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Foreword: The Perpetual Controversy

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A little more than thirty years have passed since the U.S. Supreme Court's decisions in *Gregg v. Georgia*¹ and its companion cases authorized the resumption of capital punishment in America. Some might have thought, at the time, that *Gregg* marked the end of the crisis that began four years earlier with the apparent judicial abolition of the death penalty effected by *Furman v. Georgia*.² The Court, it seemed, had surrendered and would no longer interpose significant obstacles to the administration of capital punishment. The people, through their elected representatives in the state legislatures, had spoken, and the people wanted the death penalty.

From the perspective of 2008, *Gregg* seems less a surrender than a retreat. Far from disappearing from the Supreme Court's docket, death penalty cases have remained a staple of the Court ever since *Gregg*. Rarely does a Supreme Court term pass without a decision in at least one death penalty case. Capital punishment has become, in the law at least, a source of perpetual controversy.

Two qualities of American capital punishment perhaps explain its ability to command the attention of the Court, year by year, decade after decade. First, an exceptionally talented and dedicated specialist capital defense bar continually mounts new challenges to the institution of the death penalty. This year, for example, we await a decision from the Supreme Court on the claim that the lethal injection method of execution violates the cruel and unusual punishments clause of the Constitution.³ Never before has the Supreme Court confronted this claim; indeed, not for more than a hundred years has the Supreme Court addressed a claim that a method of execution violates the Constitution.⁴

In response to the success of the defense bar in raising genuinely plausible legal obstacles to the use of the death penalty, an equally committed corps of death penalty supporters seeks to break the legal resistance to capital punishment, so that the penalty can become at last an effective tool

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1. 428 U.S. 153 (1976).

2. 408 U.S. 238 (1972).

3. *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 128 S. Ct. 34 (U.S. Sept. 25, 2007) (No. 07-5439).

4. *See Wilkerson v. Utah*, 99 U.S. 130 (1878) (holding that death by firing squad did not violate the Eighth Amendment).

of law enforcement. Perhaps their greatest recent legal achievement was the passage, in 1996, of the Antiterrorism and Effective Death Penalty Act (AEDPA).⁵ By instituting a deferential standard of federal review of state court decisionmaking, the AEDPA significantly lowered the frequency of success of state prisoners in seeking federal habeas relief. But, as the defenders of the death penalty cannot have failed to notice, even their successes can seem, at times, like failures. Although the AEDPA has lowered the reversal rates, it has itself produced any number of complex interpretive issues, many of which have reached the Supreme Court. Efforts to end the legal controversy, in short, seem often rather to prolong it. Insofar as neither the opponents nor the advocates of the death penalty seem at all inclined to yield, we may expect that the legal controversy shall continue for years to come.

Second, capital punishment raises genuinely hard issues of law. I offer as evidence of this assertion the surprising frequency with which the Supreme Court has reversed course on a particular death penalty issue. For example, the Court has overruled its prior decisions on issues such as the eligibility of juveniles⁶ and mentally retarded persons⁷ for the death penalty, and the admissibility of victim-impact evidence.⁸

The death penalty poses hard questions, of course, not only about law, but also about public policy and morality. Accordingly, capital punishment remains a subject of concern in the legislative and executive branches. In some places, the institution of capital punishment seems as strong as ever. In Louisiana, for example, the legislature has enacted a law making eligible for the death penalty defendants who rape, but do not kill, child victims. The case of one defendant sentenced to death under that provision now awaits U.S. Supreme Court review.⁹ In our own state of New Hampshire, after the passage of many years in which no capital prosecution even went so far as to reach a jury, the attorney general now seeks the death penalty in two separate cases.¹⁰ Such signs of the strength of the institution, though, may perhaps be deceiving. Just a few years ago, when no cases were pending, New Hampshire's legislature voted to abol-

5. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

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

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

8. *Payne v. Tennessee*, 501 U.S. 808 (1991).

9. *Kennedy v. Louisiana*, 957 So. 2d 757 (La. 2007), *cert. granted*, 128 S. Ct. 829 (U.S. Jan. 4, 2008) (No. 07-343).

10. See Annmarie Timmins, *A.G. Seeks Death for Brooks*, CONCORD MONITOR, Jan. 24, 2008, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20080124/FRONTPAGE/801240349> (last visited Feb. 6, 2008); Kathryn Marchocki, *State Answers Death Penalty Objections*, UNION LEADER, Feb. 5, 2008, available at <http://www.unionleader.com/article.aspx?headline=State+answers+death+penalty+objections&articleId=a8eb7a16-5d4f-4cec-878c-c811106dd054>.

ish the death penalty, and only a governor's veto intervened to save the death penalty.¹¹ In 2007, the state of New Jersey earned the distinction, so nearly claimed by New Hampshire, of being the first state since 1965 to abolish the death penalty by legislation.¹² Popular support for the death penalty, so high in the wake of *Gregg*, seems to have begun to decline.

The continuing vitality of the debate about the death penalty gives rise to a continuing need for scholarship that brings new insights and evidence to bear on the perpetual controversy. The articles contained in this volume constitute very useful contributions to the literature. They range from discussions about particular doctrines to historical surveys of capital punishment to discussions about strategies for seeking abolition of the death penalty to an investigation of the nature of life on death row. Legal scholarship, in itself, may never bring an end to the debate about the proper place of capital punishment in America. Such scholarship, though, by keeping capital punishment ever under examination, may preserve us from a system of capital punishment that nobody could defend.

11. *New Hampshire Veto Saves Death Penalty*, N.Y. TIMES, May 20, 2000, at A16.

12. Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3.