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# The Death Penalty and Justice Scalia's Lines

J. Richard Broughton

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## THE DEATH PENALTY AND JUSTICE SCALIA'S LINES

*J. Richard Broughton\**

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### I. INTRODUCTION

“There are now no lines.”<sup>1</sup>

When the Supreme Court held in 1988 that the Independent Counsel provisions of the Ethics in Government Act did not violate the separation of powers, Antonin Scalia could not contain his frustration. The Court had just told the Nation that the Constitution permitted Congress to enact a law that allowed federal judges to appoint a prosecutor—who would have the full weight of the Justice Department behind her, and who could be removed only for good cause—because she is an inferior officer, and Congress’s restriction on her removal was not *too* intrusive with respect to the President’s constitutional functions.<sup>2</sup> To Scalia, this case—the wolf that came as a wolf<sup>3</sup>—proved why the

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\* Associate Dean for Academic Affairs & Associate Professor of Law, University of Detroit Mercy. I appreciate the invitation to participate in this symposium. Some of the ideas expressed here are derived from my presentation at the *Michigan Journal of Law Reform’s* symposium on the future of the death penalty, held in February 2016 (only days before Justice Scalia’s death). I am grateful for the feedback I received during that event. I am also grateful to Trish McDermott for her excellent editorial and research assistance.

1. *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).  
2. *Id.*  
3. *Id.* at 699 (Scalia, J., dissenting).

rule of law demands a decent respect for the formal arrangements of American government. Those forms create space within which each department of government can function effectively in carrying out its powers.<sup>4</sup> They also create boundaries that prevent encroachments by ambitious actors in the other branches, vying for more power, concentrating authority.<sup>5</sup> The rule of law in a constitutional republic, then, requires adherence to formalities, and those formalities require the drawing of lines. Scalia therefore lamented: there were now no lines. When the Court upheld the federal law in *Morrison v. Olson*, it undermined the virtue of lines, making the ones between the three branches fuzzy, at best. Scalia's lone dissenting voice reminded us that, in constitutional government, even fuzzy lines are no lines at all.

The formality of lines was critical to the world in which Justice Scalia lived and worked—to his perspectives on the law and the Constitution, the role of judges, and (one might credibly argue) life.<sup>6</sup> In political life, lines help to establish authority, telling actors what they are empowered to do, and also to restrain. Constitutional government—like life—requires a proper understanding, and exercise, of restraint. “Long live formalism!,” Scalia once declared.<sup>7</sup> “It is what makes a government a government of laws and not of men.”<sup>8</sup>

Unsurprisingly, much of Scalia's work in the areas of criminal law and procedure was devoted to understanding and preserving appropriate lines. Scalia not only safeguarded the Government's power to define crimes, but also was prepared to enforce the lines that limited that power. Sometimes he sided with the Government, sometimes with the criminal defendant, in ways that confounded conventional labels that are often given to the Justices.<sup>9</sup> When he interpreted federal criminal

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4. See HARVEY C. MANSFIELD, *AMERICA'S CONSTITUTIONAL SOUL* 16 (1991).

5. See THE FEDERALIST NO. 51, at 322-23 (James Madison) (Clinton Rossiter, ed. 1961).

6. See Christopher Landau, *The Anti-Casual Justice*, 39 HARV. J. L. & PUB. POL'Y 579 (2016). Landau, a former Scalia clerk, recounts the annual Scalia-law-clerk reunion: “a black-tie dinner in the West Conference Room of the Supreme Court on the first Saturday night in May. Champagne and sirlain. Spouses or announced fiancé(e)s only.” *Id.* Landau further observed that “[t]he reunion fit the man. In a society in which it was fashionable to be casual, Antonin Scalia was not . . . I cannot imagine the Scalia reunion in the format of a backyard barbecue with the Justice flipping burgers.” *Id.* Though Scalia was “warm and engaging,” still, “he clearly believed, in matters both large and small, in formality and ritual.” *Id.*

7. See Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW* 25 (1997) (hereinafter *Common Law Courts*).

8. *Id.*

9. See Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005).

statutes, he favored his own brand of discerning meaning that championed precision and an understanding of English usage.<sup>10</sup> He agreed that there were limits to the scope of Congress's ability to define crimes using the commerce power,<sup>11</sup> but also he provided a key vote and distinguishing rationale for allowing Congress to use the commerce power, incident to the Necessary and Proper Clause, to combat drug trafficking.<sup>12</sup> He wrote the definitive opinion on the scope of the Second Amendment's right to keep and bear arms, favoring an individual, rather than collective, right.<sup>13</sup> But he also confounded the more libertarian aspects of the opinion by empowering criminal law-making with respect to firearms control, invoking limits on the possession of guns by felons and the mentally ill and restrictions on commercial sale, carrying in sensitive public places, and the possession of dangerous and unusual weapons.<sup>14</sup>

In criminal procedure, he wrote deeply influential opinions on the meaning of the Sixth Amendment, leading the Court to adopt—or at least grapple with—new (or, in Scalia's view, old) understandings of the right to trial by jury<sup>15</sup> and to confront witnesses.<sup>16</sup> He even favored the constitutional right to self-representation<sup>17</sup> because, as he also articulated in the *Miranda* area,<sup>18</sup> the Constitution does not create barriers to a criminal defendant's autonomous choice to do something unwise, even foolish—whether it be confessing (which is, after all, good for the soul) or eschewing the assistance of a lawyer. He almost single-handedly revived the trespass doctrine in Fourth Amendment search law,<sup>19</sup> marrying the Fourth Amendment's text to the common law and accommodating concerns about modern technology. And it was his concurring opinion in *Thornton v. United States*<sup>20</sup> that helped reshape

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10. See, e.g., *Whitfield v. United States*, 135 S. Ct. 785 (2015) (explaining the meaning of the forced accompaniment provision of the federal bank robbery statute).

11. See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

12. See *Gonzales v. Raich*, 545 U.S. 1, 34-42 (2005) (Scalia, J., concurring).

13. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

14. *Id.* at 626-27.

15. See *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004).

16. See *Crawford v. Washington*, 541 U.S. 36 (2004); *Coy v. Iowa*, 487 U.S. 1012 (1987).

17. See *Indiana v. Edwards*, 554 U.S. 164, 186-87 (2008) (Scalia, J., dissenting) (“the dignity at issue is the supreme human dignity of being master of one’s fate rather than a ward of the State—the dignity of individual choice.”).

18. See *Minnick v. Mississippi*, 498 U.S. 146, 166-67 (1990) (Scalia, J., dissenting).

19. See *United States v. Jones*, 132 S. Ct. 945 (2012); *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

20. *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring).

the rules for searches of a vehicle incident to arrest that would emerge later in *Arizona v. Gant*.<sup>21</sup> At the same time, he advocated sharp limits on the scope of the Fourth Amendment exclusionary rule.<sup>22</sup>

His work in criminal law and procedure was both substantial and influential, and it was not subject to easy, but ultimately confused and meaningless, labeling as “pro-defendant” or “pro-government,” “tough-on-crime” or “soft.” Instead, he was, as he might describe it, pro-text and pro-rule-of-law (and he saw those two things as closely connected). He favored enforcing formal constitutional arrangements regardless of the party they favored in litigation. He championed constitutional equilibrium, ever vigilant about the circumscribed role of judges in a constitutional democracy and skeptical of the power of courts to spare citizens from the burdens and tragedies of political life. In no area of criminal justice adjudication was that more evident than in the area of capital punishment. This paper, therefore, examines Scalia’s body of work in death penalty cases, a body of work defined by his admonition that judges be modest in reviewing challenges to a sentencing practice that Scalia found to be both morally and constitutionally acceptable. New challenges to the constitutionality of capital punishment are arising, and Scalia’s death has created anew the possibility of judicial abolition. This paper further explores that possibility and argues that the lines Scalia advocated may well be in jeopardy again.

