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The Doctrinal Side of Majority Will

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THE DOCTRINAL SIDE OF MAJORITY WILL

Corinna Barrett Lain*

2010 MICH. ST. L. REV. 775

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What is the Supreme Court’s relationship with public opinion? Barry Friedman’s answer in *The Will of the People*¹ scours some 200 years of history to provide a distinctly political view of the Court, and the story he tells is compelling. Yet it is also incomplete. *The Will of the People* presents a largely external account of the law; it sees the influence of majority will as a force that moves *outside* the jurisprudence we lawyers spend so much of our time researching, writing, and talking about. By this account, there is what the Justices say is driving their decisionmaking—legal doctrine—and then what, consciously or subconsciously, is really going on. As Friedman has explained elsewhere, “The Justices don’t tend to give speeches much less write opinions saying ‘we are following public opinion.’”² Or do they?

In this symposium contribution, I contend that Friedman is right; Supreme Court decisionmaking is inextricably bound to majority will. But he is more right than he knows, or at least more right than *The Will of the*

* Professor of Law, University of Richmond School of Law. My thanks to Barry for including me in the conversation, and for starting it in the first place. Thanks also to Jim Gibson for comments on a prior draft, and to Kevin Michel and Jennifer Sykes for excellent research assistance.

1. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

2. Kevin Russell, *Ask the Author with Barry Friedman, Part I*, SCOTUS BLOG (Jan. 25, 2010, 5:20 PM), <http://www.scotusblog.com/2010/01/ask-the-author-with-barry-friedman-part-i/> (quoting Barry Friedman). In fairness, I take Friedman’s comment as a general (and largely correct) impression of Supreme Court decisionmaking and not as a denial that the Justices sometimes *do* write explicitly majoritarian opinions. In other writings, Friedman himself has recognized the doctrinal side of majority will, albeit in a limited fashion. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 597-99 (1992) (discussing state polling in Sixth Amendment context).

People shows.³ In his focus on an extralegal account of Supreme Court decisionmaking, Friedman misses the best evidence yet of the Court's majoritarian leanings: its widespread use of explicitly majoritarian doctrine. Sometimes—not all the time or even most of the time, but *sometimes*—the influence of majority will is so strong that it seeps into the legal framework for deciding questions of constitutional law. On these occasions, the Justices do write opinions that say “we are following majority will.” By and large, the phenomenon simply has gone unnoticed.⁴

My approach in this essay is as follows. First, I canvass the surprisingly large number of areas in which the Supreme Court uses the prevailing position of state legislatures—its proxy for the will of the people⁵—to delineate the contours of constitutional law. Second, I explain why the Justices might find state counting attractive, complementing Friedman's explanation of the Court's majoritarian proclivities outside the realm of doctrine. Finally, I use majoritarian doctrine to reinforce Friedman's non-doctrinal claim, showing how even the Court's state counting exercises may be affected by the larger social and political currents of a given time. In the end, Friedman is right; forces outside the law push the Court towards majoritarian outcomes. But the relationship between the Justices and the will of the people is not just ethereal. There is a doctrinal side to the influence of majority will.

3. See *supra* note 2 (noting Friedman's recognition of explicitly majoritarian doctrine in other work).

4. A few scholars have recognized the Court's use of explicitly majoritarian doctrine in the substantive due process area. See *infra* note 11 and accompanying text. Otherwise, I have found just four articles on point. Two are seminal pieces, excellent although limited in scope. See Friedman, *supra* note 2, at 592-607 (discussing state counting phenomenon in the context of the Supreme Court's Sixth Amendment right to jury trial jurisprudence while recognizing larger phenomenon); Steven L. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679, 683-91 (1986) (same but focusing discussion on Fourth Amendment context). The other two are recent works that incorporate these early insights into related discussions. See Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 18 (2009) (arguing that to the extent the Supreme Court counts states, it does so as a limit on, rather than source of, constitutional law and as such, is consistent with federalism principles); Note, *State Law as "Other Law": Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1690 (2007) (comparing Court's reliance on state counting and foreign law).

5. The Supreme Court assumes that state legislative positions are an accurate reflection of majority will. See *infra* notes 8, 12-13, and accompanying text. Following its lead, I make the same assumption here, although my most recent work questions whether that is necessarily true. See Corinna Barrett Lain, *An Upside-Down Theory of Judicial Review* (2011) (on file with author).

I. STATE COUNTING AS A DOCTRINAL PHENOMENON

The most famous example of explicitly majoritarian constitutional doctrine is in the Eighth Amendment context, where the Supreme Court has interpreted the “cruel and unusual punishments” clause to prohibit punishments once a “national consensus” has formed against them.⁶ And how is a national consensus established? The starting point is the majority position of state legislatures⁷— “[t]he clearest and most reliable . . . evidence of contemporary values.”⁸ Within the academy, conventional wisdom is that the Eighth Amendment is the only place where the Court takes such an explicitly majoritarian approach.⁹ Yet that impression is simply inaccurate. As I

6. See *Roper v. Simmons*, 543 U.S. 551, 560-64, 578-79 (2005) (invalidating juvenile death penalty upon finding that a national consensus had formed against it); *Atkins v. Virginia*, 536 U.S. 304, 316, 321 (2002) (invalidating death penalty for mentally retarded offenders upon same finding); *Stanford v. Kentucky*, 492 U.S. 361, 370-73 (1989) (upholding juvenile death penalty upon finding of insufficient evidence of a national consensus against it), *abrogated by*, *Roper*, *supra*; *Penry v. Lynaugh*, 492 U.S. 302, 334-35 (1989) (upholding death penalty for mentally retarded offenders upon same finding), *abrogated by* *Adkins*, *supra*.

7. See *Roper*, 543 U.S. at 564 (“The beginning point [of analysis] is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”); *accord Atkins*, 536 U.S. at 314-16, 321-23; *Stanford*, 492 U.S. at 370-73; *Penry*, 492 U.S. at 331, 334-35. The Justices also consider jury sentencing data, see *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (“[T]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)), and reserve the right to use their own judgment as to whether a punishment violates the “cruel and unusual punishments” clause. See *Coker*, 433 U.S. at 597 (“[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment”); *accord Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 312.

