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AMERICAN DEATH PENALTY EXCEPTIONALISM, THEN AND NOW

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The most commonly observed fact of American capital punishment is its present outlier status: the United States (U.S.) is the only developed Western democracy that retains the death penalty, and it does so not simply as a matter of law, but as a matter of practice, conducting numerous executions every year.

This "exceptionalism" with respect to the death penalty is noteworthy, but focusing on present-day American retention obscures many additional aspects of American death penalty exceptionalism. This Keynote will trace several ways in which the American death penalty was an outlier at its founding and throughout its subsequent history, as well as the varied aspects of its exceptionalism today. I will conclude by predicting that U.S. exceptionalism will soon come to an end–with an "exceptional" form of death penalty abolition, traceable to the distinctive path of the American death penalty.

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I. EXCEPTIONALISM THEN

Let me first highlight some less frequently observed aspects of American death penalty exceptionalism, beginning with the country's early history. At our founding, several leading political and intellectual leaders voiced skepticism about the death penalty, though it was an entrenched practice both here and abroad. These leaders were influenced by Cesare Beccaria's pathbreaking abolitionist arguments,[1] published in the decade before our Revolution in his now-famous tract, "On Crimes and Punishment."[2]

Beccaria emphasized both pragmatic and profound objections to the death penalty, asking, for example, "What right . . . have men to cut the throats of their fellow-creatures?"[3] Beccaria insisted that the death penalty was neither necessary nor useful, doubting that a public murder by the state would yield significant deterrence (and worrying it might do the reverse–an early version of the argument about the death penalty's "brutalization effect").[4] He also believed that the state could not claim the power to execute via social contract theory, as individuals lack the right to forfeit their own lives and thus cannot relinquish their right to life to the state.[5]

Dr. Benjamin Rush, an influential statesman of the founding era who signed the Declaration of Independence and led the effort to ratify the Constitution in Pennsylvania, embraced Beccaria's arguments and urged the end of capital punishment.[6] James Madison likewise questioned the wisdom of capital punishment, suggesting that he would welcome decisions by states to abandon the practice.[7] Thomas Jefferson sought to limit the reach of the death penalty in Virginia, in-

1. For an excellent discussion of Beccaria's influence on the American founding generation, see John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL. 195 (2009).

2. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (1872) (ebook).

3. *Id.* at 51.

4. *Id.* at 53.

5. *Id.* at 51.

6. *See* Bessler, *supra* note 1, at 209–10.

7. JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 158 (2012).

fluenced in part by Beccaria's insistence on "proportionate" punishments. Jefferson later embraced Beccaria's position regarding "the unrightfulness and inefficacy" of punishing crimes by death.[8]

These founding leaders were not alone in the world in embracing many of Beccaria's concerns about the death penalty.[9] Bentham, for example, was enormously influenced by Beccaria.[10] However, the United States was unusual, if not "exceptional," in having significant reservations about the death penalty at its founding and in two related respects: (1) the country's founding creed, voiced in the Declaration of Independence maintains that individuals are endowed with a God-given inalienable right to life; and (2) these reservations quickly became the basis for significant narrowing of the death penalty before such narrowing became commonplace in other countries.[11]

How significant is the claim in the Declaration of Independence that it is self-evident that "man is endowed by his Creator with certain inalienable rights," among them "[l]ife, [l]iberty, and the pursuit of happiness?" This language, though likely not intended as a rebuke of the death penalty, provides the ingredients of a quite modern version of the "human rights" ground for abolition: the Beccaria notion that the right to life is "God-given," "inalienable," and thus outside of the powers states legitimately can possess. Although the Declaration of Independence does not have the same legal force as the Constitution, it occupies a central role in this country's political culture and self-image. It is not accidental that President Lincoln, insisting in his Gettysburg Address that our country was "conceived in liberty" and "dedicated to the proposition that all men are created equal," dated these commitments back to the Declaration of Independence ("four score and seven years ago") rather than to our 1789 Constitution (which was notably less committed to equality, especially in its concessions to slavery).

Perhaps more importantly, skepticism about the death penalty in the founding era yielded real-world, concrete results. Dr. Rush's embrace of Beccaria contributed to the effort in Pennsylvania, in the late

8. *See* Bessler, *supra* note 1, at 212–15.

9. BESSLER, *supra* note 7, at 43–47.

10. *Id.* at 48.

11. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 9–10 (2016).

eighteenth century, to limit the reach of the death penalty.[12] Pennsylvania's innovative effort to divide murder into degrees was explicitly designed to make even some murders punishable by sentences less than death–a striking contrast to England's "bloody code," which authorized the death penalty for a wide range of crimes, including such offenses as theft from a rabbit warren.[13] The Pennsylvania restriction of the death penalty to murders in the first degree spread quickly to other states, with the net result that many states essentially punished only murder (and not even *all* murder) with death by the mid-nineteenth century.[14]

At the same time, the American death penalty was more robust in the American South.[15] The varying availability and use of the death penalty throughout the U.S. was attributable to another central aspect of American death penalty exceptionalism: American federalism. Our federal structure leaves decisions about crime and punishment to each of the states. Although there is a federal criminal code (which includes the death penalty), the federal government punishes crimes only where there is a distinct federal interest, leaving the definition of, and punishment for, ordinary crimes to the states. As a result, American jurisdictions were outliers with respect to the death penalty in *both* directions during the antebellum period. On the one hand, two American states–Michigan and Wisconsin–were among the first jurisdictions in the world to permanently abolish capital punishment, having done so more than 160 years ago.[16] These vanguards of abolition complicate the story of the U.S. as "exceptional" in its present-day retention of capital punishment.

On the other hand, the American South was an outlier in the other direction. Not only did Southern states retain the death penalty, but they also practiced a particularly brutal and racialized version of the punishment.[17] Under the infamous slave codes, slave states made a wide variety of offenses punishable by death, but only when commit-

12. *Id.* at 10–11.

13. *See History of the Death Penalty: Early History of the Death Penalty,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty (last visited Apr. 5, 2023).

14. *See* STEIKER & STEIKER, *supra* note 11, at 11.

15. *Id.* at 17–19.

16. *Id.* at 22.

17. *Id.* at 17–24.

ted by a slave (or a free person of color), and only when the victim was white.[18] In antebellum Virginia, for example, whites could receive the death penalty for four crimes, whereas slaves were subject to over sixty capital offenses.[19] Slave states also made the death penalty available for threats to slavery itself, such as encouraging escape or insurrection–and reserved particularly dramatic and painful modes of execution, such as burning at the stake and public display of the corpse, for those perceived to challenge the slavocracy.[20] The breadth of the death penalty as applied to slaves was widely understood as a necessary part of Southern codes because threats of confinement or lesser physical punishments were not likely to serve as much of a deterrent for an already enslaved population. Moreover, the extent to which capital punishment was deemed a necessary public good was reflected in the practice of compensating owners of executed slaves.[21] Thus, an important aspect of American death penalty exceptionalism was the death penalty's role in maintaining the American system of chattel slavery.

The twin "exceptional" features of the early American death penalty,–"American federalism," and "death-penalty-as-essential tool of American slavery"–are not truly distinct phenomena: the choice at our founding of a largely decentralized polity, with police powers over crime, public health and safety, and domestic relations (including the institution of slavery) reserved to the states, was a necessary compromise to form a union. Slave states needed reassurance that the newly created federal government would not use its powers to impose the abolition of slavery. It is notable that one of the rare "unamendable" provisions of our Constitution restricted federal power to interfere with the slave trade for two decades. Indeed, the same federal structure which precluded Congress from using its powers to abolish slavery also likely precludes Congress today from using its original Article I powers to abolish capital punishment. If there is a case to be made for federal power to legislate nationwide abolition of the death penalty, it is via Congress's enforcement power in the Fourteenth Amendment.

18. *Id.* at 20–21.
19. *Id.*
20. *Id.* at 19.
21. *Id.*

A further aspect of the American decentralized system is not merely "federalism," whereby the states retain significant autonomy in regulating important issues of social and political life (including criminal law), but also "localism," whereby power *within* states is vested in local counties. American criminal law is unusual in granting so much discretion to local actors in deciding law enforcement priorities and whether and against whom to wield the power of criminal law. This localism permits, even invites, arbitrary or discriminatory administration of justice if local preferences welcome such discrimination, especially given the fact that local district attorneys stand for election and rarely stray from such preferences. Thus, American criminal justice is both unusually decentralized and *populist*.

