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The Death Penalty and the Fundamental Right to Life

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KEVIN M. BARRY

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THE DEATH PENALTY AND THE FUNDAMENTAL RIGHT TO LIFE

KEVIN M. BARRY*

Abstract: For over forty years, the Supreme Court has held that the death penalty is not invariably cruel and unusual in violation of the Eighth Amendment. But the Court has never addressed—let alone decided—whether the death penalty per se deprives the fundamental right to life in violation of substantive due process. The legal literature has followed suit, scarcely addressing the issue. This Article makes the case for why the death penalty violates the fundamental right to life. It first argues that the condemned have a fundamental right to life based on a history and tradition of diminished support for the death penalty nationally and worldwide, the dignity of the condemned, and the negative right not to be killed by one’s government. It next argues that the death penalty deprives this right in violation of substantive due process because the State cannot prove that the death penalty is narrowly tailored to achieve deterrence or retribution. Arbitrariness, delay, and unreliability deprive the death penalty of a compelling purpose, and execution belies narrow tailoring. Lastly, this Article argues that the right-to-life challenge is not inconsistent with the Fifth Amendment’s text or the elephant in the room: abortion rights. Although the Eighth Amendment has paved the road toward judicial abolition of the death penalty, there remains no end in sight, no welcome sign on the horizon. The road less traveled is substantive due process—the right to life of the condemned. On the long road toward abolition, this Article argues that two lanes are better than one.

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* Professor of Law, Quinnipiac University School of Law. This Article is adapted from an amicus curiae brief in support of a petition for writ of certiorari in the case of *Zagorski v. Tennessee*. See Brief of the Center for Constitutional Rights as *Amicus Curiae* in Support of Petition for Writ of Certiorari, *Zagorski v. Tennessee*, 137 S. Ct. 1814 (2017) (No. 16-7576). Edmund Zagorski was executed on November 1, 2018. Yihyun Jeong et al., *Tennessee Executes Edmund Zagorski by Electric Chair*, TENNESSEAN (Nov. 1, 2018), <https://www.tennessean.com/story/news/2018/11/01/execution-edmund-zagorski-tennessee-electric-chair/1570451002/> [<https://perma.cc/RNL2-BE7S>]. Thanks to Baher Azmy, Ben Jones, Bharat Malkani, and Carol Steiker for helpful comments on the amicus brief. Thanks to Paul Bottei, Jeff Cooper, Neal Feigenson, John Garcia, Stephen Gilles, Ben Jones, Bharat Malkani, Linda Meyer, and participants at the Faculty Forum at Quinnipiac University School of Law for thoughtful advice on this Article; to the *Boston College Law Review* staff for editorial assistance; and to Shanna Hugle and Jeff Kaplan for research assistance.

INTRODUCTION

“I will be appointing pro-life judges.”¹

For well over a century, the Supreme Court has recognized the fundamental right to life under the Fifth and Fourteenth Amendments.² But it has never squarely addressed whether the death penalty per se deprives this right in violation of substantive due process.³ Over forty years ago, in the landmark case of *Gregg v. Georgia*, the Supreme Court rejected a per se challenge to the death penalty on the grounds that it did not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.⁴ Neither *Gregg* nor its progeny ever mentioned the right to life.⁵

This omission is in stark contrast to two powerful and relatively recent traditions—one secular, the other religious—that oppose the death penalty on right-to-life grounds. The first is international human rights law, which for over thirty years has declared the death penalty a violation of two of its central tenets—the prohibition on cruel and unusual punishment, and, importantly, the fundamental right to life.⁶ “[S]ince 1989[,] . . . there has been a revolution in the” worldwide debate over the death penalty, from “the view that each nation has, if it wishes, the sovereign right to retain the death penalty as a repressive tool of its domestic criminal justice system,” to the view that “the death penalty . . . inevitably, and [no matter how] administered,” violates “the most fundamental of human rights—the right to life.”⁷ As of December 31, 2018, 142 countries have abandoned the death penalty explicitly or in practice.⁸

The second tradition that opposes the death penalty on right-to-life grounds is religious teaching—particularly that of the Catholic Church. For

¹ Aaron Blake, *The Final Trump-Clinton Debate Transcript, Annotated*, WASH. POST (Oct. 19, 2016) (quoting then-presidential candidate Donald Trump), https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/?utm_term=.b815198c005e [<https://perma.cc/9XTB-B7AZ>].

² See, e.g., *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 856–58 (1998) (Kennedy, J., concurring); see also *infra* note 108 (collecting cases regarding the fundamental right to life).

³ See Brief of the Ctr. for Constitutional Rights as *Amicus Curiae* in Support of Petition for Writ of Certiorari at 2, *Zagorski v. Tennessee*, 137 S. Ct. 1814 (2017) (No. 16-7576) [hereinafter *Zagorski Amic. Br.*].

⁴ 428 U.S. 153, 168–69 (1976).

⁵ See *id.*; see, e.g., *Baze v. Rees*, 553 U.S. 35, 47 (2008) (citing *Gregg*).

⁶ ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY, A WORLDWIDE PERSPECTIVE* 16–17 (5th ed. 2015).

⁷ *Id.*; FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 27 (2003).

⁸ See *infra* note 221 and accompanying text (discussing international opposition to the death penalty based on, *inter alia*, the death penalty’s inconsistency with the right to life).

over twenty years, Catholic social teaching has opposed the death penalty in nearly all circumstances as inconsistent with promoting a culture of life.⁹ In 2018, Pope Francis made history by proclaiming that the death penalty was, always and everywhere, “inadmissible” because human life “is always sacred in the eyes of the [C]reator.”¹⁰ Many evangelical Christians have added their voices in opposition to the death penalty on pro-life grounds, as have religious conservatives in state legislatures throughout the country.¹¹

The Supreme Court’s failure to engage with the right to life in the death penalty context contrasts not only with human rights and religious traditions but also with recent changes in the legal and political landscape. In 2015, in the landmark case of *Obergefell v. Hodges*, the Supreme Court held that the Fourteenth Amendment grants same-sex couples the fundamental right to marry.¹² Although many commentators have debated *Obergefell*’s implications for the criminalization of polygamy, assisted suicide, and even incest, none have suggested its implications for the death penalty.¹³ This is not surprising; with only a handful of exceptions over the past several decades, the legal literature has followed the example of the Supreme Court in ignoring a substantive due process challenge to the death penalty premised on the fundamental right to life.¹⁴ But *Obergefell*’s implications for the death penalty are real; if the Fourteenth Amendment reaches

⁹ See *infra* notes 186, 261–264 and accompanying text.

¹⁰ Morgan Gstalter, *Pope Francis Changes Capital Punishment Teaching, Now Finds Death Penalty Inadmissible*, THE HILL (Aug. 2, 2018), <https://thehill.com/homenews/news/400025-pope-francis-changes-capital-punishment-teaching-now-finds-death-penalty> [https://perma.cc/XW45-3CMB] (quoting Pope Francis).

¹¹ See *infra* notes 203–206 and accompanying text.

¹² 135 S. Ct. 2584, 2604–05 (2015).

¹³ See, e.g., Richard S. Myers, *The Constitutionality of Laws Banning Physician Assisted Suicide*, 31 BYU J. PUB. L. 395 (2017); Y. Carson Zhou, *The Incest Horrible: Delimiting the Lawrence v. Texas Right to Sexual Autonomy*, 23 MICH. J. GENDER & L. 187 (2016); Amberly N. Beye, Comment, *The More, the Marry-er? The Future of Polygamous Marriage in the Wake of Obergefell v. Hodges*, 47 SETON HALL L. REV. 197 (2016).

¹⁴ See, e.g., James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1335–37 (1989) (discussing substantive due process challenge to death penalty); N.B. Smith, *The Death Penalty as an Unconstitutional Deprivation of Life and the Right to Privacy*, 25 B.C. L. REV. 743 (1984) [hereinafter Smith, *Deprivation of Life*] (same); Daniel G. Bird, Note, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329, 1355–56 (2003) (same); see also Petition for Writ of Certiorari at 26–27, *Zagorski v. Tennessee*, No. 16-7576 (U.S. Jan. 13, 2017) (“Just as no state can deny the fundamental right to marry, *a fortiori*, no state can deny the fundamental right to life, which is the fundamental human right and provides the predicate for the exercise of all other rights. Under *Obergefell* and the Fourteenth Amendment, the death sentence cannot stand, as it violates a fundamental right, while simultaneously depriving the individual of all human dignity and personhood.”); cf. Hugo Adam Bedau, *Capital Punishment and the Right to Life*, 2011 MICH. ST. L. REV. 505, 505 (examining the “natural right to life” in philosophical literature and its implications for the death penalty).

the most intimate associations of our lives, it ought to reach our lives as well.¹⁵

The Court's silence is also at odds with politics—particularly, the changing composition of the Supreme Court. On the campaign trail and as president-elect, Donald Trump promised to appoint “pro-life” Justices to the Court.¹⁶ His first nominee, Neil Gorsuch, fits that mold. Prior to assuming the bench, Justice Gorsuch wrote that “human life is fundamentally and inherently valuable” and therefore “inviolab[le],” although he carefully avoided applying this view to the death penalty, which, he said, “raise[d] unique questions all [its] own.”¹⁷ Defending himself against charges of sexual assault before the Senate Judiciary Committee, Trump's second nominee, Brett Kavanaugh, repeatedly invoked his devotion to the Catholic Church, which opposes the death penalty.¹⁸ Both Justices thus have firm ideological reasons to engage with the right to life in the death penalty context. Given the bitter public debate surrounding the Court's legitimacy in the wake of Justice Kavanaugh's confirmation hearings,¹⁹ these Justices also have an institutional reason to engage: a majority decision declaring the death penalty unconstitutional on right-to-life grounds would be a historic exemplar of non-partisan decision-making. Such a decision would, in the words of Justice Elena Kagan, “enable[] the [C]ourt to look as though it was not owned by one side or another, and was indeed impartial and neutral and fair.”²⁰ In

¹⁵ See *Obergefell*, 135 S. Ct. at 2599 (“[D]ecisions concerning marriage are among the most intimate that an individual can make.”).

¹⁶ See Blake, *supra* note 1 and accompanying text.

¹⁷ NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 157, 272 n.2 (2d prtg. 2009).

¹⁸ *Kavanaugh Hearing Transcript*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.f0006fbd3f76 [<https://perma.cc/3T47-QBE8>] (“[F]or me, going to church on Sundays was like brushing my teeth, automatic. It still is.”); see *infra* note 263–264 and accompanying text (discussing the Catholic Church's opposition to the death penalty). On President Trump's list of potential future nominees is Amy Coney Barrett, who has expressed the belief that “Catholic judges . . . are morally precluded from enforcing the death penalty” because it violates the “dignity” and “sanctity of human life.” John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 305, 308 (1998).

¹⁹ The Editorial Board, *Brett Kavanaugh Joins a Supreme Court Challenged with Legitimacy*, USA TODAY (Oct. 8, 2018), <https://www.usatoday.com/story/opinion/2018/10/08/brett-kavanaugh-joins-supreme-court-challenged-legitimacy-editorials-debates/1558899002/> [<https://perma.cc/SSE8-BDJC>].

²⁰ Ezra Austin, *Sotomayor on the Supreme Court: “We Have to Rise Above Partisanship.”* WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/politics/2018/10/06/sotomayor-supreme-court-we-have-rise-above-partisanship/?utm_term=.f902dbaa2df1 [<https://perma.cc/58KF-P6FT>]; see also Linda Greenhouse, *Opinion, Playing the Long Game for the Supreme Court*, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/opinion/supreme-court-conservatives-progressives.html> [<https://perma.cc/LQJ3-JLCL>] (recalling “a time when not every decision

the political thicket we call the “culture wars,” the death penalty is low-hanging fruit.

Given these developments, the time is right to break the silence. When the Court eventually confronts the validity of the death penalty per se, it should speak to the fundamental right to life under the Fifth and Fourteenth Amendments. This Article makes the case for why the death penalty deprives that right in violation of substantive due process.

Part I briefly discusses some of the obvious limitations of an Eighth Amendment challenge to the death penalty per se as compared to the right to life challenge—namely, *Gregg*’s holding, the plaintiff’s burden of proof, and a resistant Supreme Court.²¹ Building on Kenji Yoshino’s work, Part II traces the contours of the Supreme Court’s evolving substantive due process inquiry after *Obergefell*. Although not a model of clarity or consistency, four factors guide the analysis: (1) the specificity with which the right is framed; (2) history and tradition of the asserted right; (3) whether the right implicates dignity; and (4) the distinction between positive and negative rights.²² Applying these factors, Part III posits a fundamental right to life of condemned prisoners based on: a history and tradition of restriction and regionalization of the death penalty in this Nation and throughout the world; the dignity of the condemned, as articulated by federal and state judges, moral philosophy, human rights, and religious teaching; and the negative character of the right at issue, namely, the freedom to not be killed by one’s government.²³ Part III argues that the State cannot meet its burden of proving that the death penalty is narrowly tailored to achieve deterrence or retribution because the imposition of the death penalty is marred by arbitrariness, delay, and unreliability, and because execution is the antithesis of narrow tailoring.

Part IV addresses some likely counterarguments to the recognition of a fundamental right to life for the condemned—from textualist claims about its constitutionality to feminist claims about its wisdom.²⁴

was foreordained and ideology did not always reign supreme at the Supreme Court?”); Debra Cassens Weiss, *Chief Justice Addresses ‘Contentious Events,’ Says Supreme Court Serves One Nation, Not One Party*, ABA J. (Oct. 17, 2018), http://www.abajournal.com/news/article/chief_justice_addresses_contentious_events_says_supreme_court_serves_one_nation [https://perma.cc/7PAZ-NFQN] (“[W]e do not serve one party or one interest. . . . We serve one nation.” (quoting Chief Justice Roberts)).

²¹ See *infra* notes 25–41 and accompanying text.

²² See *infra* notes 42–102 and accompanying text.

²³ See *infra* notes 103–313 and accompanying text.

²⁴ See *infra* notes 317–364 and accompanying text.

I. THE EIGHTH AMENDMENT CHALLENGE

Analysis of why the death penalty violates substantive due process under the Fifth and Fourteenth Amendments begins with a straightforward observation: according to the Supreme Court, the death penalty does *not* currently violate the Eighth Amendment.²⁵ Although five former and two current Supreme Court Justices—Arthur Goldberg, William Brennan, Thurgood Marshall, Harry Blackmun, John Paul Stevens, Stephen Breyer, and Ruth Bader Ginsburg—have made a powerful case for why the death penalty is unconstitutionally cruel and unusual, their argument has never commanded a majority.²⁶ In 1976, in *Gregg*, the Supreme Court directly addressed for the first time whether “the punishment of death for the crime of murder is, under all circumstances, ‘cruel and unusual’ in violation of the Eighth [Amendment],” as applied to the States by the Fourteenth Amendment.²⁷ *Gregg* answered this question in the negative, and its progeny have repeated this refrain.²⁸

Although the Court has never retreated from its holding in *Gregg* that the death penalty per se does not violate the Eighth Amendment, it has, in the words of Justice Antonin Scalia, “pecked” away at the death penalty, categorically prohibiting its application to people declared insane, people with intellectual disabilities, people under eighteen years of age at the time of the offense, and those whose crimes do not result in the death of the victim.²⁹ Employing its now familiar two-prong “proportionality” framework, the Court has held that the execution of such people is cruel and unusual because: (1) it is unacceptable to contemporary society, as objectively determined by states’ unwillingness to impose it; and (2) it serves no legitimate penological purpose—namely, deterrence or retribution—as subjectively determined by the Court.³⁰

²⁵ *Gregg*, 428 U.S. at 168–69.

²⁶ See *infra* notes 163–165, 272–278 and accompanying text (discussing cases regarding the constitutionality of the death penalty).

²⁷ 428 U.S. at 168.

²⁸ *Id.* at 169; see, e.g., *Baze*, 553 U.S. at 47 (“We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.”).

²⁹ See Mark Walsh, *Death Revisited: Will the Supreme Court “Peck Away at” Capital Punishment?*, A.B.A. J., Oct. 2015, at 19 (quoting Justice Scalia’s comment from the bench during announcement of decision in *Glossip v. Gross*, 135 S. Ct. 2726 (2015)) (“Maybe we should celebrate that these two justices [Breyer and Ginsburg] are trying to kill [the death penalty] outright rather than peck it to death.”); *infra* note 172 and accompanying text (discussing *Kennedy v. Louisiana*, 554 U.S. 407 (2008), *Roper v. Simmons*, 543 U.S. 551 (2005), *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Ford v. Wainwright*, 477 U.S. 399 (1986)).

³⁰ E.g., *Atkins*, 536 U.S. at 312–13.

In 2015, the Supreme Court appeared on the verge of declaring the death penalty per se cruel and unusual and abolishing it altogether in *Glossip v. Gross*. In a lengthy dissent from a 5-4 decision upholding Oklahoma's lethal injection protocol, Justice Breyer, joined by Justice Ginsburg, stated that it was "highly likely that the death penalty violates the Eighth Amendment."³¹ Approximately three months later, and shortly before his death, conservative jurist Antonin Scalia told an audience of college students that four of his colleagues on the Court believed that the death penalty was unconstitutional and that he "wouldn't be surprised" if the Court abolished it.³² With Justice Scalia's passing in February 2016 and the prospect of a Hillary Clinton presidency in November of that year, the death penalty's days appeared numbered.³³ The election of populist and pro-death-penalty president, Donald Trump, in November 2016, and his appointment of conservative jurist, Justice Neil Gorsuch, to the Court in April 2017, proved otherwise.³⁴ With the retirement of Justice Anthony Kennedy and the appointment of conservative jurist, Justice Brett Kavanaugh, to the Court, *Gregg*'s holding will likely remain law for some time, especially given that the two most senior members of the Court are liberal jurists Ruth Bader Ginsburg (age eighty-six) and Stephen Breyer (age eighty).³⁵

In contrast to the Eighth Amendment argument, the Supreme Court has never squarely addressed whether the death penalty per se deprives criminal defendants of the fundamental right to life in violation of substantive due process. *Gregg* was an Eighth Amendment decision—not a substantive due process decision.³⁶

Indeed, the only mention of due process in *Gregg* relates to the Fifth and Fourteenth Amendments' guarantee of *procedural* due process and the

³¹ *Glossip*, 135 S. Ct. at 2776–77.

³² Debra Cassens Weiss, *Scalia Says He 'Wouldn't Be Surprised' if SCOTUS Overturns the Death Penalty*, ABA J. (Sept. 24, 2015), http://www.abajournal.com/news/article/scalia_says_he_wouldnt_be_surprised_if_scotus_overturns_the_death_penalty [<https://perma.cc/L3N9-Z726>].

³³ Robert J. Smith, *The End of the Death Penalty?*, SLATE (July 1, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/07/death_penalty_at_the_supreme_court_kennedy_may_vote_to_abolish_capital_punishment.html [<https://perma.cc/P628-2PFP>]; see also Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383, 391 (2017) [hereinafter Barry, *Dignity Clauses*] (predicting prior to the November 2016 presidential election that the Court would abolish the death penalty).

³⁴ See, e.g., *Tharpe v. Sellers*, 138 S. Ct. 545, 547 (2018) (Thomas, J., dissenting, joined by Alito & Gorsuch, JJ.) (arguing against the remand of death penalty case involving evidence of racial bias).

³⁵ *Current Members, Justices, About the Court*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/TL3E-J9RM>].

³⁶ See *Gregg*, 428 U.S. at 168–69.

