Thirty-seven times during his long legislative career, Nebraska Sen. Ernie Chambers had introduced legislation to repeal the state’s death penalty. Every time, it had ended in defeat. And for those outside Nebraska, there was little reason to believe the 38th time would be the charm for death-penalty opponents — the newly elected governor supported capital punishment, and the unicameral legislature was still considered politically conservative. Inside the state Capitol, though, legislators were well aware that 2015 could finally be the year for a successful repeal.

“I knew there would be a serious push,” says Nebraska Sen. Beau McCoy, who opposed the repeal and, two years ago, had led a filibuster to stop a similar measure from advancing. Near the end of this year’s legislative session, supporters mustered not only enough votes to pass LB 268, but to override the veto of Gov. Pete Ricketts as well.

It marked the first time that a U.S. state’s repeal of the death penalty occurred over the veto of a governor.

“When I think about the debate on the floor [over LB 268], it really was mostly about conservative principles,” says Nebraska Sen. Sue Crawford, an opponent of the death penalty.

Is capital punishment more costly to the state than a sentence of life in prison? Does it work as a deterrent? Has it become impractical to implement? Is it better for the families of murder victims? Should we entrust the governor to execute someone?

Those questions, Crawford says, drove legislative discussion. Though Nebraska’s actions this year stood out in some ways (the veto override, for one), they also followed a pattern seen across the country, notes Robert Dunham, executive director of the Death Penalty Information Center.

“There have now been seven states that have repealed or judicially abolished the death penalty over the past 10 years,” he notes, “and the one thing those states have in common is that they had largely abolished the death penalty in practice through disuse.”

Nebraska, for example, hasn’t executed anyone since 1997 (10 people were on death row when LB 268 became law), and when Illinois legislators repealed the state’s death-penalty statute in 2011, a moratorium had been in place for more than 10 years.

Of the four remaining states in the Midwest with the death penalty, Indiana, Ohio and South Dakota have all put someone to death by lethal injection within the past six years. Kansas, on the other hand, hasn’t executed anyone since 1965, when two people were hanged in a murder case that captured international attention because of author Truman Capote’s book “In Cold Blood.”

Bills to abolish the death penalty were introduced this year in all four of those states: Indiana’s SB 136, Kansas’ HB 2129, Ohio’s SB 154 and South Dakota’s SB 121. None of those measures advanced.

And at least over the next year, discussion on the death penalty in the 11-state Midwest will not focus on more repeals. Instead, two other issues are looming — plans in Nebraska to challenge LB 268 via a 2016 ballot initiative, and Ohio’s attempts to secure a supply of drugs to execute people by lethal injection.

Death penalty on the ballot?

The Nebraska legislature’s override of Gov. Ricketts’ veto did not end debate in that state over the death penalty; in some ways, it has just begun. “This is a major enough issue that people should have a say in it,” says Sen. McCoy, who is helping lead a petition drive to get a repeal of LB 268 — and thus restoration of the death-penalty law — on
the ballot in 2016.

Under state law, 5 percent of Nebraska’s registered voters must sign the petition by Aug. 27; LB 268 would be suspended with signatures by 10 percent of voters. Nine years have passed since voters in any Midwestern state cast a vote for or against the death penalty. In 2006, 56 percent of Wisconsin residents voted in favor of a nonbinding referendum that called for the use of capital punishment in first-degree murder cases where the conviction was supported by DNA evidence. (Wisconsin still does not impose the death penalty.)

But since then, nationwide public support for the death penalty has dropped. Though a majority of Americans still favor it, levels of support have fallen from a high of 78 percent (in 1996) to a low of 56 percent (as of April 2015), according to the Pew Research Center.

Death-penalty opponents also point to the 2014 results of a Washington Post-ABC News poll question that asked the following: Which punishment do you prefer for people convicted of murder — the death penalty or life in prison with no chance of parole? On that question, a majority of respondents preferred the latter, by a margin of 52 percent to 42 percent.

“That’s really the policy question, as we just saw in Nebraska,” Dunham says. “The Legislature wasn’t deciding to abolish the death penalty in favor of freedom. They were abolishing in favor of life without the possibility of release.”

But in that same Washington Post-ABC News poll, about 60 percent of respondents still voiced support for the death penalty. In Nebraska, McCoy believes public support is even greater.

“I tried to make the point during [legislative debate] that the only thing that matters is what has happened in Nebraska with the death penalty,” he says. “It doesn’t cost more, and we haven’t wrongly executed anyone.”

A statewide vote on LB 268 would capture national attention, and if it happens, Sen. Crawford says “there will be the same broad discussion we had in the Legislature, and that might sway public opinion toward repeal.”

During this year’s debate, legislators talked about a “broken” system that had not delivered for taxpayers, about not giving the government the power to kill its citizens, and about the continuing problem of not being able to secure the drugs to execute people by lethal injection. They also heard from victims’ families — both those who support and oppose the death penalty.

Those families’ committee testimony and individual meetings with legislators were critical to building support for repeal, Crawford says, and she also points to the importance of a recent academic study on the death penalty’s impact. In that study, researchers followed the experiences of murder victims’ families in Minnesota, a state without capital punishment, and Texas, a state with the death penalty.

The Minnesota families showed higher levels of physical, psychological and behavioral health, as well as more satisfaction with the justice system.

“In my mind, there just isn’t evidence to support the death penalty, and the evidence against it continues to mount,” Crawford says. “And then you get to the moral arguments, and the fact if the government executes an innocent person, it is the most grave injustice.”

But McCoy believes “the ultimate punishment should be available to people who commit the most heinous crimes.”

Voters in Nebraska may have the final say.

**Ohio halts executions in 2015**

In February 1989, Joy Stewart, 22 years old and eight months pregnant, was brutally raped, choked, stabbed and murdered. Twenty-five years later, the murderer, Dennis McGuire, was executed by the state of Ohio.

McGuire’s death has received international attention because of what has widely been called a “botched execution” — it took McGuire an unexpectedly long time to die, according to The (Cleveland) Plain Dealer, and some witnesses reported seeing him gasp, choke and clench his fists.

Rep. Jim Bucy hesitates to use the word “botched”: The execution ended in the way it should have, the death of a
murderer, Buchy says. While policymakers should revise the state’s capital punishment policy in a way that prevents unnecessary pain and suffering, he adds, they should always have Stewart and Ohio’s other murder victims foremost in their minds.

Buchy has a personal connection to the Stewart case because the crime occurred in the legislative district that he represented at the time. But it is the execution of McGuire that led to a series of judicial rulings, new policies and legislative actions in Ohio, including the passage of a bill sponsored by Buchy.

Earlier this year, the Ohio Department of Rehabilitation and Correction announced that none of the state’s death-row inmates would be executed in 2015. Ohio currently has 145 individuals on death row, and six executions had been planned for this year.

A few weeks prior to announcing the delay, the department said it was revising the state’s lethal-injection protocol. (In 2014, a federal judge issued a temporary moratorium on executions until a new protocol could be adopted and implemented.)

With the changes, the two-drug regimen of midazolam and hydromorphone — the mix used in McGuire’s “botched execution” — was removed from the protocol. The two drugs permitted for lethal injections in Ohio are now thiopental sodium and pentobarbital, and the state must secure a supply of those drugs before executions can resume.

Helping secure that supply is the goal of HB 663, introduced by Buchy in November 2014 and signed into law a month later. The bill shields from public record the identities of individuals who provide the state with the drugs used in lethal injection. HB 663, Buchy says, will allow Ohio to get the drugs it needs from compound pharmacists.

“While the legislation was advancing, there was never any question that the state would be able to get the drugs it needs [with the changes],” Buchy says.

The new law also protects the identities of individuals involved in an execution and establishes a new legislative committee to study how the families of homicide victims can be better supported by the state. Ohio is not alone in grappling with drug shortages and having to revise its lethal-injection protocol.

The problem of securing the drugs was raised during Nebraska’s debate over LB 268, and the use of midazolam is the subject of a U.S. Supreme Court case (see sidebar for details on the case and the causes of drug shortages). But Buchy says Ohio’s current delay in executions and transition to a new protocol shouldn’t be confused with any wavering about the future of the death penalty in his state.

“The issue here is lethal injection; it is not capital punishment,” he adds.

Last year, an Ohio Supreme Court task force gave state legislators 56 recommendations on how to improve administration of the death penalty. The list covers nearly all aspects of the death penalty — from tighter controls on how evidence is collected and interrogations are conducted, to more funding for defense services, to new rules for post-conviction proceedings.

U.S. Supreme Court ruling will have ‘great bearing’ on lethal-injection protocol

In April, the U.S. Supreme Court heard arguments in a case that could determine the future of how some states administer the death penalty. At issue is use of the drug midazolam in executions and whether it violates the constitutional prohibition on “cruel and unusual punishment.” “It will have great bearing on what a number of states do, and I know the federal government itself is not proceeding with developing its own protocol [for lethal injection]
until the court weighs in,” says Robert Dunham, executive director of the Death Penalty Information Center. Seven years ago, the nation’s highest court ruled that the state of Kentucky’s use of a drug protocol that included sodium thiopental was constitutional.

But since then, states across the country have changed the combinations of drugs used to execute people because of shortages. Manufacturers have either enacted policies to prevent their products from being used to execute people, Dunham says, or they’ve stopped producing the drugs altogether. And in 2011, the European Union banned the export of certain anesthetics, such as sodium thiopental, to the United States and other countries with the death penalty.

Some states then began using midazolam, a drug used in highly publicized “botched executions” in 2014, including in Ohio. Ohio has since delayed all scheduled executions and announced it would no longer use midazolam. The current case before the U.S. Supreme Court was brought by three death-row inmates in Oklahoma, where a year ago, Clayton Lockett was put to death with a drug mix that included midazolam. During the execution, Lockett awoke mid-execution to pain-inducing and paralyzing drugs in his system.

Midazolam is a central nervous system depressant and has been used in conjunction with two other drugs for lethal injections 15 times since its introduction; there have been complications in three of the 15 executions for which the drug has been used. Dunham says the case will have one of three outcomes: 1) the use of midazolam is not cruel and unusual punishment; 2) this particular drug is not appropriate for use in capital punishment (though lethal injection itself would still be constitutional); or 3) the case is sent back to the federal district court for further review.