Both this localism and populism account for the discriminatory administration of the death penalty long after the Civil Rights Act of 1866 and the Fourteenth Amendment prohibited explicitly race-based capital statutes. The unchallengeable right of local district attorneys to forego prosecuting capital offenses, or to prosecute them without seeking the death penalty, has ensured that ostensibly "neutral" criminal laws are not actually administered even-handedly. For example, the use of the death penalty to punish rape in this country between 1930 and 1977 (when the U.S. Supreme Court found the practice unconstitutional)[22] was unquestionably race based. The punishment was essentially confined to states within the former Confederacy and border states, and within those jurisdictions, used almost exclusively to punish interracial rape involving black defendants and white victims–even though inter-racial rape was far less common than intra-racial rape.[23]

That same localism remains at play today, as the death penalty is increasingly confined to a few counties with an appetite for capital punishment. Conversely, the same localism that permits the zealous pursuit of the death penalty has also allowed some district attorneys to disclaim interest in seeking the death penalty under any circumstances, effectively creating enclaves of abolition within states that are otherwise retentionist.

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

23. CAROL S. STEIKER & JORDAN M. STEIKER, *Global Abolition of Capital Punishment: Contributors, Challenges and Conundrums, in* COMPARATIVE CAPITAL PUNISHMENT 400–01 (Carol S. Steiker & Jordan M. Steiker eds. 2019) [hereinafter COMPARATIVE CAPITAL PUNISHMENT].

The weakness of the federal and even state governments (relative to other countries), together with racial strife, also contributed to another aspect of American death penalty exceptionalism: the American experience with extra-judicial killings in the form of lynching. In the aftermath of the Civil War, lynching became commonplace in the U.S. with thousands of such killings in the peak decades toward the end of the nineteenth century (far outpacing state-administered executions).[24] Lynchings have a complicated interaction with the death penalty. Some lynchings were performed prior to official criminal proceedings, motivated by a distrust of local authorities or impatience with the formalities of law or the lack of severity of "ordinary" modes of execution. Others were carried out after death sentences were pronounced in court, again in opposition to the delays and lack of terror associated with local or state executions. Some lynchings were openly defiant of unwelcome exercises of official power, as in 1906, for example, when Ed Johnson was lynched in Tennessee by a mob aided by local authorities in response to Justice Harlan announcing that the U.S. Supreme Court would exercise jurisdiction to review his death sentence.[25] A member of the lynch mob attached a note to Johnson's body, stating: "To Justice Harlan: come get your [n-word] now."[26] Or, in 1915, when Leo Frank was lynched in Georgia after the Governor's decision to commute his death sentence to life imprisonment based on evidence of innocence;[27] the Governor himself, fearing mob violence in response to his commutation of Frank, left Georgia for a decade.

The experience with lynching helped sustain the death penalty in a peculiar way: the prospect of lynching became an important argument for death penalty retention because the absence of the death penalty, it was claimed, would make it impossible to prevent lynching in aggravated cases.[28] Thus, when Tennessee briefly abolished the death penalty for murder in the early twentieth century, it refused to eliminate the death penalty for rape, fearing increased lynching.[29] Several states that abolished the death penalty during the Progressive Era, including

24. *See* STEIKER & STEIKER, *supra* note 11, at 22–24.
25. *Id.* at 33–34.
26. *Id.* at 34.
27. *Id.* at 33.
28. *Id.* at 23.
29. *Id.* at 23–25.

Tennessee with its partial abolition, subsequently reinstated the death penalty at least partly in response to post-abolition lynching.[30] Indeed, it is strange to read the decisive opinion upholding the constitutionality of the death penalty in *Gregg v. Georgia*,[31] defending the punishment based on the prospect of extra-judicial violence if the death penpenalty were withdrawn. According to the *Gregg* plurality opinion, "[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they deserve, then there are sown the seeds of anarchy, self-help, vigilante justice, and lynch law."[32]

II. EXCEPTIONALISM NOW

The distinctive aspects of the American death penalty at the founding and in subsequent years, including the early skepticism, the path-breaking reform and early abolition, its decentralized, populist administration, and its connection to the racialized practices of slavery and lynching, have influenced the present shape of the American death penalty. In particular, we still have great divergences among states in terms of formal retention and actual use, attributable to our federal system and American localism, with decentralized decision-making about whether to have the death penalty (made at the state level) and if so, when and against whom to deploy it (made by elected district attorneys at the local level). Race continues to play an outsized role in the administration of the death penalty. The death penalty remains most prominent in the states of the former Confederacy, especially with respect to executions. Indeed, research has shown a striking relationship between the likelihood to conduct executions in the modern era and the prior history of lynching.[33] More broadly, it is hard to imagine that the U.S. would be the outlier that it has become in its retention absent the fraught racial context which had galvanized support for the punishment.

We also have new forms of American death penalty exceptionalism, apart from the mere fact of American retention, some of which

30. *Id.*

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

32. *Id.* at 183 (internal quotation marks omitted) (citation omitted).

33. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 89 (2003).

are at odds with the "old" exceptionalism and some of which are entirely new and unrelated to the past. Take, for example, the early enthusiasm among some prominent American leaders for enlightenment-inspired opposition to the death penalty–that is, Beccaria's insistence that states lack the moral authority to take life, and individuals cannot consent to give such power to their governments. Similarly-styled arguments about the sanctity of life and non-negotiable limits on state power are ubiquitous in contemporary death penalty debate–but notably, much less so in the United States. The abolitionist argument for human dignity and the inherent right to life is *the* central basis for European opposition to the death penalty (partly in response to the experience of the Holocaust), and it provides the basis for the European Union's (E.U.) insistence on death penalty abolition as a condition for membership in the E.U.;[34] it is also the dominant argument for abolition around the world.[35]

Nonetheless, in the U.S., despite the early seeds of the human rights grounds for abolition at the founding (and its prominence in the discourse of nineteenth-century "anti-gallows" societies), these arguments are marginalized in contemporary American discourse. Several dynamics contributed to this marginalization, but I will highlight two. First,the U.S. Supreme Court's 1976 decision mentioned above, upholding the death penalty against the charge that it constituted "cruel and unusual punishment," made it difficult to continue urging this ground of opposition. The U.S. Supreme Court not only upheld the death penalty against a constitutional challenge: it gave moral legitimacy to the practice given the Court's prominence in articulating moral norms, and the widespread American belief that our Constitution does not tolerate fundamental injustice. Further, for a variety of reasons, at the time of the U.S. Supreme Court's pronouncement of the death penalty's constitutionality, American courts, rather than state legislatures or Congress, provided the central battlefield regarding the future of the American death penalty. The U.S. Supreme Court invited scrutiny to the death penalty in the early 1960s, and it demonstrated an interest in regulating the practice at a time when states were largely uninterested in reforming their longstanding capital practices. The Court seemed to provide the sole forum for the total abolition of the

34. *See* COMPARATIVE CAPITAL PUNISHMENT, *supra* note 23, at 395.

35. *Id.* at 408.

death penalty in the United States (for the reasons of federalism mentioned above). Thus, when the Court insisted that the death penalty itself was not a problematic ("cruel and unusual") punishment, legal strategies shifted away from moral claims about the death penalty's violation of human rights and focused instead on claims about problematic aspects of its administration; popular discourse shifted along these lines as well.

Second, in more recent years, when debates over the death penalty surfaced in state legislatures, opponents of the death penalty made a conscious decision not to prioritize arguments based on human rights or human dignity.[36] Such arguments were deemed less likely to gain converts among those who did not already share intuitions about the basic inhumanity of the practice.[37] Instead, opponents of the death penalty sought to persuade by invoking more prosaic concerns regarding the death penalty's cost, the risk of executing innocents, and the ability of life-without-the-possibility-of-parole sentences to incapacitate offenders. Indeed, the extent to which death penalty opponents have sought to find "common ground" on the death penalty rather than to persuade supporters of their moral error is reflected in the recent choice to call for the "repeal" of the death penalty rather than its "abolition"–a self-conscious use of nomenclature to make the decision about the death penalty seem like a run-of-the-mill public policy choice rather than a moral imperative (comparable to the decision to abolish slavery).[38]

Perhaps the most significant aspect of present-day American death penalty exceptionalism, apart from the fact of American retention, is the extent to which American capital practices have been subject to extensive top-down regulation from the U.S. Supreme Court. In the early 1960s, the U.S. Supreme Court "invited" constitutional litigation around the death penalty when Justice Goldberg suggested in a dissent from denial of certiorari that the death penalty might be an excessive punishment for the offense of rape.[39] That opinion inspired the NAACP Legal Defense Fund to make the

36. Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 675–77 (2010).

37. *Id*.

38. *Id.* at 676–77; *see* STEIKER & STEIKER, *supra* note 11, at 246–49.

39. Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting).

death penalty an important part of its civil rights portfolio and to seek to limit or end the practice.[40] After successfully establishing a de facto moratorium on executions by the late 1960s, the NAACP sought a Supreme Court decision finding the death penalty unconstitutional as a punishment; it almost succeeded.[41] In 1972, the Court endorsed a less encompassing proposition: the American death penalty's haphazard and infrequent application under prevailing statutes made the death sentences secured under those statutes unconstitutional under the Eighth Amendment.[42] Members of the Court, the media, government officials, and the general public had reason to believe that the American death penalty had come to an end.[43] If the decision had been embraced by political elites, the U.S. would have been slightly "exceptional" in its relatively *early* abandonment of the death penalty (and also in its abolition via judicial decision).