Court's holding in *McGautha v. California* that standardless jury sentencing procedures do not violate this guarantee.³⁷

Although the concepts of cruel and unusual punishment and substantive due process are substantially similar in cases challenging the constitutionality of the death penalty per se, they are not the same. Under the Eighth Amendment, the prisoner bears the “heavy burden” of proving that the death penalty is “without justification and thus is . . . unconstitutionally severe.”³⁸ By contrast, “the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (i.e., the right to life), the State *needs a compelling interest* to justify it.”³⁹ Critically, the State bears the burden of proving that the death penalty is narrowly tailored to serve the penological interests of retribution or deterrence.⁴⁰

For over forty years, the Eighth Amendment has paved the road toward the abolition of the death penalty—but there remains no end in sight, no welcome sign on the horizon.⁴¹ The road less traveled is substantive due

³⁷ See *id.* at 177, 195–96 n.47 (discussing *McGautha v. California*, 402 U.S. 183, 185–86 (1971), which rejected a procedural due process challenge based on standardless sentencing procedures); see also *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 275–76 (1998) (rejecting a procedural due process challenge based on inadequate clemency proceedings); *Herrera v. Collins*, 506 U.S. 390, 393, 407 n.6 (1993) (rejecting a procedural due process challenge based on a claim of innocence, and declining to consider a substantive due process challenge).

³⁸ *Gregg*, 428 U.S. at 175, 187.

³⁹ *Furman v. Georgia*, 408 U.S. 238, 359 n.141 (1972) (Marshall, J., concurring) (emphasis added) (citation omitted).

⁴⁰ See *Roper*, 543 U.S. at 571 (noting two penological justifications for the death penalty: “retribution and deterrence of capital crimes by prospective offenders” (quoting *Atkins*, 536 U.S. at 319)); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 831 (5th ed. 2015) (discussing the government’s burden of proof). This point regarding burdens of proof bears repeating. Although the Supreme Court’s Eighth Amendment jurisprudence has repeatedly acknowledged that “the penalty of death is different in kind from any other punishment” and is therefore deserving of special consideration, *Gregg*, 428 U.S. at 188, the Court has never shifted the burden of proof to the State to demonstrate the death penalty’s validity. Conversely, in the substantive due process context, the State bears this burden. See also *Commonwealth v. O’Neal*, 327 N.E.2d 662, 668 (Mass. 1975) (“[I]n order for the State to allow the taking of life by legislative mandate it must demonstrate that such action is the least restrictive means toward furtherance of a compelling governmental end.”); Smith, *Deprivation of Life*, *supra* note 14, at 752 (stating that substantive due process analysis “requires a determination whether a compelling state interest or a necessity on grounds of public health and safety exists to exact the death penalty” and “whether a lesser penalty would adequately serve the states’ claimed interest. . . . [T]he burden of proof is on the state and not the accused.”). See generally *Zagorski Amic. Br.*, *supra* note 3, at 6–7.

⁴¹ Although judicial abolition under the Eighth Amendment is unlikely in the near term, the Eighth Amendment still has important work to do. See, e.g., Adam Liptak, *Justices Weigh Case of Condemned Inmate Who Cannot Recall His Crime*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/us/politics/supreme-court-death-penalty-dementia.html> [<https://perma.cc/>

process—the right to life of the condemned. Although this asserted right is not without obstacles, two lanes are better than one. The remainder of this Article takes up the right-to-life challenge.

II. SUBSTANTIVE DUE PROCESS GENERALLY

Substantive due process refers to “whether the government has an adequate reason for taking away a person’s life, liberty, or property.”⁴² The literature on substantive due process is legion, in large part because this area of the law implicates weighty questions concerning which rights are fundamental under our Nation’s charter and, more particularly, whether Supreme Court Justices—as opposed to the People, through their democratically-elected leaders—should be the ones to decide.⁴³ For purposes of this Article, a brief summary of substantive due process will suffice.

The Supreme Court’s analytical framework for evaluating substantive due process claims involves two primary inquiries. Section A discusses the first, which relates to the importance of the asserted right, that is, whether the right being deprived is fundamental.⁴⁴ Section B discusses the second, which relates to the burden the State must meet to deprive this right. If the right is fundamental, strict scrutiny applies, which means that the state interest must be compelling, and the law must be narrowly tailored to serve that interest.⁴⁵ If the right is not fundamental, rational basis review applies, which means the law will pass muster so long as it is rationally related to a legitimate purpose.⁴⁶

A. Is the Right Deprived Fundamental?

For over a century, the Court has used a variety of broad formulations to describe what qualifies as a fundamental right.⁴⁷ Applying these formulations, the Court has found nearly all of the rights enumerated in the Bill of Rights—e.g., the First Amendment’s protection of speech, the Second

WD82-KEL7] (discussing a case pending before the Supreme Court involving an Eighth Amendment challenge to executing people with dementia).

⁴² CHEMERINSKY, *supra* note 40, at 570.

⁴³ *See id.* at 828–30; *see also id.* at 18 (“Originalists believe that the meaning of a constitutional provision was set when it was adopted and that it can be changed solely by amendment; nonoriginalists believe that the Constitution’s meaning can evolve by amendment *and* by interpretation.”) (emphasis added).

⁴⁴ *Id.* at 828–30; *see infra* notes 47–98 and accompanying text.

⁴⁵ CHEMERINSKY, *supra* note 40, at 830–31; *see infra* notes 99–102 and accompanying text.

⁴⁶ CHEMERINSKY, *supra* note 40, at 828.

⁴⁷ *See* McDonald v. City of Chicago, 561 U.S. 742, 759–61 (2010) (reviewing “different formulations” used by the Court to “describ[e] the boundaries of due process”).

Amendment's right to bear arms, and the Fourth Amendment's protection against unreasonable searches and seizures—to be fundamental and therefore applicable to the states through the Due Process Clause of the Fourteenth Amendment.⁴⁸

The Court's willingness to find *unenumerated* rights to be fundamental is far less settled.⁴⁹ Debate over the judicial role, and between originalism and nonoriginalism, more specifically, figures prominently in the Court's decisions.⁵⁰ On one side of the debate are those Justices who narrowly construe the Due Process Clause to protect a circumscribed set of rights firmly grounded in the "Nation's history, legal traditions, and practices."⁵¹ Judicial restraint is a virtue in the uncharted waters of substantive due process, these Justices argue, lest "the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of th[e] Court."⁵² This was the approach taken by the majority in *Washington v. Glucksberg* and *Reno v. Flores*, in which the Court upheld laws prohibiting assisted suicide and the detention of immigrant children, respectively.⁵³

On the other side of the debate are those Justices who favor a more flexible, common law approach "[ir]educ[able] to any formula," by which fundamental rights are discerned through the exercise of reasoned judgment—aided, but not bound by, history and tradition.⁵⁴ For these Justices, the liberty protected by the Due Process Clause is a "bulwark[] . . . against

⁴⁸ CHEMERINSKY, *supra* note 40, at 6 n.13, 529. This process of applying the Bill of Rights to the States is known as "selective incorporation." *Id.* at 6 n.13.

⁴⁹ Examples of unenumerated rights include "rights protecting family autonomy, procreation, sexual activity and sexual orientation, medical care decision making, [and] travel." *Id.* at 826; see also Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148–49 (2015) [hereinafter Yoshino, *Freedom*] (discussing the Court's recognition of various unenumerated rights); see also *infra* notes 58–98 (discussing the Court's substantive due process jurisprudence).

⁵⁰ CHEMERINSKY, *supra* note 40, at 829; see also *id.* at 17–26 (discussing the debate between originalism and nonoriginalism).

⁵¹ *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997); *id.* at 720 ("[W]e 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.'" (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992))).

⁵² *Id.* at 720 ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11 (1971) ("[S]ubstantive due process, revived by the *Griswold* case, [381 U.S. 479 (1965),] is and always has been an improper doctrine.").

⁵³ See *Glucksberg*, 521 U.S. at 735–36; *Reno v. Flores*, 507 U.S. 292, 303 (1993).

⁵⁴ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.").

arbitrary legislation,” and it is the duty of the Court—and only the Court—to “protect[] the right of all persons to enjoy liberty as we learn its meaning.”⁵⁵ This was the approach famously laid down by Justice Harlan in his dissenting opinion in *Poe v. Ullman*, and invoked by a majority of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which reaffirmed the fundamental right to abortion, and, more recently, in *Obergefell*, which recognized same-sex couples’ fundamental right to marry.⁵⁶

Although the Court’s unenumerated rights decisions—typified by *Glucksberg* and *Obergefell*—are not a model of clarity or consistency, four primary factors guide the Court’s inquiry: (1) the specificity with which the right is framed; (2) history and tradition of the asserted right; (3) whether the right implicates dignity; and (4) the distinction between positive and negative rights.⁵⁷

1. Specificity

The level of specificity with which a right is framed is often determinative of the substantive due process inquiry; the more general the level of abstraction at which the right is defined, the more likely the Court is to find the right to be fundamental.⁵⁸

In *Glucksberg*, for example, the Court required a “careful description” of the asserted fundamental liberty interest.⁵⁹ The interest at stake in that case was not a generalized “liberty to choose how to die” or “to make end-

⁵⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (“The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.”); *Poe*, 367 U.S. at 541 (Harlan, J., dissenting) (quoting *Hurtado v. California*, 110 U.S. 516, 532 (1884)).

⁵⁶ See *Obergefell*, 135 S. Ct. at 2598 (citing Justice Harlan’s dissent in *Poe*); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (same); see also *Glucksberg*, 521 U.S. at 769 (Souter, J., concurring) (same); *Roe v. Wade*, 410 U.S. 113, 169 (1973) (Stewart, J., concurring) (same); *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (same); Yoshino, *Freedom*, *supra* note 49, at 150 (discussing Justice Harlan’s “balancing methodology that weighed individual liberties against governmental interests in a reasoned manner. Such an approach always occurred against the backdrop of tradition, but was not shackled to the past, not least because tradition was itself ‘a living thing.’”).

⁵⁷ For an excellent discussion of the first, second, and fourth factors, see Yoshino, *Freedom*, *supra* note 49, at 163–69; see also CHEMERINSKY, *supra* note 40, at 829 (discussing three factors). In this Article, I supplement Professor Yoshino’s discussion with analysis of a fourth factor—dignity. See *infra* notes 78–93 and accompanying text; see also Barry, *Dignity Clauses*, *supra* note 33, at 395–416 (comparing the Court’s analysis of dignity under the Eighth Amendment and substantive due process).

⁵⁸ See CHEMERINSKY, *supra* note 40, at 829 (“At a sufficiently general level of abstraction, any liberty can be justified as consistent with the nation’s traditions. At a very specific level of abstraction, few nontextual rights would be justified.”); Yoshino, *Freedom*, *supra* note 49, at 164–66.

⁵⁹ *Glucksberg*, 521 U.S. at 721.

of-life decisions,” or the “right to choose a humane, dignified death.”⁶⁰ Instead, the Court reasoned the interest at stake was the “right to commit suicide with another’s assistance.”⁶¹ So framed, the Court not surprisingly found no such fundamental right.⁶² The same was true in *Flores*, where the Court declined to frame the right of juvenile immigrants in INS detention as the “freedom from physical restraint,” and instead selected a far narrower frame: “the . . . right of a child . . . for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution.”⁶³

In *Obergefell*, by contrast, the Court broadly framed the asserted interest as the “right to marry,” not the “right to same-sex marriage,” and invalidated laws that refused that right to same-sex couples.⁶⁴ This broad framing was in keeping with earlier decisions, including *Casey*, which explicitly rejected “defin[ing rights] at the most specific level” and reaffirmed the right to abortion prior to viability.⁶⁵ It was also consistent with *Lawrence v. Texas*, which struck down laws infringing the right to engage in private, consensual sexual activity.⁶⁶ Notably, *Lawrence*’s invalidation of same-sex sodomy laws overruled a contrary holding in *Bowers v. Hardwick* years earlier, which had framed the right narrowly: “the claimed constitutional right of homosexuals to engage in acts of sodomy.”⁶⁷

2. History and Tradition

The Court’s level of commitment to history and tradition is also key to determining the existence of a fundamental right.⁶⁸ The more willing the Court is to look beyond history and tradition, the more likely it is to recognize a fundamental right.⁶⁹ In *Glucksberg*, for example, the Court noted a “consistent and almost universal tradition” among the states and throughout Anglo-American history

⁶⁰ *Id.* at 703.

⁶¹ *Id.* at 722–23.

⁶² *See id.* at 728.

⁶³ *Flores*, 507 U.S. at 302.

⁶⁴ *Obergefell*, 135 S. Ct. at 2602.

⁶⁵ *Casey*, 505 U.S. at 847. *But see id.* at 980 (Scalia, J., dissenting) (arguing that the right to abortion was not fundamental because, *inter alia*, “the Constitution says absolutely nothing about it”).

⁶⁶ 539 U.S. 558, 566–67 (2003).

⁶⁷ *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986), *overruled by Lawrence*, 539 U.S. at 578.

⁶⁸ *See* CHEMERINSKY, *supra* note 40, at 829; Yoshino, *Freedom*, *supra* note 49, at 152, 164.

⁶⁹ *See* Yoshino, *Freedom*, *supra* note 49, at 153–54, 164.

that has long rejected the asserted right [to assisted suicide], and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.⁷⁰

The Court declined to do so, upholding the state of Washington's law prohibiting physician-assisted suicide.⁷¹

With Justice Kennedy at the helm, the Court in *Obergefell* took a different tack. According to Justice Kennedy's majority opinion, which struck down laws depriving gays and lesbians of the right to marry, "history and tradition guide and discipline th[e] [substantive due process] inquiry but do not set its outer boundaries."⁷² For this proposition, Justice Kennedy cited his opinion for the Court in *Lawrence*, which made the same point when it struck down laws criminalizing gays' and lesbians' right to engage in private, consensual sexual activity.⁷³ "[H]istory and tradition are the starting point," the *Lawrence* Court reasoned, "but not in all cases the ending point of the substantive due process inquiry."⁷⁴ That language in *Lawrence*, in turn, derives from Justice Kennedy's concurring opinion (joined by Justice O'Connor) in *Lewis*, in which he acknowledged a criminal suspect's fundamental right to life.⁷⁵

According to these precedents, then, history and tradition are a beacon—not a mooring. They do not constrain the Court from looking beyond history and tradition to discern fundamental rights, for to do so would, according to the *Obergefell* Court, "allow[] the past alone to rule the pre-

⁷⁰ *Glucksberg*, 521 U.S. at 723; see also *Flores*, 507 U.S. at 303 (stating that "[t]he mere novelty of" a claimed right to be released from INS detention into the custody of a responsible adult "is reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'"); *Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring in part and dissenting in part) ("Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is 'fundamental.'").

⁷¹ *Glucksberg*, 521 U.S. at 735.

⁷² *Obergefell*, 135 S. Ct. at 2598.

⁷³ *Id.* (citing *Lawrence*, 539 U.S. at 572).

⁷⁴ *Lawrence*, 539 U.S. at 572 (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

⁷⁵ *Lewis*, 523 U.S. at 857–58 (Kennedy, J., concurring) (acknowledging a right to life, but holding that this right was outweighed by state's interest in "conduct[ing] a dangerous chase of a suspect who disobeys a lawful command to stop").

sent.”⁷⁶ Because “new dimensions of freedom become apparent to new generations,” the Court continued,

[t]he nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.⁷⁷

3. Dignity

Beyond history and tradition, “dignity” figures prominently in the Court’s assessment of whether a right is fundamental.⁷⁸ Although the term is not explicitly defined in the Court’s substantive due process jurisprudence, its basic meaning is clear enough. Dignity, as conceived by the Court, refers to our intrinsic worth as human beings and the attendant freedom from being personally disparaged or humiliated.⁷⁹ Where an asserted liberty interest

⁷⁶ *Obergefell*, 135 S. Ct. at 2598; see also *id.* at 2602 (“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”).

⁷⁷ *Id.* at 2598; see also *id.* at 2602 (“[R]ights come not from ancient sources alone.”); *Lawrence*, 539 U.S. at 578–79 (“[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”); *Casey*, 505 U.S. at 847 (rejecting the view “that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified”).

⁷⁸ See, e.g., Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1736–37 (2008); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 22–23 (2015), <https://harvardlawreview.org/2015/11/equal-dignity-speaking-its-name/> [<https://perma.cc/AWN7-HNHW>] (discussing dignity’s “considerable doctrinal pedigree,” which is “most apparent in the gay-rights triptych of *Lawrence v. Texas*, *United States v. Windsor*, and now *Obergefell*”); Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3083–84 (2014) [hereinafter Yoshino, *Anti-Humiliation*] (discussing the Court’s reliance on dignity in *Lawrence* and *Casey*). See generally Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 176, 206–12 (2011) (providing “a systematic account of dignity’s varied meanings” in Supreme Court opinions, including those involving fundamental rights).

⁷⁹ See, e.g., Siegel, *supra* note 78, at 1737–39 (discussing dignity as “the inherent worth of a life” in the context of Fourteenth Amendment abortion jurisprudence); Yoshino, *Anti-Humiliation*, *supra* note 78, at 3076, 3082 (describing the Supreme Court’s invocation of “dignity” in the substantive due process context as an endorsement of “the anti-humiliation principle,” asking, “what, after all, is the opposite of ‘humiliation’ but ‘dignity?’”); see also William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47, 62 (Michael J. Meyer & William A. Parent eds., 1992) (defining dignity as “a negative moral right not to be regarded or treated with unjust personal disparagement”); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1164–65 (2004) (equating dignity to protection “from shame and humiliation”); cf. Furman

implicates dignity, that is, where its deprivation disparages or humiliates, the Court is more likely to find the interest to be fundamental.⁸⁰

The Court's decisions involving abortion rights and the rights of gays and lesbians powerfully demonstrate dignity's centrality to the substantive due process inquiry.⁸¹ In *Casey*, for example, the Court reaffirmed the fundamental right to abortion prior to viability, noting that the decision to terminate a pregnancy is among those choices "central to personal dignity and autonomy," and therefore "central to the liberty protected by the Fourteenth Amendment."⁸² To deny a woman this right would deprive her of dignity, subjecting her "to anxieties, to physical constraints, to pain that only she must bear."⁸³ The fact "[t]hat these sacrifices have from the beginning of the human race been endured by woman" did not undermine the recognition of such a right.⁸⁴ In the words of the majority: "[a woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."⁸⁵

In *Obergefell*, the Court relied on dignity to find a fundamental right of same-sex couples to marry.⁸⁶ "The fundamental liberties protected by the . . . Due Process Clause," the Court stated, "extend to certain personal choices central to individual dignity and autonomy."⁸⁷ The right of same-sex couples to marry is fundamental, the Court reasoned, because it implicates "dignity in the bond between two men or two women . . . and in their

v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (discussing dignity as one's "intrinsic worth as [a] human being[]" in the context of Eighth Amendment death penalty jurisprudence).

⁸⁰ See Yoshino, *Anti-Humiliation*, *supra* note 78, at 3087–88 (stating that the Supreme Court's use of dignity "cannot be dismissed as quirk," and observing that, "when Justice Kennedy ascribes dignity to an entity, that entity generally prevails"). Some commentators have suggested that dignity is, itself, a fundamental right. See, e.g., Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity'*, THE ATLANTIC (Apr. 29, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796> [<https://perma.cc/GM79-Q5PQ>] (arguing that the Supreme Court's substantive due process jurisprudence "constitutional[ized] . . . the right to dignity," which "may lead to results in the future that liberals come to regret" (emphasis added)). The better view is that dignity is not a fundamental right but is instead one of the elements of the substantive due process inquiry that yields such a right. See Barry, *Dignity Clauses*, *supra* note 33, at 395; see also Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 743 (2006) (stating that dignity is not "a new right or value," but rather is "a value underlying, or giving meaning to, existing constitutional rights and guarantees").

⁸¹ See *infra* notes 82–93 and accompanying text (citing *Casey*, *Obergefell*, and *Lawrence*).

⁸² *Casey*, 505 U.S. at 851.

⁸³ *Id.* at 852.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Obergefell*, 135 S. Ct. at 2597.

⁸⁷ *Id.*

autonomy to make such profound choices.”⁸⁸ By refusing to recognize these profound choices among same-sex couples, the state laws at issue denied same-sex couples “equal dignity”—“disrespect[ing] and subordinat[ing],” “demean[ing]” and “disparag[ing],” and “stigma[tizing]” and “injur[ing]” them.⁸⁹

And in *Lawrence*, the Court relied on dignity to find a fundamental right to engage in private, consensual sexual activity.⁹⁰ Citing *Casey*, the Court stated that decisions involving private consensual sex are “central to personal dignity and autonomy” and, by extension, “central to the liberty protected by the Fourteenth Amendment.”⁹¹ Accordingly, the Court struck down laws criminalizing same-sex intimacy because they deprived same-sex couples of their “dignity as free persons”—subjecting them to “a life-long penalty and stigma.”⁹² Notably, *Lawrence* explicitly overruled the holding of *Bowers*, decided nearly two decades earlier, which never mentioned dignity.⁹³

4. Negative and Positive Rights

Lastly, the Court’s fundamental rights jurisprudence turns on the familiar distinction between negative and positive rights.⁹⁴ As Justice Clarence Thomas put it, “[i]n the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.”⁹⁵ Accordingly, the Court has declined to recognize a fundamental right *to* education and protection from child

⁸⁸ *Id.* at 2600.

