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# New Majoritarian Constitutionalism

Joseph Landau

*Fordham University School of Law*, [jlandau4@law.fordham.edu](mailto:jlandau4@law.fordham.edu)

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# New Majoritarian Constitutionalism

Joseph Landau\*

*ABSTRACT: Ever since Alexander Bickel coined the phrase “counter-majoritarian difficulty,” commentators have frequently described the Supreme Court as either a “majoritarian” or “counter-majoritarian” institution. In this heuristic dichotomy, the Justices either base constitutional law on their own independent and subjective interpretations or they rely on extrinsic indicators to determine constitutional meaning. In practice, however, this dichotomy is neither clearly evident, nor clearly applied, and a third approach—“New Majoritarian” Constitutionalism—has emerged. Under new majoritarian constitutionalism, the Court considers (1) the actual decisions of courts and juries; (2) legislative trends; (3) executive branch practices; and (4) geographic disparities within various jurisdictions. This model of majoritarianism accepts the traditional idea that constitutional decisions must be grounded in conventional lawmaking sources and that interpretations of vague constitutional language should accord with broadly held, majoritarian positions. This approach, however, creatively uses traditional indicators to a far greater extent than others.*

*This Article provides a new typology of majoritarian constitutional theories that reorients our understanding of the role of objective indicators of meaning, with major implications for scholarship and doctrine. In addition to its descriptive power, new majoritarianism has important normative implications—promoting institutional process values such as stability and transparency, while reinforcing the centrality of coordinate branch dialogue in evolving constitutional meaning.*

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## I. INTRODUCTION

When Yale Law Professor Alexander Bickel, in his 1962 book *The Least Dangerous Branch*, coined “the counter-majoritarian difficulty,” he dichotomized the manner in which judicial review and constitutional interpretation are often expressed and understood.<sup>1</sup> The first part of the

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1. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986) (describing the problem of unelected judges undermining the democratic process by resolving major constitutional questions against the wishes of the majority); *see id.* at 16–17 (“[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of

dichotomy is the counter-majoritarian view, in which the justices say “what the law is”<sup>2</sup> by rendering constitutional decisions through their own faculties of interpretation. A second and opposing approach is the majoritarian view, in which constitutional meaning is derived from extrinsic or “objective” factors such as state legislation and other, similar criteria that reflect the “consensus” views of the citizenry.<sup>3</sup>

In this heuristic dichotomy, the Court is either majoritarian or counter-majoritarian; the Justices either base constitutional law on their independent and subjective interpretations<sup>4</sup> or they rely on extrinsic indicators to determine constitutional meaning.<sup>5</sup> In practice, however, this dichotomy is neither clearly evident, nor clearly applied, and a third approach—“New Majoritarian” Constitutionalism—has emerged. This model of majoritarianism accepts the traditional idea that constitutional decisions must be grounded in conventional lawmaking sources and that interpretations of

the here and now; it exercises control, not in behalf of the prevailing majority, but against it. . . . [That] is the reason the charge can be made that judicial review is undemocratic.”)

2. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

3. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) [hereinafter FRIEDMAN, *WILL OF THE PEOPLE*]; MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) [hereinafter KLARMAN, *FROM JIM CROW*]; JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006); CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS* (2009); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) [hereinafter Friedman, *Dialogue*]; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1 (1996) [hereinafter Klarman, *Rethinking Civil Rights*].

4. See THE FEDERALIST NO. 48 (James Madison), NO. 49 (Alexander Hamilton or James Madison) (finding necessary “some more adequate defense . . . for the more feeble, against the more powerful” and identifying a representative republic with a truly separate judiciary as one such defense, especially against the passions of the public controlling the government); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 244 (3d ed. 2000) (describing the Supreme Court as “a principally counter-majoritarian institution charged with protecting the rights of individuals from democratic excesses”); see also LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 66 (1991) (noting that value choices are endemic to judicial interpretations of concepts like “liberty”). See generally JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980) (arguing that the Supreme Court’s insulation from politics best enables it to protect minorities from the pressures of the majority and current events); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982) (finding the Court, despite its lack of electoral accountability, to be essential to protect minority rights).

5. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (arguing that the decision as to whether same-sex couples should be permitted to marry constitutionally lay not with the Court but “with the people acting through their elected representatives”); *Boumediene v. Bush*, 553 U.S. 723, 801 (2008) (Roberts, C.J., dissenting) (criticizing the replacement of “a review system designed by the people’s representatives” with one “defined by federal courts”); Klarman, *Rethinking Civil Rights*, *supra* note 3, at 17–18 (arguing that the Supreme Court rarely acts as a counter-majoritarian force, instead “identif[ying] and protect[ing] minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection”); Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community From Itself*, 70 MINN. L. REV. 611, 613 (1986) (describing the Supreme Court’s invalidation of state or federal statutes as “enforcing its own will over that of the electorate”).

vague constitutional language should accord with broadly held, majoritarian positions. This approach, however, creatively uses traditional indicators to a far greater extent than others.

Critical to new majoritarian constitutionalism is the recognition that state legislation is not the only indication of majority views. On the other hand, new majoritarianism is not boundless. Under this framework, the Court considers (1) the actual decisions of courts and juries; (2) legislative trends; (3) executive branch practices; and (4) geographic disparities within various jurisdictions. By employing a more in-depth reading of these four categories, the Court grounds constitutional decisionmaking in objective indicators, while preserving its own unique role in deciding how to read, interpret, and apply extrinsic sources of meaning.<sup>6</sup>

To take just one example, consider *Roper v. Simmons*, a criminal sentencing case outlawing the imposition of the death penalty on juvenile offenders. *Roper* engages a highly nuanced reading of extrinsic sources of meaning that includes (1) the 18 states whose legislatures had abolished the juvenile death penalty; (2) the 12 states that had rejected the death penalty for all offenders, both juvenile and adult; (3) a gubernatorial moratorium on juvenile death sentences; and (4) the drastic decline in jury verdicts imposing juvenile death sentences even where permitted.<sup>7</sup> Based on the totality of these extrinsic sources, the Court concluded that the juvenile death penalty, a practice with superficial majoritarian appeal, was hardly the consensus practice it was widely believed to be.<sup>8</sup> The Court has applied new majoritarian analysis not only in the sentencing context, where majoritarian state practices have been prevalent for some time,<sup>9</sup> but also within the due process and equal protection contexts and likely more in the future.<sup>10</sup>

This Article presents new majoritarian constitutionalism through a typology that analyzes majoritarian constitutionalism through three models. The first is a “traditional” form of majoritarianism that finds expression in much of the relevant scholarship; on this theory, the Court tends to outsource constitutional interpretation to state legislation, public opinion, and little else.<sup>11</sup> A second and opposing view finds constitutional meaning in an open-

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6. See *infra* Part III.C.

7. See *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005).

8. See *id.* at 567.

9. See *infra* note 68 and accompanying text.

10. See *infra* notes 44–48 and accompanying text; cf. Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365, 371, 377, 389, 392, 395–97 (2009) (noting the prevalence of state-polling in the First Amendment, equal protection, due process, selective incorporation, Fourth Amendment, and Sixth Amendment contexts).

11. See *infra* Part III.A. Compare Friedman, *Dialogue*, *supra* note 3, at 609 (articulating a theory of consensus constitutionalism and “paint[ing] a picture of a judiciary far more majoritarian than generally described”), and Klarman, *Rethinking Civil Rights*, *supra* note 3, at 16 n.72 (noting that “the Court strays relatively little from majoritarian impulses”), with Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 8 (2007) [hereinafter Lain, *Deciding Death*] (arguing that the “inherently majoritarian tendencies of the Supreme Court itself” poses an obstacle “to countermajoritarian

ended array of sources, including the positions of professional associations, psychological and sociological studies, foreign law, and legal scholarship.<sup>12</sup> Third, and finally, is new majoritarianism, which borrows features of both the traditional and expansive models and is increasingly prevalent in major constitutional cases. New majoritarianism adheres to more traditional lawmaking sources but considers those laws in action, finding emerging consensus in legislative trends, the practices of executive branch officials, jury decisions, and geographic disparities to gain a better understanding of where consensus on a given issue *really* lies.<sup>13</sup>

New majoritarianism not only contributes to positivistic theories concerning the role of objective indicators in constitutional theory, but it also helps decipher the broader purposes of constitutional clauses through a more dynamic understanding of how “the people” express themselves—and what they are saying.<sup>14</sup> New majoritarianism therefore has important institutional and normative dimensions. While this Article does not consider those issues in full, it begins that discussion by introducing the new majoritarian approach as well as its core tradeoffs and implications.

Following this Introduction, Part II outlines the debate surrounding consensus-based approaches in constitutional interpretation, noting that the literature does not always provide a clear definition of what “consensus” means. Part III then explains how the Supreme Court has begun to address that important question through new majoritarian constitutionalism, which, this Article demonstrates, is prevalent across a range of controversies and especially so in criminal sentencing and LGBT rights cases. Parts IV and V explore, respectively, the doctrinal and normative implications of new majoritarianism. Part IV shows how new majoritarian constitutionalism could influence other constitutional controversies. Part V demonstrates how new majoritarianism promotes critical institutional process values such as stability, transparency, and dialogue. Part VI provides a brief conclusion.

## II. THE DEBATE OVER MAJORITARIAN CONSTITUTIONALISM

The use of extrinsic indicators is a subject of great debate among constitutional scholars. Some believe the Supreme Court decides major cases by looking to predominant state-law practices, majority opinion, or “the

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decisionmaking”), and Lain, *supra* note 10, at 366 (criticizing the “majoritarian approach” of consensus constitutionalism in which the Court announces a constitutional rule “only after a majority of states have already done so on their own”).

12. See *infra* Part III.B; see also, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015) (upholding the right of same-sex couples to marry and referencing sources ranging from “referenda” and “legislative debates” to more unorthodox indicators such as “democratic discourse” and “deliberation,” “grassroots campaigns,” and “studies, papers, books, and other popular and scholarly writings”).

13. See *infra* Part III.C.

14. See *infra* Part V.

people” writ large.<sup>15</sup> Others believe the Supreme Court is a guardian of marginalized groups and a defender of counter-majoritarian values;<sup>16</sup> scholars in favor of this view argue the Court should use its own reasoned judgment—regardless of where the majority stands on an issue—when engaging constitutional interpretation. Consensus constitutionalism aims to provide a counterweight to, and critique of, the idea that it is the sole province of the Court “to say what the law is.”<sup>17</sup> While advocates of the *Marbury* view have for decades advanced the idea of a heroic, counter-majoritarian Court,<sup>18</sup> consensus constitutionalists generally believe this view misdescribes major Supreme Court decisionmaking and that the *Marbury* view risks placing unrealistic hope in the Court that is destined to lead to disappointment.<sup>19</sup>

15. See, e.g., *Graham v. Florida*, 560 U.S. 48, 97 (2010) (Thomas, J., dissenting) (writing that the members of the Court are no more qualified to make moral judgments than normal citizens and should defer to judge and jury decisions on such matters); *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) (“I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners . . .”); *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting) (arguing that legislation and jury determinations should be the only factors considered by the Court when measuring society’s evolving “conception of decency for purposes of the Eighth Amendment”).