8. *Penry*, 492 U.S. at 331; *accord Stanford*, 492 U.S. at 370; *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Gregg*, 428 U.S. at 173-76.

9. Conventional wisdom is that the Court only takes an explicitly majoritarian approach in the Eighth Amendment context because the text of the “cruel and unusual punishments” clause arguably demands it. See, e.g., Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 266 & n.125 (2008) (“[I]t is unusual for the Court to acknowledge the relevance of the national consensus,” noting in accompanying footnote that “[t]he Court occasionally does refer to such a consensus in the Eighth Amendment context, . . . but the word ‘unusual’ in the amendment provides a textual hook for that approach in these cases”); Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1331 (2008) (arguing that constitutional norms are influenced by the prevailing social climate and that in some cases, “perhaps limited to the Eighth Amendment,” the unusualness of a practice should itself be reason to reconsider precedents in light of a new state of affairs); James W. Ellis, *Disability Advocacy and the Death Penalty: The Road From Penry to Atkins*, 33 N.M. L. REV. 173, 178 (2003) (“But while the Court, in interpreting other parts of the Constitution, occasionally observes that a particular state’s statute is unique or unusual, it is only in the context of the Punishments Clause of the Eighth Amendment that such comparisons are given doctrinal significance. This unique feature of Eighth Amendment jurisprudence derives, of course,

discuss below (and have discussed in greater detail elsewhere),¹⁰ the Supreme Court counts states to identify and apply constitutional norms in a host of other doctrinal areas too.

To the limited extent scholars have recognized state counting as a doctrinal phenomenon outside the Eighth Amendment, they have done so in the substantive due process context.¹¹ Given the Supreme Court's fundamental rights jurisprudence, this comes as no surprise. When identifying whether a substantive due process claim involves a fundamental right, the Justices ask whether the asserted right is "deeply rooted in this nation's history and tradition," relying on the position taken by state legislatures as "crucial 'guideposts for responsible decisionmaking'" and "[t]he primary and most reliable indication of . . . consensus."¹² The latter phrase, as one might surmise, comes straight from the Court's Eighth Amendment cases,¹³ and results in the same sort of state nose-counting that the Justices engage in when deciding cases under the "cruel and unusual punishment" clause.¹⁴ In both con-

from the text's prohibition on the infliction of 'cruel and unusual punishments.'"). *See also Penry*, 492 U.S. at 351 (Scalia, J., dissenting) ("If [a punishment] is not unusual, that is, if an objective examination of the laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court.").

10. Part I of this Essay draws upon a more elaborate articulation of the point I have made elsewhere. *See* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 U.C.L.A. L. REV. 365 (2009).

11. *See, e.g.,* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 124–33 (2006) (recognizing implicit doctrine of "evolving national values" in Supreme Court's most recent substantive due process cases, and pointing to Eighth Amendment "evolving standards" doctrine as precedent and guidance for developing the doctrine); Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 174 (noting that while constitutional theory has been dominated by originalist and moral reasoning approaches, in practice a third approach has appeared—one grounded on "the gradually evolving moral principles of the nation" and exemplified by the Court's most recent substantive due process decisions); Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379, 382 (2006) (noting "striking similarities" between substantive due process analysis in recent cases and Eighth Amendment "evolving standards" analysis, and absence of similar doctrinal developments elsewhere); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 496 (2005) (noting that at times, "the Court has appealed to majoritarian judgments as defining the scope of fundamental substantive due process rights"); Robert F. Nagel, *Disagreement and Interpretation*, 56 LAW & CONTEMP. PROBS. 11, 19 (1993) (recognizing role of state legislation in the use of "tradition" to define due process rights).

12. *Washington v. Glucksberg*, 521 U.S. 702, 711, 721 (1997).

13. *See id.* at 711 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989)) ("[T]he primary and most reliable indication of a [national] consensus is . . . the pattern of enacted laws."). *See also supra* note 8 and accompanying text (quoting a similar articulation of the point in the Eighth Amendment context).

14. *See* Lain, *supra* note 10, at 372–73 (comparing the Supreme Court's analysis in *Roper v. Simmons*, 543 U.S. 551 (2005), which invalidated the juvenile death penalty under

texts, the Court's analysis focuses heavily on the state legislative landscape, considering current statutes, legislative trends, and under-enforcement among those statutes allowing the challenged practice to remain.¹⁵

It is tempting to dismiss the Supreme Court's state-counting exercises in the substantive due process context as a function of the doctrine's textually paradoxical, and thus entirely unbounded, nature.¹⁶ The Justices need *something* upon which to hang their hats in this area; they have said as much themselves.¹⁷ But even on the process side of due process, the Supreme Court commonly determines constitutional protection based on whether a majority of the states agrees with it. Three procedural due process doctrines illustrate the point.

First is the Supreme Court's doctrine for identifying fundamental procedures. Just as the Due Process Clause protects certain *substantive* rights because they are considered fundamental, it also protects certain *procedural* rights because they are considered fundamental.¹⁸ As one might have guessed, the standard used to determine whether a procedural right is fundamental is the same as the Court uses in the substantive due process context: the right must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁹ Here too, the Court relies on state

the Eighth Amendment, with *Lawrence v. Texas*, 539 U.S. 558 (2003), which invalidated statutes criminalizing same-sex sodomy under the Due Process Clause).

15. See *id.* (comparing *Lawrence*, 539 U.S. at 571-73, with *Roper*, 543 U.S. at 564-67).

16. The notion that the due process clause would protect something other than process is, as John Hart Ely famously wrote, "a contradiction in terms—sort of like 'green pastel redness.'" JOHN HART ELY, *DEMOCRACY AND DISTRUST* 18 (1980).

17. See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."); *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) ("Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. . . . That history counsels caution and restraint.").

18. See *infra* notes 19-20 (citing cases applying principle).

19. See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *accord* *Dist. Att'y's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2332 (2009); *Medina v. California*, 505 U.S. 437, 449 (1992); *Speiser v. Randall*, 357 U.S. 513, 523 (1958). Indeed, some of the Court's *substantive* due process decisions use this articulation of the standard as well. See, e.g., *Lawrence*, 539 U.S. at 593 (2003); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

legislative consensus as its guide.²⁰ According to the Supreme Court, practices “are unlikely to endure for long, or to retain wide acceptance, if they are at odds with notions of fairness and rationality sufficiently fundamental to be comprehended in due process.”²¹ Simply put, if a procedure was *really* inconsistent with due process, most states would not be using it.

