bail was already well-defined elsewhere.

The first Statute of Westminster, passed in 1275,[62] formed the bedrock of English bail law for "five centuries and a half."[63] This statute provided a detailed list of the offenses that sheriffs must bail and those that they could not.[64] Many additional statutes supplemented the list over the next several centuries, adding to the technical tangle, and the justices of the peace took over the bailing power of the sheriffs and were likewise restrained by the bail statutes.[65] Notably, these statutes never bound the Court of King's Bench.[66] In sum, "bail law

specified bailable and nonbailable offenses for lesser officers, but gave them considerable discretion in cases that were 'dubious.' It also gave great power to the Court of King's Bench, or to any judge of that court in time of vacation, to rule on bail."[67]

However, as the law progressed, important English safeguards against pretrial detention grew out of cases that illuminated abuses in this system. In *Darnel's Case*, five knights were imprisoned by the special command of the king after having refused to give the king a loan.[68] One of the knights brought a writ of habeas corpus, alleging that by law he was bailable and that there was no cause for the imprisonment. The Court of King's Bench upheld the king's power to imprison without showing cause, and then held that without a cause shown, they lacked the power to judge whether or not bail should be granted. Instead, the court suggested that the prisoner appeal to the mercy of the king, who did know the cause for the imprisonment.[69] The House of Commons responded immediately, emphasizing that the decision in Darnel's Case undermined all of the law governing pretrial detention and bail.[70] The Petition first complained, inter alia, that despite the guarantees of Magna Carta, subjects had been imprisoned without cause and had illegally been denied bail; it then outlawed detention without cause, requiring that "no freeman in any such manner as is before mentioned, be imprisoned or detained."[71]

Despite the Petition of Right, due to the haziness of the habeas corpus procedures at the time, it was not always clear which courts could issue the different habeas corpus writs, and it was fairly easy for jailers to delay or avoid bailing a prisoner before trial.[72] These problems are well illustrated by *Jenkes'* Case, in which a man was imprisoned for making a speech calling for a new Parliament.[73] By statute, he was clearly entitled to be bailed, but months after his arrest he still could not get a court to set bail, and was ultimately released only through an informal bureaucratic procedure. [74] In response to countless cases like *Jenkes*', Parliament enacted the Habeas Corpus Act of 1679, which protested that "many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable…"[75] To prevent such abuse, the Act then set out detailed procedures for habeas corpus, closing the loopholes and providing penalties for all judges who did not comply.[76]

Further problems again arose. As the Act "mainly conferred a power to discharge on bail", it "could easily be obstructed merely by imposing excessive bail which the prisoner was unable to raise."[77] Such a practice did indeed develop, and in 1689, one of the abuses alleged in the English Bill of Rights was that excessive bail had been required, "to elude the benefit of the laws made for the liberty of the subjects."[78] Parliament's answer was clause 10 of the Bill of Rights, which provided that "excessive bail ought not to be required."[79] This clause later formed the basis of the Eighth Amendment to the Constitution of the United States.[80]

Each piece of the English laws protecting individuals against pretrial detention, culminating in the excessive bail clause of the English Bill of Rights, was dependent on the others.[81] Even those who dispute the fact that the Bail Clause of the Eighth Amendment protects any residual right to bail acknowledge its complicated history, and that "there was a direct connection between the Petition of Right of 1628 which prohibited arrests without notification of the cause, with the Habeas Corpus Act of 1670 which was to ensure speedy judicial review of the causes of arrests, and the excessive bail clause of the Bill of Rights of 1689 which was to prevent obstruction of the Habeas Corpus Act."[82] All three points of the English system were imported into the Constitution: the right to be informed of the cause of the accusations in the Sixth Amendment,[83] habeas corpus in Art. I, § 9,[84] and the prohibition of excessive bail in the Eighth Amendment.[85] However, the underlying right to bail, which had initially been defined by the Statute of Westminster, was not explicitly incorporated, leaving open the question of how to answer the question of what offenses should be bailable.

The Supreme Court has suggested in dicta that the fact that a right to bail was not explicitly included in the Constitution means that the Eighth Amendment says nothing about whether bail should ever be available.[86] To enshrine this interpretation would ignore not only the long struggle against unjustified detention underlying the Amendment, but also the courts' historical role in the granting or denial of bail. To interpret the Bail Clause untethered from its origins completely ignores the centuries of development that led to its inclusion in the Bill of Rights in 1689 and then into the American Constitution. Interpreted so narrowly, the Eighth Amendment never restrains Congress when it decides whether bail should be available. In *Carlson*, the Court cites Blackstone stating that, "[i]n England, there was a series of crimes and situations where the arrested person 'could have no other sureties but the four walls of the prison.'"[87]
This, the Court says in dicta, means that the Excessive Bail Clause guarantees nothing, but merely prohibits excessive bail where bail is otherwise set. However, Blackstone in the same passage goes on to take account of the full history of bail, explaining that the certain offenses and persons to which he was referring could not be admitted to bail by the justices of the peace, but "it is agreed that the court of king's bench…may bail for any crime whatsoever, be it treason, murder, or any other offense, according to the circumstances of the case."[88]

King's Bench cases from the 17th and 18th centuries also explicitly recognize the power of that Court to bail in any case. A sample of these cases shows that this power was generally accepted and clearly established. In *Rex v. Rudd*, a felony forgery case, the court denied bail but noted that "this Court has undoubtedly a discretionary power to bail in all cases whatsoever."[89] Likewise, in *Rex v. Marks*, another felony case, the court noted that "[t]here is not doubt of the power of this Court to bail, if they see occasion, in all cases of felony, even in case of murder, though there should be no doubt as to the validity of the warrant of commitment."[90] In yet another case, the court demonstrated this power by granting bail in the case of an alleged rape, because it[91] found that the defendant was not a flight risk. And in Witham and Dutton, the court refused bail but noted explicitly that it "may likewise bail for murder" although recognizing that it is "seldom done."[92]

Furthermore, renowned 19th century English legal

scholars, including Hale, Coke and Blackstone, agree that King's Bench had unlimited bailing power.[93] The reason for this exception, Blackstone noted, is because "there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offense. The law has therefore provided one court, and only one, which has *discretionary power of bailing in any case*."[94] Thus, though not every defendant was bailable by the lower courts, and the legislature could prohibit the justices of the peace from granting bail to certain classes of offenders, no individual was categorically denied bail at common law. In England, at the time the American Bill of Rights was enacted, the highest level of the judiciary could always grant bail, even if the denial was required by statute.

How the unlimited bailing power of the Court of King's Bench should affect the interpretation of the Eighth Amendment is obviously difficult to discern. At the very least, the history of the Eighth Amendment has been misunderstood, while at the same time, the Court has relied heavily upon history in interpreting the Bail Clause. This history has been cited for the simple proposition that the Eighth Amendment guarantees no right to bail, but also for the additional proposition that if there is no absolute guarantee to release on bail, then the Amendment places no limits on the decision whether or not to grant bail. The historical interaction between the right to bail, habeas corpus and the prohibition on excessive bail demonstrates that the question of what the Bail Clause guarantees is not so straightforward. In actuality, a full analysis of the history confirms that bail was indeed not compulsory, but also confirms that it was never completely barred. The courts could always review the detention and grant bail if such detention was not warranted. By contrast, § 1226(c) requires no reason for the denial of bail and allows no court, indeed even does not allow any executive official, to review the detention. The words "excessive bail shall not be required" include a much stronger guarantee when it is assured that a court will review any denial of bail for reasonableness. By parroting the words of the English Bill of Rights, the Framers seemed to intend to incorporate everything which that right guaranteed, and the Court has indicated that this history is the touchstone for the interpretation of the Bail Clause. But in England at that time, the prohibition on excessive bail meant very little without its connected guarantees, including the unlimited power of one sector of the judiciary.