But the swift and vociferous backlash to the Court's decision–reflected in the passage of dozens of new state capital statutes–made clear that the death penalty retained significant political support.[44] The U.S. Supreme Court thereafter sustained the constitutionality of the death penalty but embarked on an unprecedented effort to rationalize the practice along numerous dimensions–including requirements that states narrow the reach of the death penalty via aggravating circumstances, provide for a sentencing proceeding in which defendants can present mitigating grounds for withholding the punishment, design procedures promoting "heightened reliability" in the administration of the death penalty, and ensure that the penalty is not applied disproportionately in terms of the offense or offender. [45] Over the next several decades, capital litigation boomed as state and federal courts struggled to understand the demands of the Court's newly-designed Eighth Amendment jurisprudence.[46]

The complexity of the Court's new constitutional regulation transformed America's system of capital punishment. It did so less because

40. *See* STEIKER & STEIKER, *supra* note 11, at 40–45.
41. *Id.* at 74.
42. Furman v. Georgia, 408 U.S. 238 (1972).
43. *See* STEIKER & STEIKER, *supra* note 11, at 50.
44. *Id.* at 60–61.
45. *Id.* at 156–75.
46. *Id.* at 195–212.

the new judicial doctrines actually imposed significant regulatory demands on states (although some of the Court's doctrines marginally improved the underlying practice); rather, constitutional regulation required new institutional actors and support.[47] The constitutionalization of a special punishment phase in capital cases gave rise to a new profession of mitigation specialists trained in uncovering and presenting evidence of a defendant's life history and circumstances.[48] The uptick in litigable capital issues required specialized lawyers for state capital trials, state postconviction proceedings, and federal habeas litigation. Over a three-decade span, the federal government, states, and nonprofits created scores of new, unprecedented organizations dedicated to the capital defense function, with the result that full-time death penalty advocates–who numbered in the single digits in the 1960s–now number in the hundreds (or perhaps more). State prosecutors, too, now often have specialized offices to litigate capital cases in state and federal postconviction proceedings.

As a result, the cost of capital punishment has exploded. While "cost" was traditionally a pro-death penalty argument (why pay for lengthy or lifetime imprisonment when an execution can save those costs?), by the turn of the millennium, the cost of capital punishment far outstripped the alternative of life without the possibility of parole.[49] The lion's share of those costs are borne at the trial stage, where the new constitutional command of "individualized sentencing" requires extensive investigation of mitigating evidence, as well as the use of a variety of mental health experts, and other new doctrines (for example, concerning the death-and-life-qualification of jurors), make capital trials much more time-consuming and resource-consuming than their non-capital counterparts. Apart from the trial costs, capital cases entail extensive appellate and postconviction costs, because in most jurisdictions only death-sentenced inmates are entitled to state-provided representation in their state and federal postconviction opportunities. Additionally, extensive regulation substantially increased the duration of capital appeals, so that death-sentenced inmates now spend decades (rather than mere months or years) before their death sentences are implemented (if at all). And the cost of death row–which

47. *Id.* at 195–207.
48. *Id.* at 196.
49. *Id.* at 204–06.

in many states involves some form of administrative segregation or solitary-style incarceration–is substantially higher than ordinary (non-capital) incarceration.

Thus, American exceptionalism with respect to regulation has generated several other distinctive features of American capital punishment: it is uniquely costly because of the added complexity and duration of capital litigation; it is uniquely problematic because of the extensive delays between death sentences and executions, and what those delays mean for the state's ability to secure deterrence or retribution; and it is uniquely cruel because of the length, but also the manner of present-day death-row incarceration, implicating new human rights concerns apart from the morality of a state's power to inflict death.

This "new" American death penalty exceptionalism, characterized by extensive and complex constitutional regulation, expensive capital trials and appeals, lengthy and cruel death row incarceration, and extraordinary time between death sentences and executions, has made the death penalty extremely unattractive as a policy matter. As a result, the American death penalty has seen an extraordinary decline over the past quarter century. Death sentences, which climbed to over 300 per year nationwide in the mid-1990s, have fallen over ninety percent, with about twenty new death sentences per year nationwide over the past three years (averaging fewer than one death sentence per death penalty state per year over that period).[50] Executions, which reached their modern highs of nearly 100 annually nationwide in the late 1990s, have dropped to fewer than twenty-four a year over the past five years.[51] Perhaps most tellingly, over the past sixteen years, the U.S. experienced an enormous decline in the number of states retaining the death penalty, with eleven states abandoning the punish-

50. *See Death Sentences in the United States Since 1977,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year (last visited Mar. 28, 2023) (documenting a peak of 315 death sentences issued in 1996 and the totals from recent years).

