The Unexceptionalism of Evolving Standards

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Conventional wisdom is that outside the Eighth Amendment context, 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—bases constitutional protection 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 constitutional norms, 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 inherently 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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THE UNEXCEPTIONALISM OF “EVOLVING STANDARDS”

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. Under the doctrine, a punishment violates the “cruel and unusual punishments” clause when a “national consensus” has formed against it, prohibiting a punishment only after a majority of states have already done so on their own. Critics claim that it makes no sense for 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. Textualists counter that the Eighth Amendment’s prohibition against “cruel and unusual punishment”...
punishments” invites, if not requires, protection that tracks majority practices.4

Implicit (and sometimes explicit) in the debate over “evolving standards” is the assumption that majoritarian doctrine—at least in the form of state nose-counting as a basis for constitutional protection5—is a distinctly Eighth Amendment phenomenon. Whether defending the doctrine or denouncing it, death penalty scholars routinely assume that the sort of consensus-based decisionmaking that the Supreme Court does under the “evolving standards” doctrine does not occur elsewhere.6 In the larger academy, too, the reigning assumption is that explicitly majoritarian doctrine is an exclusively Eighth Amendment affair—an

4 See, e.g., Penry v. Lynaugh, 492 U.S. 302, 351 (1989) (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.”); Akhil Reed Amar and Vikram David Amar, Eighth Amendment Mathematics (Part One): How the Atkins Justices Divided when Summing, FINDLAW, June 28, 2002, available at 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.”); 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 textualist claim that “the term ‘unusual’ provides a unique license for judicial appeals to changing convictions and practices”); 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.”). 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.”).

5 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 dominant position of the states to identify the constitutional norm.

6 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 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.’”); 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 counter-majoritarian constitutional rights,” contrasting the Supreme Court’s approach under the Eighth Amendment and other constitutional provisions); Heffernan, supra note 4, at 1362 (describing “evolving standards” doctrine as a “conspicuous exception” to Supreme Court’s approach in other doctrinal areas and advocating that it be used elsewhere); Joseph 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 majoritarian nature of constitutional inquiry under Eighth Amendment with that undertaken in First and Fourth Amendment contexts).
approach limited to the “cruel and unusual punishments” clause and the death penalty cases that dominate this corner of constitutional law.7

But what if that assumption is wrong?

As it turns out, the Supreme Court’s explicitly majoritarian approach under the Eighth Amendment 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—and explicitly—bases constitutional protection on whether a majority of states agree with it. By and large, we simply haven’t noticed.8

The implications are significant. For death penalty scholars, the phenomenon of consensus-based decisionmaking outside the Eighth Amendment calls into question the leading defense of the “evolving

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7 See, e.g., Cass Sunstein, Second Amendment Minimalism: Heller as Griswold, 122 HARV. L. REV. 246, 266 and n. 127 (2008) (“[I]t is unusual for the Court to acknowledge the relevance of the national consensus,” noting in accompanying footnote that “The Court occasionally does refer to such a consensus in the Eighth Amendment context, but the word “unusual” in the amendment provides a textual hook for that approach in these cases.”); Kermit Roosevelt III, Polyphonic Stare Decisis: Listening to Non-Article III Actors, 83 NOTRE DAME L. REV. 1303 (2008) (arguing that constitutional norms are influenced by 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. Drobac ed., 2006) (discussing “doctrinal limitations” on Supreme Court’s countermajoritarian capacity such as principles of justiciability, federalism, and legislative deference in standards of review—but omitting mention of state consensus-based doctrine); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH 12 (2006) (discussing possibility that Supreme Court consult state legislation for constitutional views of national majorities, and citing “evolving standards” test as sole example); 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 omitting mention of state legislation as an actual source of constitutional norms); 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 omitting mention of state legislation as a doctrinal phenomenon outside Eighth Amendment and select due process cases); Keith E. Wittington, Extrajudicial Constitutional Interpretation: Three Objectives 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 omitting mention of state legislatures as a source of constitutional interpretation).

8 A few scholars recognize the Court’s use of explicitly majoritarian doctrine in the substantive due process area. See infra note 13 and accompanying text. 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 (1992-93) (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, 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); State Law as “Other Law”: Our Fifty Sovereigns in the Federal Constitutional Canon, 120 HARV. L. REV. 1670 (2007) (student note comparing Court’s reliance on state counting and foreign law).
standards” doctrine—majoritarian Eighth Amendment text. 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—and it is. But in the end, one need not do the work of a legal historian or political scientist to figure that out. The most powerful evidence of the Court’s majoritarian proclivities has been right under our noses all along: its widespread use of explicitly majoritarian doctrine.

This Article examines the Supreme Court’s reliance on the majority position of the states to identify constitutional norms outside the Eighth Amendment. Part I explores the phenomenon in the substantive and procedural due process contexts. Part II explores the phenomenon in the Equal Protection and First Amendment contexts. Part III turns to the criminal context, exploring the phenomenon in the Fourth and Sixth Amendments. Part IV discusses the qualifications, explanations, and implications of state polling as a larger doctrinal phenomenon. The Article concludes with a reason to talk about, and teach, the unexceptionalism of “evolving standards”—constitutional theory could benefit from the recognition that explicitly majoritarian doctrine permeates constitutional law.

I. DUE PROCESS

The Supreme Court’s approach to due process presents the clearest example of explicitly majoritarian doctrine outside the Eighth

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9. See supra note 4 and accompanying text (discussing textual defense of “evolving standards” doctrine based on words “cruel and unusual” in Eighth Amendment).

Amendment. Nothing about the words “due process” requires or even invites protection based on state legislative positions, yet the Court’s doctrine in this area is riddled with the same consensus-driven decisionmaking for which the “evolving standards” doctrine is famous. A closer look at the Court’s substantive and procedural due process doctrines illustrates the point.

A. Substantive Due Process

The notion of substantive due process is, as others have noted, an oxymoron. That the due process clause would protect something other than process is like the color of “green pastel redness,” to borrow from John Hart Ely’s prose. To fill the gap in constitutional meaning, the post-Lochner Supreme Court has frequently turned to the states to define substantive due process protection. 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 extent scholars have recognized the phenomenon of majoritarian doctrine outside the Eighth Amendment, they have generally done so in the context of the Supreme Court’s substantive due process cases involving fundamental rights. Given the strong resemblance between the Court’s fundamental rights and “evolving standards” doctrines, this comes as no surprise. As (most) every law student knows, legislation that burdens a fundamental right is permissible

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11 ELY, supra note 1, at 18.
12 See, e.g., West Coast Hotel Co. v. Parrish, 200 U.S. 379, 399 (1937) (“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.”).
13 See 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); Daniel O. Conkle, Three Theories of Substantive Due Process, 85 N.C. L. REV. 63, 124-33 (2006) (recognizing implicit doctrine of “evolving national values” in Supreme Court’s most recent substantive due process cases, and pointing to Eighth Amendment “evolving standards” doctrine as precedent and guidance for developing the doctrine); Michael W. McConnell, Tradition and Constitutionalism Before the Constitution, 1998 U. ILL. L. REV. 173, 174 (noting that while constitutional theory has been dominated by originalist and moral reasoning approaches, in practice a third approach has appeared—one grounded on “the gradually evolving moral principles of the nation” and exemplified by the Court’s most recent substantive due process decisions); Stacy, supra note 1, at 495-96 (noting that at times, “the Court has appealed to majoritarian judgments as defining the scope of fundamental substantive due process rights.”).
only when it is narrowly tailored to a compelling government interest. Legislation that does not burden a fundamental right is permissible so long as it is rationally related to a legitimate government objective. Thus, the analysis turns on a single threshold issue: the identification of a fundamental right.

Although in decades past, the Supreme Court identified fundamental rights based on its own assessment of a right’s importance, its fundamental rights doctrine today is firmly majoritarian. According to the Court, only those liberties “deeply rooted in this nation’s history and tradition” qualify as fundamental, an objective inquiry in which “our nation’s history, legal traditions, and practices” stand as “crucial guideposts for responsible decisionmaking.” Central to this analysis is the position taken by state legislatures, for as the Court has explained, “the primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws.” For death penalty scholars, the latter pronouncement should sound familiar—the principle, as well as the quote itself, comes straight from an “evolving standards” case. Indeed, the entire fundamental rights inquiry is almost exactly what the Court does in the name of “evolving standards.”

