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SOME RELIGIOUSLY DEVOUT JUSTICES, CIVIL RELIGION, AND THE CULTURE WAR

CHRISTOPHER F. WOLFE*

Thomas Berg and William Ross provide us with some thoughtful discussion of religious Supreme Court judges and American law. Most of what I say will simply reinforce or extend their arguments, but I will note a few differences between us.

I. SUPREME COURT JUSTICES AND CIVIL RELIGION

The first two parts of the paper (on justices in the Gilded Age and in the New Deal) could be described as an essay on civil religion and some Supreme Court justices. There was, as they note, in the earlier eras of American history, a "de facto Protestant establishment," in which the planting of the colonies and the birth and development of the nation were seen as unfolding under the hand of Divine Providence. I suspect that members of the Supreme Court during this era generally tended to reflect the more elite brand of religious views, which tended toward Unitarianism rather than Calvinism. But, in either case, the harmony between religion and American political ideals was felt to be strong. This initial sense of harmony was reflected in the writing of Gilded Age justices such as William Strong, Joseph Bradley, John Harlan, and David Brewer. I find persuasive the suggestion of Berg and Ross that, while there are explicit religious references at this time, they are relatively few, because "Christian morality (or a version of it) may have so pervaded legal doctrines in a general way that, paradoxically, explicit references were seldom needed." The key, of course, is that "the mainstream Protestantism of this period was highly non-doctrinal, instrumen-


2. It might be interesting to start a paper like this closer to the beginning of American history, by examining some of the religious views of earlier Court justices, such as John Jay and Joseph Story.

tal, and general," which made it easy to blend Christianity and American constitutional ideals. It was not necessary to "draw sharp lines between the Constitution, the Declaration of Independence, Holy Scripture, and The Wealth of Nations."

The same is true with the New Deal Justice Frank Murphy, who was Roman Catholic (though somewhat anticlerical). Murphy "repeatedly defended New Deal-style regulation as the application of Christian principles of charity to the new social and industrial order," even citing a specific encyclical (Leo XIII's *Rerum Novarum*) as providing the basis of his labor views. On the Court, he saw himself as "an evangelist for broad principles of freedom and equality" and "for Murphy, as for the Gilded Age justices of the Protestant establishment, Christian values were not just consistent with, but identical to, constitutional ideals of democracy and equality."

But, of course, this "equating . . . of Christianity, of morality, and of constitutional ideals" also raises some interesting questions, especially in light of the post-*Everson* dispensation of American church-state relations. Isn't civil religion a "religion"? And, if so, isn't it true of civil religion, as it is of other religions, that it cannot be "established"? Under the dominant earlier, pre-*Everson* notions of church-state principles, which I take to be nonpreferentialism, it was possible to uphold a general (rather non-doctrinal) theism (which favored religion in general, without singling out particular sects for special preferences) without violating the Establishment Clause. But in the post-*Everson* era, when favoring religion in general has become a constitutional violation, how can civil religion be exempted from the separationist principle? Perhaps that fact, more than anything else, suggests why Murphy refrained from including any explicit religious references in his opinions. On the other hand, I do not think that Berg and Ross are incorrect in pointing to two other important factors: (1) "increasing religious diversity in America" and (2) the fact that "intellectual and professional elites had come to

4. *Id.* at 394.
7. *Id.*
8. *Id.* at 399.
think that religious arguments lacked any credibility.” But these two factors may explain the absence of religious Court opinions more indirectly, in the sense that they help to explain why *Everson* adopted a view of church-state relations so strikingly at odds with American history (including such aspects as the Declaration of Independence, “In God We Trust” on coins, congressional chaplains, Presidential proclamations of prayer and thanksgiving, and so forth).

The apparent power of the civil religion—the tendency to assimilate religious and constitutional ideals, on the terms of the latter—in Murphy’s own thinking raises interesting questions. Murphy was a Roman Catholic, but there are suggestions in the Berg and Ross paper that he may have been more an “American Catholic.” In defending Jehovah’s Witnesses parents’ right to have their children pass out religious tracts (against the application of child labor laws), Murphy emphasizes parental rights in religious education in a note to his law clerk, but adds, apologetically, that this “might sound a little Catholic but I assure you I have nothing in mind but liberty of religion in a country that was conceived as a sanctuary for oppressed people.” Why so apologetic about sounding Catholic? And why endorse parental religious education rights for Jehovah’s Witnesses, but then join strict separationist opinions (in the education area) in such cases as *Everson* and *McCollum*? Is this the embarrassment of so many modern Catholic intellectuals that they might be accused of being sectarian Catholics?