Excessiveness under the Bail Clause

If the Clause has any meaning at all, it must imply some constitutional protection of a right to bail.[95] Otherwise, it does not limit Congress in deciding whether bail is ever available, nor does it restrain a judge who is deciding whether bail should be set in any particular case. A return to the Supreme Court precedent dealing with the Eighth Amendment generally, and with the Bail Clause specifically, leads to the conclusion that the Excessive Bail Clause should be interpreted to prohibit the unreasoned denial of bail. Such an interpretation strikes a balance between finding an absolute right to bail in the Eighth Amendment, which the Court has rejected, and finding no guarantee at all in the Eighth Amendment, which would render it essentially meaningless.

If the Clause has any meaning at all, it must imply some constitutional protection of a right to bail. Otherwise, it does not limit Congress in deciding whether bail is ever available, nor does it restrain a judge who is deciding whether bail should be set in any particular case. A return to the Supreme Court precedent dealing with the Eighth Amendment generally, and with the Bail Clause specifically, leads to the conclusion that the Excessive Bail Clause should be interpreted to prohibit the unreasoned denial of bail. Such an interpretation strikes a balance between finding an absolute right to bail in the Eighth Amendment, which the Court has rejected, and finding no guarantee at all in the Eighth Amendment, which would render it essentially meaningless.

In the main decisions upholding no-bail detention as a reasonable government action, *United States v. Salerno*[96] and *Carlson v. Landon*,[97] the Supreme Court has recognized three factors as important: an individualized finding of dangerousness or risk of flight, procedural protections and the discretion of government officials. In the case of detention pursuant to § 1226(c), none of these factors is present and there are no safeguards against unwarranted detention. Thus, non-citizens are entitled to an individualized determination of dangerousness or risk of flight to ensure that the denial of bail to them is not unreasonable in violation of the Excessive Bail Clause. Such an interpretation would require only that there be a non-arbitrary justification for detention without bail, and would require basic procedures, such as a hearing, to ensure that a valid justification exists.

Though the Court has never directly confronted the issue, several individual justices have expressed the view that the Eighth Amendment means that the denial of bail cannot be arbitrary. For example, in *Sellers v. United States*, Justice Black explained that "[t]he command of the Eighth Amendment that excessive bail shall not be required at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons."[98] Likewise, in *Carlisle v. Landon*, a case involving one of the petitioners from *Carlson v. Landon,* Justice Douglas agreed that the Bail Clause means that "a person may not be capriciously held…[i]t is the unreasoned denial of bail that the Constitution condemns…[u]nder our constitutional system the power to hold without bail is subject to judicial review. There must be an informed reason for the detention."[99] Carlisle was released on bail because in the intervening time between *Carlson* and *Carlisle*, he had proven that he was not dangerous and thus that there was no longer any justification for his detention.[100] Justice Frankfurter, also dissenting in *Carlson,* argued that "To deny bail, the Attorney General should have a reasonable basis for believing that the circumstances attending [a petitioner] present too hazardous a risk in leaving him at large."[101] Justice Burton agreed, writing that the Eighth Amendment prohibits excessive bail as well as the "unreasonable denial of bail."[102] The *Carlson* majority found in their due process analysis that there were sufficient grounds to establish that the alien Communists posed a danger to the nation and thus the Eighth Amendment would likewise have been satisfied.[103] The disagreement in *Carlson* was not whether the Eighth Amendment required a showing of

dangerousness before bail could be denied, and the majority did not answer that question. The question was whether the government had in fact made a sufficient showing that the petitioners were dangerous.[104]

Although the Court has recognized that the Eighth Amendment does not guarantee an absolute right to release on bail in all cases,[105] it has explained that the Amendment "places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments."[106] These exact substantive limits have never been exhaustively outlined, but the Supreme Court gave some guidance in *Salerno* in upholding the Bail Reform Act.

In *Salerno*, the Court first noted that the government could detain individuals without bail only if it had a compelling interest in doing so.[107] "The primary function of bail" is "to safeguard the courts' role in adjudicating the guilt or innocence of defendants." The government can pursue other compelling interests through regulation of bail and release.[108] The Court then noted that, even if the government has a sufficiently compelling interest in detention, the "substantive limitation of the Bail Clause" requires that "the government's proposed conditions of release or detention must not be 'excessive' in light of the perceived evil."[109] In short, "To determine whether the Government's response is excessive" under the Eighth Amendment, a court "must compare that response against the interest the Government seeks to protect by means of that response."[110] For example, "when the government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more."[111]

The *Salerno* Court held that the government must articulate a reason for the denial of bail and must also prove that detention without bail is the appropriate response to further that interest. Courts have generally accepted just two compelling justifications for the denial of bail: ensuring presence at trial,[112] and risk of future dangerousness.[113] Not surprisingly, these two reasons have also been the justifications offered by the government for detention under § 1226(c).[114] In addition to serving a valid interest, the Supreme Court in *Salerno* and *Carlson* found several other factors to be important when upholding no-bail detention as a reasonable response to those two interests, including individualized determinatons of flight risk or dangerousness, procedural protections and the discretionary nature of the denial of bail. None of these factors are present in detentions under § 1226.

The Bail Reform Act, which was upheld in *Salerno*, allowed defendants to be detained before trial if the government could show by clear and convincing evidence that no conditions of release would "reasonably assure ... the safety of any other person and the community."[115] Detention had to be the last resort. The detainees in *Salerno* were two individuals who had been charged with 29 violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), including fraud, extortion, criminal gambling and conspiracy to commit murder and who the government intended to prove were in charge of a notorious crime family.[116] *Salerno* involved only a facial challenge to the statute. The Court required the challengers to prove that the Act would be invalid under any set of circumstances.[117] The preventive detention provision was found not to be an excessive response to the defendants' perceived dangerousness because it applied only to individuals indicted on specified "serious" felonies. Moreover, it provided substantial procedural protections, the foremost of which was an individualized hearing before a judicial officer which included a right to counsel and cross-examination.[118] Under these circumstances, the Court refused to hold the Act facially unconstitutional, charactering its holding thus: detention without bail is constitutional for "arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing."[119] Thus, for detention without bail to be constitutional under *Salerno*, at the very least, an individual has to be specifically found to be dangerous after a hearing before a judicial officer. That is not the case under § 1226, nor is this provision limited to the commission of very serious felonies. Instead, it covers a wide range of offenses of varying degrees of severity. Finally, a § 1226(c) detention is not a last resort to be used only when necessary; rather it is the initial, and only government response.

In the McCarthy-era decision, *Carlson v. Landon*, the Supreme Court responded to an Eighth Amendment challenge by upholding the detention of certain non-citizens who were members of the Communist Party.[120] The facts of *Carlson* are similar to detentions under § 1226(c), apart from the crucial fact that *Carlson* did *not* involve mandatory detention of all Communist Party members without individualized determinations. Even the government stated, in response to the contention that the statute made it "mandatory on the Attorney General to deny bail to alien communists," that "[w]e need not consider the constitutionality of such a law for that is not what the present law provides."[121] In addition to the discretionary nature of the detention without bail, two very important factors contributed to the validity of the detention in *Carlson* that are not present in detentions under § 1226(c): individualized determinations and a denial of bail only to a limited group.

The most important distinguishing factor between current detentions under § 1226 and *Carlson* is that individualized determinations of dangerousness were made in *Carlson*. Although Chief Justice Rehnquist contends in *Demore* that "[t]he aliens in Carlson had not been found individually dangerous," he only cites Justice Black's *Carlson* dissent.[122] The *Carlson* majority, on the other hand, reasoned that "evidence of membership in the [Communist Party] plus *personal activity* in supporting and extending the Party's philosophy concerning violence" were sufficient grounds to establish dangerousness.[123] Thus, *Carlson* merely held that the immigration detention of those persons specially determined to pose a "menace to the public interest" did not violate the Bail Clause.[124] "Of course," the Court noted, "purpose to injure could not be imputed generally to all aliens subject to deportation," suggesting that had they agreed with Justices Black and Rehnquist that if individual dangerousness had not been established, they would have been concerned.[125] The situation under § 1226(c) is entirely the opposite; all aliens who are deportable because of certain crimes—which may or may not be crimes of violence—are detained without bond and without a determination of dangerousness or risk of flight.