A comparison of the Supreme Court’s recent decisions in Lawrence v. Texas and Roper v. Simmons illustrates the point. Lawrence is the Court’s 2003 substantive due process case invalidating state statutes that criminalized same sex sodomy. Roper is the Court’s 2005 “evolving standards” case invalidating the juvenile death penalty. Despite their

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14 See, e.g., Lawrence v. Texas, 539 U.S. 558, 593 (2003) (“Our opinions applying the doctrine known as ‘substantive due process’ hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.”); see also John E. Nowak & Ronald D. Rotunda, Constitutional Law 471-72 (7th ed. 2004) (discussing six categories of rights thus far deemed fundamental).
15 See, e.g., Lawrence, 539 U.S. at 593 (“All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.”). See also Nowak and Rotunda, supra note 14, at 471-72 (discussing substantive due process standards of review).
16 See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (recognizing right to privacy as fundamental in context of abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (same in context of access to contraceptives). See also Conkle, supra note 13, at 98-115 (discussing “reasoned judgment” approach to substantive due process); Post, supra note 10, at 88-91 (discussing trend prior to 1980s, particularly in the area of sexuality, of identifying liberty interests “by directly evaluating the intrinsic value of liberty itself.”).
18 Id. at 711.
22 See Lawrence, 539 U.S. at 578.
23 See Roper, 543 U.S. at 570-74.
different nomenclatures, the Court’s analysis in both decisions was virtually the same. In both decisions, the Court focused its discussion on the state legislative landscape; first, it examined current statutes, then it turned to state legislative trends, and finally it noted underenforcement among those statutes that allowed the challenged practice to remain. Even the phraseology that the Court used in these decisions—“evolving standards” in Roper versus an “emerging awareness” in Lawrence—bore a striking resemblance.

In the academy, Lawrence garnered substantial attention, especially among scholars who view the Supreme Court as an essentially majoritarian institution. 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. It was a lesson about the dialectical relationship between culture and constitutional law. It was an example of the political nature of judicial review. And it was a case study about how social movements can create constitutional change. Yet for all the discourse on Lawrence as a majoritarian decision, there was little to no discussion of majoritarian doctrine in the Court’s decisionmaking.

24 Compare Lawrence, 539 U.S. at 571-73, with Roper, 543 U.S. at 564-65.
25 Compare Lawrence, 539 U.S. at 571-73, with Roper, 543 U.S. at 565-67.
26 Compare Lawrence, 539 U.S. at 573, with Roper, 543 U.S. at 565-66.
27 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 (concluding that “evolving standards of decency” protect against juvenile death penalty).
28 See, e.g., Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 55 SUP. CT. REV. 27 (2003) (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.”); Klarman, supra note 10 (discussing Lawrence as a product of broader sociopolitical mores).
29 See, e.g., Post, supra note 10 (discussing Lawrence as a cultural product and opening bid in a conversation with the American public about homosexual rights).
31 See, e.g., Suzanne B. Goldberg, Constitutional Tipping Points, Civil Rights, Social Change, and Fact-Based Adjudication, 106 COLUM. L. REV. 1955 (2007) (discussing Lawrence as an example of how “courts are inescapably involved in absorbing, evaluating, and influencing changes to popular judgments regarding social groups yet have adopted an approach to decisionmaking that obfuscates that role.”); William N. Eskridge, Jr., Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics, 88 MINN. L. REV. 1021 (2004) (discussing Lawrence as evidence that the Court “is responsive to the constitutional politics of social movements”).
32 This is not to say that doctrine was never mentioned. Sometimes it was, sometimes it wasn’t, and sometimes it was, but was discounted as a reason for the Court’s decision. See, e.g., SAGER, supra
Pages upon pages of commentary about how the Supreme Court in *Lawrence* constitutionalized national norms somehow missed the significance of the fact that the Court actually *told* us this is what it was trying to do.

My best guess about the dearth of discussion on state-counting in *Lawrence* is that scholars have not seen it as part of a larger doctrinal phenomenon. Indeed, it is tempting to dismiss the similarities between *Lawrence* and *Roper* as a product of the same author (Justice Kennedy wrote both), but other fundamental rights cases have used the same analytic approach. For example, in *Bowers v. Hardwick,* 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.” Similarly, the Court polled the states in deciding substantive due process claims to the right to physician-assisted suicide for terminally ill competent adults, the right to refuse unwanted medical treatment, the right to parental recognition of a child born into another couple’s marriage, and the right of custodial parents to make visitation decisions regarding their children and natural grandparents. In these and other substantive due process decisions, what made a fundamental right

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**Note 30, 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...”); DEVINS AND FISHER, supra note 30, at 139-44 (discussing state positions on same-sex sodomy prohibitions, but not in the context of doctrine); Sunstein, supra note 28, at 49-50 (recognizing importance of “emerging awareness” language in *Lawrence* and likening it to the common law notion of desuetude, but adding that “Most American courts do not accept that idea in express terms”).**

**See Lawrence, 539 U.S. at 558; Roper, 543 U.S. at 551.**

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

**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.**

**See Glucksberg, 521 U.S. at 710 (“In almost every State indeed, in almost every western democracy-it is a crime to assist a suicide.”).**

**See Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 284 (1990) (relying on procedure “at common law and by statute in most states” to validate state regulation of third-party decisions to terminate medical treatment).**

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

**See Troxel v. Granville, 520 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.”).**
fundamental was whether the states had deemed it worthy of protection on their own.40

2. Punitive Damages Caps

The fundamental rights doctrine is a strong example of explicitly majoritarian decisionmaking outside the Eighth Amendment, but it is by no means the only one. Consider briefly the Supreme Court’s punitive damages jurisprudence. According to the Court, the due process clause also imposes substantive limits on the size of punitive damages awards, prohibiting awards deemed “grossly excessive.”41 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.42 Under the three-part test enunciated in BMW of North America, Inc. v. Gore,43 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.44 In assessing the third “Gore guidepost,” the Court gives “substantial deference” to legislative judgments concerning appropriate sanctions for the conduct at issue.45

Gore’s doctrinal framework is majoritarian in two ways. The third “Gore guidepost” is explicit in this regard. It calls for the Court to defer to majoritarian decisionmakers and to consider punitive damages awards against the statutory fines available in other states.46 The second “Gore guidepost,” which considers the punitive damages-to-actual harm ratio, is not explicitly majoritarian but results in the same consensus-driven

40 See, e.g., Reno v. Flores, 507 U.S. 292, 303 (1993) (rejecting substantive due process challenge to detention of juvenile aliens stating, “The 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.”’); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977) (invalidating statute limiting housing to nuclear families, stating “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.”).
41 BMW of North America, 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 Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993) (“[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits ‘beyond which penalties may not go.’”).
42 I credit Pam Karlan, with thanks, for this insight.
44 See id. at 574-75 (discussing three guideposts).
45 Id. at 583.
46 See, e.g., id. at 584 (comparing sanction imposed on BMW against statutory fines available under Alabama and New York law).
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,” the Court again turns to the states to delineate the limits of due process protection. Thus, in Gore itself, the Court relied on state statutes in recognizing double, treble, and quadruple damages as a baseline of reasonableness against which a punitive damages award could be judged. In subsequent cases, too, the Court has continued to rely on these benchmarks, invalidating punitive damages awards that represent significant departures from state practice and validating those that do not.

In the punitive damages context, then, the doctrine is in part formally majoritarian and in part majoritarian as applied. Both avenues result in the Supreme Court asking whether the award is excessive when considered against the larger legislative landscape. Tellingly, even the Court itself has, in another context, referred to its jurisprudence in this area as a response to “outlier punitive damages awards.”

Upon reflection, the Court’s majoritarian approach to punitive damages is just as one might expect. 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 punishments, what the Court does in the punitive damages area and what it does under the rubric of “evolving standards” is (again) essentially the same.

47 Id. at 580-81.
48 See id. at 581 (“Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.”). The statutes cited in Gore were old, but the norm they established was still current. See Exxon Shipping company v. Baker, 128 S.Ct. 2605, 2626, 2631 (2008) (“While a slim majority of the States with a ratio have adopted 3:1, others see fit to apply a lower one.”); infra note 49.
49 See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (invalidating punitive-to-compensatory damages ratio of 145:1 and explaining that the 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. While these ratios are not binding, they are instructive.”); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (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 Baker, 128 S.Ct. at 2631, 2634 (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, that limit may be “the outermost limit of the due process guarantee” as well).
50 Baker, 128 S.Ct. at 2626 (imposing limits on punitive damages awards as a matter of maritime common law, but describing due process jurisprudence in same area).
51 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, 312 (2002).
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. It is procedural in the sense that many, if not most, of those guarantees are themselves procedural in nature. 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, 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. Because the Court’s selective incorporation doctrine is just its fundamental rights doctrine applied in the Bill of Rights context, the analysis is basically the same. To determine which rights are sufficiently fundamental to incorporate into the due process clause, here too the Court polls the states.

