

# ABOLISHING DEATH

RENEE KNAKE\*

## PROPOSED AMENDMENT

The death penalty shall not be imposed by the United States, or by any State, Territory, or other jurisdiction within the United States.<sup>1</sup>

## INTRODUCTION

Much of the democratic world long ago abolished the death penalty as a matter of fundamental human rights, including Canada, Mexico, South Africa, and all of Europe (except Belarus).<sup>2</sup> A majority of the countries around the globe have done so.<sup>3</sup> One nation is noticeably absent from this list: the United States.

While a handful of the states embrace the death penalty, many do not. Nineteen prohibit it by statute<sup>4</sup> or in their constitution,<sup>5</sup> with a gubernatorial moratorium in an additional three<sup>6</sup> and state court bans in several others.<sup>7</sup> The number of death sentences decreased dramatically over the past two decades, down to just 39 in 2017

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\* Professor of Law and the Joanne and Larry Doherty Chair in Legal Ethics, University of Houston Law Center. My thanks to Katy Badeaux for research assistance and to participants in the Duke Journal of Constitutional Law and Public Policy Symposium: *An Even More Perfect Union: Proposed Amendments to the Constitution* for their helpful feedback.

1. H.R.J. Res. 214, 100th Congress (1987).

2. According to data maintained by Amnesty International, 141 countries have abolished the death penalty by law or in practice. See *The Death Penalty in 2016: Facts and Figures*, AMNESTY INT'L NEWS (2017), <https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures/> (last visited Dec. 1, 2017).

3. See *id.*

4. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2017), <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Jan. 5, 2018) (listing non-death penalty states).

5. See, e.g., MICH. CONST. of 1964, art. IV, § 46 (effective Jan. 1, 1964) (“No law shall be enacted providing for the penalty of death.”).

6. See DEATH PENALTY INFO. CTR., DEATH PENALTY ON HOLD IN MOST OF THE COUNTRY (2014), <https://deathpenaltyinfo.org/node/5829> (last visited Dec. 1, 2017) (noting that Colorado, Oregon, Washington have a gubernatorial moratorium on the death penalty).

7. See *id.* (California, Massachusetts, and Connecticut are the only three states in which a court has declared the death penalty unconstitutional per se).

compared with 295 in 1998.<sup>8</sup> Only eight states conducted executions in 2017.<sup>9</sup> Harris County, Texas, once the leading jurisdiction for capital punishment by a substantial margin,<sup>10</sup> imposed no death sentences and engaged in no executions in 2017.<sup>11</sup>

At the same time, the United States Supreme Court seems to similarly disfavor the death penalty, having narrowed its scope over the past few decades. The Court even brought it to a halt briefly for a few years in the mid-1970s.<sup>12</sup> But permanent abolishment is unlikely to occur there.

In a recent opportunity to end the death penalty, only Justices Breyer and Ginsburg would have done so.<sup>13</sup> They believe it is unconstitutional under the Eighth Amendment, which prohibits “cruel and unusual punishments”<sup>14</sup> because of the “(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays.”<sup>15</sup> Justice Breyer, authoring the dissent, proposed that “rather than try to patch up the death penalty’s legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.”<sup>16</sup>

Justice Scalia countered in a scathing concurrence: “It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*.”<sup>17</sup> His successor appears to hold a similar view.<sup>18</sup> This makes it doubtful that the present Court would reach the

8. *Id.*

9. *See id.* Texas led executions in 2017, with seven. Arkansas followed, with four. Alabama and Florida carried out three, Ohio and Virginia two, and Georgia and Missouri one each. *Id.*

10. *See* Frank R. Baumgartner, et al., *The Geographic Distribution of US Executions*, 11 DUKE J. CONST. L. & PUB. POL’Y 1, 10 (2016). From 1975 to 2017, Harris County, Texas, executed 125 individuals. *Id.* Dallas County, Texas, followed at 55, with only 20 other jurisdictions executing up to ten (or fewer) individuals over the same time period. *Id.*

11. *See* Jacey Fortin, *US Had 23 Executions in 2017, Second-Lowest Number in a Quarter-Century*, N.Y. TIMES, Dec. 14, 2017, <https://mobile.nytimes.com/2017/12/14/us/death-penalty-execution-rate.html> (last visited Jan. 5, 2018).

12. *See* *Furman v. Georgia*, 408 U.S. 238 (1972) (striking down all death penalty schemes in the United States under the Eighth Amendment); *Gregg v. Georgia*, 428 U.S. 153 (1976) (re-authorizing some death penalty schemes meeting certain guidelines).