In *Demore*, Chief Justice Rehnquist did attempt to

analogize mandatory detentions under § 1226(c) to the detention of Communists in *Carlson*, suggesting that the conduct which served as the basis for a criminal conviction is "personal activity" in the same way that the *Carlson* petitioners had engaged in "personal activity" supporting the Communist cause.[126]

There is, of course, a crucial distinction. The commitment of criminal acts of varying degrees of severity by unrelated non-citizens is not the same "personal activity" as is coordinated steps taken by individuals who have a group goal of violent overthrow of the government.Thus, the finding of "personal activity" in *Carlson* indicated the individual's support for a goal which had been repeatedly found to threaten the security of the United States. The "personal activity" in §1226(c) detention does not establish such a finding of dangerousness. It merely establishes that the individual had committed one of a host of criminal acts, some serious and some less so, which makes him or her part of a group connected only by the fact of falling under § 1226(c).

Even if the "personal activity" finding in *Carlson* is considered a typical "individualized determination," the Court has recognized that *Carlson* is a somewhat unique case because it implicated communism and national security. *Carlson* does not hold that the detention of any entire group of unrelated non-citizens without bail is constitutionally legitimate.[127] In *Carlson*, alien Communists were denied bail "because of Congress' understanding of their attitude toward the use of force and violence in such a constitutional democracy as ours to accomplish their political aims."[128] Detention without bail was not excessive because of the perceived magnitude of the threat being responded to. Alien Communists were specifically designated by Congress as national security threats.[129] In *Carlson* itself, members of the Communist Party were characterized as "members of organizations devoted to the overthrow by force and violence of the Government of the United States,"[130] with the Court adding:

> We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien communists under its power to regulate the exclus ion, admission and expulsion of aliens.[131]

The Attorney General defended the detention of the petitioners on the same grounds, arguing "that there was reasonable cause to believe that petitioners' release would be prejudicial to the public interest and would endanger the welfare and safety of the United States."[132]

The Court has continually recognized that in the 1950's communism presented special legal problems which are not applicable outside of that context. In one case, the Supreme Court noted that it has "consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which, in a different context, would certainly have raised constitutional issues of the gravest character," citing specifically *Carlson v. Landon*.[133] In yet another later case, the Court again characterized *Carlson* as a case involving detention of aliens "on the ground that they posed a threat to national security."[134] The policy that justified the detention in *Carlson*, the Court explained, was "the congressional determination that the presence of alien Communists constituted an unacceptable threat to the Nation.[135] The fact that, in an atmosphere of alarm, the Supreme Court held that the detention of certain aliens designated as threats to national security did not violate the Excessive Bail Clause does not answer the question of whether a large group of unrelated, unconnected, aliens can likewise be detained without bail hearings. It has not been, and could not be suggested that all aliens currently subject to mandatory detention while awaiting removal proceedings pose any national security threat to the United States. They are not organized or acting in concert. Many are subject to detention because of relatively ordinary, everyday actions, ranging from being a drug addict to document fraud. Non-citizens subject to mandatory detention are far from being an organized group acting towards a common goal which threatens the national security of the United States, as communism was feared to do at the time *Carlson* was decided.

Furthermore, in direct contrast to the situation under § 1226(c), the *Carlson* Court found it important that, even with the findings regarding alien Communists generally, there was "no evidence or contention that all persons arrested as deportable . . . for Communist membership are denied bail." Despite Chief Justice Rehnquist's contention in *Demore* that "the INS had adopted a policy of refusing to grant bail to those aliens in light of what Justice Frankfurter viewed as the mistaken 'conception that Congress had made [alien Communists] in effect unbailable,'"[136] the *Carlson* majority explicitly relied on a government report showing that "the large majority" of aliens arrested on charges comparable to the *Carlson* aliens were allowed bail.[137] Indeed, the Court went out of its way to ensure that detention without bail was not the rule when it requested that the government submit the report detailing the status of those individuals held pursuant to the no-bail provision. The court concluded that "It is quite clear from the list that detention without bond has been the exception."[138] This suggests that the Court would have been troubled had detention been class-wide and mandatory.

The denial of bail to a limited class of aliens, or to particular individuals, who were specifically determined to pose a danger to the public is not at all akin to the current situation, where a large class of aliens is detained regardless of whether they are individually dangerous or a flight risk. Furthermore, *Carlson* has never stood for the proposition that it is constitutionally unproblematic to deny bail to all aliens without individualized hearings. Where the Supreme Court subsequently has cited *Carlson*, it has given it a narrow interpretation. In *Salerno*, the Court cited *Carlson* for the proposition that there is "no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings."[139] *In INS v. Lopez-Mendoza*, the Court characterized *Carlson* as holding that the Eighth Amendment does not require bail to be granted in "certain" deportation cases.[140] Finally, in *INS v. Nat'l Center for Immigrants' Rights, Inc.*, the Court recognized that the detention scheme in Carlson required at least "some level of individualized determination" as a precondition to detention.[141] Thus, *Carlson* merely establishes that there is no absolute barrier to the denial of bail to a specified group of non-citizens, as long as that denial based on an individual determination of dangerousness or some other comp-

elling government interest requiring detention. As the detention under § 1226(c) is mandatory, with no hearing and no individualized determination, *Carlson* is not dispositive.

Additionally, in both *Salerno* and *Carlson*, detentions were reviewable. In *Salerno*, the Bail Reform Act provided for expedited appellate review of the detention.[142] In *Carlson*, the Court explained that, "In carrying out that policy [of deportation] the Attorney General is not left with untrammeled discretion as to bail. Courts review his determination. Hearings are had, and he must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity."[143] In contrast, in the current situation, no court can review the denial of bail because those detained receive no hearing; there is no record to review. No official must justify the denial of bail or show how that denial serves the legislative purposes better than conditions on release would.

Finally, the balancing of the government's interest against its response in detentions under § 1226(c) is different than that in *Carlson* or *Salerno* because currently detained immigrants would only be asking for a bail hearing, not for release. In both *Salerno* and *Carlson*, the government action at issue was the denial of bail after a hearing to determine if that denial was warranted. In both cases, the Court relied fairly heavily on the existence of those procedures to find that the action was not excessive. By contrast, government action in detaining non-citizens under § 1226(c) is much more severe. The denial of bail is categorical and no hearing may be held. Regardless of the circumstances, non-citizens who fall into the relevant categories are detained without a possibility of release on bail, regardless of whether they pose a risk of flight or a danger to the community. Moreover, non-citizens would be required to appear at a removal hearing and face consequences. As in *Zadvydas v. Davis*, where the Court found the indefinite detention of removable non-citizens to be constitutionally problematic, "The question before [the courts] is not one of 'confer[ring] on those admitted the right to remain against the national will' who should be removed."[144] The choice would not "be between imprisonment and the alien 'living at large.' It is between imprisonment and supervision under release conditions that may not be violated."[145] All that is required is a hearing to determine whether or not detention is necessary.

In sum, the Court has explained that if the denial of bail is not a reasonable response to a compelling government interest, such a denial is an excessive government action under the Eighth Amendment. The government interests served by § 1226(c) are ensuring that the non-citizen appears for later proceedings and protecting the community from danger. These interests are clearly valid, but the means of implementing them are just as clearly unreasonable. The lack of individualized findings of dangerousness or risk of flight, the absence of procedural protections, and the mandatory nature of the detention—which allows no opportunity nor any discretion for either the detaining official or any judge to release any of those detained regardless of the circumstances—renders § 1226(c) an excessive response to those interests.

Lastly, making the Excessive Bail Clause, a provision of the Bill of Rights, dependent upon an outside act of the legislature—as it would be if it existed at the whim of Congress—is extraordinary. If the Bail Clause means only that bail cannot be excessive when it is set but does not restrict the legislature's ability to classify the cases and offenses that are not bailable, then the Clause does not limit the steps that Congress can take against any individual. Congress could simply declare that no offenses are bailable without violating the Eighth Amendment, thereby keeping every person accused of any crime in prison before trial. However, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[146] As Justice Black argued in *Carlson*, unless some protection against the arbitrary denial of bail is found in the Eighth Amendment, the Bail Clause "does no more than protect a right to bail which Congress can grant and Congress can take away. The Amendment is thus reduced below the level of a pious admonition."[147] The Eighth Amendment, like the rest of the Bill of Rights, was instituted as a check on government power. To interpret it as being completely subject to the whim of those that it sought to limit renders it meaningless.