52 See NOWAK AND ROTUNDA, supra note 14, at 600 (discussing Court’s interpretation of “liberty” under the due process clause as including incorporated provisions of the Bill of Rights).
53 See infra note 68 and accompanying text.
54 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”); Slaughter-House Cases, 83 U.S. 36 (1872) (limiting privileges and immunities clause to privileges of national citizenship). See also NOWAK AND ROTUNDA, supra note 14, 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.”).
55 See, e.g., Duncan v. Louisiana, 391 U.S 145, 148 (“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 AND ROTUNDA, supra note 14, 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 mean to protect a ‘fundamental’ aspect of liberty”); supra Part I.A.1 (discussing substantive due process fundamental rights doctrine).
56 Indeed, the Court has articulated the same standards in both areas and even treated precedent interchangeably. Compare Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977) (describing 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, 478 U.S. at 191-92 (quoting Palko in substantive due process context).
The Supreme Court’s 1961 decision in *Mapp v. Ohio*\(^{57}\) provides a fitting example. In *Mapp*, the Court incorporated the Fourth Amendment’s exclusionary rule to the states, launching the famous criminal procedure revolution.\(^{58}\) Although *Mapp* was not the first to recognize the importance of “a strong consensus of views in the states” in the incorporation analysis,\(^{59}\) it was the first to exemplify the modern selective incorporation doctrine.\(^{60}\) Defending its decision to abandon *Wolf v. Colorado*’s holding to the contrary in 1949,\(^{61}\) 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.\(^{62}\)

By the Court’s own account, it was the “seemingly inexorable” movement of the states that finally moved constitutional law.\(^{63}\)

*Mapp*’s majoritarian approach to selective incorporation is no anomaly. In the 1960s, the Supreme Court selectively incorporated almost all of the remaining Bill of Rights guarantees,\(^{64}\) similarly relying on the fact that most states had already recognized the protection on their

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59 Cohen v. Hurley, 366 U.S. 117, 130 n.11 (1961); see also District of Columbia v. Clawans, 300 U.S. 617, 628 (1937) (“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.”); Powell v. Alabama, 287 U.S. 45, 73 (1932) (“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.”).
60 Prior to selective incorporation, the Court used the (equally majoritarian) “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 AND ROTUNDA, supra note 14, at 462-67 (comparing selective incorporation and fundamental fairness doctrines).
61 See Wolf v. Colorado, 338 U.S. 25 (1949) (rejecting claim that exclusionary rule was fundamental and thus applied to states). The Court in *Wolf* also counted states to support its ruling. See id. at 29-30 (surveying state positions on the exclusionary rule in Tables A-J).
62 *Mapp*, 367 U.S. at 651.
63 *Mapp*, 367 U.S. at 660 (“Moreover, the experience of the states is impressive. The movement towards the rule of exclusion has been halting but seemingly inexorable.”).
64 See NOWAK AND ROTUNDA, supra note 14, 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).
own. For example, the Court counted states in incorporating the right to counsel, the right to jury trial, the right to confrontation and the right to a speedy trial. It likewise counted states when incorporating the protections against double jeopardy and prosecutorial comments on a defendant’s failure to testify. On each of these occasions, the Court was ostensibly asking whether “a civilized system could be imagined that would not accord the particular protection.” But in asking that question, the Justices used little imagination. As in the fundamental rights (and “evolving standards”) context, they surveyed the states instead.

B. Procedural Due Process

One might think that the Supreme Court’s procedural due process cases would be less consensus-driven than its substantive due process cases, if only because the Court is no longer making doctrine whole cloth. Yet here, too, the Court routinely defines constitutional protection based on the majority position of the states. To see the phenomenon at work, consider the Court’s decisionmaking in the areas of fundamental procedures, notice and opportunity to be heard, and burdens of proof.

1. Fundamental Procedures

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65 See Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (“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.”).
66 See Duncan v. Louisiana, 391 U.S. 145, 154 (1968) (“The 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.”).
67 See Pointer v. Texas, 380 U.S. 400, 402 (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 all, the states composing the Union.”).
68 Klopfer v. North Carolina, 386 U.S. 213, 225 (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.”).
69 See Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the double jeopardy guarantee 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 Fifth Amendment protection against comments on the defendant's failure to testify and explaining, “The 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.’”).
70 Duncan v. State of Louisiana, 391 U.S. 145, 149 (1968); Accord Palko, 302 U.S. at 325 (asking whether “a fair and enlightened system of justice would be impossible” without the protection at issue).
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 basically the same as what 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.”71 As in the substantive due process context, the result is again a doctrinal framework that polls the states to delineate the limits of due process protection.

The Supreme Court’s decision in Schad v. Arizona72 provides a revealing discussion of just how majoritarian the doctrine in this area is. 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.73 The Court rejected that contention, emphasizing “the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require.”74 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.75

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73 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, 627.

74 Id. at 640. The Court then discounted the usefulness of history in the context of modern statutory offenses lacking common-law roots, like the one at issue in Schad. See id. at n.7.

75 Schad, 501 U.S. at 640.
After discussing the prevalence of Arizona’s approach to first-degree murder among the states and at early common law, 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.76

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

Other decisions likewise showcase the Supreme Court turning to the states to decide the contours of procedural due process protection. The Court has, for example, counted states to decide a procedural due process challenge to a state’s definition of insanity.77 It has counted states to decide a procedural due process challenge to a state’s refusal to admit evidence of intoxication on the issue of a defendant’s mental state.78 It has counted states to decide a procedural due process challenge to pretrial detention of juveniles.79 And most recently, it has turned to the states to decide a procedural due process challenge to a state’s post-

76 Schad, 501 U.S. at 642.
77 See Clark v. Arizona, 548 U.S. 735, 748-52 (2006) (rejecting defendant’s claim that due process entitled him to at least M’Naghten test on issue of insanity, surveying states and concluding “With 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.”).
78 See Montana v. Egelhoff, 518 U.S. 37, 46-49 (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 allegiance, to qualify as fundamental, especially since it displaces a lengthy common-law tradition which remains supported by valid justifications today.”).
79 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, “In 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.”).
conviction procedures for access to evidence for DNA testing.\textsuperscript{80} In these and other cases,\textsuperscript{81} the Court relied on the states to define the “traditions and conscience of our people” embodied in due process.

In fairness, the Court has on several occasions clarified that the states’ position on an issue is not conclusive in its due process analysis.\textsuperscript{82} Yet over the years, a consensus among the states (or lack thereof) has been described as “weighty evidence,”\textsuperscript{83} “convincing support,”\textsuperscript{84} a “significant indicator,”\textsuperscript{85} and a “primary guide”\textsuperscript{86} 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 have doctrinal room to go against the grain\textsuperscript{87}—but it comes close.

2. Notice and Opportunity to be Heard

The Supreme Court’s decisionmaking in the area 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. Here the Supreme Court tends to evaluate the adequacy of procedural protections using the three-part balancing test of Matthews v.

\textsuperscript{80} See District Attorney’s Office for Third Judicial Dist. v. Osborne, ___ S.Ct. __, at *7 (WL 1685601) (June 18, 2009) (rejecting procedural due process challenge to Alaska’s postconviction relief procedures for persons seeking access to evidence for DNA testing, noting that “These 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’...”); see also id. at *8 (noting Alaska’s “widely accepted three-part test” governing access to DNA rights).

\textsuperscript{81} See, e.g., Estes v. Texas, 381 U.S. 532, 540 (1965) (polling states to decide due process challenge to refusal to televise trial); Snyder, 291 U.S. at 334-35 (polling states to decide due process challenge to inability of defendant to be present at view of crime scene).

\textsuperscript{82} See, e.g., Schad, 501 U.S. at 642 (“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.’”).

\textsuperscript{83} Estes, 381 U.S. at 540 (characterizing 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.”).

\textsuperscript{84} 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.”).

\textsuperscript{85} 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...”).

\textsuperscript{86} Egelhoff, 518 U.S. at 43 (“Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice.”).

\textsuperscript{87} 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 death penalty under the Eighth Amendment.”); accord Roper v. Simmons, 543 U.S. 551, 564 (2005); Atkins v. Virginia, 536 U.S. 304, 312 (2002).
Eldridge. Under the *Matthews* balancing test, the Court weighs the government’s interest in the procedure used against the private interests at stake as well as the likelihood that a different procedure would lessen the risk of erroneous deprivation. On its face, nothing about the Court’s doctrine in this area is majoritarian. Yet in practice, the Court’s notice and opportunity to be heard cases provide yet another example of explicitly majoritarian constitutional protection.

Under the *Matthews* balancing test, the Supreme Court incorporates majoritarian benchmarks into its 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, the Supreme Court in *Pennsylvania v. Ritchie* used the majority position of the states to uphold a trial court’s refusal to disclose to the defendant 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.” In other cases, too, the Court has used the majority position of the states to validate the government’s interest in a particular procedure.

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*, 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. Rejecting the state’s interest in the procedure, the

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88 424 U.S. 319 (1976). Sometimes the Court does not evaluate a litigant’s claim to notice and/or opportunity to be heard under *Matthews* by name, but nevertheless uses its balancing framework. See infra note 90 and accompanying text (discussing *Pennsylvania v. Ritchie*).

89 See id. at 321. See also NOWAK AND ROTUNDA, supra note 14, at 636-39, 655 (discussing *Matthews* balancing test).


91 Id. at 60, n. 17.

92 See, e.g., Williams v. Florida 399 U.S. 78, 81-82 (1970) (justifying notice of alibi requirement based on importance of state interest at stake, reasoning that “[T]he 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.”). See also Schall v. Martin, 467 U.S. 253, 267-68 (1984) (justifying pretrial detention of juveniles based on importance of state interest at stake, surveying states and reasoning that “In 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.”).