## II. SCALIA ON LINES AND THE DEATH PENALTY

For Scalia, the relationship between constitutional rights and the legitimate exercise of constitutional power could prove especially problematic when the right that a court recognizes is either unenumerated or otherwise has no basis in constitutional text, structure, history, or tradition.<sup>23</sup> When the judiciary expands the sphere of constitutional protection for rights, it necessarily restricts the sphere of permissible political action. And where the judiciary does so, Scalia believed, illegitimately—such as by adhering to a methodology that views that Constitution as a “living document” that embodies the values of each generation, which unelected judges then endeavor to apply through constitutional adjudication—its restriction of government power can have pernicious effects on democracy and the capacity for good

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21. 556 U.S. 332 (2009).

22. See *Hudson v. Michigan*, 547 U.S. 586 (2006).

23. See J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia’s Unwritten Constitution*, 103 W. VA. L. REV. 19, 38-39 (2000).

citizens to govern themselves safely and effectively.<sup>24</sup> Some things, good or not, are simply not the business of judges in a constitutional republic.

So it was, in Scalia's view, with capital punishment.

#### A. *On Capital Punishment . . . and God*

Scalia discussed capital punishment extensively in his extrajudicial writings, which is noteworthy because it offers the reader a window into his thinking outside of the context of specific cases and the precise issues presented therein. Also noteworthy is that his own adherence to Catholicism did not lead him to the conventional wisdom about the Church and the death penalty.

He was fond of using capital punishment as an example of his originalism and of the difficulties, and limits, presented by Living Constitutionalism. In his initial essay in *A Matter of Interpretation*, Scalia noted that three of his colleagues on the Court (Justices Brennan, Marshall, and Blackmun) had concluded that the death penalty was, in all circumstances, cruel and unusual and in violation of the Eighth Amendment.<sup>25</sup> But Scalia noted that the death penalty "is explicitly contemplated in the Constitution"<sup>26</sup>—in the Fifth Amendment's Due Process Clause (which forbids the government from depriving a person of "life" without due process)<sup>27</sup> and its Indictment Clause (which refers specifically to the indictment of "capital" crimes).<sup>28</sup> This theme appears prominently in Scalia's judicial writings on capital punishment<sup>29</sup> and was one that he developed even earlier in writing about originalism and constitutional interpretation.<sup>30</sup> He thus chided his Living Constitutionalist colleagues for their conclusion that something that the Constitution acknowledges could later "*become* unconstitutional."<sup>31</sup> The

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24. See Scalia, *Common Law Courts*, *supra* note 7, at 41-42.

25. *Id.* at 46.

26. *Id.* For a critical analysis of this argument, see Joseph Blocher, *The Death Penalty and the Fifth Amendment*, 111 NW. U. L. REV. ONLINE 1, 3 (2016) (contending that the Fifth Amendment Argument "itself carries no weight" until Eighth Amendment doctrine changes, and stating that the constitutionality of capital punishment should be evaluated "without the distraction of the Fifth Amendment.").

27. U.S. CONST. amend V.

28. *Id.*

29. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring); *Baze v. Rees*, 553 U.S. 35, 87 (2008) (Scalia, J., concurring in the judgment).

30. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (stating "the death penalty was not cruel and unusual punishment because it is referred to in the Constitution itself").

31. Scalia, *Common Law Courts*, *supra* note 7, at 46.

political community may choose to abandon capital punishment, he noted, but the Constitution does not compel such a policy. Nor, he thought, does the vacant concept of “evolving standards of decency” move us closer to such a conclusion.<sup>32</sup> Rather than accurately informing us of the moral values of the Eighth Amendment, such a concept merely empowers judges to forever alter criminal sentencing law by imposing on the Nation their own views of moral progress.<sup>33</sup>

His later essay, *God’s Justice, And Ours*, more fully explored his views on the subject.<sup>34</sup> Although he did not advocate the imposition of capital punishment, he concluded in this essay that it was simply not immoral—an important point, because, in his view, he could not be a judge if he believed his role in the “machinery of death” resulted in his approval of a system that was immoral.<sup>35</sup> He said that, for the judge who believes the death penalty to be immoral, the choice is resignation rather than to ignore the law and to sabotage capital cases.<sup>36</sup> He openly argued against Pope John Paul II’s 1995 encyclical, *Evangelicum Vitae*, which viewed capital punishment as limited to “cases of absolute necessity: in other words, when it would not be possible otherwise to defend society.”<sup>37</sup> Today, however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically nonexistent.<sup>38</sup> As Scalia argued, “[h]ow in the world can modernity’s ‘steady improvements in the organization of the penal system’ render the death penalty less condign for a particularly heinous crime?”<sup>39</sup> He cited Saint Paul and Thomas More as authorities on the morality of lawfully constituted authority to impose death as a punishment, alluded to the murders committed by Timothy McVeigh and the perpetrators of the September 11 attacks, and viewed technological advancements as increasing, rather than diminishing, the individual’s capacity for evil.<sup>40</sup> “If just retribution is a legitimate purpose (indeed, the principal legitimate purpose) of capital punishment, can one possibly say with a straight face that nowadays death would ‘rarely if

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32. *Id.* at 40 (referring to the Court’s use of “evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958), to guide its view of the scope of the Eighth Amendment).

33. *Id.* at 40-41.

34. See Antonin Scalia, *God’s Justice, And Ours*, FIRST THINGS, (May 2002), <https://www.firstthings.com/article/2002/05/gods-justice-and-ours> (hereinafter *God’s Justice*).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

ever' be appropriate?"<sup>41</sup>

Add to Justice Scalia's sense of formality and traditionalism the fact that he regularly attended one of two Latin Masses in the Washington, D.C. area.<sup>42</sup> It was, therefore, no surprise that he would sarcastically refer to the "latest, hot-off-the-presses version" of the catechism that viewed capital punishment so narrowly as to make it nearly impossible to implement.<sup>43</sup> Nor is it surprising that he would conclude that his disagreement with the papal encyclical and the "new" views of the Church did not contradict his obligations as a Catholic. As he said, he had consulted "canonical experts" who informed him that neither *Evangelicum Vitae* nor the latest catechism was binding on practicing Catholics.<sup>44</sup>

The essay is rich and revealing. Scalia was willing to challenge the latest views on Christian thought about the death penalty when they would "sweep aside" millennia of Christian teaching.<sup>45</sup> His approach to constitutional adjudication took similar form. As he said in his essay, and would repeat on other occasions,<sup>46</sup> "the Constitution that I interpret and apply is not living but dead—or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted."<sup>47</sup> As applied

41. *Id.* To McVeigh, the September 11 attackers, and many others, one might also add Johnathan and Reginald Carr, whose case came before the Court in the October 2015 Term and who were convicted and sentenced to death for horrific crimes that became known as the Wichita Massacre. *See Kansas v. Carr*, 136 S. Ct. 633 (2016). The Court, in an opinion by Justice Scalia, held that the Eighth Amendment did not require the Carr brothers' jury to be informed that mitigators do not have to be proven beyond a reasonable doubt. *Id.* at 642. This would be Scalia's final opinion for the Court.