Application of the Excessive Bail Clause

The remaining obstacle to the argument that the Bail Clause requires hearings before non-citizens can be detained without bail under § 1226(c) is the argument that the Eighth Amendment does not apply in this civil context. The Supreme Court has never defined the scope of the Excessive Bail Clause, but has noted that "bail, by its very nature, is implicated only when there is a direct government restraint on personal liberty, be it in a criminal case or a *civil deportation proceeding*. The potential for governmental abuse which the Bail Clause guards against is present in both instances..."[148] The threat of an arbitrary deprivation of physical liberty is present whenever the government physically restrains an individual absent a criminal conviction. Because of the risk of the unnecessary and unwarranted deprivation of liberty, which the Eighth Amendment guards against, it should be interpreted to apply against the government whenever it detains an individual for further proceedings, regardless of whether the proceeding that results in detention is labeled "criminal" or "civil."

Though the Supreme Court has occasionally suggested that the Eighth Amendment applies only in criminal cases,[149] it has never actually held that the Amendment is limited in this way. On the contrary, the Court has carefully avoided delineating its outer reaches. In *Browning-Ferris*, a case involving the Excessive Fines Clause, the Court held that the Eighth Amendment did not apply "in a suit between private parties," but noted that they were not deciding that the Eighth Amendment only applies to criminal cases.[150] "Whatever the outer confines of the [Excessive Fines] Clause's reach may be," the Court explained, "we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." Although Browning-Ferris deals with the Excessive Fines Clause, the Court declared that "the

of the damages awarded."[151] Although *Browning-Ferris* deals with the Excessive Fines Clause, the Court declared that "the insights into the meaning of the Eighth Amendment" reached in cases dealing with one clause "are highly instructive" in determining the meaning of the other clauses of the Eighth Amendment.[152] Thus, the Court recognized that the appropriate question might not be whether the Eighth Amendment generally applies in "civil" cases but whether the Eighth Amendment applies against government action, in any context. By contrast, when a non-citizen is detained pending a removal hearing, the government is prosecuting the action and doing the detaining. The action is not between two private parties, but between the government and an individual entitled to constitutional protection,[153] a classic case for the application of the Bill of Rights.

Even when the Supreme Court has recognized that the traditional application of the Eighth Amendment is in the criminal context, it has acknowledged that the Amendment may find some applicability in other situations. In *Ingraham v. Wright*, where the Court suggested that the Eighth Amendment might apply only to criminal punishments,[154] the opinion still left open the possibility that it might apply in some civil cases that "though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment," citing the examples of "persons involuntarily confined in mental or juvenile institutions."[155] Thus, the Court has recognized that the fact that proceedings are labeled "civil" does not preclude application of the Amendment.

It is illuminating that the examples cited by the Court as potentially warranting application of the Eighth Amendment, even though they are not necessarily "criminal," involve detention, supporting the proposition that the Eighth Amendment should apply in situations where the government detains an individual awaiting further court proceedings. Government detention is of course one of the most serious deprivations of an individual's rights and it makes sense that it is in this context where the most stringent restrictions would be necessary. Criminal pretrial detention is the typical and most common example of such a situation, but it is not the only context in which the state makes the decision to detain a person. While labeled "civil," proceedings that result in deprivation of physical liberty, like the deportation proceedings at issue, are still vulnerable to the same abuses as any criminal pretrial detention. Just as a prosecutor, if unchecked by a judge, could unnecessarily detain an individual who was not dangerous and was not a flight risk, an immigration official, unchecked by a judge, can easily be overly cautious in deciding to detain an immigrant who is not a danger or a flight risk. Serious errors are virtually assured in the current situation, where not even an immigration official can decide that custody is not necessary; Congress has made the irreversible decision that the entire class must be held in custody.

The text of the Eighth Amendment does not support the conclusion that it applies only to criminal cases. As the Supreme Court has recognized, "[s]ome provisions of the Bill of Rights are expressly limited to criminal cases," for example some sections of the Fifth and Sixth Amendments, "[t]he text of the Eighth Amendment, however, includes no similar limitation."[156] The Indictment Clause and the Self-Incrimination Clause of the Fifth Amendment include references to "crime" and "criminal case" respectively and have been thus limited. The Due Process Clause of the same Amendment, however, includes no such limitation and has not been limited in that way. The Sixth Amendment specifically refers to "all criminal prosecutions" and is correspondingly limited in its protections. The Eighth Amendment nowhere limits itself to criminal cases. Even if one clause is limited to criminal cases, similar to the Fifth Amendment, the Bail Clause is not necessarily also limited in the same way. An example would be the word "punishment" in the Cruel and Unusual Punishments Clause being construed to apply only to punishment after a criminal trial.

The constitutional convention debate history of the Eighth Amendment does not indicate that it was to be limited to explicitly "criminal" cases. The Supreme Court has explained that "Consideration of the Eighth Amendment immediately followed consideration of the Fifth Amendment…after deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings…"[157] The Eighth Amendment is hardly even mentioned in the convention debate. Thus, the primary history of the Bail Clause is its English predecessor, from which the convention took its language.[158] This predecessor, § 10 of the English Bill of Rights of 1689, also "contains no reference to 'criminal cases' and, thus, would seem to apply the principle to all cases."[159]

Application of the Eighth Amendment to civil deportation proceedings is not novel. Several federal courts have applied the limitations of the Excessive Bail Clause in the context of deportation proceedings.[160] Furthermore, in *Carlson v. Landon*, the Supreme Court met the argument that the Eighth Amendment required bail to be set in deportation proceedings as well as in criminal cases.[161] The government contended that, "[s]ince these proceedings are not criminal in character, the Eighth Amendment has no application."[162] However, the Court did not make a distinction between civil and criminal proceedings and did not dismiss the Eighth Amendment as inapplicable in civil cases, but instead found that bail had been properly denied.[163] In a later case, the Court recognized that "[t]here is language in *Carlson v. Landon* suggesting that the Bail Clause may be implicated in civil deportation proceedings."[164] After Carlson was decided, one of the petitioners was released on bail while his appeals were pending.[165] In order to gain release on bail, he had to show that there was a substantial question to be resolved on appeal; Justice Douglas, who had the power to bail the petitioner, found that the question of the power of the Attorney General to require burdensome conditions attached to his release on bond presented such a question.[166] Justice Douglas explained that "There is a constitutional question that lurks in every bail case," because "The Eighth Amendment provides that 'excessive bail' shall not be required."[167] Justice Douglas, and several other justices who dissented in *Carlson*, agree that the Eighth Amendment prevents any person from being "capriciously held," regardless of whether they are held pursuant to a criminal or civil proceeding.[168] In Carlson, Justice Black, who would have found bail mandatory, explicitly rejected "the contention that this constitutional right to bail can be denied a man in jail by the simple device of providing a 'not criminal' label for the techniques used to incarcerate."[169] Justice Black reasoned that "Imprisonment awaiting determination of whether that imprisonment is justifiable has precisely the same evil consequences to an individual whatever legalistic liable is used to describe his plight."[170]

Finally, application of the Eighth Amendment to deportation proceedings is not antithetical to Congress's plenary power in the area of immigration. Applying the Bail Clause in no way challenges the plenary authority of Congress to admit and deport non-citizens, it would simply clarify the procedures required should Congress choose to detain non-citizens during their removal pro-

ceedings. The exercise of Congress's plenary power over immigration "is, of course, subject to judicial intervention under the 'paramount law of the Constitution.'"[171] Requiring a bail hearing, or even ordering an immigrant released on bail, does not challenge Congress's ultimate power to deport him once a final order is issued. Review of the procedures used to implement the deportation power does not require a court "to consider the political branches' authority to control entry into the United States."[172] Enforcement of the Eighth Amendment would not allow dangerous aliens or aliens who are a flight risk to escape detention; it would simply require that the government prove that the detention of each individual is warranted. Congress must always choose "a constitutionally permissible means of implementing" its deportation power,[173] which includes refraining from detaining non-citizens in violation of the Eighth Amendment.