Court reasoned that “nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place” and referenced an appendix to its opinion categorizing those statutes along five different axes. 94 Similarly, the Court in Ake v. Oklahoma 95 relied on the states in overturning a conviction where the trial court had refused to provide a psychiatrist to support an indigent defendant’s mental health claim, 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. 96

In other cases, too, the Court has relied on what most states could do in determining what, consistent with due process, a particular state couldn’t. 97

Finally, sometimes in its notice and opportunity to be heard cases, the Supreme Court uses the fact that most states have—or have not—adopted similar procedures to assess the risk of error 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

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94 Id. at 17. See also id. at 24-25 (attached appendix).
96 Id. at 78-79. See also id. at 79 (noting that “More than 40 states, as well as the Federal Government” entitle indigent defendants to a psychiatrist’s assistance when warranted).
97 See, e.g., Little v. Streater, 452 U.S. 1, 15 (1981) (finding 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.’”); Morrissey v. Brewer, 408 U.S. 471, 484, 488 n.15 (1972) (finding due process violation where state revoked parole without a hearing, reasoning that “most States have recognized that there is no interest on the part of the State in revoking parole without any procedural guarantees at all” and referencing footnote stating that “Very 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.”).

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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.98

Likewise, in Parham v. J.R.,99 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.”100

In the area of notice and opportunity to be heard, then, one can see several ways in which the Supreme Court’s decisionmaking is explicitly majoritarian, even in the absence of explicitly majoritarian doctrine. Granted, the state counting here is not formally entrenched, as it is in the “evolving standards” context. But where the Court counts states, the result is the same—explicitly majoritarian constitutional protection.

3. Burdens of Proof

The Supreme Court’s decisionmaking in the burdens-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.101 The one constant has been the Court’s reliance on the majority view of the states as a formal component of its due process analysis.

The Supreme Court’s decision in Rivera v. Minnich102 illustrates just how majoritarian the doctrine 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

98 Ake, 470 U.S. at 79.
99 442 U.S. 584 (1979). See also Crane v. Kentucky, 476 U.S. 683, 689 (1986) (finding due process violation where state excluded testimony concerning circumstances of confession at trial, holding that defendant was deprived of opportunity to be heard on issue affecting reliability of conviction and relying on “statutory and decisional law of virtually every State in the Nation.”).
100 Id. at 612.
applied in paternity litigation in the majority of American jurisdictions.” 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 principle 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.

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

Consistent with Rivera, the Supreme Court has relied on the states to decide a number of burden-of-proof issues. For example, the Court counted states in rejecting the preponderance of evidence standard in civil commitment proceedings and termination of parental rights proceedings. It has likewise counted states in deciding burden-of-proof issues relating to surrogate medical decisions, a criminal defendant’s competency, sentencing enhancements, and the absence

103 Id. at 578. See also id. at 579 (relying on “the collective judgment of the many state legislatures” in determining what due process requires).
104 Id. at 578-79.
105 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 each case to prove point).
106 See Addington v. Texas, 441 U.S. 418, 426 (1979) (holding that due process is not satisfied by 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”).
107 See Santosky, 455 U.S. at 749 and n.3 (holding that due process is not satisfied by preponderance of evidence standard in termination of parental rights proceedings, noting “Thirty-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’”).
108 See Cruzan v. Missouri Dept. of Health, 497 U.S. 261, 284 (1990) (holding that due process is satisfied by state’s use of clear and convincing standard in surrogate medical decisionmaking context, 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.”).
109 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
of malicious intent.  Although here again, the states’ adoption of a particular burden of proof is not conclusive in the due process analysis, the Court has 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.” Under the “evolving standards” doctrine, a consensus means no more, or less.

II. 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 described as “the most absorptive of powerful social standards of a progressive society”—a characterization not so different from the “evolving standards of decency that mark the progress of a maturing society.” Yet even where the Supreme Court is construing constitutional provisions celebrated for countermajoritarian protection, one can still find striking similarities to what the Court does in the name of “evolving standards.” The equal protection clause and First

\textsuperscript{110}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.”).

\textsuperscript{111}Mullaney v. Wilbur, 421 U.S. 684, 696 (1975) (holding that due process is violated 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.”).


\textsuperscript{113}See supra note 2 (discussing Supreme Court’s recognition of state statutes under “evolving standards” doctrine as the “clearest and most reliable objective evidence of contemporary values”); note 87 (discussing Supreme Court’s recognition that “in the end our own judgment will be brought to bear” on questions of constitutionality under “evolving standards” doctrine).

\textsuperscript{114}Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring) (“Due process’ is, perhaps, the least frozen concept in 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.

Amendment—both sources of some of the Supreme Court’s most famous countermajoritarian rulings\textsuperscript{116}—present prime examples.

\textit{A. Equal Protection Clause}

Unlike other constitutional provisions, the equal protection clause promises nothing on its own. Rather, its promise is equal treatment in whatever the law otherwise provides.\textsuperscript{117} To realize this promise, the Supreme Court takes an approach almost identical to its due process fundamental rights doctrine; there is just more to it.\textsuperscript{118} 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.\textsuperscript{119} If the classification burdens a quasi-suspect class, it must be substantially related to an important government interest.\textsuperscript{120} And if the classification does neither, then it need only be rationally related to a legitimate government interest.\textsuperscript{121}

Although the Supreme Court’s substantive due process and equal protection doctrines mirror each other in several respects, they 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.\textsuperscript{122}

\textsuperscript{116} See, e.g., \textit{Brown v. Board of Education}, 347 U.S. 483 (1954) (invalidating racially segregated schools under equal protection clause); \textit{Engel v. Vitale}, 370 U.S. 421 (1962) (invalidating school prayer under \textit{First Amendment}); \textit{Texas v. Johnson}, 491 U.S. 397 (1989) (invalidating state’s proscription on flag burning under \textit{First Amendment}). See also Friedman, supra note 8, at 604 (“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.”).

\textsuperscript{117} See \textit{San Antonio Independent School 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.”).

\textsuperscript{118} See generally NOWAK AND ROTUNDA, supra note 14, at 429 (comparing provisions).

\textsuperscript{119} See (ironically) \textit{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 AND ROTUNDA, supra note 14, at 687-88 (discussing strict scrutiny standard and its application to classifications based on race or national origin); \textit{id.} at 752 (discussing \textit{Korematsu’s} introduction of strict scrutiny standard).

\textsuperscript{120} See \textit{Craig v. Boren}, 429 U.S. 190, 197 (1976) (articulating standard). See also NOWAK AND ROTUNDA, supra note 14, at 688 (discussing intermediate scrutiny standard and its application to classifications based on gender or illegitimacy).

\textsuperscript{121} See \textit{Heller v. Doe}, 509 U.S. 312, 319-21 (discussing rational basis standard); see also NOWAK AND ROTUNDA, supra note 14, at 429, 687 (same).

\textsuperscript{122} See supra notes 17-18 and accompanying text.
Court’s equal protection cases use that avenue too, but here the prime conduit for majoritarian decisionmaking is in evaluating the legitimacy of the classification itself.

Consider, for example, the Supreme Court’s decision in **Heller v. Doe**. In **Heller**, the Court upheld a classification that treated mentally retarded and mentally ill persons differently in the involuntary commitment context, relying in part on the fact that “[a] large majority of states have separate involuntary commitment laws for the two groups.” 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.

In other cases, too, the Supreme Court has relied on a consensus among the states to validate a classification. In **San Antonio Independent School Dist. v. Rodriguez**, 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.

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

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124 **Heller**, 509 U.S. at 326.
125 Id. at 327-28 and n.5.
126 **Heller** at 477-48.
129 Id. at 804-05.
130 See, e.g., **Martinez v. Bynum**, 461 U.S. 321, 325 n.4 (1983) (rejecting equal protection challenge to residence requirement for tuition-free public schooling, noting “The vast majority of the States have some residence requirements governing entitlement to tuition-free public schooling. Many States have statutes substantially similar...”); **Holt Civic Club v. City of Tuscaloosa**, 439 U.S. 60, 72 (1978) (rejecting equal protection challenge to state’s creation of political subdivisions, explaining,
The reverse is also true. The Supreme Court has instructed that “discriminations of unusual character” be carefully considered, even under rational basis review, and has invalidated a number of outlier classifications on that basis. From the poll tax, to gender restrictions in the sale of alcohol, to a constitutional amendment targeting sexual orientation, the Court has used the majority position of the states to define what minimum equal protection requires.

Although the Supreme Court’s explicit reliance on majoritarian benchmarks in the equal protection context will for some come as a surprise, perhaps it shouldn’t. On the surface, the equal protection clause requires only that like persons be treated alike. But underlying the surface simplicity of that command are more difficult questions about what differences matter when—and those are questions that have no easy answers. As Peter Westen recognized years ago, equality is an “empty...
idea” on its own, a mandate that means nothing absent the value judgments used to fill it. Those judgments have to come from somewhere. As even the Court’s equal protection cases show, the majority position of the states is an obvious (and oft-used) choice.