16. See Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 6 (2003); *id.* at 76 (noting the Supreme Court’s “essential mission of protecting individual rights”); see also Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1272 (2001) (arguing that the Supreme Court is “the highest and the last source of appellate review, whose chief function [is] correctly to discern and to protect the federal rights of litigants”); *Recent Publications*, 120 HARV. L. REV. 2254, 2256 (2007) (reviewing REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS (2006)) (“The federal courts have acquired the honored distinction—at least among constitutional law students and scholars—of being the primary guarantors of individual rights . . .”); cf. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1127 (2010) (“The courts thus could not rely on the people to protect individual rights because even if the people cared about those rights in a general sense, Chief Justice Gibson doubted whether they would notice the breach of those rights and do anything in response.”).

17. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Henry Monaghan has noted that the conventional understanding of *Marbury* “as requiring independent judicial judgment on questions of law” overlooks a narrower model of “dispute resolution,” akin to *ultra vires* review, which lies at the core of that holding. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 672–75 (2012).

18. See Klarman, *Rethinking Civil Rights*, *supra* note 3, at 1–3 (discussing scholars such as Kenneth Karst and Laurence Tribe, who embrace a “heroic” role of the Court in which the Court “protect[s] minority rights from majoritarian overreaching”); see also Paul L. Murphy, *Book Review*, 65 MINN. L. REV. 158, 165 (1980) (reviewing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)) (arguing that in the absence of the Court’s “second-guessing the substantive merits of laws . . . the populous is left at the mercy of legislative majorities—majorities whose proclivity for passing bad laws through legitimate means is certainly not unknown in this country”). For a critique of this view, see generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1st ed. 1991) (expressing reservations about the Court’s ability to effect social reform and attributing such a role to the Judiciary).

19. Friedman argues that “[d]espite the breathless way people spoke, and still speak, about the Warren Court, the deeper lesson of that time was not about the judiciary’s ability to effect revolutionary change but about the inherent limitations that the Supreme Court faces when it

## A. INSIDE THE CONSENSUS CONSTITUTIONALISM DEBATE

## 1. Consensus Constitutionalism and Majoritarian Influences

Much of consensus scholarship reframes our understanding of judicial review as a product of extra-judicial forces (social, political, cultural) and a call for legal scholars to abandon the false hope in a counter-majoritarian Court. Michael Klarman, a leading exponent of consensus constitutionalism, argues that “[i]t is time for constitutional historians to explode [the counter-majoritarian] myth, to identify and describe the parameters within which judicial review actually operates, and to create a richer and more credible account of the twentieth century’s civil rights and civil liberties revolutions.”<sup>20</sup> Consensus scholars tend to find those parameters within majoritarian legislation. According to Barry Friedman, another major scholar of consensus constitutionalism, “the Court, in defining the nature of constitutional rights, often refers to majoritarian sources of decision” and “reflect[s] majority will more often than we think.”<sup>21</sup> For Friedman, “courts defer to—indeed offer support to—the decisions of ostensibly majoritarian government.”<sup>22</sup> Jeffrey Rosen, another prominent consensus scholar, makes a similar argument: “Far from protecting minorities against the tyranny of the majority or thwarting the will of the people, courts for most of American history have tended to reflect the constitutional views of majorities.”<sup>23</sup>

Consensus-backers see majoritarian influences as a reliable helpmate in the judicial resolution of hard cases: “Whenever a principle presents itself for which the Court seems to lack hard evidence, it puts its finger on the American pulse.”<sup>24</sup> Despite the commonly held view that major Supreme Court rulings involving school desegregation, abortion rights, and same-sex marriage are the product of counter-majoritarian decisionmaking,<sup>25</sup> backers

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attempts to do so.” FRIEDMAN, *WILL OF THE PEOPLE*, *supra* note 3, at 238; *see also id.* at 259 (“The constant theme of the Court’s prominent critics in the legal academy after 1957 was that majority will is frustrated when unelected and unaccountable judges strike down legislative and executive acts.”).

20. Klarman, *Rethinking Civil Rights*, *supra* note 3, at 67.

21. Friedman, *Dialogue*, *supra* note 3, at 601, 607.

22. *Id.* at 592.

23. ROSEN, *supra* note 3, at xii.

24. Friedman, *Dialogue*, *supra* note 3, at 596.

25. *See, e.g.*, Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 285, 287 (1983) (providing *Brown v. Board of Education* as an example of the way “that the courts, whose members are relatively insulated from day-to-day partisan politics, will restrain the majority’s worst excesses, in the name of the constitutional values that define our national community”); Jonathan P. Kastellec, *Empirically Evaluating the Countermajoritarian Difficulty: Public Opinion, State Policy, and Judicial Review Before Roe v. Wade*, 4 J.L. & CTS. 1, 3 (2016) (arguing that at the time *Roe* was decided, “a majority of state majorities did not favor such a policy [on abortion]” and that “the policy announced in *Roe* was countermajoritarian to some degree”); *cf.* Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473 (2005) (describing *Brown* and *Lawrence* as counter-majoritarian decisions that created political backlash because “[t]hey raise[d] the salience of an issue, they incite[d] anger over ‘outside interference’ or ‘judicial activism,’ and they alter[ed] the order in which social change would otherwise have occurred”).

of consensus constitutionalism argue that major decisions such as *Brown v. Board of Education* are more a reflection of the prevailing view of the times influenced by social movements and accrued understandings shared by “the people” more broadly.<sup>26</sup> Groundbreaking decisions are thus the result of “the social, political, and ideological context within which judges function,”<sup>27</sup> and so-called “jurisprudential transformations” are less the result of the Court’s independent, counter-majoritarian function and more “dependent upon the broad sweep of historical forces.”<sup>28</sup>

Consensus constitutionalists dispute the idea that the Supreme Court is the civil libertarian institution it is often made out to be; rather, they argue that the Court generally does not protect minority rights unless doing so is consistent with the views of the majority.<sup>29</sup> Whatever “psychological imperative” may exist “for believing in the Court’s countermajoritarian heroics, the historical record plainly suggests that such a view is chimerical.”<sup>30</sup> After all, “[j]udges who generally reflect popular opinion are unlikely to have the inclination, and they may well lack the capacity, to defend minority rights from majoritarian invasion.”<sup>31</sup> Thus, despite the “powerful hold” *Marbury* “exercises . . . over our constitutional discourse . . . [t]he Supreme Court does not play the strong countermajoritarian role in defense of individual liberties that popular wisdom ascribes to it.”<sup>32</sup> By framing constitutional law this way, consensus scholars do away with and reject the “easy assumption about judicial trumping of majority will,” which “may well be incorrect.”<sup>33</sup>

A few consensus scholars reject the *Marbury* view not only as descriptively inaccurate but also normatively unappealing, producing decisions that lack legitimacy and are prone to backlash because out of step with the opinions of

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26. Friedman, *Dialogue*, *supra* note 3, at 608 (noting that *Brown v. Board of Education*, at the time it was decided, was supported by majoritarian public opinion). Klarman argues that “*Brown* is [thus] better understood as the product of a civil rights movement spawned by World War II than as the principal cause of the 1960s civil rights movement.” Klarman, *Rethinking Civil Rights*, *supra* note 3, at 7.

27. Klarman, *Rethinking Civil Rights*, *supra* note 3, at 18.

28. *Id.* at 7.

29. KLARMAN, FROM JIM CROW, *supra* note 3, at 450 (“[The] courts are likely to protect only those minorities that are favorably regarded by majority opinion. Ironically, when a minority group suffering oppression is most in need of judicial protection, it is least likely to receive it.”).

30. Klarman, *Rethinking Civil Rights*, *supra* note 3, at 24.

31. KLARMAN, FROM JIM CROW, *supra* note 3, at 6.

32. Klarman, *Rethinking Civil Rights*, *supra* note 3, at 2, 7. Klarman does of course accept some room for the occasional counter-example. *See id.* at 6 (“[M]y purpose here is neither to deny that some scholars appreciate the overblown nature of the countermajoritarian hero image nor to dispute that the Court does occasionally play a limited countermajoritarian function. Both the countermajoritarian capacity of the Court and scholars’ assessment of that capacity are measured along a continuum. My claim is only that the Court’s capacity to protect minority rights is more limited than most justices or scholars allow.” (emphasis omitted)).

33. Friedman, *Dialogue*, *supra* note 3, at 607.

the broader public.<sup>34</sup> These scholars worry that counter-majoritarian rulings will undermine the Court's reputation as a viable and trustworthy institution.<sup>35</sup> They support the outsourcing of constitutional meaning to extrinsic indicators—primarily majoritarian viewpoints and state legislation—as a superior and more realistic anchor for constitutional interpretation. Rosen argues, for example, that the Court, rather than being a defender of “vulnerable minorities,” should follow majoritarian opinions even when the democratically elected branches fail to do so.<sup>36</sup> Courts preserve “their legitimacy and independence” when they are receptive and responsive to the views of the majority of the American people and refrain from engaging in activist decisionmaking that exceeds the bounds of what most Americans are willing to accept.<sup>37</sup> Thus, the Court “should hesitate to strike down state laws unless it is confident that a clear national consensus, represented by a strong majority of states, has, in fact, materialized.”<sup>38</sup>

## 2. Critiques of the Consensus Model

While backers of consensus constitutionalism look outward to majoritarian state practices for indication of constitutional meaning, critics of consensus constitutionalism tend to look inward, extoling the independent role of the Justices to shape the Constitution based on their subjective judgments of law and morality.<sup>39</sup> Among these critics are civil libertarian scholars, who believe that constitutional law is shaped by the Justices' experience, expertise, values, and commitments—not the views of state legislatures.<sup>40</sup> Outsourcing constitutional meaning to extra-judicial sources

34. See ROSEN, *supra* note 3, at xii (asserting that “the most descriptively accurate” view of the role of the courts is that of the courts following public opinion, and when courts “act[] unilaterally” by “impos[ing] a constitutional vision that a majority of the country rejects,” backlash results; thus courts should continue to follow majoritarian viewpoints).

35. *Id.* at xiv (stating that when courts interfere on a hotly debated political issue, they “imperil their own legitimacy”); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting) (arguing that “[t]he legitimacy of this Court” depends on the respect given its decisions, which in turn depends on judicial humility, restraint, and deference to the democratic process).

36. ROSEN, *supra* note 3, at 5. This leads to the intriguing if counterintuitive proposition that courts “express the views of popular majorities more faithfully than the people's elected representatives.” *Id.* at 4.

37. *Id.* at 15.