Berg and Ross make an observation in this section of their paper that could open the door to a much wider discussion of religion and Supreme Court justices. Murphy’s separationism is linked with similar views of Justices Black, Douglas, and Frankfurter, and Berg and Ross are explicit in attributing very definite religious views to these justices. Black and Douglas are “sympathetic to individual conscience but suspicious of the social power of communal or organized religion” and Frankfurter—out of a concern for secular social unity—is even more unsympathetic to religious claims. These remarks suggest that justices’ “religious views” go far beyond identification with a particular religion. They suggest—rightly—that modern separationism may often reflect an

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12. Id. at 395.
13. *McCollum v. Board of Educ.* 333 U.S. 203 (1948). Of course, the bottom line in *Everson* was not so separationist, but the broad discussion of the principles of the First Amendment that preceded the holding was—and it helped lead to the more separationist result in *McCollum*.
underlying hostility to certain forms of religion: not merely religions that are intolerant in the sense of the post-Reformation religious warfare (for few would object to the disfavoring of religions that would violate the rights of other religious believers), but also religions that are not willing to be confined to the purely private sphere.

Also interesting in this regard, especially given that Berg and Ross chose Murphy, a Roman Catholic, as a subject of attention, would be a look at Justice William Brennan. Brennan made significant contributions to the strong separationist wing of the Court (as his major concurrence in Abington School District v. Schempp and his later Court opinion in Edwards v. Aguillard demonstrated) in church-state cases. Perhaps even more notably, he was a major supporter of modern "autonomist" positions in modern "culture-war cases," such as Roe v. Wade, and Bowers v. Hardwick, despite the strong opposition of his Church to such positions.

One of the most interesting examples of Brennan's jurisprudential opposition to the moral views of the Catholic faith is his opinion in Eisenstadt v. Baird, in which Brennan penned the following statement:

It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Quite apart from the fact that Brennan says nothing about contraception that might in any way reflect the teaching of Catholicism, the view of marriage here is dramatically individualistic. The overtones of

18. 478 U.S. 186 (1986); see BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (1979). The account of Roe v. Wade in The Brethren—whatever the other limitations of that book—seems entirely credible, and it assigns a significant role in the development of the Court majority to Brennan's behind-the-scenes work.
20. Id. at 453.
21. Note also, in this regard, Justice Brennan's joining of the Court opinion in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). The Danforth court dismisses the participation of the father in the abortion decision, not even treating the father as
Brennan's description of marriage do not immediately resonate with a conception of marriage in which the "two shall become one flesh."°\textsuperscript{22}

II. SUPREME COURT JUSTICES AND TODAY'S CULTURE WAR

Berg and Ross are right to see the issue of religion and the Court today as a reflection of today's culture war between "traditionalists" and those with "progressive" views, "in areas such as education, the family, and sexuality."°\textsuperscript{23} Unlike the past, today's more publicly religious justices (e.g., Scalia and Thomas, who have spoken explicitly about their personal—and generally traditional—religious views in off-the-court speeches) are less likely to identify their religious views and constitutional ideals. In fact, their commitment to some form of originalism seems to create a deep separation between their religious views and their judicial decisionmaking.

Berg and Ross make the observation that, despite their commitment to limited judicial power, Scalia and Thomas have still been able to reach "constitutional results that, so far as we can tell, are consistent with the views of traditionalist Christianity."°\textsuperscript{24} How?°\textsuperscript{25}

Berg and Ross point out three ways in which Scalia's and Thomas' interpretive approaches harmonize with traditionalist culture war views. First, their interpretive approach allows one's personal religious beliefs to enter into the determination of social or "constitutional facts" ("one's application of the law to particular facts"); Romer is a prime example, with regard to whether the Second Amendment was based on irrational animus against a class of people or on moral disapproval of homosexual conduct. Second, tradition is a key element in their interpretive approach, and this permits religious views to become significant factors in

having an independent interest in the child, but regarding paternal participation as an attempt by the state to delegate whatever power it might have to the father.