51. *See Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 (last visited Mar. 27, 2023) (documenting a modern-era peak of 98 executions in 1999, compared to fewer than 25 per year in each of the last five years).

ment since 2007, joining the twelve states that had abolished it over the preceding 160 years.[52]

These changes on the ground strengthen the case for the constitutional abolition of the death penalty. Under the Court's longstanding approach to the Eighth Amendment (whether a practice remains consistent with "evolving standards of decency"[53]), the striking decline in American capital practices boosts the claim, rejected in 1976,that the death penalty lacks contemporary support and has become so marginal that it cannot possibly serve any permissible penological interest. Ironically, though, at the same time that the death penalty has diminished in the public sphere, it has found new defenders on the U.S. Supreme Court. In recent years, the Court has sought to curtail judicial oversight of state and federal capital practices. In particular, the Court has been hostile to end-stage litigation seeking to thwart the actual imposition of executions.[54] Moreover, a majority on the Court has indicated its desire to revisit the standard for gauging "cruel and unusual" punishment, making clear its view that the death penalty is constitutional as a matter of constitutional text and history, whether or not it comports with "evolving standards of decency."[55]

III. CONCLUSION

The American death penalty is thus at a crossroads. It carries forward many features of its "original" exceptionalism: it varies dramatically state-by-state and even within states. It continues to be dispro-

52. *See State by State: States with and without the death penalty 2021*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Mar. 27, 2023) (noting states' abandonment of the death penalty historically and over the past fifteen years).

53. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 173 (1976) (applying "evolving standards of decency" approach to determine whether death penalty is constitutionally permissible under the Eighth Amendment).

54. *See* Carol S. Steiker & Jordan M. Steiker, *The Court and Capital Punishment on Different Paths: Abolition in Waiting*, 29 WASH. & LEE J. CIV. RTS. & SOC. JUST. 1, 46–52 (2023) (describing present Court's new hostility to end-stage litigation).

55. Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019) ("The Constitution allows capital punishment.").

portionally used in the former slave states,[56] and concerns about race discrimination loom large over its present-day administration. And yet its "new" exceptionalism–its extensive judicial regulation, exploding costs, intractable delays, and new cruelty–make it less attractive and tenable as an ongoing practice. This will likely further diminish the footprint of the American death penalty, as additional states, including conservative ones, revisit their commitment to the death penalty. Indeed, recently several Republican lawmakers in Oklahoma called for a moratorium on executions–in the state with the highest per capita execution rate in the modern era.[57] At the same time, the current Court will likely pave the way for any executions states are inclined to carry out, though it cannot reverse the prevailing structural barriers to a robust death penalty. The leading indicator of the death penalty's health—death sentences, not executions—will likely remain astonishingly (and historically) low, as the death penalty's cost and the new politics surrounding the death penalty make it unattractive to pursue. As more states abolish capital punishment and the national death row diminishes in size (with executions and deaths by natural causes outpacing new death sentences), the constitutional case for abolition strengthens. The case strengthens not as a matter of the human rights or dignity grounds prominent around the world, but on the more prosaic basis that its infrequent use undermines the possibility that it can serve any plausible deterrent or retributive purpose. It has become cruel because of its lack of efficacy. The current Court will surely not embrace that argument. But this Court will not have the final word. Eventually, a new Court will deploy the prior "evolving standards of decency" framework and find that the marginal practice of the American death penalty has outlived its purposes. The U.S. will then join the overwhelming majority of democratic nations that have turned away from the death penalty, but it will do so for distinctively "American" reasons: that the effort to regulate rather than abolish the death penalty produced an unsustainable and undesirable practice. The U.S. will no

56. *See Facts about the Death Penalty,* DEATH PENALTY INFO. CTR., https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf (last visited Apr. 5, 2023) (documenting executions by region).

57. Sean Murphy, *GOP Lawmakers Join Call for Death Penalty Pause*, AP NEWS (Feb. 22, 2023), https://apnews.com/article/crime-legal-proceedings-oklahoma-ff494bc93b81076fca3dbb96cebdac37.

longer be exceptional with respect to the death penalty unless one looks closely at its remarkable death penalty past.