38. *Id.*; see also *id.* at 13 (“My point is that judges should identify the constitutional views of the people by using whatever combination of the usual methodologies they find most reliable and then enforce those views as consistently as possible.”); *id.* at 210 (“The courts can best serve the country in the future as they have served it in the past: by reflecting and enforcing the constitutional views of the American people.”).

39. See *supra* note 18.

40. See, e.g., Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 47 (1989) (asserting the “desirability of judicial value choices”). Chemerinsky argues that Justices' personal values “crucially influence [their] decision as to what the Constitution means” and that no interpretative method is bereft of a given Justice's personal values. *Id.* at 95–96. Thus, for Chemerinsky, judicial deference to majoritarian

leaves in place the status quo and “legitimize[s] advances already made by the other departments and opinions already the conventional wisdom.”<sup>41</sup> Consensus-critics oppose constitutional theories that provide no occasion for the Court “to clash with majority preferences,”<sup>42</sup> rejecting scholarship that endorses that view.

Other scholars who accept the central positivistic claim of consensus constitutionalism still find the Court’s particular brand of outsourcing to be unsatisfying, if not deeply problematic. For example, Corinna Lain writes that the “Court routinely—and explicitly—determines constitutional protection based on whether a majority of states agrees with it.”<sup>43</sup> Lain deciphers a consensus-based approach across a range of constitutional contexts including the First Amendment,<sup>44</sup> equal protection,<sup>45</sup> due process,<sup>46</sup> selective incorporation,<sup>47</sup> and the Fourth and Sixth Amendments;<sup>48</sup> in all of these areas, she argues, the Court derives constitutional meaning by counting or “polling” the number of state legislatures that have either endorsed or prohibited a particular practice.<sup>49</sup> Lain finds this narrow form of majoritarianism wanting,<sup>50</sup> and she argues that majoritarianism, as practiced, undermines the Court’s role as a check on coordinate institutions, “shatter[ing] the conventional understanding of the Court as a countermajoritarian institution” and “shak[ing] the bedrock principles of constitutional law.”<sup>51</sup> The problem with consensus constitutionalism, she explains, is that it fails to safeguard vulnerable minorities from mistreatment

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institutions has not “avoided value choices by deferring to the political process” because “in reality [the Court] has made a value choice in choosing such deference.” *Id.* at 100; *see also* *Furman v. Georgia*, 408 U.S. 238, 258 (1972) (Brennan, J., concurring) (recognizing the “Court[’s] . . . duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be” and since “[t]hat issue confronts [the court], . . . the task of resolving it is inescapably [theirs].” (alteration in original) (quoting *Trop v. Dulles*, 356 U.S. 86, 103 (1958))).

41. *Furman*, 408 U.S. at 268 (Brennan, J., concurring) (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970)).

42. Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 758 (2011).

43. Lain, *supra* note 10, at 368–69.

44. *Id.* at 392.

45. *Id.* at 389.

46. *Id.* at 371.

47. *Id.* at 377–78.

48. *Id.* at 395–98.

49. Lain describes a number of cases where the Supreme Court used state polling to reach a conclusion about constitutional meaning. *See, e.g., id.* at 390 (discussing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)); *id.* at 393 n.158 (discussing *Marsh v. Chambers*, 463 U.S. 783 (1983)); *id.* at 396 (discussing *Payton v. New York*, 445 U.S. 573 (1980)); *id.* at 398 (discussing *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

50. *See id.* at 366 (criticizing the “majoritarian approach” of consensus constitutionalism in which the Court announces a constitutional rule “only after a majority of states have already done so on their own”); *see also* Lain, *Deciding Death*, *supra* note 11, at 3–8.

51. Lain, *supra* note 10, at 369–70.

by majorities: “[A] check on majority will that depends on majority will is hardly a check at all.”<sup>52</sup>

B. WHAT THE CONSENSUS DEBATE MISSES

Part of the rationale for a consensus or majority-based constitutionalism is interpretive necessity: Because so many of the Constitution’s words and phrases lack any clear or obvious meaning—from “due process” to “equal protection” to “cruel and unusual punishments”—the only way for the Court to properly “give content to the document’s indeterminate phrases”<sup>53</sup> is through determining, and endorsing, the majority position on a given constitutional issue.<sup>54</sup> On this view, constitutional rulings that reflect broad majoritarian support will be more likely to stand the test of time, preventing backlash and preserving judicial integrity.<sup>55</sup> Because “[j]udges cannot always know whether they are right, even about the meaning of the Constitution . . . intense public convictions may provide relevant information about the correctness of their conclusions.”<sup>56</sup> From this perspective, majoritarian viewpoints and state legislation provide the Court with indicators that will ground constitutional meaning in something clear, concrete, and enduring.

Notwithstanding the appeal of consensus constitutionalism, the actual concept of “consensus” has remained very difficult to specify. Moreover, evidence in support of a consensus-oriented Court can often be highly theoretical and abstract. Although its adherents claim to bring theory into better alignment with the actual operation of the Supreme Court, the conventional consensus literature has not produced a definition of what “consensus” or “majoritarianism” actually means, making it harder to pragmatically “identify and describe the parameters within which judicial review actually operates”<sup>57</sup> and describe “the more practical question of how judicial review actually operates as a check and balance.”<sup>58</sup> Generally speaking, consensus scholars are clearer about what consensus is *not* rather than what it is: “Polls are hardly a reliable indicator”<sup>59</sup> because they can be misleading;

52. *Id.* at 417.

53. Driver, *supra* note 42, at 770.

54. See KLARMAN, FROM JIM CROW, *supra* note 3, at 5–6 (“[B]ecause constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times. . . . In the absence of determinate law, constitutional interpretation necessarily implicates the values of the judges, which themselves generally reflect broader social attitudes.”).

55. See *id.* at 453 (“When people strongly favor a particular policy about which the Constitution offers no determinate guidance, they are understandably inclined to construe the document to support that policy. Because the justices broadly reflect society, if most people feel strongly about a particular policy, it is likely that most justices will as well. They will then face the same temptation to constitutionalize the position that they support as a policy matter.”).

56. SUNSTEIN, *supra* note 3, at 143.

57. Klarman, *Rethinking Civil Rights*, *supra* note 3, at 67.

58. Friedman, *Dialogue*, *supra* note 3, at 627.

59. ROSEN, *supra* note 3, at 9.

after all, minor changes in how a question is asked can dramatically impact polling results.<sup>60</sup> Neither is Congress a proper bellwether of the nation's views on a particular matter.<sup>61</sup> While Friedman notes "the Court's dependence on popular support,"<sup>62</sup> that still begs the question: What does "popular support" actually mean? Friedman adds that "when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices."<sup>63</sup> This claim sounds perfectly reasonable, yet it leaves questions unanswered about how exactly a court would apply this concept in practice.<sup>64</sup> While this definitional ambiguity does not detract from the appeal of consensus constitutionalism, it makes it harder to understand the metes and bounds of consensus-oriented methodology and exactly how one can be certain that courts are following it.

All of this raises a question whether "majoritarian" or "consensus"-based decisions really should turn on the simple arithmetic of counting states: Given the wide variances in state populations, treating states as the primary unit of measurement has risks.<sup>65</sup> Moreover, state legislation is often stalled by tiny minorities; in many states, a single legislator on a single committee can defeat

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60. See, e.g., Jon A. Krosnick et al., *Survey Research*, in HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY 404, 426 (Harry T. Reis & Charles M. Judd eds., 2d ed. 2014) (noting how word choices "can have a big impact on [survey] responses"); *Questionnaire Design*, PEW RES. CTR., <http://www.pewresearch.org/methodology/u-s-survey-research/questionnaire-design> (last visited Dec. 27, 2017) (describing a 2003 survey regarding support for military intervention in Iraq in which responses differed when respondents were provided with information about U.S. casualties); see also ROSENBERG, *supra* note 18, at 236 (noting that "differences in question wording and question order turn out to make a difference in responses" in surveys about abortion).

61. Rosen argues that, while Congress historically was "the most reliable representative of the constitutional views of the American people," it no longer serves that role. ROSEN, *supra* note 3, at 9. Rosen argues at times that courts should look to state constitutions and state laws for a more "objective measure of a national consensus." *Id.* at 9–12.

62. FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 371.

63. *Id.* at 375.

64. Rosen, rather than define what might constitute evidence of a national consensus, largely brackets that critical descriptive question and instead jumps to the normative takeaway that judges should identify such national consensus and "enforce those views as consistently as possible," because that is how courts "maintain their democratic legitimacy." ROSEN, *supra* note 3, at 13; see also *id.* ("Judges should be free to strike down laws if they believe, in good conscience, that the Constitution requires it, but they should be wary about rejecting the competing constitutional views of Congress, the presidents, or a majority of the states unless the case for invalidation is very strong.")

65. Under a traditional approach, Wyoming's population of roughly 600,000, *QuickFacts: Wyoming*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WY> (last visited Dec. 27, 2017), would carry the same weight in determining what constitutes a national consensus as California's population of 39 million. See *QuickFacts: California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/CA> (last visited Dec. 27, 2017). But surely any attempt to measure a truly majoritarian decision should take those differences into consideration. Cf. Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 308 (2016) ("[G]iving each state equal suffrage . . . violates the principle of one-person, one-vote" given the enormous disparity between states such as, in the most dramatic example, California and Wyoming).

a bill supported by the remainder of the chamber.<sup>66</sup> Indeed, the default position of most legislatures is the status quo—not action.<sup>67</sup> Securing a legislative majority—or even a supermajority—in support of a bill is no guarantee of passage.

The limitations of using state legislation as the sole or primary indicia of “popular support” indicate that consensus constitutionalism should turn on more than a few fixed and static indicators. Indeed, the Court’s actual consensus-based decisions eschew a narrow, state-legislation-based model. The Supreme Court, across a range of cases, has drawn on a theory of majoritarianism that is far more dynamic and complex than state-polling. Sometimes the Court finds a consensus through canvassing a broad range of indicators, including some that traditionally do not carry legal or constitutional weight. Other times the Court hews more closely to traditional legal sources but places those sources to novel and surprising ends—often overturning statutes that superficially seem majoritarian but are, on further reflection, legal outliers. The more one understands the Court’s varied uses of consensus, the more a reappraisal of the very idea of majoritarianism becomes both necessary and possible.