42. *See* Kenneth J. Wolfe, *Scalia the Music Critic and Pew Policeman*, WALL ST. J. (Feb. 18, 2016), <http://www.wsj.com/articles/scalia-the-music-critic-and-pew-policeman-1455840082>. Steven Calabresi also shares a humorous account that highlights Justice Scalia's traditionalism in matters of faith. *See* Steven G. Calabresi, *The Unknown Achievements of Justice Scalia*, 39 HARV. J. L. & PUB. POL'Y 576 (2016). Calabresi, a former Scalia clerk, tells of the time immediately following Scalia's nomination to the United States Court of Appeals, when he was still a law professor at the University of Chicago. As he was undergoing the requisite background investigation, FBI agents contacted Scalia's priest in Chicago. *See id.* at 577-78. As Calabresi tells the story, Scalia and his family "refused to attend mass at the [University of Chicago's] Catholic chapel, which they considered to be too liberal and too much in favor of the Vatican II reforms. Instead, they went to mass in Chicago's ethnic Italian neighborhood, where the priest was more conservative and orthodox." *Id.* at 578. Once after mass, the priest pulled Scalia aside and expressed worry: "'Nino, it is the FBI. They were here yesterday asking all kinds of questions about you. But, Nino, don't worry—I told them nothing!'" *Id.*

43. Scalia, *God's Justice*, *supra* note 34.

44. *Id.*

45. *Id.*

46. *See, e.g.,* Scalia, *Common Law Courts*, *supra* note 7, at 45-47.

47. Scalia, *God's Justice*, *supra* note 34.

specifically to the death penalty, “the constitutionality of the death penalty is not a difficult, soul-wrenching question. It was clearly permitted when the Eighth Amendment was adopted . . . And so it is clearly permitted today.”<sup>48</sup> If there is to be “evolution” on the acceptability of the death penalty, then “the instrument[s] of evolution” are the legislative branches of government at the federal and state levels, who, at their discretion, may “restrict or abolish the death penalty as they wish.”<sup>49</sup>

Justice Scalia’s position was that although the morality of the death penalty enabled him to continue to sit on cases involving that punishment, his personal or political views about the death penalty were not relevant to exercising judicial power with respect to constitutional challenges to the death penalty. And his line-drawing in constitutional adjudication involving the death penalty is consistent with the understanding of the judge’s formal role in a capital case that he articulated in these essays.

### *B. On the Constitutionality of Capital Punishment*

Claims regarding the constitutionality of the death penalty—an issue once thought settled after the Court’s 1976 decision in *Gregg v. Georgia*<sup>50</sup>—are making a comeback. There is even a movement among American conservatives to abolish capital punishment, which, though small today, should be taken seriously by every death penalty supporter.<sup>51</sup> It is a needle-moving effort. Abolition talk is alive and well. This is despite the fact, as Scalia and others on the Court repeatedly reminded us, that the Constitution expressly acknowledges the existence

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48. *Id.*

49. *Id.*

50. *Gregg v. Georgia*, 428 U.S. 153 (1976).

51. I develop this notion further in another forthcoming paper. See J. Richard Broughton, *Hate Crimes, the Death Penalty, and Criminal Justice Reform*, 37 MITCHELL HAMLINE J. PUB. L. & POL’Y 185 (2017) (*Hate Crimes*). For some notable commentary on the “conservative case”, see George F. Will, *Capital Punishment’s Slow Death*, WASH. POST (May 20, 2015), [http://www.washingtonpost.com/opinions/capital-punishments-slow-death/2015/05/20/f3c14d32-fe4f-11e4-8b6c-0dcce21e223d\\_story.html](http://www.washingtonpost.com/opinions/capital-punishments-slow-death/2015/05/20/f3c14d32-fe4f-11e4-8b6c-0dcce21e223d_story.html); Leon Neyfakh, *The conservative case against the death penalty*, BOSTON GLOBE (May 25, 2014), <https://www.bostonglobe.com/ideas/2014/05/24/the-conservative-case-against-death-penalty/6NsOMqKbpJeIVMllynelCIM/story.html>; S.E. Cupp, *The conservative case against the death penalty*, N.Y. DAILY NEWS (May 6, 2014), <http://www.nydailynews.com/opinion/conservative-case-death-penalty-article-1.1781639>; Mary Kate Cary, *The Conservative Case Against the Death Penalty*, U.S. NEWS & WORLD REP. (March 30, 2011), <http://www.usnews.com/opinion/articles/2011/03/30/the-conservative-case-against-the-death-penalty>.

of capital punishment.<sup>52</sup> Of course, whether its use violates the Eighth Amendment may be a separate matter,<sup>53</sup> and its recognition in the Fifth Amendment is not conclusive of its validity as to *all* applications; rather, its recognition in the Fifth Amendment should be a critical factor in determining whether *any* application of capital punishment is constitutionally permissible. Moreover, abolition talk is increasingly fashionable despite public opinion remaining supportive of capital punishment,<sup>54</sup> and despite the fact that a clear majority of American jurisdictions still maintain the death penalty.<sup>55</sup> Claims that the death penalty is *per se* unconstitutional also persist despite the reality that abolition would mean concluding that the Constitution forbids applying the death penalty to *any* defendant—no matter how heinous, cruel, or depraved the defendant's crime, no matter how strong the evidence against him, and no matter how powerful the aggravators or how weak the mitigators.<sup>56</sup>

Arguments for invalidating the death penalty also rely substantially upon claims about the risk of executing innocents.<sup>57</sup> Those are, of course, powerful claims. But they do not explain why every death

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52. See *Glossip v. Gross*, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring); *Baze v. Rees*, 553 U.S. 35, 87 (2008) (Scalia, J., concurring in the judgment); *Furman v. Georgia*, 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting); *Id.* at 419 (Powell, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325, 350-51 (1976) (White, J., dissenting).

53. See Blocher, *supra* note 26, at 3.

54. See J. Richard Broughton, *Hate Crimes, the Death Penalty, and Criminal Justice Reform*, 37 MITCHELL HAMLINE J. PUB. L. & POL'Y 185 (2017) (*Hate Crimes*).

55. See *States and Capital Punishment*, National Conference of State Legislatures (Sept. 6, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx>. The information about Nebraska requires clarification, however: although Nebraska has legislatively abolished the death penalty, that decision is subject to reconsideration by ballot referendum this year. Meanwhile, California—a death penalty state—has two ballot measures before voters in 2016 that would either reform or end the death penalty there. For more on each State's activity, see Douglas Berman, *Might the Nebraska death penalty repeal referendum in 2016 be even more important symbolically than the dueling California capital initiatives?*, Sentencing Law & Policy Blog, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2016/07/might-the-nebraska-death-penalty-repeal-referendum-in-2016-be-even-more-important-symbolically-than.html](http://sentencing.typepad.com/sentencing_law_and_policy/2016/07/might-the-nebraska-death-penalty-repeal-referendum-in-2016-be-even-more-important-symbolically-than.html) (posted July 6, 2016).

56. See HEARING ON OVERSIGHT OF THE FEDERAL DEATH PENALTY, SUBCOMM. ON THE CONSTITUTION, SENATE COMM. ON THE JUDICIARY (June 25, 2007) (testimony of William G. Otis) (“the central reason for opposing abolition of the death penalty is that it is a one-size-fits-all proposition.”).