⁸⁹ *Id.*; see also *United States v. Windsor*, 570 U.S. 744, 770, 774 (2013) (holding that the federal Defense of Marriage Act’s exclusion of state-sanctioned same-sex marriages deprived same-sex couples of “dignity conferred by the States” in violation of “the liberty of the person protected by the Fifth Amendment”).

⁹⁰ *Lawrence*, 539 U.S. at 574, 578–79.

⁹¹ *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

⁹² *Id.* at 567, 584 (citation omitted).

⁹³ *Id.* at 578 (expressly overruling *Bowers*). The word “dignity” appeared only once in *Bowers*—in Justice Stevens’ dissent upon which the *Lawrence* majority relied. See *Bowers*, 478 U.S. at 217 (Stevens, J., dissenting) (stating that the recognition and protection of liberty is guided by “respect for the dignity of individual choice in matters of conscience”), *overruled by Lawrence*, 539 U.S. 558.

⁹⁴ See Yoshino, *Freedom*, *supra* note 49, at 159; see also CHEMERINSKY, *supra* note 40, at 577 (discussing “deeply entrenched belief that the Constitution is a charter of negative liberties—rights that restrain the government—and not a creator of affirmative rights to government services”) (citing *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989)).

⁹⁵ *Obergefell*, 135 S. Ct. at 2634 (Thomas, J., dissenting); see also *DeShaney*, 489 U.S. at 196 (“[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”).

abuse in *San Antonio Independent School District v. Rodriguez* and *DeShaney v. Winnebago County Department of Social Services*, respectively, while acknowledging the fundamental right to be free *from* government intrusion into one's private decisions regarding contraceptives and consensual sex in *Griswold v. Connecticut* and *Lawrence*, respectively.⁹⁶ Although *Obergefell* arguably blurred this distinction by recognizing a fundamental right to marry (as opposed to freedom *from* civil or criminal penalties for marrying), "marriage has a somewhat distinctive feature of being both a positive and a negative right" involving governmental entitlements and a zone of privacy into which the government cannot intrude.⁹⁷ Therefore, even after *Obergefell*, the positive/negative rights distinction likely remains a feature of the Court's fundamental rights inquiry.⁹⁸

B. Does the Law Meet the Appropriate Level of Scrutiny?

The second question the Court asks when evaluating substantive due process claims is whether the law satisfies the appropriate level of scrutiny, namely, strict scrutiny or rational basis.⁹⁹ As Justice Thomas has stated, if the right is fundamental, "legislation trenching upon [it] . . . is subjected to 'strict scrutiny,' and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring."¹⁰⁰ In short, "the government has the burden of persuading the Court that a truly vital interest is served by the law in question," and that such interest could not be served

⁹⁶ See Yoshino, *Freedom*, *supra* note 49, at 160–62 (discussing *Rodriguez*, *DeShaney*, *Griswold*, and *Lawrence*).

⁹⁷ *Id.* at 168; see also *Obergefell*, 135 S. Ct. at 2600 ("[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there.").

⁹⁸ Yoshino, *Freedom*, *supra* note 49, at 168–69 (suggesting that *Obergefell*'s "eliding the negative/positive distinction" may "represent a 'one-off'" rather than a radical departure from existing law).

⁹⁹ See *CHEMERINSKY*, *supra* note 40, at 828; see also *Glucksberg*, 521 U.S. at 721, 728 (stating that "the Fourteenth Amendment 'forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest," and that the deprivation of non-fundamental interests need only be "rationally related to legitimate government interests") (quoting *Flores*, 507 U.S. at 302); *accord* *Glucksberg*, 521 U.S. at 767 & n.9 (Souter, J., concurring in judgment). Although these levels of scrutiny are "firmly established in the law," the consistency with which the Court applies them is the subject of debate. *CHEMERINSKY*, *supra* note 40, at 568 (discussing criticism that Court inconsistently applies levels of scrutiny); see also *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (stating that plurality correctly invalidated state law infringing fundamental right but failed to "articulate[] the appropriate standard of review," namely, "strict scrutiny").

¹⁰⁰ *Foucha v. Louisiana*, 504 U.S. 71, 115 (1992) (Thomas, J., dissenting).

“through any means less restrictive of the right.”¹⁰¹ If the right is not fundamental, judicial scrutiny is “not exacting”; the legislation will pass constitutional muster so long as it is rationally related to a legitimate interest, and regardless of the existence of a less restrictive alternative.¹⁰²

With this doctrinal foundation laid, this Article next argues that the death penalty deprives the fundamental right to life in violation of substantive due process.

III. THE DEATH PENALTY DEPRIVES THE FUNDAMENTAL RIGHT TO LIFE IN VIOLATION OF SUBSTANTIVE DUE PROCESS

Under the Fifth and Fourteenth Amendments’ guarantee of substantive due process, the government cannot deprive the fundamental right to life unless the deprivation is narrowly tailored to achieve a compelling purpose.¹⁰³ For the reasons that follow, the death penalty deprives condemned prisoners of the fundamental right to life in violation of substantive due process. As discussed in Section A, the condemned’s right to life is fundamental because of: a history and tradition of restriction and regionalization of the death penalty; the dignity of the condemned, as articulated by federal and state judges, moral philosophy, human rights, and religious teaching; and the negative right at issue, namely, the freedom to not be killed by the State.¹⁰⁴ Furthermore, as discussed in Section B, the death penalty is not narrowly tailored to achieve deterrence or retribution because its imposition is marred by arbitrariness, delay, and unreliability, and because execution belies narrow tailoring.¹⁰⁵

A. Condemned Prisoners’ Right to Life Is Fundamental

Generally speaking, the fundamental nature of the right to life is not open to serious debate. Unlike unenumerated liberties such as marriage and intimacy that the Court has struggled to identify, life is explicit in the Constitution’s Due Process Clauses, which reach back to Magna Carta.¹⁰⁶ The right to life’s foundational pedigree,

¹⁰¹ CHEMERINSKY, *supra* note 40, at 831.

¹⁰² *Foucha*, 504 U.S. at 115; CHEMERINSKY, *supra* note 40, at 831.

¹⁰³ See *supra* notes 42–102 and accompanying text.

¹⁰⁴ See *infra* notes 106–281 and accompanying text (discussing the fundamental right to life of the condemned).

¹⁰⁵ See *infra* notes 282–313 and accompanying text (discussing the death penalty’s arbitrariness, delay, and unreliability).

¹⁰⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2632 (2015) (Thomas, J., dissenting) (discussing the history of the Fourteenth Amendment). Compare Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 TEX. L. REV. 1189, 1224–25 (2017) (discussing

derives . . . from the irreducible perception that life and the organic base on which it subsists are somehow sacred; it is . . . the primordial experience of being alive, of experiencing elemental sensation of vitality and of fearing its extinction that generates the sense of sanctity that attaches to the living human being.¹⁰⁷

As the Supreme Court has observed in a range of contexts for well over a century, the right to life is “the right which comprehends all others”; it is, quite literally, “the right to have rights.”¹⁰⁸

In his concurring opinion in *County of Sacramento v. Lewis*, Justice Kennedy, joined by Justice O’Connor, made plain this right in the context of a motorcycle passenger accidentally killed by police during a high-speed chase.¹⁰⁹ The passenger, Justice Kennedy wrote, had an “interest sufficient to invoke [substantive] due process,” namely, the “interest in life which the State, by the Fourteenth Amendment, is bound to respect.”¹¹⁰

Stated at this broad level of abstraction, the right to life is a fundamental right that cannot be denied to anyone, including condemned prisoners, unless the law satisfies strict scrutiny.¹¹¹ The critical question under this formulation, then, is not whether prisoners have a right to life, but rather

Supreme Court’s recognition of various unenumerated liberties under rubric of privacy), *with* U.S. CONST. amend. XIV, § 1 (prohibiting deprivation of “life, liberty, or property, without due process of law” (emphasis added)).

¹⁰⁷ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-12 (2d ed. 1988) (internal quotation marks omitted); *see also* THE DECLARATION OF INDEPENDENCE ¶ 2 (describing right to life as “unalienable”).

¹⁰⁸ *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring); *Screws v. United States*, 325 U.S. 91, 133 (1945) (Rutledge, J., concurring); *see, e.g., Cty. of Sacramento v. Lewis*, 523 U.S. 833, 856 (1998) (Kennedy, J., concurring) (stating that the interest in one’s life was “protected by the text of the [Due Process Clause]”); *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (acknowledging a “fundamental right to life” in the Eighth Amendment context); *Tennessee v. Garner*, 471 U.S. 1, 7, 9, 22 (1985) (acknowledging a “suspect’s fundamental interest in his own life” in the Fourth Amendment context); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (acknowledging the right to life as a “fundamental human right[]” in the Sixth Amendment context); *United States v. Cruikshank*, 92 U.S. 542, 554 (1875) (acknowledging the right to life as a “fundamental right[] which belong[s] to every citizen as a member of society” in the Fourteenth Amendment context); *see also* Bird, *supra* note 14, at 1350–57 (collecting cases regarding the right to life). *See generally Zagorski Amic. Br., supra* note 3, at 4.

¹⁰⁹ *See Lewis*, 523 U.S. at 856–58 (Kennedy, J., concurring).

¹¹⁰ *Id.* at 857–58 (concluding that the right to life was outweighed by the “necessities of law enforcement . . . [to] conduct a dangerous chase of a suspect who disobeys a lawful command to stop”).

¹¹¹ *See id.* at 856–58; *cf. Herrera v. Collins*, 506 U.S. 390, 437 (1993) (Blackmun, J., dissenting) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992), in support of argument that execution of the innocent violates substantive due process).

whether death penalty laws are narrowly tailored to serve a compelling state interest.¹¹²

If the right to life is stated at a more specific level of abstraction, however, discussion of fundamental rights requires a more in-depth analysis—one to which this Article now turns.

1. Specificity

When described at a more specific level, the asserted right is not “the right to life” generally, but rather “the right to life of people condemned to death” or “the right of people convicted of murder not to be punished with death.”¹¹³ In determining whether such a narrowly defined right is fundamental, reliance on the plain letter of the Fifth and Fourteenth Amendments and citation to Supreme Court precedents articulating a fundamental right to life are unlikely to suffice.¹¹⁴ At this more specific level of abstraction, the positive/negative rights distinction, history and tradition, and human dignity must be consulted.¹¹⁵ The remainder of this Section discusses each of these three elements in turn. The positive/negative rights distinction is straightforward and is therefore discussed only briefly; the latter two elements, which require more explanation, are examined in greater detail.

2. Negative Right

The distinction between positive and negative rights strongly supports the fundamental right to life of the condemned.¹¹⁶ As Chief Justice Roberts has stated, fundamental rights are not “a sword to demand positive entitlements from the State,” but rather a “shield” from State power.¹¹⁷ In the death penalty context, Roberts’s words are more than mere metaphor. Those on death row seek not a sword, but rather a shield to protect them from the sword (or syringe) of the State.¹¹⁸ They claim the ultimate negative right: the right to not be killed by their government, the freedom from death at the hands of the State. Far less than “the right to be let alone” by one’s govern-

¹¹² See *supra* notes 99–102 and accompanying text (discussing strict scrutiny standard).

¹¹³ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (requiring “careful description” of asserted right).

¹¹⁴ See *supra* notes 106–110 and accompanying text (discussing the text of Fifth and Fourteenth Amendments, and Supreme Court’s precedent recognizing the right to life).

¹¹⁵ See *supra* notes 57–98 and accompanying text (discussing the four elements of the fundamental rights analysis).

¹¹⁶ See, e.g., *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989) (discussing the distinction between positive and negative rights).

¹¹⁷ *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting).

¹¹⁸ See *id.*

ment,¹¹⁹ they seek simply the right to be. In the pantheon of negative rights, the right to life is second to none.¹²⁰

3. History and Tradition

At first blush, history and tradition appear to offer little support for the recognition of a fundamental right to life of the condemned.¹²¹ In 1976, in *Gregg v. Georgia*, the Court stated that, “the imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England.”¹²² But this sweeping conclusion from over forty years ago obscures a more complex history and tradition.¹²³ Two central themes emerge.

First, as Justice Brennan stated in his concurring opinion in *Furman v. Georgia*, “although ‘the death penalty has been employed throughout our history,’ in fact the history of this punishment is one of successive restriction.”¹²⁴ The Nation’s road to abolition, though long and winding, has inevitably tended in one direction—toward reform and, in many states, abolition of the death penalty.¹²⁵ As the Connecticut Supreme Court observed, “[s]ecularization, evolving moral standards, new constitutional and procedural protections, and the availability of incarceration as a viable alternative to execution have resulted in capital punishment being available for far fewer crimes and criminals, and being imposed far less frequently, with a concomitant deterioration in public acceptance.”¹²⁶

Second, the states in which the death penalty has thrived throughout this Nation’s history share one common feature—they are all located in the

¹¹⁹ *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 n.10 (1972) (quoted in *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting)).

¹²⁰ See *Screws*, 325 U.S. at 133 (Rutledge, J., concurring) (discussing “the right which comprehends all others, the right to life itself”).

¹²¹ See *Glucksberg*, 521 U.S. at 723 (discussing the role of history and tradition in substantive due process context).

¹²² 428 U.S. 153, 176 (1976).

¹²³ Cf. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (overruling the eighteen-year-old holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that upheld law criminalizing same-sex intimacy, in part, because “the historical grounds relied upon in *Bowers* are more complex than the majority opinion [in *Bowers*] and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”).

¹²⁴ *Furman*, 408 U.S. at 299 (Brennan, J., concurring) (citation omitted) (quoting *Trop v. Dulles*, 356 U.S. 86, 99 (1958)).

¹²⁵ See *infra* notes 132–215 and accompanying text (discussing the history of the death penalty in the United States).

¹²⁶ *State v. Santiago*, 122 A.3d 1, 36 (Conn. 2015).

South.¹²⁷ As Carol and Jordan Steiker have written, “[t]he history of the American death penalty has been one of broad-based change over time, yes—but it has also been a history of profound regional division that is still clearly visible in death penalty practices today.”¹²⁸ The thirteen states that comprised the Confederacy, “that were last to abandon slavery and segregation, and that were most resistant to the federal enforcement of civil rights norms,” have carried out more than seventy-five percent of the Nation’s executions over the past four decades.¹²⁹ Indeed, for over three centuries, the South has “consistently outstripped every other region in total number of executions, the majority of which were of black people.”¹³⁰ Accordingly, the history and tradition of denying the condemned’s right to life is most closely associated with those states with a sordid history and tradition of enslaving and subordinating people of color.¹³¹ This correlation does not eviscerate the history and tradition that has supported the death penalty, but it does provide some essential context.

This Subsection now turns to the history and tradition of the right to life of the condemned, as informed by the twin themes of restriction and regionalization. Given their significance to the substantive due process inquiry, history and tradition are discussed in some detail.

¹²⁷ See *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO. CTR., *States*], <https://deathpenaltyinfo.org/states-and-without-death-penalty> [https://perma.cc/R7SF-Y574] (last updated Oct. 11, 2018).

¹²⁸ CAROL STEIKER & JORDAN STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 17 (2016) [hereinafter STEIKER & STEIKER, *COURTING DEATH*]; see also *Background and Developments*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 1, 21–23 (Hugo Adam Bedau ed., 1997) (discussing the regionalization of the death penalty).

¹²⁹ *Santiago*, 122 A.3d at 52–53 & n.86 (quoting C. STEIKER & J. STEIKER, *REP. TO THE AM. L. INST. CONCERNING CAPITAL PUNISHMENT* (Nov. 2008), in *AM. L. INST., REP. OF THE COUNCIL TO THE MEMBERSHIP OF THE AM. L. INST. ON THE MATTER OF THE DEATH PENALTY* (Apr. 15, 2009) annex B, https://www.ali.org/media/filer_public/3f/ae/3fae71f1-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf [https://perma.cc/PF56-E83U] [hereinafter STEIKER & STEIKER, *REP. TO THE AM. L. INST.*]).

¹³⁰ STEIKER & STEIKER, *COURTING DEATH*, *supra* note 128, at 17.

¹³¹ See *id.* See generally BHARAT MALKANI, *SLAVERY AND THE DEATH PENALTY: A STUDY IN ABOLITION* 10 (2018) (discussing “the historical and conceptual links between slavery, capital punishment, and their respective abolitionist movements”); Kevin Barry & Bharat Malkani, *The Death Penalty’s Darkside: A Response to Phyllis Goldfarb’s Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 74 WASH. & LEE L. REV. ONLINE 184, 186–87 (2017) (examining “[t]he relationship between slavery—the pinnacle of American racism—and the death penalty”).

a. Colonial America—Early 1950s: Northern Restriction and Southern Retention

Brought to this continent by the earliest colonial governments, the death penalty, “once here, was tempered considerably.”¹³² By the late-1600s, for example, English law recognized nearly fifty capital crimes; the average American colony recognized only twelve.¹³³ Although all of the original colonies authorized the death penalty as the mandatory punishment for certain crimes, colonial governments did not always enforce the law.¹³⁴ In Connecticut, for example, “judges and juries often hesitated to enforce the capital laws as written. In many adultery cases, . . . courts avoided imposing the ultimate punishment by finding the parties not guilty but ‘highly suspicious,’ and thus imposing a sentence of something other than death.”¹³⁵ In other cases, prisoners were sentenced to “simulated hanging” (i.e., standing on the gallows for a half-hour with one’s neck in a noose) or given last-minute reprieves.¹³⁶ And, as in England, “the vast reach of the death penalty . . . was cabined by discretionary grants of mercy at all stages of the process.”¹³⁷

In the 1770s and 1780s, American newspapers reprinted Italian philosopher Cesare Beccaria’s 1764 treatise *On Crimes and Punishments*, a seminal Enlightenment-era work that challenged the legitimacy of the death penalty and found widespread support in Europe and the United States.¹³⁸ From the 1790s to the 1860s, the abolitionist movement, “led variously by secular reformers and Quakers, Unitarians, and other liberal Christians,” succeeded in restricting the death penalty in the northern states by introducing degrees of murder, reducing the variety of crimes punishable by death, replacing mandatory death sentences with jury discretion, ending public executions, and completely abolishing the death penalty in Michigan (1847), Rhode Island (1852), and Wisconsin (1853).¹³⁹

¹³² *Furman*, 408 U.S. at 341 (Marshall, J., concurring).

¹³³ *Id.* at 335.

¹³⁴ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 89–91 (2016); STEIKER & STEIKER, *COURTING DEATH*, *supra* note 128, at 116.

¹³⁵ *Santiago*, 122 A.3d at 36 (citation omitted).

¹³⁶ STEIKER & STEIKER, *COURTING DEATH*, *supra* note 128, at 116–17.

¹³⁷ *Id.* at 117.

¹³⁸ *Background and Developments*, *supra* note 128, at 4; see also BANNER, *supra* note 134, at 91–92 (discussing Beccaria’s influence among luminaries such as William Blackstone, Thomas Jefferson, and John Adams). See generally John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 NW J. L. & SOC. POL’Y 195 (2009).

¹³⁹ *Background and Developments*, *supra* note 128, at 4–8.

