8TH AMENDMENT: EXCESSIVE FINES, CRUEL AND UNUSUAL PUNISHMENTS
MIDDLE LEVEL LESSON PLAN

NATIONAL CONSTITUTION CENTER
Independence Mall • 525 Arch Street • Philadelphia, PA 19106
Grade Levels: 8th
Number of class periods: 1 (approximately 45-minutes)

AUTHOR: ALYSSA DETREUX
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ABOUT THIS LESSON
This lesson introduces students to different viewpoints and debates surrounding the 8th Amendment by using the National Constitution Center’s Interactive Constitution. Students will build understanding of the resources and methods used by justices on the Supreme Court and Constitutional scholars when analyzing and forming opinions about articles, sections, and clauses of the Constitution. Using graphic organizers, students will identify key points from the essays of constitutional scholars Bryan A. Stevenson and John F. Stinneford. Students will be able to trace the historic development of the 8th Amendment with help from the Common Interpretation and matters of debate essays, and use evidence from the readings to explore modern interpretation of the 8th Amendment.

For students studying the Constitution and the Bill of Rights, this lesson helps clarify the role of the Supreme Court and constitutional scholars in interpreting and applying the Constitution today.
COMMON CORE STANDARDS
KEY IDEAS AND DETAILS

CCSS.ELA-Literacy.RH.6- 8.1
Cite specific textual evidence to support analysis of primary and secondary sources.

CCSS.ELA-Literacy.RH.6-8.6
Identify aspects of a text that reveal an author’s point of view or purpose (e.g., loaded language, inclusion or avoidance of particular facts).

ESSENTIAL QUESTIONS:

★ What are the tools and resources used by the Supreme Court and experts who study the Constitution?
★ How are parts of the Constitution understood at different points of history?
★ How do the Supreme Court and experts who study the Constitution understand and apply the 8th Amendment?

MATERIALS:

★ Excerpts from Bryan A. Stevenson’s and John F. Stinneford’s “Matters of Debate” essays from the Interactive Constitution (attached)
  **Full essays available here:**
  “The Eighth Amendment- A Contemporary Perspective” (Stevenson)
  “Against Cruel Innovation: The Original Meaning of the Cruel and Unusual Punishments, and Why it Matters Today” (Stinneford)
★ Sticky notes
★ 8th Amendment graphic organizer (attached)
★ Key points from the Common Interpretation (attached)

OBJECTIVES:

★ Students will develop understandings of the tools and resources used by the Supreme Court and constitutional scholars for interpretation and application of the Constitution.
★ Understand the historical origins, evolution, and modern debates of interpretations of the 8th Amendment.
★ Identify and compare arguments of constitutional scholars on the 8th Amendment.
PROCEDURE:

1. **THINK AND WRITE: Preview / Hook Activity / Do Now (2-3 minutes):**
   As the students walk into the class, they will see the symbol for the 8th Amendment from the Interactive Constitution. Have the students describe the details of the symbol and identify what they think they will discuss during the lesson.

2. **INTRO:** Use the student observations about the symbol to start a broader discussion about the 8th Amendment, what the students will be doing, and why they are going to be doing it. Use the following questions to guide the discussion.
   - Where are specific rights of American citizens protected? (Students will say the Constitution or Bill of Rights)
   - Who interprets, or answers legal questions about, the Constitution? (The students might say the government, the President, but they will likely say the Supreme Court.)
   - How might the justices on the Supreme Court form their opinions? (Students might say personal experience, history, etc. The Justices actually form their opinions based on the work of constitutional experts. They also form ideas working with their clerks, staff who help look at history and modern debates.)
   - Where do clerks get their information? (They get their information from constitutional scholars, too.)
   - “So, today, we will investigate opinions from top constitutional scholars—just like clerks and Justices at the Supreme Court to better understand debates about the 8th Amendment.”

   This may be a good point to emphasize that Supreme Court Justices use more than their personal opinions and beliefs to interpret the Constitution when making rulings. The students will not use their personal political opinions during this lesson, either. They will look at the arguments put forth by the constitutional scholars and decide who makes the better argument.

3. **SHORT LECTURE (4-6 minutes):** Common Interpretation: The Common Interpretation essay on the 8th Amendment was written by Bryan A. Stevenson (Professor of Clinical Law, New York University School of Law, and Executive Director, Equal Justice Initiative) and John F. Stinneford (Professor of Law and Assistant Director, Criminal Justice Center, University of Florida Levin College of Law)—leading conservative and liberal scholars on the 8th Amendment. It includes information and interpretations on which the two scholars agree. It provides a foundation of common ground before students consider opposing viewpoints about how we might interpret the Amendment in the future.
Building on student observations, the teacher will explain the Common Interpretation of the 8th Amendment, providing the “big points” from the common interpretation and the historical context of the amendment. Students should write notes in the space for the common interpretation on the graphic organizer.

**Key Points from the Common Interpretation:**

- The 8th Amendment prohibits the federal government from using harsh penalties for criminal defendants, either as the price for pretrial release or as punishment for crime after conviction. “Cruel and Unusual Punishments Clause” is most important and controversial part of the amendment.
- Modern debates: What does it mean for a punishment to be “cruel and unusual”? How do we measure cruelty? If punishment is cruel, why should we care if it is “unusual”?
- Founding Era: The phrase “cruel and unusual comes from England in 1689. The Constitution made the federal government more powerful than under the Articles of Confederation. Significant new power was power to create federal crimes and to punish those who committed them. Opponents of the Constitution feared this allowed Congress to use cruel punishments to oppress the people.
- Today: Most people also agree “Cruel and Unusual Punishments Clause” limits state power as well as federal power.
- Questions today: How should the Court use to decide if punishment is cruel? Does the Amendment only prohibit harsh methods of punishment, or does it prohibit punishment that does not match the crime (a life sentence for chewing gum in school)? Does the Amendment prohibit the death penalty? Do modern methods of punishment violate the Amendment?

4. **GROUP ACTIVITY (12-14 minutes):** Break students into groups of 3 or 4. Each group will read the excerpts from the “Matters of Debate” essays by Bryan A. Stevenson and John F. Stinneford. In these essays the same scholars who wrote the Common Interpretation write individual essays about how they believe the Amendment should be interpreted moving forward.

As the students are reading, they should identify the thesis or “main point” of each scholar by highlighting, circling, or underlining the thesis on each side of the graphic organizer. This will help the students focus on the argument the scholar is trying to make.

After finding the thesis for each scholar, students should write at least one question they have for the scholars.

- “If the scholars were in the room with us, today, what is something you would want to ask them about their opinion? What would need to have clarified to understand their argument?”
- While students complete these the teacher should post the names “Bryan A. Stevenson” and “John F. Stinneford” on opposite sides of the classroom.
Teacher will circulate through the room to support students, as needed, with isolating the thesis, understanding new vocabulary, etc.

Once they identify the theses and develop questions, each group should, then, write each thesis and two of their questions on separate sticky notes (four, total, for each group). Students should place their sticky notes—with the theses and questions—on the wall under the corresponding scholars’ names.

Having the students use sticky notes to report their findings and question at the front of the room allows the teacher to quickly assess the answers from all the groups at once rather than going around the room group by group. The anonymity also removes the pressure of students being “put on the spot” when reporting out the theses or asking their questions.

5. **SHARE (6-8 minutes):** Once every group has posted their theses and questions, use their findings and questions to facilitate discussion about Stevenson’s essay and Stinneford’s essay. This can help as a quick assessment to make sure each group knows what each scholar is trying to say. The teacher will be able to clarify any questions the students may have and highlight the key arguments of each scholar.

Teacher will remind the students, as needed, that they are analyzing the scholars’ constitutional arguments—not having a political debate.

NOTE: The teacher will answer the “Questions for Stevenson” and “Questions for Stinneford” based on the scholars’ essay. So she/he will need to be familiar with the full text of those essays before using this lesson.

- **Full essays available here:**
  - “The Eighth Amendment- A Contemporary Perspective” (Stevenson)
  - “Against Cruel Innovation: The Original Meaning of the Cruel and Unusual Punishments, and Why it Matters Today” (Stinneford)

6. **LINE-UP (6-8 minutes):** After the students have gathered information from the common interpretation and the essays, ask the students to use the understandings they developed from the readings and discussion (not their political opinions) to stand on the side of room near the name of the scholar they think does a **better job of providing an understanding of how the Amendment should be applied**. Explain to the students that they can stand somewhere in the middle if they do not fully agree with one side or the other, if they have more questions, or if they need more information. Once the students have picked a place to stand, lead a discussion asking some students why they stood where they did reminding the student that they should relate their answer back to the history, common interpretation, and scholar essays. (It is important to remind students throughout that they are considering the arguments are presented in the lecture, essay excerpts, and whole class discussion—they are NOT debating political/personal opinions.)
* Ask a student standing near Stevenson to explain why they think Stevenson offers the stronger argument.
* Ask a student standing near Stinneford to explain why they think Stinneford offers the stronger argument.
* Ask a student in the middle why they are standing in the middle.
* Ask a student standing near Stevenson to explain why they think someone else might think Stinneford offers the stronger argument (get the students to consider the other side of the argument)
* Ask a student standing near Stinneford to explain why they think someone else might think Stevenson offers the stronger argument.

7. **REFLECTION/EXIT SLIP (2 minutes):** Students will then go back to their seats and write a brief reflection on how their understandings of the scholars’ viewpoint affected their understanding of the amendment. This, along with the work from the rest of the activity, will be on their 8th Amendment graphic organizer and can be collected to assess class participation and learning outcomes.
NAME:

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<thead>
<tr>
<th><strong>BRYAN A. STEVENSON:</strong></th>
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<tr>
<td>The greatness of our Constitution and America itself is dependent on how the Constitution is interpreted to ensure that all people are treated equally and fairly and have the same opportunity to exercise the rights to life, liberty, and the pursuit of happiness as the exclusive group of men who authored the Constitution. As our notions of fairness, equality, and justice have evolved, so too must our interpretation of the Constitution. No provision of the Constitution enshrines this principle more clearly than the Eighth Amendment. For progressives, the Constitution must evolve and be interpreted so that the rights of people who are less favored, less protected, and less influential are not sacrificed to serve the interests of the powerful and the popular.</td>
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<td>There is nothing in the Constitution that gives unelected judges the authority to overturn laws enacted by democratically elected legislatures, based on the judges’ own subjective ideas of what current “standards of decency” require. The appropriate benchmark for determining whether a punishment is cruel and unusual is neither the subjective feelings of the current Supreme Court nor the outdated standards of 1791. Rather, the benchmark is longstanding prior practice. If a given punishment has been continuously used for a very long time, this is powerful evidence that multiple generations of Americans have considered it reasonable and just. This does not mean that any punishment that was once part of our tradition can still be used today. If a once-traditional punishment falls out of usage for several generations, it becomes unusual. If a legislature then tries to reintroduce it, courts should compare how harsh it is relative to those punishment practices that are still part of our tradition.</td>
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8TH AMENDMENT

Notes on the “Common Interpretation”. What are the things on which the scholars agree?

- The 8th Amendment prohibits the federal government from using harsh penalties for criminal defendants, either as the price for pretrial release or as punishment for crime after conviction. “Cruel and Unusual Punishments Clause” is most important and controversial part of the amendment.
- Modern debates: What does it mean for a punishment to be “cruel and unusual”? How do we measure cruelty? If punishment is cruel, why should we care if it is “unusual”?
- Founding Era: The phrase “cruel and unusual comes from England in 1689. The Constitution made the federal government more powerful than under the Articles of Confederation. Significant new power was power to create federal crimes and to punish those who committed them. Opponents of the Constitution feared this allowed Congress to use cruel punishments to oppress the people.
- Today: Most people also agree “Cruel and Unusual Punishments Clause” limits state power as well as federal power.
- Questions today: How should the Court use to decide if punishment is cruel? Does the Amendment only prohibit harsh methods of punishment, or does it prohibit punishment that does not match the crime (a life sentence for chewing gum in school)? Does the Amendment prohibit the death penalty? Do modern methods of punishment violate the Amendment?

BRYAN A. STEVENSON:
The greatness of our Constitution and America itself is dependent on how the Constitution is interpreted to ensure that all people are treated equally and fairly and have the same opportunity to exercise the rights to life, liberty, and the pursuit of happiness as the exclusive group of men who authored the Constitution. As our notions of fairness, equality, and justice have evolved, so too must our interpretation of the Constitution. No provision of the Constitution enshrines this principle more clearly than the Eighth Amendment.

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QUESTION FOR STEVENSON:

How do you understand current debates about this Amendment based on the “Common Interpretation” and what Stevenson and Stinneford say? (Why did you stand where you did when everyone lined up and why did you not stand somewhere else?)
EIGHTH AMENDMENT, FROM THE INTERACTIVE CONSTITUTION

EXCESSIVE FINES, CRUEL AND UNUSUAL PUNISHMENT

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

JOINT STATEMENT: BRYAN STEVENSON AND JOHN STINNEFORD

The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” This amendment prohibits the federal government from imposing unduly harsh penalties on criminal defendants, either as the price for obtaining pretrial release or as punishment for crime after conviction.

The Cruel and Unusual Punishments Clause is the most important and controversial part of the Eighth Amendment. In some ways, the Clause is shrouded in mystery. What does it mean for a punishment to be “cruel and unusual”? How do we measure a punishment’s cruelty? And if a punishment is cruel, why should we care whether it is “unusual”?

We do know some things about the history of the phrase “cruel and unusual punishments.” In 1689 – a full century before the ratification of the United States Constitution – England adopted a Bill of Rights that prohibited “cruell and unusuall punishments.” In 1776, George Mason included a prohibition of cruel and unusual punishments in the Declaration of Rights he drafted for the Commonwealth of Virginia. In 1791, this same prohibition became the central component of the Eighth Amendment to the United States Constitution.

When the United States Constitution was first ratified by the states, it did not contain a Bill of Rights, and it did not prohibit cruel and unusual punishments. These protections were not added until after the Constitution was ratified. The debates that occurred while the states were deciding whether to ratify the Constitution shed some light on the meaning of the Cruel and Unusual Punishments Clause, because they show why many people thought this Clause was needed.

The proposed Constitution made the federal government much more powerful than it had been under the Articles of Confederation. One of the most significant of these new powers was the power to create federal crimes and to punish those who committed them. Opponents of the Constitution feared that this new power would allow Congress to use cruel punishments as a tool for oppressing the people. For example, Abraham Holmes argued that Congress might repeat the abuses of “that diabolical institution, the Inquisition,” and start imposing torture on those convicted of federal crimes: “They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.” Patrick Henry asserted, even more pointedly than Holmes, that the lack of a prohibition of cruel and unusual punishments meant that Congress could use punishment as a tool of oppression: “Congress . . . . may introduce the practice
of France, Spain, and Germany of torturing, to extort a confession of the crime. They . . . will tell you that there is such a necessity of strengthening the arm of government, that they must . . . extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.” Largely as a result of these objections, the Constitution was amended to prohibit cruel and unusual punishments.

As these debates demonstrate, the Cruel and Unusual Punishments Clause clearly prohibits “barbaric” methods of punishment. If the federal government tried to bring back the rack, or thumbscrews, or gibbets as instruments of punishment, such efforts would pretty clearly violate the Eighth Amendment. Most people also agree that the Cruel and Unusual Punishments Clause now limits state power as well as federal power, because the Fourteenth Amendment prohibits states from abridging “the privileges or immunities of citizens of the United States” and from depriving “any person of life, liberty, or property, without due process of law.”

But once we get beyond these areas of agreement, there are many areas of passionate disagreement concerning the meaning and application of the Cruel and Unusual Punishments Clause: First and foremost, what standard should the Court use in deciding whether a punishment is unconstitutionally cruel? Should it look to the standards of 1791, when the Eighth Amendment was adopted? Should it look to contemporary public opinion? Should it exercise its own moral judgment, irrespective of whether it is supported by societal consensus? Should it look to some other standard?

Second, does the Cruel and Unusual Punishments Clause only prohibit barbaric methods of punishment, or does it also prohibit punishments that are disproportionate to the offense? For example, would it violate the Eighth Amendment to impose a life sentence for a parking violation? Third, does the Cruel and Unusual Punishments Clause prohibit the death penalty? Many argue that capital punishment fails to advance any public good, that it is of a past era, and it should be eliminated. Proponents of the death penalty argue that some people have committed such atrocious crimes that they deserve death, and that the death penalty may deter others from committing atrocious crimes. They also point out that the punishment is authorized in a majority of states, and public opinion polls continue to show broad support for it.

Finally, are some modern methods of punishment – such as the extended use of solitary confinement, or the use of a three-drug “cocktail” to execute offenders – sufficiently “barbaric” to violate the Eighth Amendment?

There is not time or space here to answer all these questions, but the essays that follow will demonstrate differing ways of approaching several of them.