### III. NEW MAJORITARIANISM ASCENDANT

A number of recent decisions spanning criminal sentencing and LGBT rights provide new insights into the question surrounding what “consensus” actually means. While some Justices have made clear that only the narrowest set of objective indicators count toward a definition of “consensus” and others take a far more wide-ranging approach, a remaining position—New Majoritarianism—provides a viable middle ground. This approach applies a more comprehensive analysis of traditional lawmaking indicators that preserves the Court’s unique role in determining how to read, interpret, and apply extrinsic indicators. New majoritarianism finds nationwide consensus by looking to: (1) the actual practices of courts and juries; (2) the pace of legal change in a small number of jurisdictions that reflects an emerging national consensus; (3) decisions by state executive branch actors, including gubernatorial moratoria and commutations; and, finally, (4) geographic disparities across jurisdictions, both at the state and county level. While this approach acknowledges the traditional idea that constitutional law should be

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66. See, e.g., CHOPER, *supra* note 4, at 19–21 (describing the enormous power of committee chairpersons, whose “immense influence” upends “the democratic precept of majority rule”); Catherine J. Barrie, *Demystifying the Legislative Process*, 50 J. MO. B. 197, 199 (1994) (noting the power of a committee chair “as to whether and when to set a hearing on the bill; bring the bill up for a vote by the committee; and, if the measure is voted ‘do pass’ by the committee, whether and when to report the bill back to the leadership for possible placement on the House or Senate calendar”).

67. See Richard Neely, *Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV. 271, 275 (1982) (reviewing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)) (observing that “a force of inertia” keeps statutes effective, with the odds of change “a hundred to one in favor of the status quo”).

grounded in consensus politics, it makes far more enterprising use of traditional legal indicators, preserving *the Court's* critical role in determining how majoritarian sources should be considered in the larger constitutional equation.

A. *THE TRADITIONAL MAJORITARIAN MODEL*

The contours of the Supreme Court's varying approaches to consensus are nicely displayed in the sentencing context, where the Court has often used a national consensus analysis to determine whether various penalties comport with "evolving standards of decency"<sup>68</sup> under the Eighth Amendment.<sup>69</sup> *Furman v. Georgia*, a 1972 decision imposing a de facto moratorium on the death penalty, illustrates a range of models regarding majoritarianism.<sup>70</sup> The dissenting Justices advanced the traditional approach—looking to state legislation, majority opinion, and little else. Writing for all four dissenters, Justice Powell argued that "the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives."<sup>71</sup> Because roughly 40 jurisdictions authorized the death penalty and that number "remained relatively static since the end of World War I,"<sup>72</sup> there was little doubt that the death penalty comported with the nation's evolving standards of decency.

In the wake of *Furman's* short-lived moratorium on the death penalty, 35 state legislatures instituted the death penalty for certain crimes resulting in death, Congress permitted the death penalty via statute, and the State of California authorized capital punishment through a statewide referendum.<sup>73</sup> Citing those legislative judgments, and consistent with the conventional model, *Gregg v. Georgia* upheld capital punishment against a *per se*

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68. The Court first adopted this phrase in *Trop v. Dulles*, and it has recited it routinely in cases since then. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see also *Kennedy v. Louisiana*, 554 U.S. 407, 419–21 (2008); Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J. ONLINE 303, 304 (2013); Robert J. Smith et al., *The Way the Court Gauges Consensus (and How to Do It Better)*, 35 CARDOZO L. REV. 2397, 2403–05 (2014).

69. U.S. CONST. amend. VIII.

70. *Furman* was an incredibly narrow holding; five Justices could agree only that then-extant death penalty regimes vested too much sentencing discretion in judges and juries, resulting in capital sentences that lacked any consistency or regularity. For this reason, the Court in *Furman* rejected only the "imposition and carrying out" of the death penalty rather than a *per se* rejection of the death penalty. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (*per curiam*).

71. *Id.* at 437 (Powell, J., dissenting). Chief Justice Burger argued in similar fashion "that the reported results have shown nothing approximating the universal condemnation of capital punishment that might lead us to suspect that the legislatures in general have lost touch with current social values." *Id.* at 385–86 (Burger, C.J., dissenting).

72. *Id.* at 437 (Powell, J., dissenting). The Court noted that 40 states, the District of Columbia, and the federal government retained the practice. *Id.*

73. See *Gregg v. Georgia*, 428 U.S. 153, 179–81 (1976) (plurality opinion).

challenge,<sup>74</sup> grounding its analysis in a narrow range of indicators—primarily state legislation—to determine constitutional meaning.

The lead opinion in *Gregg*, jointly authored by Justices Stewart, Powell, and Stevens, rejected “subjective judgment”<sup>75</sup> and instead “look[ed] to objective indicia that reflect the public attitude toward a given sanction.”<sup>76</sup> State legislation provided strong “indication of society’s endorsement of the death penalty for murder.”<sup>77</sup> The Court would “presume [the] validity” of a legislative act regarding punishment—especially for crimes involving murder—by placing a “heavy burden . . . on those who would attack the judgment of the representatives of the people.”<sup>78</sup> Deference was especially warranted to “state legislatures . . . where the specification of punishments is concerned, for ‘these are peculiarly questions of legislative policy.’”<sup>79</sup>

The traditional approach can also be traced to a number of due process and equal protection cases. Consider *Lawrence v. Texas*, for example, which invalidated anti-sodomy laws in 13 states and reversed the then-relatively recent *Bowers v. Hardwick* decision.<sup>80</sup> While portions of Justice Kennedy’s majority opinion relied on new majoritarian approaches,<sup>81</sup> he noted, in traditionalist fashion, that anti-sodomy laws were unsupported by conventional indicators, with 37 states eliminating their anti-sodomy laws. And of the remaining 13 states, only “4 enforce[d] their laws . . . against homosexual conduct”<sup>82</sup>—rendering the proscription on same-sex behavior at the core of *Bowers* even more of an outlier. Justice Scalia’s dissenting opinion, arguing in favor of the constitutionality of challenged provisions, also invoked

74. See *id.* at 180–81, 187 (“[W]e are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.” (footnote omitted)). It should be noted that no more than three justices signed onto any one opinion in *Gregg*, though all seven concurring justices appear to have agreed with the proposition that capital punishment was appropriate at least for the crime of murder. *Id.*

75. *Id.* at 173.

76. *Id.*

77. *Id.* at 179.

78. *Id.* at 175.

79. *Id.* at 176 (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)).

80. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. . . . *Bowers v. Hardwick* should be and now is overruled.”). The Supreme Court is loath to overrule itself in general, and it is exceedingly rare for the justices to even consider reversing a decision of such recent vintage. Yet in *Lawrence* Justice Kennedy directly criticized the less than 20-year-old *Bowers* opinion and stated that not only was the decision incorrect due to changes in society between 1986 and 2003, but it was incorrect at the time it was written. *Id.* at 576, 578.

81. See *infra* notes 138–44 and 177–82 and accompanying text.

82. *Lawrence*, 539 U.S. at 572–73 (noting that “before 1961 all 50 states had outlawed sodomy”; that at the time of *Bowers v. Hardwick*, “24 States and the District of Columbia had sodomy laws”; and that by the time of *Lawrence*, that number had been “reduced now to 13, of which 4 enforce their laws only against homosexual conduct”).

conventional majoritarian analysis.<sup>83</sup> As Scalia noted, the Court traditionally accords substantive due process protections only to those “fundamental” rights “deeply rooted in . . . history and tradition”;<sup>84</sup> in light of this, the national consensus arguably supported the status quo given the combination of: (1) “a longstanding history of laws prohibiting *sodomy in general*”;<sup>85</sup> (2) the more than 200 prosecutions of “consensual, adult homosexual sodomy” between 1880 and 1995;<sup>86</sup> and (3) the states’ continued regulation of other sexual behaviors.<sup>87</sup> In *United States v. Windsor*, a decision invalidating Section 3 of the Defense of Marriage Act (“DOMA”), Scalia, again in dissent, championed traditional indicia of consensus. He argued that Section 3 of DOMA, adopted by both chambers of Congress and signed by President Clinton,<sup>88</sup> plainly reflected majoritarian beliefs about the disbursement of federal benefits to married same-sex couples and that the majority undermined this national consensus by “robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat.”<sup>89</sup>

In *Obergefell v. Hodges*, which drew both on due process and equal protection principles to recognize a nationwide right to same-sex marriage, Chief Justice Roberts’s dissenting opinion articulated the traditional majoritarian argument, accusing the Justices in the majority of undermining the consensus of “more than half the States,”<sup>90</sup> slighting an ongoing political “debate and enact[ing] their own vision of marriage as a matter of constitutional law,”<sup>91</sup> and undermining broader social and political progress favoring LGBT equality outside the Court, “making a dramatic social change that much more difficult to accept.”<sup>92</sup> Indeed, Roberts’s portentous warnings about a clash between judicial and mainstream values addressed the very anxiety about judicial integrity that consensus constitutionalism was meant to address.<sup>93</sup>

### B. THE EXPANSIVE MAJORITARIAN MODEL

At the opposite end of the spectrum from the traditional model is an expansive approach that allows for a range of extrinsic sources in determining

83. See *id.* at 589 (Scalia, J., dissenting).

84. *Id.* at 588 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); see also *Glucksberg*, 521 U.S. at 721 (looking to “history, legal traditions, and practices” as sources of fundamental rights).

85. *Lawrence*, 539 U.S. at 596 (Scalia, J., dissenting).

86. *Id.* at 597.

87. *Id.* at 598.

88. See Joseph Landau, *Foreword to Symposium: Defense of Marriage Act: Law, Policy, and the Future of Marriage*, 81 *FORDHAM L. REV.* 537, 537 & n.2 (2012).

89. See *United States v. Windsor*, 133 S. Ct. 2675, 2711 (2013) (Scalia, J., dissenting).

90. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

91. *Id.*

92. *Id.*

93. See *supra* notes 34–38 and accompanying text.

the content of constitutional meaning. This expanded model is featured in the 1988 ruling *Thompson v. Oklahoma*, in which the Court declared it unconstitutional to execute a defendant under the age of 16 at the time of committing the underlying crime.<sup>94</sup> Justice Stevens's plurality opinion considered traditional legal markers such as state legislation as well as data regarding the infrequency with which juries had actually imposed death sentences upon those who were younger than 16 at the time of committing their crimes.<sup>95</sup> These sources, combined with foreign law and the expressed positions of professional organizations, led to the Court's "unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community."<sup>96</sup>

Stevens noted that "respected professional organizations" such as the American Bar Association and the American Law Institute had "formally expressed their opposition to the death penalty for juveniles."<sup>97</sup> He observed further that a number of "leading" Western democracies had abolished the practice of executing juveniles.<sup>98</sup> He delved into penological literature stressing the differences between minors and adults—noting widespread agreement that punishment should be directly proportional to culpability, and that adolescents as a class were less culpable than adults.<sup>99</sup> And he cited psychological literature regarding the differences in reasoning and maturity between juveniles and adults, questioning whether certain punitive goals could actually be attained in the case of juvenile offenders.<sup>100</sup> Based on this expanded array of factors, Justice Stevens concluded that executing those who

94. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion).

95. *Id.* at 832. Justice Stevens wrote that according to a recent study less than 20 individuals were executed in the 20th century for crimes committed while under the age of 16 (with the most recent execution occurring in Louisiana in 1948), and further found significance in the Department of Justice statistics showing that from 1982 to 1986, 82,094 people were arrested for willful criminal homicide and "[o]nly 5 of them, including the petitioner in [*Thompson*], were less than 16 years old at the time of their offense." *Id.* at 832–33.