Significantly, these death penalty reforms “happened later, less completely, or not at all in the South,” due in large part “to the South’s historical practice of chattel slavery and of slavery’s enduring racial legacy long after the end of the Civil War.”¹⁴⁰ For example, although many southern states, like their northern counterparts, reduced the number of crimes punishable by death, they did so only for whites—not blacks.¹⁴¹ Indeed, southern “slave codes” even compensated white slaveholders for the “taking” of executed slaves.¹⁴² Public executions remained popular in southern states long after they were banned in the North, particularly when the execution involved a black man convicted of raping a white woman.¹⁴³ And, unlike several of its northern counterparts, abolition of the death penalty proved impossible in the South because of the widely held belief that the death penalty was needed to protect the white minority from violence by an enslaved black majority for whom incarceration was no deterrent.¹⁴⁴ After the war, support for the death penalty persisted among white southerners who believed that the death penalty maintained order by deterring violence by “the newly freed and impoverished black population” and deterring the lynching of black people by whites.¹⁴⁵

In the years following the Civil War, slave codes gave way to “Black Codes,” which reinstated a dual system of criminal justice based explicitly on race, with the death penalty at its center.¹⁴⁶ “As was the case under [slavery], blacks . . . were given harsher punishments than whites for committing similar offenses.”¹⁴⁷ Although Reconstruction ended *de jure* discrimination under the Black Codes, it did not—and, indeed, *could* not—end *de facto* discrimination.¹⁴⁸ As Phyllis Goldfarb has written, “[t]he past was not the past—it flourished in new forms.”¹⁴⁹ Proponents of racial segregation turned to the criminal justice system, generally—and the death penalty, spe-

¹⁴⁰ STEIKER & STEIKER, *COURTING DEATH*, *supra* note 128, at 11, 17.

¹⁴¹ *Id.* at 11; *see also* *McCleskey v. Kemp*, 481 U.S. 279, 328–30 (1987) (Brennan, J., dissenting) (discussing “Georgia’s legacy of a race-conscious criminal justice system”); Brief of Amici Curiae for NAACP et al. at 9, *Aikens v. California*, 404 U.S. 812 (1971) (No. 68-5027) (discussing “substantial number of felonies carrying capital punishment for slaves and lesser punishments for whites” in southern states).

¹⁴² STEIKER & STEIKER, *COURTING DEATH*, *supra* note 128, at 19.

¹⁴³ *Id.* at 24.

¹⁴⁴ *Id.* at 7, 19.

¹⁴⁵ *See id.* at 19, 22–23.

¹⁴⁶ *State v. Loftin*, 724 A.2d 129, 208 (N.J. 1999) (Handler, J., dissenting).

¹⁴⁷ *Id.*

¹⁴⁸ *See Loftin*, 724 A.2d at 208.

¹⁴⁹ Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1395, 1403 (2016).

cifically—as a tool of racial control.¹⁵⁰ Racial discrimination, no longer explicit in the law, persisted in the administration of the death penalty under Jim Crow and continues to this day, with “death sentences . . . far more likely to be handed down if the victim is white—even controlling for other factors.”¹⁵¹

Although “the Civil War halted much of the abolition furor,” with “[s]ome of the attention previously given to abolition . . . diverted to prison reform,” the abolitionist movement pressed on with moderate success.¹⁵² Declining rates of violent crime and increasing ambivalence over the retributive and deterrent value of the death penalty contributed to a wave of legislative repeals in the late nineteenth century.¹⁵³ Maine abolished the death penalty in 1876, restored it in 1883, and abolished it for good in 1887.¹⁵⁴ Iowa abolished the death penalty from 1872–1878, and Colorado followed from 1897–1901.¹⁵⁵ The turn of the century saw the abolition of the death penalty in nine states, although all but two, North Dakota and Minnesota, restored the death penalty within just a few years.¹⁵⁶ Notably, “for every state that abolished capital punishment during the first two decades of the century there were two that came close.”¹⁵⁷ In 1919, executions dropped to just sixty-five—per capita, a new low.¹⁵⁸ Although executions would soon soar to new heights amidst a “crime wave” generated by the Great Depression, reaching 200 by the late-1930s, abolitionist sentiment continued, leading to the development of ostensibly more humane methods of execution, namely electrocution and lethal gas, which were thought to be “as quick, painless, reliable, and as little disfiguring as possible.”¹⁵⁹

¹⁵⁰ See *id.* at 1402–03; see also BANNER, *supra* note 134, at 228 (stating that, after the Civil War, southern whites turned to the death penalty as an “alternative form[] of racial subjugation”).

¹⁵¹ BRANDON L. GARRETT & LEE B. KOVARSKY, *THE DEATH PENALTY* 89 (2018); see also STEIKER & STEIKER, *supra* note 128, at 110 (“[T]he unjust influence of race in the capital punishment process continues unchecked.”); CARTER ET AL., *supra* note 175, at 353–54 n.54 (“[U]nconscious operation of irrational sympathies and antipathies including racial upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable . . .”) (quoting memorandum from Justice Scalia to Justice Marshall); *infra* notes 291–292 and accompanying text (discussing racialized application of death penalty).

¹⁵² *Furman*, 408 U.S. at 338–39 (Marshall, J., concurring).

¹⁵³ BANNER, *supra* note 134, at 219.

¹⁵⁴ *Background and Developments, supra* note 128, at 9.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 8–9.

¹⁵⁷ BANNER, *supra* note 134, at 222.

¹⁵⁸ *Id.* at 223.

¹⁵⁹ *Background and Developments, supra* note 128, at 8–10; see also *Baze v. Rees*, 553 U.S. 35, 80 (2008) (observing that “our society has moved away from public and painful retribution toward ever more humane forms of punishment”).

b. Mid-1950s–Mid-1970s: Judicial Intervention

From the mid-1950s to the mid-1970s, the abolition movement achieved some of its greatest successes, as nine more states abolished the death penalty, public support for the death penalty dropped to historic lows, and annual executions declined sharply—ceasing completely in 1968.¹⁶⁰ Many mainstream religious organizations, including the American Baptist Church, the United Methodist Church, the Episcopal Church, the Unitarian Universalist Association of Congregations, the National Council on Churches, and Judaism’s Conservative, Reform and Reconstructionist movements, likewise registered their opposition to the death penalty at this time—a far cry from the Old Testament’s eye-for-an-eye justice championed by many religious groups over the past three centuries.¹⁶¹ Abolition’s greatest accomplishment during this period, however, took place not in legislative halls, empty execution chambers, or churches and synagogues, but rather in the courts.¹⁶²

On the heels of newly appointed Supreme Court Justice Arthur Goldberg’s groundbreaking dissent in the 1963 case of *Rudolph v. Alabama*, which called into question the constitutionality of the death penalty as applied to non-homicide crimes, a network of highly skilled lawyers at the ACLU and the NAACP Legal Defense Fund began challenging the constitutionality of the death penalty per se.¹⁶³ In the 1972 watershed case of *Furman*, the Supreme Court famously struck down all death penalty statutes then in force, holding that standardless jury discretion violated the Eighth Amendment.¹⁶⁴ Justices Brennan and Marshall would have gone further—declaring the death penalty unconstitutional per se because of its unaccepta-

¹⁶⁰ *Background and Developments*, *supra* note 128, at 13, 16–17.

¹⁶¹ Compare PEW RES. CTR., *Religious Groups’ Official Positions on Capital Punishment* (Nov. 4, 2009), <http://www.pewforum.org/2009/11/04/religious-groups-official-positions-on-capital-punishment/> [<https://perma.cc/79JV-M9JW>] (discussing religious opposition to death penalty in twentieth century), with BANNER, *supra* note 134, at 104–06, 116–18, 213, 225, 241 (discussing religious support for death penalty from the colonial era to the early 1900s, when “[c]hurch groups and religious leaders . . . began arguing for the abolition of the death penalty in increasing numbers”).

¹⁶² See STEIKER & STEIKER, *COURTING DEATH*, *supra* note 128, at 38–79 (discussing the Supreme Court’s “constitutional regulation” of the death penalty); BANNER, *supra* note 134, at 231–66 (same); see also Kevin Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 537–50 (2017) [hereinafter Barry, *The Law of Abolition*] (discussing support for abolition of death penalty among federal and state supreme court justices).

¹⁶³ *Dist. Att’y v. Watson*, 411 N.E.2d 1274, 1278 (Mass. 1980) (quoting Arthur J. Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 365 (1973)).

¹⁶⁴ See *Furman*, 408 U.S. at 239–40 (per curiam).

bility to contemporary society, unreliability, arbitrariness, and lack of legitimate penological purpose.¹⁶⁵

The backlash was swift. “Amid burgeoning political campaigns organized under the rubric of ‘states’ rights,’ the slogan formerly deployed to justify both slavery and Jim Crow segregation,” thirty-six states redrafted their death penalty statutes to address the concerns outlined in *Furman*.¹⁶⁶ Four years later, in *Gregg*, the Court for the first time addressed—and confirmed—the constitutionality of the death penalty per se under the Eighth Amendment, but it was far from a full-throated endorsement.¹⁶⁷ The Court held that, “in the absence of more convincing evidence,” the death penalty was not “without justification,” and states were not “clearly wrong” that the death penalty “may be necessary.”¹⁶⁸ The Court did not say that the death penalty could never be held unconstitutional, and three of its authors, Justices Powell, Blackmun, and Stevens, would come to regret their votes—the latter two writing opinions toward the end of their careers that called on the Court to declare the death penalty unconstitutional.¹⁶⁹

Instead of “overrul[ing] *Furman* and return[ing] the death penalty to the states,” *Gregg* set in motion a process of constitutional regulation that still endures—one designed to tame the death penalty’s “arbitrary, discriminatory, and excessive applications through a growing set of constitutional doctrines.”¹⁷⁰ In addition to imposing a number of procedural constraints on the administration of the death penalty,¹⁷¹ these doctrines would eventually lead the Court to categorically prohibit the death penalty for people declared insane (*Ford v. Wainwright*, 1986), people with intellectual disabilities (*Atkins v. Virginia*, 2002), people who were juveniles at the time of the offense (*Roper v. Simmons*, 2005), and people convicted of non-homicide crimes (*Kennedy v. Louisiana*, 2008).¹⁷² Writing for the majority in *Ford*,

¹⁶⁵ See *id.* at 305 (Brennan, J., concurring); *id.* at 370 (Marshall, J., concurring).

¹⁶⁶ HOOD & HOYLE, *supra* note 6, at 129.

¹⁶⁷ *Gregg*, 428 U.S. at 186–87.

¹⁶⁸ *Id.*

¹⁶⁹ See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (Fordham Univ. Press 2001) (1994) (discussing Justice Lewis Powell’s statement to his biographer that, if “he would change his vote in any case,” he “would vote [against capital punishment] in any capital case,” including *Furman*, because he had “come to think that capital punishment should be abolished”); *infra* notes 275–276 and accompanying text (discussing Justices Blackmun’s and Stevens’s opinions).

¹⁷⁰ STEIKER & STEIKER, *COURTING DEATH*, *supra* note 128, at 40, 71.

¹⁷¹ These constraints include a two-part trial (first the determination of guilt, then sentencing) and standards to guide the jury in deciding between death and incarceration. See *Background and Developments*, *supra* note 128, at 19.

¹⁷² See *Kennedy v. Louisiana*, 554 U.S. 407, 420, 446–47 (2008) (prohibiting death penalty for non-homicide crimes); *Roper v. Simmons* 543 U.S. 551, 560, 578–79 (2005) (prohibiting the death penalty for juveniles); *Atkins v. Virginia*, 536 U.S. 304, 311, 321 (2002) (prohibiting the

Justice Marshall explicitly recognized the right to life of the condemned, concluding that the execution of people declared insane does not “comport[]with the fundamental human dignity that the [Eighth] Amendment protects,” in part, because the prisoner “has no comprehension of why he has been singled out and stripped of his fundamental right to life.”¹⁷³

Contrary to *Gregg*’s assertion that the death penalty does not “invariably” violate the federal Constitution, a number of state supreme court justices throughout the country—in California, Connecticut, Illinois, Indiana, Massachusetts, Mississippi, Montana, Tennessee, Texas, Utah, Washington, and Wyoming—would soon reach the opposite conclusion under state constitutions.¹⁷⁴ In California and Massachusetts, in particular, this conclusion commanded the support of a majority.¹⁷⁵ Notably, in holding the death penalty unconstitutional, the Massachusetts Supreme Judicial Court relied, in part, on the death penalty’s deprivation of the “fundamental right [to life] ‘explicitly or implicitly guaranteed by the Constitution’” and “the natural right of every man.”¹⁷⁶ Although voters in California and Massachusetts subsequently abrogated their high courts’ decisions by amending their respective state constitutions to permit the death penalty, calls for judicial abolition did not fade.¹⁷⁷ Decades later, in 2015, the Connecticut Supreme Court answered those calls, abolishing its nearly 400-year-old death penalty in *State v. Santiago*. That decision still stands.¹⁷⁸

c. Late 1970s–1990s: Death-Penalty Lite

In the 1970s and 1980s, high rates of violent crime led many elected officials to call for stiffer criminal sentences, including the death penalty.¹⁷⁹ Although crime rates began to decline in the 1990s, the climate of fear

death penalty for people with intellectual disabilities); *Ford*, 477 U.S. at 409–10 (prohibiting the death penalty for people declared insane).

¹⁷³ *Ford*, 477 U.S. at 409.

¹⁷⁴ *Gregg*, 428 U.S. at 169; see Barry, *The Law of Abolition*, *supra* note 162, at 537–50 (discussing state supreme court opinions in California, Illinois, Connecticut, Massachusetts, Montana, Tennessee, Utah, Washington, and Wyoming).

¹⁷⁵ *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27; *Santiago*, 122 A.3d at 1, 10; *Watson*, 411 N.E.2d at 1286–87, *superseded by constitutional amendment*, MASS. CONST. art. CXVI.

¹⁷⁶ *Watson*, 411 N.E.2d at 1282–83 (citations omitted) (first quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973); then quoting ALBERT CAMUS, REFLECTIONS ON THE GUILLOTINE (1957), *reprinted in* RESISTANCE, REBELLION, AND DEATH 131, 221 (Justin O’Brien trans. 1960)).

¹⁷⁷ See *supra* note 175 and accompanying text (discussing California and Massachusetts).

¹⁷⁸ See *Santiago*, 122 A.3d at 10.

¹⁷⁹ See BANNER, *supra* note 134, at 282, 301.

stoked by “tough-on-crime” advocates did not diminish.¹⁸⁰ As Franklin Zimring has written, the 1990s, therefore, “should have been the decade when the death penalty was restored as a normal part of the criminal process.”¹⁸¹ But they were not. True, the number of executions soared in the two decades following *Gregg*, eventually peaking at ninety-eight in 1999—the highest number of executions on record since the early 1950s.¹⁸² Importantly, however, this number was still well short of the 200 annual executions in the late-1930s.¹⁸³ The death penalty had returned, all right, but it was a much leaner version of its former self. In addition, regionalization remained a troubling fixture of execution. While three-quarters of the country—thirty-six states—had reaffirmed their commitment to the death penalty by enacting new death penalty statutes in the wake of *Gregg*, “[s]outhern states continued to account for three-quarters of all executions.”¹⁸⁴

Lastly, despite the expansion of the federal death penalty and polling data revealing increased popular support for the death penalty during this period, powerful religious and secular institutions rose in opposition.¹⁸⁵ In his 1995 encyclical, *Evangelium Vitae* (The Gospel of Life), Pope John Paul II added the Roman Catholic Church to the long list of religious organizations opposed to the death penalty, invoking “the inviolability of human life” and “the dignity of the human person.”¹⁸⁶ And in 1997, the American Bar Association’s House of Delegates called for a nationwide moratorium on executions until courts could ensure fairness in the death penalty’s administration and minimize the risk of executing innocent people.¹⁸⁷

¹⁸⁰ *Id.* at 301.

¹⁸¹ ZIMRING, *supra* note 7, at 143.

¹⁸² HOOD & HOYLE, *supra* note 6, at 130.

¹⁸³ BANNER, *supra* note 134, at 208, 267; *Background and Developments*, *supra* note 128, at 9–10. During the mid-1990s, death sentences climbed to three hundred—the highest number since the government began tracking this information in the 1930s. BANNER, *supra* note 134, at 267.

¹⁸⁴ ZIMRING, *supra* note 7, at 143–44.

¹⁸⁵ See HOOD & HOYLE, *supra* note 6, at 130 (discussing support for the death penalty during the 1990s).

¹⁸⁶ POPE JOHN PAUL II, *EVANGELIUM VITAE: ON THE VALUE AND INVIOABILITY OF HUMAN LIFE* ¶¶ 40, 56 (1995), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html [<https://perma.cc/V2GK-SR2E>]; *id.* ¶ 40 (distinguishing Old Testament’s “sense of the value of life” from “the refinement found” in the New Testament).

¹⁸⁷ See STEIKER & STEIKER, *COURTING DEATH*, *supra* note 128, at 283; see also HOOD & HOYLE, *supra* note 6, at 137.

d. The Twenty-First Century

At the start of the twenty-first century, the abolition movement has recorded some of its greatest gains in over forty years. By virtually every measure, the death penalty has lost the acceptance it once enjoyed.¹⁸⁸

Consider first the new wave of states to abolish the death penalty. Between 2007 and 2018, nine states abandoned the death penalty through legislative repeal, judicial abolition, or some combination of both; only one state—Nebraska—brought its death penalty back.¹⁸⁹ Today, thirty states retain the death penalty, but few states use it with any frequency.¹⁹⁰ Indeed, eleven retentionist states plus the federal government and military have not carried out an execution in at least a decade.¹⁹¹ Before abolishing the death penalty, the governors of Illinois, New Jersey, and Maryland granted broad commutations that cleared their states' death rows, and the governors of California, Colorado, Oregon, and Pennsylvania have imposed moratoria on executions.¹⁹² As the Supreme Court stated in *Lawrence* in the context of same-sex sodomy laws, such a “pattern” or “history of nonenforcement suggests the moribund character” of laws that no longer enjoy support.¹⁹³

¹⁸⁸ See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2772–76 (2015) (documenting the declining use of the death penalty); *Santiago*, 122 A.3d at 50–53 (same); see also GARRETT & KOVARSKY, *supra* note 151, at 235–45 (discussing declining use of death penalty since 1990s).

¹⁸⁹ See *State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018) (holding the death penalty invalid because it “is imposed in an arbitrary and racially biased manner”); Barry, *The Law of Abolition*, *supra* note 162, at 530–31 & n.54. The nine states are New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Nebraska (abolished in 2015; reinstated in 2016), Delaware (2016), and Washington (2018). See *supra*. At the time of this writing, New Hampshire appears poised to abolish its death penalty in 2019. See Holly Ramer, *New Hampshire House Overrides Sumunu Veto of Death Penalty Repeal*, CONCORD MONITOR (May 23, 2019), <https://www.concordmonitor.com/Override-day-at-the-State-House-25751868> [<https://perma.cc/57GE-X5HC>] (discussing the New Hampshire House of Representatives' passage of a death penalty repeal bill over the governor's veto).

¹⁹⁰ DEATH PENALTY INFO. CTR., *States*, *supra* note 127.

¹⁹¹ *Jurisdictions with No Recent Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/jurisdictions-no-recent-executions> [<https://perma.cc/99Q9-2TSL>] (last updated Nov. 21, 2018). The eleven states are: California, Colorado, Kansas, Kentucky, Montana, Nevada, New Hampshire, North Carolina, Oregon, Pennsylvania, and Wyoming.

¹⁹² *Clemency*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/clemency> [<https://perma.cc/7N8L-PMCG>] (July 20, 2018); *Death Penalty in Flux*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-penalty-flux> [<https://perma.cc/WJB5-QTEL>]. The governor of Washington, Jay Inslee, issued a moratorium on executions in 2014—four years prior to the Washington Supreme Court's invalidation of the death penalty in 2018. *Gregory*, 427 P.3d at 627, 636 n.10.

¹⁹³ *Lawrence*, 539 U.S. at 572–73 (citation omitted); see also *Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014) (counting Oregon, which last executed a person in 1997, on the “[abolitionist] side of the ledger”).