57. See generally Michael L. Radelet, *Given That We Know We Sometimes Convict Innocent People, What, If Anything, Does That Say About the Death Penalty?: The Role of the Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH L. REV. 199 (2008); JIM DWYER, ET. AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996).

sentence should be forbidden. The risk of executing innocents is simply not the same in every capital case. In some cases, the risk is negligible, or even non-existent.<sup>58</sup> Moreover, opposing imposition of the death penalty upon an innocent person tells us very little about the proper punishment for a guilty person. Why should the risk of executing innocents impede the execution of, for example, an unquestionably guilty killer like Timothy McVeigh or Dzhokhar Tsarnaev? Political life brings risks, risks that sometimes unfortunately implicate innocents. The political community can decide whether to tolerate those risks.<sup>59</sup> But it often does (for example, in war, in policing, or in defining the law of self-defense).

Still, the argument for abolition—and particularly for judicial abolition, which some abolitionists appear to prefer<sup>60</sup>—survives. And Justice Breyer’s dissenting opinion in *Glossip v. Gross*<sup>61</sup> formulated the outlines for such a claim, doing so as passionately as any modern judicial opinion, focusing (predictably) upon geographic biases, arbitrariness in selection, and the risk of executing innocents.<sup>62</sup> Although Justice Breyer—joined by Justice Ginsburg—did not call for the Court to once and for all end the use of capital punishment, his opinion noted his view that it was “highly likely” that the death penalty violated the Eighth Amendment, and called for briefing and argument on the question.<sup>63</sup> He then repeated his call more recently in his dissents from the denial of certiorari in *Tucker v. Louisiana*<sup>64</sup> and *Boyer v. Davis*.<sup>65</sup> In *Tucker*, he noted that the defendant had received the death penalty in Caddo Parish, and speculated that perhaps Tucker received the death penalty “not because of the comparative egregiousness of his crime, but because of an arbitrary feature of his case, namely, geography.”<sup>66</sup> In *Boyer*, he focused upon what he perceived as the Eighth Amendment problems created by California’s system of death penalty administration, and reiterated the three pillars of his *Glossip* dissent: “(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably

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58. See Kent Scheidegger, *Exoneration Inflation, Continued*, Crime & Consequences (Dec. 17, 2014), <http://www.crimeandconsequences.com/crimblog/2014/12/exoneration-inflation-continue.html#more>.

59. See *Kansas v. Marsh*, 548 U.S. 163, 199 (2008) (Scalia, J., concurring).

60. See Carol S. Steiker & Jordan M. Steiker, *Abolition in Our Time*, 1 OHIO ST. J. CRIM. L. 323, 340 (2003).

61. *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

62. *Id.*

63. *Id.* at 2776-77 (Breyer, J., dissenting).

64. *Tucker v. Louisiana*, 136 S. Ct. 1801 (2016).

65. *Boyer v. Davis*, 136 S. Ct. 1446 (2016).

66. *Tucker*, 136 S. Ct. at 1801-02 (Breyer, J., dissenting from denial of certiorari).

long delays that undermine the death penalty's penological purpose."<sup>67</sup>

But Justice Scalia did not allow these claims to go unanswered. In his own concurrence in *Glossip*, Scalia responded directly to Justice Breyer's dissent:

A vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare, insist that now, at long last, the death penalty must be abolished for good. Mind you, not once in the history of the American Republic has this Court ever suggested that the death penalty is categorically impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*.<sup>68</sup>

Scalia goes on to dismantle the Breyer dissent. His opinion is not charitable, often mocking Justice Breyer's sources and his conclusions (he refers to one argument as "gobbledy-gook,"<sup>69</sup> another as "nonsense,"<sup>70</sup> and describes Justice Breyer as the "Drum Major in this parade"<sup>71</sup> of cases requiring conformity to the Court's view of "evolving standards of decency").

As to Breyer's unreliability claim, Scalia says it is "convictions, not punishments, that are unreliable," and the risk of wrongful conviction inheres equally in a system of life imprisonment.<sup>72</sup> Though Scalia is correct, and though the risk of executing an innocent need not be (as I explain above) a reason for abandoning capital punishment, Scalia does not spend sufficient time in this opinion taking seriously the claims of actual innocence—claims worth taking seriously, even if not sufficient to justify abandoning the death penalty altogether. Scalia had earlier made clear his skepticism about the Court's power to review actual innocence claims in *Herrera v. Collins*, where he noted the Court's "reluctance . . . to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate."<sup>73</sup>

Moreover, although he does not cite to it in *Glossip*, Justice Scalia wrote extensively about the problem of actual innocence in his

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67. *Boyer*, 136 S. Ct. at 1446-147 (Breyer, J., dissenting from denial of certiorari).

68. *Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring).

69. *Id.*

70. *Id.* at 2748 (Scalia, J., concurring).

71. *Id.* at 2749 (Scalia, J., concurring).

72. *Id.* at 2747 (Scalia, J., concurring).

73. *Herrera v. Collins*, 506 U.S. 390, 428 (1993) (Scalia, J., concurring).

concurring opinion in *Kansas v. Marsh*<sup>74</sup> nearly a decade earlier. *Marsh* involved the validity of Kansas's "equipoise" rule, in which the death penalty is imposed if the mitigators do not outweigh the aggravators.<sup>75</sup> The Court held that imposing the death penalty where the evidence was "in equipoise" did not violate the Eighth Amendment.<sup>76</sup> Responding to Justice Souter's concerns in dissent about the risks of executing the innocent,<sup>77</sup> Scalia noted that actual innocence was not at issue in this case (the dissent's "policy agenda" was, he said, "nailed to the door of the wrong church"<sup>78</sup>). In any event, the dissent failed to point to any case in the modern death penalty era in which an actually innocent person had been executed.<sup>79</sup> He also cited problems with the conclusions of various scholarly research on actual innocence<sup>80</sup> and chided the dissent for using a "distorted" concept of "exoneration," which includes those freed from death row on legal grounds other than actual innocence.<sup>81</sup> He also explained a theme that he would reiterate in *Glossip*: that the special attention given to capital cases makes it more likely errors will be caught in capital cases than in cases that do not involve the imposition of a death sentence.<sup>82</sup> But he closed with an admonition that reflected his view of the lines separating judicial power from political power on the subject of capital punishment. "The American people have determined that the good to be derived from capital punishment . . . outweighs the risk of error," he said.<sup>83</sup> "It is no proper part of the business of this Court, or of its Justices, to second guess that judgment, much less impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution."<sup>84</sup>

As to Breyer's arbitrariness claim in *Glossip*, Scalia reminds us

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74. *Kansas v. Marsh*, 548 U.S. 163, 182 (2006) (Scalia, J., concurring). Disclosure: although I did not play any role personally in litigating the *Marsh* case, when I served in the Justice Department's Capital Case Unit, I was among a group of lawyers who assisted the Kansas Attorney General in preparing the case for oral argument before the Supreme Court.

75. *Id.* at 166-67.

76. *Id.* at 181.

77. *Id.* at 208-211 (Souter, J., dissenting).

78. *Id.* at 186 (Scalia, J., concurring).

79. *Id.* at 188 (Scalia, J., concurring).

80. *Id.* at 191-92 (Scalia, J., concurring).

81. *Id.* at 198 (Scalia, J., concurring). To Scalia's opinion, one might add the notable work of Ward Campbell on this subject. See, e.g., Ward Campbell, *Exoneration Inflation: Justice Scalia's Concurrence in Kansas v. Marsh*, IACJ J. 48 (Summer 2008).