96. *Id.* at 832. Justice Stevens added a unique twist to the normal consensus analysis of state practices by highlighting how states treated minors differently in a number of legal contexts. *See id.* at 824 ("The line between childhood and adulthood is drawn in different ways by various States. There is, however, complete or near unanimity among all 50 States and the District of Columbia in treating a person under 16 as a minor for several important purposes. In no State may a 15-year-old vote or serve on a jury. Further, in all but one State a 15-year-old may not drive without parental consent, and in all but four States a 15-year-old may not marry without parental consent." (footnotes omitted)).

97. *Id.* at 830.

98. *Id.* at 830–31 (noting that juveniles could not be executed in the U.K., Australia and New Zealand and that a number of European countries had abolished the death penalty entirely).

99. *Id.* at 834 ("It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'" (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))).

100. The Court also cited literature explaining the differences in reasoning and maturity between juveniles and adults, noting minors' strong impulses and weak self-discipline, the lesser deterrent effect offered by the threat of the death penalty due to their lack of foresight, and the much greater potential for rehabilitation because of their youth and malleability. *Id.* at 834–38.

were under 16 at the time of their offense “would offend civilized standards of decency.”<sup>101</sup>

By the time of *Thompson*, the chasm between those Justices favoring traditional versus expansive approaches had become plain, with one bloc recognizing only state legislation as a barometer of constitutional meaning—a view illustrated by Justice Scalia’s repudiation of the idea that “[m]embers of this Court will have a better sense of the evolution in views of the American people than . . . their elected representatives.”<sup>102</sup> Generally, however, Court majorities tended to accept a broader range of extrinsic sources in deciphering constitutional meaning;<sup>103</sup> Justices articulating the traditional view were generally in the minority.

The due process and equal protection cases provide further illustration of the expansive approach. In *Lawrence v. Texas*, Justice Kennedy relied on a broad range of sources, including the Model Penal Code and the European Court of Human Rights; Kennedy indicated further that these same sources should have persuaded the *Bowers* Court to conclude that private sexual conduct between consenting adults was constitutionally protected.<sup>104</sup> Kennedy also pointed to heavy criticism of *Bowers* in scholarly articles.<sup>105</sup> When Justice Kennedy penned the majority opinion in *Obergefell v. Hodges* just 12 years later, he again referenced an expansive array of extrinsic indicators as informing the constitutionality of same-sex marriage.<sup>106</sup> Arguing that state and federal court decisions had left the issue of same-sex marriage unresolved,<sup>107</sup> Kennedy noted the broad range of “debates, and grassroots campaigns, as well as . . . studies, papers, books, and other popular and scholarly writings” that supported the outcome.<sup>108</sup> Kennedy also noted that a “more general, societal discussion of same-sex marriage and its meaning” had taken place within “the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and

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101. *Id.* at 830.

102. *Id.* at 865 (Scalia, J., dissenting). Justice Scalia’s dissent affirmed the validity of the traditional majoritarian approach in interpreting the Eighth Amendment. Although he first analyzed the original understanding of the Eighth Amendment, looking to Blackstone’s Commentaries on the Laws of England as published in 1769 and “widely accepted” at the Founding, *id.* at 864, in deference to the precedent of *Trop v. Dulles*, see *supra* note 68 and accompanying text, Scalia rooted his understanding of those “standards of decency” in enacted legislation. *Thompson*, 487 U.S. at 864–65 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

103. See *infra* Part III.B–C (noting continued use of expansive model, along with new majoritarian approaches, to invalidate legislation in sentencing, due process, and equal protection cases).

104. *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003).

105. *Id.* at 576. As discussed at *infra* notes 138–44 and 177–82 and accompanying text, *Lawrence* also draws upon elements of the new majoritarian approach.

106. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–98 (2015).

107. *Id.* at 2597.

108. *Id.* at 2605.

universities,”<sup>109</sup> indicating that this very debate produced “an enhanced understanding of the issue” and reflected a majoritarian view that favored a constitutional right of same-sex couples to marry.<sup>110</sup> These non-conventional sources were now legally and constitutionally relevant, and same-sex couples no longer needed to wait for the political process or other, more traditional extrinsic indicators to line up behind their claim.<sup>111</sup> Kennedy’s expansive reading of extrinsic sources supported judicial validation of same-sex marriage, “*even if the broader public disagrees and even if the legislature refuses to act.*”<sup>112</sup>

### C. THE NEW MAJORITARIAN MODEL

While the traditional model looks exclusively to predominant state law practices and the expansive approach considers an open-ended array of extrinsic sources, there is a third, middle-ground position that has become remarkably common in recent constitutional decisions. This model of majoritarianism accepts the traditional idea that constitutional decisions must be grounded in conventional lawmaking sources; moreover, it endorses the conventional consensus position that interpretations of vague constitutional language should accord with broadly held, majoritarian positions. Yet this new model makes far more creative use of traditional indicators. New majoritarian constitutionalism, which has generally escaped notice, reinvigorates our understanding of what “majoritarianism” actually means to determine where the majoritarian position on a given issue *really* lies.

#### 1. Law in Action Versus Law “On the Books”

The first feature of new majoritarianism concerns the actual practices of courts, juries, and prosecutors to determine whether the law “on the books” comports with the law in action. Courts deciding sentencing cases, for example, often consider the frequency with which various punishments are actually imposed; once it becomes clear that courts and juries are unwilling to apply a particular sentence, that sentence may no longer enjoy majoritarian legitimacy. This analysis can also look to the decisions of prosecutors and other officers who implement the law: When laws go unenforced, or when there is an abundance of favorable exercises of prosecutorial discretion, executive non-enforcement can be as good (if not better) an indication of constitutional legitimacy as legislative action.

Again, *Furman v. Georgia* is instructive. In *Furman*, Justice White penned an influential concurrence that considered the constitutionality of the death

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (emphasis added).

penalty from the standpoint of the law in action.<sup>113</sup> Justice White observed that “[l]egislative ‘policy’ is . . . necessarily defined not by what is legislatively authorized *but by what juries and judges do in exercising the discretion.*”<sup>114</sup> Given the infrequency with which juries actually imposed the death penalty, “even for the most atrocious crimes,” White found “no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”<sup>115</sup> The sheer infrequency of the death penalty, measured against the occasions in which a defendant was death-eligible, showed the penalty to be “too attenuated to be of substantial service to criminal justice.”<sup>116</sup> And because “the policy of vesting sentencing authority primarily in juries” had caused “capital punishment . . . for all practical purposes [to] run its course,” Justice White found no remaining penological or constitutional basis to support the death penalty.<sup>117</sup>

Justice White paired his more pragmatic interest in actual jury outcomes with a deeper jurisprudential concern: Namely, that unenforced punishments not only lacked practical utility but also raised doubts about whether they served any true penological goal beyond “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.”<sup>118</sup> Based on that analysis, Justice White concluded that the death penalty (as then instituted) failed “to contribute to any other end of punishment in the criminal justice system”<sup>119</sup> and, therefore, no longer survived constitutional scrutiny.<sup>120</sup>

White’s approach drew fire from those Justices who rejected jury practices as unreliable indicators of constitutional meaning and dismissed sentencing data as too easily manipulated, outcome-oriented, and contradictory. Chief Justice Burger, advocating the traditional majoritarian

113. *Furman v. Georgia*, 408 U.S. 238, 310–15 (1972) (White, J., concurring).

114. *Id.* at 314 (emphasis added).

115. *Id.* at 313.

116. *Id.*

117. *Id.*

118. *Id.* at 312. Justice White’s use of jury verdict statistics was meaningfully different than the more cut-and-dried approach favored by Justice Brennan. While Brennan’s bright-line numerical cutoff would rely on statistics alone, Justice White’s analysis linked the available statistics to an inquiry whether death penalty regimes had lost their retributive effect and deterrence purpose. *Compare id.* at 291–93 (Brennan, J., concurring) (“When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied.”), *with id.* at 312 (White, J., concurring) (arguing that “seldom-enforced laws become ineffective measures for controlling human conduct”).

119. *Id.* at 311 (White, J., concurring).

120. *Id.* at 314. Justice Stewart also expressed an interest in a more expansive analysis of objective indicators, writing that “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual” and concluding that “the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.” *Id.* at 309–10 (Stewart, J., concurring).

model, saw jurors' hesitation around the death penalty as a further reason to uphold it.<sup>121</sup> Justice Powell, also adopting the traditional majoritarian view, argued in his *Furman* dissent that the data showed admirable restraint by juries, not a practical rejection of the death penalty.<sup>122</sup>

One year after the Supreme Court upheld the death penalty as a punishment for murder in *Gregg v. Georgia*,<sup>123</sup> it invalidated the death penalty for the crime of adult rape in *Coker v. Georgia*.<sup>124</sup> Justice White's opinion again invoked practical disuse as an indication of majoritarian opinion.<sup>125</sup> Examining cases in which "the jury has an appropriate measure of choice as to whether the death penalty is to be imposed,"<sup>126</sup> he found enough data in Georgia's sentencing practices to draw a conclusion about the challenged law. In 63 cases reviewed by the Supreme Court of Georgia, only six since 1973 had imposed a sentence of death,<sup>127</sup> data that "strongly confirm[ed]" the Court's judgment "that death [was] . . . a disproportionate penalty for the crime of raping an adult."<sup>128</sup>

More recently, the Court has shifted focus from juror behavior to a wider range of actual sentencing and execution practices, sometimes treating those practices as a functional equivalent of legislation.<sup>129</sup> In *Hall v. Florida*, for example, a case involving Florida's use of a rigid IQ cutoff to determine intellectual disability,<sup>130</sup> Justice Kennedy's discussion of the law in action in Kansas and Oregon was particularly noteworthy. Because Kansas, despite having the death penalty on its books, had not executed anyone in almost 50 years,<sup>131</sup> the "laws and jurisprudence on this issue are unlikely to receive attention."<sup>132</sup> Citing dicta from prior Supreme Court rulings, Kennedy indicated there would be little need for legislative override in those states where "the practice is uncommon" or where no executions "have been carried

121. *Id.* at 388 (Burger, C.J., dissenting) ("The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than a repudiation of, the statutory authorization for that penalty.")

122. *Id.* at 439–42 (Powell, J., dissenting).

123. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

124. *Coker v. Georgia*, 433 U.S. 584, 599–600 (1977).

125. *Id.* at 592, 596.

126. *Id.* at 596.

127. *See id.* at 596–97.

128. *See id.* at 597.

129. *Hall v. Florida*, 134 S. Ct. 1986, 1996–98 (2014).