Next, consider executions. Although nineteen retentionist states have imposed the death penalty since 2009, the number of executions nationwide has steadily declined: from a height of nearly one hundred executions in 1999, to 66 in 2001, 37 in 2008, and 20 in 2016—the lowest number since 1991.¹⁹⁴ In 2017, there were twenty-three executions, and in 2018, there were twenty-five executions—the second and third lowest numbers, respectively, since 1991.¹⁹⁵ The geographic concentration of these executions, moreover, is breathtaking. Between 2009 and 2018, over three-quarters of executions occurred in just six states: Texas (135), Florida (31), Georgia (29), Alabama (25), Missouri (22), and Oklahoma (24), with over one-third of executions (38%) in Texas alone.¹⁹⁶

Death sentences have also dropped dramatically, from modern era highs of more than three hundred annually in the mid-1990s to modern era lows of eighty-five or fewer since 2011, culminating in an over forty-year low of just thirty-one death sentences in 2016.¹⁹⁷ The year 2017, with thirty-nine death sentences, and 2018, with forty-two death sentences, were the second and third lowest, respectively.¹⁹⁸ Well over half of all death sentences in 2018 (57%) “came from just four states: Texas and Florida (both with seven) and California and Ohio (both with five).”¹⁹⁹

Given these paltry numbers, it is not surprising that popular support for the death penalty has fallen to its lowest point in decades. Some polling data concludes that less than half of all Americans (49%) prefer the death penalty over life without the possibility of parole, while other data suggests that a slim majority of the public (55%) prefers the death penalty—the lowest

¹⁹⁴ *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO. CTR., *Executions*], <https://deathpenaltyinfo.org/number-executions-state-and-region-1976> [<https://perma.cc/84WK-TKUM>] (Feb. 8, 2019). The nineteen retentionist states and their respective total number of executions between 2009 and 2018 are: Alabama (25), Arizona (14), Arkansas (4), Florida (31), Georgia (29), Idaho (1), Indiana (1), Louisiana (1), Mississippi (11), Missouri (22), Nebraska (1), Ohio (28), Oklahoma (24), South Carolina (3), South Dakota (3), Tennessee (5), Texas (135), Utah (1), Virginia (11). *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Death Penalty Info. Ctr., Executions*, *supra* note 194. From 2009 to 2018, there were 354 executions nationwide. *Id.*

¹⁹⁷ *2018 Sentencing*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/2018-sentencing#Defendants%20Sentenced%20to%20Death%20in%202018>.

¹⁹⁸ *Id.*

¹⁹⁹ *Death Penalty Info. Ctr., Year End Report 2018*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/YearEnd2018>. Two-thirds of death sentences in 2017 “were imposed in just five states (California, Arizona, Nevada, Texas, and Florida), with nearly one-third of those sentences emanating from just three counties (Riverside, California; Clark, Nevada; and Maricopa, Arizona).” *New Resources: Capital Punishment and the State of Criminal Justice 2018*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/7180> [<https://perma.cc/UVC6-7F84>].

percentage in over forty years.²⁰⁰ This virtual dead heat is significant because, throughout the world, no country has *ever* abolished its death penalty “as a result of the majority of the general public *demanding* it.”²⁰¹ As Franklin Zimring and Gordon Hawkins have written, “[m]ajorities of two-thirds *opposed* to abolition were associated with abolition in Great Britain in the 1960s, Canada in the 1970s, and the Federal Republic of Germany in the late 1940s.”²⁰² When looked at in this historical context, today’s wavering support for the death penalty is a sign of just how tenuous the death penalty’s hold on the public imagination has become.

Significantly, many evangelical Christians and political conservatives now count themselves among those opposed to the death penalty.²⁰³ In 2015, after forty years of supporting the death penalty, the National Association of Evangelicals acknowledged, for the first time, the “biblical and theological case” *against* the death penalty, based on “the sacredness of all life, including the lives of those who perpetrate serious crimes and yet have the potential for repentance and reformation.”²⁰⁴ The National Latino Evangelical Coalition went further, adopting a position opposing the death penalty.²⁰⁵ Although the Republican Party remains the only major political party to support the death penalty, a significant number of Republican state lawmakers have likewise championed legislation repealing the death penalty, invoking the death penalty’s incompatibility with conservative principles of limited government, fiscal responsibility, and promoting a culture of life.²⁰⁶

²⁰⁰ *Gallup Poll: Support for Death Penalty in U.S. Falls to a 45-Year Low*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/Gallup-Support_for_Death_Penalty_Falls_in_2017 [<https://perma.cc/FF99-W32Z>] (comparing a 2017 Gallup poll and a September 2016 Pew Research Center poll regarding the death penalty).

²⁰¹ FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 13, 22 (1986); *accord* STEIKER & STEIKER, *COURTING DEATH*, *supra* note 128, at 318.

²⁰² ZIMRING & HAWKINS, *supra* note 201, at 21–22 (finding no “examples of abolition occurring at a time when public opinion supported the measure”).

²⁰³ *See* Ben Jones, *The Republican Party, Conservatives, and the Future of Capital Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 223, 238–39 (2018) (discussing evangelicals’ support for abolition of the death penalty “as part of a consistent life ethic”).

²⁰⁴ *See id.*; *see also* *Capital Punishment*, NAT’L ASS’N EVANGELICALS, <http://www.nae.net/capital-punishment-2/> [<https://perma.cc/8K9S-QCXX>] (affirming “the conscientious commitment of both streams of Christian ethical thought,” that is, for and against the death penalty).

²⁰⁵ *See* Jones, *supra* note 203, at 238.

²⁰⁶ *See id.* at 226–27; *see also* ANDREW HAMMEL, *ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE* 168 (2010) (discussing abolition of death penalty in Europe and noting that, “[o]nce abolition became acceptable in center-right circles—that is, once a solid minority of, say, 30–40% of conservative lawmakers became willing to vote for abolition—its success became inevitable”); *CONSERVATIVES CONCERNED ABOUT THE DEATH PENALTY, THE RIGHT WAY: MORE REPUBLICAN LAWMAKERS CHAMPIONING DEATH PENALTY REPEAL* (Oct. 2017), <https://conservativesconcerned.org/wp-content/uploads/2017/10/The-Right-Way-Online.pdf>

Among those elected officials who continue to advocate for the death penalty, there are doubtless some who believe that the death penalty can actually accomplish what it purports to do, that is, consistently execute guilty individuals fairly and efficiently.²⁰⁷ But for many others, the death penalty now serves primarily a ritualistic function—a “symbolic affirmation of the public’s fear of criminal victimization” and “frustration over the apparent failure of government” to do anything about it.²⁰⁸ In the words of philosopher Hugo Adam Bedau:

In today’s electoral politics, a candidate’s support for the death penalty amounts to saying: “Believe me, I care about you and I hear your anger and frustration. That’s why I support the death penalty, whether or not it would do any good in removing the objective causes of your distress. Knowing where I stand ought to make you feel better—and more willing to put government into my hands than in the hands of liberals who disagree with us over the death penalty. They care more about the vicious criminals than they do about the victims and law-abiding citizens like you and me.”²⁰⁹

Bedau’s words, written twenty years before Donald Trump’s ascendancy to the presidency, read as if they were lifted from the pages of President Trump’s ads, speeches, and tweets calling for the execution of rapists (“crazed misfits”), military deserters (“traitors”), and drug dealers (“big pushers”), among others.²¹⁰ Although powerful voices have, for centuries, expressed support for the death penalty in the name of retribution and deterrence, in recent years, base politics—not high-minded principles—have become ever more important to the death penalty’s defense.²¹¹

From this brisk historical survey, a central theme emerges: after four centuries of experience with the death penalty, the U.S. tradition of punishing those convicted of murder with death has gradually deteriorated, reveal-

(“During [2016 and 2017], . . . Republicans constituted a third of all sponsors of death penalty repeal bills in state legislatures.”)

²⁰⁷ See *Background and Developments*, *supra* note 128, at 23–24.

²⁰⁸ *Id.* at 24.

²⁰⁹ *Id.*

²¹⁰ See J. Richard Broughton, Essay, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611, 1622–23, 1627 n.65 (2018); Matt Ford, *Donald Trump’s Racially Charged Advocacy of the Death Penalty*, THE ATLANTIC (Dec. 18, 2015), <https://www.theatlantic.com/politics/archive/2015/12/donald-trump-death-penalty/420069/> [<https://perma.cc/6PKH-F72L>] (discussing then-presidential candidate Trump’s advocacy of the death penalty).

²¹¹ See *Background and Developments*, *supra* note 128, at 17 (discussing the politicization of the death penalty, beginning with Richard Nixon’s 1968 presidential campaign).

ing an “emerging awareness” that the right to life ought never be taken away through application of the death penalty.²¹² Justice is better served through incarceration.²¹³ This diminishing appetite for the death penalty in all but a few states strongly suggests a tradition of punishment that no longer commands the respect of the Nation, but there is more. Robust support for the death penalty, as gauged by those who regularly execute, is concentrated among states with a history of slavery, racial segregation, and race-conscious criminal justice systems.²¹⁴ As Carol and Jordan Steiker have observed, “the current map of active death penalty states is predominantly a map of the former Confederacy.”²¹⁵ A tradition infected with racial disparities, which is observed by only a small fraction of states with a deeply troubling legacy of racial prejudice, is hardly a tradition at all—much less one deserving of preservation.

e. The International Community

This Nation’s gradual recognition of the fundamental right to life of condemned prisoners is bolstered by an overwhelming rejection of the death penalty worldwide on right-to-life grounds.²¹⁶ As the Court stated in *Roper*

²¹² See *Lawrence*, 539 U.S. at 559, 572 (invalidating same-sex sodomy laws and stating that “[t]he Nation’s laws and traditions in the past half century are most relevant here. They show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex” (citing *Lewis*, 523 U.S. at 857)); see also *supra* notes 121–211 and accompanying text (discussing the history of restriction of the death penalty).

²¹³ See *Santiago*, 122 A.3d at 36 (stating that “the acceptability of imposing death as a form of judicial punishment has declined steadily over Connecticut’s nearly 400 year history,” in part, because of “the availability of incarceration as a viable alternative to execution”); see also *Furman*, 408 U.S. at 305 (Brennan, J., concurring) (stating that “[t]he practice of punishing criminals by death . . . was widespread and by and large acceptable to society,” in part, because, “without developed prison systems, there was frequently no workable alternative”); *id.* at 335 (Marshall, J., concurring) (“[W]ith county jails inadequate and insecure, the criminal population seemed best controlled by death, mutilation, and fines.”).

²¹⁴ See, e.g., *McCleskey v. Kemp*, 481 U.S. at 328–34, 343–44 (1987) (Brennan, J., dissenting) (discussing “Georgia’s legacy of a race-conscious criminal justice system”); *Santiago*, 122 A.3d at 53 n.86 (noting “broad scholarly literature . . . point[ing] to the fact that executions are overwhelmingly confined to the South [and states bordering the South], the very same jurisdictions that were last to abandon slavery and segregation, and that were most resistant to the federal enforcement of civil rights norms”) (alteration in original) (quoting STEIKER & STEIKER, REP. TO THE AM. L. INST., *supra* note 129); see also *supra* notes 127–131, 140–151, 196, 199 and accompanying text (discussing regionalization of death penalty).

²¹⁵ STEIKER & STEIKER, *COURTING DEATH*, *supra* note 128, at 17; see also MALKANI, *supra* note 131, at 55 (“[A]ctual executions tend to occur in those states that practiced slavery, and which saw lynchings carried out with some frequency.”).

²¹⁶ See *infra* notes 221–241 and accompanying text (discussing the international criticism of the death penalty). For an excellent and concise summary of death penalty trends worldwide, see

v. *Simmons*, a case that categorically barred the juvenile death penalty based, in part, on its rejection by the world community, “express affirmation of certain fundamental rights by other nations and peoples . . . underscores the centrality of those same rights within our own heritage of freedom.”²¹⁷ This is especially true where, as here, the Court’s “precedent has been . . . weakened.”²¹⁸ Since *Gregg*, successive Supreme Court decisions have dramatically narrowed the death penalty’s reach.²¹⁹ In light of this “serious erosion” in precedent, worldwide criticism of the death penalty as a violation of the right to life is especially relevant.²²⁰

As of December 2018, 106 countries—over half of the world—have abolished the death penalty for all crimes.²²¹ Add to this the 8 countries that have abolished the death penalty for all “ordinary crimes” and the 28 countries that have not executed anyone over the past decade, and the total number of abolitionist countries is 142, or nearly three-quarters of the world.²²² Just 56 countries retain the death penalty, and only 7 countries other than the U.S. presently use it with any frequency—China, Iran, Iraq, Saudi Arabia, Pakistan, Egypt, and Somalia—“paradoxically the regions of the world with justice systems and economies most unlike those of the United States.”²²³ Importantly, the world community’s opinion of the death penalty

GARRETT & KOVARSKY, *supra* note 151, at 228–35; for an excellent comprehensive account of these trends, see generally HOOD & HOYLE, *supra* note 6.

²¹⁷ *Roper*, 543 U.S. at 578; see also *Atkins*, 536 U.S. at 316 n.21 (2002) (prohibiting the death penalty for those with intellectual disabilities, noting that “within the world community, the imposition of the death penalty for crimes committed by [such offenders] is overwhelmingly disapproved”).

²¹⁸ *Lawrence*, 539 U.S. at 576.

²¹⁹ See *supra* notes 172 and accompanying text (discussing categorical bars to death penalty).

²²⁰ See *Lawrence*, 539 U.S. at 577.

²²¹ AMNESTY INT’L GLOBAL REPORT, DEATH SENTENCES AND EXECUTIONS 2018, at 48 (2019) [hereinafter 2018 AMNESTY REPORT], <https://www.amnesty.org/en/latest/news/2019/04/death-penalty-facts-and-figures-2018/>; see also *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR. [DEATH PENALTY INFO. CTR. *Countries*], <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries> [<https://perma.cc/AXU8-UL9G>] (last updated Dec. 31, 2017). Over thirty of these countries prohibit the death penalty in their constitutions or through constitutional interpretation by their high courts, and many do so based on “the right to life and/or freedom from cruel and inhumane punishment and treatment.” HOOD & HOYLE, *supra* note 6, at 18, 515; see also Renáta Uitz, *Lessons from the Abolition of Capital Punishment in Hungary: A Fortuitous Constellation Amidst and Beyond Democratic Transition*, 45 ACTA JURIDICA HUNGARICA 67, 79 (2004) (discussing the Hungary Constitutional Court’s conclusion that the death penalty violated Article 54(1) of the Hungary Constitution by “allow[ing] for the total and irreparable extinguishing of the right to life and human dignity”).

²²² 2018 AMNESTY REPORT, *supra* note 221, at 48.

²²³ BANNER, *supra* note 134, at 300; *The Death Penalty: An International Perspective*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-penalty-international-perspective#interexec> [<https://perma.cc/2UU6-MAA7>]. “Rare figures made publicly available by the authorities of Viet Nam” revealed at least 85 executions in that country in 2018, “placing the country among the

has not always trended toward abolition. For centuries, world history and tradition pointed in the opposite direction, with “the threat of punishment by death . . . widely accepted as an effective penal weapon of social control.”²²⁴ In early nineteenth century England, for example, 223 crimes were punishable by death.²²⁵

But “[t]ime works changes.”²²⁶ A crucial step on the path toward worldwide abolition took place nearly seventy years ago with the adoption of the 1948 Universal Declaration of Human Rights, which expressly recognized “the right to life.”²²⁷ Significantly, the Declaration did not expressly forbid—indeed, it did not even mention—the death penalty.²²⁸ At that time, the right to life enshrined in the Declaration was generally understood to *permit* the death penalty, and the vast majority of nations that adopted the Declaration employed the death penalty and continued to do so after adoption.²²⁹ Two subsequent international treaties carried this understanding forward, explicitly exempting the death penalty from the protection of the right to life.²³⁰

Notwithstanding international law’s approval of the death penalty for certain crimes by the middle of the twentieth century, every Western European nation with the death penalty either suspended or abolished it over the next thirty years.²³¹ Notably, each country did so on its own initiative; there was no “serious effort to confront the death penalty in Western democracies as a human rights issue.”²³²

This new insight eventually came in 1983, when the Council of Europe formally abolished the death penalty in times of peace through Protocol No. 6 of the European Convention on Human Rights, thus providing the “key transition from a right to life that exempts state death penalties to a right to life that condemns state execution.”²³³ No longer was the death penalty an

world’s top executioners.” 2018 AMNESTY REPORT, *supra* note 221, at 7. In 2018, for the first time in at least a decade, Japan and Singapore were also among the world’s top executioners, with fifteen and thirteen executions, respectively. *Id.* at 9.

²²⁴ HOOD & HOYLE, *supra* note 6, at 10.

²²⁵ *Id.*; accord *Furman*, 408 U.S. at 334.

²²⁶ *Furman*, 408 U.S. at 264 (Brennan, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

²²⁷ G.A. Res. 217 A (III), Universal Declaration of Hum. Rts., art. 3 (Dec. 10, 1948), <https://www.un.org/en/universal-declaration-human-rights/> [<https://perma.cc/LTM7-LMG5>].

²²⁸ *Id.*

²²⁹ See ZIMRING, *supra* note 7, at 31; see also HOOD & HOYLE, *supra* note 6, at 504–05 (compiling dates of the last executions).

²³⁰ HOOD & HOYLE, *supra* note 6, at 25 (discussing the 1950 European Convention on Human Rights and the 1966 International Covenant on Civil and Political Rights).

²³¹ See ZIMRING, *supra* note 7, at 29.

²³² *Id.* at 31.

²³³ *Id.* at 29. See generally Zagorski Amic. Br., *supra* note 3, at 22–23.

issue of state sovereignty to be “decided solely or mainly as an aspect of national criminal justice policy”; now it was “a fundamental violation of human rights,” namely, the right to be free of excessive, repressive, and torturous punishments and, critically, the right to life.²³⁴ In 2003, the Council of Europe went further, abolishing the death penalty “in all circumstances” on grounds that “the right to life is a basic value in a democratic society and . . . the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.”²³⁵ International and regional organizations, including the United Nations and the Organization of American States, have similarly rejected the death penalty on right to life grounds.²³⁶

As a precondition for joining the Council of Europe and the European Union, abolition is now almost universally accepted in the countries of Western and Eastern Europe and the former Soviet Union.²³⁷ Australasia and Central and South America have likewise nearly eradicated the death penalty.²³⁸ In Asia and Africa, the trend toward abolition continues, with a growing number of countries abolishing the death penalty outright and in practice, generally conducting fewer executions, and calling for abolition out of respect for the “right to life” in regional human rights instruments.²³⁹

The world community has come to understand the death penalty not as an issue of state sovereignty, but rather as a violation of the fundamental

²³⁴ HOOD & HOYLE, *supra* note 6, at 16, 22 (discussing the “revolution” in discourse on death penalty—from an issue “of national criminal justice policy to the status of a fundamental violation of human rights”).

²³⁵ *Id.* at 28 (quoting Protocol No. 13 of the European Convention on Human Rights); *see also* Charter of Fundamental Rights of the European Union art. 2, Dec. 8, 2000, 2000 O.J. (C 364) 1, 9, http://www.europarl.europa.eu/charter/pdf/text_en.pdf [<https://perma.cc/DF7H-X2AE>] (stating that “[e]veryone has the right to life” and that “[n]o one shall be condemned to the death penalty, or executed”).

²³⁶ *See* Second Optional Protocol to the International Covenant on Civil and Political Rights ¶ 5, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx> (declaring that “all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life”); *IACHR Urges OAS Member States to Abolish the Death Penalty*, ORGANIZATION OF AMERICAN STATES (Oct. 10, 2014), https://www.oas.org/en/iachr/media_center/PReleases/2014/115.asp (stating that death penalty “is incompatible with the rights to life, humane treatment and due process”).

Significantly, the International Criminal Court, which was established in 1998 by the Rome Statute, does not provide the death penalty for any offense, including genocide and war crimes. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, arts. 5, 77 (July 17, 1998), <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (listing as penalties imprisonment for a term of years, life imprisonment, fines, and forfeiture).

²³⁷ *See* HOOD & HOYLE, *supra* note 6, at 29–30.

²³⁸ *See id.* at 49.