A second example of the Supreme Court’s explicitly majoritarian approach to procedural due process protection is in the area of notice and opportunity to be heard. Here one can see a different way in which majority will explicitly shapes the contours of constitutional protection: by guiding the application, as opposed to identification, of a constitutional norm. In this area, the Justices employ an interest-balancing analysis to identify what the Due Process Clause requires, balancing the government’s interest in the challenged procedure against the private interests at stake and the likelihood that a different procedure would lessen the risk of an erroneous deprivation.²² On its face, nothing about the Court’s articulation of the constitutional norm is explicitly majoritarian. Yet, as applied, the Court’s cases in this area commonly employ state counting as a means of determining constitutional protection. Sometimes the Court uses the fact that most states have adopted similar procedures as evidence of the importance of the government interest at stake.²³ Sometimes the Court uses the fact that most states have *not* adopted similar procedures as evidence of the lack of an

20. *See, e.g.*, *Schad v. Arizona*, 501 U.S. 624, 640 (1991) (counting states to decide procedural due process challenge to a state’s definition of a crime, emphasizing “the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require”); *Clark v. Arizona*, 548 U.S. 735, 748-52 (counting states to decide procedural due process challenge to a state’s definition of insanity); *Montana v. Egelhoff*, 518 U.S. 37, 46-49, 51 (1996) (counting states to decide procedural due process challenge to a state’s exclusion of evidence on the issue of the defendant’s mental state); *Schall v. Martin*, 467 U.S. 253, 267-68 (1984) (counting states to decide procedural due process challenge to pretrial detention of juveniles).

21. *Schad*, 501 U.S. at 642.

22. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

23. *See, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 n.17 (1987) (rejecting due process claim to notice of the contents of a child abuse report in a sexual assault case, reasoning that “[t]he importance of the public interest at issue in this case is evidenced by the fact that all 50 States and the District of Columbia have statutes that protect the confidentiality of their official records concerning child abuse”); *Williams v. Florida* 399 U.S. 78, 81-82 (1970) (justifying notice of alibi requirement based on the importance of state interest at stake, reasoning that “the State’s interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States”) (internal citation omitted); *see also Schall v. Martin*, 467 U.S. 253, 267-68 (1984) (justifying pretrial detention of juveniles based on the importance of state interest at stake, surveying states and reasoning that “[i]n light of the uniform legislative judgment that pretrial detention of juveniles properly promotes the interests both of society and the juvenile, we conclude that the practice serves a legitimate regulatory purpose compatible with the ‘fundamental fairness’ demanded by the Due Process Clause in juvenile proceedings”).

important government interest at stake.²⁴ And sometimes the Court uses the fact that most states have, or have not, adopted similar procedures to assess the risk of erroneous deprivation associated with a challenged procedure.²⁵ Whatever the avenue, the result is the same: constitutional protection that turns on whether a majority of states agree with it.

Yet a third example of the Supreme Court's explicitly majoritarian approach to procedural due process protection is the Court's jurisprudence on burdens of proof. In this area, the Court has explained:

A legislative judgment that is not only consistent with the 'dominant opinion' throughout the country but is also in accord with 'the traditions of our people and our law,' is entitled to a powerful presumption of validity when it is challenged under the Due Process Clause of the Fourteenth Amendment. The converse of this proposition is that a principal reason for any constitutionally mandated departure

24. See, e.g., *Connecticut v. Doehr*, 501 U.S. 1, 3-4 (1991) (rejecting the state's interest in challenged procedure and relying on the fact that "nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place," attaching an appendix to its opinion categorizing the statutes along five different axes); *Ake v. Oklahoma*, 470 U.S. 68, 78-79 (1985) ("Oklahoma asserts that to provide Ake with psychiatric assistance on the record before us would result in a staggering burden to the State. . . . We are unpersuaded by this assertion. Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance. . . . We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial."); *Little v. Streater*, 452 U.S. 1, 15-16 (1981) (finding a due process violation where state forced indigent defendants to pay for cost of paternity test, reasoning: "Moreover, following the example of other states, the expense of blood grouping tests for an indigent defendant in a Connecticut paternity suit could be advanced by the state and then taxed as costs to the parties. . . . We must conclude that the State's monetary interest 'is hardly significant enough to overcome private interests as important as those here'" (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981)); *Morrissey v. Brewer*, 408 U.S. 471, 484, 488 n.15 (1972) (finding a due process violation where state revoked parole without a hearing, reasoning that "most States have recognized that there is no interest on the part of the State in revoking parole without any procedural guarantees at all" and stating in a footnote that "[v]ery few States provide no hearing at all in parole revocations. Thirty States provide in their statutes that a parolee shall receive some type of hearing").

25. See, e.g., *Ake*, 470 U.S. at 79-80 ("Last, we inquire into the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance is not offered. We begin by considering the pivotal role that psychiatry has come to play in criminal proceedings. More than 40 states, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise. . . . These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."); *Parham v. J.R.*, 442 U.S. 584, 612 (1979) (rejecting a due process challenge to a state's truncated procedure for committing juveniles to state mental hospitals, reasoning, "[t]hat there may be risks of error in the process affords no rational predicate for holding unconstitutional an entire statutory and administrative scheme that is generally followed in more than 30 states").

from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions.²⁶

Applying this principle, the Supreme Court has counted states when deciding a number of constitutional questions regarding burdens of proof.²⁷ According to the Court, state legislative consensus reflects “a profound judgment about the way in which law should be enforced and justice administered.”²⁸

Outside the due process context, the Supreme Court uses the majority position of the states to guide its decisionmaking as well. One can even find this phenomenon in areas famous for countermajoritarian decisionmaking, like the Equal Protection Clause and the First Amendment.²⁹ In the equal protection area, for example, courts first must determine whether the challenged classification burdens a fundamental right, suspect class, or quasi-suspect class, then must apply the appropriate level of scrutiny to determine whether the relationship between the classification and the government interest supporting it is sufficient.³⁰ Like the notice and opportunity to be

26. *Rivera v. Minnich*, 483 U.S. 574, 578 (1987) (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)) (citations omitted).

27. *See, e.g., In re Winship*, 397 U.S. 358, 361-62 (1970) (counting states when rejecting preponderance of evidence standard in criminal proceedings); *Addington v. Texas*, 441 U.S. 418, 426 (1979) (counting states when rejecting preponderance of evidence standard in civil commitment proceedings); *Santosky v. Kramer*, 455 U.S. 745, 749 & n.3 (1997) (counting states when rejecting preponderance of evidence standard in termination of parental rights proceedings); *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 284 (1990) (counting states to decide burden of proof question related to surrogate medical decisions); *Cooper v. Oklahoma*, 517 U.S. 348, 360-62 (1996) (counting states to decide burden of proof question related to a criminal defendant’s competency); *Medina v. California*, 505 U.S. 437, 447-48 (1992) (same); *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (counting states to decide burden of proof question related to sentencing enhancements); *Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975) (counting states to decide burden of proof question related to criminal intent).

28. *In re Winship*, 397 U.S. at 361-62 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)); *accord Apprendi*, 530 U.S. at 478; *Rivera*, 483 U.S. at 578-79.

29. *See* Friedman, *supra* note 2, at 604 n.135 (“In the First Amendment context, second perhaps only to small parts of equal protection jurisprudence, the Court most unabashedly seems to take on the majority in the name of minority rights.”). For cases famous for countermajoritarian decisionmaking, *see, for example, Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954) (invalidating racially segregated schools under the Equal Protection Clause); *Engel v. Vitale*, 370 U.S. 421, 421 (1962) (invalidating school prayer under the First Amendment); *Texas v. Johnson*, 491 U.S. 397, 397 (1989) (invalidating a state’s proscription on flag burning under the First Amendment).

30. If the classification burdens a fundamental right or suspect class, it must be narrowly tailored to a compelling state interest. If the classification burdens a quasi-suspect class, it must be substantially related to an important government interest. And if the classification does neither, it need only be rationally related to a legitimate government interest. *See* (ironically) *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It

heard cases, the Court's equal protection cases show the Justices following the majority position of the states when applying the constitutional norm, rather than when identifying it in the first place. In some cases, the Court relies upon the majority position of the states to validate a classification.³¹ According to the Court, the fact that most states employ a classification suggests that there is a "commonsense distinction" along the lines that the classification has drawn.³² In other cases, the Court has relied on a classification's outlier status to strike it down, cautioning that "[d]iscriminations of an unusual character" be carefully scrutinized, even under rational basis review.³³

The Supreme Court's First Amendment cases provide a similar example, but here, the majority position of the states matters in at least two ways.

is to say that courts must subject them to the most rigid scrutiny."); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (articulating the intermediate scrutiny standard); *Heller v. Doe*, 509 U.S. 312, 319-21 (1993) (discussing the rational basis standard). See also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 687-88 (7th ed. 2004) (discussing all three standards and their application to classifications based on race, national origin, gender and illegitimacy).

31. See, e.g., *Heller*, 509 U.S. at 327, 333 (rejecting an equal protection challenge to classification that treated mentally retarded and mentally ill persons differently, relying in part on the fact that "[a] large majority of states have separate involuntary commitment laws for the two groups"); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 47-48 (1973) ("The District Court found that the State had failed even 'to establish a reasonable basis' for a system that results in different levels of per-pupil expenditure. We disagree. In its reliance on state as well as local resources, the Texas system is comparable to the systems employed in virtually every other State." (citation omitted)); *Vacco v. Quill*, 521 U.S. 793, 804-05 (1997) (rejecting an equal protection challenge to a state's ban on assisted suicide, relying on the fact that "the overwhelming majority of state legislatures have drawn a clear line between assisting suicide and withdrawing or permitting the refusal of unwanted lifesaving medical treatment"); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 72 (1978) (rejecting an equal protection challenge to the state's creation of political subdivisions, explaining, "[i]n this country 35 States authorize their municipal subdivisions to exercise governmental powers beyond their corporate limits"); *Sosna v. Iowa*, 419 U.S. 393, 404-05 (1975) (rejecting an equal protection challenge to a residency requirement for divorce, reasoning that "[t]he imposition of a durational residency requirement for divorce is scarcely unique to Iowa, since 48 States impose such a requirement as a condition for maintaining an action for divorce"); *Reynolds v. Sims*, 377 U.S. 533, 583 (1964) ("Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States.").

32. *Heller*, 509 U.S. at 326.

33. *Romer v. Evans*, 517 U.S. 620, 633 (1996); see, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 n.4 (1966) (invalidating a poll tax under the Equal Protection Clause, noting that "[o]nly a handful of States today condition the franchise on the payment of a poll tax"); *Craig*, 429 U.S. at 208 n.22 (invalidating gender distinctions in state regulation of sale of alcohol, stating, "[t]he repeal of most of these laws signals society's perception of the unfairness and questionable constitutionality of singling out groups to bear the brunt of alcohol regulation"); *id.* at 212 n.3 (Stevens, J., concurring) ("Apparently Oklahoma is the only State to permit this narrow discrimination to survive . . .").

In the freedom of religion context, the Court counts states when scrutinizing the sufficiency of the government interest supporting a challenged practice and the legitimacy of the means used to serve it, just as it does in the equal protection context.³⁴ Here again, the more common the practice, the more likely it is to pass constitutional muster, and vice versa.³⁵ In the freedom of speech context, the Court does the same thing,³⁶ but it also counts states to determine whether First Amendment protection is available as a threshold matter. According to the Court, certain categories of speech are outside the ambit of First Amendment protection altogether.³⁷ To identify those categories, the Court frequently relies on the majority position of the states, refus-

34. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 435 (1961) (upholding Sunday closing laws, stating, “[a]lmost every state in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system”); *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 676 (1970) (upholding a state tax exemption for realty owned for religious purposes, stating, “[a]ll of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. . . . Few concepts are more deeply embedded in the fabric of our national life”); *Marsh v. Chambers*, 463 U.S. 783, 788-89, 794 (1983) (upholding the state practice of opening a legislative session with a prayer by a chaplain paid from public funds, noting that the practice has “been followed consistently in most of the states” and that “many state legislatures and the United States Congress provide compensation for their chaplains”); *McDaniel v. Paty*, 435 U.S. 618, 625 (1978) (invalidating a state provision barring ministers from serving as delegates, noting that “[t]oday Tennessee remains the only State excluding ministers from certain public offices”); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 701 (1994) (invalidating a school district that tracked denominational lines, noting that it was “exceptional to the point of singularity”).

35. See *id.*

36. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353, 370 (1997) (upholding a ban on so-called “fusion” candidates under interest balancing test, beginning opinion with the statement: “Most States prohibit multiple-party, or ‘fusion,’ candidacies for elected office” and concluding that “the Constitution does not require Minnesota, and the approximately 40 other States that do not permit fusion, to allow it”); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991) (upholding a public indecency statute under interest balancing test, noting that “[p]ublic indecency statutes of this sort are of ancient origin and presently exist in at least 47 States”); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 223 n.12 (1986) (invalidating a closed primary statute under an interest balancing test, noting “that appellant’s direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 States which have chosen to permit more substantial openness in their primary systems than Connecticut has permitted heretofore”); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (upholding a billboard regulation under an interest balancing test, noting that “the [legislative] judgment involved here is not so unusual as to raise suspicions in itself” and that the regulation at issue was “like many States”).

37. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”); accord *Virginia v. Black*, 538 U.S. 343, 358 (2003); *Roth v. United States*, 354 U.S. 476, 485 (1957).

ing to recognize constitutional protection where the states have declined to extend protection on their own.³⁸

Finally, one can see the Supreme Court taking an explicitly majoritarian approach to constitutional protection in the criminal context. When interpreting the Fourth Amendment's prohibition against "unreasonable searches and seizures," for example, the Court looks for a "clear consensus among the States."³⁹ According to the Court,

A longstanding, widespread practice is not immune from constitutional scrutiny. But neither is it to be lightly brushed aside. This is particularly so when the constitutional standard is as amorphous as the word "reasonable," and when custom and contemporary norms necessarily play such a large role in the constitutional analysis.⁴⁰

Applying these principles, the Court has counted states when resolving a number of key Fourth Amendment issues.⁴¹ On each of these occasions, what struck the Court as "reasonable" was what a majority of state legislatures considered the term to mean.

The Supreme Court's Sixth Amendment cases on the right to a jury trial provide yet another example. For over seventy years now, the Court has relied on "objective standards such as may be observed in the laws and practices of the community" to guide its determination of which jury prac-

38. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 255 (1952) (excluding libel from First Amendment protection while recognizing that "[t]oday, every American jurisdiction—the forty-eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish [sic] libels directed at individuals"); *New York v. Ferber*, 458 U.S. 747, 757-58 (1982) (excluding child pornography from First Amendment protection and providing detailed breakdown of similar state statutes); *Roth*, 354 U.S. at 485 (excluding obscenity from First Amendment protection, noting "the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956").

39. *Payton v. New York*, 445 U.S. 573, 590-603 (1980).

40. *Id.* at 600.

41. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 15-16 (1985) (counting states to determine when a police officer has used excessive force, noting that "[i]n evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions"); *Payton*, 445 U.S. at 600 (prohibiting warrantless arrest in the home, stating, "[o]nly 24 of the 50 States currently sanction warrantless entries into the home to arrest, and there is an obvious declining trend. Further, the strength of the trend is greater than the numbers alone indicate" (citations omitted)); *United States v. Watson*, 423 U.S. 411, 421-22 (1976) (recognizing the validity of warrantless arrest in public, stating, "[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact. It appears in almost all of the States in the form of express statutory authorization"); *Atwater v. City of Lago Vista*, 532 U.S. 318, 320, 344 (2001) (upholding arrest for nonjailable offense, stating, "today statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace, as do a host of congressional enactments," and attaching appendix).

tices are constitutionally required and which are not,⁴² stressing the importance of “objective criteria, chiefly the existing laws and practice of the Nation” in its Sixth Amendment analysis.⁴³ Here, as elsewhere, the Court’s approach is patently majoritarian, surveying the states and then following the national norm.⁴⁴

In sum, the Supreme Court takes an explicitly majoritarian approach to constitutional protection across a variety of doctrinal contexts, consciously considering—and then constitutionalizing—the majority position of the states. Friedman is right; Supreme Court decisionmaking is inextricably bound to majority will, and in *The Will of the People*, he proves the point brilliantly. But the story Friedman tells would have been richer had it not overlooked the most provocative, and powerful, evidence of the Court’s majoritarian proclivities: its widespread use of explicitly majoritarian doctrine. Through explicitly majoritarian doctrine, the Justices admit to doing what Friedman works so hard to prove. Indeed, they prove the point better, for they tell us that following the will of the people is what they are *trying* to do. The question then becomes why, as a doctrinal matter, the Justices might find such an approach to constitutional protection attractive.

II. EXPLAINING EXPLICITLY MAJORITARIAN DOCTRINE

In *The Will of the People*, Friedman provides a compelling account of the reasons for the Supreme Court’s majoritarian proclivities—an account that, as Friedman rightly recognizes, is “remarkably impoverished” in current scholarship.⁴⁵ But here too, Friedman’s explanation is entirely extra-legal. He discusses the majoritarian influence of the judicial appointments process.⁴⁶ He discusses the majoritarian influence of Justices who want to be liked.⁴⁷ He discusses the majoritarian influence of the Court’s median,

42. *Dist. of Columbia v. Clawans*, 300 U.S. 617, 628 (1937).

43. *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968).

44. *See, e.g., Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (invalidating nonunanimous six-member juries and stating, “[i]t appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow non-unanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not”); *Baldwin v. New York*, 399 U.S. 66, 70 (1970) (quoting *Duncan*, 391 U.S. at 161) (rejecting state’s proposed analysis to determine when a sentence was sufficiently severe to trigger the right to jury, stating, “[a] better guide ‘[i]n determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial’ is disclosed by ‘the existing laws and practices in the Nation.’”).

45. FRIEDMAN, *supra* note 1, at 373.

46. *See id.* at 374.

47. *See id.*

swing voters.⁴⁸ And most of all, he discusses the majoritarian influence of various court-curbing techniques, arguing that the Justices are somewhat stuck issuing majoritarian rulings because bad things will happen if they don't.⁴⁹ While each of these explanations is important, here too, Friedman's account would have been richer had he considered a doctrinal explanation for the influence of majority will.

I am not the first to point out the Constitution's indeterminate text, but a doctrinal explanation of the Supreme Court's majoritarian proclivities requires starting here. Most constitutional liberties are not self-defining. What is unreasonable in the search and seizure context? What process is due? The Constitution is written in broad, malleable terms; it takes value judgments to give those terms meaning.⁵⁰ This is true even for seemingly clear constitutional commands. The Equal Protection Clause, for example, requires that like persons be treated alike, but underlying the surface simplicity of that command are difficult questions about what differences matter and when, and they have no ready answers.⁵¹ The First Amendment, to take another example, begins with the words "Congress shall make no law"⁵² but its freedoms of religion and speech have never been absolute.⁵³ For any enumerated protection, judgment calls must be made⁵⁴—and they have to come from *somewhere*. As I see it, the Court has three main choices.

One is originalism. The chief benefit of relying on original intent to draw the contours of constitutional protection is that it cabins judicial discretion (at least according to originalists).⁵⁵ While this may or may not be

48. See *id.* at 375.

49. See *id.* at 375-76.

50. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* I 452 (Foundation Press 3d ed. 2000) ("There is simply no way for courts to review legislation in terms of the Constitution without repeatedly making difficult substantive choices among competing values . . .").

51. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (arguing that equality is an "empty idea" on its own, a command that means nothing absent the values used to fill it).

52. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .").

53. See *supra* note 37 and accompanying text.

54. Erwin Chemerinsky may have put the point best when he wrote, "The Court can be criticized for the choices it makes but not for making choices." Erwin Chemerinsky, *The Supreme Court 1988 Term—Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 101 (1989); see also *supra* note 50 (recognizing value judgments inherently implicated in constitutional decisionmaking).

55. See Randy E. Barnett, *Was the Right To Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 240 (2004) (book review) ("Those originalists who favor original intent want to fill the gaps in the original public meaning and cabin the discretion of those engaged in construction of abstract provisions by appealing to

true, the downside of an originalist approach is dead hand rule: why should today's majorities be governed by what majorities thought two hundred years ago? The Court can ask the framers (who may or may not have thought about the issue, and who may or may not have supported originalism in the first place),⁵⁶ but the fact of the matter is that the framers are long dead, so using their views, even if ascertainable, merely exacerbates the already undemocratic nature of judicial review.

A second source of values is the Justices' own judgment. Indeed, even when the Supreme Court counts states in its constitutional decision-making, it sometimes reserves the right to use its "independent judgment" to go the other way.⁵⁷ The danger here is just what originalism aims to prevent: the Court's unbridled ability to decide any given case any way it wants. This is the core of the countermajoritarian difficulty—the fact that nine unelected judges (five, really) can impose their judgments on democratic majorities in a land ostensibly governed by majority rule.⁵⁸

That leaves the third option, prevailing contemporary norms. Like the first two, this option is not perfect. While it avoids the undemocratic tendencies of the other approaches, a consensus-based approach to constitutional decisionmaking has a problem of its own. As John Hart Ely put the point, "it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."⁵⁹ That said, when the Justices count states to decide what is reasonable, what process is due—whether the state interest supporting a challenged practice is sufficiently important—their approach is not all that different from what the rest of us do when grappling with value-laden questions that have no obviously right or wrong answer. We look around, see what everybody else is doing, ask our friends. We search for evidence of a norm. However perverse the notion of explicitly majoritarian constitutional protec-

the specific intentions of those who either wrote or ratified them."); see also ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* vii (1997) ("Originalism helps specify "textualism" and helps judges arrive at definite interpretations of the text even when the words are ambiguous.").

56. See Michael Klarman, *What's So Great About Constitutionalism?*, 93 *NW. U. L. REV.* 145, 147-48 (1998) (noting a "plentitude of subjects not contemplated by the Framers"); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. R.* 885 (1985) (arguing that the Framers did not intend originalism as a means of constitutional interpretation).

57. See, e.g., *Schad v. Arizona*, 501 U.S. 624, 642 (1991) (noting in due process context, "[t]his is not to say that either history or current practice is dispositive"); see also *supra* note 7 (noting similar disclaimer in the Eighth Amendment context).

58. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962) ("[J]udicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of the representatives of the actual people of the here and now.").

59. ELY, *supra* note 16, at 69.

tion may be in theory, it is not difficult to see why the Justices count states (and they *all* do).⁶⁰ Constitutional interpretation involves judgment calls, and state counting provides an objective, contemporary measure of how those calls should be made. The Justices have said as much themselves.⁶¹

III. RETURNING TO THE EXTERNAL VIEW

Thus far, I have aimed to complement *The Will of the People* by providing a doctrinal account of the influence of majority will. In this final Part, I return to the essence of Friedman's claim, taking a *nondoctrinal* look at explicitly majoritarian doctrine. The insight that emerges reinforces the external view—even the Supreme Court's state counting exercises are susceptible to the influence of larger, *extralegal*, social and political forces. The Court's flip-flop rulings on the death penalty for mentally retarded and juvenile offenders provide prime examples.

On the same day in 1989, the Supreme Court issued two landmark death penalty rulings: *Penry v. Lynaugh*⁶² and *Stanford v. Kentucky*.⁶³ In *Penry*, the Court rejected the claim that the Eighth Amendment's "cruel and unusual punishments" clause prohibited the death penalty for mentally retarded offenders,⁶⁴ while in *Stanford*, the Court rejected the same claim for juvenile offenders.⁶⁵ In both cases, the Justices held that a "national consensus" had not yet formed against the challenged practice based on a survey of state legislatures.⁶⁶

Despite their similarities, *Penry* and *Stanford* posed dramatically different doctrinal applications. On the merits, *Penry* was an easy case for the Supreme Court; only two states barred the execution of mentally retarded offenders.⁶⁷ *Stanford* was much harder. In 1989, twelve of the thirty-seven death penalty states had no juvenile death penalty, while the remaining twenty-five states allowed it.⁶⁸ That made the ruling in *Stanford* look straightforward—over half the death penalty states supported the sanction—but the numbers were not that simple. In prior cases, the Court had also

60. See Lain, *supra* note 10, at 409-12 (discussing state counting among the Supreme Court's conservatives, moderates, and liberals, and explaining why each ideological type might find state polling attractive).

61. See *supra* notes 8, 12-13, 43 and accompanying text.

62. 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

63. 492 U.S. 361 (1989), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005).

64. See *Penry*, 492 U.S. at 328-40.

65. See *Stanford*, 492 U.S. at 380. Technically, the Supreme Court in *Stanford* was only considering the death penalty for sixteen- and seventeen-year-old offenders, *see id.*, as it had already invalidated the death penalty for juveniles age fifteen and younger the previous year. See *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

66. See *supra* note 6.

67. See *Penry*, 492 U.S. at 334.

68. See *Stanford*, 492 U.S. at 370.

considered *non*-death penalty jurisdictions in its state counting exercises,⁶⁹ which, as *Stanford's* dissenters pointed out, would have significantly changed the calculus.⁷⁰ If the twelve death penalty states that exempted juvenile offenders were added to the thirteen non-death penalty states and the District of Columbia (also a non-death penalty jurisdiction), then the number of jurisdictions rejecting the juvenile death penalty became twenty-six—a slight majority.⁷¹ If one also included Vermont, whose death penalty had been invalidated in 1972 but never legislatively rescinded or amended, the number became twenty-seven.⁷² If one included other states—and there were various reasons to do so—the numbers inched incrementally higher.⁷³ In the end, whether the state count supported constitutional protection was mostly a function of whether the Justices wanted it to.

Over a decade later, the Supreme Court reconsidered its rulings in *Pe- nry* and *Stanford*, reversing its position in both. The Court's 2002 decision in *Atkins v. Virginia* invalidated the death penalty for mentally retarded offenders,⁷⁴ while its 2005 decision in *Roper v. Simmons* invalidated the death penalty for juvenile offenders.⁷⁵ By sheer happenstance, the number of states prohibiting the death penalty for mentally retarded and juvenile offenders in *Atkins* and *Roper* was the same: eighteen of the thirty-eight death penalty states.⁷⁶ To arrive at a national consensus, the Court added the number of death penalty states prohibiting the challenged practice to the twelve states that had no death penalty at all.⁷⁷

On the merits, neither the Supreme Court's methodology in 1989, nor its methodology in the post-2000 cases, was obviously right or wrong. Li-

69. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.24 (1988) (plurality opinion) (“Almost every State, and the Federal Government, has set a minimum age at which juveniles accused of committing serious crimes can be waived from juvenile court into criminal court. The dissent’s focus on the presence of these waiver ages in jurisdictions that retain the death penalty but that have not expressly set a minimum age for the death sentence, distorts what is truly at issue in this case.” (citations omitted)).

70. See *Stanford*, 492 U.S. at 383 (Brennan, J., dissenting).

71. See *id.* at 384.

72. See *id.* at 384 n.1.

73. See *id.* (noting, for example, that South Dakota has a death penalty, but has sentenced no one to death since 1972, effectively rendering it an abolition state).

74. 536 U.S. 304, 321 (2002).

75. 543 U.S. 551, 578-79 (2005).

76. See *Roper*, 543 U.S. at 564 (“When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”). Because a number of states had already prohibited the juvenile death penalty in 1989, the rate of change in these two cases was different.

77. See *id.*

miting the state count to death penalty jurisdictions made some amount of sense; states that had no death penalty arguably had nothing to say about how it should be administered in states that do. On the other hand, considering non-death penalty states also made sense; if a state had rejected the death penalty altogether, it would presumably reject the death penalty for mentally retarded and juvenile offenders too. The problem, in short, was not the methodology per se. The problem was that the methodology had changed. By 1989's standards, a national consensus still had not materialized against the death penalty for mentally retarded and juvenile offenders. And by the Court's post-2000 standards, the Justices could have invalidated the juvenile death penalty back in 1989. What gives?

One possibility is a change in the Supreme Court's composition. Between 1989 and 2002, four Justices retired, although due to the vagaries of the judicial appointments process, conservatives failed to gain a seat.⁷⁸ As a result, the delicate ideological balance on the Court remained roughly the same, with *Atkins* and *Roper* coming out the way they did because one or both of the Court's swing voters—Justices Kennedy and O'Connor—switched sides.⁷⁹ The question then becomes what caused them to do so, and the most plausible answer is external to the law: non-doctrinal social and political developments made them *want* to.

In 1989, when the Supreme Court decided *Penry* and *Stanford*, the larger sociopolitical context was extremely hostile to death penalty protections. Support for the death penalty while the two cases were pending was an astonishing *seventy-nine* percent—the highest figure ever recorded (at least at the time).⁸⁰ Politicians were campaigning on promises to execute more people, faster.⁸¹ And judicial resistance to the death penalty had be-

78. Between 1989 and 2002, Justices Brennan, Blackmun, White, and Marshall retired. In theory, conservatives had a chance to gain a seat—three of the four retirees were liberals, and President Bush had the advantage of appointing two of the replacements, not one. But it was not to be. One of Bush's seemingly conservative appointments, Justice Souter, in fact wasn't. See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 577-78 (2003) (discussing and charting the turnover from 1986 to the mid-1990s).

79. In *Atkins*, both Justices O'Connor and Kennedy changed their minds, and the vote was 6-3; thus, at least one of them was necessary for the majority. In *Roper*, Justice Kennedy changed his mind, and the vote was 5-4. See *supra* notes 74-75.

80. See *Public Support for Death Penalty is Highest in Gallup Annals*, GALLUP REPS., Jan. 1989, at 27. Support for the death penalty subsequently hit a new all-time high of eighty percent in 1994. See David W. Moore, *Americans Firmly Support Death Penalty*, THE GALLUP POLL MONTHLY, June 1995, at 23.

81. See Andrew H. Malcolm, *Society's Conflict on the Death Penalty Stalls Procession of the Condemned*, N.Y. TIMES, June 19, 1989, at B10 (“[A]ware of the electoral fate last fall of Gov. Michael S. Dukakis, the Democratic Presidential nominee who opposed the death penalty, many politicians embrace capital punishment.”); Michael Oreskes, *The Political Stampede on Executions*, N.Y. TIMES, Apr. 4, 1990, at A16 (“From one end of the country to the other, political candidates this year are competing to persuade voters that if elected,

come politically hazardous.⁸² Support for the death penalty was part of the same “tough on crime” mood that was gripping the country during this time, producing mandatory minimums, three strikes legislation, and other populist punitive measures.⁸³ In light of that fact, it is hard to imagine the Supreme Court imposing significant restrictions on the death penalty in 1989—and it didn’t. The most important death penalty rulings of the mid- to late 1980s (and there were a number of them) all went the government’s way.⁸⁴

The extralegal context in which *Atkins* and *Roper* were decided, by contrast, was dramatically different. A number of high profile death row exonerations ignited a national debate about the death penalty in 2000, setting off a virtual explosion in support for death penalty reforms and moratoriums on executions.⁸⁵ Public support for the death penalty hit a twenty-year low,⁸⁶ death sentences fell by more than fifty percent,⁸⁷ and executions fell by almost as much—even in states like Virginia and Texas, where political commitment to capital punishment was strongest.⁸⁸ Against this back-

they would be more vigorous, more vigilant and more relentless than their opponents in the application of the death penalty.”); Richard Lacayo et al., *The Politics of Life and Death*, TIME, Apr. 2, 1990, at 19; see also *id.* (reporting campaign spokesman’s statement that “[m]aybe the next step will be scratch-and-sniff ads, so voters can sample the smell of the death chamber”).

82. See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 38 (2007) (discussing successful 1988 campaign to defeat the retention election of California Supreme Court Justice Rose Bird because of her decisions in death penalty cases).

83. See *id.* at 38-39 (discussing punitive public mood of mid- to late 1980s); Faye A. Silas, *The Death Penalty: The Comeback Picks Up Speed*, 71 A.B.A. J. 43, 52 (1985) (discussing nation’s “tough on crime” mood in late 1980s and the underlying events that led to it).

84. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 297-99 (1987) (rejecting evidence of racial discrimination in the imposition of death); *Teague v. Lane*, 489 U.S. 288, 316 (1989) (denying retroactivity for new constitutional rulings on habeas corpus); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (rejecting claim that death row inmates are entitled to right to attorney in collateral proceedings); *Burger v. Kemp*, 483 U.S. 776, 795-96 (1987) (rejecting ineffective assistance of counsel claim in which the attorney failed to develop and present mitigating evidence at the sentencing phase of a capital trial); *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987) (sanctioning death penalty for accomplices who neither killed nor intended to kill); *Lockhart v. McCree*, 476 U.S. 162, 177 (1986) (restoring death qualification of jurors).

85. See Lain, *supra* note 82, at 43-50.

86. See Frank Newport, *Support for Death Penalty Drops to Lowest Level in 19 Years, Although Still High at 66%*, GALLUP NEWS SERVICE, Feb. 24, 2000, <http://www.gallup.com/poll/3199/Support-Death-Penalty-Drops-Lowest-Level-Years-Although.aspx>.

87. In 2004, there were 125 death sentences imposed, compared to 314 in 1994, 318 in 1995, and 320 in 1996. See James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1659-60 (2006).

88. See Brooke A. Masters, *Executions Decrease for the 2nd Year; Va., Texas Show Sharp Drops Amid a National Trend*, WASHINGTON POST, Sept. 6, 2001, at A1.

drop, death penalty practices that were controversial when support for capital punishment was high became obvious targets of reform, and executions of mentally retarded and juvenile offenders were chief among them. By 2002, when the Supreme Court decided *Atkins*, even fervent death penalty supporters no longer supported executing mentally retarded offenders.⁸⁹ And by 2005, when the Court decided *Roper*, the juvenile death penalty had already pretty much died out on its own.⁹⁰

In sum, the most plausible explanation for the Supreme Court's change of heart on the death penalty for mentally retarded and juvenile offenders between 1989 and its post-2000 decisions is not doctrine—explicitly majoritarian as it is—but the larger sociopolitical context in which these issues were decided. Like any doctrine, the Court's state counting exercises are subject to manipulation. The Justices decide questions of constitutional law the way they *want* to, not the way they have to—and majoritarian forces outside the law play a role in how they want to rule.

IV. CONCLUSION

Barry Friedman's *The Will of the People* is a masterfully written account of the influence of public opinion on Supreme Court decisionmaking. But the argument it makes is even stronger than it looks. Sometimes the influence of majority will is so pervasive that it seeps into the doctrinal fibers of the law itself. This is not to say that doctrine, as opposed to extralegal influences, is necessarily driving the Court's decisionmaking—even here, extralegal forces can influence how decisions are made. But it is to say that Friedman's account would have been richer had he incorporated what the Supreme Court has been telling us all along. One can catch the Justices in the act of responding to public opinion, as Friedman has convincingly done, or one can just ask them. When it comes to Supreme Court decisionmaking, there is a doctrinal side to the influence of majority will.

89. Those supporters included President G.W. Bush and his brother Jeb, Governor of Florida. See Raymond Bonner, *President Says the Retarded Should Never Be Executed*, N.Y. TIMES, June 12, 2001, <http://www.nytimes.com/2001/06/12/us/president-says-the-retarded-should-never-be-executed.html?pagewanted=print&src=pm>; *Jeb Bush Signs Bill Barring Executing the Retarded*, N.Y. TIMES, June 13, 2001, <http://www.nytimes.com/2001/06/13/us/jeb-bush-signs-bill-barring-executing-the-retarded.html?src=pm>.

90. See VICTOR STREIB, REPORT ON THE STATUS OF THE JUVENILE DEATH PENALTY 9 (2005) (noting that in 2001, state courts imposed just seven juvenile death sentences and that in the two years before *Roper*—2003 and 2004—the annual national tally was two).