130. *Id.* Florida's scheme defined intellectual disability as having an IQ of 70 or less, and if a prisoner scored higher than 70 there could be no showing of intellectual disability. *Id.* at 1990. The Court held that Florida's rigid test "create[d] an unacceptable risk that persons with intellectual disability will be executed." *Id.*

131. *Id.* at 1997.

132. *Id.*

out in decades.”<sup>133</sup> Kennedy thus appeared to treat Kansas as a functionally abolitionist state.

Oregon at the time of *Hall* had a death penalty law and 36 people on death row,<sup>134</sup> but Kennedy still treated Oregon as a *non*-death state on account of two factors: First, by 2014, the year *Hall* was decided, Oregon had executed only two individuals since 1976 (when the death penalty was revived); second, in 2014, Oregon’s governor imposed a moratorium on executions.<sup>135</sup> In short, Oregon, like Kansas, would be deemed the functional equivalent of an abolitionist state, notwithstanding its death penalty law.

Justice Kennedy did not indicate whether his characterization of Oregon was based solely on the gubernatorial moratorium, the very small number of individuals actually put to death in that state, or a combination of the two. Yet both concepts are meaningful to new majoritarian constitutionalism. The idea that gubernatorial moratoria can be deemed equivalent to statutory abolition—at least under some circumstances—shows how certain practices of the executive branch can influence constitutional meaning under a new majoritarian framework.<sup>136</sup> And the consideration of Oregon’s two executions within a 40-year timespan is also meaningful because it suggests that actual sentencing practices can be as significant as legislative action.<sup>137</sup>

The Court has also considered how prosecutorial and enforcement practices bear on broader societal attitudes toward a particular punishment and the constitutionality of that punishment—as demonstrated in *Lawrence v. Texas*. Assailing *Bowers v. Hardwick*’s conclusion that anti-sodomy laws were rooted in the nation’s history and tradition, Justice Kennedy distinguished between the non-enforcement of sodomy laws against “consenting adults acting in private” on the one hand and the prosecutions of prohibited acts of

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133. *Id.* (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)). In addition to citing prior cases, Kennedy’s *Hall* decision also made use of sources associated with the more expansive approach, including multiple references to the relevant psychological literature and recounting the views of professional associations. *See id.* at 1994–95 (noting how Florida’s strict method of judging intellectual disability “disregards established medical practice”). Kennedy looked to other, more expansive indicators as well, citing the position of the American Psychological Association’s amicus brief indicating the wide range of information, in addition to IQ, used to measure intellectual disability. *Id.* at 1994. Kennedy also discussed a study titled “The Measurement of Adult Intelligence” to show that medical professionals have also long viewed IQ scores as a range rather than a single, fixed number due to the variety of factors that can affect a score. *Id.* at 1995. Kennedy employed these sources to demonstrate that Florida’s use of a strict IQ threshold violated *Atkins*. *See id.* at 1995–97. However, Kennedy also noted that these studies “inform[ed] the Court’s] determination whether there [was] a consensus.” *Id.* at 1993.

134. David Menschel, *Justice Kennedy Quietly Empowers Death Penalty Opponents*, AM. CONST. SOC’Y BLOG (July 2, 2014), <https://www.acslaw.org/acsblog/justice-kennedy-quietly-empowers-death-penalty-opponents> (noting 36 inmates on Oregon’s death row at the time of *Hall*). That number is now 33. *Death-Row Prisoners by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Dec. 28, 2017).

135. *See Hall*, 134 S. Ct. at 1997.

136. *See* Menschel, *supra* note 134 (“Kennedy’s doctrinal move is terribly important, because it expands the ways that death penalty opponents can demonstrate progress to the Supreme Court.”).

137. *Hall*, 134 S. Ct. at 1997.

pedophilia, force, and bestiality on the other.<sup>138</sup> As to the 19th century, Kennedy stated “that infrequency makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults.”<sup>139</sup> The 20th century followed a similar pattern of nonenforcement, even among those states that enacted laws prescribing criminal prosecution for same-sex relations.<sup>140</sup> Much like Georgia in *Bowers*,<sup>141</sup> the State of Texas admitted that as of 1994, it had never prosecuted same-sex relations between consenting adults acting in private.<sup>142</sup> This continued lack of enforcement evidenced an “emerging awareness that liberty gives substantial protection to adult persons” in their decisions about their private sexual lives,<sup>143</sup> an important step toward the conclusion that the private, consensual activity at issue warranted constitutional protection.<sup>144</sup>

## 2. Legislative Trends

Another feature of new majoritarianism concerns ways that courts find patterns and trends in a relatively small number of states to reflect nationwide agreement. In *Atkins v. Virginia*, for example—a case invalidating the execution of intellectually disabled individuals—Justice Stevens noted a “dramatic shift in the state legislative landscape”<sup>145</sup> during the brief, 13-year period after the Court upheld the same practice in *Penry v. Lynaugh*.<sup>146</sup> Drawing on the traditionalist insight that state legislation provided “the ‘clearest and most reliable objective evidence of contemporary values,’”<sup>147</sup> the decision by 17 states to ban the execution of intellectually disabled individuals after *Penry* provided strong indications that the practice had become an

138. *Lawrence v. Texas*, 539 U.S. 558, 569 (2003).

139. *Id.* at 569–70.

140. *See id.* at 570, 572–73.

141. *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring).

142. *Lawrence*, 539 U.S. at 573 (“In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.”).

143. *Id.* at 572.

144. *Id.* at 578–79 (describing the “right to liberty under the Due Process Clause” and the Constitution’s generational evolution such that “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom”). In his dissent, Justice Scalia criticized the validity of the described “emerging awareness,” first as insufficient to “establish a ‘fundamental right’” under the Due Process Clause and second as empirically false. *Id.* at 598 (Scalia, J., dissenting) (“States continue to prosecute all sorts of crimes by adults ‘in matters pertaining to sex’ . . . Sodomy laws, too, have been enforced ‘in the past half century,’ in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy.”). Though Scalia appears to follow a new majoritarian approach by focusing on actual enforcement practices, he does so at a much higher level of generality, using a more static analysis than the more fine-grained features of new majoritarian approaches. *Accord id.* (“Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior.”).

145. *Atkins v. Virginia*, 536 U.S. 304, 310 (2002).

146. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

147. *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331).

outlier.<sup>148</sup> Importantly, Justice Stevens noted that “[i]t is not so much *the number of these States* that is significant, but *the consistency of the direction of change*” that influenced constitutional meaning.<sup>149</sup> The stability in state-law practices after *Penry*, combined with the lack of any legislation reinstating the imposition of the sentence in question, demonstrated its counter-majoritarian nature.<sup>150</sup> Justice Stevens even considered (1) the margin by which the measures to ban the practice passed;<sup>151</sup> (2) similar pending legislation in additional states;<sup>152</sup> and (3) the rarity of sentences in the remaining states such that “there [would be] little need to pursue legislation barring” it in those holdout jurisdictions.<sup>153</sup>

The Court again looked to a nationwide trend inquiry when it outlawed the execution of minors between the ages of 15 and 18 in *Roper v. Simmons*.<sup>154</sup> As in *Atkins*, *Roper* involved a challenge to a practice (the imposition of the death penalty on a juvenile offender between the ages of 15 and 18 at the time of commission of a crime) that the Court had recently upheld just 15 years prior, in *Stanford v. Kentucky*.<sup>155</sup> As Justice Stevens had done in *Atkins*, Kennedy’s consensus analysis focused not only on the number of states banning a practice but also “the consistency of the direction of change.”<sup>156</sup> In addition to the trend analysis, Kennedy considered the 18 states that directly banned the juvenile death penalty, the 12 states that had rejected the death penalty entirely,<sup>157</sup> and the fact that between 1995 and 2005 only 3 states had executed prisoners for crimes the defendants had committed as juveniles.<sup>158</sup> Kennedy noted further that the governor of Kentucky commuted the sentence of the defendant at issue in *Stanford*, “ensur[ing] Kentucky would

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148. *Id.* at 314–15. Justice Stevens also recognized that, at the time of the decision in *Atkins*, two states (Virginia and Nevada) had passed a bill through one house to accomplish the same ends. *Id.* at 315.

149. *Id.* (emphasis added).

150. *See id.* at 315–16.

151. *See id.* at 316.

152. *See id.* at 314–15.

153. *See id.* at 316. Justice Stevens also considered more expansive sources, noting the “deliberat[ion]” by “the American public, legislators, scholars, and judges” that had contributed to a consensus against executing individuals below certain IQ levels. *Id.* at 307.

154. *Roper v. Simmons*, 543 U.S. 551, 555–56, 578–79 (2005).

155. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). Although Kennedy noted that more states had banned the imposition of the death penalty on mentally challenged defendants between *Penry* and *Atkins* than had banned the juvenile death penalty between *Stanford* and *Roper*, the development in state law was still “significant” and required the law’s invalidation. *Roper*, 543 U.S. at 565.

156. *Roper*, 543 U.S. at 565–66 (quoting *Atkins*, 536 U.S. at 315).

157. *Id.* at 564 (“30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”).

158. *See id.* at 564–65. Justice Scalia, in dissent, argued that the majority counted states in a misleading way: “That 12 states favor *no* executions says something about consensus against the death penalty, but nothing—absolutely nothing—about consensus that offenders under 18 deserve special immunity from such a penalty.” *Id.* at 610–11 (Scalia, J., dissenting).

not add itself to the list of States that ha[d] executed juveniles [between 1995 and 2005].”<sup>159</sup> This combination of new majoritarian influences, including the infrequency of executions in those states that did not ban the practice entirely,<sup>160</sup> led to the conclusion that the sentence was no longer the majoritarian institution it was perceived to be.<sup>161</sup>

*Hall v. Florida* also focused on trend analysis by emphasizing that the *pace* with which states were abandoning their support for executing intellectually disabled prisoners provided further reason to strike down Florida’s strict numerical cut-off.<sup>162</sup> Justice Kennedy’s opinion noted that during the 12 years since *Atkins*, 11 states either banned the death penalty entirely or allowed defendants to present evidence of intellectual disability beyond IQ score.<sup>163</sup> Such a rapid “‘consistency in . . . trend’ . . . provide[d] strong evidence of *consensus* that our society does not regard [Florida’s] strict cutoff as proper or humane.”<sup>164</sup>

The Court has applied its trend analysis to non-death sentences as well. In *Graham v. Florida*, the Court invalidated all life-without-the-possibility-of-parole sentences for juveniles who had committed non-homicide crimes.<sup>165</sup> Justice Kennedy, building on the flexible counting mechanism in *Hall*, considered both the 13 states that had abolished the practice of sentencing

159. *Id.* at 565 (majority opinion).

160. *Id.* at 564–65.