82. *Marsh*, 548 U.S. at 198 (Scalia, J., concurring).

83. *Id.* at 199 (Scalia, J., concurring).

84. *Id.* For an examination of Scalia's opinions in this area, see Lee Kovarsky, *Justice Scalia's Innocence Tetralogy*, 101 MINN. L. REV. 94 (2016) (discussing Scalia's views of actual innocence claims in death penalty cases).

some variation is inevitable in the jurors' approaches to questions about how to apply their moral judgments.<sup>85</sup> And as to Breyer's claim of inordinate delays, Scalia quite rightly noted that much delay in the system is a product of the extensive process to which capital defendants are entitled.<sup>86</sup> Comparatively few delays, then, are solely the product of state action. In a system devoted to ensuring the maximum possible procedural protection for a capital defendant—and one that includes a variety of post-conviction process, opportunity for clemency, as well as direct appeals—some delay in carrying out executions is inevitable.<sup>87</sup> But such delays are not the same everywhere.<sup>88</sup> Moreover, Justice Breyer fails to explain why the remedy for such delays would be the abandonment of capital punishment. Why would the remedy not be a process in which the state (and judges) must more expeditiously consider petitions from death row inmates? In other words, why is the remedy for inordinate delays the abandonment of capital punishment, rather than to adopt procedures that make that punishment effective?<sup>89</sup>

Scalia then completed his refutation of Justice Breyer—and of the argument against the death penalty's constitutionality—with an appeal to constitutional lines. “Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter,” he wrote.<sup>90</sup> “For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide.”<sup>91</sup>

### *C. On Categorical Exemptions from Capital Punishment*

Scalia also aggressively objected to what has become one of the most formidable constitutional bases for judicially narrowing American

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85. *Glossip*, 135 S. Ct. at 2748 (Scalia, J., concurring).

86. *Id.* at 2749 (Scalia, J., concurring).

87. See J. Richard Broughton, *Jones, Lackey, and Teague*, 48 J. MARSHALL L. REV. 961, 983-84 (2015).

88. I am reminded, as I noted in my aforementioned article on *Lackey* claims, *see id.* at 965 n. 17, of a recent brief submitted by Texas in response to a claim by a Texas death row inmate that the Court should grant relief for an inordinate delay in his execution, basing his claim in part on a federal district court holding from California. *See Jones v. Chappell*, 31 F. Supp. 2d 1050 (C.D. Cal. 2014), *rev'd. sub. nom. Jones v. Davis*, 808 F.3d 538 (9th Cir. 2015)). The State responded: “Texas is not California.” Respondent’s Brief in Opp., *Bower v. Texas*, No. 14-292, at 35 (U.S., filed Nov. 13, 2014).

89. See Broughton, *Jones, Lackey, and Teague*, *supra* note 87, at 987.

90. *Glossip*, 135 S. Ct. at 2749-50 (Scalia, J., concurring).

91. *Id.*

death penalty practices: the categorical exemption, based either on the particular physical characteristics of the defendant that reduce his culpability or on the nature of the defendant's crime.

In *Coker v. Georgia* (and prior to Justice Scalia's appointment to the Court), a Court plurality held that the Eighth Amendment forbid the imposition of capital punishment for the crime of raping an adult woman, where no death resulted.<sup>92</sup> *Coker* was based on a two-pronged approach that purports to look first at the objective indicia of societal attitudes about a particular capital punishment practice, but then requires the Court to conduct an independent analysis of the death penalty practice at issue.<sup>93</sup> As applied, however, the objective prong has never done the work that the Court supposes. Rather, the Court's cases have actually treated the objective indicia as *subordinate* to the Court's independent judgment about the acceptability of the practice.<sup>94</sup> Indeed, it would be difficult to find a constitutional framework less connected to the constitutional text and history, and more closely tied to the value preferences of the judge, than the existing categorical exemption framework. By departing from a pure national consensus approach and conceding that the objective factors of societal attitudes are merely advisory, the Court charted its inevitable path toward a framework that places greater emphasis on values identified by the Court than by the American people and their elected representatives, who still approve of the death penalty in substantial numbers.<sup>95</sup>

Applying that framework, the Court, during Scalia's tenure, forbid capital punishment for the mentally disabled<sup>96</sup>, for those who commit capital murder before reaching age eighteen<sup>97</sup>, and for those who commit any crime against the person—no matter how heinous, depraved, or harmful—that does not result in death.<sup>98</sup> In doing so, the Court also found itself guided by scientific propositions and international opinion and practice, factors that Scalia found particularly objectionable.<sup>99</sup>

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92. *Coker v. Georgia*, 433 U.S. 584 (1977).

93. *Id.* at 597.

94. See J. Richard Broughton, *The Second Death of Capital Punishment*, 58 FLA. L. REV. 639, 647 (2006).

95. See Broughton, *Hate Crimes*, *supra* note 51, at 203-05. *But cf.* Linda E. Carter, *The Evolution of Justice Kennedy's Eighth Amendment Jurisprudence on Categorical Bars in Death Penalty Cases*, 44 MCGEORGE L. REV. 229, 245 (2013) (defending the second prong of the capital proportionality test as consistent with constitutional structure).

96. *Atkins v. Virginia*, 536 U.S. 304 (2002).

97. *Roper v. Simmons*, 543 U.S. 551 (2005).

98. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

99. See, e.g., *Simmons*, 543 U.S. 551 at 623-24 (Scalia, J., dissenting) ("the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—

Ever the critic of judicially divining “evolving standards of decency,”<sup>100</sup> and consistent with his effort to keep the lines of judicial power bright, Scalia believed instead that these questions could be resolved solely on objective factors.<sup>101</sup> In *Stanford v. Kentucky*,<sup>102</sup> Scalia wrote for the Court that the Eighth Amendment did not forbid a capital sentence for a person who had not attained the age of eighteen, so long as there was no national consensus against the practice. His *Stanford* opinion therefore represented a sharp break from the Court’s post-*Coker* precedents on categorical exemptions from the death penalty, and it remains an outlier after *Atkins*, *Simmons*, and *Kennedy*. Whereas the approach of *Coker* and its progeny never resolved the matter on objective factors alone, but instead invoked the Court’s now-superior subjective analysis, the *Stanford* opinion relied on the fact that a minority of jurisdictions rejected the death penalty for offenders under age seventeen, and an even smaller minority rejected it for offenders under age eighteen.<sup>103</sup> This evidence was sufficient to conclude that there was no national consensus against the use of capital punishment for a murder committed at age sixteen or seventeen.<sup>104</sup> The view of what constituted a national consensus changed dramatically by the time the Court overruled *Stanford* in *Simmons*, which—along with *Atkins*—looked simply to the “consistency of the direction of change.”<sup>105</sup> More critically, however, *Stanford* proved to be an outlier in rejecting a subjective Eighth Amendment analysis, a result made especially notable in light of Justice White’s decision to join the Scalia opinion in full (Justice White wrote the plurality opinion that invoked the two pronged, objective-then-subjective framework in *Coker*).

Scalia’s rejection of an “independent” subjective analysis—and his obvious effort to validate the lines that he thought divided judicial from political power as to the acceptability of capital punishment—was even clearer in the portion of *Stanford* for which Justice Scalia spoke for himself, the Chief Justice, and Justices White and Kennedy (and which Justice O’Connor refused to join). There, Scalia referred to the “socioscientific” evidence demonstrating the reduced culpability of

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ought to be rejected out of hand.”).

