



Why Does the U.S. Have Capital Punishment?

By David Garland



Paula Knudsen and others who oppose the death penalty stage a protest in Pennsylvania in response to the 1,000th U.S. execution since 1976, the year that the U.S. Supreme Court reinstated capital punishment. ©AP Images

Emphasis on Local Autonomy Gives States Power to Decide

The answer lies in the limited power of the U.S. federal government to impose laws on the states, the interplay between state politics and federal law, and the role of the U.S. Supreme Court in interpreting the Constitution.

Different States, Different Penalties

One result of America's emphasis on federalism and local autonomy is that the United States is not one single place when it comes to the death penalty: The law and practice of capital

punishment vary from state to state and region to region.

Sixteen states and the District of Columbia have no death penalty, having repealed their capital punishment laws sometime between 1846 — when Michigan became the first state to abolish capital punishment — and the last few years, when New York, New Jersey, Illinois and New Mexico ended the practice.

An additional 20 states (and the federal government) have death penalty laws but rarely use them. States such as Kansas and New Hampshire are “death penalty

states” in name only, since they have not executed anyone in many decades. Other states, such as California and Pennsylvania, sentence many murderers to death but rarely execute them; these states have hundreds of inmates who live on “death row.”

Another 15 states — most of them in the South — have capital punishment laws that result in death sentences being imposed and executions being carried out. Even then, executions are comparatively rare and take place only after many years of legal

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contestation. The average time between sentence and execution is 14 years.

In practice, death sentences are permitted only for the crime of aggravated murder (a murder involving circumstances that increase its magnitude). Even in the most heinous cases, capital punishment is the exception, not the rule. In 2010, about 14,000 homicides occurred in the United States, and 114 resulted in death sentences. Most of them will likely be overturned by appeal courts or commuted by state governors. The number of executions in 2010 totaled 46, which is close to the recent annual average.

Decline of Capital Punishment

About 300 years ago, organized societies used the death penalty for a wide range of offences and offenders. Today the death penalty is prohibited throughout most of the developed world, especially in democratic nations. As of 2010, 95 nations had abolished capital punishment. Nine nations have abolished it for ordinary crimes; 35 countries have capital laws but have not executed anyone in the past 10 years; and 58 nations actively retain it.

One explanation for this transformation is that modern governments have developed less violent means — including police and prisons — to control crime and punish offenders. As these societies became more orderly, their politics became more democratic and humane, and the death penalty came to seem less necessary and less legitimate.

In the early 20th century, most developed nations retained the death penalty but used it more sparingly. The United States was involved in this reform process, despite having comparatively high homicide rates, and often led the way. U.S. states were among the first to narrow capital codes, abolish public execution, abolish the death penalty altogether and seek less painful methods of execution.

By the last decades of the 20th century, European nations had, one by one, abolished capital punishment, with France being last in 1981. Instead of following suit, many U.S. states retained the death



Left: Opponents of the death penalty march away from the state Capitol building and toward the governor's mansion in Jefferson City, Missouri. About 250 people participated in a protest against Missouri's use of capital punishment. ©AP Images

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penalty and still do, 30 years after France dismantled its guillotine.

Different Democracies, Different Legislative Processes

The United States, which helped lead the movement to reform capital punishment, lags in the movement to abolish it.

The reason for this paradox has to do with the way these laws typically have been abolished. In countries where the death penalty has been removed from the law books, it was repealed by national governments imposing top-down reform because they decided the death penalty was no longer necessary or legitimate. In many cases, repeal was carried out even if a majority of citizens continued to support capital punishment. That the death penalty has been abolished throughout most of the western world (and in many other nations) but not in the United States speaks not to differences in popular attitudes — heinous murderers are unpopular everywhere — but to differences in political institutions.

Local Power, Local Law

Unlike its European counterparts, the U.S. Congress lacks the legal power to impose national repeal because the U.S. Constitution allocates legislative power over criminal law to the states. Each of the 50 U.S. states (plus the federal government and the U.S. military) would have to repeal its own capital punishment law. This means that nationwide abolition of capital punishment would require not one comprehensive act of abolition (as occurred in other nations) but 52 distinct acts. To date, 25 states have abolished their capital punishment laws at one time or another, but 10 later reversed themselves.

Congress also lacks the political power to impose repeal, and so do lawmakers in many states. The U.S. political system makes it more difficult for elected officials to disregard the preferences of the majority of their citizens than is the case elsewhere. Short election cycles, primary elections, weak political parties and campaign finance needs combine to

SUPREME COURT DECISIONS

The one American institution that has the power to bring about nationwide abolition of capital punishment is the U.S. Supreme Court, which could end the practice by declaring it unconstitutional. This almost occurred in 1972 when a majority of the court ruled (in the case of *Furman v. Georgia*) that the death penalty, as then administered by the states, violated the constitutional guarantees of due process, equal protection and the prohibition of cruel and unusual punishment.