B. First Amendment

Unlike the elusive equal protection clause, the First Amendment is written in unequivocal, absolute terms. Yet despite its opening words, “Congress shall make no law...,” the First Amendment has not proven to be a right of unbounded religious freedom and free speech. Rather, it too is chock full of line-drawing and limitations, with examples of consensus-driven 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. In practice, that means a government regulation can neither benefit nor burden religion (at least on purpose) unless doing so is necessary to promote a compelling state or federal interest. As in the equal protection context, the Court’s approach in this area necessitates judgments about the sufficiency of the government interest at stake and the legitimacy of the means used to serve it.

Here again, the Supreme Court commonly counts the states in conducting its analysis. For example, the Court counted states in

138 See 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...”).
139 See NOWAK AND ROTUNDA, supra note 14, at 1408 (discussing neutrality principle); see also supra note 138 (quoting both clauses).
140 See Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (holding that free exercise clause does not prohibit governmental burden on religion where law is neutral and of general applicability, and was not intended to burden religious practice); accord Gonzales v. O Centro Espirita Beneficien te Uniao do Vegetal, 546 U.S. 418 (2006). See also Van Orden v. Perry, 545 U.S. 677, 690-91 (2005) (“Simply 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”).
141 See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 529 (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 AND ROTUNDA, supra note 14, at 1408-09 (discussing compelling interest test).
142 See supra Part II.A. (discussing equal protection doctrine and the Supreme Court’s use of majoritarian benchmarks in applying it).
upholding Sunday closing laws, a tax exemption for churches, and opening prayers in legislative assemblies. Likewise, the Court counted states when invalidating a rule that barred ministers from serving as delegates and a school district that tracked denominational lines. On each of these issues, the Court used explicitly majoritarian benchmarks to define the contours of minority rights.

In the free speech context, the Supreme Court uses majoritarian benchmarks in yet another way. Granted, the Court’s free speech cases likewise use an interest balancing approach, and one can readily find examples of state polling within that analysis. But the free speech context is unique in that here the Court also makes threshold determinations about whether certain categories of speech are outside the realm of First Amendment protection altogether—and often those determinations, too, are made in a distinctly majoritarian manner.

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143 See McGowan v. Maryland, 366 U.S. 420, 444 (1961) (upholding Sunday closing laws, stating, “Almost every state in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system.”).

144 See Walz v. Tax Commission of City of New York, 397 U.S. 664, 676 (1970) (upholding 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...”).

145 See Marsh v. Chambers, 463 U.S. 783, 788-89, 794 (1983) (upholding state practice of opening 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”).

146 See McDaniel v. Paty, 435 U.S. 618, 625 (1978) (invalidating state provision barring ministers from serving as delegates, noting that “Today Tennessee remains the only State excluding ministers from certain public offices.”).

147 See Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) (invalidating school district that tracked denominational lines, noting that it was “exceptional to the point of singularity”).

148 See generally NOWAK AND ROTUNDA, supra note 14, at 1130-43 (discussing different categories of speech and different tests used to evaluate restrictions on them).

149 See, e.g., Timmons v. Twin Cities Area New Party, 520 U.S. 351, 353 (1997) (upholding ban on so-called “fusion” candidates, beginning opinion with statement, “Most States prohibit multiparty, 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 public indecency statute, noting that “Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States.”); Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 223 n. 12 (1986) (invalidating closed primary statute, stating, “We note 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.”); see also Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981) (recognizing valid state interest in billboard regulation, noting that “the [legislative] judgment involved here is not so unusual as to raise suspicions in itself” and that regulation at issue was “like many States”).

150 See R.A.V. v. City of St. Paul, Minnesota, 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.”\textsuperscript{151} 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 “Today, every American jurisdiction—the forty-eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish libels directed at individuals.”\textsuperscript{152} 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.\textsuperscript{153}

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.”\textsuperscript{154}

Indeed, in the obscenity context, the Supreme Court’s explicitly majoritarian approach goes one step further. 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 localities—“contemporary community standards”—to define obscenity in the first place.\textsuperscript{155} By constitutionalizing majority rule at the local level, the Court cannot even engage in what others have called “sheep dog” judicial review, forcing upon laggard states a higher national standard.\textsuperscript{156}

\begin{footnotes}
\item[156] See Heffernan, supra note 4, at 1446-47 (describing Court’s consensus-based approach under Eighth Amendment as “a sheep-dog process of judicial review, one that rounds up stray states...”).
\end{footnotes}
In sum, the First Amendment, like the equal protection clause, presents an intriguing example of explicitly majoritarian decisionmaking outside the Eighth Amendment. Even here, where the Supreme Court is famous for upsetting the majority position of the states, one can still see majoritarian benchmarks shaping the contours of constitutional law. Granted, the state polling in the Court’s First Amendment (and equal protection) cases is less doctrinally entrenched than elsewhere. But the point is more modest: explicitly majoritarian decisionmaking pervades even equal protection and First Amendment law.

III. FOURTH AND SIXTH AMENDMENTS

In the final leg of this doctrinal survey, I turn to the Supreme Court’s decisionmaking under provisions specific to the criminal context. Here I examine 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” necessitates the sort of state nose-counting that marks the “evolving standards” doctrine. Yet here, too, the doctrine is firmly majoritarian. Those who now know the deal (and Fourth Amendment doctrine) might surmise that the Supreme Court counts states when deciding whether a defendant has a constitutionally cognizable expectation of privacy—the threshold determination for Fourth Amendment search claims. After all, the Court has clarified that the Fourth Amendment does not protect all expectations of privacy—the threshold inquiry for Fourth Amendment protection has not given rise to the same state polling we see in the Eighth Amendment context, despite being written in majoritarian terms. Instead, the Court’s Fourth Amendment doctrine follows the majority

157 See supra note 116 (referencing Supreme Court’s school prayer and flag burning cases).
158 See 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…”).
159 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.”).
position of the states in determining the reasonableness of the police action itself.

The Supreme Court’s decision in Payton v. New York\(^{161}\) 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.\(^{162}\) 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.\(^{163}\) 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.\(^{164}\)

The Court then went on to distinguish Payton from “the kind of virtual unanimity” that supported no warrant requirement for felony arrests in public,\(^{165}\) using an approach almost identical to what it does under “evolving standards.” First, the Court counted states, then it recognized a legislative trend in one direction, then it discussed why “the strength of the trend is greater than their numbers alone indicate.”\(^{166}\) The Court in Roper v. Simmons—the 2005 “evolving standards” case that invalidated the juvenile death penalty—did the same thing.\(^{167}\)

In other cases, too, the Supreme Court has formally recognized the importance of state-counting in its Fourth Amendment analysis. In Tennessee v. Garner,\(^{168}\) 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 looked to prevailing rules in individual jurisdictions.”\(^{169}\) Similarly, in Atwater v. City of Lago Vista,\(^ {170}\) the Court parroted back

\(^{161}\) 445 U.S. 573 (1980).
\(^{162}\) Id. at 603.
\(^{163}\) See id. at 590-603.
\(^{164}\) Payton, 445 U.S. at 600.
\(^{165}\) Id.
\(^{166}\) Id.
\(^{167}\) See supra notes 21-26 (discussing analysis in Roper and comparing analysis in “evolving standards” and substantive due process fundamental rights context).
\(^{168}\) 471 U.S. 1 (1985).
\(^{169}\) Id. at 15-16.
Justice O’Connor’s admonition that courts be “reluctant” to invalidate under the Fourth Amendment a historically accepted practice that “has continued to receive the support of many state legislatures.”

Applying these standards, the Supreme Court has identified, and followed, a national consensus in deciding a number of key Fourth Amendment issues. For example, the Court counted states in its landmark rulings on excessive force, knock and announce, warrantless arrests, and arrests for nonjailable offenses. In each of these areas, 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.” But as Barry Friedman has noted, “all” does not mean all. According to the Supreme Court, “all” actually means some, and here again, the Court uses the majority position of the states to decide constitutional protection.

The right to jury is a prime example. For over seventy years now, the Supreme Court has sanctioned state polling to determine which jury practices are constitutionally required and which are not. In District of Columbia v. Clawans, for example, the Court counseled that “objective

171 Id. at 345 n. 14 (quoting Garner, 471 U.S. at 26 (O’Connor, J., dissenting); see also infra note 175 (quoting state counting in Atwater).
172 See Garner, 471 U.S. at 18 (finding 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 8.
174 See Payton, 455 U.S. at 600 (prohibiting warrantless arrest in the home, stating, “Only 24 of the 50 States currently sanction warrantless entries into the home to arrest, and there is an obvious declining trend. Further, the strength of the trend is greater than the numbers alone indicate.”); Watson v. United States, 423 U.S. 411, 421-22 (1976) (recognizing 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.”).
175 See Atwater, 532 U.S. at 325 (upholding arrest for nonjailable offense, stating, “today statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace, as do a host of congressional enactments” and attaching appendix).
176 U.S. CONST. amend. VI.
177 See Friedman, supra note 8, at 593-94 (noting in the Sixth Amendment context, “But ‘all’ turns out not to mean all: it just means some.”).
standards such as may be observed in the laws and practices of the community” guide the jury trial analysis. In Duncan v. Louisiana, the Court reiterated that standard, stressing the importance of “objective criteria, chiefly the existing laws and practices in the Nation.” For death penalty scholars, that language should sound familiar—it is nearly the same as what the Court says under the “evolving standards” doctrine.