Evolving Standards of Decency

Further support for the interpretation of the Eighth Amendment as prohibiting the arbitrary denial of bail can be found in the practice of the states. The English history of the Eighth Amendment may not be dispositive, due to ambiguity and the difficulty of determining which provisions of English law the American Founders meant to incorporate. Even if the import of the Bail Clause cannot be discerned by reference to its English history, the practice of the states, both at the beginning of the republic and since, indicate that the unreasonable denial of bail is inconsistent with American jurisprudence. The Supreme Court, when considering the Eighth Amendment, has stated: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions."[174] In *Trop v. Dulles*, though referring specifically to the Cruel and Unusual Punishment Clause,[175] the Supreme Court acknowledged that "the words of the [Eighth] Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[176] The word "excessive", like "cruel and unusual," is a vague and relative term that can depend on the standards of the community for its definition. Thus, because of the difficulty in interpreting it, the Excessive Bail Clause could be given meaning by reference to the evolving standards of decency.

The evolving standards test is well established in the Supreme Court's Eighth Amendment jurisprudence. The Court has noted that "legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency,"[177] and has given meaning to the vague language in the Eighth Amendment by reference to state legislative enactments and state practice.[178] State bail laws and practice are very well developed, unambiguous and provide a solid basis on which to rest an interpretation "excessive bail."[179] Only nine states do not guarantee a general right to bail in their constitutions and merely prohibit excessive bail. By contrast, twenty states guarantee a right to bail in all but capital cases,[180] and twelve more provide a right to bail except where the proof is evident or the presumption of guilt is strong and the defendant has been determined to pose a danger to the public.[181] Nine more states specifically define violent or dangerous offenses that are not bailable, and most of these provide specific, swifter procedures when bail is denied.

Thus, a total of thirty-two states guarantee a right to bail except in capital cases or when the defendant is deemed dangerous. In separate cases, the Supreme Court has found a national consensus against executing the mentally retarded and then against juveniles where thirty states prohibited such executions; twelve states had no death penalty at all, and only 18 specifically prohibited the execution of these groups.[183] Yet, in both cases, the Supreme Court found that a national consensus had developed against the execution of these two groups. Regarding bail, a majority of state constitutions prohibit a blanket denial of bail absent a finding of dangerousness or risk of flight. Granted, the state standards are not so much evolving as evolved, but the test has never been applied to the Excessive Bail Clause. Thus, the pervasiveness of the prohibition on the unjustified denial of bail, evident in the number of state provisions barring such practices, indicates that the arbitrary denial of bail has always violated the standards of decency of the United States, and continues to do so. Thus, the Excessive Bail Clause should be read to likewise prohibit the arbitrary and unreasonable denial of bail.

The Supreme Court's inquiry into the evolving standards of decency does not end with the test for a national consensus. The Court also noted that "the Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question" of the acceptability of a certain practice under the Eighth Amendment. Thus, a court can exercise its own independent judgment to recognize that it cannot be reasonable to deny bail indefinitely to a large group of people with no procedural protections and no individualized determinations of dangerousness or risk of flight. To do so offends general principles of criminal jurisprudence as well as the core purpose of the Bill of Rights to guard against government abuse of power.

Conclusion

The Excessive Bail Clause of the Eighth Amendment should be read not only to forbid the setting of bail in excessive amounts, but also to prohibit the unreasonable denial of bail. Such an interpretation is consistent with both the history of that Clause, the purpose behind the enactment of the Bill of Rights generally and the Eighth Amendment, specifically limitation of government power. Furthermore, this interpretation of the Eighth Amendment is drawn from Supreme Court precedent and is also in line with the contemporary standards of the United States, as reflected in the laws and practices of the states.

In order to ensure that a denial of bail is reasonable, a non-arbitrary justification for the denial must be proved before someone can be locked away to await further proceedings. Such a showing must be accompanied by basic procedures, such as a hearing, to guarantee that a valid justification exists.

The guarantees of the Bail Clause are not limited by text, debate history or Supreme Court interpretation, to criminal cases and thus this test should also be applied in the context of civil removal proceedings. The Clause renders unconstitutional the mandatory detention without a hearing of an entire class of aliens required by 8 U.S.C. § 1226(c).

---

1 8 U.S.C. § 1226(c) (2006) (referring to criminal offenses covered in § 1182(a)(2) or in § 1227(a)(2)(A)(ii), (A)(iii), (B), (C) or (D).

2 *See* 8 U.S.C. § 1227(a)(2)(B)(ii) ("any alien who is, or at any time after admission has been, a drug abuser or addict is deportable"); § 1226(c)(1)(B) ("the Attorney General shall take into custody any alien who… is deportable by reason of having committed any offense covered § 1227(a)(2)(A)(ii), (A)(iii), (B), (C) or (D)").

3 8 U.S.C. § 1227(a)(4)(B) ("any alien described in subparagraph (B) or (F) of § 1182(a)(3)… is deportable"); 8 U.S.C. § 1226(c)(1)(D) ("the Attorney General shall take into custody any alien who… is inadmissible under § 1182(a)(3)(B)… or deportable under § 1227(a)(4)(B)").

4 8 U.S.C. §§1227(a)(2)(A)(iii), 1226(c)(1)(B).

5 8 U.S.C. §§ 1227(a)(2)(A)(i), 1226(c)(1)(C).

6 8 U.S.C. § 1101(a)(43).