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

101. See *Thompson v. Oklahoma*, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting) (arguing that it “will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.”).

102. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

103. *Id.* at 370-72.

104. *Id.* at 373.

105. *Atkins*, 492 U.S. at 315.

juveniles, evidence the Court would later validate in *Simmons*.<sup>106</sup> But, he said, on the battlefield of the Eighth Amendment, “socioscientific, ethicoscientific, and even purely scientific evidence is not an available weapon.”<sup>107</sup> The punishment “is either ‘cruel *and* unusual’ (i.e., society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded.”<sup>108</sup> The Constitution, he wrote, does not empower the Justices to “substitute our belief in the scientific evidence for the society’s apparent skepticism.”<sup>109</sup>

Scalia therefore wrote robust dissents in *Atkins* and *Simmons*. As for the objective indicia of a national consensus in *Atkins*, Scalia correctly noted that as of 2002, less than half of death penalty jurisdictions had imposed a legislative ban on the death penalty for the mentally disabled, and only seven of those states imposed the death penalty for all persons who were mentally disabled.<sup>110</sup> The remaining states did not have retroactive legislation, meaning that they permitted the execution of any inmate who was already on death row, even if mentally disabled under state law.<sup>111</sup> Moreover, Scalia correctly explained that any rarity in death sentences for the mentally disabled is likely a product of the Court’s decision in 1989 to require juries to consider evidence of mental disability as a mitigating factor in capital sentencing.<sup>112</sup> In *Simmons*, the objective evidence was equally weak. As Scalia noted, only eighteen death penalty states had enacted legislation to exempt those under age eighteen, and only four had done so since *Stanford*.<sup>113</sup> And, as with mental disability, the Court required the states to permit juror consideration of youth as a mitigating factor.<sup>114</sup>

It was rare, then, that Scalia would side with the claims of a capital defendant challenging a death penalty statute or procedure. In one of his last cases on the Court, however, Scalia did just that. In *Hurst v. Florida*, the Court invalidated Florida’s capital sentencing scheme, which allowed a judge to weigh aggravating and mitigating factors and to treat the jury’s recommendation as merely advisory.<sup>115</sup> The Court, in an

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106. See *Stanford*, 492 U.S. at 378.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Atkins*, 492 U.S. at 342 (Scalia, J., dissenting).

111. *Id.*

112. *Id.* at 347 (Scalia, J., dissenting) (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

113. *Simmons*, 545 U.S. at 609-12 (Scalia, J., dissenting).

114. *Id.* at 614 (Scalia, J., dissenting) (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

115. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

opinion by Justice Sotomayor, held that this violated the Sixth Amendment's right to a jury trial<sup>116</sup> and was inconsistent with the holding in *Ring v. Arizona*, which had held unconstitutional a death penalty scheme in which the judge and not the jury found the facts that would render a defendant death-eligible.<sup>117</sup> Justice Scalia joined the Sotomayor opinion, just as he joined the majority in *Ring*. But his conclusions in both of these cases must be understood in light of the "quandary" he described in his *Ring* concurrence: he disagreed with the Court's post-*Furman* imposition of aggravators upon the states, but also believed that the jury trial guarantee was "in perilous decline" and that the Arizona scheme clearly implicated that guarantee.<sup>118</sup> He therefore conceded that he had gained new wisdom on the matter since approving the Arizona scheme twelve years earlier,<sup>119</sup> and decided that even if the states had been unduly coerced into requiring certain aggravators as a matter of constitutional mandate, those factors must be proven to a jury beyond a reasonable doubt.<sup>120</sup>

It cannot be said fairly, then, that Justice Scalia saw no limitations on the state's use of capital punishment.<sup>121</sup> Still, emboldened by his reliance on the text of the Fifth Amendment, by what he viewed as the structural limits on the Court's power to stand in the way of imposing the death penalty, and, perhaps, even by the personal convictions that led him to conclude that the death penalty was not immoral, Scalia overwhelmingly rejected constitutional challenges to the use of capital punishment. His sense of constitutional line-drawing led him to conclude that the people, acting politically, should decide whether and how to impose capital punishment. But, of course, Scalia's colleagues did not always draw those same lines. After his death, then, the fate of Scalia's lines is in question, even in doubt.

### III. DEATH PENALTY LINES ON A POST-SCALIA COURT

With Justice Scalia's death in February 2016, the political battle over the Court and constitutional law has reached a fever pitch. The open seat on the Court could determine the future of the death penalty in

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116. *Id.* at 619.

117. *See Ring v. Arizona*, 536 U.S. 584 (2002).

118. *See id.* at 610 (Scalia, J., concurring).

119. *See Walton v. Arizona*, 497 U.S. 639, 656-57 (1990) (Scalia, J., concurring).

120. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring).

121. *Cf.* Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 *DRAKE L. REV.* 593, 603 (1995); Steven G. Gey, *Justice Scalia's Death Penalty*, 20 *FLA. ST. U. L. REV.* 67, 102 (1992).

America. Though political and legal commentary about the 2016 elections focused on a number of important issues, including the future of the Court in light of Scalia's death,<sup>122</sup> it largely ignored the consequences for capital punishment. But the lines that Scalia sought to draw between legitimate judicial authority to enforce the Bill of Rights and the legitimate power of the state to continue imposing the death penalty for heinous crimes are now in greater jeopardy than at any time since the early 1970s. The categorical exemption cases<sup>123</sup> have legitimized the Court's power to impose substantive limits on the death penalty, making it easier to justify the progression from procedural supervision—from *Furman*<sup>124</sup> to the 1976<sup>125</sup> cases to *Lockett v. Ohio*<sup>126</sup> and *Eddings v. Oklahoma*<sup>127</sup>—to outright substantive abolition. Moreover, the claim for legitimating judicial abolitionism is not presented covertly, in some legal sneak attack. It does not have to be, because opposition to capital punishment today is neither shockingly rare nor does it exist simply on the political fringes. The judicial challenge to the death penalty's validity is yet another wolf coming as a wolf.

On the current Court, Justice Breyer appears to have staked out this position. Although he has not explicitly argued that the Court should rule the death penalty cruel and unusual in all circumstances, his *Glossip* dissent and his recent dissents from the denial of certiorari in *Boyer* and *Tucker* have plainly signaled that he favors considering the question, and—it is fair to conclude—would be likely to so hold on the merits. One might reasonably add Justice Ginsburg's vote to that of Justice Breyer, as she has joined him in multiple cases on this matter.<sup>128</sup> At that

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122. See, e.g., Lydia Wheeler, *Election to Shape Supreme Court*, THE HILL (July 17, 2016), <http://thehill.com/homenews/campaign/287828-election-to-shape-supreme-court>; Albert R. Hunt, *The Supreme Court Really Matters in This Election*, Bloomberg, (July 3, 2016) <https://www.bloomberg.com/view/articles/2016-07-03/the-supreme-court-really-matters-in-this-election>.

123. See *supra* note 122.

124. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (holding that death penalty is unconstitutional where it is the product of unguided sentencing discretion).

125. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976)

126. *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that capital jurors must have the opportunity to consider mitigating evidence related to the crime and to the defendant's character and background).

127. *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that capital jurors cannot be precluded from considering mitigation evidence).