²³⁹ *See id.* at 28–29, 75 (discussing the Asian Human Rights Charter and the African Charter on Human and Peoples’ Rights).

right to life.²⁴⁰ There is nothing to suggest that, in this country, the governmental interest in depriving life “is somehow more legitimate or urgent.”²⁴¹

4. Dignity

In assessing whether the death penalty deprives condemned prisoners of the fundamental right to life in violation of substantive due process, *Obergefell* teaches that “history and tradition guide and discipline the inquiry but do not set its outer boundaries”; human dignity is also central to the analysis.²⁴²

Like laws depriving gays and lesbians of their dignity, the death penalty violates the dignity of condemned prisoners. Indeed, it deprives them of not only liberty and equality rights but also “the right of life itself”—one which entitles every human being to “respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution.”²⁴³ In the words of Justice Brennan, the death penalty is the ultimate humiliation, treating people not as “human being[s] possessed of common human dignity,” but rather “as nonhumans, as objects to be toyed with and discarded.”²⁴⁴ Many sources inform this dignity interest. This Subsection briefly touches on four: international human rights and foreign law, moral philosophy, religious teaching, and federal and state judicial precedent.

a. The Dignity of the Condemned in International and Foreign Law

International human rights law and foreign law underscore the death penalty’s deprivation of dignity. As numerous commentators have observed, human rights—including the right to life—“are based upon or derivative from human dignity. It is because humans have dignity that they have human rights.”²⁴⁵ International human rights law’s founding charter, the Universal Declaration of Human Rights, proclaims the “inherent dignity . . . of

²⁴⁰ HOOD & HOYLE, *supra* note 6, at 22.

²⁴¹ *Lawrence*, 539 U.S. at 577.

²⁴² *Obergefell*, 135 S. Ct. at 2598 (citing *Lawrence*, 539 U.S. at 572, which, in turn, quoted Justice Kennedy’s concurring opinion in *Lewis*, 523 U.S. at 857, recognizing fundamental right to life). See generally Zagorski Amic. Br., *supra* note 3, at 3–4.

²⁴³ *Screws*, 325 U.S. at 134–35 (Murphy, J., dissenting).

²⁴⁴ *Furman*, 408 U.S. at 273 (Brennan, J., concurring).

²⁴⁵ Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 79, at 10; see also Hugo Adam Bedau, *The Eighth Amendment, Dignity, and the Death Penalty*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 79, at 154 (“[H]uman dignity provides the basis for equal human rights. All and only creatures with rights . . . have dignity.”).

all members of the human family” and the universal “right to life” that flows from it.²⁴⁶ Successive international and regional human rights instruments and foreign laws have carried this understanding forward, restricting or prohibiting the death penalty on dignity grounds.²⁴⁷ As the leaders of several national and international parliaments declared at the first World Congress against the death penalty in 2001, “the death penalty is a violation of the most fundamental of human rights—the right to life,” and of “human dignity” more broadly.²⁴⁸ Notably, in a series of decisions narrowing the death penalty, the United States Supreme Court has expressly acknowledged the world community’s linkage of the death penalty and the dignity of the condemned.²⁴⁹

b. Moral Philosophy and the Dignity of the Condemned

Various strands of moral philosophy likewise support condemned prisoners’ right to life on dignity grounds. One view holds that dignity is innate and universal among human beings; we all have it and we cannot lose it.²⁵⁰ According to this view, the condemned have dignity by dint of being hu-

²⁴⁶ G.A. Res. 217 A (III), *supra* note 227; *see also* Louis Henkin, *Human Dignity and Constitutional Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, *supra* note 79, at 211 (“The authors of [the Universal Declaration of Human Rights and successive international human rights instruments], seeking a theoretical foundation for the international human rights movement that would be acceptable to all peoples, cultures, and political ideologies, justified human rights by relating them to human dignity.”); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUR. J. INT’L L.* 655, 678 (2008) (stating that dignity “supplied a theoretical basis for the human rights movement in the absence of any other basis for consensus”).

²⁴⁷ McCrudden, *supra* note 246, at 664, 668 (discussing incorporation of dignity in the national constitutions of Japan, Italy, Germany, and various other countries after Second World War, and “the relatively dramatic increase in the use of dignity in the international human rights law context during the 1940s”); *see also* Uitz, *supra* note 221 (discussing Art. 54(1) of Hungary Constitution).

²⁴⁸ ZIMRING, *supra* note 7, at 27.

²⁴⁹ *See, e.g., Roper*, 543 U.S. at 576–78 (relying on international human rights law and foreign law to hold that the juvenile death penalty violates “human dignity”); *id.* at 605 (O’Connor, J., dissenting) (concluding that the evolving understanding of whether juvenile death penalty violates “human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries [as] . . . expressed in international law or in the domestic laws of individual countries”); *Furman*, 408 U.S. at 371 (Marshall, J., concurring) (discussing “the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment”).

²⁵⁰ *See* Gewirth, *supra* note 245, at 12 (“[D]ignity signifies a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human. This is a necessary, not a contingent, feature of all humans; it is permanent and unchanging, not transitory or changeable”); Henry, *supra* note 78, at 199–203 (discussing “universal human dignity”).

man.²⁵¹ Although they may not be “good” people, the argument goes, they are still *people*. Depriving condemned prisoners of life therefore implicates—indeed, it eviscerates—this innate dignity.

A more moderate view is that dignity is not innate but must be earned; we become *worthy* of dignity by acting virtuously.²⁵² Obviously, the murder of another does not make one worthy of dignity; according to some philosophers, it makes one worthy of death because it represents a failure to act morally.²⁵³ But, one might argue, a condemned person remains *capable* of acting morally. Consider, for example, Kelly Gissendaner, who recruited a man with whom she was romantically involved to murder her husband and who subsequently sought forgiveness for her crime, studied theology in prison, and ministered to her sister inmates.²⁵⁴ Depriving condemned prisoners of life implicates dignity because it forecloses the possibility of their becoming worthy of dignity once more.

A third view focuses not on the dignity of the individual, but on the dignity of the *community* in relation to the individual.²⁵⁵ Regardless of whether the death penalty implicates the dignity of the condemned, the argument goes, it most certainly implicates the dignity of those who *condemn*. According to this view, the death penalty undermines the dignity of the com-

²⁵¹ See Gewirth, *supra* note 245, at 12.

²⁵² See *id.* (discussing dignity as “a kind of gravity or decorum or composure or self-respect or self-confidence Such dignity is a contingent feature of some human beings as against others; it may be occurrently had, gained, or lost”); see also Henry, *supra* note 78, at 213 (discussing Roman philosopher Cicero’s use of dignity “to describe the quality of achieving human excellence”).

²⁵³ Ernest Van Den Haag, *The Death Penalty Once More*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES*, *supra* note 128, at 452 (defending the death penalty as necessary “to redeem, or restore, the human dignity of the executed”). A related view, which derives from philosopher Immanuel Kant, is that the death penalty *respects* the dignity of the condemned. This tortured logic is oft-criticized. See, e.g., H.A. Bedau, *A Reply to van den Haag*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES*, *supra* note 128, at 468–69 (“[I] think the whole idea [that the death penalty affirms the humanity of both victim and murderer] is bizarre. The very thought that I affirm the humanity of a murderer by treating him more or less as he treated his innocent and undeserving victim would be funny were it not so momentous.”).

²⁵⁴ See Dan Shepherd et al., *Georgia Woman Kelly Gissendaner Sings ‘Amazing Grace’ During Execution*, NBC NEWS (Sept. 30, 2015), <http://www.nbcnews.com/storyline/lethal-injection/pope-urges-halt-execution-georgia-woman-kelly-gissendaner-n435566> [<https://perma.cc/YA7L-7KM8>].

²⁵⁵ See Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 773 (2005) (“The imposition of extreme punishments such as execution . . . , even in cases involving the most deserving of murderers . . . , violates human dignity—not because of what it does to the punished, but rather because of what it does to all of us in whose name the punishment is publicly inflicted.”).

munity by coarsening society to the humanity of others—eroding our collective virtue and, in the words of Justice Blackmun, “lessen[ing] us all.”²⁵⁶

c. Religion and the Dignity of the Condemned

Religion provides another source of authority for the death penalty’s violation of the dignity of the condemned. The Bible teaches that every individual is created in the image of God, the *imago Dei*, and must be treated accordingly—that is, with dignity.²⁵⁷ “Being in the image of God, the human individual possesses the dignity of a person, who is not just something, but someone.”²⁵⁸ Some strands of religious thought find no inconsistency between the death penalty and the dignity of the condemned, often citing God’s command to Noah in *Genesis*: “Whoso sheddeth man’s blood, by man shall his blood be shed: for in the image of God made he man.”²⁵⁹ Because human beings are made in God’s image, the argument goes, their murder requires the ultimate sacrifice.²⁶⁰

Many other strands of religious thought—most notably, Catholic social teaching—have reached the opposite conclusion.²⁶¹ In 1948, Catholic social teaching influenced the creation of the Universal Declaration of Human

²⁵⁶ *Callins v. Collins*, 510 U.S. 1141, 1159 (1994) (Blackmun, J., dissenting from denial of petition for writ of certiorari); see also *Watson*, 411 N.E.2d at 1294 (Liacos, J., concurring) (“What dignity can remain for the government that countenances its use?”); Henry, *supra* note 78, at 221 (“When society treats people in ways that are *in*-humane, or when people engage in activities that are *de*-humanizing, collective virtue as dignity diminishes.”).

²⁵⁷ H. Wayne House, *The New Testament and Moral Arguments for Capital Punishment*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 128, at 423; see also *Genesis* 1:26–27 (King James) (“And God said, Let us make man in our image, after our likeness . . .”). See generally DAVID GUSHEE, THE SACREDNESS OF HUMAN LIFE (2013).

²⁵⁸ PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶108 (rept. 2005) (2004), http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html [<https://perma.cc/MYK6-FSJT>]; accord Henry, *supra* note 78, at 200–01; see also Gordon Butler, *The Essence of Human Rights: A Religious Critique*, 43 U. RICH. L. REV. 1255, 1263 (2009) (“[T]he source of inherent human dignity is the fact that ‘every human being is a beloved child of God and a sister/brother to every other human being.’” (quoting MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS 24 (2007))).

²⁵⁹ John Howard Yoder, *Noah’s Covenant, the New Testament, and Christian Social Order*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 128, at 429 (quoting *Genesis* 9:6).

²⁶⁰ See House, *supra* note 257, at 423 (“[T]o punish criminals because they deserve it is to respect them as morally responsible persons created in God’s image who knew better and therefore have earned this punishment Capital punishment, then, is the ultimate compliment to the human dignity of both victim and murderer”); David B. Kopel, *The Torah and Self-Defense*, 109 PENN. ST. L. REV. 17, 19 (2004) (“Humans are made in God’s image, and the murder of a human therefore requires the supreme penalty.”).

²⁶¹ See *supra* notes 9–11 and accompanying text (discussing Catholic social teaching).

Rights, which proclaimed the “dignity and worth of the human person” and the concomitant fundamental “right to life.”²⁶² Seventy years later, Catholic social teaching condemns the death penalty as a violation of “the dignity of the person.”²⁶³ Building on the teachings of Popes John Paul II and Benedict, who rejected the death penalty on dignity grounds in all but the rarest circumstances, Pope Francis, in 2018, called for the abolition of the death penalty in all circumstances “because it attacks the dignity of the person, a dignity that is not lost even after having committed the most serious crimes.”²⁶⁴ Similarly, although Jewish Biblical tradition requires the death penalty in certain rare circumstances, most if not all major schools of modern Jewish thought have avoided or rejected the death penalty as a violation of human dignity.²⁶⁵

d. The Courts and the Dignity of the Condemned

Most importantly, the courts have acknowledged the death penalty’s violation of the dignity of the condemned.²⁶⁶ For over forty years, the Supreme Court has made dignity the touchstone for gauging who may receive the death penalty,²⁶⁷ the procedures under which the death penalty may be imposed,²⁶⁸ and the means by which the death penalty may be carried out

²⁶² G.A. Res. 217 A (III), *supra* note 227; *see also* McCrudden, *supra* note 246, at 677–78 (discussing Catholic social teaching’s influence on the inclusion of dignity in the Universal Declaration of Human Rights).

²⁶³ The Sovereign Pontiff Francis, *Letter to the Bishops Regarding the New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty* ¶ 6 (June 28, 2018), <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2018/08/02/0556/01210.html#lett-eraing> [<https://perma.cc/PK3A-D8HA>].

²⁶⁴ *Id.* ¶¶ 1–7.

²⁶⁵ Butler, *supra* note 258, at 1272 (citation omitted); *see also* Brief Amici Curiae of the United States Conference of Catholic Bishops and Other Religious Organizations in Support of Respondent at 8, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) (“[T]he American Jewish Committee opposes capital punishment in general, as cruel, unjust and incompatible with the dignity and self-respect of man”); Marvin Lim, *Human Dignity and Punishment in Judaic and Islamic Law: War and the Death Penalty*, 22 SW. J. INT’L L. 303, 307–18 (2016) (arguing that “[a]ll major schools of modern Jewish thought appear to clearly reject the death penalty as a means of punishment. . . . primarily because even the worst wrongdoers retain their dignity”).

²⁶⁶ *See infra* notes 267–281 and accompanying text.

²⁶⁷ *See, e.g., Kennedy*, 554 U.S. at 420, 446–47 (execution of people who commit non-homicide crimes violates “respect for the dignity of the person”); *accord Roper*, 543 U.S. at 560, 578–79 (juveniles); *Atkins*, 536 U.S. at 311, 321 (people with intellectual disabilities); *Ford*, 477 U.S. at 406, 409–10 (people declared insane); *Gregg*, 428 U.S. at 173 (death penalty “must accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment’” (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958))).

²⁶⁸ *See, e.g., Furman*, 408 U.S. at 255, 257 (Douglas, J., concurring) (stating that discretionary death penalty statutes are invalid because they are “pregnant with discrimination”—“feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a

under the Eighth Amendment.²⁶⁹ In *Hall v. Florida*, for example, the Court struck down a Florida law that narrowed the class of people exempted from execution based on intellectual disability.²⁷⁰ “Florida’s law,” the Court concluded, “contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.”²⁷¹

Several current and former Supreme Court Justices have gone further, concluding that the death penalty per se is incompatible with human dignity under the Eighth Amendment.²⁷² In *Furman*, Justice Brennan argued that the death penalty was inconsistent with the “fundamental premise . . . that even the vilest criminal remains a human being possessed of common human dignity.”²⁷³ Justice Marshall agreed. “In recognizing the humanity of our fellow beings,” he wrote, “we pay ourselves the highest tribute.”²⁷⁴

Decades after voting to revive the death penalty in *Gregg*, Justices Blackmun and Stevens similarly turned against it. In his dissenting opinion in *Callins v. Collins*, Justice Blackmun famously vowed to “never again tinker with the machinery of death,” and recalled, in vivid prose, the consummation of such tinkering: Mr. Callins, his arms affixed with “intravenous tubes carry[ing] the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings”—“no longer a defendant, an appellant, or a petitioner, but *a man*, strapped to a gurney, and seconds away from extinction.”²⁷⁵ In his concurring opinion in *Baze v. Rees*, Justice Stevens, reflecting on his over thirty years on the bench, pronounced the death penalty a “pointless and needless extinction of life.”²⁷⁶ And in his dissenting opinion in *Glossip v. Gross*, Justice Breyer, joined by Justice Ginsburg, argued that it is “highly likely that the death penalty violates the Eighth Amendment.”²⁷⁷ In support of this argument, Justice Breyer relied on the Court’s decisions in *Atkins*, *Roper*, *Louisiana*, and *Hall*—all four of which

member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position”).

²⁶⁹ See, e.g., *Baze*, 553 U.S. at 49 (prohibiting “inhuman and barbarous” methods of execution).

²⁷⁰ See *Hall*, 572 U.S. at 724.

²⁷¹ *Id.*

²⁷² See *infra* notes 273–278 and accompanying text.

²⁷³ *Furman*, 408 U.S. at 273 (Brennan, J., concurring).

²⁷⁴ *Id.* at 371 (Marshall, J., concurring).

²⁷⁵ 510 U.S. at 1143 (emphasis added).

²⁷⁶ *Baze*, 553 U.S. at 86.

²⁷⁷ *Glossip*, 135 S. Ct. at 2776–77 (Breyer, J., dissenting).

invoked dignity to categorically prohibit the death penalty for certain types of crimes and offenders.²⁷⁸

Over the course of the past half-century, three state supreme courts and at least eleven state high court justices throughout the nation have similarly concluded that the death penalty is per se unconstitutional on dignity grounds.²⁷⁹ As memorably stated by Connecticut Supreme Court Justice Lubbie Harper, Jr., an African-American jurist, native son of inner-city New Haven, and the descendant of slaves from North Carolina:

[T]he categorical exclusion of any person from humanity cannot be reconciled with a legitimate vision of human dignity It is a reality, albeit a difficult one, that even a person who commits the most heinous and unforgivable acts is still one of us—a member of the human community and of our society No matter how fervently some may wish it otherwise, all individuals are entitled, as citizens of this state and, more fundamentally, as human beings, to be treated with the dignity and respect that is the hallmark of our society.²⁸⁰

Although these federal and state court opinions addressed the dignity of condemned prisoners under the Eighth Amendment or state corollary, their discussion of dignity applies with equal force to substantive due process, which shares a commitment to dignity.²⁸¹

B. The Death Penalty Is Not Narrowly Tailored to Serve a Compelling State Interest

Having determined that specificity, history and tradition, dignity, and the positive/negative rights distinction support the condemned's fundamental right to life, this Article now turns to the second step of the substantive due process inquiry: whether the death penalty is narrowly tailored to serve

²⁷⁸ See *id.* at 2760, 2772 (citation omitted).

²⁷⁹ See, e.g., *Santiago*, 122 A.3d at 32 (stating that death penalty was at odds with “dignity reflect[ing] . . . the [n]ation we aspire to be” (quoting *Hall*, 134 S. Ct. at 1992)); see also Barry, *The Law of Abolition*, *supra* note 162, at 537–50 (discussing state supreme court decisions holding that the death penalty was per se unconstitutional).

²⁸⁰ *Santiago*, 49 A.3d at 697, 705 (Harper, J., concurring in part and dissenting in part).

²⁸¹ See *Furman*, 408 U.S. at 359 n.141 (Marshall, J., concurring) (discussing similarities in the analysis of whether the death penalty is “cruel and unusual” under Eighth Amendment, on the one hand, and whether the death penalty deprives fundamental right to life in violation of substantive due process, on the other); Yoshino, *Freedom*, *supra* note 49, at 791–92 (noting the connection between dignity in the Fourteenth Amendment LGBT rights context and the Eighth Amendment death penalty context); accord Barry, *Dignity Clauses*, *supra* note 33, at 387.

a compelling state interest, namely, retribution or deterrence.²⁸² The burden is on the State to show that it does so.²⁸³

In *Gregg*, the Supreme Court concluded that the Georgia legislature was not “clearly wrong” in its determination that the death penalty serves the purposes of deterrence and retribution.²⁸⁴ Because *Gregg* was an Eighth Amendment decision, not a substantive due process decision, the Court did not determine whether these interests were compelling, and, if so, whether the death penalty was narrowly tailored to serve these interests.²⁸⁵

The answer to the first question is straightforward: deterrence and retribution are compelling state interests.²⁸⁶ Were this not the case, incarceration, itself, would violate substantive due process by depriving the fundamental right to liberty. It does not. According to the Supreme Court, “[a] State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution.”²⁸⁷ The answer to the second question—whether the death penalty is narrowly tailored to serve the compelling purposes of retribution and deterrence—is considerably more nuanced.

1. Compelling Interests Not Served

To the extent that the death penalty ever served the compelling interests of retribution and deterrence, it no longer does so; arbitrariness, delay, and unreliability deprive the death penalty of any such interest.²⁸⁸

a. Arbitrariness

The death penalty does not serve a compelling interest because the individualized process of selecting people for death is hopelessly arbitrary.²⁸⁹

²⁸² See *infra* notes 283–313 and accompanying text.

²⁸³ See CHEMERINSKY, *supra* note 40, at 831.

²⁸⁴ See *Gregg*, 428 U.S. at 183, 186.

²⁸⁵ See *id.* at 168 (holding that death penalty did not invariably violate Eighth Amendment as incorporated by the Fourteenth Amendment).