22. \textit{Matthew} 19:5.
24. \textit{Id.} at 403.
25. Berg and Ross mention, but for the most part set aside, the possibility that Scalia and Thomas are acting hypocritically. The one area where they give credence to the charge of hypocrisy (although they say that extensive discussion of the Fourteenth Amendment's original meaning would be necessary to make it stick) is affirmative action, "where they use rather free-floating language about the immorality and counterproductivity of race-conscious programs." It is hard for me to see how the charge of hypocrisy is any more plausible here, since their positions are based squarely on their plain reading of the central principle of the equal protection clause as a denial of the legitimacy of race-based differential treatment of citizens. They may be wrong in this interpretation, but it is hard for me to see any reason to doubt their sincerity. \textit{Id.} at 404 n.92.
interpretation, as in *Bowers v. Hardwick* (or, without any explicit religious reference, *Cruzan*).\(^{26}\) Third, Scalia and Thomas emphasize that their interpretive approach entails deference to the political branches. Even though some of the practical political results of *Employment Division v. Smith*\(^ {27}\) may be unpalatable to Scalia, his position is that the legislature is the arena in which these issues should be decided.

After some discussion, Berg and Ross seem to indicate that, for the most part, the limited sources approach insulates Scalia from the charge that, by upholding laws that permit or mandate immorality, he acts immorally. The exception they mention is that a judge may be viewed as materially cooperating in evil, unjustifiably, (a) when he "makes statements in the course of upholding a law that give the impression that the law is moral when it is not"\(^ {28}\); and (b) when "moral factors can and should play a role in constitutional interpretation when the 'limited sources' of text and tradition cannot give definitive answers in particular cases."\(^ {29}\)

The first case ("a"), in which a judge says that a law is moral when it is not, is not so much a case of material cooperation in the wrong act being done in the particular case, perhaps, as simply a case of saying something that is objectively false (with culpability being determined by whether this error is intentional, or even if not intentional, if it rests on a failure to know what one has a responsibility to know, e.g., the teaching of the Church).

Berg and Ross' second case ("b") is based on a failure to understand the implications of a "limited sources" position, or at least Scalia's version of it. Here I think Berg and Ross concede too much to contemporary notions of judicial review as an essentially discretionary power. Scalia would argue, I think, that if "text and tradition cannot give definitive answers in particular cases"\(^ {30}\), then it is the duty of the judge to defer to the legislature. His limited sources approach does not say that a justice is bound by text and tradition if they give a definite answer, but he is free to decide the case on his own best judgment if they do not give a definite answer. Judges are bound by text and tradition, Scalia would say, and if a law is not unconstitutional on the basis of text and tradition, then there is no ground for a justice to exercise judicial review.

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\(^{27}\) 494 U.S. 872 (1990).

\(^{28}\) Berg and Ross, *supra* note 1, at 411.

\(^{29}\) Berg and Ross, *supra* note 1, at 411.

\(^{30}\) *Id.*
Berg and Ross seem to believe that Scalia's position in death penalty cases is questionable, while his stated willingness to uphold laws permitting abortion and euthanasia is not. While I ultimately agree that a traditionalist justice ought not to strike down laws allowing abortion and euthanasia, the matter is a bit more complicated than it might appear at first. Some pro-life advocates, for example, have made the following case about abortion.

The Fourteenth Amendment contains a clause which says that states may not deny to persons under their jurisdiction the equal protection of the law. It is a simple fact, rooted in human biology, that human life begins at conception—and, frankly, outside the context of abortion (say, in the field of neonatology, with its wonderful developments that make possible medical care of the unborn while they are still in the womb) I think this biological fact is a widely, though perhaps only implicitly, accepted "social fact." (What couple happy to have conceived a child considers the being in the womb merely "a blob of cells"—unless perhaps they make a strenuous effort to bring their natural sense of things in line with ideological opinions on abortion?) Nor, despite efforts made to show the contrary, is there any persuasive argument that human personhood can somehow be separated from human life. Liberal abortion laws clearly deny unborn children the equal protection of ordinary laws prohibiting the use of private lethal force against innocent persons. Therefore liberal abortion laws deny the equal protection of the laws and are unconstitutional. (Note the obvious fact that there is no appeal to religious beliefs of any sort in this line of reasoning.)