161. *See id.* at 567. While Justice Stevens’s *Atkins* opinion relegated its discussion of international perspectives to a footnote, Justice Kennedy’s *Roper* decision brought the discussion into the foreground, spanning several pages of the opinion and concluding that the Court’s “determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” *Id.* at 575. *Roper* thus approximated the expanded model at times. Justice O’Connor’s dissent in *Roper* did not take issue with the sources consulted by the majority in its consensus analysis. Rather, she found that they did not provide compelling evidence of a consensus in that particular case. *See id.* at 595 (O’Connor, J., dissenting). O’Connor first pointed out that in contrast to past death penalty cases like *Atkins*, in which legislatures tacitly permitted a type of execution through silence, here a number of states affirmatively stated that 16- or 17-year-olds could be executed. *See id.* at 595–96. She also argued that the trend evidence of a societal consensus was much weaker here than in prior cases, highlighting that only four states that permitted the execution of minors had reversed course in the 16 years since the Court last addressed the issue, and in that time span two states had also reaffirmed their support for the practice by statutorily allowing for the execution of 16-year-olds. *Id.* at 596–97. Thus, while Justice O’Connor accepted the kinds of extrinsic markers the majority looked to for guidance, she simply disagreed that the data provided strong enough evidence that the nation’s view on the execution of minors had in fact changed. She concluded, by contrast, that “the halting pace of change gives reason for pause.” *Id.* at 597. Justice Scalia’s *Roper* dissent rejected the majority’s consensus-based approach entirely and criticized the majority’s consensus analysis as a thinly veiled policy preference, writing in the opening section of his dissent that “I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners.” *Id.* at 608 (Scalia, J., dissenting).

162. *Hall v. Florida*, 134 S. Ct. 1986, 1997–98 (2014).

163. *Id.*

164. *Id.* at 1998 (emphasis added) (citation omitted).

165. *Graham v. Florida*, 560 U.S. 48, 82 (2010).

minors to life without parole for non-homicide crimes and the 26 states that did not have any juveniles actually serving such a sentence, concluding that an overwhelming majority of states had either formally or functionally expressed their opposition to the punishment.<sup>166</sup> In addition, the Court for the first time equated life without parole as the functional equivalent of a death sentence, noting that both forms of punishment “alter[] the offender’s life by a forfeiture that is irrevocable.”<sup>167</sup>

*Graham* represented a marked shift from the Court’s prior non-capital criminal sentencing cases, which adopted nearly automatic deference to legislative judgment, resulting in the judicial validation of long and harsh sentences, even for minor crimes.<sup>168</sup> *Graham*’s shift toward a new majoritarian approach set up new possibilities for revisiting sentencing practices that, prior to *Graham*, appeared immune to an effective challenge.<sup>169</sup>

In *Miller v. Alabama*, the Supreme Court expanded *Graham* by holding unconstitutional all mandatory sentences of life without the possibility of parole for juvenile offenders.<sup>170</sup> Justice Kagan’s majority opinion fused *Graham* with the Court’s death penalty decisions, finding that “the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.”<sup>171</sup> Notably, *Miller* does not reflect the core features of new majoritarian constitutionalism, making no reference to state practices (most notably the handful of states that had banned juvenile life without parole prior to

166. *Id.* at 62–64.

167. *Id.* at 69. Justice Kennedy’s opinion, while rooted for the most part in new majoritarianism, stretched well beyond traditional indicators, relying on various “indicia of national consensus” that included psychological findings and the law of foreign jurisdictions. *Id.* at 62, 68, 74–75, 80.

168. In *Rummel v. Estelle*, for example, the Court upheld a life sentence for a defendant convicted of fraudulent use of a credit card, passing a forged check, and obtaining \$120.75 by false pretenses. *Rummel v. Estelle*, 445 U.S. 263, 265–66 (1980). The Court’s opinion in *Rummel* acknowledged the harshness of the sentence and the arbitrary lines drawn by the statute’s rigid rules, but nonetheless found “that Texas is entitled to make its own judgment as to where such lines lie, subject only to those strictures of the Eighth Amendment that can be informed by objective factors.” *Id.* at 284. The opinion goes on to stress its formal approach in this context, noting that “one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative.” *Id.* at 274. And with rare exceptions, the Court has continually refused to override non-capital criminal sentencing schemes given the “tradition of deferring to state legislatures in making and implementing such important policy decisions.” *Ewing v. California*, 538 U.S. 11, 24 (2003). The Court’s bright-line approach meant that gross disproportionalities in sentencing would be overturned only in the most extreme cases. See *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003).

169. See, e.g., Bidish J. Sarma & Sophie Cull, *The Emerging Eighth Amendment Consensus Against Life Without Parole Sentences for Nonviolent Offenses*, 66 CASE W. RES. L. REV. 525, 547 (2015) (noting “a slow but steady rollback of mandatory minimum laws” at the state level since 1998, “particularly for nonviolent offenders”).

170. *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

171. *Id.* at 470.

2012).<sup>172</sup> Instead, *Miller* adopts the expanded approach, citing a number of prior cases drawing on scientific and psychological studies regarding differences between the emotional and psychological composition of children as opposed to adults.<sup>173</sup>

The Court elevated *Miller's* importance by making it retroactive in *Montgomery v. Louisiana*, a case grounded more in a technical application of retroactivity but which nonetheless signals an increased role of extrinsic indicators of meaning in future life-without-parole cases.<sup>174</sup> Referencing the same psychological insights used in prior cases, Justice Kennedy's majority opinion noted that "[i]n light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability . . . prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption."<sup>175</sup> Indeed, *Miller* and *Montgomery* already appear to be having a dramatic effect on the states, which are shifting their practices in response to the Court's ruling regarding life-without-parole sentences.<sup>176</sup>

Similar insights into legislative trends permeate the due process and equal protection contexts, too. In *Lawrence v. Texas*, for example, the Court performed a careful reading of state legislation to determine whether the existing laws actually demonstrated a consensus supporting punishment for consensual same-sex behavior. Rather than flatly assume that the persistence of some anti-sodomy laws evidenced a broad condemnation of homosexual activity, Justice Kennedy explained how the context and history of these laws undermined their constitutionality, both at the time of *Lawrence* and at the time of *Bowers*.<sup>177</sup> As Kennedy noted, sodomy laws, as drafted, were not historically focused on homosexual activity; rather, they were directed at *all* "nonprocreative sexual activity."<sup>178</sup> By contrast, anti-sodomy laws specifically targeting homosexual activity were a new and recent phenomenon—indeed, the *earliest* such law was enacted as late as 1970,<sup>179</sup> with only nine states following suit.<sup>180</sup> Moreover, Kennedy observed that even states that took steps to ban homosexual relations had in recent decades begun to repeal those

172. See *infra* note 225 and accompanying text.

173. *Miller*, 567 U.S. at 476.

174. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

175. *Id.*

176. See *infra* notes 226–51 and accompanying text.

177. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) ("[T]he historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated."); see also *id.* at 567–68 ("In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*.").

178. *Id.* at 568.

179. Given their recent vintage, these laws hardly reflected the "ancient roots" *Bowers* referenced. See *id.* at 570 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)).

180. *Id.*

laws.<sup>181</sup> The actual practices of the states led the Court to conclude that “*Bowers* was not correct when it was decided, and it is not correct today.”<sup>182</sup>

*United States v. Windsor* also looked to extrinsic markers—primarily the positive law of the states and the position of the Executive Branch<sup>183</sup>—to invalidate a federal statute. Justice Kennedy’s majority opinion cited New York’s “statewide deliberative process” as indicative of an emerging consensus;<sup>184</sup> moreover, he recognized how trends in state laws had moved constitutional culture toward “a new perspective, a new insight” that it was “unjust” to refuse recognition to same-sex marriages.<sup>185</sup> This emerging movement in state law highlighted an “urgency . . . for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.”<sup>186</sup> By the time of *Obergefell v. Hodges*, that progression had advanced even further. As Kennedy noted in his majority opinion, states were steadily shifting toward recognition of the right to marry, with 37 states performing same-sex marriages by the time of *Obergefell*<sup>187</sup>—a trend indicating the truly majoritarian nature of the right of same-sex couples to marry.

### 3. Geographic Disparities

In 2015, the Supreme Court rejected a challenge to Oklahoma’s execution protocol in *Glossip v. Gross*.<sup>188</sup> The petitioners argued that Oklahoma’s practices “create[d] an unacceptable risk of severe pain” and were thus unconstitutional under the Eighth Amendment.<sup>189</sup> Justice Alito’s majority opinion found that the petitioners failed to provide evidence of an adequate alternative method of execution and, accordingly, failed to meet the extraordinarily high burden the law imposed for a preliminary injunction.<sup>190</sup> Notwithstanding *Glossip*’s actual holding, the case has become associated with a broader debate regarding the per se constitutionality of the death penalty;

181. *Id.* at 570–71, 573.

182. *Id.* at 578. The Court went on to explain why the right at issue was constitutionally protected. *Id.* (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

183. For a discussion of the function of executive branch constitutionalism in new majoritarian analysis see *supra* Part III.C.1.

184. *United States v. Windsor*, 133 S. Ct. 2675, 2689, 2692 (2013).

185. *Id.* at 2689; *see also id.* at 2689 (noting that the recognition of same-sex marriage started “[s]lowly at first[.]” but then more legal change occurred “in rapid course,” with New York and 11 other states recognizing the right of same-sex couples to marry as of the day *Windsor* was issued).

186. *Id.*

187. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (citing Appendices A and B of the opinion for figures).

188. *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

189. *Id.*

190. *See id.* at 2738–39. Justice Alito, writing for the Court, also upheld the decisions of the lower courts based on a determination that the district court’s findings of fact were not clearly erroneous. *See id.* at 2739–46.

indeed, *Glossip* illustrates virtually every aspect of new majoritarian constitutionalism—from the number of states authorizing the punishment, the extent and direction of legislative change in relation to the punishment, the extent of the punishment’s use where authorized, and—importantly—whether a punishment is geographically isolated in a particular jurisdiction or cluster of jurisdictions.<sup>191</sup> Regarding this last factor, Justice Breyer’s dissent specifically noted that capital prosecutions were being pursued in only a few isolated counties;<sup>192</sup> by removing state boundary lines and inquiring into capital punishment at the county level, Justice Breyer added an additional, critical dimension to new majoritarianism that could figure prominently in subsequent cases.