²⁸⁶ See, e.g., *Foucha*, 504 U.S. at 80 (“A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution.”); *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (discussing “society’s compelling interest in finding, convicting, and punishing those who violate the law”). *But see, e.g., Furman*, 408 U.S. at 343 (Marshall, J., concurring) (“Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.” (citation omitted)).

²⁸⁷ *Foucha*, 504 U.S. at 80.

²⁸⁸ See, e.g., *Glossip*, 135 S. Ct. at 2756–72 (Breyer, J., dissenting); *Santiago*, 122 A.3d at 57–73.

²⁸⁹ See *infra* notes 290–294 and accompanying text.

Being executed is about as random as being struck by lightning.²⁹⁰ Former Supreme Court Justices and state high courts have gone further, suggesting an arbitrariness that is not random: the disproportionate selection of people for death based on race.²⁹¹ A punishment that is inherently arbitrary—or worse, discriminatory—does not deter offenders.²⁹² Retribution is also not served by the death penalty, which gives “just deserts” to only some offenders, provides closure to only some family members, and expresses society’s outrage for only some murders.²⁹³ Such results do not restore balance to the moral order; they perpetuate imbalance.²⁹⁴

b. Delay

A second reason that the death penalty does not serve a compelling state interest is the prolonged and inevitable delay between sentencing and execution.²⁹⁵ Such delay deprives the death penalty of any deterrent effect.²⁹⁶ Would-be offenders face not a swift and certain execution, but in-

²⁹⁰ *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

²⁹¹ See, e.g., *McCleskey*, 481 U.S. at 328 (Brennan, J., dissenting) (arguing that the “risk that race influenced McCleskey’s sentence is intolerable by any imaginable standard”); *Gregory*, 427 P.3d 621, 635 (Wash. 2018) (“Given the evidence before this court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance.”); *Santiago*, 122 A.3d at 66–67 (“[T]he selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias.”); *id.* at 68–69 (citing opinions of former Supreme Court Justices Douglas, Marshall, Brennan, Blackmun, and Stevens and legal scholarship regarding racial discrimination in administration of death penalty); *id.* at 96 (Norcott & McDonald, JJ., concurring) (citing “abundant evidence that suggests the death penalty in Connecticut, as elsewhere, has been and continues to be imposed disproportionately on racial and ethnic minorities, and particularly on those whose victims are members of the white majority. It also appears that such disparities are not primarily the result of benign, nonracial factors.”); *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (“[E]xperience has shown that the death penalty will fall discriminatorily upon minorities, particularly blacks.”).

²⁹² See, e.g., *Gregory*, 427 P.3d at 636 (“Given our conclusion that the death penalty is imposed in an arbitrary and racially biased manner, it logically follows that the death penalty fails to serve penological goals.”); see also *Glossip*, 135 S. Ct. at 2760 (“Despite the *Gregg* Court’s hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the ‘reasonable consistency’ legally necessary to reconcile its use with the Constitution’s commands.”) (citation omitted).

²⁹³ See, e.g., *Gregory*, 427 P.3d at 636 (“If the policy of this state is retribution for capital crimes, then it must be evenhanded. . . . To the extent that race distinguishes the cases, it is clearly impermissible and unconstitutional.”).

²⁹⁴ See *Santiago*, 122 A.3d at 66 (“To the extent that the ultimate punishment is imposed on an offender on the basis of impermissible considerations such as his, or his victim’s, race, ethnicity, or socio-economic status, rather than the severity of his crime, his execution does not restore but, rather, tarnishes the moral order.”).

²⁹⁵ See *infra* notes 296–302 and accompanying text.

²⁹⁶ See, e.g., *Glossip*, 135 S. Ct. at 2768 (Breyer, J., dissenting) (stating that the rarity and delay of executions “must have some offsetting effect on a potential perpetrator’s fear of a death

stead what one federal district judge has called “life imprisonment with the remote possibility of death.”²⁹⁷ This is hardly a deterrent. Retribution is also not served.²⁹⁸ Decades after the crime, community outrage has subsided as the community has changed.²⁹⁹ Family members seeking closure have instead been retraumatized during protracted legal proceedings that force them to relive their loved one’s murder.³⁰⁰ And the offender who once “deserved” death “may have found [herself] a changed human being”—like Kelly Gissendaner, a once-vengeful spouse who died a woman of faith seeking and preaching forgiveness.³⁰¹

Several state high courts and former Supreme Court Justices have gone further, arguing that prolonged death row delay is literally “too much” retribution because of the “brutalizing psychological effects of impending execution,” namely, prolonged solitary confinement and the “uncertainty as to whether a death sentence will in fact be carried out.”³⁰²

c. *Unreliability*

A third reason that the death penalty does not serve a compelling interest is its inherent unreliability.³⁰³ Since 1973, 165 people have been exoner-

penalty. And, even if that effect is no more than slight, it makes it difficult to believe . . . that such a rare event significantly deters horrendous crimes.”); *Santiago*, 122 A.3d at 59 (“[T]he fact that one who commits the most heinous of crimes can expect to spend decades in prison prior to any execution suggests that capital punishment promises little if any deterrence over and above life imprisonment.”).

²⁹⁷ *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1062 (C.D. Cal. 2014), *rev’d sub nom.*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

²⁹⁸ *See, e.g., Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting) (“[D]elays and low probability of execution . . . may well attenuate the community’s interest in retribution to the point where it cannot by itself amount to a significant justification for the death penalty.”); *see also Santiago*, 122 A.3d at 63–64 (“[L]engthy if not interminable delays in carrying out capital sentences do not just undermine the death penalty’s deterrent effect; they also spoil its capacity for satisfying retribution.”) (citation and internal quotation marks omitted).

²⁹⁹ *See Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting) (stating that, by the time the defendant is executed, “the community is a different group of people” and “[f]eelings of outrage may have subsided”).

³⁰⁰ *See Santiago*, 122 A.3d at 64 (discussing the “second victimization of survivors,” who “must contend with repeated reminders about the murder during the protracted [court] proceedings”—“imped[ing] the healing process”).

³⁰¹ *Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting); *see Connor*, *supra* note 254 (discussing Kelly Gissendaner, who sought forgiveness and ministered to her sister inmates).

³⁰² *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting); *Anderson*, 493 P.2d at 895; *see also* *Bucklew v. Precythe*, 139 S. Ct. 1112, 1144 (2019) (Breyer, J., dissenting) (“Delays can aggravate the cruelty of capital punishment by subjecting the offender to years in solitary confinement”); *Watson*, 411 N.E.2d at 1283 (discussing “mental pain . . . during the inevitable long wait between the imposition of sentence and the actual infliction of death”) (quoting *Furman v. Georgia*, 408 U.S. at 287–88 (Brennan, J., concurring)).

³⁰³ *See infra* notes 304–308 and accompanying text.

ated from death row, including five people in 2017 and two people in 2018.³⁰⁴ It does not take a mathematical model (though there are some) to conclude from these astonishingly high numbers that “innocent Americans have been and will continue to be executed in the post-*Furman* era.”³⁰⁵

Killing an innocent person obviously serves no compelling state interest because it is not punishment at all—it is murder, or something “perilously close” to it.³⁰⁶ A majority of the Supreme Court has therefore concluded that “the execution of a legally and factually innocent person would be a constitutionally intolerable event.”³⁰⁷ Some authorities have gone further, holding that the substantial *risk* of executing a legally and factually innocent person is constitutionally intolerable. Among them are multiple former Supreme Court Justices, the Connecticut Supreme Court, and U.S. District Court Judge Jed S. Rakoff, who equated execution under the Federal Death Penalty Act to “foreseeable, state-sponsored murder of innocent human beings.”³⁰⁸

2. Not Narrowly Tailored

Even if the death penalty—with its intractable flaws—served some marginal deterrent or retributive purpose, it is hardly narrowly tailored. Narrow tailoring requires the government “to *prove* that no other alternative, less intrusive of the right, can work.”³⁰⁹ Here, the government cannot meet its burden.³¹⁰ It cannot prove that death deters *better* than incarceration; indeed, the Court in *Gregg* acknowledged that there was no such proof, and

³⁰⁴ *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> [<https://perma.cc/X5J2-H4GW>] (last updated Nov. 5, 2018).

³⁰⁵ *Santiago*, 122 A.3d at 65; *accord Callins*, 510 U.S. at 1159 n.8 (Blackmun, J., dissenting); *see also Glossip*, 135 S. Ct. at 2757–58 (Breyer, J., dissenting) (citing studies).

³⁰⁶ *Santiago*, 122 A.3d at 65 (citation omitted).

³⁰⁷ *Herrera*, 506 U.S. at 419 (O’Connor, J., concurring); *accord id.* at 431–32 (Blackmun, J., dissenting).

³⁰⁸ *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002); *see, e.g., Baze*, 553 U.S. at 85–86 (Stevens, J., concurring); *Callins*, 510 U.S. at 1158 (Blackmun, J., dissenting); *Santiago*, 122 A.3d at 65.

³⁰⁹ CHEMERINSKY, *supra* note 40, at 831 (emphasis added).

³¹⁰ *See Furman*, 408 U.S. at 359 (Marshall, J., concurring) (“[F]or more than 200 years men have labored to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally well. And they have done so with great success.”); *cf. Br. of Appellant at 4–5, 102–03, Hines v. Mays*, No. 15-5384 (6th Cir. Nov. 17, 2017) (arguing that, where the State originally agreed to a life sentence for the defendant, only to have that agreement rejected by the trial judge and later replaced with a sentence of death, the State could not prove that the death penalty was the “least restrictive means” of punishing the defendant as required by the Fourteenth Amendment).

studies conducted since that time are, at best, inconclusive.³¹¹ Similarly, although the death penalty may arguably be a *rational* way to give the condemned what he deserves,³¹² the government cannot prove that it is the *only* way, as substantive due process requires.³¹³ Arguments to the contrary reduce to a tautology: the death penalty provides “just deserts” because the condemned deserve death.

IV. COUNTERARGUMENTS

Recognition of the right to life of the condemned under substantive due process invites objections from all sides. This Part takes up the most obvious arguments and ventures some responses. Section A addresses the argument that the Fifth and Fourteenth Amendments foreclose recognition of the condemned’s right to life.³¹⁴ Section B responds to the argument that the Eighth Amendment, not the Fifth and Fourteenth Amendments, governs the constitutionality of the death penalty *per se*.³¹⁵ Section C addresses the elephant in the room—the argument that recognition of the condemned’s right to life will undermine a woman’s right to abortion.³¹⁶

A. The Text of the Fifth and Fourteenth Amendments Forecloses Recognition of the Condemned’s Right to Life

The most obvious rejoinder to the argument that the death penalty violates substantive due process is a textual one: the Fifth and Fourteenth Amendments explicitly mention, and therefore categorically authorize, the death penalty.³¹⁷ As Ernest Van Den Haag, a prominent proponent of capital punishment, succinctly stated:

³¹¹ See *Furman*, 408 U.S. at 347 (“No one can ever know how many people have refrained from murder because of the fear of being hanged.” (citation omitted)). Compare *Gregg*, 428 U.S. at 185 (“[T]here is no convincing empirical evidence either supporting or refuting th[e] view” that the death penalty “may not function as a significantly greater deterrent than lesser penalties . . .”), with *Glossip*, 135 S. Ct. at 2768 (Breyer, J., dissenting) (discussing recent reports finding “profound uncertainty” and “insufficient evidence” regarding the death penalty’s deterrent effect).

³¹² *But see Furman*, 408 U.S. at 359 (Marshall, J., concurring) (“There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.”). See also *supra* notes 288–308 and accompanying text (discussing reasons why the death penalty does not serve compelling interests).

³¹³ See *supra* notes 99–102 and accompanying text (discussing government’s burden).

³¹⁴ See *infra* notes 317–331 and accompanying text.

³¹⁵ See *infra* notes 332–346 and accompanying text.

³¹⁶ See *infra* notes 347–364 and accompanying text.

³¹⁷ U.S. CONST. amend. V (“No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . .”); *id.* amends. V, XIV (stating that no person shall be “deprived of life . . . without due process of law”); see also Joseph Blocher, *The Death*

The fifth amendment, passed in 1791, states that “no person shall be deprived of life, liberty, or property, without due process of law.” Thus, with “due process of law,” the Constitution authorizes depriving persons “of life, liberty, or property.” The fourteenth amendment, passed in 1868, applies an identical provision to the states. The Constitution, then, authorizes the death penalty.³¹⁸

The late Justice Antonin Scalia and several of his brethren, past and present, agree. “It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*,” Justice Scalia wrote in *Glossip v. Gross*.³¹⁹

Even assuming that the Fifth and Fourteenth Amendments affirmatively grant (as opposed to merely restrict) the power to execute—a highly debatable proposition³²⁰—it is a limited grant. The Fifth and Fourteenth Amendments, by their terms, permit the death penalty only where “due process” is afforded.³²¹ Due process comes in two varieties—procedural and substantive; to pass muster under the Fifth and Fourteenth Amendments, the death penalty must satisfy both.³²² Accordingly, the Fifth and Fourteenth Amendments do not permit imposition of the death penalty where procedural safeguards are inadequate, or where imposition of the death penalty would violate a fundamental right without adequate justification.³²³ Although the

Penalty and the Fifth Amendment, 111 NW. U. L. REV. ONLINE 1 (2016) (discussing Fifth and Fourteenth Amendment argument in support of death penalty).

³¹⁸ Van Den Haag, *supra* note 253, at 445.

³¹⁹ 135 S. Ct. 2726, 2747 (2015) (Scalia & Thomas, JJ., concurring); *see also* *Furman v. Georgia*, 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting) (“[T]he explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment.”).

³²⁰ Blocher, *supra* note 317, at 2–3 (“[T]he Fifth Amendment contains *prohibitions*, not powers, and there is no reason to suppose that it somehow nullifies *other* constitutional prohibitions”); *see also* Barry, *Dignity Clauses*, *supra* note 33, at 432 (“[A]ll three state supreme courts that abolished the death penalty have done so notwithstanding reference to capital punishment in their state constitutions.”).

³²¹ U.S. CONST. amends. V, XIV.

³²² *See* *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (“Our prior cases have held the provision that ‘[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law,’ U.S. Const., amend. 14, § 1, to ‘guarante[e] more than fair process,’ *Washington v. Glucksberg*, 521 U.S. 702, 719[] (1997), and to cover a substantive sphere as well, ‘barring certain government actions regardless of the fairness of the procedures used to implement them’”); *id.* at 855 (Kennedy, J., concurring) (“It can no longer be controverted that due process has a substantive component as well.”).

³²³ *See* *Herrera v. Collins*, 506 U.S. 390, 435–37 (1993) (Blackmun, J., dissenting) (citing *Rochin v. California*, 342 U.S. 165 (1952)) (discussing procedural and substantive due process in the death penalty context); *see also* *Rochin*, 342 U.S. at 169 (discussing the Court’s responsibility under the Due Process Clause to “exercise . . . judgment upon the whole course of the [criminal] proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses”).

death penalty surely would have satisfied substantive due process at the time of the adoption of the Fifth and Fourteenth Amendments in 1791 and 1868, respectively, when substantive due process was still in its infancy (or, in 1791, non-existent),³²⁴ the death penalty no longer does so for the reasons discussed in this Article.³²⁵ Had the amendments' drafters intended to make the death penalty permissible in perpetuity, they should have been more specific.³²⁶ Alas, they were not; there is no "governmental *right* to kill."³²⁷

A related textual argument is that declaring the death penalty unconstitutional per se under the Fifth and Fourteenth Amendments would render the words "without due process of law" superfluous with respect to life, yielding a right to life that can *never* be deprived.³²⁸ This is incorrect. A Supreme Court decision declaring the death penalty a violation of substantive due process would only prohibit the State from taking lives *as punishment*; it would not prohibit the State from taking lives in other contexts, such as police interactions, provided that procedural safeguards were afforded and the taking of life was narrowly tailored to serve a compelling interest.³²⁹ Forbidding deprivations of life in some contexts but not others is therefore no different than forbidding deprivations of liberty in some contexts (e.g., the fundamental right to refuse medical care) but not others (e.g., no fundamental right to physician-assisted suicide).³³⁰ Declaring the death penalty a violation of substantive due process, moreover, would not open the door to making *incarceration* a violation of substantive due process. Although there may come a day when the deprivation of liberty, itself, is deemed too harsh a punishment, history and precedent strongly suggest that this day is a long way off.³³¹

³²⁴ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting) ("The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*, [60 U.S. 393 (1857)].").

³²⁵ See *supra* notes 282–313 and accompanying text (discussing the death penalty's lack of a compelling purpose and narrow tailoring); see also *supra* note 213 (discussing the historical emergence of incarceration as a viable alternative to execution).

³²⁶ See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.").

³²⁷ *State v. Peeler*, 140 A.3d 811, 829 (Conn. 2016) (Palmer, J., concurring).

³²⁸ U.S. CONST. amends. V, XIV.

³²⁹ See *Lewis*, 523 U.S. at 854 (holding that high-speed police chase that resulted in death of suspect did not violate substantive due process because there was "no intent to harm suspect[] physically or to worsen [his] legal plight").

³³⁰ See *CHEMERINSKY*, *supra* note 40, at 885, 888.

³³¹ See *Foucha v. Louisiana*, 504 U.S. 71, 118 (1992) (Thomas, J., dissenting) ("There is simply no basis in our society's history or in the precedents of this Court to support the existence

B. The Eighth Amendment, Not the Fifth and Fourteenth Amendments, Governs the Constitutionality of the Death Penalty Per se

Another counterargument to the substantive due process challenge is prudential: given the Court's "reluctan[ce] to expand the concept of substantive due process,"³³² per se challenges to the death penalty are more appropriately analyzed under the Eighth Amendment. This argument derives from the Supreme Court's "more-specific-provision" rule, which states that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."³³³ Because the death penalty is a punishment, the argument goes, the Eighth Amendment covers it, and "the more generalized notion of substantive due process" does not apply.³³⁴ Attractive in its simplicity, this argument is unpersuasive for two reasons.

First, it is not at all clear that the Eighth Amendment "covers" per se challenges to the death penalty to the exclusion of substantive due process.³³⁵ As between the Eighth Amendment, on the one hand, and the Fifth and Fourteenth Amendments, on the other, the latter seem to provide the more "explicit textual source of constitutional protection against a particular source of government behavior."³³⁶ Indeed, the Fifth and Fourteenth Amendments are the *only* constitutional provisions that explicitly mention the death penalty.³³⁷ Prominent jurists like Justice Scalia have repeatedly pointed to the Fifth and Fourteenth Amendments for the proposition that the death penalty is constitutional per se; it would be strange to conclude that those amendments have no application when that very proposition is challenged.³³⁸

To the extent there is any doubt that the Fifth and Fourteenth Amendments apply to per se challenges to the death penalty, the prisoner—who faces a punishment indisputably greater than any other—ought to receive the benefit of the constitutional provision most protective of life.³³⁹ In the

of a sweeping, general fundamental right to 'freedom from bodily restraint' applicable to *all* persons in *all* contexts. If convicted prisoners could claim such a right, for example, we would subject all prison sentences to strict scrutiny. This we have consistently refused to do.").

³³² *Lewis*, 523 U.S. at 842.

³³³ *Id.* at 843; *accord* *Graham v. Connor*, 490 U.S. 386, 395 (1989).

³³⁴ *See Lewis*, 523 U.S. at 843.

³³⁵ *See id.*

³³⁶ *Id.*

³³⁷ *See* U.S. CONST. amends. V, XIV.

³³⁸ *See supra* notes 317–331 and accompanying text (arguing that the Fifth and Fourteenth Amendments contemplate the death penalty).