128. See *Glossip*, 135 S. Ct. at 2755 (Breyer, J., joined by Ginsburg, J., dissenting); *Tucker v. Louisiana*, 136 S. Ct. 1801 (2016) (Breyer, J., joined by Ginsburg, J., dissenting from denial of certiorari).

point, the dominoes start to fall. Although neither Justice Kagan nor Justice Sotomayor has expressed the same view as Justice Breyer—and, interestingly, neither has joined in his more aggressive opinions on the possibility of judicial abolition—one might expect that those two justices would be persuaded to join their more liberal colleagues on this issue. If this voting lineup emerges as accurate, this means that only one additional vote would be necessary to judicially abolish the death penalty. Casting a vote to permanently abolish the death penalty would be a stunning move for a rookie justice and this seems far less likely under President Trump than may have been true had Hillary Clinton prevailed in the election. Still, the possibility of judicial abolition remains alive, and the confirmation process for Justice Scalia's successor should give considerable attention to this issue.

If, as seems likely, President Trump fills Justice Scalia's seat with an appointee who is uneasy about, or outright opposed to, judicial abolition, then we must consider the next alternative: Justice Kennedy. And if Justice Kennedy is willing to vote with the four other Justices who are likely to support judicial abolition, then whether Justice Scalia's seat is vacant would not matter to the Court's voting.

Others have pondered whether Justice Kennedy can be persuaded on this issue.<sup>129</sup> The main arguments for this proposition are not inconsiderable ones. First, Justice Kennedy has been among the leaders on the Court in limiting the scope of the death penalty through the granting of categorical exemptions under the Eighth Amendment.<sup>130</sup> He wrote the Court's opinions in *Simmons* and *Kennedy*, as well as the opinion in *Hall v. Florida* that clarified the scope of the categorical exemption for mental disability granted in *Atkins*,<sup>131</sup> and the opinion in *Panetti v. Quarterman*<sup>132</sup> that clarified the procedures and standards that apply when a condemned prisoner makes a threshold showing that he is

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129. See, e.g., Dahlia Lithwick, *Fates Worse Than Death?*, SLATE (July 14, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/07/will\\_kennedy\\_overturn\\_the\\_death\\_penalty\\_his\\_views\\_on\\_solitary\\_confinement.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/07/will_kennedy_overturn_the_death_penalty_his_views_on_solitary_confinement.html); Matt Ford, *How a Victory for the Death Penalty May Hasten Its End*, THE ATLANTIC (July 23, 2015), <http://www.theatlantic.com/politics/archive/2015/07/death-penalty-kennedy/399419/>; David Cole, *Justice Breyer V. The Death Penalty*, THE NEW YORKER (June 30, 2015), <http://www.newyorker.com/news/news-desk/justice-breyer-against-the-death-penalty>. I would note that this was also a subject of some conversation at the aforementioned *Michigan Journal of Law Reform* symposium. See generally Jason Searle, *Speakers address future of death penalty*, DETROIT LEGAL NEWS (Feb. 16, 2016), <http://legalnews.com/detroit/1420611/>.

130. See Carter, *supra* note 95, at 239-46.

131. *Hall v. Florida*, 134 S. Ct. 1986 (2014).

132. *Panetti v. Quarterman*, 551 U.S. 930 (2007).

insane and thus exempt from execution.<sup>133</sup> In *Simmons*, he plainly signaled concerns about the American view of capital punishment when compared with America's peers internationally.<sup>134</sup> While he limited his references there to international opinion on "the juvenile death penalty," there is ample reason to believe that he could be similarly influenced by the weight of international opinion—particularly in advanced nations—against the death penalty generally. And if public sentiment about American capital punishment—though still favorable to it now—were to decline measurably, it is also reasonable to think that he might be moved to further apply his observation in *Hall* that "the Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by human justice.'" <sup>135</sup>

A second argument with which one must contend is that Justice Kennedy has been among the most vocal champions on the modern Court of a jurisprudence of human dignity.<sup>136</sup> Justice Kennedy has recently been outspoken on the practice of solitary confinement and whether it can be legally sustained.<sup>137</sup> While Justice Kennedy's opinions in cases like *Simmons*, *Kennedy*, and *Hall* refer to the relationship between the Eighth Amendment and preservation of human dignity,<sup>138</sup>

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133. See *Ford v. Wainwright*, 477 U.S. 399 (1986).

134. See *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005).

135. *Hall*, 134 S. Ct. at 1992 (quoting *Weems v. United States*, 217 U.S. 349 (1910)).

136. For a general discussion of the subject, see Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011). For extensive treatment of dignity and the reach of criminal law and sentencing, see Michael Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291 (2013); Eva S. Nilson, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111 (2007). As to constitutional law more broadly, see Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006). For discussion of how Catholic teaching informs a death penalty jurisprudence tied to human dignity, see Kurt M. Denk, S.J., *Jurisprudence That Necessarily Embodies Moral Judgment: The Eighth Amendment, Catholic Teaching, and Death Penalty Discourse*, 88 NOTRE DAME L. REV. 323 (2012). And for a note of caution in using human dignity too liberally, see Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201 (2008).

137. See *Davis v. Ayala*, 135 U.S. 2187 (2015) (Kennedy, J., concurring) ("the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and if so, whether a correctional system should be required to adopt them.").

138. See *Simmons*, 543 U.S. at 560 ("the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons"); *Kennedy*, 554 U.S. at 420 ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to the rule."); *Hall*, 134 S. Ct. at 1992 (stating that imposition of the "harshest of punishments" upon the mentally disabled "violates his or her inherent dignity as a human being"). This notion was also found in the original "evolving standards" case, *Trop v. Dulles*, 356 U.S. 86 (1958), which referred to the "underlying concept" of the Eighth Amendment as

other obvious examples are those cases involving rights that extend to same-sex couples, a subject on which Justice Kennedy has been a leading voice (perhaps *the* leading voice on the Court). Justice Kennedy wrote the landmark opinion in *Obergefell v. Hodges*,<sup>139</sup> recognizing both due process and equal protection rights to same-sex marriage. The opinion is littered with references to human dignity.<sup>140</sup> The same holds true for Justice Kennedy's opinion for the Court in *United States v. Windsor*,<sup>141</sup> the pre-*Obergefell* decision holding that the federal definition of marriage in the Defense of Marriage Act violated equal protection. There, too, Justice Kennedy wrote of "the equal dignity of same-sex marriages."<sup>142</sup> He wrote *Lawrence v. Texas*, striking down a Texas law that made it a crime to engage in sodomy with a person of the same sex, explaining that people of the same sex should be able to maintain a sexual relationship in private "and still retain their dignity as free persons."<sup>143</sup> Additionally, he wrote *Romer v. Evans*, striking down, on equal protection grounds, a Colorado law that forbid local governments from giving legal protections based on sexual orientation in their civil rights laws.<sup>144</sup> Finally, others have noted that Justice Kennedy has expressed concern about the length of stays on death row in some jurisdictions, and whether such lengthy stays would frustrate the purposes of capital punishment.<sup>145</sup>

In light of this record, Justice Kennedy's vote certainly seems obtainable by abolitionists. But caution is in order. Yes, Justice Kennedy wrote the categorical exemption cases, but those decisions were based on the finding that individual instances of the death penalty's imposition would be constitutionally disproportionate either for a given crime or a given offender.<sup>146</sup> This is far different, however, from concluding—as

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"nothing less than the dignity of man." *Id.* at 100-01. See also Susan Raeker-Jordan, Kennedy, Kennedy, and the Eighth Amendment: "Still in Search of a Unifying Principle"?, 73 U. PITT. L. REV. 107, 160 (2011) (noting that "thread of respect for human dignity" as unifying the Court's cases under the Cruel and Unusual Punishment Clause).

139. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

140. See, e.g., *id.* at 2599 ("There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices").

141. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

142. *Id.* at 2693.

143. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

144. *Romer v. Evans*, 517 U.S. 620 (1996).

145. See Brent E. Newton, *Justice Kennedy, the Purposes of Capital Punishment, and the Future of Lackey Claims*, 62 BUFF. L. REV. 979, 990-91 (2014) (analyzing Justice Kennedy's remarks during the argument of *Hall v. Florida*, in which he questioned the State's attorney on whether a lengthy delay on death row was consistent with the purposes of the death penalty and orderly administration of justice).

146. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551

one must to hold the death penalty *per se* unconstitutional—that each and every instance, or even an overwhelming majority of instances, of the death penalty’s imposition would violate principles of proportionality. It is one thing to say that the death penalty is disproportionate for a seventeen-year-old, or for a person who does not kill. It is quite another to say—again, as one must, if one believes that proportionality is a constitutional basis for invalidating the death penalty in all circumstances—that the death penalty is categorically disproportionate for a Timothy McVeigh or the Carr brothers.<sup>147</sup> Moreover, public opinion remains quite favorable to capital punishment (and likely *understates* support for it in certain cases).<sup>148</sup> Continued public support for the death penalty, combined with Justice Kennedy’s sensibilities with respect to federalism and deference to the states in administering their own criminal law,<sup>149</sup> could therefore undermine the argument about his willingness to favor complete judicial abolition.

Moreover, it is true that Justice Kennedy has spoken openly and movingly about human dignity in his judicial writings. And that theme has certainly played a central role in arguments about the invalidity of capital punishment—both in the 1970s and today.<sup>150</sup> Justice Breyer’s work in this area has repeated that theme, notably in his *Glossip* dissent.<sup>151</sup> But it is also noteworthy that Justice Kennedy has not joined in any of Justice Breyer’s opinions questioning the constitutionality of the death penalty. He also joined the lead opinions in each of the cases involving challenges to execution procedures, *Glossip* and *Baze v. Rees*.<sup>152</sup> And with respect to the notion that Justice Kennedy might be interested in a claim involving an excessive delay in carrying out an execution, there is reason to be skeptical of this argument. The Court has repeatedly rejected the claim that the Eighth Amendment bars imposition of the death penalty after a lengthy delay (so-called “*Lackey* claims”),<sup>153</sup> and although Justice Breyer (and previously, Justice Stevens) has shown interest in reviewing such claims,<sup>154</sup> Justice

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(2005).

147. See *Kansas v. Carr*, 136 S. Ct. 633, 638-40 (2016).

148. See Broughton, *Hate Crimes*, *supra* note 51.

149. See *McClesky v. Zant*, 499 U.S. 467, 491-93 (1991) (“Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.”).

150. See Raeker-Jordan, *supra* note 138, at 160.

151. See *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting) (referring to the “dehumanizing” effect of solitary confinement while awaiting execution).

152. *Baze v. Rees*, 553 U.S. 35 (2008).

153. See Broughton, *Jones, Lackey, and Teague*, *supra* note 87, at 964-65.

154. See *Muhammad v. Florida*, 134 S. Ct. 894 (2014) (Breyer, J., dissenting from denial of

Kennedy has not. Despite his question during the *Hall* argument, Justice Kennedy has not returned to the subject and has not joined any of the dissents from the denial of certiorari that questioned whether this might pose an Eighth Amendment problem.

Still, the October 2015 Term offered abolitionists reasons for renewed (or continued) optimism about eventually obtaining Justice Kennedy's vote. Justice Kennedy, for example, had regularly voted to strike down affirmative action policies in higher education. He even wrote the opinion in *Fisher v. University of Texas at Austin*<sup>155</sup> when it first arrived at the Court in 2013, and scolded the Fifth Circuit for an approach that was too deferential for strict scrutiny review. It therefore seemed sensible to predict that Justice Kennedy would be among those voting to invalidate the Texas policy when it returned to the Court in 2015. But Justice Kennedy wrote the opinion in *Fisher II* upholding the program and affirming the Fifth Circuit's revised decision.<sup>156</sup> In addition, although Justice Kennedy was among the three Justices who authored the joint opinion in *Planned Parenthood v. Casey*,<sup>157</sup> reaffirming the "central holding" of *Roe v. Wade*, he has also been a consistent vote in upholding a variety of abortion restrictions.<sup>158</sup> But in June 2016, Justice Kennedy joined the more Liberal wing of the Court in invalidating two abortion restrictions embedded in a more comprehensive Texas law regulating abortion.<sup>159</sup> Of course, these cases may not tell us much about Justice Kennedy's current thinking on the question of invalidating the death penalty in all circumstances. But they are a *potentially* ominous sign for those advocates of the death penalty—or at least of judicial restraint in this area—who otherwise have placed their confidence in Justice Kennedy's reluctance to join with the idea of abolitionism in prior cases. Past is not necessarily prologue in Justice Kennedy's jurisprudence.

So while Justice Kennedy seems like the one Justice on the current Court who could move it toward judicial abolition of the death penalty,

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certiorari); *Thompson v. McNeil*, 556 U.S. 1114, 1114-21 (2009) (Stevens, J., respecting denial of certiorari & Breyer, J., dissenting from denial of certiorari); *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J., dissenting from denial of certiorari).

155. *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013).

156. *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016).

157. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

158. See *Gonzales v. Carhart*, 550 U.S. 124 (2007) (opinion by Kennedy, J.); *Stenberg v. Carhart*, 530 U.S. 914, 956 (2000) (Kennedy, J., dissenting); *Hodgson v. Minnesota*, 497 U.S. 417, 480 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (joining opinion of the Court). And, of course, he voted to uphold nearly all of the abortion restrictions at issue in *Casey*.

159. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

there are reasons to think that he is not willing to go quite so far. Although he has certainly not shown the kind of solicitude for deference to political bodies that was a central part of Justice Scalia's approach, Justice Kennedy has thus far shown no interest in removing capital punishment entirely from the state's criminal law toolbox. At least in this narrow sense, Justice Kennedy could help to preserve the formal lines between political and judicial action on the death penalty that Justice Scalia fought so hard to safeguard. Still, he and Justice Scalia were often on different sides in death penalty cases. And if the October 2015 Term is any indication, there are reasons for advocates of restraint in this field to be at least concerned about Justice Kennedy's approach to the line dividing judicial abolition from political action.

#### IV. CONCLUSION

Today, it is not fashionable to defend the death penalty—politically or legally. That is especially true in academic and political settings, even (gasp!) conservative ones. But Antonin Scalia cared little about doing or saying what was fashionable, faddish, popular, or politically correct. This was, after all, a man who sought out the traditional Latin Mass, and challenged the “new” position of the Catholic Church on capital punishment as inconsistent with established Christian teaching on retribution. Of course, this is not to say that Scalia did not understand or appreciate contemporary life. It is to say, rather, that he viewed changing the law to suit the fashions, and passions, of the day as someone else's job, but not the judge's. Whatever their personal views on the death penalty, Scalia believed, judges must respect the constitutional lines that restrain them from imposing their will upon the Nation, absent some explicit command of the constitutional text that would empower the judge to invalidate a death sentence or capital punishment practice. Today, though, under the ill-conceived guise of giving some meaning to modernity's “evolving standards of decency,” the Court is poised to obliterate those formal lines that Scalia believed to be so critical to the Court's institutional legitimacy and to American constitutional government. Long live formalism, indeed.