7 *See* 8 U.S.C. § 1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor").
8 *See* 8 U.S.C. § 1101(a)(43)(G) ("a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year").
9 *See* 8 U.S.C. § 1101(a)(43)(J) ("an offense described in §1955 of [Title 18] (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed").
10 *See* 8 U.S.C. § 1101(a)(43)(P) ("an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of § 1543 of Title 18 or is described in § 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter").
11 *See* 8 U.S.C. § 1101(a)(43)(S) ("an offense relating to the obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year").
12 *See* 8 U.S.C. § 1101(a)(43)(U) ("an attempt or conspiracy to commit an offense described in this paragraph").
13 8 U.S.C. § 1226(c) only applies once the individual is released from any incarceration imposed as punishment for the criminal offense which serves as the basis for detention.
14 *See Kansas v. Crane*, 534 U.S. 407, 409-10 (2002) (summarizing civil detention requirements); Zadvydas v. Davis, 533 U.S. 678, 690-91 (2001) (noting that only "specially dangerous" individuals are subject to civil detention); *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding detention limited to "a small segment of particularly dangerous individuals"); *United States v. Salerno*, 481 U.S. 739, 749, 750-52 (1987) (specifying the individual's characteristics and background as relevant to the determination that he should be detained, and describing the individualized hearing provided); *Carlson v. Landon*, 342 U.S. 524, 541-42 (1952) (holding that Communist Party membership plus "personal activity in supporting and extending the Party's philosophy concerning violence gives adequate ground for detention").
15 U.S. CONST. amend. VIII.
16 Although in immigration law, the term "removal" now refers to both the exclusion of aliens at the border and the deportation of aliens who have already been admitted inside U.S. territory, the words "deportation" and "removal" are used interchangeably in this article, referring only to the latter.
17 *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 n.8 (1953).
18 *Yamataya v. Fisher,* 189 U.S. 86, 100-01 (1913).
19 *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (noting the long-held principle that "[e]ven when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act…"); *Fong Yue Ting v. United States,* 149 U.S. 698, 730 (1893) (holding that deportation is not criminal punishment and thus, that the procedural rights are different).
20 *E.g., Fong Yue Ting,* 149 U.S. at 730 (describing the hearing "not [as] a punishment for crime").
21 *See, e.g., Kwong Hai Chew,* 344 U.S. at 598 n.8 (citing prior cases where the court considered hearings of resident aliens).
22 *E.g., Shaughnessy v. United States ex rel. Mezei,* 345 U.S. at 215 (1953) (holding that the continued exclusion of respondent, stranded on Ellis Island because other countries would not take him back, was not "deprive[d] of any statutory or constitutional right").
23 *See, e.g., Zadvydas*, 533 U.S. at 693 (discussing the constitutional distinction between entering aliens and aliens already present in the United States); *United States v. Verdugo-Urquidez,* 494 U.S. 259, 271 (1990) (remarking that aliens receive the protection of the Due Process Clause "when they have come within the territory of the United States and developed substantial connections with this country."); Landon v. Plasencia, 459 U.S. 21, 33 (1982) (asserting that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"); *Kwong Hai Chew,* 344 U.S. at 595 n.5 (proclaiming that "once an alien lawfully enters and resides in this country he becomes invested with…rights…protected by…the Fifth Amendment[] and by the due process clause of the Fourteenth Amendment") (internal quotation omitted); *Johnson v. Eisentrager,* 339 U.S. 763, 770 (1950) (declaring that "mere lawful presence in the country creates an implied assurance of safe conduct and gives [the alien] certain rights [that] become more extensive and secure" as he intends "to become a citizen").
24 *See, e.g., Landon,* 459 U.S. at 32 (1982) (contrasting the lack of constitutional rights for "an alien seeking initial admission to the United States" with the increased "constitutional status" of an alien after gaining admission into the United States).
25 *Wong Wing v. United States*, 163 U.S. 228 (1896).
26 *Salerno*, 481 U.S. at 749 (1987)
27 *See, e.g., Hendricks*, 521 U.S. at 358 (civil commitment of mentally ill sex offenders); *Salerno*, 481 U.S. 739 (pretrial detention of dangerous adults); *Schall v. Martin*, 467 U.S. 253, 253 (1984) (pretrial detention of dangerous juveniles); *Carlson*, 342 U.S. at 537-42 (civil detention of potentially dangerous resident aliens for a limited time pending deportation).
28 *Hendricks*, 521 U.S. at 352 (permitting civil detention of people with "mental abnormality" that rendered them likely to commit "predatory acts of sexual violence"); see also Foucha v. *Louisiana*, 504 U.S. 71, 72 (1992) (indicating that both a finding of mental illness and dangerousness would be required to maintain civil commitment); *Vitek v. Jones*, 445 U.S. 480, 480 (1980) (requiring mental illness and dangerousness as conditions for non-release); O'Connor v. *Donaldson,* 422 U.S. 563, 575 (1975) (mental illness does not alone justify confinement); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (pendency of a charge that cannot be tried because of mental illness does not, by itself, justify confinement).
29 *Hendrick*s, 521 U.S. at 358.
30 *Zadvydas*, 533 U.S. at 690-691.
31 *Id*.
32 *Id.*
33 *Id.* at 699.
34 *Demore v. Kim,* 538 U.S. 510, 524 (2003).
35 *See, e.g.*, Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "Joseph" Hearings after Demore v. Kim,* 31 N.Y.U. REV. L. & SOC. CHANGE 51, 57-63 (2006) (describing the ways *Demore* deviates from due process precedent); *Demore v. Kim: A Divided Supreme Court Upholds Lesser Due Process*, 10 NEW ENG. J. INT'L & COMP. L. 137 (2004); *The Supreme Court, 2002 Term: Leading Cases*, 117 HARV. L. REV. 287, 288 (2003) (declaring that "by withholding meaningful constitutional protection from permanent resident aliens… *Demore* casts an ominous shadow on the constitutional rights of all other aliens); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1023 (2002) (arguing that "the Court has applied the same general due process analysis to all preventive detention, including preventive detention that is likely to be much more short-lived than that imposed on aliens in removal proceedings").
36 *Demore*, 538 U.S. at 552 (Souter, J., dissenting).
37 *Id*.
38 *Carlson*, 342 U.S. at 524.
39 *Salerno*, 481 U.S. at 750-52.
40 *See infra* Parts II, IV.
41 BLACK'S LAW DICTIONARY 150 (8th ed. 2004) (defining bail as "a security such as cash or bond; esp., security required by a court for the release of a prisoner who must appear at a future time").
42 *Landon*, 459 U.S. 21.
43 *Salerno*, 481 U.S. at 752.
44 *See Salerno*, 481 U.S. at 751 (delineating the "extensive safeguards" contained in the Bail Reform Act which comported with due process, including the requirement that "the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain"); *Carlson*, 342 U.S. at 541-42 (holding that the denial of bail was not "arbitrary or capricious" and there was "no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government").
45 *Carlson*, 342 U.S. at 545-46 (citations omitted).
46 *Id*. (citing CHARLES PETERSDORFF, A PRACTICAL TREATISE ON THE LAW OF BAIL 483 et. seq. (1835)).
47 Britain would eventually move to a system of complete judicial discretion in bailing, but not until 1830, after which its practice had much force in the interpretation of the U.S. Constitution. *See* NEIL CORRE AND DAVID WOLCHOVER, BAIL IN CRIMINAL PROCEEDINGS 31 (2004).
48 *Carlson*, 342 U.S. at 545-46 (emphasis added).
49 *Id*. at 546 (emphasis added).
50 RICHARD WYDICK, PLAIN ENGLISH FOR LAWYERS 67 (1985).
51 *Salerno*, 481 U.S. 739 at 752.
52 *Id*. at 754.
53 *Id*.
54 *Id.*
55 U.S. CONST. amend. VIII.
56 *See Salerno*, 481 U.S. at 754; *Carlson*, 342 U.S. at 565.
57 The Bill of Rights, 1689, 1 W. & M., Sess. 2, c. 2, cl. 10 (Eng.), 9 STAT. AT LARGE 440 (1807).
58 *Browning-Ferris Industries of Vermont, Inc. v. Kelco*, 492 U.S. 257, 264 n.4 (1989) (1989); *see also Ingraham v. Wright*, 430 U.S. 651, 670-71, n.39 (1977) ("The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation."); *Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976) (reviewing the history of the Cruel and Unusual Punishments Clause); *Furman v. Georgia,* 408 U.S. 238, 316-328 (1972) (Marshall, J., concurring) (reviewing the history of the Cruel and Unusual Punishments Clause).
59 *See Salerno*, 481 U.S. at 753; *Carlson*, 342 U.S. at 536-37.
60 *See Salerno*, 481 U.S. at 752.
61 *See* Caleb Foote, *The Coming Constitutional Crisis in Bail*: I, 113 U. PA. L. REV. 959, 968-69 (1965); Hermine Meyer, Constitutionality of Pretrial Detention, 60 GEO. L.J. 1139, 1190 (1971).
62 The Statute of Westminster, The First, 1275, 3 Edw. 1, c. 15 (Eng.), 1 STAT. AT LARGE 84 (1807).
63 1 JAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 236 (1883).
64 *See* LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS 88 (1981); 4 WILLIAM M. BLACKSTONE, COMMENTARIES *297.

65 SCHWOERER, *supra* note 64, at 88; Foote, *supra* note 61, at 973.
66 *E.g.*, SCHWOERER, *supra* note 64, at 88; BLACKSTONE, *supra* note 64, at *297.
67 SCHWOERER, *supra* note 64, at 88.
68 3 T. HOWELL, STATE TRIALS 1 (1809); Foote, *supra* note 61, at 966-67.
69 Foote, *supra* note 61, at 966-67; *see also* SCHWOERER, supra note 64, at 89.
70 SCHWOERER, *supra* note 64, at 89; Foote, *supra* note 61, at 967.
71 The Petition of Right, 1628, 3 Charles 1, c. 1 (Eng.), 7 STAT. AT LARGE 317 (1807).
72 *See* SCHWOERER, *supra* note 64, at 89; Meyer, *supra* note 61, at 1185-88.
73 6 T. HOWELL, STATE TRIALS 1189, 1208 (1676); Foote, *supra* note 61, at 967.
74 Foote, *supra* note 61, at 967, n.39.
75 The Habeas Corpus Act, 1679, 31 Charles 2, c. 2 (Eng.), 8 STAT. AT LARGE 432 (1807).
76 *Id*; Foote, *supr*a note 61, at 967.
77 Meyer, *supra* note 61, at 1189.
78 The Bill of Rights, 1689, 1 W. & M., Sess. 2, c. 2, preamble (Eng.), 9 STAT. AT LARGE 440 (1807).
79 *Id*., cl. 10.
80 *Carlson,* 342 U.S. at 565; *Salerno*, 481 U.S. at 754.
81 Foote, *supra* note 61, at 968; *see also* BLACKSTONE, *supra* note 64 at *135.
82 Meyer, *supra* note 61, at 1190.
83 U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right…to be informed of the nature and cause of the accusation…").
84 U.S. CONST, art I, § 9, cl. 2 ("The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.").
85 U.S. CONST. amend. VIII ("Excessive bail shall not be required . . . .").
86 *Salerno*, 481 U.S. at 752.
87 BLACKSTONE, *supra* note 64, at *298 (quoted in Carlson, 342 U.S. at 546).
88 BLACKSTONE, *supra* note 64, at *299.
89 *Rex v. Rudd,* (1775) 1 Cowp. 331, 98 Eng. Rep.1113 (K.B.).
90 *Rex v. Marks,* (1802) 3 East. 155, 102 Eng. Rep. 557 (K.B.).
91 *Rex v. Lord Baltimore*, (1768) 1 Black. W. 648, 96 Eng. Rep. 376 (K.B).
92 *Witham and Dutton*, (1724) 1 Comb. 111, 90 Eng. Rep. 374 (K.B.); *see also* Kirk's Case, (1738) 1 Holt, K.B. 86, 90 Eng. Rep. 946 (K.B.) (acknowledging power to bail in murder case, but declining to do so).
93 *See, e.g.,* SIR MATTHEW HALE, PLEAS OF THE CROWN 85 (1678) (noting that the King's Bench may bail when justices of the peace cannot, because the statutes defining those offenses that are not bailable do not apply to the King's Bench); SIR EDWARD COKE, 4 INSTITUTES OF THE LAWS OF ENGLAND 71 (1797) ("Also this court [King's Bench] may bail any person for any offense whatsoever."); CHARLES PETERSDORFF, A PRACTICAL TREATISE ON THE LAW OF BAIL *483-87 (1835) (explaining the expansive power of the King's Bench to admit persons to bail).
94 BLACKSTONE, *supra* note 64, at *299 (emphasis added).
95 Foote, *supra* note 61, at 972-73 (1965) (arguing that the failure to include an explicit right to bail in the Eighth Amendment was a "historical accident," the result of inadvertence and misunderstanding, and should be implied); Lawrence Tribe, *Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 399-406 (1970) (arguing that the Eighth Amendment supplements due process where pretrial detention is involved); *see also* Stack v. Boyle, 342 U.S. 1, 4 (1952) (suggesting that the Bail Clause protects the presumption of innocence). *See generally* Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329-46 (1982) (laying out the arguments for and against finding a right to bail in the Eighth Amendment).
96 *Salerno*, 481 U.S. 739.
97 *Carlson*, 342 U.S. 524 .
98 *Sellers v. United States*, 89 S.Ct. 36, 38 (1968) (Black, J., in chambers).
99 *Carlisle v. Landon*, 73 S.Ct. 1179, 1182 (1953).
100 *Id.*
101 *Carlson*, 342 U.S. at 566 (Frankfurter, J., dissenting).
102 *Id*. at 569 (Burton, J., dissenting).
103 *Id.* at 536 ("We have in the preceding sections of this opinion [dealing with due process] set out why this refusal of bail is not an abuse of power, arbitrary or capricious . . . .").
104 *Id*. at 540 (Black, J., dissenting) ("Thus it clearly appears that these aliens are held in jail without bail for no reason except that 'they had been active in the Communist movement. From this it is concluded that their association with others would so imperil the Nation's safety that they must be isolated . . . ."); *id*. at 566 (Frankfurter, J., dissenting) (finding problematic the "insubstantiality of the evidence for showing any danger in freeing each individual alien on bail").
105 For example, the idea that those accused of capital crimes should not be admitted to bail has been long accepted. Foote, *supr*a note 61, at 970 (noting that an implied right to bail would not apply in capital cases); John Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1227-30 (1969) (arguing that the denial of bail to capital defendants was based on their dangerous tendencies); *see also* BLACKSTONE, *supra* note 64, at *297 ("For what is it that a man may not be induced to forfeit to save his own life?"); Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (making bail mandatory in criminal arrests, but leaving bail in capital cases to the discretion of judges).
106 *Browning-Ferris*, 492 U.S. at 275; *see also id*. at 266 (noting that that the Eighth Amendment was "clearly adopted with the particular intent of placing limits on the powers of the new Government").
107 *Salerno*, 481 U.S. at 753.
108 *Id*.
109 *Id*. at 754.
110 *Id.*
111 *Id.; see also Stack*, 342 U.S. at 5 ("Bail set at higher figure than the amount reasonably calculated to fulfill purpose of assuring that the accused will stand trial and submit to sentence if found guilty is 'excessive' under Eighth Amendment.").
112 *Stack*, 342 U.S. at 8.
113 *Salerno*, 481 U.S. at 755; *Carlson*, 342 U.S. at 529.
114 *Demore*, 538 U.S. at 518-21 (discussing the legislative history and stated purposes of § 1226(c)); *Zadvyda*s, 533 U.S. at 690-92 (same).
115 *Salerno*, 481 U.S. at 741.
116 *Id*. at 743.
117 *Id*. at 745.
118 *Id*. at 742-43; *see also Faheem-El v. Klincar*, 841 F.2d 712, 721 (7th Cir. 1988) ("In Salerno the statute's limited applicability to serious felonies and the individualized hearing readily contribute to the conclusion that the preventive detention provisions are not excessive.").
119 *Salerno*, 481 U.S. at 755.
120 *Carlson*, 342 U.S. at 534-35.
121 Brief for Respondent in *Carlson v. Landon*, O.T.1951, No. 35, p. 19 (quoted in Demore, 538 U.S. at 569 (Souter, J., dissenting)).
122 *Demore*, 538 U.S. at 524-25 (citing Carlson, 342 U.S. at 549 (Black, J., dissenting)).
123 *Carlson*, 342 U.S. at 541 (emphasis added).
124 *Id.*
125 *Id.* at 538.
126 *Demore*, 538 U.S. at 524 n. 9.
127 The majority in *Demore v. Kim* misconstrues *Carlso*n, and in fact represents statements made in dissent as the holding, when it writes that individualized determinations of dangerousness were not made in *Carlson*. *Id.* at 524-25. In fact, the *Carlson* majority clearly held that individualized findings were made and explained that "personal activity" advocating violence made the aliens a "menace to the public interest." *Carlson,* 342 U.S at 541.
128 *Carlson*, 342 U.S. at 541.
129 In the provision at issue in *Carlson*, Congress described Communism as "an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks to convert far and wide by an extensive system of schooling and indoctrination… The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions…" and as a "world-wide conspiracy." 50 U.S.C.A. § 781(15) (1950) (quoted in *Carlson*, 342 U.S. at 535 n.21).
130 *Carlson*, 342 U.S. at 535.
131 *Id*. at 536.
132 *Id*. at 529, *see also Salerno*, 481 U.S. at 753-54.
133 *Barenblatt v. United States*, 360 U.S. 109, 128 (1959).
134 *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 193-94 (1991).
135 *Id*.
136 *Demore*, 538 U.S. at 524 (citing Carlson, 342 U.S. at 559 (Frankfurter, J., dissenting)).
137 *Carlson*, 342 U.S. at 541-42; s*ee also Demore*, 538 U.S. at 569 (Souter, J., dissenting).
138 *Carlson*, 342 U.S. at 538 n.31.
139 *Salerno*, 481 U.S. at 748 (emphasis added).
140 *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1983).
141 *Nat'l Center for Immigrants' Rights*, 502 U.S. at 194-95.
142 *Salerno,* 481 U.S. at 751.
143 *Carlson,* 342 U.S. at 543.

