

3-25-2018

The Death Penalty and the Constitution

John M. Greabe

UNH Law School, john.greabe@law.unh.edu

Follow this and additional works at: https://scholars.unh.edu/law_facpub



Part of the [Constitutional Law Commons](#)

Recommended Citation

Greabe, John M., "The Death Penalty and the Constitution" (2018). *Concord Monitor*. 369.
https://scholars.unh.edu/law_facpub/369

This Editorial is brought to you for free and open access by the University of New Hampshire – School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of University of New Hampshire Scholars' Repository. For more information, please contact ellen.phillips@law.unh.edu.

The death penalty and the Constitution



JOHN GREABE

Constitutional Connections

The death penalty is back in the news. Last week, President Donald Trump argued that capital punishment should be available to punish drug dealers who have contributed to the opioid crisis. Earlier this month, in contrast, the New Hampshire Senate voted to prospectively repeal the state's death penalty. These developments provide occasion to review the constitutional issues raised when the federal government or a state seeks to put a convict to

death. The basic question is whether, as a general matter, imposition of the death penalty is consistent with the Constitution. Ordinarily, those who see an inconsistency argue that the death penalty violates the Eighth Amendment's ban on "cruel and unusual punishments." To many who disagree, this argument is silly. The Constitution contains two due-process clauses that explicitly contemplate that the govern-

ment may deprive a person of "life" (as well as "liberty" and "property") as long as it provides "due process of law" in doing so. Moreover, the Fifth Amendment provides that "no person shall be held to answer for a capital ... crime, unless on a presentment or indictment of a Grand Jury." If the death penalty were unconstitutional, the argument goes, the Constitution would not impose conditions such as

SEE CONSTITUTION D3

Debate over constitutionality of death penalty won't end anytime soon

CONSTITUTION FROM D1

these for the taking of a life by government.

But the Supreme Court has not accepted the argument that the death penalty is constitutional simply because those who wrote the Eighth and 14th Amendments expected that it would be imposed. Rather, in a 1958 decision that supplies the relevant standard, the court stated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In practice, the "evolving standards of decency" test invites an ongoing inquiry into the causes and effects of crime; the nature of and rationales for various criminal punishments; the reliability of the federal and state criminal justice systems; and the moral views of contemporary political societies – both at home and abroad. It treats the meaning of the Eighth Amendment's "cruel and un-

usual punishments" clause as fluid rather than static.

As a consequence, the Supreme Court has recently placed previously unrecognized limits on the availability of the death penalty. For example, the court has held that it now violates the Eighth Amendment to execute persons with severe mental disabilities; persons who committed their crimes while under the age of 18; and persons who stand convicted of rape, child rape and other non-homicide crimes against individuals.

Each of these rulings necessarily rests on the premise that the Eighth Amendment prohibits punishments that are viewed as cruel and unusual today, and not merely punishments that were viewed as cruel and unusual in the 18th and 19th centuries. Thus, at least insofar as the Eighth Amendment is concerned, the Constitution draws its meaning from contemporary norms. But none of this is to say

that the Supreme Court is on the cusp of declaring the death penalty unconstitutional. While Justices Stephen Breyer and Ruth Bader Ginsburg have signaled that they think the death penalty may violate the Eighth Amendment, and while there is reason to think that Justices Sonia Sotomayor and Elena Kagan may agree, no other member of the court has shown a sympathy for this view.

In fact, just this past week, the Supreme Court declined to take up a case that squarely raised the question whether the death penalty should be held unconstitutional per se. So apparently, there are not at present five votes to do away with capital punishment entirely.

Yet by operationalizing the Eighth Amendment through a standard that focuses on whether a challenged practice is consistent with "evolving" norms, the Supreme Court has ensured that the question whether the death penalty is

constitutional will never be fully put to bed. And the recent tendency toward limiting its application has been unmistakable.

So why do those who believe the death penalty to be a cruel and unusual punishment hold this view? There are many reasons, but three inevitably take center stage in death-penalty debates.

First, in recent years, there has been an astonishing number of exonerations of persons on death row through DNA testing and other means. According to the Death Penalty Information Center, 161 persons who were sentenced to death and awaiting execution have been exonerated between 1973 and 2017. This means that the death penalty is prescribed (and surely has been imposed) on factually innocent persons with alarming frequency, notwithstanding the due-process requirements that attend capital trials. Many find the likelihood – or even the possibility – of government executing an inno-

cent person to be reason enough to do away with the death penalty.

Second, some pharmaceutical manufacturers no longer sell their products to government purchasers who intend to use them in the "lethal injections" by which the death penalty has been administered in recent years. As a result, states have turned to alternative drug combinations in order to carry out capital sentences. And this has led to a number of recent executions where witnesses have reported that the convict suffered tremendous and prolonged pain and suffering during the execution. Many believe that the Constitution should be understood to prohibit the government from ever causing such pain and suffering.

Third, statistical analyses have repeatedly demonstrated that the death penalty has been and continues to be imposed in a racially discriminatory manner. These studies suggest that persons of color

are somewhat more likely to receive a death sentence than similarly situated white defendants. Moreover, they convincingly show that a capital sentence is far more likely to be imposed in cases where the victims are white than when the victims are African American, Latino or Hispanic. To many, a racially skewed death-penalty regime is a fundamental breach of the Constitution's promise of equal protection under law.

As long as the federal government and some states continue to impose the death penalty, and as long as we understand the Eighth Amendment to incorporate contemporary moral norms, debates about the death penalty's constitutionality will continue.

(Olin Greene teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civic Education.)