This is a controversial claim, of course. But its constitutional logic is far greater than that of Roe v. Wade and its progeny. It easily meets whatever standards one might put forward for making a "colorable" claim. For reasons that I have discussed elsewhere, I think there are sound reasons for judges not to strike down such laws, despite their profound immorality. Judicial review ought not to be exercised on the basis of merely colorable claims, or indeed on the basis of anything less than a clear constitutional command, and I do not believe that the in-

34. This proposition is discussed and analyzed at length in CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW (rev. ed. 1995). See also CHRISTOPHER WOLFE, JUDICIAL ACTIVISM (rev. ed. 1997), and CHRISTOPHER WOLFE, HOW TO READ THE
clusion of unborn children in the Fourteenth Amendment is a clear constitutional command. The fact that other justices—such as the authors of the Roe and Casey opinions—have grossly abused their judicial power to further immoral legislation is no warrant for other justices to strike down immoral laws by abusing their powers.

The foregoing argument leads me to make a point that may get lost in Berg and Ross’s observation that Scalia and Thomas’s interpretive approach is “consistent” with traditionalist culture war views. I think it is important to note the price that traditionalists pay by sticking to their interpretive views.

There is a profound asymmetry in the Court’s cases dealing with culture war issues (education, the family, and sexuality). Liberal justices in general put forward views that embrace a particular vision within the culture war, namely the “autonomist” view, which would leave to private individuals the power to make decisions in such matters, without being subject to regulation by government in the name of the common good. For example, Justice Blackmun’s dissent in Bowers v. Hardwick makes a case for private power to decide issues relating to “personal intimacy.” But there is no “conservative” culture war position represented in Supreme Court opinions. Justice White’s Court opinion in Bowers says absolutely nothing about sodomy, other than that the people of Georgia can prohibit it if they want to, largely because Americans in the past have never felt it was a right. Likewise, Blackmun’s Court opinion in Roe v. Wade and the plurality opinion in Casey reaffirming the “central holding” of Roe make an argument for a women’s right to choose to have an abortion, while the dissents in those cases simply point out that the Constitution does not authorize the Court to strike down abortion-limiting legislation, since it leaves that whole matter to the states. There has never been a Court opinion that attempts to explain why abortion or homosexuality is wrong.

Now it may be true, if Scalia is right, that judges have no reason to discuss why abortion or homosexuality is wrong, since the Constitution says nothing on either subject. But that does not remove a very genuine and severe problem: the advantage that liberals in the culture war derive from the educative impact of Supreme Court opinions. Supreme Court opinions are important not only because they are decisions of a case, but also because—whether justices see this as part of their “duty” or not—they help to shape opinions in this nation. The Court is one of the main

CONSTITUTION (Rowman and Littlefield, 1996).

instruments for shaping the "public philosophy" of the United States, precisely for one of the reasons that is often put forward (unpersuasively, in my opinion) to justify judicial activism: it is unusual in the degree to which its duties require it to give reasoned opinions on questions raised about our fundamental law. These opinions must be studied by a whole class of people who are, or will be, among the most important shapers of American political life and public opinion (lawyers and law students). For cultural conservatives to engage in that debate, with their views on the substantive issues at stake muffed, is to put them at a great disadvantage.

I do not know that there is any easy way to handle this asymmetry. But one, rather limited suggestion is this: if Scalia and Thomas are loath to explicitly adopt a stance on culture war issues in their opinions, in their capacity as judges, might they not be able at least to lay out the positions that will otherwise be ignored by the simple expedient of representing them as third-party opinions? Such opinions could take something like this form:

Justice So-and-So, arguing for the Court [or in dissent], maintains that there is a constitutional right to [abortion, or assisted-suicide, gay marriage, etc.] on the grounds that [whatever version of liberal autonomy has been presented in the case]. It does not appear, however, that the Constitution takes any particular stand on this issue. What are we judges to say, then, to those who argue, contrary to Justice So-and-So, that public policy ought to be determined by quite different considerations. For example, [here state a trenchant case for a moral traditionalist public policy]. Don't people with these views have just as much a right, under the Constitution, to shape our public policy, through the legislative process? We are compelled to acknowledge that, in the absence of any constitutional command to the contrary, the determination of such issues is left, not to this or any other court, but to the ordinary political process.

Of course, this might lead to criticism of Scalia and Thomas, on the grounds that it is their own policy views—now explicitly revealed in the description of the moral traditionalist position—that is the real engine of their opinions, rather than their conception of the Constitution. But how would that differ from the present situation, in which their critics hardly seem reluctant to accuse them of hiding their political opinions behind disingenuous judicial reasoning?

In making this argument, I am implicitly distinguishing between a judicial activism that consists in judicial specification of allegedly vague constitutional generalities (which is characteristic of modern judicial ac-
tivism), and a narrower and more defensible judicial activism that consists in a judicial defense of the Constitution. Chief Justice John Marshall was, in my opinion, an example of the latter, in that he wrote broad opinions—often broader than were necessary to decide a case—with a view to defending the Constitution against those who would undermine it.\textsuperscript{36} I believe that Scalia and Thomas would be equally justified in writing broader opinions to defend the legitimate authority of the political branches to legislate on the basis of traditionalist moral views, and to minimize the unfair advantage that "autonomists" derive from the current shape of judicial opinions.

III. JUSTICE SCALIA AND THE DEATH PENALTY

The point on which Berg and Ross seem more willing to raise serious questions about the fidelity of Scalia (and perhaps Thomas) to their religious ideals concerns the death penalty. They argue that Scalia may have gone beyond merely upholding the constitutionality of the death penalty to active support for it, in two ways. First, Scalia has "rejected claims by capital defendants in situations where moral arguments against the death penalty could permissibly enter into constitutional interpretation."\textsuperscript{37} But, as I suggested above\textsuperscript{38}, Scalia would probably deny that such moral arguments could legitimately enter into constitutional interpretation. If text and tradition leave the matter unclear, that is no warrant for judicial decisionmaking, but rather a ground for judges to defer to the political branches. Second, they "wonder if Justice Scalia has not sometimes left the distinct impression that the death penalty is morally justified, and not merely within the people's power to enact."\textsuperscript{39} But here (as in the first point as well), Berg and Ross assume—despite earlier qualifications\textsuperscript{40}—that there is some kind of obligation to oppose the death penalty. They do not consider whether Scalia might have in mind those cases in which the death penalty is legitimate (or at least cases that fall within the range of legitimate free opinion among Catholics).

Pope John Paul II, in \textit{Evangelium Vitae}, states that "punishment . . . ought not go to the extreme of executing the offender except in cases of absolute necessity; in other words, when it would not be possible other-

\textsuperscript{36} See WOLFE, supra note 34, at 84-89
\textsuperscript{37} Berg and Ross, supra note 1 at 413.
\textsuperscript{38} See supra notes 28-30 and accompanying text.
\textsuperscript{39} Berg and Ross, supra note 1, at 413.
\textsuperscript{40} Berg and Ross, supra note 1 at 412 n.116.
wise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent." And, citing the Catechism of the Catholic Church, he goes on to say: “If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.”

These are strong statements, and I do not wish to suggest that they are not quite serious. But, at the same time, I think that the limits of the statements ought to be noted as well. (Berg and Ross rightly note that this is not a teaching on the *per se* immorality of capital punishment, though they do “doubt that the current practice of capital punishment in America comports with any reasonable reading of the papal statements.”)

It is often useful to reformulate a principle to recognize its implications more fully. So, for example, the first sentence above might fairly be restated in this way: “In (the very rare) cases of absolute necessity—when it is not possible otherwise to defend society—and only in those, punishment *ought* to go to the extreme of executing an offender.” That is, the teaching of the Pope is that the death penalty in some cases is appropriate. This puts the matter in a category quite distinct from actions that are intrinsically wrong, such as directly-procured abortion or suicide.

As to the authority of the discussion of the death penalty, it is necessary to note the distinction between different kinds of statements in papal teaching. In particular, one must distinguish between principles and more particularized prudential judgments. Vatican II’s Dogmatic Constitution on the Church, *Lumen Gentium*, says that “religious submission of the mind and will must be given in a unique way to the authoritative teaching of the Roman Pontiff, even when he does not speak *ex cathedra*. That is, it must be given in such a way that his supreme magisterium is reverently acknowledged, and the judgments proposed by him are sincerely accepted, according to his manifest mind and will, which he expresses chiefly either by the type of document, or by the frequent

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42. Id. at 92.
43. Berg & Ross, supra note 1, at 412 n.117.
proposal of the same teaching, or by the argument for the position."

Now, in light of these distinctions, contrast the way the pope speaks, in Evangelium Vitae, of abortion and euthanasia, on one hand, and the death penalty, on the other. The condemnations of abortion and euthanasia are very strong (even solemn) and unqualified. The discussion of the death penalty is neither solemn nor unqualified.

Moreover, in according weight to the discussion of the death penalty in Evangelium Vitae, one must also note the recent vintage of this teaching, contrasted with almost two millennia in which the morality of the death penalty was upheld. It is plainly arguable that there is going on here a process of "development" of doctrine on this matter, as, for example, earlier eras saw a development of doctrine on slavery and certain aspects of religious liberty. But it is clearly the case that we do not have here an authoritative Church teaching that the death penalty is wrong, and there is no attempt in Church teaching (as, in my opinion, is appropriate45) to be specific about what the "very rare" cases are that would justify the death penalty.

An evaluation of Scalia's death penalty jurisprudence, then, is complex. First, Scalia can, acting in accord with Catholic teaching, go so far as to "formally cooperate" (uphold a death penalty, intending to bring about the result of death) in some cases, namely, those—unspecified—"rare" cases in which the death penalty is legitimate. Second, in those cases where the death penalty is not justified by Catholic teaching, Scalia's upholding of death penalties can be justified by his "limited sources" approach to constitutional adjudication. It is even questionable whether this is a form of "material cooperation." For a judge to say—truthfully—that he has no jurisdiction to overrule a state act in a particular case is not "cooperation" in the act itself. But even if it is cooperation, it is legitimate, as long as his "cooperation in evil" is not formal cooperation (intending the evil itself), but only justifiable material cooperation (accepting the evil as a byproduct of another action which is good—in this case, performing his judicial function of interpreting and applying the law, according to the intention of the lawgiver, whatever that may be). Third, even apart from the legitimacy of the previous two cases based on the teaching of John Paul II and the Catholic Catechism,


45. To be clear, I should indicate that it is the teaching of the Catholic Church that the Church hierarchy has the legitimate authority to make such specific judgments (see, for example, the statement to that effect in the encyclical Mater et Magistra); but only very rarely does the Church exercise such power (and wisely so, in my opinion).
there is the possibility that Scalia may, in good faith, question the authoritativeness of the prudential part of this relatively recent and somewhat qualified teaching, namely, whether and to what extent the legitimate use of the death penalty would be "rare." That is a very fact-bound judgment involving complex determinations about the magnitude of crime and the relative merits of different ways of dealing with it. As such, it does not carry the same weight or authority as the general moral principles enunciated in the ordinary Magisterium.

In light of those observations, I do not see any reasonable grounds for saying that Justice Scalia is not a good Catholic because of his death penalty decisions or his failure to recuse himself in such cases. That is true both (a) because he himself, as a Catholic, has a legitimate range of free opinion on the subject, and also (b) because he must acknowledge that others—the political branches—have such a range of free opinion. The second point is particularly important, given his interpretive principles and the fact that the Constitution is not merely silent on this issue, as it is on many other controversial issues, but clearly implies the legitimacy of the death penalty (in the due process and double jeopardy clauses).

IV. CONCLUSION

If I were to fault Justice Scalia for anything in his jurisprudence, it would be for his failure to distinguish more carefully what might be called his "judicial positivism" from a broader "legal positivism." So concerned does he appear to be with denying judicial discretion untethered to the positive law—a completely defensible position for a moral traditionalist—that the language he uses at times suggests a much broader (and completely indefensible) positivism, i.e., that what the majority does is right because the majority does it. I do not believe that this is Justice Scalia's position, but perhaps he should give more attention to the fact that many people appear to believe that it is.