144 *Zadvyadas*, 533 U.S. at 695 (quoting Shaughnessy, 435 U.S. at 222-223 (Jackson, J., dissenting)(emphasis deleted)).

145 *Id.* at 696.

146 *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943); see also *Weems v. United States*, 217 U.S. 349, 372 (1910) (asserting that the "predominant political impulse" of proponents of the Bill of Rights "was distrust of power, and they insisted on constitutional limitations against its abuse"); *Barron v. Mayor and City Council of Baltimore,* 32 U.S. 243, 250 (1833) ("In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended.").

147 *Carlson*, 342 U.S. at 556 (Black, J., dissenting).

148 *Browning-Ferris*, 492 U.S. at 263 n. 2 (emphasis added).

149 *See Ingraham*, 430 U.S. at 664.

150 *Browning-Ferris*, 492 U.S. at 260, 263.

151 *Id*. at 263-64.

152 *Id.* at 263, n.3.

153 *E.g., Zadvydas*, 533 U.S. at 693 (applying general due process standards to non-citizens); *Landon*, 459 U.S. at 33 (noting that resident aliens have greater constitutional rights than other non-citizens); *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (aliens have equal protection rights under the Fourteenth Amendment); *Bridges v. Wilson*, 326 U.S. 135, 148 (1945) (holding that resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 483, 492 (1931) (implying Constitution protects illegal aliens under Fifth Amendment); *Yamataya*, 189 U.S. at 86 (affirming applicability of procedural due process limits to deportation of recently arrived alien); *Wong Wing*, 163 U.S. at 238 ("all persons within the territory of the United States are entitled to the protection" of the Constitution); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Equal Protection Clause protects "all persons within the territorial jurisdiction" of the United States); *see also INS v. St. Cyr,* 533 U.S. 289 (2001) (affirming right to judicial review of deportation orders under the Suspension Clause); *INS v. Chadha,* 462 U.S. 919 (1983) (invalidating legislative veto of grant of discretionary relief to deportable alien).

154 *Ingraham*, 430 U.S. at 664 ("Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government"). However, the Supreme Court has not found this dicta dispositive in later cases involving the Eighth Amendment. *See Browning-Ferris*, 492 U.S. at 262 ("Our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments.") (emphasis added); id. at 263 n.3 ("We left open in Ingraham the possibility that the Cruel and Unusual Punishments Clause might find application in some civil cases.").

155 *Ingraham*, 430 U.S. at 669 n. 37; *see also Browning-Ferris*, 492 U.S. at 263, n.3.

156 *Austin v. United States*, 509 U.S. 602, 607-08 (1993).

157 *Id*. at 608-09 (quoted in Browning-Ferris, 492 U.S. at 194).

158 *See supra* Part III.

159 *See* SCHWOERER, *supra* note 64.

160 *See Caballero v. Caplinger,* 914 F.Supp. 1374, 1380 (E.D. La. 1996) (finding that the denial of an opportunity to seek bail is equivalent to the setting of excessive bail), Paxton v. INS, 745 F. Supp. 1261, 1265-66. (E.D. Mich. 1990) (applying the reasoning of Salerno to find that mandatory detention violated the Eighth Amendment); *Agunobi v. Thornburgh*, 745 F. Supp. 533, 537 (N.D. Ill. 1990) (applying the reasoning of Salerno to find that detention without a bail hearing violates the Eighth Amendment); *Leader v. Blackman*, 744 F. Supp. 500, 509 (S.D.N.Y. 1990) ("[A] blanket rule prohibiting a court from even ascertaining whether bail in a particular situation is appropriate would violate [the Eighth] amendment as well.").

161 *Carlson*, 342 U.S. at 544.

162 *Id*. at 557 (Black, J., dissenting)

163 *Id*. at 544-46.

164 *Browing-Ferri*s, 492 U.S. at 263 n. 3.

165 *Carlisle*, 73 S.Ct. at 1182 (Douglas, J., in chambers). *Carlisle* could apply to a single justice for bail pending disposition of his case on appeal. Id. at 1181.

166 *Id*. at 1182.

167 *Id*. (emphasis added).

168 *Id.* The disagreement in Carlson was not over the requirements of the Eighth Amendment, a question which the majority did not reach. 342 U.S. at 544-45; *see supra* notes101-104.

169 *Carlson,* 342 U.S. at 556 (Black, J., dissenting).

170 *Id*. at 557.

171 *Id.* (citing Fong Yue Ting, 149 U.S. at 713-715)*; see also Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (noting that plenary congressional authority in the immigration area is limited "by the Constitution itself").

172 *Zadvydas*, 533 U.S. at 695-96 (quoting Kwong Hai Chew, 344 U.S. at 602).

173 *Zadvydas*, 533 U.S. at 695.

174 *Weems*, 217 U.S. at 373 (quoted in *Browning-Ferris*, 492 U.S. at 273-74).

175 Although *Gregg* deals with the Cruel and Unusual Punishments Clause, as noted earlier, *supra* note 152, the Court has noted that reasoning applicable to one clause of the Eighth Amendment is instructive in interpreting the other clauses.

176 *Trop v. Dulles,* 356 U.S. 86, 100-01 (1958).

177 *Woodson v. North Carolina*, 428 U.S. 280, 294-95 (1976).

178 *See Roper v. Simmons,* 543 U.S. 551, 563 (2005) (examining the statutes of various states prohibiting the execution of minors before declaring that the Eighth Amendment likewise prohibits the execution of minors).

179 *See* GA. CONST. art. I, § 1, para. 17; HAW. CONST. art. I, § 12 (although section found to prohibit the unreasonable denial of bail as well as excessive bail. Huihui v. Shimoda, 64 Haw. 527, 644 P.2d 968 (1982)); MD. DECL. OF RIGHTS. art. 25; MASS. CONST. art. XXVI; N.H. CONST. Part First, art. 33; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; VA. CONST. art. I, § 9; W. VA. CONST. art. III, § 5.

180 *See* ALA. CONST. art. I, § 16; ALASKA CONST. art. I, § 11; ARK. CONST. art. II, § 8; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IOWA CONST. art. I, § 12; KAN. CONST. Bill of Rights § 9; KY. CONST. § 16; ME. CONST. art. I, § 10; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20; MONT. CONST. art. II, § 21; N.J. CONST. art. I, § 11;N.D. CONST. art. I, § 11; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; WASH. CONST. art. I, § 20; WYO. CONST. art. I, § 14.

181 *See* ARIZ. CONST. art. II, § 22; CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 19; FLA. CONST. art. I, § 14; ILL. CONST. art. I, § 9; LA. CONST. art. I, § 18; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 8; OR. CONST. art. I, § 43; PA. CONST. art. I, § 14; UTAH CONST. art. I, § 8; VT. CONST. ch. II, § 40.

182 See IND. CONST. art. I, § 17; MICH. CONST. art. I, § 15; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 7; N.M. CONST. art. II, § 13; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; TEX. CONST. art. I, §§ 11, 11a; WIS. CONST. art. I, § 8.

183 *See* Roper, 543 U.S. at 564-65 (prohibiting the execution of juveniles as cruel and unusual punishment); Atkins v. Virginia, 536 U.S. 304, 313-15 (2002) (prohibiting the execution of the mentally retarded as cruel and unusual punishment).

184 *Roper*, 543 U.S. at 563 (quoting Atkins, 536 U.S. at 312 (internal quotation omitted)).

Kayla Gassman received her JD from NYU School of Law in 2008, where she was Executive Editor of the Journal of International Law and Politics. She was a former intern at the ACLU Immigrants' Rights Project, the Brennan Center for Justice, and the Kentucky Department of Public Advocacy working in capital postconviction. She is currently an Assistant Attorney General at the New York State Office of the Attorney General in the Civil Rights Bureau.