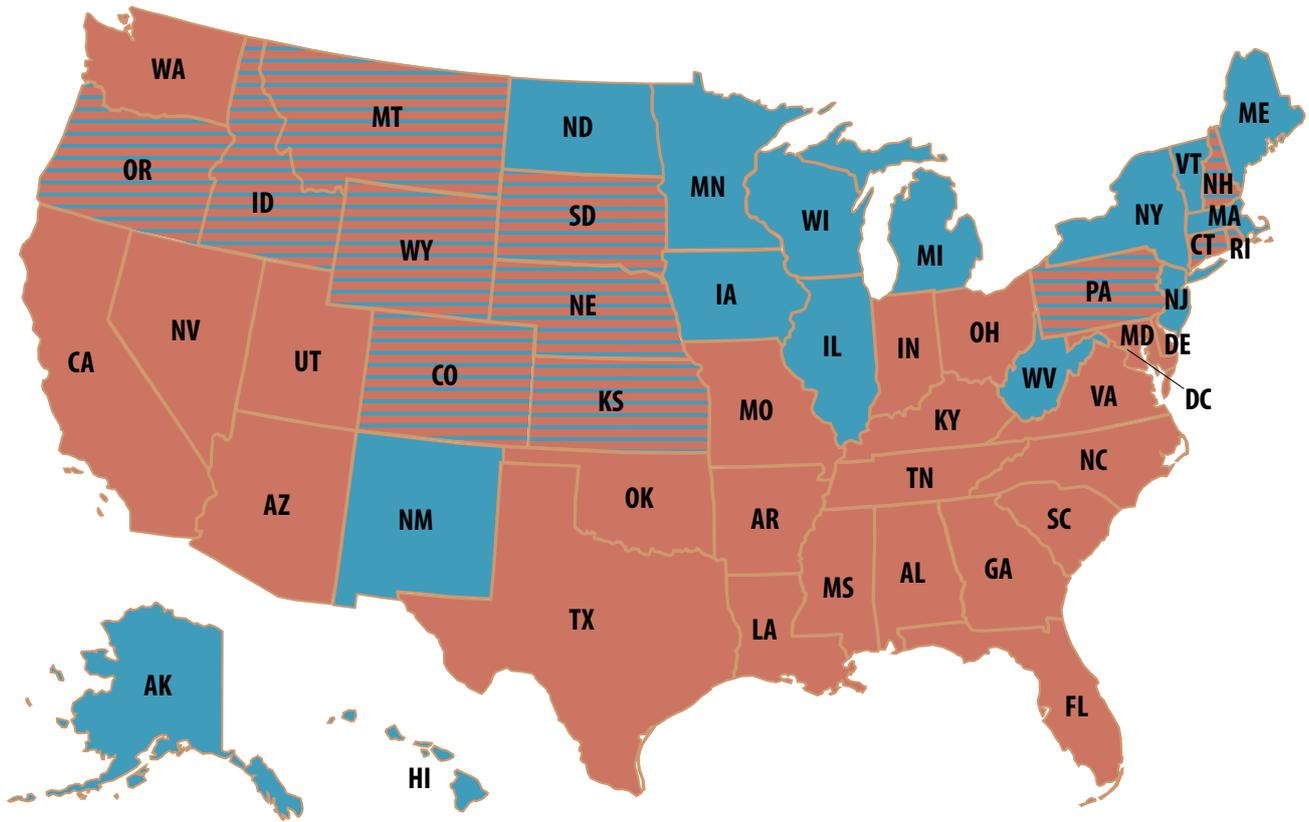
In the years following *Furman*, 35 states passed new legislation, reintroducing capital punishment with reformed procedures and safeguards against arbitrariness and discrimination. In light of this show of political support, indicating that most Americans did not regard capital punishment as “cruel and unusual,” and in response to the reforms, the court declared in 1976 that the death penalty could be constitutionally valid when administered according to approved procedures.

In the years since, the Supreme Court has sought to oversee and regulate how states administer death penalty laws and has intervened to ensure constitutional compliance. The outcome is an elaborate process overlaid with appeals and post-conviction review, in federal as well as state courts, resulting in a great deal of expense, delay and uncertainty. The complicated system that emerged from the interplay between local democratic processes and federal constitutional law is one that few Americans seem to like, regardless of whether they support capital punishment.

Standing outside a Mississippi state prison, Ann Pace, an advocate for the rights of victims, explains why she supports the death penalty. ©AP Images



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Sixteen states (blue) and the District of Columbia do not have the death penalty. Of the 34 states (red) that have capital punishment laws, 12 (striped) have carried out the death penalty no more than three times since 1976. © SHUTTERSTOCK/Lisa Jusino

make it difficult for elected officials to move far from the preferences of the average voter. That capital punishment laws remain on the

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books in 35 states is explained by the preferences of local majorities — and a system of political representation that ensures these preferences are expressed in state law and local practice.

Liberalism, Democracy and the Death Penalty

Liberal democracies — unlike authoritarian or theocratic nations — are committed to limiting government power and protecting individual liberties. The result is that the death penalty has been used less often, eventually disappearing throughout most of the democratic world. But each nation

works out the practical balance between “liberalism” and “democracy” for itself. America’s distinctive emphasis on the value of local popular democracy — together with the Supreme Court’s interpretation of the meaning of liberty — explains why the United States still has capital punishment.



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