³³⁹ *See California v. Ramos*, 463 U.S. 992, 998–99 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of

context of a *per se* challenge to the death penalty, the Fifth and Fourteenth Amendments are more protective than the Eighth Amendment because they require the State to prove that the death penalty is narrowly tailored to serve a compelling interest—i.e., that retribution and deterrence cannot be achieved through any less restrictive means.³⁴⁰ The Eighth Amendment, by contrast, turns this analysis on its head: according to *Gregg v. Georgia*, the validity of the death penalty is “presume[d],” and the “heavy burden” is on the prisoner to produce “convincing evidence” that the death penalty is “so totally without penological justification that it results in the gratuitous infliction of suffering.”³⁴¹ It cannot be that the Supreme Court is duty-bound to give less protection to life; given the heightened burden imposed on the prisoner by the Eighth Amendment, the Fifth and Fourteenth Amendments should control.³⁴²

Second, even if the “more-specific-provision” rule were applicable to a substantive due process challenge to the death penalty, the Supreme Court’s commitment to the rule is anything but certain.³⁴³ Indeed, in the nearly thirty years since announcing its “more-specific-provision” rule, the Supreme Court has never applied the rule to a substantive due process challenge in the death penalty context—let alone a challenge to the death penalty *per se*.³⁴⁴ In fact, the Court has rarely invoked the rule to reject a substantive due process challenge in favor of an Eighth Amendment challenge; the cases applying the rule have almost universally involved unlawful searches and

death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”); *cf.* *Whitley v. Albers*, 475 U.S. 312, 313, 326–27 (1986) (analyzing prison security claims under substantive due process and the Eighth Amendment, and holding that, “[i]n the prison security context, the Due Process Clause affords respondent *no greater protection* than does the Cruel and Unusual Punishments Clause” (emphasis added)).

³⁴⁰ See *supra* notes 99–102, 309–313 and accompanying text (discussing government’s burden under substantive due process).

³⁴¹ 428 U.S. 153, 175, 187 (1976); see also *id.* at 186–87 (stating that “the infliction of death as a punishment for murder is not *without justification*,” many post-*Furman* statutes reflected “a responsible effort to define those crimes and those criminals for which capital punishment is *most probably* an effective deterrent,” and the Georgia legislature’s judgment “that capital punishment *may be* necessary in some cases” was not “*clearly wrong*” (emphasis added)).

³⁴² See *supra* notes 38–40 and accompanying text (discussing Eighth Amendment and due process protections).

³⁴³ See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49, 52 (1993) (“We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another . . . [A]ssuming that the Fourth Amendment were satisfied in this case, it remains for us to determine whether the seizure complied with our well-settled jurisprudence under the Due Process Clause.”); *Soldal v. Cook Cty.*, 506 U.S. 56, 70 (1992) (“Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution’s commands.”).

³⁴⁴ See *infra* notes 345–346 and accompanying text (collecting cases discussing the “more-specific-provision” rule).

seizures implicating the Fourth Amendment.³⁴⁵ Furthermore, the rule's application is highly contested—often commanding a mere plurality or invoked by dissenters.³⁴⁶ The Court's failure to invoke the rule in like contexts, together with the disputed nature of the rule itself, thus raises substantial doubts about the Court's willingness to apply the rule to a challenge to the death penalty per se.

C. Recognition of the Condemned's Right to Life Will Undermine a Woman's Right to Abortion

Lastly, pro-choice advocates might argue that a Supreme Court decision invalidating the death penalty as a violation of the right to life will undermine a woman's right to abortion. At first blush, the concern seems reasonable. If the State cannot take the lives of prisoners, the argument goes, it must also protect the lives of the unborn.³⁴⁷ But this argument is too facile.³⁴⁸ Although both the death penalty and abortion contexts implicate life interests, these interests are legally distinct, making it unlikely that the Supreme Court's recognition of the right to life of the condemned would extend to the life of a fetus.³⁴⁹ There are two reasons for this.

³⁴⁵ Compare *Albright v. Oliver*, 510 U.S. 266, 305 at 273–74 (1994) (plurality) (applying more-specific-provision rule in context of police seizure), and *Graham*, 490 U.S. at 400 (same), with *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 841–43 (1998) (finding rule inapplicable to claim involving police deprivation of right to life outside of search-and-seizure context).

³⁴⁶ See, e.g., *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2479 (2015) (Alito, J., dissenting) (disagreeing with majority's substantive due process analysis of excessive force claim because majority did not first “decide whether a pretrial detainee can bring a Fourth Amendment claim”); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200–01 (2003) (Scalia, J., concurring) (disagreeing with majority's substantive due process analysis of the denial of a building permit because “a more specific constitutional provision”—the Equal Protection Clause—“govern[ed]”). Compare *Albright v. Oliver*, 510 U.S. 266, 305 at 273–74 (1994) (plurality) (rejecting a substantive due process claim because the Fourth Amendment provided “explicit textual source of constitutional protection” for arrests without probable cause) (quoting *Graham*), with *id.* at 282 (Kennedy, J., concurring in judgment) (suggesting that the more-specific-provision rule would not apply where substantive due process protections exceeded—as opposed to “mirror[ed]”—those of Fourth Amendment), and *id.* at 288–89 & n.2 (Souter, J., concurring in judgment) (concluding that *Graham* did not foreclose a substantive due process claim).

³⁴⁷ See DANIEL K. WILLIAMS, *DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE ROE V. WADE* 126, 163, 192 (2015) (tracing the history of pro-life activism throughout the twentieth century, including its opposition to the death penalty); see also Jones, *supra* note 203, at 238 (discussing conservative Catholic support for “two pieces of legislation introduced in Kansas—one to limit abortion and another to repeal the death penalty”).

³⁴⁸ Cf. Hugo Adam Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759, 770 (1991) (“I do not think that logic requires anyone who is absolutely opposed to the death penalty to oppose as well all abortions, suicides, mercy killings, lethal force, and so on.”).

³⁴⁹ See *infra* notes 350–364 and accompanying text. According to *Roe v. Wade*, these interests are also factually distinct because the fetus, unlike the condemned, “represents only the potentiality of life.” 410 U.S. 113, 162 (1973); see also Chemerinsky & Goodwin, *supra* note 106, at 1229

First, the Court is unlikely to reach the question of whether a fetus has a right to life because of the Fifth and Fourteenth Amendments' federal and state action requirements, which prohibit the government—not private actors—from depriving rights.³⁵⁰ In the abortion context, the State is not depriving life, but is instead *protecting* fetal life *from* abortion. The legal question in this context, therefore, is not whether a woman can deprive a fetus of the right to life, but rather whether the State can deprive a woman of the right to abortion.³⁵¹ In *Roe v. Wade* and its progeny, the Court answered this question in the negative; the government may not prohibit abortion prior to viability.³⁵² Although it is possible that a newly constituted Court might overturn *Roe*, it would most likely do so on grounds that women have no right to an abortion—not that fetuses have a right to life.³⁵³ Simply put, the Court is unlikely to determine whether the State can deprive the right to life of the fetus because the question would not be before the Court. In the death penalty context, by contrast, the deprivation of the right to life of the con-

("[T]here may be a reasonable chance—but clearly no more than that—that there will be a baby but for an abortion."); Mayo Clinic Staff, *Miscarriage*, MAYO CLINIC (July 20, 2016), <https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/symptoms-causes/syc-20354298> [<https://perma.cc/Y7D2-RE9A>] ("About 10 to 20 percent of known pregnancies end in miscarriage."); *Pregnancy and Infant Loss*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/features/pregnancy-infant-loss-day/index.html> [<https://perma.cc/PLA8-9EX5>] (last updated Oct. 15, 2018) ("[E]ach year about 24,000 babies are stillborn in the United States").

Dozens of countries appear to have acknowledged a distinction between fetal life and the life of the condemned by abolishing the death penalty while permitting abortion on request. *Compare Worldwide Abortion Policies*, PEW RES. CTR. (Oct. 5, 2015), <http://www.pewresearch.org/interactives/global-abortion/> [<https://perma.cc/F72S-TBY6>] (showing that, as of 2013, fifty-seven countries, including the U.S., permitted abortion on request), *with* DEATH PENALTY INFO. CTR. *Countries*, *supra* note 221 (showing that, of the fifty-seven countries that permit abortion on request, forty-nine have abolished the death penalty explicitly or in practice). Ireland, a predominantly Catholic country, is a case in point; it abolished the death penalty in 1990 and repealed its abortion ban in 2018. *See Eighth Amendment Repealed as Irish President Signs Bill Into Law*, BBC NEWS (Sept. 2018), <https://www.bbc.com/news/world-europe-45568094>.

³⁵⁰ *See* U.S. CONST. amends. V, XIV.

³⁵¹ *See* CHEMERINSKY, *supra* note 40, at 603 ("[T]he debate [over abortion rights] is rarely couched in terms of the meaning of the word 'life' in the due process clause but, instead, is usually about whether women have a right to terminate their pregnancies and whether fetuses should be considered persons under the Constitution.").

³⁵² *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming *Roe*'s "recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State").

³⁵³ *See id.* at 979 (Scalia, J., dissenting) ("The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so."); *see also* Raymond B. Marcin, *God's Littlest Children and the Right to Live: The Case for a Positivist Pro-Life Overturning of Roe*, 25 J. CONTEMP. HEALTH L. & POL'Y 38, 45–46 (2008) (stating that, if the Court decides to overrule *Roe*, it will most likely do so on grounds that "nothing in the Constitution protects the right to privacy in the abortion decision," rather than because the "prenatal child has a fundamental and unalienable right to life").

demned is front and center. In this context, unlike in the abortion context, the State kills.

Second, even if the Court were to reach the issue of whether a fetus has a fundamental right to life, the Court is unlikely to find that such a right exists. This Article has argued that the condemned have a fundamental right to life based on a history and tradition of diminished support for the death penalty nationally and worldwide, the dignity of the condemned, and the negative right not to be killed by one's government.³⁵⁴ The case for the right to life of a fetus, by contrast, is far weaker. Although an extensive discussion of this argument is beyond the scope of this Article, some preliminary points are in order.

Unlike the death penalty, history and tradition do not suggest a country that has turned its back on abortion. While the number of executions has steadily declined to just twenty-five in 2018, the number of abortions in recent years, though declining, hovers around one million—its decline largely attributable to fewer unwanted pregnancies.³⁵⁵ Worldwide, the number of countries permitting abortion has increased over the past two decades: 96% of countries permit abortion to save the life of the mother; two-thirds of the world permit abortion for this and other specified reasons; and 30% of all countries, including the United States, permit abortion on request up to a certain point in the pregnancy (e.g., twenty weeks).³⁵⁶ Furthermore, although there is dignity in fetal life, there is also dignity in a woman's choice not to carry the fetus to term. These dignity interests compete, as the Court recognized in *Roe's* trimester framework and *Casey's* undue burden framework.³⁵⁷ The dignity of the fetus, therefore, is not absolute. Indeed, according to the Supreme Court in *Roe* and its progeny, women do not

³⁵⁴ See *supra* notes 106–281 and accompanying text.

³⁵⁵ Reid Wilson, *Abortion Rates Hit New Low as Birthrates Fall*, THE HILL (Dec. 6, 2017) <https://thehill.com/homenews/state-watch/363557-abortion-rates-hit-new-low-as-birth-rates-fall> [<https://perma.cc/JT7A-8Z99>] (discussing declining abortion rates and birthrates across the country); see also Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States 2008–2014*, 107 AM. J. PUB. HEALTH 1904, 1907 (2017), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304042> (finding that nearly one in four U.S. women (23.7%) will have an abortion by age forty-five). Ancient history and the common law likewise do not support the fetus's right to life. See *Roe*, 410 U.S. at 129 (stating that laws proscribing abortion “are not of ancient or even of common-law origin[;] instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century”).

³⁵⁶ Angelina E. Theodorou & Aleksandra Sandstrom, *How Abortion Is Regulated Around the World*, PEW RES. CTR. (Oct. 6, 2015), <http://www.pewresearch.org/fact-tank/2015/10/06/how-abortion-is-regulated-around-the-world/> [<https://perma.cc/822U-DLRJ>].

³⁵⁷ *Casey*, 505 U.S. at 876–77 (employing “undue burden standard” to “reconcil[e] the State’s interest [in protecting potential life] with the woman’s constitutionally protected liberty”); *Roe*, 410 U.S. at 162–63 (establishing trimester framework to determine when government’s interest in maternal health and “potentiality of human life” overrides the rights of the pregnant woman).

merely have a dignity interest in choosing whether to bear a child—they have a *right*.³⁵⁸ In the death penalty context, by contrast, the dignity of the condemned is complete. There simply is no competing dignity interest, much less a right.³⁵⁹ On the contrary, the State's interest is one of *indignity*—disparaging life because it supposedly deters or is somehow deserved.³⁶⁰

Lastly, the fetus's right to life is not a negative right to be shielded from state power. After all, the State does not deprive the lives of fetuses; when the State acts in this context, it acts to *protect* fetuses.³⁶¹ The fetus's right to life is thus a positive right to be protected by the State from abortion. This is a feeble claim to a fundamental right.³⁶² Automobile accidents, drug overdoses, and air pollution take hundreds of thousands of lives each year, but this does not mean that we have a positive right to protective laws that take cars off the road, drugs off the street, or carbon monoxide out of the air. The right to life of the condemned is different, and on surer footing. It is a negative right to be free from punitive laws that kill.³⁶³ To carry the

³⁵⁸ *Roe*, 410 U.S. at 153–54.

³⁵⁹ Although future murder victims, their family members, and society more generally may have an interest in deterrence (i.e., in not being killed by private actors) and retribution (i.e., in killing murderers because they deserve it), they do not have a *right* to it. According to *DeShaney v. Winnebago County Department of Social Services*, there is no affirmative right to state protection from murder—much less a right to the punishment of murderers with death. 489 U.S. 189, 196 (1989).

³⁶⁰ See *supra* notes 242–281 and accompanying text (discussing dignity in the death penalty context).

³⁶¹ See *Casey*, 505 U.S. at 876 (discussing the State's interest in protecting potential life).

³⁶² See *DeShaney*, 489 U.S. at 195–97 (stating that the purpose of the Due Process Clause “was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes. . . . As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”); *Sandage v. Bd. of Com'rs of Vanderburgh Cty.*, 548 F.3d 595, 596 (7th Cir. 2008) (“[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen. . . . The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order. There is a moral right to such services—protection against violence is the single most important function of government—and a government that fails in this duty invites well-deserved political retribution. But there is no enforceable federal constitutional right.”) (citation omitted); see also *supra* notes 94–98 and accompanying text (discussing the Court's reluctance to recognize positive rights under substantive due process).

In moral and political philosophy, by contrast, negative liberties are not constrained by state action; they can encompass the freedom from intrusion by government *as well as* private individuals. See *Positive and Negative Liberty*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/liberty-positive-negative/> (“[N]egative liberty is the absence of obstacles, barriers or constraints.”).

³⁶³ See *supra* notes 116–120 and accompanying text (discussing the negative right to be free from execution).

analogy forward, the condemned does not ask to be protected *by* the State from deadly motorists, lethal drugs, or toxic emissions; rather, the condemned asks to be protected *from* the State, which *is* the deadly force.³⁶⁴

³⁶⁴ Invalidation of the death penalty on right-to-life grounds could, perhaps paradoxically, fortify abortion rights by acknowledging the inherent risks to life that pregnancy and childbirth impose on women. See WORLD HEALTH ORG., MATERNAL MORTALITY (Feb. 16, 2018), <http://www.who.int/news-room/fact-sheets/detail/maternal-mortality> [<https://perma.cc/2EB7-88GF>] (discussing maternal mortality); see also Patty Skuster, *How Laws Fail the Promise of Medical Abortion: A Global Look*, 18 GEO. J. GENDER & L. 379, 382 (2017) (“[D]enial of abortion often leads to maternal mortality and morbidity, which in turn constitutes a violation of the right to life.” (quoting Comm. on Econ., Soc., and Cultural Rights, General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12), ¶ 10, U.N. Doc. E/C.12/GC/22 (May 2, 2016))); Hilary Hammell, *Is the Right to Health a Necessary Precondition for Gender Equality?*, 35 N.Y.U. REV. L. & SOC. CHANGE 131, 142 (2011) (discussing potentially fatal complications of pregnancy “that are impossible to predict”). Since *Roe*, these risks have not gone away, but instead have increased. See Nina Martin & Renee Montagne, *Focus on Infants During Childbirth Leaves U.S. Moms in Danger*, NPR (May 12, 2017), <https://www.npr.org/2017/05/12/527806002/focus-on-infants-during-childbirth-leaves-u-s-moms-in-danger> [<https://perma.cc/5YHZ-GSS4>] [hereinafter *U.S. Moms*] (finding that, between 1990 and 2015, more American women died “of pregnancy-related complications than any other developed country[, and o]nly in the U.S. has the rate of women who die been rising.”). The number of pregnancy- and childbirth-related deaths of U.S. women has nearly tripled over the past thirty years, climbing steadily from 7.2 deaths per 100,000 in 1987, to 18.0 deaths per 100,000 in 2014. *Pregnancy Mortality Surveillance System*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-mortality-surveillance-system.htm> [<https://perma.cc/U64C-HZ5S>] (last updated Aug. 7, 2018) [hereinafter *Pregnancy Mortality*] (examining deaths of women while pregnant and within one year of the end of a pregnancy).

Each year between seven hundred to nine hundred women in the United States die from pregnancy or childbirth-related causes, and approximately sixty-five thousand nearly die—“by many measures, the worst record in the developed world.” *U.S. Moms*, *supra*. There is also a deeply troubling complexion to these deaths: Black women (who are statistically more likely than white women to have an abortion) are nearly four times more likely than white women to die because of pregnancy or childbirth. See *Pregnancy Mortality*, *supra*; see also *U.S. Moms*, *supra* (“[M]aternal mortality is significantly more common among African-Americans . . .”); News Release, *Abortion Is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates*, GUTTMACHER INST. (Oct. 19, 2017), <https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates> [<https://perma.cc/W2AG-L4MG>] (summarizing a report finding wide variance in abortion rates based on race and ethnicity). Black lives matter in every context, and this is one of them. See Katie Mitchell, *An Open Letter to the White Protester Outside the Abortion Clinic Who Told Me “Black Lives Matter,”* *Rewire*.News (Oct. 13, 2017), <https://rewire.news/article/2017/10/13/open-letter-white-protester-outside-abortion-clinic-told-black-lives-matter/>; Black Mamas Matter Alliance & Center for Reproductive Rights, *Black Mamas Matter, Advancing the Human Right to Safe and Respectful Maternal Health Care* (2018), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/USPA_BMMA_Toolkit_Booklet-Final-Update_Web-Pages.pdf (“Black women in Southern states face some of the highest risks for poor maternal health outcomes and care.”).

If a state were to force a woman—particularly a black woman—to carry a child to term by banning abortion, and if she were to die because of a complication that was undetected or undetectable (and therefore not sufficient to trigger a medical exception to the abortion ban), the State may well have deprived her of the right to life. Cf. CHEMERINSKY, *supra* note 40, at 830 (“[I]n evaluating whether there is a violation of a right[, the Supreme Court] considers ‘[t]he directness

CONCLUSION

For over forty years, the Supreme Court has held fast to its conclusion in *Gregg v. Georgia* that the death penalty is not per se cruel and unusual in violation of the Eighth Amendment. In 2015, many observers, including conservative jurist Antonin Scalia, believed that the Court was prepared to reverse course, but the election of Donald Trump proved otherwise. The vision of judicial abolition was a mirage.

Although the Eighth Amendment still has important work to do in this context, this Article has suggested a new path toward abolition: substantive due process. Applying the four factors that guide the Supreme Court's substantive due process inquiry, this Article has argued that the death penalty infringes the condemned's fundamental right to life, and the State cannot meet its burden of proving that the death penalty is narrowly tailored to achieve deterrence or retribution. Notwithstanding reasonable arguments to the contrary, this Article has argued that the right-to-life challenge is not inconsistent with the Fifth Amendment's text or a woman's privacy.

As the Court stated in *Obergefell v. Hodges*, when "new insight reveals discord between the Constitution's central protections and a received legal stricture," the Court must address that discord.³⁶⁵ Here, the conflict is plain: the right to life and the death penalty exception. When the Court takes up this issue, it should conclude that the death penalty, "once thought necessary and proper," now "stands condemned as fatally offensive" to the right to life.³⁶⁶

and substantiality of the interference.'" (quoting *Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978))).

³⁶⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

³⁶⁶ *Lawrence v. Texas*, 539 U.S. 558, 579 (2003); *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring).