

2009

The Unexceptionalism of Evolving Standards

Corinna Barrett Lain

University of Richmond, clain@richmond.edu

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Corinna Barrett Lain, *The Unexceptionalism of Evolving Standards*, 52 UCLA L. Rev. 365 (2009)

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THE UNEXCEPTIONALISM OF “EVOLVING STANDARDS”

Corinna Barrett Lain^{*}

Conventional wisdom is that outside the Eighth Amendment, the Supreme Court does not engage in the sort of explicitly majoritarian state nose-counting for which the “evolving standards of decency” doctrine is famous. Yet this impression is simply inaccurate. Across a stunning variety of civil liberties contexts, the Court routinely—and explicitly—determines constitutional protection based on whether a majority of states agree with it. This Article examines the Supreme Court’s reliance on the majority position of the states to identify and apply constitutional norms, and then turns to the qualifications, explanations, and implications of state polling as a larger doctrinal phenomenon. While the past few years have seen an explosion of constitutional law scholarship demonstrating the Supreme Court’s majoritarian tendencies, the most powerful evidence of the Court’s inherently majoritarian nature has been right under our noses all along: its widespread use of explicitly majoritarian doctrine.

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^{*} Professor of Law, University of Richmond School of Law. This Article benefited from faculty workshops at Emory, William and Mary, and Seton Hall, as well as presentations at the Fall 2008 Virginia Junior Faculty Forum and the Southeastern Association of Law Schools 2008 Conference. Special thanks to Michael Klarman, Barry Friedman, Michael Perry, Bill Buzbee, Robert Shapiro, Neal Devins, Steve Gottlieb, Bill Marshall, Lori Ringhand, Jim Gibson, Shari Motro, Jessica Erickson, Carl Tobias, J.P. Jones, Bill Fisher, Jack Preis, and Kevin Walsh for their comments in developing this piece, and to Lidia Niecko, David Hartnett, and Elly Pepper for their excellent research assistance.

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INTRODUCTION

The Supreme Court’s landmark death penalty rulings over the past several years have renewed scholarly criticism of the Eighth Amendment’s “evolving standards of decency” doctrine.¹ Under the doctrine, a punishment violates the Cruel and Unusual Punishments Clause² when a “national consensus” has formed against it, prohibiting a punishment only after a majority of states have already done so on their own.³ Critics claim that it makes no sense for

1. Compare, e.g., Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113 (2006) (“[D]eclaring an action unconstitutional because a significant number of states prohibit the practice leaves the Supreme Court enforcing constitutional protections only in cases where they are least needed.”), and Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 47, 63 (2008) (“What is the worth of a right good against the majority when that same majority interprets that right?”), and Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 520 (2005) (lamenting need for constitutional protection “that is countermajoritarian in character and that does not blithely accept the prevailing outcome of political processes as fixing the constitutional baseline”), with, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 69 (1980) (“[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.”), and William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 328–29 (1986) (“At the outset, it seems to me beyond dispute that we should not permit the legislature to define for us the scope of permissible punishment It would effectively write the clause out of the Bill of Rights were we to permit legislatures to police themselves by having the last word on the scope of the protection that the clause is intended to secure against their own overreaching.”), and Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 88 n.200 (1989) (“The preferences of the majority should not determine the nature of the eighth amendment or of any other constitutional right.”). For two of these rulings, see *infra* note 4.

2. U.S. CONST. amend. VIII (“nor cruel and unusual punishments inflicted”).

3. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 562–64 (2005) (discussing the importance of a “national consensus” in prior Eighth Amendment “evolving standards” cases, and noting that “[t]he beginning point [of analysis under the “evolving standards” doctrine] is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the

constitutional protection to turn on whether a majority of states agree with it—particularly in the capital context, where death penalty politics make tyranny of the majority more than a theoretical concern.⁴ Textualists counter that the Eighth Amendment’s prohibition against “cruel and unusual punishments” invites, if not requires, protection that tracks majority preferences.⁵

Implicit (and sometimes explicit) in the debate over “evolving standards” is the assumption that majoritarian doctrine—at least in the form of state legislative consensus as a basis for constitutional protection⁶—is a distinctly Eighth Amendment phenomenon. Whether defending the doctrine or denouncing it, death penalty scholars routinely assume that the sort of state nose-counting that the Supreme Court does under the “evolving standards” doctrine does not occur elsewhere.⁷ In the larger academy, too, the reigning assumption is that

question”); accord *Atkins v. Virginia*, 536 U.S. 304, 314–16, 321–23 (2002); *Stanford v. Kentucky*, 492 U.S. 361, 370–73 (1989); *Penry v. Lynaugh*, 492 U.S. at 331, 334–35 (1989); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987).

4. For an excellent discussion of death penalty politics, see Stephen B. Bright, *The Politics of Capital Punishment: The Sacrifice of Fairness for Executions*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 127 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 2d ed. 2003); Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711 (1990). For criticism of the “evolving standards” doctrine, see *supra* text accompanying note 1.

5. See, e.g., *Penry*, 492 U.S. at 351 (Scalia, J., dissenting) (“If [a punishment] is not unusual, that is, if an objective examination of 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.”); Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1200 (2006) (“Of course, even if a punishment is ‘cruel,’ it must also be ‘unusual’ to trigger scrutiny under the Eighth Amendment.”); William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1414 (2005) (acknowledging the textualist claim that “the term ‘unusual’ provides a unique license for judicial appeals to changing convictions and practices”); Akhil Reed Amar & Vikram David Amar, *Eighth Amendment Mathematics (Part One): How the Atkins Justices Divided When Summing*, FINDLAW, June 28, 2002, <http://writ.news.findlaw.com/amar/20020628.html> (“[T]he word ‘unusual’ in this clause invites attention to the way standards of decency evolve over time.”); see also Jacobi, *supra* note 1, at 1098 (“A response to this criticism [of majoritarian protection] is that, while this may be true of constitutional interpretation generally, the phrase ‘cruel and unusual’ necessitates an inquiry into social mores and practices to determine what is unusual.”).

6. Doctrine can be majoritarian in a number of different ways. My focus here is on doctrine that is majoritarian in the same sense that the “evolving standards” doctrine is majoritarian—it uses the majority position of the states to determine constitutional protection.

7. See, e.g., Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789, 810 (1996) (“We do not attempt to define or explain ‘due process of law,’ ‘equal protection of the law,’ ‘an impartial jury,’ or any other of the fundamental, normative constitutional concepts by making an appeal to what the majority believes or accepts Out of considerations of consistency alone, therefore, we should hesitate to incorporate majoritarian considerations into our interpretation of the Eighth Amendment.”); 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

explicitly majoritarian doctrine is an exclusively Eighth Amendment affair—an approach limited to the Cruel and Unusual Punishments Clause and the death penalty cases that dominate this corner of constitutional law.⁸

But what if that assumption is wrong?

As it turns out, the Supreme Court's explicitly majoritarian approach to Eighth Amendment protection is not all that different from what the Court does in other constitutional contexts. From due process to equal protection, from the First Amendment to the Fourth and Sixth, the Supreme Court routinely—

that such comparisons are given doctrinal significance. This unique feature of Eighth Amendment jurisprudence derives, of course, from the text's prohibition on the infliction of 'cruel and unusual punishments.'"); Heffernan, *supra* note 5, at 1362–63 (describing “evolving standards” doctrine as a “conspicuous exception” to the Supreme Court's approach in other doctrinal areas and advocating that it be used elsewhere); Stacy, *supra* note 1, at 478, 494–96, 524–27 (“This deference to majoritarian judgments, which gives rise to the Justices’ publicized jurisdiction-counting debates, conflicts with the independent role the Court has assumed in interpreting other countermajoritarian constitutional rights,” contrasting the Supreme Court's approach under the Eighth Amendment and other constitutional provisions.); see also Joseph L. Hoffmann, *The “Cruel and Unusual Punishment” Clause: A Limit on the Power to Punish or Constitutional Rhetoric?*, in *THE BILL OF RIGHTS IN MODERN AMERICA* 140–41 (David J. Bodenhamer & James W. Ely eds., 1993) (contrasting the majoritarian nature of constitutional inquiry under the Eighth Amendment with that undertaken in the First and Fourth Amendment contexts).

8. 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.” (citations omitted)); 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); see also John Ferejohn & Larry D. Kramer, *Judicial Independence in a Democracy: Institutionalizing Judicial Restraint*, in *NORMS AND THE LAW* 161–207 (John N. Drobach ed., 2006) (discussing “doctrinal limitations” on the Supreme Court's countermajoritarian capacity, such as principles of justiciability, federalism, and legislative deference in standards of review, but not mentioning state consensus-based doctrine); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH* 12 (2006) (discussing the possibility of the Supreme Court consulting state legislation for constitutional views of national majorities, citing only the “evolving standards” doctrine as an example); William N. Eskridge, Jr., *America's Statutory “Constitution,”* 41 U.C. DAVIS L. REV. 1 (2007) (arguing that legislation has become the primary source of constitutional values in our society, but not mentioning state legislation as a doctrinal phenomenon outside the Eighth Amendment and select due process cases); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007) (discussing state legislation as a way of protecting constitutional values outside the Constitution, but not mentioning state legislation as an actual source of constitutional norms); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002) (discussing various ways that nonjudicial actors interpret the constitution, including the President, Congress, and others, but not mentioning state legislatures as a source of constitutional interpretation).

and explicitly—determines constitutional protection based on whether a majority of states agrees with it. By and large, we simply haven’t noticed.⁹

The implications are striking. For death penalty scholars, the phenomenon of explicitly majoritarian decisionmaking outside the Eighth Amendment calls into question the leading defense of the “evolving standards” doctrine—majoritarian Eighth Amendment text.¹⁰ If the Court is polling states in *and* outside the Eighth Amendment, then majoritarian constitutional text cannot be all that is driving majoritarian constitutional doctrine.

In the broader body of constitutional law scholarship, the implications are larger yet. Over the past few years, the country’s top constitutional scholars have filled volumes of law reviews convincing us that the Supreme Court is an inherently majoritarian institution,¹¹ and it is. But the most powerful evidence of the Court’s majoritarian proclivities has gone virtually unnoticed, although right under our noses all along: its widespread use of explicitly majoritarian doctrine. Explicitly majoritarian doctrine shatters the conventional understanding of the Court as a countermajoritarian institution, challenges the theoretical

9. A few scholars recognize the Court’s use of explicitly majoritarian doctrine in the substantive due process area. See *infra* text accompanying note 18. Otherwise, I have found just four discussions on point. Two are seminal pieces, excellent although limited in scope. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 592–607 (1993) (focusing discussion on Sixth Amendment right to trial by jury context 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) (focusing discussion on Fourth Amendment context while recognizing larger phenomenon). 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 (2009) (arguing that to the extent that 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 (2007) (comparing Supreme Court’s reliance on state counting and foreign law).

10. See *supra* text accompanying note 5 (discussing textual defense of “evolving standards” doctrine based on words “cruel and unusual” in the Eighth Amendment (emphasis added)).

11. See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (discussing role that social movements play in constitutional understanding); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005) (arguing that normative constitutional theory about judicial review will remain impoverished until it incorporates the nonlegal influences that motivate judges to act as they do); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005) (discussing influence of broader sociopolitical mores on Supreme Court’s decisions in *Brown v. Board of Education* and *Lawrence v. Texas*); Larry Kramer, *Generating Constitutional Meaning*, 94 CA. L. REV. 1439, 1441 (2006) (stressing extralegal influences on the shape of constitutional law and lauding Reva Siegel’s work on constitutional culture and social movements as “the new center of academic work in constitutional theory”); Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (discussing dialectical relationship between culture and constitutional law); see also Sunstein, *supra* note 8 (discussing *District of Columbia v. Heller* as a decision that tracked majority preferences although it was formally decided on originalist grounds).

underpinnings of judicial review, and casts the story of “Our Federalism”¹² in an entirely new light. It shakes the bedrock principles of constitutional law.

This Article examines the Supreme Court’s reliance on the majority position of the states to identify and apply constitutional norms outside the Eighth Amendment. Part I explores the phenomenon in the Due Process Clause, the constitutional catchall for a number of substantive and procedural protections. Part II explores the phenomenon in the Equal Protection Clause and First Amendment, provisions famous for providing countermajoritarian protection. Part III explores the phenomenon in the criminal context, turning to the Fourth and Sixth Amendments. Part IV discusses the qualifications, explanations, and implications of state polling as a larger doctrinal phenomenon. The Article concludes that we should talk about, and teach, the unexceptionalism of “evolving standards.” Constitutional theory should reflect the reality of constitutional law.

I. THE CONSTITUTIONAL CATCHALL: DUE PROCESS

Since colonial times, the Due Process Clause has served as a constitutional catchall for a variety of substantive and procedural protections.¹³ In large part, this variety is what makes the Due Process Clause one of the strongest examples of explicitly majoritarian decisionmaking outside the Eighth Amendment. Nothing about the phrase “due process” requires or even necessarily invites protection based on state legislative consensus, yet the Supreme Court’s doctrine in this area is riddled with the same state nose-counting for which the “evolving standards” doctrine is famous. An examination of several substantive and procedural due process protections illustrates the point.

12. See *Younger v. Harris*, 401 U.S. 37, 44–45 (1971) (“[A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as ‘Our Federalism’ . . .”).

13. See RODNEY L. MOTT, *DUE PROCESS OF LAW* § 54, at 142 (1926) (noting that American colonists saw the Due Process Clause as “a catch-all phrase for human rights rather than a phrase with a well defined content”); see also Shawn P. Davisson, *Balancing the Scales of “Confidential” Justice*, 38 MCGEORGE L. REV. 679, 688 (2007) (“The guarantee of due process is often portrayed as a catch-all provision . . .”).

A. Substantive Due Process

The notion of substantive due process is, as others have noted,¹⁴ an oxymoron. That the Due Process Clause would protect something other than process is itself “a contradiction in terms—sort of like ‘green pastel redness,’” to borrow from John Hart Ely’s famous line.¹⁵ To fill the void in constitutional meaning, the Supreme Court in the post-*Lochner*¹⁶ era has frequently turned to the states to define substantive due process protection.¹⁷ Today, one can see the approach at work in at least three doctrinal areas: fundamental rights, punitive damages, and selective incorporation.

1. Fundamental Rights

To the limited extent that scholars have recognized the phenomenon of explicitly majoritarian doctrine outside the Eighth Amendment, they have generally done so in the substantive due process context of fundamental rights.¹⁸ Given the Supreme Court’s fundamental rights doctrine, this comes as no surprise. As (most) every law student knows, legislation that burdens a fundamental right must be narrowly tailored to a compelling government

14. For a discussion of the literature, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 319 (1999).

15. ELY, *supra* note 1, at 18.

16. *Lochner v. New York*, 198 U.S. 45 (1905).

17. See, e.g., *W. Coast Hotel Co. v. Parrish*, 200 U.S. 379, 399 (1937) (upholding minimum wage legislation against substantive due process challenge, reasoning, “The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it.”).

18. See 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 J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 714, 741–42 (2008) (recognizing state practice as a constitutional benchmark in both the Eighth Amendment and substantive due process contexts); 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); Robert F. Nagel, *Disagreement and Interpretation*, LAW & CONTEMP. PROBS. Autumn 1993, at 11, 19 (recognizing the role of state legislation in the use of “tradition” to define due process rights); 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); Stacy, *supra* note 1, at 496 (noting that at times, “the Court has appealed to majoritarian judgments as defining the scope of fundamental substantive due process rights”).

interest.¹⁹ Legislation that does not burden a fundamental right, by contrast, need only be rationally related to a legitimate government objective.²⁰ In this area, then, the appropriate analysis turns on a single threshold issue: whether the legislation burdens a fundamental right.

Although in decades past, the Supreme Court identified fundamental rights based on its independent judgment of the right's importance,²¹ today the Court's approach is firmly majoritarian. According to the Supreme Court, only those liberties "deeply rooted in this nation's history and tradition" qualify as fundamental, an objective inquiry in which "[o]ur Nation's history, legal traditions, and practices" stand as "crucial guideposts for responsible decisionmaking."²² Central to this analysis is the position taken by state legislatures, which the Court has described as "the primary and most reliable indication of consensus."²³ For death penalty scholars, the latter quote should sound familiar—it was imported straight from an "evolving standards" case.²⁴ Indeed, the entire fundamental rights analysis is almost exactly the same as the analysis the Court uses under the "evolving standards" doctrine.

A comparison of the Supreme Court's recent decisions in *Lawrence v. Texas*²⁵ and *Roper v. Simmons*²⁶ illustrates the point. *Lawrence* is the Court's 2003 substantive due process case invalidating state statutes that criminalized same-sex sodomy.²⁷ *Roper* is the Court's 2005 "evolving standards" case invalidating the juvenile death penalty.²⁸ Despite these decisions' different nomenclatures, the Court's analysis in each proceeded in the same lockstep fashion. In both

19. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (noting that fundamental rights may not be infringed "no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest" (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))); see also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 471–72 (7th ed. 2004) (discussing the six categories of rights thus far deemed fundamental).

20. See, e.g., *Glucksberg*, 521 U.S. at 722 (noting that only fundamental rights require "more than a reasonable relation to a legitimate state interest to justify the action"); see also NOWAK & ROTUNDA, *supra* note 19, at 471–72 (discussing substantive due process standards of review).

21. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing the right to privacy as fundamental in context of abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right to privacy as fundamental in context of access to contraceptives); see also Post, *supra* note 11, at 88–91 (discussing the trend prior to 1980s, particularly in the area of sexuality, of identifying liberty interests "by directly evaluating the intrinsic value of liberty itself").

22. *Glucksberg*, 521 U.S. at 721 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

23. *Id.* at 711 ("[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws." (quoting *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989))).

24. *Stanford*, 492 U.S. at 373 ("[T]he primary and most reliable indication of consensus is . . . the pattern of enacted laws.").

25. 539 U.S. 558 (2003).

26. 543 U.S. 551 (2005).

27. See *Lawrence*, 539 U.S. at 578.

28. See *Roper*, 543 U.S. at 570–74.

decisions, the Court focused its discussion on the state legislative landscape, first examining current statutes,²⁹ then turning to state legislative trends,³⁰ and then finally noting underenforcement of those statutes that allowed the challenged practice to remain.³¹ Even the standard the Court used to articulate its decisions—relying on an “emerging awareness” of the liberty interest at issue in *Lawrence* and on “evolving standards of decency” in *Roper*—was strikingly similar.³²

In the academy, *Lawrence* garnered substantial attention among scholars who view the Supreme Court as an essentially majoritarian institution—but for reasons that had nothing to do with majoritarian doctrine. For these scholars, *Lawrence* was a reminder of how the Justices are influenced by the sociopolitical mores of the larger society in which they live.³³ It was a lesson about the dialectical relationship between culture and constitutional law.³⁴ It was an example of the political nature of judicial review.³⁵ And it was an illustration of how social movements can create constitutional change.³⁶ Yet for all the discourse on *Lawrence* as a majoritarian decision, there was virtually

29. Compare *Lawrence*, 539 U.S. at 572, with *Roper*, 543 U.S. at 564–65.

30. Compare *Lawrence*, 539 U.S. at 571–73, with *Roper*, 543 U.S. at 565–67.

31. Compare *Lawrence*, 539 U.S. at 573, with *Roper*, 543 U.S. at 565–66.

32. Compare *Lawrence*, 539 U.S. at 571–72 (recognizing an “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”), with *Roper*, 543 U.S. at 560–61 (referring to “the evolving standards of decency that mark the progress of a maturing society” to determine whether a punishment violates the Cruel and Unusual Punishments Clause).

33. See, e.g., Klarman, *supra* note 11 (discussing *Lawrence* as a product of broader sociopolitical mores); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27 (discussing *Lawrence* as a reminder that “members of the Supreme Court live in society, and they are inevitably influenced by what society appears to think”).

34. See, e.g., Post, *supra* note 11 (discussing *Lawrence* as a cultural product and opening bid in a conversation with the American public about homosexual rights).

35. See NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 3, 143–44 (2004) (discussing *Lawrence* as an example of how “nearly all landmark Supreme Court decisions cannot be understood without first paying attention to the politics surrounding them”); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 222–25 (2004) (discussing *Lawrence* as an example of the democratic nature of judicial review); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005) (discussing *Lawrence* as a reflection of the Justices’ political preferences); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1300–03 (2004) (discussing *Lawrence* as a reflection of mainstream public opinion from a political science perspective).

36. See, e.g., Balkin & Siegel, *supra* note 11, at 948–49 (discussing *Lawrence v. Texas* as an example of how social movements “can change the meaning of constitutional norms”); William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1026 (2004) (discussing *Lawrence* as evidence that the Court “is responsive to the constitutional politics of social movements”); Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1961 (2006) (discussing *Lawrence* as an example of how “courts are inescapably involved in absorbing, evaluating, and influencing changes to popular judgments regarding social groups”).

no discussion of the Court's explicitly majoritarian legal analysis in the case.³⁷ Pages upon pages of commentary about how *Lawrence* constitutionalized national norms somehow missed the significance of the fact that the Supreme Court actually *told* us that this is what it was trying to do.

What explains the dearth of discussion on state counting in *Lawrence*? My best guess is that scholars simply have not seen it as part of a larger doctrinal phenomenon. Indeed, it is tempting to dismiss even the similarities between *Lawrence* and *Roper* as products of the same author, for Justice Kennedy wrote both³⁸—but other fundamental rights cases have used the same analytic approach. For example, in *Bowers v. Hardwick*,³⁹ the 1986 decision that *Lawrence* overruled, the Court relied heavily on the fact that “until 1961, all 50 states outlawed sodomy, and today, 24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.”⁴⁰ And in other fundamental rights cases since then, the Court has also relied on state legislative consensus to decide substantive due process claims. For example, the Court polled the states in deciding the right to physician-assisted suicide for terminally ill competent adults,⁴¹ the right to refuse unwanted medical treatment,⁴² the right to parental recognition of a

37. This is not to say that majoritarian doctrine was never mentioned. Occasionally it was, but more often it wasn't, or was mentioned but discounted as a reason for the Court's decision. See, e.g., DEVINS & FISHER, *supra* note 35, at 139–44 (discussing state positions on same-sex sodomy prohibitions, but not mentioning the Court's reliance on those positions in its opinion); SAGER, *supra* note 35, at 223–24 (“Nor did the Court in *Lawrence* bend to the chore of aligning its judgment with the process of democratic choice. . . . When the claims of John Geddes Lawrence and Tyron Garner were presented to the Court, what mattered was not the number of electoral votes that sponsored them”); Sunstein, *supra* note 33, at 49–50 (discussing various readings of *Lawrence*, including one reviving common law doctrine of desuetude, but viewing that doctrine as a procedural protection against arbitrary enforcement within a jurisdiction rather than as a substantive constraint on national outliers, and in any event doubting its current vitality, noting that “[m]ost American courts do not accept that idea in express terms”); see also Posner, *supra* note 35, at 85 (dismissing the Supreme Court's consensus-based decisionmaking in *Lawrence* as “an effort to ground controversial Supreme Court judgments in something more objective than the Justices' political preferences and thus to make the Court's political decisions seem less political”).

38. See *Roper v. Simmons*, 543 U.S. 551, 554 (2005); *Lawrence v. Texas*, 539 U.S. 558, 561 (2003).

39. 478 U.S. 186 (1986).

40. *Id.* at 193–94. The Court continued, “Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation's history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.” *Id.* at 194.

41. See *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (“In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide.”).

42. See *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 284 (1990) (relying on procedure “[a] common law and by statute in most states” to validate state regulation of third-party decisions to terminate medical treatment).

child born into another couple's marriage,⁴³ and the right of custodial parents to make visitation decisions regarding their children and natural grandparents.⁴⁴ In these and other substantive due process cases, what made a "fundamental right" fundamental was whether the states had deemed it worthy of protection on their own.⁴⁵

2. Punitive Damages Caps

The fundamental rights doctrine is a strong example of explicitly majoritarian substantive due process protection, but it is by no means the only one. Consider briefly the Supreme Court's punitive damages jurisprudence.⁴⁶ According to the Court, the Due Process Clause also imposes substantive limits on the size of punitive damages awards, prohibiting awards deemed "grossly excessive."⁴⁷ So how does one tell when an award is grossly excessive?

In this narrow but increasingly important area of law, the Supreme Court's answer is again explicitly majoritarian. Under the three-part test enunciated in *BMW of North America, Inc. v. Gore*,⁴⁸ the Court assesses the constitutionality of punitive damages awards by considering first, the seriousness of the misconduct at issue; second, the punitive damages-to-actual-harm ratio; and third, the statutory penalties authorized for comparable conduct.⁴⁹

Gore's doctrinal framework is majoritarian in two ways. The third "*Gore* guidepost"⁵⁰ is explicit in this regard. It calls for courts to consider punitive

43. See *Michael H. v. Gerald D.*, 491 U.S. 110, 125–27 (1989) (examining state statutes to support the conclusion that "the ability of a person in Michael's position to claim paternity has not been generally acknowledged").

44. See *Troxel v. Granville*, 530 U.S. 57, 71 (2000) ("Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) [it] to the concerned third party.").

45. See, e.g., *Reno v. Flores*, 507 U.S. 292, 303 (1993) (rejecting substantive due process challenge to detention of juvenile aliens stating, "[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'"); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 503–05 (1977) (invalidating a statute limiting housing to nuclear families in light of "this Nation's history and tradition" of supporting extended family households).

46. I credit Pam Karlan, with thanks, for bringing this area to my attention.

47. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–54 (1993) ("[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" (quoting *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907))).

48. 517 U.S. 559.

49. See *id.* at 574–75 (discussing three guideposts).

50. See *supra* note 49.

damages awards against the statutory fines available for comparable conduct in the same and other jurisdictions,⁵¹ and to give “substantial deference” to legislative judgments concerning appropriate sanctions for the conduct at issue.”⁵²

The second “*Gore* guidepost,” which considers the ratio of punitive damages to actual harm, is not explicitly majoritarian, but results in the same consensus-driven analysis. Under this guidepost, which the Supreme Court has recognized as both “significant” and the “most commonly cited indicum of an unreasonable or excessive punitive damages award,”⁵³ the Court again relies on the predominant position of the states to define the limits of due process protection. For example, in *Gore* itself, the Court relied on over sixty-five state statutes “dating back over 700 years and going forward to today”⁵⁴ in recognizing double, treble, and quadruple damages as a benchmark of reasonableness against which punitive damages awards were to be judged.⁵⁵ In subsequent cases, too, the Court has relied on these benchmarks, invalidating punitive damages awards that depart significantly from state practice and validating those that do not.⁵⁶

In the punitive damages context, then, the doctrine is part formally majoritarian and part majoritarian as applied. Either way, the result is the same: substantive due process protection aimed at what the Supreme Court itself has characterized as “outlier punitive damages awards.”⁵⁷ Upon reflection, this should come as little surprise. Defining excessiveness is difficult, if not impossible, without reference to some normative baseline; to know what is excessive, one must first know what is not. Indeed, to the extent that the “evolving standards” doctrine is just an objective way of measuring grossly disproportionate

51. See, e.g., *Gore*, 517 U.S. at 584 (comparing sanction imposed on BMW against statutory fines available under Alabama and New York law).

52. *Id.* at 583.

53. *Id.* at 580–81.

54. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (explaining that the Supreme Court in *Gore* “further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish”).

55. See *Gore*, 517 U.S. at 581 (“Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.”); *supra* note 54.

56. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991) (upholding punitive damages award more than four times the amount of compensatory damages but calling it “close to the line” of constitutional violation); see also *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2634 (2008) (polling states to support imposition of a maximum punitive-to-compensatory damages ratio as a matter of maritime common law and noting that under facts of that case, the maritime limit may be “the outermost limit of the due process guarantee” as well (quoting *Campbell*, 538 U.S. at 425)).

57. *Baker*, 128 S. Ct. at 2626–27.

punishments,⁵⁸ what the Court does in the punitive damages area and what it does under the Eighth Amendment is (again) essentially the same.

3. Selective Incorporation

The Supreme Court’s selective incorporation doctrine straddles the substantive and procedural sides of the Due Process Clause. It is substantive in the sense that it recognizes particular provisions of the Bill of Rights as a substantive component of due process protection.⁵⁹ It is procedural in the sense that many, if not most, of those guarantees are themselves procedural in nature.⁶⁰ Although in years past, several of the Court’s members—Justice Black, most famously—maintained that the Fourteenth Amendment’s Due Process Clause incorporated *all* of the Bill of Rights guarantees,⁶¹ the Supreme Court has never taken that approach. Instead, it has incorporated only those provisions deemed “fundamental”—the same standard the Court uses to identify unenumerated substantive due process rights.⁶² Because the Court’s selective incorporation doctrine is just its fundamental rights doctrine applied in the Bill of Rights context, the analysis is predictably the same.⁶³ To determine which rights are

58. The Supreme Court has couched the doctrine this way. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (“[W]e have established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.”); accord *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002).

59. See NOWAK & ROTUNDA, *supra* note 19, at 464–67 (discussing the Court’s incorporated provisions of the Bill of Rights in substantive due process chapter).

60. See *infra* text accompanying notes 72–77.

61. See NOWAK & ROTUNDA, *supra* note 19, at 464 (“A few Justices, most notably Justice Black, argued that the history of the Fourteenth Amendment indicated that all of the Bill of Rights were to be made directly applicable to the states.”). In fairness, Justice Black’s preferred position was to rely on the Privileges and Immunities Clause for total incorporation, but the *Slaughter-House Cases* rendered that an impossibility, leaving him with only the Due Process Clause to support his position. See *Adamson v. California*, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting) (arguing for total incorporation under Due Process Clause while noting that the Fourteenth Amendment was “sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights”); *The Slaughter-House Cases*, 83 U.S. 36 (1872) (limiting Privileges and Immunities Clause to privileges of national citizenship).

62. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”). See generally NOWAK & ROTUNDA, *supra* note 19, at 465 (describing selective incorporation as the concept “whereby a provision of the Bill of Rights is made applicable to the states if the Justices are of the opinion that it was meant to protect a ‘fundamental’ aspect of liberty”); *supra* Part I.A.1 (discussing substantive due process fundamental rights doctrine).

63. Indeed, the Court has articulated the same standards in both areas and even treated precedent interchangeably. Compare *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (describing

sufficiently fundamental to incorporate into the Due Process Clause, here again the Court relies on state legislative consensus.

The Supreme Court's 1961 decision in *Mapp v. Ohio*⁶⁴ provides a fitting example. In *Mapp*, the Court incorporated the Fourth Amendment's exclusionary rule to the states, launching the 1960s criminal procedure revolution⁶⁵ and the modern, "selective" approach to incorporation.⁶⁶ Although prior cases had recognized the importance of "a strong consensus of views in the states" in the incorporation analysis,⁶⁷ *Mapp* showed just how pivotal state legislative consensus could be. Defending its decision to abandon *Wolf v. Colorado*'s⁶⁸ 1949 holding to the contrary,⁶⁹ the Court in *Mapp* explained:

While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing on it, by their own legislative or judicial opinion, have wholly or partly adopted or adhered to it.⁷⁰

fundamental right in substantive due process context as that which is "deeply rooted in this Nation's history and tradition"), with *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (describing fundamental right in incorporation context as that which is "so rooted in the tradition and conscience of our people as to be ranked as fundamental"). See also *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko* in the substantive due process context).

64. 367 U.S. 643 (1961).

65. See *id.* at 655 ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."); Corinna Barrett Lain, *Counter-majoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PENN. L. REV. 1361, 1372-73 (2004) (discussing *Mapp*'s role in the criminal procedure revolution).

66. Prior to selective incorporation, the Court used a "fundamental fairness" approach to incorporation. Under the fundamental fairness approach, the Court incorporated only those applications of a right that were deemed fundamental, rather than the right itself. See NOWAK & ROTUNDA, *supra* note 19, at 462-67 (comparing selective incorporation and fundamental fairness doctrines).

67. *Cohen v. Hurley*, 366 U.S. 117, 130 n.11 (1961) (considering a due process claim in the context of attorney disbarment proceedings, defining reasonableness "in much the same way that a strong consensus of views in the States is relevant to a finding of fundamental unfairness"); see also *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937) (noting in the context of incorporation of the right to a jury that "[d]oubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments"); *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (noting in the context of incorporation of the right to counsel that "[a] rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right").

68. 338 U.S. 25 (1949).

69. See *id.* at 29-30 (rejecting the claim that the exclusionary rule was fundamental and thus applied to states). The Court in *Wolf* also counted states to support its ruling. See *id.* at 33-39 (surveying state positions on the exclusionary rule in Tables A-J).

70. *Mapp*, 367 U.S. at 651.

By the Court’s own account, it was the “seemingly inexorable” movement of the states that finally moved constitutional law.⁷¹

The Supreme Court’s majoritarian approach to incorporation in *Mapp* was no anomaly. After *Mapp*, the Court selectively incorporated almost all of the remaining Bill of Rights guarantees,⁷² similarly relying on the fact that most states had already recognized the protection on their own. For example, the Court counted states in incorporating the right to counsel,⁷³ the right to jury trial,⁷⁴ the right to confrontation,⁷⁵ and the right to a speedy trial.⁷⁶ It likewise counted states when incorporating the protections against double jeopardy and prosecutorial comments on a defendant’s failure to testify.⁷⁷ On each of these occasions, the Court was ostensibly asking whether “a civilized system could be imagined that would not accord the particular protection.”⁷⁸ But in

71. *Id.* at 660 (“Moreover, the experience of the states is impressive . . . The movement towards the rule of exclusion has been halting but seemingly inexorable.” (quoting *Elkins v. United States*, 364 U.S. 206, 218–19 (1960))).

72. Most of these were criminal procedure protections. See NOWAK & ROTUNDA, *supra* note 19, at 397 (“Of the first eight Amendments the Supreme Court has held explicitly that only three of the individual guarantees are inapplicable to the states.”); *id.* at 465–67 (discussing in detail individual provisions incorporated); *infra* text accompanying notes 73–77.

73. See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (incorporating the Sixth Amendment right to counsel, stating that “Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argued that *Betts* was ‘an anachronism when handed down’ and that it should now be overruled. We agree.”).

74. See *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) (incorporating the Sixth Amendment right to a jury, noting that “[t]he laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so”).

75. See *Pointer v. Texas*, 380 U.S. 400, 402 (1965) (incorporating the Sixth Amendment confrontation clause, reasoning that “the right of confrontation [i]s ‘one of the fundamental guaranties of life and liberty,’ and . . . ‘guarded against legislative and judicial action by provisions in the constitution of the United States and in the constitutions of most, if not of all, the states composing the Union’” (quoting *Kirby v. United States*, 174 U.S. 47, 55, 56 (1899))).

76. See *Klopfer v. North Carolina*, 386 U.S. 213, 225–26 (1967) (“That this right was considered fundamental at this early period in our history is evidenced by its guarantee in the constitutions of several of the states of the new nation, as well as by its prominent position in the Sixth Amendment. Today, each of the 50 States guarantees the right to a speedy trial to its citizens.” (internal citation omitted)).

77. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (incorporating the Fifth Amendment double jeopardy clause and explaining, “Today, every state incorporates some form of the prohibition in its constitution or common law”); *Griffin v. California*, 380 U.S. 609, 611 n.3 (1965) (incorporating the Fifth Amendment protection against comments on the defendant’s failure to testify and explaining that “[t]he overwhelming consensus of the States . . . is opposed to allowing comment on the defendant’s failure to testify. The legislatures or courts of 44 states have recognized that such comment is, in light of the privilege against self-incrimination, ‘an unwarrantable line of argument.’” (quoting *State v. Howard*, 14 S.E. 481, 483 (S.C. 1892))).

78. *Duncan v. State of Louisiana*, 391 U.S. 145, 149 (1968); *accord Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (asking whether “a fair and enlightened system of justice would be impossible” without the protection at issue).

asking that question, the Justices used little imagination. As elsewhere, they surveyed the states instead.

B. Procedural Due Process

Lest one think that only the Supreme Court's substantive due process cases are explicitly majoritarian, I now turn to the process side of due process. Here the Court is free of the paradox that in the substantive due process context led it to create doctrine whole cloth, yet its use of state legislative consensus to decide due process protection remains. To see the phenomenon at work, consider the Court's decisionmaking in three procedural due process contexts: fundamental procedures, notice and opportunity to be heard, and burdens of proof.

1. 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. Indeed, the standard that the Court uses to identify fundamental rights in the procedural due process context is almost identical to the standard it uses to identify fundamental rights 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."⁷⁹ Here again, the result is a decisionmaking framework that looks to the states to delineate the contours of constitutional protection.

The Supreme Court's decision in *Schad v. Arizona*⁸⁰ provides a revealing discussion of the importance of state legislative consensus in the Court's analysis. In *Schad*, the defendant argued that due process required the jury to agree on a single theory of mens rea to support his conviction for first-degree murder.⁸¹ The Court rejected that contention, emphasizing "the importance of history

79. 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. See, e.g., Lawrence v. Texas, 539 U.S. 558, 593 (2003); Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); see also *supra* text accompanying notes 22 and 63 (discussing standards for identifying fundamental rights in substantive due process and selective incorporation contexts).

80. 501 U.S. 624 (1991).

81. In accordance with Arizona law, the prosecutor in *Schad*'s case had advanced both premeditated and felony-murder theories to support the first-degree murder conviction, and the trial court had not required the jury to agree on one of the two theories, as both satisfied the mens rea requirement for first-degree murder. See *id.* at 624, 629.

and widely shared practice as concrete indicators of what fundamental fairness and rationality require.”⁸² According to the Court,

Where a State’s particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that a state has . . . defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant’s burden.⁸³

After placing Arizona’s approach to first-degree murder within “the norm” of a majority of states,⁸⁴ the Court went on to explain:

Such historical and contemporary acceptance of Arizona’s definition of the offense and verdict practice is a strong indication that they do not ‘offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ for we recognize the high probability that legal definitions, and the practices comporting with them, 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.⁸⁵

In short, if a procedure was *truly* inconsistent with due process, most states would not be using it.

Other decisions similarly showcase the Supreme Court polling the states to decide the limits of procedural due process protection. For example, the Court has counted states to decide a procedural due process challenge to a state’s definition of insanity.⁸⁶ It has counted states to decide a procedural due process challenge to a state’s exclusion of evidence on the issue of a defendant’s mental state.⁸⁷ It has counted states to decide a procedural due process challenge to

82. *Id.* at 640.

83. *Id.*

84. *Id.* at 642 (“[T]here is sufficiently widespread acceptance of the two mental states as alternative means of satisfying the mens rea element of the single crime of first-degree murder to persuade us that Arizona has not departed from the norm.”).

85. *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

86. See *Clark v. Arizona*, 548 U.S. 735, 748–52 (2006) (rejecting defendant’s claim that due process entitled him to at least the *M’Naghten* test on issue of insanity, surveying states and concluding, “[w]ith this varied background, it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice”).

87. See *Montana v. Egelhoff*, 518 U.S. 37, 46–49, 51 (1996) (rejecting defendant’s claim that due process entitled him to submit evidence of intoxication on the issue of his mental state at the time of the offense, surveying states, and concluding: “Although the rule allowing a jury to consider evidence of a defendant’s voluntary intoxication where relevant to *mens rea* has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent

pretrial detention of juveniles.⁸⁸ And, most recently, it has counted states to decide a procedural due process challenge to a state's post-conviction procedures for DNA testing of evidence.⁸⁹ In these and other cases,⁹⁰ the Court used the majority position of the states to define the "traditions and conscience of our people" embodied in due process.

Granted, the Court also has clarified on several occasions that the states' position on an issue is not conclusive in its due process analysis.⁹¹ Yet over the years, a consensus among the states (or lack thereof) has been described as "weighty evidence,"⁹² "convincing support,"⁹³ "significant,"⁹⁴ and a "primary guide"⁹⁵ in the Court's procedural due process analysis. Simply put, the consensus view of the states does not decide the matter—as in the "evolving standards" context, the Justices can always go against the grain⁹⁶—but it comes close.

allegiance, to qualify as fundamental, especially since it displaces a lengthy common-law tradition which remains supported by valid justifications today.").

88. See *Schall v. Martin*, 467 U.S. 253, 267–68 (1984) (rejecting defendant's claim that due process prevented pretrial detention of juveniles, surveying states and concluding, "[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").

89. See *Dist. Att'y's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2316, 2320–21 (2009) (rejecting a procedural due process challenge to Alaska's postconviction relief procedures for persons seeking access to evidence for DNA testing, noting that forty-six states have statutes governing access to DNA testing and that while Alaska is not among them, "[its] procedures are similar to those provided by federal law and the laws of other States, and they are not inconsistent with the 'traditions and conscience of our people'" (quoting *Medina v. California*, 505 U.S. 437, 446 (1992)) (internal citation omitted); see also *id.* at 2317 (noting Alaska's "widely accepted three-part test" governing access to DNA rights).

90. See, e.g., *Estes v. Texas*, 381 U.S. 532, 540–41 (1965) (polling states to decide a due process challenge to refusal to televise trial); *Snyder v. Massachusetts*, 291 U.S. 97, 118–20 (1934) (polling states to determine a due process issue in defendant's inability to be present at view of crime scene).

91. See, e.g., *Schad v. Arizona*, 501 U.S. 624, 642 (1991) ("This is not to say that either history or current practice is dispositive."); *Schall v. Martin*, 467 U.S. 253, 268 (1984) ("The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952))).

92. *Estes*, 381 U.S. at 540 (characterizing the fact that only two states allow the televising of a criminal trial as "weighty evidence that our concepts of a fair trial do not tolerate such an indulgence").

93. *Powell v. Alabama*, 287 U.S. 45, 73 (1932) ("A rule adopted with such unanimous accord . . . lends convincing support to the conclusion we have reached as to the fundamental nature of that right.").

94. *Schad*, 501 U.S. at 643 ("In fine, history and current practice are significant indicators of what we as a people regard as fundamentally fair . . .").

95. *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) ("Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice.").

96. See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) ("[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

2. Notice and Opportunity To Be Heard

The Supreme Court’s decisionmaking in the context of notice and opportunity to be heard introduces yet another way in which the majority position of the states shapes the contours of procedural due process protection: by guiding *application* of a constitutional norm. Granted, this is slightly different from what the Court does under the “evolving standards” doctrine, where state legislative consensus is used to identify the norm itself. But in the end, the result is the same: explicitly majoritarian constitutional protection.

When considering claims of insufficient notice and/or opportunity to be heard, the Supreme Court evaluates the adequacy of procedural protections using an interest-balancing approach that in substance (and sometimes name) tracks the three-part balancing test enunciated in *Mathews v. Eldridge*.⁹⁷ Under the *Mathews* balancing test, the Court weighs the government’s interest in the procedure against the private interests at stake and the likelihood that a different procedure would lessen the risk of erroneous deprivation.⁹⁸ On its face, nothing about the Supreme Court’s doctrine in this area is majoritarian, yet in practice, explicitly majoritarian benchmarks seep into the Court’s decisionmaking in several ways.

Sometimes the Court uses the fact that most states have adopted similar procedures as evidence of the importance of the government interest at stake. For example, in *Pennsylvania v. Ritchie*,⁹⁹ the Supreme Court used the majority position of the states to reject a defendant’s due process claim to notice of the contents of a child abuse report in a sexual assault case. According to the Court, “The 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.”¹⁰⁰ In other cases, too, the Court has validated the government’s interest in a particular procedure by pointing to the legislative position of a majority of states.¹⁰¹

penalty under the Eighth Amendment.”); *accord* *Roper v. Simmons*, 543 U.S. 551, 564 (2005); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

97. 424 U.S. 319 (1976).

98. *See id.* at 321; *see also* NOWAK & ROTUNDA, *supra* note 19, at 636–39, 655 n.77 (discussing the *Mathews* balancing test).

99. 480 U.S. 39 (1987).

100. *Id.* at 60 n.17.

101. *See, e.g., 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,

Conversely, sometimes the Supreme Court uses the fact that most states have not adopted similar procedures as evidence of the *insufficiency* of the government interest at stake. For example, in the landmark decision *Connecticut v. Doehr*,¹⁰² the Court used the majority position of the states to invalidate a statutory scheme that allowed for prejudgment attachment of real estate without notice or a showing of exigent circumstances.¹⁰³ Rejecting the state's interest in the procedure, the Court relied 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,"¹⁰⁴ and attached an appendix to its opinion categorizing the statutes along five different axes.¹⁰⁵ Similarly, in *Ake v. Oklahoma*,¹⁰⁶ the Court relied on over forty state statutes in finding that a trial court's refusal to appoint a psychiatrist to support an indigent defendant's mental health claim deprived him of the opportunity to present a fair defense, reasoning:

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.¹⁰⁷

In other cases considering claims of notice and opportunity to be heard, too, the Court has relied on what most states *do* in determining what a state was entitled *not* to.¹⁰⁸

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").

102. 501 U.S. 1 (1991).

103. See *id.* at 17–18.

104. *Id.* at 17.

105. See *id.* at 24–25.

106. 470 U.S. 68 (1985).

107. *Id.* at 78–79 (internal citation omitted); see also *id.* at 79 (noting that "[m]ore than 40 states, as well as the Federal Government" entitle indigent defendants to a psychiatrist's assistance when warranted).

108. See, e.g., *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

Finally, sometimes in these cases, the Supreme Court uses the fact that most states have, or have not, adopted similar procedures to assess the risk of erroneous deprivation inherent in a particular procedure. In *Ake*, for example, the Court concluded its analysis with the following:

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.¹⁰⁹

Likewise, in *Parham v. J.R.*,¹¹⁰ the Court rejected a due process challenge to a state’s truncated procedure for committing juveniles to state mental hospitals, reasoning, “That 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.”¹¹¹

In the area of notice and opportunity to be heard, then, the Supreme Court uses majoritarian benchmarks to guide its decisionmaking in several ways. Again, none of these are exactly what the Court does under “evolving standards,” but in the larger genre of constitutional decisionmaking, the upshot is the same. Whether using the majority position of the states to identify the constitutional norm or just apply it, the result is distinctly majoritarian constitutional protection, and deliberately so.

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 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.”)

109. *Ake*, 470 U.S. at 79–80.

110. 442 U.S. 584 (1979).

111. *Id.* at 612; see also *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (relying on “statutory and decisional law of virtually every State in the Nation” to find that defendant was deprived of an opportunity to be heard where the state excluded testimony at trial that called into question the reliability of his confession).

3. Burdens of Proof

The Supreme Court's decisionmaking in the burden-of-proof context presents a final, and striking, example of its explicitly majoritarian approach to procedural due process protection. In this area, the Court has at times applied a balancing test, and at times applied its fundamental rights doctrine.¹¹² The one constant has been the importance of state legislative consensus in the Court's burden-of-proof analysis.

The Supreme Court's decision in *Rivera v. Minnich*¹¹³ illustrates just how explicitly majoritarian the Court's approach in this area is. In *Rivera*, the Court upheld a state's use of the preponderance standard for determining paternity, relying heavily on the fact that it was "the same standard that is applied in paternity litigation in the majority of American jurisdictions."¹⁴ Justifying its decision, the Court 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 from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions.¹¹⁵

The Court then went on to discuss three prior cases in which it had invalidated a burden-of-proof standard, emphasizing the importance of the majority position of the states in each of those rulings.¹¹⁶

As *Rivera* recognized, the Supreme Court has polled the states in deciding a number of other burden-of-proof issues as well. For example, the Court counted states when it rejected the preponderance-of-evidence standard in

112. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 754–55 (1982) (using the *Mathews* balancing test to determine the burden of proof required in a termination of parental rights proceeding); *Medina v. California*, 505 U.S. 437, 443–46 (1992) (rejecting the *Mathews* balancing test and asking whether burden of proof in competency proceedings is fundamental).

113. 483 U.S. 574 (1987).

114. *Id.* at 577–78; see also *id.* at 579 (relying on "[t]he collective judgment of the many state legislatures" in determining what due process requires).

115. *Id.* at 578 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

116. See *id.* at 578–79 ("In each of the three cases in which we have held that a standard of proof prescribed by a state legislature was unconstitutional, our judgment was consistent with the standard imposed by most jurisdictions." (discussing *Santosky v. Kramer*, 455 U.S. 745, 749 & n.3 (1997); *Addington v. Texas*, 441 U.S. 418, 426 (1979); *In re Winship*, 397 U.S. 358 (1970))).

criminal proceedings,¹¹⁷ civil commitment proceedings,¹¹⁸ and termination of parental rights proceedings.¹¹⁹ The Court counted states when it decided burden-of-proof issues relating to surrogate medical decisions¹²⁰ and a criminal defendant’s competency.¹²¹ And the Court counted states when it resolved burden-of-proof questions related to sentencing enhancements¹²² and criminal intent.¹²³ Although here again, the states’ widespread adoption of a particular burden of proof is not *conclusive* in the due process analysis, the Court has

117. See *Winship*, 397 U.S. at 361–62 (“Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does ‘reflect a profound judgment about the way in which law should be enforced and justice administered.’” (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968))).

118. See *Addington*, 441 U.S. at 426 (holding that due process is not satisfied by the preponderance of evidence standard in involuntary civil commitment proceedings, noting that “only one state by statute permits involuntary commitment by a mere preponderance of the evidence”).

119. See *Santosky*, 455 U.S. at 749 & n.3 (holding that due process is not satisfied by the preponderance of evidence standard in termination of parental rights proceedings, noting, “[t]hirty-five States, the District of Columbia, and the Virgin Islands currently specify a higher standard of proof, in parental rights termination proceedings, than a ‘fair preponderance of the evidence’” (citations omitted)).

120. See *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 284 (1990) (holding that due process did not prohibit the state’s use of the clear and convincing standard to judge surrogate medical decisions, under which oral statements had been found inadequate, and noting that “most, if not all, States simply forbid oral testimony entirely in determining the wishes of parties in transactions which, while important, simply do not have the consequences that a decision to terminate a person’s life does”); see also *id.* at 280 (“Whether or not Missouri’s clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide.”).

121. See, e.g., *Cooper v. Oklahoma*, 517 U.S. 348, 360–62 (1996) (holding that due process is violated by state procedure requiring defendant to prove incompetence by clear and convincing evidence, stating: “Only 4 of the 50 States presently require the criminal defendant to prove his incompetence by clear and convincing evidence The near-uniform application of a standard that is more protective of the defendant’s rights than Oklahoma’s clear and convincing evidence rule supports our conclusion that the heightened standard offends a principle of justice that is deeply ‘rooted in the traditions and conscience of our people.’” (quoting *Medina v. California*, 505 U.S. 437, 445 (1992))); *Medina*, 505 U.S. at 447–48 (holding that due process is satisfied by state rule imposing upon defendant burden of proving incompetency, polling states and concluding that “there remains no settled view of where the burden of proof should lie”).

122. See *Apprendi v. New Jersey*, 530 U.S. 466, 482–83 (2000) (holding that due process requires proof beyond a reasonable doubt of any fact that increases penalty for crime beyond statutorily prescribed maximum, noting “the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone”).

123. *Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975) (holding that due process is violated by state rule imposing upon defendant burden of proving absence of malice, noting that “the large majority of States . . . now require the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt”).

emphasized that the consensus view of the states “does reflect a profound judgment about the way in which law should be enforced and justice administered.”¹²⁴ Under the “evolving standards” doctrine, the same legislative consensus amounts to nothing more, or less.¹²⁵

II. THE COUNTERMAJORITARIAN CONSTITUTION: EQUAL PROTECTION AND THE FIRST AMENDMENT

Given the Supreme Court’s explicitly majoritarian approach to a variety of due process protections, it is tempting to conclude that the Due Process Clause is, like the Cruel and Unusual Punishments Clause, more or less an anomaly in constitutional law. After all, due process has been called “the most absorptive of powerful social standards of a progressive society,”¹²⁶—a depiction not so different from the “evolving standards of decency that mark the progress of a maturing society” under the Eighth Amendment.¹²⁷ Yet even where the Supreme Court is construing constitutional provisions celebrated for countermajoritarian protection—provisions famous for frustrating, rather than following, majority will—one can still find striking similarities to what the Court does under the “evolving standards” doctrine. The Equal Protection Clause and First Amendment, both sources of several of the Supreme Court’s most famous countermajoritarian rulings,¹²⁸ present prime examples.

A. Equal Protection

Unlike other constitutional provisions, the Equal Protection Clause contains no substantive guarantee of its own. Rather, its promise is equal treatment

124. *In re Winship*, 397 U.S. 358, 361–62 (1970) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)); accord *Apprendi*, 530 U.S. at 478; *Rivera v. Minnich*, 483 U.S. 574, 578–79 (1987).

125. See *supra* text accompanying note 3 (discussing the role of state legislation in “evolving standards” analysis); *supra* text accompanying note 96 (discussing the Supreme Court’s admonition that state legislative consensus is not conclusive in “evolving standards” analysis).

126. *Griffin v. Illinois*, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring) (“Due process’ is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.”); accord *Medina*, 505 U.S. at 454 (O’Connor, J., concurring).

127. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

128. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (invalidating racially segregated schools under the Equal Protection Clause); *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating school prayer under the First Amendment); *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating a state’s proscription on flag burning under the First Amendment); see also Friedman, *supra* note 9, 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.”).

in whatever substantive guarantees the law otherwise provides.¹²⁹ To realize this promise, the Supreme Court takes an approach to equal protection almost identical to its approach to due process fundamental rights, just slightly more elaborate.¹³⁰ Under the Equal Protection Clause, if a classification burdens a fundamental right or suspect class, it must be narrowly tailored to a compelling state interest.¹³¹ If the classification burdens a quasi-suspect class, it must be substantially related to an important government interest.¹³² And if the classification does neither, it need only be rationally related to a legitimate government interest.¹³³

Despite their similarities, the Supreme Court’s substantive due process and equal protection cases tend to exemplify different ways in which the same doctrine can be majoritarian. In the substantive due process context, the prime conduit for majoritarian decisionmaking is the identification of fundamental rights.¹³⁴ The Court’s equal protection decisions use that avenue too,¹³⁵ but here the prime conduit for majoritarian decisionmaking is the application of the balancing test framework itself. Granted, this is (again) slightly different from what the Court does under “evolving standards,” where state legislative consensus is used to identify the constitutional norm, not just apply it. But as in the area of notice and opportunity to be heard, the distinction is without much difference—both result in explicitly majoritarian constitutional protection.

Consider, for example, the Supreme Court’s decision in *Heller v. Doe*.¹³⁶ In *Heller*, the Court upheld a classification that treated mentally retarded and

129. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) (“Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.”).

130. See generally NOWAK & ROTUNDA, *supra* note 19, at 429 (comparing provisions).

131. 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 is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”); see also NOWAK & ROTUNDA, *supra* note 19, at 687–88 (discussing the strict scrutiny standard and its application to classifications based on race or national origin); *id.* at 751–52 (discussing *Korematsu*’s introduction of the strict scrutiny standard).

132. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (articulating intermediate scrutiny standard); see also NOWAK & ROTUNDA, *supra* note 19, at 688 (discussing the intermediate scrutiny standard and its application to classifications based on gender or illegitimacy).

133. See *Heller v. Doe*, 509 U.S. 312, 319–21 (1993) (discussing the rational basis standard); see also NOWAK & ROTUNDA, *supra* note 19, at 429, 687 (same).

134. See *supra* text accompanying notes 22–23.

135. Compare, e.g., *Vacco v. Quill*, 521 U.S. 793, 804–05 (1997) (relying on the majority position of the states to find no fundamental right to assisted suicide under equal protection analysis), with *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (relying on the same under due process analysis).

136. 509 U.S. 312.

mentally ill persons differently for the purposes of involuntary commitment, relying in part on the fact that “[a] large majority of states have separate involuntary commitment laws for the two groups.”¹³⁷ According to the Court, “That the law has long treated the classes as distinct suggests that there is a commonsense distinction” along the lines that the classification has drawn.¹³⁸

In other cases, too, the Supreme Court has relied on a consensus among the states to validate a classification. In *San Antonio Independent School District v. Rodriguez*,¹³⁹ for example, the Court upheld a state’s unequal allocation of funding among school districts, reasoning:

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.¹⁴⁰

And in *Vacco v. Quill*,¹⁴¹ the Court rejected 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.”¹⁴² In these decisions and others,¹⁴³ what proved a classification legitimate was its use in a majority of states.

The reverse is also true. The Supreme Court has instructed that “[d]iscriminations of unusual character” be carefully considered, even under rational basis

137. *Id.* at 327–28, 328 n.3 (applying rational basis review).

138. *Id.* at 326.

139. 411 U.S. 1 (1973).

140. *Id.* at 47–48 (applying rational basis review).

141. 521 U.S. 793 (1997).

142. *Id.* at 804–05 (applying rational basis review); see also *supra* note 135 (discussing *Vacco*’s use of the majority position of the states to reject the claim that assisted suicide is a fundamental right under Equal Protection Clause).

143. See, e.g., *Martinez v. Bynum*, 461 U.S. 321, 325 n.4 (1983) (rejecting equal protection challenge to residency requirement for tuition-free public schooling and noting that “[t]he vast majority of the States have some residence requirements governing entitlement to tuition-free public schooling”); *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 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, 583–84 (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 . . . [I]f reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.”).

review,¹⁴⁴ and has invalidated a number of outlier classifications on that basis. From the poll tax,¹⁴⁵ to gender restrictions in the sale of alcohol,¹⁴⁶ to a state constitutional amendment targeting sexual orientation,¹⁴⁷ to other sex and race classifications,¹⁴⁸ the Court has used the majority position of the states to determine the minimum that equal protection requires.

Given the conventional understanding of the Equal Protection Clause as a bastion for minority rights,¹⁴⁹ the Supreme Court’s reliance on state legislative consensus in this area may come as a surprise. But upon reflection, perhaps it shouldn’t. On the surface, the Equal Protection Clause requires only that like persons be treated alike. Yet underlying the apparent simplicity of that command are more difficult questions about *what* differences matter *when*—and those are questions with no ready answers. As Peter Westen recognized years ago, equality is an “empty idea” on its own, a precept that means nothing absent the value judgments used to fill it.¹⁵⁰ In the end, those value judgments have to come from *somewhere*. Here, too, the majority position of the states is an obvious (and oft-used) choice.

144. See *Romer v. Evans*, 517 U.S. 620, 633 (1996) (justifying careful scrutiny under rational basis review).

145. See *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”).

146. See *Craig v. Boren*, 429 U.S. 190, 208 n.22 (1976) (invalidating gender distinctions in state regulation of sale of alcohol, stating that “[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 . . .”).

147. See *Romer*, 517 U.S. at 633 (invalidating a state constitutional amendment prohibiting protection on the basis of sexual orientation, relying in part on the fact that it was “unprecedented”).

148. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147 n.3 (1980) (invalidating gender distinctions for surviving spouse benefits, noting that “[t]he workers’ compensation laws of the vast majority of States now make no distinction between the eligibility of widows and widowers for death benefits”); *Loving v. Virginia*, 388 U.S. 1, 6 & n.5 (1967) (invalidating a miscegenation statute, noting that “Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications” and that “[o]ver the past 15 years, 14 States have repealed laws outlawing interracial marriages”); see also *Grutter v. Bollinger*, 539 U.S. 306, 357 (2003) (Thomas, J., concurring in part and dissenting in part) (opining that in the affirmative action context, “circumstantial evidence as to whether a state activity is of pressing public necessity can be obtained by asking whether all States feel compelled to engage in that activity”); *J.E.B. v. Alabama*, 511 U.S. 127, 144 (1994) (invalidating gender-based preemptory challenges, stating that “[t]he experience in the many jurisdictions that have barred gender-based challenges belies the claim that litigants and trial courts are incapable of complying with a rule barring strikes based on gender”).

149. See *supra* note 128 and accompanying text.

150. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

B. First Amendment

Unlike the elusive Equal Protection Clause, the First Amendment is written in unequivocal terms. Yet despite its opening command, "Congress shall make no law,"¹⁵¹ the First Amendment's protection of religion and free speech has not proven to be absolute. Here, too, the Court's jurisprudence is chock full of line drawing and limitations, with examples of explicitly majoritarian decisionmaking at nearly every turn.

In the religion context, the Supreme Court has resolved the tension between the Free Exercise Clause and the Establishment Clause by steering a course of basic religious neutrality.¹⁵² In practice, that means a government regulation can neither benefit nor burden religion (at least not on purpose)¹⁵³ unless doing so is necessary to promote a compelling state or federal interest.¹⁵⁴ As was true in the equal protection context, the Court's interest-balancing approach to religious freedom inevitably requires judgments about the sufficiency of the government interest at stake and the legitimacy of the means used to serve it.¹⁵⁵ And as was true in the equal protection context, the Court commonly counts states in conducting its analysis.

A number of cases illustrate the point. For example, the Supreme Court relied on the majority position of the states when it upheld Sunday closing laws¹⁵⁶

151. 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 . . .").

152. See NOWAK & ROTUNDA, *supra* note 19, at 1408 (discussing the neutrality principle); see also *supra* text accompanying note 151 (quoting both clauses).

153. See *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–89 (1990) (holding that the Free Exercise Clause does not prohibit governmental burden on religion where the law is neutral and of general applicability, and was not intended to burden religious practice); accord *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006); see also *Van Orden v. Perry*, 545 U.S. 677, 690–91 (2005) (noting that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause," at least without an "improper and plainly religious purpose").

154. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."); see also NOWAK & ROTUNDA, *supra* note 19, at 1408–09 (discussing the compelling interest test).

155. See *supra* Part II.A (discussing the equal protection doctrine and the Supreme Court's use of majoritarian benchmarks in applying it).

156. See *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").

and a tax exemption for churches.¹⁵⁷ The Court counted states when it refused to bar opening prayers in legislative assemblies¹⁵⁸ and when it invalidated a rule that barred ministers from serving as delegates.¹⁵⁹ And the Court counted states when it struck down a school district boundary that tracked denominational lines.¹⁶⁰ On each of these occasions, the Court used the majority position of the states to determine the reach of First Amendment protection.

In the free speech context, the Supreme Court’s decisionmaking is explicitly majoritarian in yet another way. Here, too, the Court uses an interest-balancing approach, and one can readily find examples of state polling within that analysis.¹⁶¹ But in addition to that approach, the Court also makes threshold determinations about whether certain categories of speech are outside the ambit of First Amendment protection altogether¹⁶²—and these determinations likewise showcase the Court drawing the lines of First Amendment protection in a distinctly majoritarian manner.

157. See *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, “All 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 . . .”).

158. See *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”).

159. See *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”).

160. See *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”).

161. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353–54, 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”). See generally NOWAK & ROTUNDA, *supra* note 19, at 1130–43 (discussing various categories of speech and the different interest-balancing tests used to evaluate restrictions on them).

162. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (noting that “a limited categorical approach has remained an important part of our First Amendment jurisprudence”).

According to the Supreme Court, “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.”¹⁶³ So how do we know when we are dealing with one of those classes? On a number of occasions, the Court’s answer has involved polling the states. For example, when the Court excluded libel from First Amendment protection, it justified its decision with the recognition that “[t]oday, every American jurisdiction—the forty-eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish[es] libels directed at individuals.”¹⁶⁴ Similarly, when the Court excluded child pornography from First Amendment protection, it began the analysis with a detailed breakdown of similar state statutes, ultimately concluding:

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. . . . Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating “child pornography.” . . . That judgment, we think easily passes muster under the First Amendment.¹⁶⁵

Likewise, when the Court excluded obscenity from First Amendment protection, it cited “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.”¹⁶⁶ In each of these cases, the Court did just what it does under “evolving standards”: it made a categorical ruling based on the one the states had made on their own.

Upon reflection, both the First Amendment and the Equal Protection Clause present intriguing examples of explicitly majoritarian decisionmaking outside the Eighth Amendment. Granted, the Supreme Court’s reliance on state legislative consensus in both areas is less formalized, and less prevalent, than what one sees in the due process arena. And granted, the Court in both areas *generally* uses the states to apply the constitutional norm, rather than identify it

163. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *accord* *Virginia v. Black*, 538 U.S. 343, 358 (2003); *Roth v. United States*, 354 U.S. 476, 485 (1957).

164. *Beauharnais v. Illinois*, 343 U.S. 250, 255 (1952).

165. *New York v. Ferber*, 458 U.S. 747, 757–58 (1982).

166. *Roth*, 354 U.S. at 485. Indeed, in the obscenity context, the Supreme Court takes the notion of explicitly majoritarian protection to a whole new level. Not only has the Court excluded obscenity from First Amendment protection based on the majority position of the states, but it has used the majority position of each *locality*—“contemporary community standards”—to define obscenity in the first place. See *Miller v. California*, 413 U.S. 15, 37 (1973); see also *id.* at 44 (Douglas, J., dissenting) (“To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society.”).

in the first place.¹⁶⁷ But it is nevertheless remarkable that even when the Court is construing provisions famous for countermajoritarian protection,¹⁶⁸ its decisionmaking is still riddled with majoritarian benchmarks, resulting in explicitly majoritarian constitutional protection.

III. THE CRIMINAL CONTEXT: FOURTH AND SIXTH AMENDMENTS

In the final leg of this doctrinal tour, I turn to the criminal context, yet another area where the Supreme Court has been credited for protecting minority rights from the vagaries of majority will.¹⁶⁹ Here I examine the Court’s decisionmaking under the Fourth and Sixth Amendments, both of which present striking examples of state polling outside the Eighth Amendment. Consider first the Fourth Amendment.

A. Fourth Amendment

Nothing about the Fourth Amendment’s prohibition against “unreasonable searches and seizures”¹⁷⁰ necessitates the sort of state nose-counting for which the “evolving standards” doctrine is famous, yet here, too, the Supreme Court’s decisionmaking is explicitly majoritarian. Those who now know the drill (and Fourth Amendment doctrine) might surmise that the Court counts states when deciding whether a defendant has a constitutionally cognizable expectation of privacy—the threshold determination for Fourth Amendment search claims.¹⁷¹ After all, the Court has clarified that the Fourth Amendment does not protect *all* expectations of privacy, only those “that society is prepared to recognize as reasonable.”¹⁷² Thus far, however, this threshold inquiry for Fourth Amendment protection has not given rise to the same state polling we see in

167. The Court’s use of state legislative consensus to make categorical exclusions to First Amendment protection in the free speech context presents a conspicuous exception. See *supra* notes 163–166 and accompanying text.

168. See *supra* text accompanying note 128 (referencing the Supreme Court’s desegregation, school prayer, and flag burning cases).

169. Lain, *supra* note 65, at 1363–64 (discussing widely held view of Supreme Court’s 1960s criminal procedure decisions as “the quintessential example of the Supreme Court playing a heroic, countermajoritarian role”).

170. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

171. See *Katz v. United States*, 389 U.S. 347, 351 (1967) (“For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

172. *Id.* at 361 (Harlan, J., concurring); accord *Bond v. United States*, 529 U.S. 334, 338 (2000); *Minnesota v. Olsen*, 495 U.S. 91, 95–96 (1990); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

the Eighth Amendment context, despite its expression in seemingly majoritarian terms. Instead, the Court surveys the states to determine what the Fourth Amendment requires after the threshold showing for Fourth Amendment protection has been made.

The Supreme Court's decision in *Payton v. New York*¹⁷³ provides a fitting example. In *Payton*, the Court held that the Fourth Amendment prohibits warrantless entry into the home to make a routine felony arrest.¹⁷⁴ To reach its decision, the Court conducted a three-part analysis, considering first, well-settled common law; second, "the clear consensus among the States"; and third, expressions of Congress on the issue.¹⁷⁵ In its section discussing the states, the Court explained:

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.¹⁷⁶

The Court then went on to distinguish the issue in *Payton*—warrantless arrests in the home—from "the kind of virtual unanimity" that supported the absence of a warrant requirement for felony arrests in public,¹⁷⁷ using an approach almost identical to its analysis under "evolving standards." First the Court counted states, then it recognized a legislative trend in one direction, and then finally it discussed why "the strength of the trend is greater than the numbers alone indicate."¹⁷⁸ In *Roper v. Simmons*¹⁷⁹—the 2005 "evolving standards" case that invalidated the juvenile death penalty—the Court's analysis moved in the exact same lockstep fashion.¹⁸⁰

In other Fourth Amendment cases, too, the Supreme Court has formally recognized the importance of state counting in identifying the constitutional norm. In *Tennessee v. Garner*,¹⁸¹ for example, the Court began its discussion of the state legislative landscape with the statement, "In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also

173. 445 U.S. 573 (1980).

174. *Id.* at 602–03.

175. *See id.* at 590–603.

176. *Id.* at 600.

177. *Id.* (discussing *United States v. Watson*, 423 U.S. 411 (1976)).

178. *Id.*

179. 543 U.S. 551 (2005).

180. *See supra* text accompanying notes 26–31 (discussing the analysis in *Roper* and comparing the analysis in the "evolving standards" and the substantive due process fundamental rights context).

181. 471 U.S. 1 (1985).

looked to prevailing rules in individual jurisdictions.”¹⁸² Similarly, in *Atwater v. City of Lago Vista*,¹⁸³ the Court parroted back Justice O’Connor’s admonition in *Garner* that courts should be “reluctant” to invalidate under the Fourth Amendment a historically accepted practice that “has continued to receive the support of many state legislatures.”¹⁸⁴

Applying these principles has led the Supreme Court to explicitly majoritarian rulings on a number of key Fourth Amendment issues. For example, the Court counted states in its landmark ruling on excessive force.¹⁸⁵ Likewise, it counted states when deciding Fourth Amendment challenges to “knock and announce” procedures,¹⁸⁶ warrantless arrests,¹⁸⁷ warrantless administrative searches,¹⁸⁸ and arrests for nonjailable offenses.¹⁸⁹ On each of these issues, what struck the Court as “reasonable” was what the majority of states considered the term to mean.

B. Sixth Amendment

The Sixth Amendment provides a final, and compelling, example of explicitly majoritarian doctrine outside the Eighth Amendment. By its own terms, the Sixth Amendment’s protections apply “[i]n all criminal prosecutions.”¹⁹⁰ But as it turns out, “all” does not mean *all*.¹⁹¹ According to the Supreme Court,

182. *Id.* at 15–16.

183. 532 U.S. 318 (2001).

184. *Id.* at 345 n.14 (quoting *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O’Connor, J., dissenting)); see also *infra* text note 189 (quoting state counting in *Atwater*).

185. See *Garner*, 471 U.S. at 18 (finding a Fourth Amendment violation where police used deadly force against nonviolent felon, stating, “the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States”). For an excellent discussion of majoritarian doctrine in the excessive force context, see generally Winter, *supra* note 9.

186. See *Wilson v. Arkansas*, 514 U.S. 927, 933–34 (1995) (recognizing “knock and announce” as a Fourth Amendment requirement “embedded in Anglo-American law”).

187. See *United States v. Watson*, 423 U.S. 411, 421–22 (1976) (recognizing the validity of warrantless arrest in public, stating, “The 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.”).

188. See *New York v. Burger*, 482 U.S. 691, 698 n.11 (1987) (recognizing validity of warrantless administrative search of vehicle-dismantling business, stating “Numerous States have provisions for the warrantless inspections of vehicle dismantlers and automobile junkyards,” and citing thirty-eight state statutes).

189. See *Atwater*, 532 U.S. at 320, 344 (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 an appendix).

190. U.S. CONST. amend. VI.

191. Barry Friedman has made the same point. See Friedman, *supra* note 9, at 593–94 (noting in the Sixth Amendment context that “‘all’ turns out not to mean all: it just means some”).

“all” actually means *some*, and here again the Court uses the majority position of the states to draw the lines of constitutional protection.

The right to jury is a prime example. For more than seventy years now, the Supreme Court has looked to the states to determine which jury practices are constitutionally required and which are not. In *District of Columbia v. Clawans*,¹⁹² for example, the Court instructed that “objective standards such as may be observed in the laws and practices of the community” guide the jury trial analysis.¹⁹³ In *Duncan v. Louisiana*,¹⁹⁴ the Court reiterated this instruction, stressing the importance of “objective criteria, chiefly the existing laws and practices in the Nation.”¹⁹⁵ To death penalty scholars, that phraseology should sound familiar—it is nearly identical to what the Court has said when applying the “evolving standards” doctrine.¹⁹⁶

In other cases, too, the Supreme Court has recognized the importance of a state legislative consensus in its jury trial analysis. In *Burch v. Louisiana*,¹⁹⁷ for example, the Court used the majority position of the states to invalidate nonunanimous six-member juries.¹⁹⁸ Justifying its decision, the Court explained:

It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous 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.¹⁹⁹

Similarly, in *Baldwin v. New York*,²⁰⁰ the Court used the majority position of the states to determine whether a potential one-year sentence was sufficiently severe to trigger the right to jury.²⁰¹ Rejecting offhand New York’s proposed

192. 300 U.S. 617 (1937).

193. *Id.* at 628 (“Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments.”).

194. 391 U.S. 145 (1968).

195. *Id.* at 161 (“In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans* . . . to refer to objective criteria, chiefly the existing laws and practices in the Nation.” (citing *Clawans*, 300 U.S. at 628)).

196. See *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (stating in “evolving standards” context that “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures”); accord *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). I made a similar point in Part I of this Article. See *supra* text accompanying notes 23–24 (discussing reliance on state legislation in the “evolving standards” and substantive due process contexts).

197. 441 U.S. 130 (1979).

198. *Id.* at 138–39.

199. *Id.* at 138.

200. 399 U.S. 66 (1970).

201. *Id.* at 70.

analysis, the Court instructed, “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.’”²⁰² In these cases and others, the Court did just what it does under the “evolving standards doctrine”—survey the states and follow the national norm.²⁰³

In other Sixth Amendment contexts, too, one can readily find examples of explicitly majoritarian decisionmaking. For instance, the Supreme Court has polled the states to decide questions concerning the right to a speedy trial,²⁰⁴ right to a public trial,²⁰⁵ and right to an impartial jury.²⁰⁶ It has polled the states to decide questions regarding the right to compulsory process²⁰⁷ and the scope of the Confrontation Clause.²⁰⁸ Just last term, the Court polled the states

202. *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968)).

203. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 607–09 (2002) (finding a violation of Sixth Amendment right to jury where sentencing judge, rather than jury, found aggravating factors to support death sentence, noting that “the great majority of states” entrust such findings to the jury and that “other than Arizona, only four states” allow the judge to make such determinations); *Ballew v. Georgia*, 435 U.S. 223, 244 (1978) (invalidating a five-member jury under Sixth Amendment, noting that “only two States, Georgia and Virginia, have reduced the size of juries in certain nonpetty criminal cases to five”); *Williams v. Florida*, 399 U.S. 78, 122 (1970) (Harlan, J., concurring) (lamenting the majority’s decision to uphold a six-member jury under Sixth Amendment, noting that “[r]ather than bind the States by the hitherto undeviating and unquestioned federal practice of 12-member juries, the Court holds, based on a poll of state practice, that a six-man jury satisfies the guarantee of a trial by jury in a federal criminal system and consequently carries over to the States”).

For an excellent (and the only other) discussion of majoritarian doctrine in the Sixth Amendment right to jury context, see Friedman, *supra* note 9, at 593–98.

204. See, e.g., *Klopper v. North Carolina*, 386 U.S. 213, 220 n.5 (1967) (invalidating an indefinite *nolle prosequi* procedure as violating the right to a speedy trial, noting that “only North Carolina and Pennsylvania have held that a *nolle prosequi* indictment could be reinstated at a subsequent term”).

205. See, e.g., *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 388 n.19 (1979) (rejecting claim that members of the public have a right to access criminal trials, noting that “[a]pproximately half the States also have statutory prohibitions containing limitations upon public trials”).

206. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 533 (1975) (“If the fair-cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be systematically excluded from jury panels from which petit juries are drawn. This conclusion is consistent with the current judgment of the country, now evidenced by legislative or constitutional provisions in every State and at the federal level qualifying women for jury service.”).

207. See, e.g., *Washington v. Texas*, 388 U.S. 14, 16 n.4 (1967) (finding a violation of compulsory process where a state statute prevented defendant from placing an accomplice on the stand, noting that “[c]ounsel have cited no statutes from other jurisdictions, and we have found none, that flatly disqualify coparticipants in a crime from testifying for each other regardless of whether they are tried jointly or separately”).

208. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 853–54 (1990) (holding that the Confrontation Clause did not categorically prohibit child sexual assault testimony via one-way closed circuit television, explaining: “We likewise conclude today that a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court. That a significant majority of States have enacted

to decide when the right to counsel attaches, relying on “the overwhelming consensus practice” of forty-three states.²⁰⁹ In each of these areas, the Court demonstrated what every preschooler already knows: line-drawing is easiest when tracing lines already there.²¹⁰

IV. QUALIFICATIONS, EXPLANATIONS, IMPLICATIONS

Thus far, the analysis has aimed at proving the existence of explicitly majoritarian decisionmaking outside the Eighth Amendment. We see it in the many meanings of due process, we see it in areas famous for countermajoritarian protection like the Equal Protection Clause and First Amendment, and we see it in the criminal context. I now turn to a discussion of these findings, qualifying my analysis and sharing initial thoughts about the explanations and implications of state polling as a larger doctrinal phenomenon.

A. Qualifications

The aim of this section is to refine my claim so that it appears no bigger, or smaller, than it is. Four points merit mention.

First, the discussion above is not meant to suggest that the Supreme Court *always* polls the states in its constitutional decisionmaking, or even that it does so most of the time. In the end, the frequency, and formality, with which the Court polls the states depends on the constitutional context. In some areas—substantive due process protection of fundamental rights comes to mind—the doctrine is just as patently majoritarian and formally entrenched as “evolving standards.”²¹¹ In other areas—equal protection is a nice example—the doctrine is majoritarian not as stated, but as applied, and the state polling is more sporadic.²¹² Even within constitutional contexts, the cases differ in the amount of attention the Court gives to its state polling analysis. In some

statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy.”).

209. See *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2586–87 (2008) (“[T]he overwhelming consensus practice conforms to the rule that the first formal proceeding is the point of attachment. We are advised without contradiction that not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel ‘before, at, or just after initial appearance.’” (citation omitted)); see also *Argersinger v. Hamlin*, 407 U.S. 25, 27 n.1 (1972) (holding that no person may be imprisoned without the right to counsel, noting that “[o]verall, 31 States have now extended the right [of counsel] to defendants charged with crimes less serious than felonies”).

210. I credit Jessica Lain for this insight, based on empirical study.

211. See *supra* Part I.A.1 (discussing majoritarian doctrine in the context of substantive due process protection of fundamental rights).

212. See *supra* Part II.A (discussing equal protection doctrine).

cases, the discussion is extensive; it is not uncommon to see an appendix to the Court’s opinion cataloguing the positions of the states.²¹³ In others, the majority position of the states is presented more as a statement of fact, with little to no accompanying discussion.²¹⁴

In short, there are substantial variations in just how much the Supreme Court’s decisionmaking outside the Eighth Amendment resembles what it does under “evolving standards.” But the basic point remains. Contrary to what scholars *think* the Justices are doing²¹⁵—and contrary to what the Justices themselves have said they do²¹⁶—the Supreme Court routinely, and explicitly, uses the majority position of the states to determine the content of constitutional law.

Second, none of this is to say that the Supreme Court’s use of state legislative consensus outside the Eighth Amendment is any less subject to manipulation than it is within the Eighth Amendment. On a few occasions

213. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 355–60 (2001) (appendix surveying state statutes on warrantless misdemeanor arrests); *Connecticut v. Doebr*, 501 U.S. 1, 24–25 (1991) (appendix surveying state statutes on prejudgment attachment); *Elkins v. United States*, 364 U.S. 206, 224–25 (1960) (appendix surveying states on exclusionary rule); *Wolf v. Colorado*, 338 U.S. 25, 29–30 (1949) (same); see also *Baldwin v. New York*, 399 U.S. 66, 138–43 (1970) (Harlan, J., concurring in part and dissenting in part) (appendix surveying states on right to jury issues).

214. See, e.g., *Wilson v. Arkansas*, 514 U.S. 927, 933–34 (1995) (recognizing “knock and announce” as a Fourth Amendment requirement “embedded in Anglo-American law”); *Parham v. J.R.*, 442 U.S. 584, 612 (1979) (upholding state procedures for involuntary commitment of juveniles under Due Process Clause, explaining “[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”); *Ballew v. Georgia*, 435 U.S. 223, 244–45 (1978) (invalidating a five-member jury under the Sixth Amendment, noting that “only two States, Georgia and Virginia, have reduced the size of juries in certain nonpetty criminal cases to five”); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (“[T]he right of confrontation [i]s ‘one of the fundamental guarantees of life and liberty,’ and . . . ‘guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most, if not of all, the States composing the Union.’” (quoting *Kirby v. United States*, 174 U.S. 47, 55–56 (1899))); see also *infra* text accompanying note 218 (discussing the absence of state counting altogether in areas where the Supreme Court’s articulation of the constitutional standard appears to invite it).

215. See *supra* notes 7–8 and accompanying text (discussing widespread perception among death penalty scholars in particular, and larger academy in general, that the Supreme Court’s reliance on state legislative consensus to determine constitutional protection is limited to Eighth Amendment “cruel and unusual punishments” context).

216. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 560 (1923) (“The elucidation of [a constitutional] question cannot be aided by counting heads.”); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 999–1000 (1992) (Scalia, J., dissenting) (“How upsetting it is that so many of our citizens . . . think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus.”).

outside the “evolving standards” context, the Court appears to have manipulated the state count, couching the question in a particularly broad or narrow fashion to make the numbers come out right.²¹⁷ On other occasions, also relatively few, the Court simply ruled the other way, leaving majoritarian arguments to the dissent.²¹⁸ Both phenomena suggest that the Supreme Court’s state polling exercises outside the Eighth Amendment are just a doctrinal façade designed to take the Justices where they (already) want to go. And that may well be. But the same could be said—and has been—of the “evolving standards” doctrine too.²¹⁹

217. See, e.g., *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2631–32 (2008) (acknowledging that “a slim majority of the States with a [punitive damages-to-actual harm] ratio have adopted 3:1” but concluding, “[t]hus, a legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case”); *Michael H. v. Gerald D.*, 491 U.S. 110, 126–27 (1989) (acknowledging that almost all states recognize right of natural parent to assert paternity but distinguishing that right, stating: “What Michael asserts here is a right to have himself declared the natural father *and thereby to obtain parental prerogatives*. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them.”); *id.* at 137–42 (Brennan, J., dissenting) (chastising the majority’s manipulation of tradition and “level of generality”).

218. Most often (but not always), this occurs when the Court’s protection lags behind that of the states. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 492 (1981) (Brennan, J., dissenting) (“First, the experience of other jurisdictions, and California itself, belies the plurality’s conclusion that a gender-neutral statutory rape law ‘may well be incapable of enforcement.’ There are now at least 37 States that have enacted gender-neutral statutory rape laws.”); *Scott v. Illinois*, 440 U.S. 367, 385–88 (1979) (Brennan, J., dissenting) (“Perhaps the strongest refutation of respondent’s alarmist prophecies that an authorized imprisonment standard would wreak havoc on the States is that the standard has not produced that result in the substantial number of States that already provide counsel in all cases where imprisonment is authorized In fact, Scott would be entitled to appointed counsel under the current laws of at least 33 States.”); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 326 n.6 (1976) (Marshall, J., dissenting) (“Appellee has produced a study of the laws of the 50 States that shows that Massachusetts’ age-50 retirement law prescribes the earliest retirement age in the Nation, and that no other State requires its state police to retire before age 55. In short, I refuse to hypothesize that testing after age 50 loses its predictive ability when the appellants have introduced absolutely nothing that supports this position.”); *Braunfeld v. Brown*, 366 U.S. 599, 614–15 (1961) (Brennan, J., dissenting) (“It is true, I suppose, that the granting of [a religious] exemption [to Sunday closing laws] would make Sundays a little noisier, and the task of police and prosecutor a little more difficult. It is also true that a majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania’s.”); *cf. Texas v. Johnson*, 491 U.S. 397, 429 (1989) (Rehnquist, C.J., dissenting) (“I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.”). For an explanation of this phenomenon, see *infra* note 253 and accompanying text.

219. See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 25–35 (2007) (deconstructing the “evolving standards” doctrine to show result-oriented manipulation of state polling data, using the death penalty for juveniles and mentally retarded offenders as examples); Jacobi, *supra* note 1, at 1123–49 (discussing in depth the “junk social science of counting state legislation”). Indeed, the same could be said of the entire body of constitutional law. See Lawrence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D. 291, 292, 295 (2005) (open letter from Tribe announcing his decision to suspend work on

That said, it is more difficult to write off the Supreme Court’s reliance on state legislative consensus in some doctrinal areas than others. Where the Court has formally recognized the importance of the majority position of the states in its doctrinal analysis, as it does when state legislative consensus identifies the constitutional norm, one might plausibly accuse the Court of manipulating the state count—but not of manipulating the existence of state counting altogether. The Court’s doctrines in the areas of fundamental rights (both substantive and procedural varieties), selective incorporation, punitive damages, burdens of proof, and the Fourth and Sixth Amendments present prime examples.

In other areas, where the Court uses state counting to apply an already identified constitutional norm, it is concededly difficult to make the same claim. Here the most one can say is that even where state polling is not formally entrenched, the Court engages in it on a regular basis—and it does so with no apparent predilection for validating or invalidating a challenged practice.²²⁰ The Court’s decisions in the areas of notice and opportunity to be heard, equal protection, and the First Amendment illustrate this subset of cases. Again, there are substantial variations as to how close the Court’s decisionmaking outside the Eighth Amendment resembles what it does inside the Eighth Amendment, and that goes for doctrinal manipulation too.

Third, thus far I have characterized the Supreme Court’s reliance on state legislative consensus as majoritarian, but that is not necessarily the case. State legislation presumably reflects the views of a democratic majority, but whether that majority is also a contemporary majority at the time of the Court’s ruling is a separate question. State laws likely reflect the views of a number of different majorities, depending on when they were enacted, and their endurance over time likely says as much about the difficulty of repeal as it does support for

the second volume of his constitutional law treatise based on “conflict over basic constitutional premises” and “profound doubts whether any new synthesis . . . is possible at present”).

220. Professor Roderick Hills has argued that the Supreme Court’s state polling exercises are consistent with federalism principles because the Court tends to use state legislative consensus to preserve, rather than invalidate, a challenged state practice. See Hills, *supra* note 9. I respectfully disagree with this assessment. In many cases (including those in which state counting is not formally entrenched as identifying the constitutional norm and is thus more susceptible to result-oriented manipulation), the Supreme Court has used the majority position of the states to invalidate, as well as validate, state legislation. See *supra* notes 99–103, 105, 107 (discussing cases where the Supreme Court used state legislative consensus to invalidate legislation in the context of notice and opportunity to be heard); 140–143 (discussing same in equal protection context); 155–156, 158 (same in First Amendment context). In fairness, Professor Hills does not base his argument on an examination of the Court’s cases, but rather upon a discussion of why it does not make sense for the Court to invalidate state legislation based on state legislative consensus—and on that score, he may well be right. For my own take on the federalism implications of state counting, see *infra* notes 294–296 and accompanying text.

their continued vitality.²²¹ Thus, constitutional protection based on state legislative consensus might still raise the specter of dead-hand rule. But here again, the same could be said of the “evolving standards” doctrine too.²²²

Fourth and finally, just as I have tried not to make the point bigger than it is, I also do not want to make it smaller. In this Article, I have focused on the most prominent examples of state polling outside the Eighth Amendment—but there are many others. The Supreme Court has followed the consensus view of the states when deciding cases under the Dormant Commerce Clause,²²³ Takings Clause,²²⁴ and Double Jeopardy Clause.²²⁵ It has counted states in its personal jurisdiction analysis,²²⁶ and has taken an explicitly majoritarian approach to questions of judicial discretion,²²⁷ statutory construction,²²⁸ and stare decisis.²²⁹

221. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 505 n.66 (1997) (“Because of inertia, enactment of legislation requires more than majority support; the same is true for repeal. Thus the failure to repeal existing legislation might indicate that a majority still supports it or that a *minority* sufficiently large to block repeal supports it. There is no way of telling for sure.”).

222. Indeed, the argument has even more force in the “evolving standards” context given the difficulty of repealing criminal law provisions. See Richard E. Myers, II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Provision*, 49 B.C. L. REV. 1327, 1329 (2008) (“Once on the books, criminal law is difficult to repeal. It stays with us, despite changing moral convictions and majority preferences.”); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 557 (2001) (“When the issue is subtracting crimes rather than adding them, legislative inertia is probably stronger in criminal law than elsewhere, since even groups with good reason to seek decriminalization hesitate to do so.”).

223. See, e.g., *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 671 (1981) (polling states to find a burden on interstate commerce imposed by outlier state’s more restrictive regulation, noting, “Iowa’s law is now out of step with the laws of all other Midwestern and Western States. Iowa thus substantially burdens the interstate flow of goods by truck.”); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445–46 (1978) (polling states to find the same).

224. See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 221–23 (2003) (polling states to uphold state’s use of interest on lawyers’ trust accounts to pay for legal services for the needy); *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 109 (1978) (polling states to uphold landmark preservation law against takings claim).

225. See, e.g., *Breed v. Jones*, 421 U.S. 519, 538 (1975) (polling states to find double jeopardy violation where juvenile was subject to both adjudicatory hearing and subsequent trial as adult).

226. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 615 (1990) (polling states to uphold tag jurisdiction, noting, “We do not know of a single state or federal statute, or a single judicial decision resting upon state law, that has abandoned in-state service as a basis for jurisdiction”); *id.* at 627 (“Nothing we say today prevents individual States from limiting or entirely abandoning the in-state-service basis of jurisdiction. And nothing prevents an overwhelming majority of them from doing so, with the consequence that the ‘traditional notions of fairness’ that this Court applies may change.”). *But see infra* note 245 (noting that the Supreme Court does not appear to have counted states in other personal jurisdiction cases).

227. See, e.g., *Carlson v. Landon*, 342 U.S. 524, 562 (1952) (“Discretion is only to be respected when it is conscious of the traditions which surround it and of the limits which an informed conscience sets to its exercise.”).

228. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 n.20 (1983) (“Yet contemporary standards must be considered in determining whether [tax exemption applies].”).

In the contempt context, the Court has even relied on “contemporary standards” to adjudicate the word “chicken shit.”²³⁰

In sum, explicitly majoritarian text may be unique to the Eighth Amendment, but explicitly majoritarian decisionmaking is not. Rulings based on state legislative consensus permeate constitutional law. Why might this be so?

B. Explanations

In this section, I first address the question just posed: What might explain why consensus-based decisionmaking appears in so many doctrinal areas? I then turn to two additional questions that immediately come to mind: Why is state polling more formally entrenched in some areas than in others? And why might Supreme Court Justices of varying political and interpretive persuasions find state polling attractive? Here are a few thoughts to get the conversation started.

1. The Phenomenon Itself

As a practical matter, the phenomenon of explicitly majoritarian protection outside the Eighth Amendment is not all that hard to understand. Constitutional decisionmaking comes down to judgment calls, and those judgment calls have to come from somewhere. Sure, the Justices could use their own judgment, but state legislative consensus provides an objective measure—something more than personal predilection—of how such decisions should be made.²³¹ Thus, we should not be surprised to see the Supreme Court turn to the states to decide what is fundamental, what is reasonable, which interests are sufficiently important, and so on. In the end, the Court’s state polling exercises are not so different from what the rest of us do when making difficult decisions: we look to others for guidance.

As a political matter, too, the Supreme Court’s state polling exercises are readily understandable. Majoritarian decisions do not expose the Supreme Court to the same vulnerabilities that nonmajoritarian decisions do—a palpable

229. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (“[E]very successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.”); *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (“If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.”).

230. See *Eaton v. City of Tulsa*, 415 U.S. 697, 700 (1974) (Powell, J., concurring) (invalidating a summary contempt finding for saying “chicken shit” in the courtroom).

231. This is not to deny that the Justices’ policy preferences might lead to manipulation of state polling data, but that is true in and outside the “evolving standards” context. See *supra* notes 217–220 and accompanying text (discussing doctrinal manipulation of state polling data).

advantage for Justices who have neither the sword nor the purse to enforce their commands.²³² So viewed, explicitly majoritarian constitutional protection—particularly in the wake of the New Deal²³³—may well be as much about judicial prudence as it is about judicial deference. Simply put, it is the Supreme Court living up to its legacy as “the least dangerous” branch.²³⁴

For these reasons (and perhaps others), one can easily see why the Supreme Court would poll the states when interpreting a variety of constitutional provisions. The harder question is how to explain the differences in the Court’s explicitly majoritarian approach across doctrinal lines.

2. Doctrinal Differences

In some ways, the doctrinal differences in the frequency and formality of explicitly majoritarian decisionmaking are just as one might expect. The Supreme Court’s use of majoritarian benchmarks is the least doctrinally entrenched in the equal protection and First Amendment contexts—both areas where the Court is famous for taking on the states in the name of minority rights.²³⁵ On the other end of the spectrum, the Court’s doctrine is probably most like “evolving standards” in the substantive due process context, where the Court engages in the politically hazardous task of identifying fundamental rights.²³⁶ If discretion truly is the better part of valor, it makes sense that the Court would tread cautiously in recognizing rights not enumerated in consti-

232. Justice O’Connor has made the point explicitly. See, e.g., Sandra Day O’Connor, Remarks, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust*, 36 CT. REV. 10, 13 (1999) (“We don’t have standing armies to enforce opinions, we rely on the confidence of the public in the correctness of those decisions. That’s why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust.”).

233. Not one of the cases I have found was decided before the 1930s, a point that is not likely coincidental. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 4 (2009) (noting that in the wake of the New Deal, “a tacit deal was reached: the American people would grant the justices their power, so long as the Supreme Court’s interpretation of the Constitution did not stray too far from what a majority of the people believed it should be. For the most part, this deal has stuck.”); see also *id.* at 195–236 (discussing in depth the Supreme Court’s capitulation to the New Deal program following President Roosevelt’s court-packing plan).

234. THE FEDERALIST NO. 78, 137 (Alexander Hamilton) (Henry B. Dawson ed., Scribner 1876).

235. See generally *supra* Part II (analyzing equal protection and First Amendment doctrines); *supra* text accompanying note 128 (citing cases famous for countermajoritarian protection in the equal protection and First Amendment contexts).

236. See generally *supra* Part I.A (comparing the Supreme Court’s substantive due process fundamental rights and “evolving standards” doctrines).

tutional text under the (also unenumerated) doctrine of C.Y.A.²³⁷ The Supreme Court has said as much itself.²³⁸

In other ways, the doctrinal differences are less obviously explicable. For example, the majoritarian approach of the Supreme Court’s notice and opportunity to be heard cases is roughly comparable to what we see in the equal protection and First Amendment contexts²³⁹—but few would describe the area of notice and opportunity to be heard as a bastion of countermajoritarian rights. Similarly, the politically hazardous nature of the protection at issue fails to explain why the Court does not count states in the controversial Fifth Amendment interrogation context²⁴⁰—nor does it explain the Court’s right to jury cases, where state polling is formally entrenched even without all the drama associated with unenumerated constitutional rights.²⁴¹ In short, the Court’s willingness to issue bold rulings in the first place provides *some* understanding as to why its commitment to majoritarian norms is stronger in some areas than in others, but it does not take us all of the way.

A second piece of the puzzle may be the opportunity for majoritarian norms to seep into the Supreme Court’s decisionmaking; some doctrinal areas are more susceptible to state polling than others. This would appear to explain the Court’s Fifth Amendment interrogation cases and its approach in the area of notice and opportunity to be heard. In the Fifth Amendment context, the

237. This venerable doctrine has other, perhaps more well known, iterations, but here the reference is to “Cover Your Authority.” Cf. Winter, *supra* note 9, at 684 (suggesting that the Court’s reliance on state polling in the Fourth Amendment context may have been “nothing more than acting prudently to cover its political flank”); Conkle, *supra* note 18, at 64 (“Nothing in constitutional law is more controversial than substantive due process.”).

238. 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.”).

239. See generally *supra* Part I.B.2 (discussing majoritarian decisionmaking under the Supreme Court’s notice and opportunity to be heard cases); *supra* Part II (discussing the same under equal protection and First Amendment).

240. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring warnings prior to custodial interrogation under the Fifth Amendment); see also LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 394 (2000) (“If *Miranda* is not the most controversial decision by the Warren Court, it is close enough, and it is the most controversial criminal procedure decision hands down.”).

241. See *supra* text accompanying notes 192–203 (discussing majoritarian decisionmaking in the Sixth Amendment right to jury context).

Court is regulating police interrogation practices that are highly fact specific and rarely capable of state-by-state legislative comparisons.²⁴² In its notice and opportunity to be heard cases, the Court is employing the same interest-balancing approach it uses in its equal protection and First Amendment cases, so it is only natural to see majoritarian benchmarks seep into the Court's decisionmaking in the same way.²⁴³

Yet here, too, there are limitations to the explanatory power of these doctrinal differences. In a few areas—very few—the Court does not count states even though its articulation of the constitutional standard clearly invites it. The Fourth Amendment's protection of only those privacy interests "that society is prepared to recognize as reasonable" provides perhaps the strongest example.²⁴⁴ The Court's personal jurisdiction analysis, which measures due process by way of "traditional notions of fair play and substantial justice," to some extent provides another.²⁴⁵ In short, the opportunity for state polling in particular doctrinal frameworks helps further explain why we see explicitly majoritarian decisionmaking more in some areas than others, but again, it does not take us all of the way.

Of course, it could be that in broad swathes, the doctrinal differences in the Supreme Court's explicitly majoritarian approach make sense, but beyond that—in the few residual areas that remain—there really is no explanation. Why hasn't the Court counted states where the constitutional norm appears to invite it? Maybe the Justices haven't gotten around to it yet. Or maybe explicitly majoritarian decisionmaking is, at its most basic level, some sort of doctrinal entropy—a discernable force in the interpretive universe with no discernable pattern. For the rest of the story, perhaps we should be looking less at doctrine and more at the Justices applying it.

242. This is not to say that the Fifth Amendment interrogation context is *never* susceptible to the sort of explicitly majoritarian decisionmaking that the Supreme Court does in other doctrinal areas. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

243. See *supra* Part I.B.2 (discussing state polling in the notice and opportunity to be heard context); Part II (discussing state polling in equal protection and First Amendment contexts).

244. See *supra* note 172 and accompanying text.

245. While the Supreme Court in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), counted states and explicitly recognized the relevance of state legislative consensus in its personal jurisdiction analysis, *id.* at 615, 627, the Court does not appear to have taken an explicitly majoritarian approach to personal jurisdiction outside that case. See *supra* note 226 (quoting *Burnham's* majoritarian language).

3. Judicial Differences

One of the most surprising discoveries about state polling as a larger doctrinal phenomenon is the variety of Justices who engage in it. Conservatives, moderates, liberals—all have embraced the majority position of the states to define the contours of constitutional protection. Why?

The attraction for judicial conservatives is fairly obvious. While not originalism, majoritarian doctrine is judicial minimalism in full flower. So long as the Supreme Court is counting states to determine the contours of constitutional protection, there is no chance of bold rulings that leave the states behind. Indeed, the formal entrenchment of state polling in the substantive due process area is perhaps best explained as a doctrinal backlash to one fundamental rights case in which the Court clearly did not count states: *Roe v. Wade*.²⁴⁶ Liberal landmarks like *Roe*, *Furman v. Georgia*,²⁴⁷ and *Engel v. Vitale*²⁴⁸ would never have come to pass had the Court been polling states, and judicial conservatives would have preferred it had been that way.

This is not to say that state polling always suits the Supreme Court’s conservative Justices. Although Justice Scalia has opined that a policy’s “wide acceptance in legal culture” is “adequate reason not to overrule it,”²⁴⁹ the inverse is not necessarily true. Even where a legislative consensus has formed against a particular practice, judicial conservatives at times oppose constitutional protection. Consider, for example, Justice Burger’s dissent in *Baldwin v. New York*,²⁵⁰ where the Court polled the states in ruling that a potential one-year sentence was sufficiently severe to trigger the right to jury.²⁵¹ Lamenting the ruling, Chief Justice Burger tersely wrote, “That the ‘near-uniform judgment of

246. 410 U.S. 113 (1973) (overturning the laws of forty-six states that placed limits on access to abortion in the first trimester). Others have recognized the point. See ROSEN, *supra* note 8, at 202 (“In response to *Roe v. Wade*, conservatives embraced a series of formalist approaches to the Constitution in an effort to constrain judicial discretion . . .”); Post, *supra* note 11, at 88–91 (discussing the Supreme Court’s conservative approach in *Bowers* as a result of its liberal result in *Roe*); see also *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (defending “restrained methodology” in the substantive due process area “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court”).

247. 408 U.S. 238 (1972) (overturning the death penalty statutes of thirty-nine states).

248. 370 U.S. 421 (1962) (overturning the laws of thirty-nine states requiring or allowing school prayer).

249. *Mitchell v. United States*, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting). Chief Justice Rehnquist apparently agreed. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (opinion by Chief Justice Rehnquist citing Justice Scalia’s dissent in *Mitchell* for the proposition that “the fact that a rule has found ‘wide acceptance in the legal culture’ is ‘adequate reason not to overrule’ it”).

250. 399 U.S. 66 (1970).

251. See *id.* The Supreme Court’s analysis in *Baldwin* is discussed at *supra* notes 201–202 and accompanying text.

the Nation' is otherwise than the judgment in some of its parts affords no basis for me to read into the Constitution something not found there."²⁵² Indeed, in the relatively few instances in which the Court has gone against the result of a straight state count, the ruling typically has been conservative, resulting in constitutional protection that lags behind the states as opposed to leapfrogging them.²⁵³

The attractiveness of state polling to the Supreme Court's moderates is also not hard to understand. These Justices are quite willing to recognize shifts in constitutional values, but they tend to be cautious in their approach and most comfortable with change backed by larger societal forces. Justice O'Connor's view of the Court's role evidences the point nicely:

[R]eal change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus. Courts, in particular, are mainly reactive institutions.²⁵⁴

Justice Kennedy, too, has described the Court's decisionmaking in explicitly majoritarian terms.²⁵⁵ Even empirical evidence has shown the Court's moderate, swing voters to be more responsive to majoritarian influences than Justices on either end of the ideological spectrum.²⁵⁶ Little wonder, then, that Justices Kennedy and O'Connor have signed onto (and often penned) a number of the most prominent state polling cases, both in and outside the "evolving standards" context.²⁵⁷ Explicitly majoritarian decisionmaking fits them like a glove.

252. *Baldwin*, 399 U.S. at 77 (Burger, C.J., dissenting).

253. This explains why the dissenters in most of these cases are the Court's liberals. See *supra* note 218 (listing a number of cases in which the Court has rejected the result that state polling would suggest and quoting state counting arguments by dissenting Justices).

254. See SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 166 (Craig Joyce ed., 2003).

255. See Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1 (quoting Justice Kennedy as stating, "In the long term, the court is not antimajoritarian—it's majoritarian."). This proclivity for majoritarian rulings may also explain Justice Kennedy's willingness to consider foreign law in constitutional decisionmaking. See Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42 (discussing Justice Kennedy's interest in foreign law and quoting him as explaining, "There is also the constitution with a small 'c,' the sum total of customs and mores of the community" and "[t]he closer the big 'C' and the small 'c,' the better off you are as a society").

256. See William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996) (providing an empirical study comparing responsiveness of moderate, conservative, and liberal Justices to public opinion).

257. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (opinion by Justice Kennedy); *Lawrence v. Texas*, 539 U.S. 558 (2003) (opinion by Justice Kennedy); *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408 (2003) (opinion by Justice Kennedy, joined by Justice O'Connor); *Troxel v. Granville*, 520 U.S. 57 (2000) (opinion by Justice O'Connor); *Romer v. Evans*, 517 U.S. 620 (1996) (opinion by Justice Kennedy, joined by Justice O'Connor); *Reno v. Flores*, 507 U.S. 292 (1993) (opinion by

That leaves the Supreme Court’s liberals. What might they find attractive about explicitly majoritarian doctrine? Sometimes the answer is nothing. The Court’s liberal members do not need the states to recognize constitutional protection; they are more than willing to make the move on their own.²⁵⁸ Indeed, the minimalism inherent in majoritarian doctrine has at times struck the Court’s liberals as downright offensive. In his fervent dissent in *Michael H. v. Gerald D.*,²⁵⁹ Justice Brennan (joined by Justices Marshall and Blackmun) decried the Court’s use of state counting to deny a putative father’s substantive due process right to prove paternity of a child born into another couple’s marriage, claiming:

[T]he plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment.²⁶⁰

Just as state polling sometimes gives the Court’s conservatives more constitutional protection than they would like, it sometimes gives the Court’s liberals less.

Yet for liberal Justices, too, explicitly majoritarian doctrine has its advantages. First and foremost, it is not originalism. Explicitly majoritarian doctrine results in constitutional protection that will more or less reflect contemporary norms, rather than those that prevailed 200 years ago.²⁶¹ In so doing, it endorses the notion of a living Constitution—one able to respond to what Oliver Wendell Holmes famously called “the felt necessities of the time”²⁶²—even if the pace is sometimes slower than liberals like. Simply put, it works. Judicial minimalism may reign in the short run, but in the long run, liberalism wins. And until then, state legislative consensus provides strong support for constitutional

Justice Kennedy); *Heller v. Doe*, 509 U.S. 312 (1993) (opinion by Justice Kennedy); *Schad v. Arizona*, 501 U.S. 624 (1991) (opinion joined by Justices O’Connor and Kennedy); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (opinion joined by Justice O’Connor).

258. See *supra* notes 246–248 and accompanying text (discussing liberal landmarks where the Court upset the majority practice of the states).

259. 491 U.S. 110 (1989). *Michael H. v. Gerald D.* is discussed at *supra* note 43 and accompanying text.

260. *Michael H.*, 491 U.S. at 140–41 (Brennan, J., dissenting).

261. Again, I concede that to the extent existing state statutes do not accurately reflect contemporary public opinion, this will not be the case. See *supra* notes 221–222 and accompanying text (discussing point). But the issue seems to me a more generic problem of the ostensibly majoritarian legislative and executive branches—that current majorities may bind those in the future not by agreement, but sheer inertia.

262. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1, 5 (Mark DeWolfe Howe ed., 1963).

protection with little downside to recognizing it. The result is like low-hanging fruit—easy pickings for constitutional protection.

Perhaps, then, the real reason we see explicitly majoritarian protection across a variety of constitutional contexts is that it offers a little something to everyone. It is neither originalism nor liberalism, yet is attractive to proponents of both. One thing is certain: it is not the case, as conventional wisdom would have it, that the leading interpretive methodologies on the right and left are fundamentally at odds with the sort of explicitly majoritarian decisionmaking examined in this Article.²⁶³ Originalism might *seem* incompatible with decisions based on state legislative consensus, but the originalists on the Court make room for it. Liberalism may not *need* state counting to back it up, but the progressives work it in. Far from “ignoring, as much as possible”²⁶⁴ the positions of state legislatures, Justices across the ideological spectrum routinely, and expressly, incorporate those positions into the content of constitutional law. The implications are striking.

C. Implications

In this section, I discuss the significance of state polling as a larger doctrinal phenomenon, turning first to death penalty theory and then to broader

263. See ROSEN, *supra* note 8, at 202 (“On the Supreme Court and in the legal academy today, the leading schools of constitutional interpretation on the left and the right tend to embrace a heroic version of judicial power, which insists that judges can demonstrate their devotion to principle by acting unilaterally—that is, ignoring, as much as possible, the constitutional views of the president, Congress, the state legislatures, and the American people.”); Brennan’s *Approach to Reading and Interpreting the Constitution*, 43 N.Y.L. SCH. L. REV. 41 (1999) (panel including, among others, Michael McConnell, who stated, “The central problem with [Justice Brennan’s] jurisprudence is that he cast aside all of the traditional constraints on constitutional decision making. This approach placed into the hands of judges the power to turn their own views of good social policy into law without any credible basis in constitutional text, history, precedent, constitutional tradition, or contemporary democratic warrant.”); Mark Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 LOY. L. REV. 221, 229 (1987) (noting “the general problem of originalism, which is that social change makes it a theory of constitutional interpretation that regularly fails to provide guidance on matters of contemporary constitutional controversy because it disregards the complexities of both the historical record and the current situation”); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (“Nonoriginalism, which under one or another formulation invokes ‘fundamental values’ as the touchstone of constitutionality, plays precisely to this weakness [of judging by personal policy preferences]. It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society.’ Thus, by the adoption of such a criterion judicial personalization of the law is enormously facilitated. (One might reduce this danger by insisting that the new ‘fundamental values’ invoked to replace original meaning be clearly and objectively manifested in the laws of the society. But among all the varying tests suggested by nonoriginalist theoreticians, I am unaware that that one ever appears.)”).

264. ROSEN, *supra* note 8, at 202; see also *supra* note 263 (quoting sentence in its entirety).

themes in constitutional law. I set aside a discussion of the methodological implications of state counting, as those issues have been ably analyzed elsewhere.²⁶⁵ I also set aside what explicitly majoritarian doctrine might mean for the so-called “popular constitutionalists,” as that discussion is sufficiently extensive and discrete to warrant separate treatment on its own.²⁶⁶

1. Death Penalty Theory

To understand the significance of my findings for death penalty theory, it is instructive to return to the “evolving standards” debate that framed the inquiry in the first place. For years now, scholars have criticized the “evolving standards” doctrine, and for good reason: the place that needs countermajoritarian protection the most is the least equipped to receive it.²⁶⁷ Defenders counter that the Eighth Amendment’s prohibition against “cruel and *unusual* punishments” provides a unique license for the Supreme Court to follow majority preferences.²⁶⁸ So framed, the debate ends a stalemate. Explicitly majoritarian protection may not make sense, but it is the natural product of explicitly majoritarian constitutional text.

Thus far, the assumption on both sides of the debate is that the sort of explicitly majoritarian decisionmaking that the Supreme Court does under the “evolving standards” doctrine is unique to the Eighth Amendment.²⁶⁹ It is not. Given the stunning variety of contexts outside the Eighth Amendment in which the Court counts states, it is difficult to conclude that majoritarian text has much to do with much of anything. Even without the benefit of Eighth Amendment text, the Court routinely—and explicitly—bases constitutional protection on whether a majority of states agree with it.

Because current scholarship has assumed that the “evolving standards” doctrine is textually driven, it also has failed to appreciate the choices implicit in the Supreme Court’s use of the doctrine in the first place. Interpreting the term “unusual” to justify constitutional protection that follows majoritarian sentiment may be one way to effectuate Eighth Amendment protection, but it is not the only way. To the extent the terms “cruel” and “unusual” have

265. See, e.g., Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C.L.R. 1089 (2006).

266. See Corinna Barrett Lain, *Popular Constitutionalism and Our (Already) Democratic Supreme Court* (unpublished manuscript, on file with author).

267. See *supra* notes 1,4 and accompanying text.

268. See *supra* note 5 and accompanying text.

269. See *supra* notes 7–8 and accompanying text.

separate meanings at all,²⁷⁰ the word “unusual” under the Eighth Amendment can support a number of plausible interpretations. A punishment can be unusual because it is unusually cruel, either in the abstract (torture) or in relation to the offense or offender’s culpability;²⁷¹ unusual because it is inflicted in an arbitrary and capricious manner;²⁷² unusual because it is procedurally irregular;²⁷³ or even unusual because it is contrary to long usage.²⁷⁴ In short, nothing about the text of the “cruel and unusual punishments” clause requires, or even necessarily invites, protection that follows majoritarian sentiment. In the Eighth Amendment context as elsewhere, majoritarian doctrine is not a given. Majoritarian doctrine is a *choice*.

This recognition, in turn, allows for yet another: the “evolving standards” doctrine might be problematic, but it is not the crux of the problem. What majoritarian doctrine seemingly obscures, but in fact reveals, is a Supreme Court naturally inclined towards majoritarian decisionmaking *anyway*, rendering the debate over “evolving standards” largely moot. In the end, the Court’s majoritarian approach to Eighth Amendment protection is more a function of

270. See *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958) (“Whether the word ‘unusual’ has any qualitative meaning different from ‘cruel’ is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word ‘unusual.’”).

271. See *Weems v. United States*, 217 U.S. 349, 368 (1910) (“What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous,—torture and the like.”); *id.* at 367 (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.”); see also HUGO ADAM BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 37 (1977) (“‘Cruel and unusual punishment,’ one is entitled to conclude, really means ‘unusually severe punishment.’”).

272. See *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring) (reading the “cruel and unusual punishments” clause to prohibit the imposition of death in an arbitrary and capricious manner).

273. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[T]he penalty of death is qualitatively different’ from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.” (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976))); *Hoffman*, *supra* note 7, at 151 (“The cruel and unusual punishments clause has, in effect, become a ‘super due process clause’ for death-penalty cases only, imposing greatly heightened procedural standards to ensure the fairness and accuracy of both the guilt and sentencing stages of capital trials.”); see also Louis D. Billionis, *The Unusualness of Capital Punishment*, 26 OHIO N.U. L. REV. 601, 614 (2000) (“[A] punishment is unusual if it is unreliable in practice. This sense is intimated when the critique complains of the risk of erroneous convictions of the innocent, as well as the risk of legally erroneous convictions.” (emphasis omitted)).

274. This interpretation, unlike the others, has not been recognized by the Supreme Court. See John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745–46 (2008) (arguing that the framers understood the word “unusual” to mean “contrary to long usage,” an interpretation that in practice would “precisely invert the evolving standards of decency test” by striking cruel innovations in punishment despite their popularity).

its inherently majoritarian proclivities than any fidelity to constitutional text, a point that becomes all the more apparent when one considers the implications of explicitly majoritarian decisionmaking in the larger constitutional universe.

2. Constitutional Theory

The most pressing question of constitutional theory over the last half century has been how to reconcile the countermajoritarian difficulty—the notion that unelected, more or less politically unaccountable judges are able to thwart majority will in a land of majority rule.²⁷⁵ Alexander Bickel coined the term almost fifty years ago,²⁷⁶ and scholars have not been able to stop talking about it since. Barry Friedman has labeled this discourse “an Academic Obsession,”²⁷⁷ and for good reason. Commentary on the countermajoritarian difficulty is now so voluminous that there is commentary on the voluminous commentary (which I suppose I have just joined).²⁷⁸

For the most part, scholars who have found a way out of this difficulty have done so by showing that the Supreme Court is less countermajoritarian than commonly supposed.²⁷⁹ As a result, the notion that the Court renders reliably majoritarian decisions is hardly new. It has been cutting-edge long enough to be considered “underground conventional wisdom” among a small but growing group of legal scholars,²⁸⁰ and is something social scientists have known (and shown) for decades.²⁸¹

275. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 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.”).

276. *Id.*

277. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

278. See, e.g., *id.* at 155–63 (discussing the scholarly preoccupation with countermajoritarian difficulty); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457, 495 (1994) (same); Chemerinsky, *supra* note 1, at 70–72 (same); Neal Kumar Katyal, *Judges as Advice-givers*, 50 *STAN. L. REV.* 1709, 1709–10 (1998) (same); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 *CAL. L. REV.* 1441 (1990) (same).

279. For a sampling of the literature, see *supra* note 11. A notable exception is John Hart Ely, who famously tackled the countermajoritarian difficulty by justifying judicial review in democracy-enhancing terms. See generally ELY, *supra* note 1 (defending judicial review as a means of protecting rights that preserve the democratic process).

280. ROSEN, *supra* note 8, at xii.

281. See, e.g., THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* ix (1989) (arguing that the Supreme Court “has been roughly as majoritarian as other American policy makers” and empirically supporting claim); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 23 (1960) (arguing that “the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment” and empirically supporting claim); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision-Making in the Post-New Deal Period*,

Within this body of work, scholars have spent no small amount of time explaining why the Supreme Court's decisions are roughly as majoritarian as those of the legislative and executive branches.²⁸² While crediting the judicial appointments process as a primary conduit for majoritarian values,²⁸³ these commentators have sought to show how constitutional meaning can change even when the Justices do not. Political scientists have used regime politics literature to view the Court as an institutional arm of the governing political coalition.²⁸⁴ Constitutional historians have provided detailed accounts of the influence of larger sociopolitical context.²⁸⁵ Court and culture scholars have demonstrated the awesome power of social movements in generating constitutional change.²⁸⁶ While all of these are worthy endeavors, one cannot help but wonder whether the explanation for majoritarian decisions might just be simpler than that. Perhaps the main reason that the Court produces widely majoritarian outcomes is widely used majoritarian doctrine.

Indeed, explicitly majoritarian doctrine may be not only the strongest explanation for majoritarian decisions, but the strongest *evidence* of them as well. One could set about proving the Supreme Court's proclivity for majoritarian protection in a number of different ways—extended historical analyses and empirical research with comparisons of the Court's rulings and public

47 J. POL. 652, 662 (1985) (arguing that the Court's decisions in the new deal period have been "surprisingly consistent with majoritarian principles" and empirically supporting claim); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (arguing that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States" and empirically supporting claim).

282. See MARSHALL, *supra* note 281.

283. See, e.g., Friedman, *supra* note 9, at 613–14 ("As vacancies occur, presidents fill them with judges whose views are at least somewhat similar to their own and, more important, to the views of the people who elected them. Thus, as the views of the electorate change, the change is reflected in the changing composition of the judiciary."); Mishler & Sheehan, *supra* note 256, at 171 ("The conventional explanation of the relationship between public opinion and Supreme Court decisions is that the influence of public opinion is indirect—that it is mediated largely through the impact of public opinion on presidential elections and the subsequent effects of presidential appointments on the ideological composition of the Court."); Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 832 (2005) (discussing view of "the appointments process as the primary mechanism for linking the policy preferences of the justices and legislative majorities").

284. See generally Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511 (2007) (noting that "[f]or at least fifty years, prominent political scientists have traced the decisions of the U.S. Supreme Court to the policy and political commitments of governing partisan regimes" and discussing the legal academy's newfound turn to regime politics literature to explain the Court's alliance with majority will).

285. On this score, Michael Klarman's work is as compelling as any I have seen. See, e.g., Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2001); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996).

286. See, e.g., Balkin & Seigel, *supra* note 11; Post, *supra* note 11; Eskridge, *supra* note 36.

opinion are two that immediately come to mind.²⁸⁷ But both of these are like catching the Justices in the act, when in many cases all we have to do is ask them. We can sidestep the inferences and possibility of coincidences. In opinion after opinion, the Supreme Court has actually *told* us that majoritarian decisionmaking is what it is trying to do.

Those obsessed with the countermajoritarian difficulty may see these points as good news. If we cannot justify an unelected judiciary in a representative democracy, we can at least take solace in the fact that the Supreme Court’s decisionmaking is a good deal more democratic than most everyone seems to think. Granted, unelected Justices (rather than “The People Themselves”²⁸⁸) are still making the decisions. But where the Court follows state legislative consensus, those decisions reflect the views of a majority of local legislative majorities—and that’s about as democratic as judicial decisionmaking gets. So viewed, the countermajoritarian difficulty is perhaps not so difficult after all. The Court’s decisionmaking is patently majoritarian, and in a democratically representative way.

At the same time, the pervasiveness of explicitly majoritarian doctrine presents a serious challenge to the assumptions that justify the institution of judicial review in the first place. The whole point of having an unelected judiciary is its ability to serve as a check on majority rule, which is why the Supreme Court’s countermajoritarian capacity undergirds most every normative theory of judicial review.²⁸⁹ Explicitly majoritarian doctrine renders this role a virtual impossibility, for a check on majority will that depends on majority will is hardly a check at all. Granted, the Court can still perform what others have called “sheep dog” judicial review, holding laggard states to a higher national standard.²⁹⁰ But by and large, even Congress can do that.²⁹¹ Thus, while majoritarian doctrine might ease concerns that the Supreme Court is a “deviant institution”²⁹² in our democratic society, it also largely eviscerates the justification

287. See *supra* note 281 (listing empirical research supporting the majoritarian claim); *supra* note 285 (listing constitutional history scholarship supporting the majoritarian claim).

288. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that the Constitution vests ultimate interpretive authority to “the people themselves” and that as a consequence, judicial supremacy is illegitimate).

289. See Friedman, *supra* note 11, at 279 (“[M]ost extant normative theories of judicial review rest on the capacity of judges to act in a manner contrary to political or popular preferences.”).

290. See Heffernan, *supra* note 5, at 1446 (describing Supreme Court’s consensus-based approach under the Eighth Amendment as “a sheep-dog process of judicial review, one that rounds up stray states”).

291. The 1964 Civil Rights Act provides a prime example of Congress performing this sheep-dog function. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

292. BICKEL, *supra* note 275, at 18 (“[J]udicial review is a deviant institution in the American democracy.”).

for judicial review in the first place. To the extent a sufficiently large number of states act in a pernicious manner, the Court is unlikely to do anything about it, resulting in a new, not-so-counter-majoritarian difficulty: constitutional protection that, like the fair-weather friend, is there in good times but gone when needed the most.

Finally, the phenomenon of majoritarian doctrine has far-reaching implications for our federal system of government. One of the defining virtues of federalism is a state's ability to experiment with policies different from those of other jurisdictions.²⁹³ In some ways, state polling supports that virtue: where most (or even half) of the states are experimenting too, the Court is unlikely to impose what Justice Harlan famously termed "a constitutional straight jacket"²⁹⁴ upon them. Yet in other ways, explicitly majoritarian doctrine places sharp limits on the freedom that federalism ostensibly provides. Where the states have formed a consensus on an issue, experience shows that outlier jurisdictions will have little room to resist it, even if local considerations legitimate a different path.²⁹⁵ Granted, the *type* of federal interference with state autonomy is different from what we typically associate with federalism concerns; although the federal government is imposing a national norm, the source of that norm is actually the sister states.²⁹⁶ But that is little consolation to states wanting to go their own way.²⁹⁷ In the end, outlier jurisdictions remain vulnerable to regulation just by virtue of their status as outliers.

CONCLUSION

Within the academy, there is little recognition of explicitly majoritarian decisionmaking outside the Eighth Amendment; scholars tend to think of the "evolving standards" doctrine as an anomaly in constitutional law. Yet the Supreme Court's state polling in the death penalty context is nowhere near as

293. See *Baldwin v. New York*, 399 U.S. 117, 133 (1970) (Harlan, J., dissenting) (describing one of the "basic virtues" of federalism as "leav[ing] ample room for governmental and social experimentation in a society as diverse as ours").

294. *Ker v. California*, 374 U.S. 23, 45 (1963) (Harlan, J., concurring).

295. The Supreme Court's Sixth Amendment right to jury decisions illustrate the point nicely. See, e.g., *Baldwin*, 399 U.S. at 134-36 (Harlan, J., dissenting) (criticizing the Court's majoritarian approach to Sixth Amendment protection on the basis that it "ignores both the basic fairness of the New York procedure and the peculiar local considerations that have led the New York Legislature to conclude that trial by jury is more apt to retard than further justice for criminal defendants in New York City" and discussing especially congested trial dockets in New York City).

296. I credit Jim Gibson for this point, with thanks.

297. If Steven Calabresi and Nicholas Terrell are right in arguing that coalition building makes tyranny of the majority less likely at the federal level than at the state level, this is little consolation indeed. See Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism* (June 18, 2009), at 32-34, available at <http://ssrn.com/abstract=1421903>.

peculiar as it seems. Across a stunning variety of civil liberties contexts, the Court routinely—and explicitly—decides constitutional protection based on whether a majority of states agree with it.

The implications are significant. For death penalty theorists, the phenomenon of explicitly majoritarian decisionmaking outside the Eighth Amendment calls into question the leading defense of the “evolving standards” doctrine—explicitly majoritarian Eighth Amendment text. For constitutional theorists, the phenomenon of explicitly majoritarian doctrine provides arguably the strongest evidence yet of the Supreme Court’s inherently majoritarian institutional nature. The result is constitutional protection that shatters the conventional conception of judicial review as an undemocratic exercise, eviscerates the countermajoritarian function that justifies the Court’s existence, and reveals the freedom of federalism to be more illusory than real.

All of this suggests that we should be talking about, and teaching, the unexceptionalism of “evolving standards.” Constitutional law texts do not discuss state legislative consensus as a basis for identifying and applying constitutional norms, nor do the leading constitutional treatises.²⁹⁸ This is unfortunate in part because our students will one day be litigators looking to effectuate constitutional change, and in part because it reflects an impoverished view of constitutional law as it actually exists. Explicitly majoritarian doctrine tells us something about the Supreme Court’s inclination to play the heroic, countermajoritarian role for which it is famous. We ought to listen.

298. See, e.g., RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* (2008); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (3d ed. 2006); NOWAK & ROTUNDA, *supra* note 19; RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW: CASES AND NOTES* (9th ed. 2009).