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

Similarly, in Baldwin v. New York, 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. Rejecting offhand the state’s proposed 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.’”

178 300 U.S. 617, 628 (1937) (“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.”)
179 391 U.S. 145, 161 (1968) (“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, supra, to refer to objective criteria, chiefly the existing laws and practices in the Nation.”).
180 See Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (“The 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 earlier in this paper. See supra note 19 and accompanying text (discussing reliance on state legislation in the “evolving standards” and substantive due process contexts).
182 Id.
184 Id.
these instances and others, the Court did just what it does under “evolving standards”—survey state legislation and follow the national norm.

In other Sixth Amendment protections, too, one can 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, right to a public trial, and right to an impartial jury. It has polled the states to resolve issues regarding the right to compulsory process and the scope of the confrontation clause. Just last term, the Court polled the states to decide when the right to counsel attaches, relying on “the overwhelming consensus process” of forty-three

185 See, e.g., Ballew v. Georgia, 435 U.S. 223, (1978) (invalidating 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, 81 (1970) (“Given the case with which an alibi can be fabricated, 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.”); id., 399 U.S. 117, 122 (Harlan, J., concurring) (“Rather 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.”); Duncan, 391 U.S. at 161-62 (“In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail….It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense.”). For an excellent (and the only other) discussion of majoritarian doctrine in the Sixth Amendment right to jury context, see Friedman, supra note 8, at 593-98.

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

187 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 criminals trials, noting that “Approximately half the States also have statutory prohibitions containing limitations on public trials.”).


189 See, e.g., Maryland v. Craig, 497 U.S. 836, 853-54 (1990) (holding that 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 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.”).
states.\textsuperscript{191} In each of these doctrinal areas, the Court demonstrated in practice what every pre-schooler already knows: line-drawing is easiest when tracing lines already there.\textsuperscript{192}

IV. QUALIFICATIONS, EXPLANATIONS, AND IMPLICATIONS

Thus far, the analysis has aimed at proving the existence of explicitly majoritarian decisionmaking outside the Eighth Amendment. We see it in due process, we see it in notoriously countermajoritarian provisions, 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

This section refines the analysis. My aim here is to make the claim 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. The Court’s use of explicitly majoritarian benchmarks outside the Eighth Amendment is pervasive, not prolific (at least not across the board). In the end, the frequency with which the Court polls the states depends on the doctrine, my next point.

Second, the strength of my analysis varies across constitutional contexts. In some areas—fundamental rights and the right to jury come to mind—the doctrine is just as patently majoritarian and formally entrenched as “evolving standards.”\textsuperscript{193} In other areas—opportunity to be heard, equal protection, and First Amendment are nice examples—the doctrine is majoritarian not as stated, but as applied, and tends to be more hit or miss.\textsuperscript{194}

\textsuperscript{191} See Rothgery v. Gillespie County, Texas, 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.’”). 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 “Overall, 31 States have now extended the right [of counsel] to defendants charged with crimes less serious than felonies.”).

\textsuperscript{192} I credit Jessica Lain for this insight, based on empirical study.

\textsuperscript{193} See supra Parts IA.1, I.B.1 (discussing fundamental rights doctrine in the substantive and procedural due process contexts); Part IIIB (discussing Sixth Amendment right to jury doctrine).

\textsuperscript{194} See supra Part I.B.2 (discussing doctrine in the area of notice and opportunity to be heard); Part II (discussing equal protection and First Amendment doctrine).
Within any given doctrinal context, one also can see substantial differences in the amount of attention the Court gives to its state-polling analysis. In some cases, the state counting is extensive; it is not uncommon to see an appendix to the Court’s opinion cataloguing the positions of the states.\textsuperscript{195} In other areas (very few), the Court does not appear to have counted states at all, even though the constitutional standard clearly invites it.\textsuperscript{196}

In short, there are variations in just how much the Supreme Court’s decisionmaking outside the Eighth Amendment resembles what it does under “evolving standards.” But the point here is more subtle. Even where the Court’s state polling practices are not formally entrenched in the doctrine, they still show the Justices routinely—and explicitly—using majoritarian benchmarks to shape the contours of constitutional law.

Third, none of this is to say that the Supreme Court always, or even almost always, follows the consensus view of the states when it does poll them. Sometimes the Court manipulates the data to make the numbers come out right, couching the question in a particularly broad or narrow fashion.\textsuperscript{197} And sometimes the Court simply goes the other way, leaving majoritarian arguments to the dissent.\textsuperscript{198} Both realities raise suspicions


\textsuperscript{196} The Fourth Amendment’s threshold showing that an expectation of privacy be one “that society is prepared to recognize as reasonable” is one example. See supra notes 159-160 and accompanying text (discussing opportunity for state polling here but absence of phenomenon). The Supreme Court’s definition of a “public forum” subject to reasonable time, place, and manner restrictions is another. See Perry Education Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (defining “public forum” as “places which by long tradition or by government fiat have been devoted to assembly and debate”); Friedman, supra note 8, at 605 (noting that definition of public forum is “itself a question resolved by reference to majoritarian sources”).

\textsuperscript{197} See, e.g., 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 majority’s manipulation of tradition and “level of generality”).

\textsuperscript{198} 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 of Sonoma County, 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
that the Supreme Court’s state polling exercises outside the Eighth Amendment are just a doctrinal façade for result-oriented decisionmaking. And that may well be. But the same could be said of the “evolving standards” doctrine too.199

Fourth and finally, just as I have tried not to make the point bigger than it is, I do not want to make it smaller. In this paper, I have focused on the most prominent examples of explicitly majoritarian decisionmaking outside the Eighth Amendment. But there are many others. The Supreme Court has followed the consensus view of the states in deciding cases under the dormant commerce clause,200 takings clause,201 and double jeopardy clause.202 It has taken an explicitly majoritarian approach to questions of personal jurisdiction,203 as well as legal concepts like judicial discretion,204 statutory construction,205 and

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202 See, e.g., Breed v. Jones, 421 U.S. 519, 538 (1975) (polling states in finding double jeopardy violation where juvenile was subject to both adjudicatory hearing and subsequent trial as adult); considering personal jurisdiction challenges against standard of “traditional notions of fair play and substantial justice, stating, “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.”).

203 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.”).
stare decisis. 206 The Court has even used “contemporary standards” to inform the meaning of the term “chicken shit.”207

In sum, majoritarian text may be unique to the Eighth Amendment, but majoritarian doctrine is not. Consensus-based decisionmaking permeates constitutional law. Why might that be so?

B. Explanations

The phenomenon of explicitly majoritarian doctrine outside the Eighth Amendment brings two questions immediately to mind. The first is the one just posed: what might explain why consensus-based decisionmaking appears in so many doctrinal areas, and why it is more formally embedded in some areas than others? The second is why Supreme Court Justices of varying political and interpretive persuasions would find state polling attractive. Here are a few thoughts to get the conversation started.

1. Doctrinal Differences

From a decisionmaking perspective, the phenomenon of majoritarian doctrine is not all that hard to explain. In the end, constitutional interpretation requires the drawing of fine lines, and that comes down to judgment calls. Judgment calls come down to others’ judgment calls, and that is where the states come in. As such, we should not be surprised to see the Supreme Court turn to the states to determine what is fundamental, what is reasonable, what state interests are sufficiently important, and so on. Those judgment calls have to come from somewhere, and as the Court itself has recognized both in and outside the “evolving standards” context, state legislative consensus provides an objective measure of how value-laden judgments should be

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

206 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.”).

made. The harder question is how to explain the differences in the Court’s explicitly majoritarian approach across doctrinal lines.

In some ways, the differences we see 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. 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. Here in particular, the Court’s approach is readily understandable. If discretion truly is the better part of valor, it makes sense that the Court would tread cautiously in recognizing rights not enumerated in constitutional text under the (also unenumerated) doctrine of C.Y.A. The Supreme Court has said as much itself.

In other ways, the fit is not so good. 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 contexts—but few would describe the area of notice and opportunity to be heard as a bastion of counter-majoritarian rights. Similarly, the controversial nature of the protection at issue fails to

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208 See supra note 2 (quoting Supreme Court in “evolving standards” context); note 18 (quoting Supreme court in substantive due process context); note 179 (quoting Supreme Court in Sixth Amendment context).

209 See generally Part II (analyzing equal protection and First Amendment doctrine); supra note 116 and accompanying text (citing cases famous for counter-majoritarian protection in the equal protection and First Amendment contexts).

210 See generally Part IA (comparing Supreme Court’s substantive due process fundamental rights and “evolving standards” doctrines).

211 This venerable doctrine is “Cover Your Authority,” and to cover mine, I offer two cites. Cf. Winter, supra note 8, at 684 (suggesting that the Court’s reliance on state polling in Fourth Amendment context may have been “nothing more than acting prudently to cover its political flank.”); Conkle, supra note 13, at 64 (“Nothing in constitutional law is more controversial than substantive due process.”).

212 See, e.g., Collins v. City of Harker Heights, Texas, 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, 431 U.S. at 502 (“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.”).

213 See generally Part I.B.2 (discussing majoritarian decisionmaking under Supreme Court’s notice and opportunity to be heard cases); Part II (discussing same under equal protection and First Amendment).
explain why the Court does not count states in the Fifth Amendment interrogation context—nor does it explain the Court’s right to jury cases, where state polling is formally entrenched as the doctrinal norm even without all the drama over unenumerated constitutional rights.

In short, the Court’s proclivity for action or inaction provides a start to understanding 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 Court is regulating police interrogation practices that are highly fact specific and rarely capable of state-by-state legislative comparisons. 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 bleed into the doctrine in the same way.

Yet here, too, there are limitations to the explanatory power of these doctrinal differences. As previously noted, there are a few areas—very few—where the Court does not count states even though its formulation 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. The Court’s personal jurisdiction cases, which measure due process by way of “traditional notions of fair play and substantial

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214 See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966) (requiring warnings prior to custodial interrogation under 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.”).

215 See supra notes 178-185 (discussing majoritarian decisionmaking in Sixth Amendment right to jury context).

216 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.”).

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

218 See supra note 196 and accompanying text.

219 See supra note 160 and accompanying text.
justice,” arguably provide another.\textsuperscript{220} In short, the opportunity for state polling in particular doctrinal frameworks may help 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 in fine, there really is no explanation. Explicitly majoritarian decisionmaking in some places (and the lack thereof in others) may be just 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.

\section*{2. 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?

For judicial conservatives, the attractiveness of majoritarian doctrine is fairly obvious. This is not originalism, but it is judicial minimalism in full flower. So long as the Supreme Court is counting states to determine 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 particular where the Court clearly did not count states—\textit{Roe v. Wade}.\textsuperscript{221} Liberal landmarks like \textit{Roe}, \textit{Furman v. Georgia},\textsuperscript{222} and \textit{Engel v. Vitale}\textsuperscript{223} would never have come to pass had the Court been polling states, and judicial conservatives like it that way.

This is not to say that state polling always suits the Supreme Court’s conservative Justices. While Justice Scalia has opined that a policy’s “wide acceptance in legal culture” is “adequate reason not to overrule

\begin{itemize}
\item \textsuperscript{220} Although the Supreme Court has explicitly recognized the relevance of state polling in its personal jurisdiction analysis, see supra note 203 (quoting Burnham v. Superior Court of California, 495 U.S. 604, 627 (1990)), it does not appear to have actually counted states in this area.
\item \textsuperscript{221} 410 U.S. 113 (1973) (overturning laws of 46 states that placed limits on access to abortion in first trimester). See also ROSEN, supra note 7, at 203 (“In response to \textit{Roe v. Wade}, conservatives embraced a series of formalist approaches to the Constitution in an effort to constrain judicial discretion...”).
\item \textsuperscript{222} 408 U.S. 238 (1972) (overturning death penalty statutes of 39 states).
\item \textsuperscript{223} 370 U.S. 421 (1962) (overturning laws of 39 states requiring or allowing school prayer).
\end{itemize}
the converse is not always true. Even where a legislative consensus has formed against a particular practice, judicial conservatives at times oppose constitutional protection. Thus, for example, in *Baldwin v. New York*, where the Court counted states in holding that a potential one-year sentence was sufficiently severe to trigger the Sixth Amendment right to jury, Chief Justice Burger dissented, lamenting, “That the ‘near-uniform judgment of 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.” On a related Sixth Amendment issue, Justice Harlan essentially agreed. Indeed, in the relatively few instances where 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 surpassing them.

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 decisionmaking 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.

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225 See 399 U.S. 66 (1970). The Supreme Court’s analysis in *Baldwin* is discussed at supra notes 183-184 and accompanying text.

226 Baldwin, 399 U.S. at 76 (Burger, C.J., dissenting).

227 See Williams v. Florida, 399 U.S. 117, 122 (1970) (Harlan, J., concurring) (“Rather 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. This is a constitutional renvoi.”). See also Baldwin, 399 U.S. at 138 (Harlan, J., dissenting) (“I agree with the Chief Justice: ‘That the ‘near-uniform judgment of the Nation’ is otherwise than the judgment in some of its parts affords no basis to read into the Constitution something not found there.’”).

228 This explains why the dissenters in most of these cases are the Court’s liberals. See supra note 198 (listing a number of cases where the Court has rejected the result that state polling would suggest, quoting state-counting arguments by dissenting Justices).

Justice Kennedy, too, has described the Court’s decisionmaking in explicitly majoritarian terms. On a larger scale, political scientists have now empirically proven what many of us intuitively knew all along: the Court’s moderate, swing voters are more responsive to majoritarian influences than Justices on either end of the ideological spectrum. Thus, it is little wonder 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. Explicitly majoritarian decisionmaking fits them like a glove.

That leaves the Supreme Court’s liberal members—what, then, might they find attractive about explicitly majoritarian doctrine? Sometimes the answer is nothing. The Court’s liberals do not need state polling to support constitutional protection; they are more than willing to make the move on their own. 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.*, 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.

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230 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.”).


233 See supra notes 221-223 and accompanying text (discussing liberal landmarks where the Court upset the majority practice of the states).

234 *Michael H. v. Gerald D.* is discussed at supra note 38 and accompanying text.

Just as state polling sometimes gives judicial conservatives more constitutional protection than they would like, it sometimes gives liberals less.

Yet for liberal Justices, too, explicitly majoritarian doctrine has its advantages. After all, counting states to define the contours of constitutional protection is at least not originalism. It recognizes that ours is a living Constitution—it evolves, responding to what Oliver Wendell Holmes referred to as “the felt necessities of the time,” even if the pace is slower than liberals like. Simply put, judicial minimalism may reign in the short run, but in the long run, liberalism wins. Explicitly majoritarian doctrine means that constitutional protection will more or less reflect contemporary norms, rather than those that prevailed 200 years ago. Moreover, in the meantime, state legislative consensus provides liberals with strong support for constitutional protection and little downside of recognizing it. Seen in this way, the results of explicitly majoritarian doctrine are like low-hanging fruit—easy pickings for constitutional protection.

In sum, perhaps the real reason for the unexceptionalism of “evolving standards” is that explicitly majoritarian doctrine has a little something for 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 Justices’ interpretive philosophies leave little room for deference to majority will. Jeffrey Rosen, whose work has eloquently and presciently detailed the Supreme Court’s tendency to reflect the views of national majorities, exemplifies the conventional view when he writes:

> 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 vision 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.

While I otherwise find Professor Rosen’s writing compelling, on this issue the academy has missed the mark. The perception of the Justices—of any methodological persuasion—ignoring as much as possible

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237 ROSEN, supra note 7, at 202. See also id. at 207 (“Since neither originalism nor pragmatism seem consistently to lead to judicial deference in practice, I find myself increasingly losing interest in abstract debates about which constitutional methodology best promotes democratic values.”).
majority will in their approach to constitutional interpretation is simply inaccurate. Explicitly majoritarian decisionmaking permeates judicial philosophies just as it permeates constitutional law. The implications are striking.

C. Implications

With so little said by so many, there are undoubtedly a number of discussions one might have about the implications of state counting as a larger doctrinal phenomenon. I set aside what explicitly majoritarian doctrine might mean to the so-called “popular constitutionalists” because this movement has a number of strands, and much of what I have to say depends on who I am saying it to. Thus, I leave the particulars of that conversation for another day, and discuss here the implications of explicitly majoritarian doctrine in more general terms. I turn first to death penalty doctrine, then to broader issues of constitutional law.

1. Death Penalty Doctrine

Within the world of death penalty doctrine, the phenomenon of explicitly majoritarian decisionmaking outside the Eighth Amendment raises significant questions about the legitimacy of the “evolving standards” doctrine itself. For years now, scholars have lamented the Supreme Court’s majoritarian approach to protection in the death penalty context, and understandably so. Capital punishment is notorious for its disproportionate impact on those most vulnerable to majority overreaching, and death penalty politics make majority overreaching

238 See Corinna Barrett Lain, Popular Constitutionalism and Our (Already) Democratic Supreme Court (on file with author).
239 See U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (examining 28 studies and concluding that 82% of them showed race-of-victim discrimination, a finding “remarkably consistent across data sets, states, data collection methods, and analytical techniques”); David C. Baldus & George Woodworth, Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research, 41 CRIM. L. BULL. 194, 214-15 (2005) (confirming the persistence over time of race as a factor in sentencing patterns in the death penalty context, and noting in particular that “black offenders whose victims are white are at particular risk of more punitive treatment”); Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L. J. 1835 (1994) (discussing relationship between poverty, race, and poor legal representation in capital trials); see also Justice Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, Lecture at the David A. Clarke School of Law, University of the District of Columbia (Apr. 9, 2001), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-09-01a.html (“I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.”).
more than a theoretical concern. In short, the “evolving standards” doctrine is especially deserving of the bad press it gets—the place most in need of countermajoritarian protection is the place least equipped to receive it.