13. *See generally* *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

14. U.S. CONST. amend. VIII. The Eighth Amendment applies to the states as well as the federal government by incorporation through the Due Process Clause of the Fourteenth Amendment.

15. *Glossip*, 135 S. Ct. at 2756.

16. *Id.*

17. *Id.* at 2747.

18. *See* Robert Barnes, *Gorsuch Casts Death-Penalty Vote in One of His First Supreme Court Cases*, WASH. POST, Apr. 21, 2017, [https://www.washingtonpost.com/politics/courts\\_law/](https://www.washingtonpost.com/politics/courts_law/)

five votes necessary to find that the death penalty violates the Eighth Amendment.

Yet, the Court regularly faces capital punishment cases, often siding for the criminal defendant.<sup>19</sup> As I write this essay, the Court has taken up eight cases involving death penalty issues during the 2017-18 Term.<sup>20</sup>

That the Constitution contemplates the death penalty does not, however, mean that it forever remains constitutional. Indeed, the Framers deliberately designed the Constitution so that the document could be revisited and adjusted over time. Thus, a constitutional amendment appears to be a more feasible path to abolishing the death penalty, at least absent a dramatic change in the composition of the Court.

This essay, written for the Duke Journal of Constitutional Law and Public Policy Symposium, *An Even More Perfect Union: Proposed Amendments to the Constitution*, makes the case for a constitutional amendment to abolish the death penalty and lays out possible routes to enactment. Part one of the essay opens by recounting one Congress member's unsuccessful efforts at launching a death penalty amendment. It then describes the present state of the law in the United States regarding capital punishment, including recent data showing a significant decline in death sentences and executions among the few states still engaging in the practice. Part two provides an overview of the process established by Article V for amending the Constitution, and then evaluates the potential paths for a successful death penalty abolition amendment.

## I. CAPITAL PUNISHMENT IN THE UNITED STATES

Death penalty opponents object to its use on several grounds. First, studies show that death sentences are unfairly imposed on vulnerable populations, especially the poor who cannot afford a skilled attorney and minorities who are victims of racism.<sup>21</sup> Second, research also shows that the death penalty is more costly than a life

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gorsuch-casts-death-penalty-vote-in-one-of-his-first-supreme-court-cases/2017/04/21/2d9bc5dc-26a8-11e7-a1b3-faff0034e2de\_story.html?utm\_term=.0e7301645d6c (last visited Dec. 10, 2017).

19. See discussion *infra* Part I.B.

20. See DEATH PENALTY INFO. CTR., UNITED STATES SUPREME COURT DECISIONS 2017-2018 TERM, <https://deathpenaltyinfo.org/united-states-supreme-court-decisions-2017-2018-term> (listing cases) (last visited Jan. 10, 2018).

21. See discussion *infra* Part I.C.

sentence and that it does not have a deterrent effect to prevent violent crime.<sup>22</sup> Third, numerous individuals sentenced to death have later been found innocent—more than 150 exonerations have occurred in twenty-six states since 1973.<sup>23</sup> Fourth, many raise moral concerns regarding respect for life.<sup>24</sup>

These concerns are at the heart of what has caused the Supreme Court in recent years to narrow the death penalty's scope, and the states to significantly reduce death penalty sentences and executions. These concerns also inspired an effort in the late 1980s and early 1990s by one member of Congress to end capital punishment via constitutional amendment. Part I summarizes this history and describes the present state of the law in the United States regarding capital punishment, including recent data showing a significant decline in death sentences and executions among the few states still engaging in the practice.

#### A. *The Gonzalez Amendment*

This essay's proposal for a death penalty abolition amendment is not novel. Representative Henry B. Gonzalez, a Democrat from Texas, attempted five times to convince Congress; his first attempt occurred in 1987. His proposed amendment provided: "The Death Penalty shall not be imposed or executed by the United States, or by any State, Territory or other jurisdiction within the United States."<sup>25</sup> The amendment called for ratification by three-fourths of state legislatures within seven years of its submission by Congress.<sup>26</sup> His initial request was joined by representatives from California, Connecticut, the District of Columbia, Minnesota, New York, Texas, and West Virginia.<sup>27</sup> He was alone in subsequent attempts in 1990,<sup>28</sup> 1992,<sup>29</sup> and 1995,<sup>30</sup> though joined by a representative from Missouri in 1993.<sup>31</sup>

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22. See discussion *infra* Part I.C.

23. See discussion *infra* Part I.C.

24. See discussion *infra* Part I.C.

25. H.R.J. Res. 214, 100th Cong. (1987).

26. *Id.*

27. See *id.*

28. See H.R.J. Res. 619, 101st Cong. (1990).

29. See H.R.J. Res. 518, 102d Cong. (1992).

30. See H.R.J. Res. 99, 104th Cong. (1995).

31. See H.R.J. Res. 224, 103d Cong. (1993).

During the last effort, Representative Gonzalez stated:

Mr. Speaker, I rise today to introduce a joint resolution proposing a constitutional amendment to prohibit capital punishment within the United States. I believe that the death penalty is an act of vengeance veiled as an instrument of justice. Not only do I believe that there are independently sufficient moral objections to the principle of capital punishment to warrant its abolition, but I also know that the death penalty is meted out to the poor, to a disproportionate number of minorities, and does not either deter crime or advance justice. At a time when South Africa's highest court, in the first ruling of the new multiracial Constitutional Court, has just abolished the death penalty—on grounds that it is a cruel and inhumane punishment that does not deter crime but which does cheapen human life—as part of the post-apartheid quest for democratic government and a just society in that country, we should live up to no lower of a standard in our continuing effort to uphold democracy and justice in our own land. . . . Nearly all other Western democracies have abolished the death penalty without any ill effects; let us not be left behind. Let us release ourselves from the limitations of a barbaric tradition that serves only to undermine the very human rights which we seek to uphold.<sup>32</sup>

The final proposal languished in the House Judiciary Subcommittee on the Constitution. Representative Gonzalez left office in 1999, and passed away in 2000. No other member of Congress has since taken up the cause. Yet, as subpart I.B reveals, the concerns articulated by Representative Gonzalez more than two decades ago endure today. This suggests that, perhaps, his amendment should be revived. Before turning to that process, however, some additional background about capital punishment in the United States is necessary.

### *B. Supreme Court Jurisprudence*

That the Supreme Court tolerates the death penalty does not mean it has not established limits. Numerous challenges have been brought arguing that various aspects of the death penalty are unconstitutional under the Eighth Amendment's prohibition against "cruel and unusual punishments."<sup>33</sup> In fact, at one point in the early

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32. 141 CONG. REC. E1386–87 (daily ed. June 30, 1995).

33. See U.S. CONST. amend. VIII. The Eighth Amendment applies to the states as well as the federal government by incorporation through the Due Process Clause of the Fourteenth

1970s, the Court declared the death penalty itself unconstitutional<sup>34</sup> only to find that it is not a few years later, as long as the sentencing body has sufficient guidance to account for both aggravating and mitigating factors, and a review procedure exists to prevent discrimination in imposing a death sentence.<sup>35</sup> (So, for example, where a mandatory death penalty for a wide range of homicides would be unconstitutional,<sup>36</sup> a sentencing procedure with some mandatory features might not be, such as a requirement that a jury impose death if an aggravating factor exists and mitigating factors are absent.<sup>37</sup>) The Court soon thereafter took capital punishment off the table in the case of adult rape,<sup>38</sup> non-homicidal kidnapping,<sup>39</sup> and felony murder.<sup>40</sup> Similarly, the Court has held that the death penalty cannot be imposed on an individual who is deemed insane at the time of punishment<sup>41</sup> or who is mentally disabled.<sup>42</sup> More recently, in 2005, the Court decided it is cruel and unusual to execute a person under the age of eighteen at the time of the crime.<sup>43</sup> The rape of a child was excluded from the death penalty in 2008.<sup>44</sup>

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Amendment. *Robinson v. California*, 370 U.S. 660, 667 (1962).

34. *See Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (5-4 decision holding that “the imposition . . . of the death penalty in these cases constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments”).

35. *See Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (7-2 decision reaffirming the use of the death penalty under certain circumstances).

36. *See Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (5-4 decision holding that North Carolina’s mandatory death penalty law violated the Eighth Amendment).

37. *Cf. id.* at 304 (“A process that accords no significance to relevant facets of the character and record . . . or the circumstances . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors . . .”).

38. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977) (7-2 decision finding the death penalty unconstitutional in cases of non-homicidal rape of an adult).

39. *See Eberheart v. Georgia*, 433 U.S. 917, 917 (1977) (per curiam) (finding the death penalty is unconstitutional for non-homicidal kidnapping).

40. *See Tison v. Arizona*, 481 U.S. 137, 157 (1987) (5-4 decision finding that the death penalty is appropriate only if an individual has been a major participant in a felony murder); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (5-4 decision setting aside the death penalty for the driver of a getaway car in a murder).

41. *See Ford v. Wainwright*, 477 U.S. 399, 401 (1986) (7-2 decision that the imposition of the death penalty on the insane violates the Eighth Amendment).

42. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (6-3 decision that the execution of a mentally retarded individual violates the Eighth Amendment).

43. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (finding the death penalty unconstitutional for juvenile offenders who committed crimes while under eighteen); *cf. Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (finding the death penalty unconstitutional for offenders under sixteen).

44. *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (5-4 decision barring the death penalty in the rape of a child where the rape did not result and was not intended to result in death).

The Court regularly hears death penalty appeals and requests for stays of execution.<sup>45</sup> Concerns raised include mitigating factors,<sup>46</sup> racial discrimination,<sup>47</sup> methods of execution,<sup>48</sup> and ineffective assistance of counsel.<sup>49</sup> Many of these determinations are part of the so-called “shadow docket” without the public argumentation and opinion writing typically associated with the Court.<sup>50</sup> In the 2016-17 Term alone, the Court considered seven cases involving the death penalty, siding with the criminal defendant more often than not.<sup>51</sup> The Court took up eight cases for the 2017-18 Term,<sup>52</sup> declining to hear one that would have directly presented the constitutionality of the death penalty; *Hidalgo v. Arizona*.<sup>53</sup> The case involved a challenge to the sentencing scheme utilized by Arizona courts, which includes

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45. See, e.g., Jess Bravin, *Supreme Court Docket Loaded with Death-Penalty Cases*, WALL ST. J., Oct. 4, 2015, <https://www.wsj.com/articles/supreme-court-docket-loaded-with-death-penalty-cases-1443999113>; Adam Liptak, *Supreme Court to Hear Death Penalty Cases*, N.Y. TIMES, June 6, 2016, [https://www.nytimes.com/2016/06/07/us/politics/supreme-court-to-hear-two-major-death-penalty-cases.html?\\_r=0](https://www.nytimes.com/2016/06/07/us/politics/supreme-court-to-hear-two-major-death-penalty-cases.html?_r=0) (noting the recent prevalence of death penalty cases on the Supreme Court’s docket).

46. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (8-1 decision in favor of Lockett because the Ohio statute did not allow for “individualized consideration of mitigating factors”).

47. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 306–08 (1987) (5-4 decision that a statistical study could not be evidence of a discriminatory effect and that specific discrimination must be shown in each individual case).

48. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2737–38 (2015) (5-4 decision that the injection of midazolam did not violate the Eighth Amendment); *Baze v. Rees*, 553 U.S. 35, 41 (2008) (7-2 decision that a three-drug injection protocol did not violate the Eighth Amendment).

49. See, e.g., *Davila v. Davis*, 137 S. Ct. 2058, 2062–63 (2017) (5-4 decision that the ineffective assistance of appellate counsel does not overcome the procedural default of ineffective assistance of counsel claims); *Buck v. Davis*, 137 S. Ct. 759, 777–78 (2017) (6-2 decision that lower court applied an unduly burdensome standard for demonstrating ineffective assistance of counsel).

50. See Ariane de Vogue, *Supreme Court Deliberations On Execution Kept Quiet*, CNN POLITICS (Dec. 10, 2016, 11:32 AM), <http://www.cnn.com/2016/12/10/politics/supreme-court-deliberations-on-execution-kept-quiet-ronald-smith-john-roberts/index.html> (noting that such deliberations tend to be “usually opaque”); see generally William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015) (explaining the lack of oversight accompanying the Court’s “shadow docket”).

51. See Stephen McCallister, *Death-Penalty Symposium: A Court Increasingly Uncomfortable With the Death Penalty*, SCOTUSBLOG (June 29, 2017), <http://www.scotusblog.com/2017/06/death-penalty-symposium-court-increasingly-uncomfortable-death-penalty/> (“The Supreme Court this term demonstrated its continuing and increasing discomfort with the death penalty, at least as that sentence is often imposed in America. For the most part, the court went out of its way to reverse the death sentences it considered, and certainly gave little deference to state court decisions.”).

52. See DEATH PENALTY INFO. CTR., *supra* note 20.

53. See *State v. Hidalgo*, 241 Ariz. 543 (2017). The Court denied cert on March 19, 2018. See *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018).

numerous aggravating factors, so many that the scheme makes most, if not all, first-degree murder convictions eligible for the death penalty.<sup>54</sup>

The Court's struggle with death penalty cases mirrors the data revealing the flawed application of this form of punishment.

### C. *Studies on Capital Punishment in the United States*

Numerous studies show not only that capital punishment does not have its desired deterrent effect, but that it is applied disproportionately against minorities and—disturbingly—to innocent individuals. This has led to a significant decrease in death sentences and executions. As the Death Penalty Information Center recently reported, “thirty-six states have either abolished the death penalty, have executions on hold, or have not carried out an execution in at least five years.”<sup>55</sup> (Keep this number in mind; it becomes significant in Part II of this essay, as we consider the likelihood of a constitutional amendment.) Moreover, “[c]ontrary to the assumption that the death penalty is widely practiced across the country, it is actually the domain of a small percentage of U.S. counties in a handful of states. . . . Only 2% of the counties in the U.S. have been responsible for the majority of cases leading to executions since 1976.”<sup>56</sup> Furthermore, even some of these counties have effectively eliminated the death penalty. Harris County the county with the greatest number of executions historically, reduced that number to zero in 2017.<sup>57</sup>

The reduction in death sentences and executions stems from volumes of data undermining the legitimacy of capital punishment. Studies on race document that black defendants are more likely than white defendants to receive the death penalty in similar cases,<sup>58</sup> and that cases involving white victims are more likely to result in the death penalty than those involving black or Latino victims.<sup>59</sup> Data on

54. See generally *Hidalgo*, 241 Ariz. 543.

55. See DEATH PENALTY INFO. CTR., *supra* note 6.

56. DEATH PENALTY INFO CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL, <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf> (last visited Dec. 1, 2017).

57. See Fortin, *supra* note 11.

58. See, e.g., KATHERINE BECKETT, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1982-2012 2 (2014) (“[T]he results of regression analyses indicate that juries were three times more likely to impose a sentence of death when the defendant was black than in cases involving similarly situated white defendants.”).

59. See, e.g., Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LA. L. REV. 647, 670 (2011) (finding “that the odds of a death sentence were 2.6 times higher for those who were charged with killing whites than for those charged

the financial costs show that death penalty cases are more expensive than imposing life imprisonment.<sup>60</sup> Indeed, “[r]esearchers estimate that about four percent of those sentenced to death are actually innocent,” with documentation showing “a strong possibility that innocent individuals have been executed.”<sup>61</sup> Empirical studies similarly support the conclusion that no heightened deterrent effect is achieved with capital punishment: “It is now widely accepted among top-flight empirical scholars that not a single study credibly supports the view that capital punishment as administered anywhere in the United States provides any added deterrent beyond that afforded by a sentence of life imprisonment.”<sup>62</sup> It is no wonder that newspaper editorial boards and scholars repeatedly call for the death penalty’s demise.<sup>63</sup>

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with killing blacks”); Glen L. Pierce & Michael L. Radelet, *Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999, The Empirical Analysis*, 46 SANTA CLARA L. REV. 1, 37 (2005) (“The data clearly indicate that the race and ethnicity of homicide victims is associated with the imposition of the death penalty.”).

60. For example, “New Jersey abolished its death penalty in 2007 in large part because the state had spent \$254 million over 21 years administering it without executing a single person.” Richard Williams, *The Cost of Punishment*, NAT’L CONF. ST. LEGIS., <http://www.ncsl.org/research/civil-and-criminal-justice/the-cost-of-punishment.aspx> (last visited Dec. 1, 2017).

Many state-initiated analyses—including reports from Michigan, New Mexico and South Dakota—have found administering capital punishment is significantly more expensive than housing prisoners for life without parole. . . . California has spent more than \$4 billion on capital punishment since 1978, executing 13 criminals. That’s about \$184 million more a year than life sentences would have cost.

*Id.* See also Chrissy Hoppe, *\$2.3 Million to Burn: Is this Justice?*, CHI. TRIB., March 24, 1992: A study by *The Dallas Morning News* found that even when those verdicts are upheld, it’s cheaper to lock someone up for life than to try to execute him. The study shows that trials and appeals take 7.5 years and cost taxpayers an average \$2.3 million per case in Texas. To imprison someone in a single cell at the highest security level for 40 years costs about \$750,000. . . . A 1982 study in New York estimated that the first level of appeals alone would cost \$1.8 million, and a 1988 series in *The Miami Herald* showed that the death penalty costs Florida \$3.1 million per execution.

61. Kenneth Williams, *Why the Death Penalty is Slowly Dying*, 46 SW. L. REV. 253, 255 (2017) (citations omitted).

62. John J. Donahue, *Empirical Analysis and the Fate of Capital Punishment*, 11 DUKE J. CONST. L. & PUB. POL’Y 50, 58 (2016) (citing numerous empirical studies).

63. See, e.g., Lawrence Tribe, *The Supreme Court Should Strike Down the Death Penalty*, WASH. POST, Nov. 2, 2017, [https://www.washingtonpost.com/opinions/the-supreme-court-should-strike-down-the-death-penalty/2017/11/02/8d3c31be-bd86-11e7-8444-a0d4f04b89eb\\_story.html?utm\\_term=.e4d4c8f8efa1](https://www.washingtonpost.com/opinions/the-supreme-court-should-strike-down-the-death-penalty/2017/11/02/8d3c31be-bd86-11e7-8444-a0d4f04b89eb_story.html?utm_term=.e4d4c8f8efa1) (last visited Dec. 10, 2017); Editorial Board, *Capital Punishment Deserves a Quick Death*, N.Y. TIMES, Dec. 31, 2017, [https://www.nytimes.com/2017/12/31/opinion/capital-punishment-death-penalty.html?\\_r=0](https://www.nytimes.com/2017/12/31/opinion/capital-punishment-death-penalty.html?_r=0) (last visited Jan. 1, 2017) (advocating for the abolition of the death penalty).

Despite the decrease in death penalty sentences and executions, despite the empirical studies undermining any support for the death penalty as a deterrent or less costly punishment, and despite the number of wrongful convictions and exonerations in death penalty cases, a majority of the Supreme Court appears unlikely to conclude that the death penalty is per se unconstitutional under the Eighth Amendment. But, the death penalty would be unconstitutional if an amendment made it so.

## II. A POTENTIAL ROADMAP FOR AMENDING THE CONSTITUTION

“The plan now to be formed will certainly be defective, as the Confederation has been found, on trial, to be. Amendments therefore, will be necessary and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to chance and violence.”<sup>64</sup>

When may the Constitution be amended? Article V provides for two possible approaches.

First, an amendment may come from Congress, and estimates suggest that over 10,000 bills have been introduced to do so.<sup>65</sup> A two-thirds majority vote is required from the House of Representatives and the Senate alike. Congress does this via joint resolution, with no formal role for the President. The amendment is then presented to the States for ratification by the legislature or by a state convention.<sup>66</sup> Congress may specify which route. Three-fourths (or thirty-eight) of the states must ratify an amendment for it to become effective. Only twenty-seven amendments have made it through Congress and state ratification, all by state legislatures except for the twenty-first amendment repealing Prohibition, which was ratified by state ratifying conventions. Congress typically specifies a seven year ratification period, but this is not required.<sup>67</sup>

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64. 1 JAMES MADISON, THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES, MAY–SEPTEMBER, 1787, 122 (Gaillard Hunt ed., 1908) (“Resolution 13. for amending the national Constitution hereafter without consent of Natl. Legislature being considered, Several members did not see the necessity of the Resolution at all, nor the propriety of making the consent of the Natl. Legisl. unnecessary. Col. Mason urged the necessity of such a provision.”).

65. Thomas Baker, *Towards a More Perfect Union: Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 10 (2000).

66. Notably, only the Twenty-First Amendment was passed in this manner.

67. For example, the most recent amendment, proposed initially in 1789, was not finally ratified by the thirty-eighth state until 1992, when Michigan voted to approve the twenty-seventh amendment which limits changes in compensation for Congress to become effective

Second, two-thirds (or thirty-four) of state legislatures may demand a constitutional convention, though it is worth noting that of the twenty-seven amendments to the Constitution none stem from this source. This might lead some to dismiss this route as a likely path for a death penalty amendment. That said, it seems we may be on the brink of a constitutional convention, even if it is not convened specifically to address the death penalty. As the *Economist* recently reported, “there are now 27 states in which the legislatures have passed resolutions calling for a convention that would propose a balance-budget amendment.”<sup>68</sup> Only seven more are needed for a convention to actually convene.<sup>69</sup>

Thus, while it is unlikely that a constitutional convention would be called solely on the issue of death penalty abolition, it seems quite possible that one could be called on other issues, such as the balanced budget amendment, and this might open the door to other amendments’ consideration. Interestingly, over time, there have actually been hundreds of Article V applications for a constitutional convention from forty-nine of the fifty states.<sup>70</sup> According to the count maintained by the U.S. House of Representatives, there are 116 applications pending.<sup>71</sup> One might ask why, then, have we not yet seen a convention? After all, the Constitution itself specifies that a convention is to be convened after two-thirds of the states demand it. At least part of the answer is that there are so many unresolved questions about the process for holding an Article V convention.

One of these critical, unresolved questions is whether an Article V convention can be convened generally, or only to address a particular amendment. A related question is whether, once convened if done so for a specific amendment or amendments, the convention might take up other issues. Constitutional scholars and experts disagree.<sup>72</sup> The

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only after a subsequent election.

68. *America Might See a New Constitutional Congress in a Few Years*, THE ECONOMIST, Sept. 30, 2017, <https://www.economist.com/news/briefing/21729735-if-it-did-would-be-dangerous-thing-america-might-see-new-constitutional-convention> (last visited Jan. 15, 2018).

69. *Id.* As it turns out, there are “seven states which have not yet called for a convention to propose a balanced-budget amendment, but in which Republicans control both houses of the legislature.” *Id.* This cannot happen until 2019, apparently, because Montana’s legislature does not meet annually. But still, by the time this essay is published, we could be in the midst of a convening of a constitutional convention—the first in more than two centuries.

70. See FRIENDS OF THE ARTICLE V CONVENTION, <http://www.foavc.org/Pages/index.htm> (last visited Jan. 15, 2018) (noting more than 550 applications from 49 of the 50 states).

71. OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/legislative/memorials.aspx> (last visited Dec. 1, 2017).

72. Professor Paulsen asks, “Can there be such a thing as a ‘limited’ constitutional

point of this essay is not to debate the structural rules for a convening and administering an Article V convention although, to be sure, the possibilities enthrall and terrify both sides of the aisle.<sup>73</sup> Instead, my purpose here is simply to observe that in the event a constitutional convention occurs, good arguments exist for presenting any and all sorts of amendments, whether or not they are part of the original call.

This opens a door to what may be the most plausible path for abolishing the death penalty—an amendment proposed at a constitutional convention. (Indeed, for death penalty opponents, this proposal could be the most redeeming aspect of a constitutional convention.) Once convened, there is nothing in Article V to suggest that a proposed amendment need more than a simple majority to then be sent to the states for ratification. Would a majority vote to support a death penalty abolition amendment? This seems at least possible, if not quite likely, given that nineteen states have already abolished it, an additional four have gubernatorial moratoriums in place, and a total of thirty-six states have not engaged in executions in at least five years (recall that figure recently reported from the Death Penalty

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convention—that is, a convention limited to the consideration and proposal of amendments only of a certain prescribed text or on a certain prescribed subject? The answer is *no . . .*” Michael Stokes Paulsen, *How to Count to Thirty-Four; The Constitutional Case for a Constitutional Convention*, 34 HARV. J. L. & PUB. POL’Y 837, 839 (2011). In contrast, Professor Rappaport has written:

I have argued that the Constitution’s original public meaning allows the state legislatures to apply for a convention limited either to a subject or to a specifically worded amendment, that Congress must then respond to that application by calling for a limited convention, and that the convention must then follow the limitations of that call.

Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53, 108 (2012).

73. For example, groups with typically divergent interests such as the John Birch Society and the American Civil Liberties Union both have warned against a constitutional convention. Compare AN ARTICLE V CONSTITUTIONAL CONVENTION (CON-CON) IS AN URGENT THREAT TO YOUR RIGHTS, <https://www.jbs.org/con-con> (last visited Jan. 11, 2018) with CALLS FOR A CONSTITUTIONAL CONVENTION HEATING UP IN THE STATES, <https://www.aclu.org/blog/free-future/calls-constitutional-convention-heating-states> (Feb. 3, 2015 11:47 AM). Harvard Law professor Lawrence Lessig, by contrast, has suggested that a constitutional convention is the sole means to obtain meaningful reform to campaign finance laws. Lawrence Lessig, *Should We Convene?*, N.Y. REV. BOOKS (July 15, 2015.) Other calls have come from politicians like Texas Governor Greg Abbott (see GREG ABBOT, TEXAS PLAN, <https://www.gregabbott.com/texasplan/>), scholars like Sandy Levinson (see Mark Tushnet, *The Politics of Levinson’s Constitutional Convention*, HARV. L. & POL. REV., <http://harvardlpr.com/online-articles/the-politics-of-levinsons-constitutional-convention/>) and Larry Sabato (see LARRY J. SABATO, A MORE PERFECT CONSTITUTION, [http://www.amoreperfectconstitution.com/23\\_proposals.htm](http://www.amoreperfectconstitution.com/23_proposals.htm)), and political action groups like the Wolf PAC (see WOLF PAC, THE PLAN, [http://www.wolf-pac.com/the\\_plan](http://www.wolf-pac.com/the_plan)).

Information Center).<sup>74</sup> A death penalty abolition amendment could be passed as part of a package of amendments, with different components attractive to different states. Of course approval by the constitutional convention is only the first hurdle. The amendment would still need to be ratified by thirty-eight states. This number matters because it takes thirty-four states to convene a constitutional convention, and thirty-eight to ratify an amendment.

It is, of course, impossible to know how legislatures or constitutional convention delegates would vote if they actually faced a death penalty amendment, though we can perhaps learn something by examining efforts endeavors at the state level. For example, Nebraska recently overturned a legislative ban on the death penalty through public referendum vote.<sup>75</sup> So, we can assume that the Nebraska delegation would be unlikely to support the amendment. (Then again, the legislature did vote to ban it in 2015, so perhaps popular sentiment could swing back.) On the other hand, public support for capital punishment is waning. According to a 2017 Gallup poll, “Americans’ support for the death penalty has dipped to a level not seen in 45 years. Currently, 55% of U.S. adults say they favor the death penalty for convicted murderers.”<sup>76</sup> The results from a Pew Research poll conducted in 2016 documents a similar decline:

Only about half of Americans (49%) now favor the death penalty for people convicted of murder, while 42% oppose it. Support has dropped 7 percentage points since March 2015, from 56%. Public support for capital punishment peaked in the mid-1990s, when eight-in-ten Americans (80% in 1994) favored the death penalty and fewer than two-in-ten were opposed (16%). Opposition to the death penalty is now the highest it has been since 1972.<sup>77</sup>

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74. See DEATH PENALTY INFO. CTR., *supra* note 6.

75. NEBRASKA DEATH PENALTY REPEAL, REFERENDUM 426 (2016), [https://ballotpedia.org/Nebraska\\_Death\\_Penalty\\_Repeal,\\_Referendum\\_426\\_\(2016\)](https://ballotpedia.org/Nebraska_Death_Penalty_Repeal,_Referendum_426_(2016)). The voters of California also voted against repealing the death penalty in a 2016 referendum. CALIFORNIA PROPOSITION 62, REPEAL OF THE DEATH PENALTY (2016), [https://ballotpedia.org/California\\_Proposition\\_62,\\_Repeal\\_of\\_the\\_Death\\_Penalty\\_\(2016\)](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)). Oklahoma voters in 2016 amended their constitution to allow state lawmakers greater latitude in death penalty legislation. OKLAHOMA DEATH PENALTY STATE QUESTION 776, [https://ballotpedia.org/Oklahoma\\_Death\\_Penalty,\\_State\\_Question\\_776\\_\(2016\)](https://ballotpedia.org/Oklahoma_Death_Penalty,_State_Question_776_(2016)).

76. Jeffrey Jones, *Death Penalty Support Lowest Since 1972*, GALLUP NEWS, Oct. 26, 2017, <http://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx>.

77. Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RES. CTR., Sept. 29, 2016, <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/>.

The nation clearly is at a tipping point; whether this galvanizes support for an amendment remains to be seen. If all 36 states declining to engage in executions over the past five years were to ratify, only two more would be needed for the death penalty to no longer be contemplated by the Constitution. This national trend of increased public support for abolishing death suggests the sentiment, perhaps, could be leveraged to produce a successful constitutional amendment.

#### CONCLUSION

That the Constitution once contemplated the death penalty does not mean it must endure, and this is the very sort of issue that Article V was designed by the Framers to address. This essay summarizes capital punishment jurisprudence and data, and describes potential routes for abolishing death via an amendment to the Constitution as an alternative to hoping that the Supreme Court might do so via the Eighth Amendment. Even if a Gonzalez amendment is not revived by Congress, and even if a proposal at a constitutional convention ultimately might not succeed, inserting the issue into the national conversation in this context may bring other states to join the increasing number refusing to impose death sentences and engage in executions.