Thus far, the only justification for the “evolving standards” doctrine is the Eighth Amendment’s explicitly majoritarian text. But this justification assumes that majoritarian doctrine, like majoritarian text, is unique to the Eighth Amendment. It is not. Given the stunning variety of contexts outside the Eighth Amendment where the Court counts states, it is difficult to conclude that majoritarian text has much to do with anything. With and without it, the Court routinely, and explicitly, bases constitutional protection on whether a majority of states agree with it.

Because current scholarship has yet to appreciate the Supreme Court’s use of majoritarian doctrine outside the Eighth Amendment, it also has failed to appreciate the choices implicit in the Court’s use of the “evolving standards” doctrine in the first place. To the extent the terms “cruel” and “unusual” have separate meanings at all, “unusual” under the Eighth Amendment can be understood in a number of plausible ways. 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), unusual because it is inflicted in an arbitrary and capricious manner, or unusual because it is procedurally irregular.

240 See supra note 3 and accompanying text.
241 See supra notes 6-7 and accompanying text.
242 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 unnaturalness 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.’”).
243 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 (“It 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.’”).
244 See Furman v. Georgia, 408 U.S. 238 (1972) (reading “cruel and unusual punishments” clause to prohibit the imposition of death in an arbitrary and capricious manner).
245 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.”); Hoffman, supra note 6, 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. Bilionis, 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
In short, the word “unusual” neither requires nor necessarily even invites explicitly majoritarian constitutional protection. The Justices count states because they want to, not because they have to.

This recognition, in turn, allows for yet another: the “evolving standards” doctrine in the death penalty context 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 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

Without a doubt, the most pressing question of the last fifty years for constitutional theory has been how to reconcile the infamous “countermajoritarian difficulty”: the notion that unelected, more or less politically unaccountable judges are able to thwart majority will within the governing structure of a representative democracy.246 Alexander Bickel coined the term,247 and scholars have not been able to stop talking about it since. Barry Friedman has labeled this discourse “an Academic Obsession,”248 and for good reason. Commentary on the countermajoritarian difficulty is so voluminous that there is now commentary on the commentary (which I suppose I have just joined).249

For the most part, scholars who have found a way out of this difficulty have done so by showing that the Supreme Court is not as

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246 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.”).

247 See supra note 246.


249 See, e.g., id. at 155-63 (discussing scholarly preoccupation with countermajoritarian difficulty); Akhil Reed Amar, The Consent of the Governed: Constitutional Adjudication Outside Article V, 94 COLUM. L. REV. 457, 495 (1994) (same); Chemerinski, supra note 1, at 17 (same); Neal Kumar Katyal, Judges as Advice-Givers, 50 STAN. L. REV. 1709 (1998) (same); Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 CAL. L. REV. 1441 (1990) (same).
countermajoritarian as commonly supposed. 250 Thus, 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, 251 and is something social scientists have known (and shown) for decades. 252

Within this body of work, scholars have spent no small amount of time trying to explain why the Supreme Court’s decisions are roughly as majoritarian as those of the majoritarian branches. 253 While recognizing the judicial appointments process as a primary conduit for majoritarian values, 254 these commentators have sought to show how constitutional meaning can change even when the Justices do not. Political scientists have placed the Court within the regime politics of dominant political coalitions. 255 Constitutional historians have provided detailed accounts of the influence of larger sociopolitical context. 256 Court and culture scholars have demonstrated the awesome power of social movements in

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250 This is not universally true. John Hart Ely, for example, famously tackled the countermajoritarian difficulty by justifying judicial review in democracy-enhancing terms. See generally ELY, supra note 1.

251 ROSEN, supra note 7, at xii.

252 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, 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).

253 See MARSHALL, supra note 252.

254 See, e.g., Keith E. Whittington, Congress Before the Lochner Court, 85 B.U. L. Rev. 821 (2005) (discussing view of “the appointments process as the primary mechanism for linking the policy preferences of the justices and legislative majorities”); Friedman, supra note 8, 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 231, 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.”).


generating constitutional change. All of these are worthy endeavors, but as the mechanism by which majoritarian values infiltrate the Supreme Court’s decisionmaking, the answer in many cases may be simpler than that. Perhaps the best explanation for the Court’s widely majoritarian outcomes is the widely-used majoritarian doctrine producing them.

Indeed, majoritarian doctrine may be not only the strongest explanation for majoritarian decisionmaking, but the strongest evidence of it as well. One can prove the Supreme Court’s inherently majoritarian leanings in a number of different ways—empirical research with statistical comparisons and extended historical analyses are two that immediately come to mind. But both of these are like catching the Justices in the act, when all we really have to do is ask them. For all the effort to prove the majoritarian nature of the Supreme Court’s protection, the Court in many places has actually told us that majoritarian protection 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, the Justices (rather than “The People Themselves”) are making the decisions, but where the Court follows the majority position of the states, those decisions reflect the views of prevailing legislative majorities at the national level. At least in practice, the countermajoritarian difficulty is not so difficult after all. The Court’s decisionmaking is majoritarian in a democratically representative way, and patently so.

At the same time, the pervasiveness of explicitly majoritarian doctrine makes it even harder to theoretically justify the institution of judicial review. The whole point of having an unelected judiciary is its ability to serve as a check on democratic majorities, which is why the Supreme Court’s countermajoritarian capacity forms the normative

257 See, e.g., Balkin and Seigel, supra note 10; Post, supra note 10; Eskridge, supra note 31.
258 See supra note 252 (listing empirical research supporting majoritarian claim); supra note 256 (listing constitutional history scholarship supporting majoritarian claim).
259 Explicitly majoritarian doctrine says nothing about the legitimacy of judicial supremacy (at least not without saying a lot of other things first)—an issue of utmost importance to at least some popular constitutionalists. See, e.g., 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).
foundation for most every justification of judicial review. Explicitly majoritarian doctrine is obviously at odds with the Court’s countermajoritarian function—a check on majority will that depends on majority will is hardly a check at all. Granted, majoritarian doctrine allows the Court to hold laggard states to a higher national standard, but we do not need judicial review for that. Even Congress can enforce a national consensus upon local outliers; the 1964 Civil Rights Act is just one example, but it amply illustrates the point. In sum, majoritarian doctrine might ease concerns that the Supreme Court is a “deviant institution” in our democratic society, but it also eviscerates the justification for judicial review in the first place. The result is a new, not-so-countermajoritarian difficulty: constitutional protection that is most likely where it least matters.

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. 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 “a constitutional straight jacket” upon them. Yet explicitly majoritarian doctrine means that the diversity we commonly associate with federalism is, in other ways, more illusory than real. Where a majority of the states have taken a position on an issue, minority states will be forced to conform regardless of the local considerations that support a different path. Simply put, explicitly majoritarian doctrine places sharp limits on the freedom that federalism ostensibly provides. Where the states vary on a protection, the Court is reluctant to intervene, but where a national consensus has formed, outlier states have little room to resist it.

260 See Friedman, supra note 8, 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.”).
262 BICKEL, supra note 246, at 17-18 (“[J]udicial review is a deviant institution in the American democracy.”).
263 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.”).
265 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 Court’s majoritarian approach to Sixth Amendment protection on 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).
266 In the only commentary I have found on the federalism implications of state counting, Roderick Hills takes a different stance, contending that state counting actually encourages federalism rather
CONCLUSION

Within the academy, there is virtually no recognition of explicitly majoritarian doctrine outside the Eighth Amendment; scholars think of the “evolving standards” doctrine as an anomaly in constitutional law. Yet when it comes to protecting individual liberties, the Supreme Court’s consensus-based decisionmaking in the death penalty context is nowhere near as peculiar as it seems. Contrary to what scholars think the Justices are doing (and contrary to what the Justices themselves have said they do), the Supreme Court routinely—and explicitly—bases constitutional protection 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 we should be talking about, and teaching, the unexceptionalism of “evolving standards.” Constitutional law texts contain little to no discussion of state legislative consensus as a basis for constitutional protection, nor do the leading treatises. 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 design. Explicitly majoritarian doctrine tells us something about the Supreme Court and the limits of constitutional protection. We ought to listen.

than limiting it. Professor Hills bases this claim on his perception of state counting as a basis for the Court to refuse constitutional protection, rather than impose it. See generally Hills, supra note 8. As this Article has endeavored to establish, my own view is that the Court does both.

267 See, e.g., West Virginia State Board of Education 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 Hospital of the District of Columbia, 261 U.S. 525, 560 (1923) (“The elucidation of [a constitutional] question cannot be aided by counting heads.”).