Justice Breyer began by examining “the trajectory of the number of annual death sentences nationwide, from the 1970’s to present day”<sup>193</sup>—similar to “the direction of change” in *Atkins*, *Roper*, and *Hall*.<sup>194</sup> Breyer also compared the 41 states that allowed for the death penalty in 1972 (the time of the Court’s decision in *Furman v. Georgia*) with the much smaller number that did so at the time of *Glossip*.<sup>195</sup> In calculating the number of states, Justice Breyer looked both to those states that had formally abolished the practice (19 states and the District of Columbia) and those that had not executed any prisoners in the eight years prior to the decision (11 additional states).<sup>196</sup> Justice Breyer thus determined that 30 states had rendered the death penalty “unusual” within their borders.<sup>197</sup> Breyer’s analysis went even further—noting that of the 20 states that had executed a prisoner in the eight years prior to the decision, nine of the 20 had executed fewer than five during that time period.<sup>198</sup> Delving even further into the data, Justice Breyer noted that three of the “11 States in which it is fair to say that capital punishment is not ‘unusual.’ . . . accounted for 80% of the executions nationwide (28 of the 35) in 2014.”<sup>199</sup>

Focusing directly on “the consistency of the direction of change,”<sup>200</sup> Justice Breyer noted that seven states had abolished the death penalty between 2005 and 2015, and that “several States have come within a single vote of eliminating the death penalty.”<sup>201</sup> He noted further that “[i]n the past two decades, no State without a death penalty has passed legislation to

191. *Id.* at 2761, 2772–76 (Breyer, J., dissenting).

192. *Id.* at 2761.

193. *Id.* at 2772.

194. *Hall v. Florida*, 134 S. Ct. 1986, 1997–98 (2014); *Roper v. Simmons*, 543 U.S. 551, 555–56, 578–79 (2005); *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

195. *Glossip*, 135 S. Ct. at 2773 (Breyer, J., dissenting).

196. *Id.*

197. *See id.*

198. *Id.*

199. *Id.*

200. *Id.* at 2774 (quoting *Roper v. Simmons*, 543 U.S. 551, 566 (2005)).

201. *See id.* (citations omitted).

reinstate the penalty.”<sup>202</sup> Justice Breyer pointed out that in the states that still carry out a significant number of executions, the total number of executions declined considerably.<sup>203</sup>

Finally, and perhaps most significantly, Justice Breyer examined county data to demonstrate why “the imposition of the death penalty heavily depends on the county in which a defendant is tried.”<sup>204</sup> Justice Breyer recognized that in 2012—the year before *Glossip* was decided—“just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide.”<sup>205</sup> Breyer also noted that “[b]etween 2004 and 2009 . . . just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide”<sup>206</sup> and, during that same period, “only 35 counties imposed 5 or more death sentences, *i.e.*, approximately one per year.”<sup>207</sup> In an appendix to his *Glossip* dissent, Justice Breyer provided an illustration of the death penalty’s geographic isolation, which is reproduced in Figure 1-A, below.

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202. *Id.* at 2775.

203. *See id.* (“In Texas, the State that carries out the most executions, the number of executions fell from 40 in 2000 to 10 in 2014, and the number of death sentences fell from 48 in 1999 to 9 in 2013 (and 0 thus far in 2015).”).

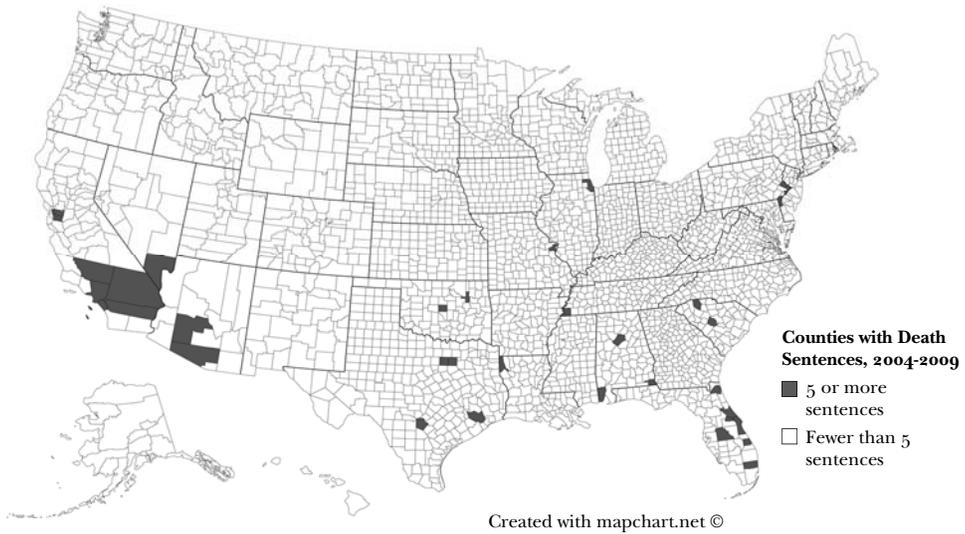
204. *Id.* at 2761 (“[T]he single most important influence from 1973–2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County].” (alterations in original) (quoting John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637, 673 (2014))).

205. *Id.*

206. *Id.*

207. *Id.* at 2774.

FIGURE 1-A

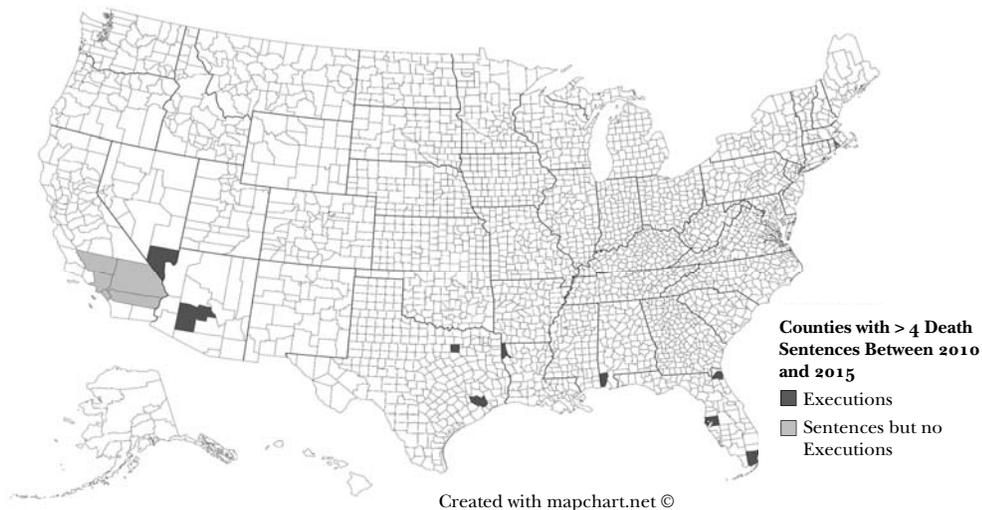


Using more recent data between 2010 and mid-2015, and removing those jurisdictions that do not actually execute prisoners on death row, Justice Breyer noted that the death penalty had become even more geographically isolated, with “only 15 counties impos[ing] five or more death sentences.”<sup>208</sup> Figure 1-B, below, reproduces that illustration. The counties shaded in black sentenced five or more individuals to death between 2010 and June 22, 2015; counties shaded in grey include those that sentenced five or more individuals to death during this time but no longer execute those on death row. All other counties in Figure 1-B have fewer than five death sentences since 2010. As Justice Breyer noted, these statistics highlight not only the rapid diminishment of capital punishment but also demonstrate, and reflect, “the power of the local prosecutor.”<sup>209</sup>

208. *Id.* at 2774.

209. *See id.* at 2761.

FIGURE 1-B



#### IV. DOCTRINAL IMPLICATIONS OF NEW MAJORITARIANISM

The more that major Supreme Court decisions come to illustrate a new approach to majoritarian constitutionalism, the more the limitations in narrower, state-polling approaches become plain, both practically and theoretically.<sup>210</sup> While the normative dimensions of new majoritarian constitutionalism are explored in Part V, this Part shows how the tools of new majoritarianism can shed significant light on looming controversies that include *per se* challenges to the death penalty and life-without-parole sentences.

##### A. NEW MAJORITARIANISM AND THE DEATH PENALTY

New majoritarian constitutionalism has major implications for the constitutionality of the death penalty. While death penalty laws technically do remain on the books in the majority of the states, the combination of recent changes in state laws (and the consistency of those changes), jury practices, gubernatorial moratoria, decline in actual executions, and geographic isolation undermines the notion that the death penalty remains a majoritarian institution.<sup>211</sup> Under a more comprehensive account of majoritarianism, the death penalty appears to be the outlier.

The counter-majoritarian nature of current death penalty regimes is perhaps best illustrated graphically. As noted in Figure 2-A below, the death

210. See *infra* Part V.A.1–2.

211. See *supra* Part III.C.

penalty has been abolished either legislatively or through a state court decision in 19 states and the District of Columbia.<sup>212</sup>

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212. The state of Alaska abolished the death penalty before being granted statehood. *Alaska*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/alaska-o> (last visited Dec. 28, 2017). Connecticut: Act of Apr. 25, 2012, Pub. Act No. 12-5, 2012 Conn. Acts 13, 13–27 (Reg. Sess.) (repealing the death penalty prospectively); *State v. Santiago*, 122 A.3d 1, 13 (Conn. 2015) (applying the prospective repeal to already imposed capital sentences). D.C.: District of Columbia Death Penalty Repeal Act of 1980, D.C. Act 3-307, 27 D.C. Reg. 5624 (Dec. 26, 1980) (repealing the death penalty). Delaware: *Rauf v. State*, 145 A.3d 430, 433–34 (Del. 2016) (finding Delaware’s capital sentencing statute unconstitutional for failure to provide for a jury determination as opposed to judge determination of the weight of circumstances). While Delaware has not appealed the decision, the Delaware House passed a bill reinstating the death penalty, subject now to the Delaware Senate’s vote. *See* Matthew Albright, *Death Penalty, Minimum Wage, Marijuana Votes May Be Put Off*, DELAWAREONLINE (June 26, 2017, 5:01 PM), <http://www.delawareonline.com/story/news/politics/2017/06/26/death-penalty-minimum-wage-marijuana-votes-may-put-off/428022001> (noting that the death penalty vote in the Delaware Senate would be postponed until 2018). The state of Hawaii abolished the death penalty before being granted statehood. *Hawaii*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/hawaii-o> (last visited Dec. 28, 2017). Illinois: 725 ILL. COMP. STAT. 5/119–1 (2016) (codifying repeal of the death penalty). Iowa: Act of Feb. 24, 1965, ch. 435, 1965 Iowa Acts 827–28 (repealing the death penalty). Maine: ME. STAT. tit. 17-A, §§ 1152, 1251 (2006) (indicating life in prison as the maximum sentence in lieu of capital punishment); *see* Karen Marks Lemke, *Death Penalty’s Demise in Maine*, PORTLAND PRESS HERALD (Apr. 14, 2013), [http://www.pressherald.com/2013/04/14/demise-of-death-penalty-in-maine\\_2013-04-14](http://www.pressherald.com/2013/04/14/demise-of-death-penalty-in-maine_2013-04-14) (describing the events that led to the 1887 death penalty repeal). Maryland: S.B. 276, 2013 Leg., 433d Sess. (Md. 2013) (repealing the death penalty and substituting life without parole as the maximum sentence). Massachusetts: *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 124–26 (Mass. 1984) (holding the death penalty unconstitutional as impermissibly burdening the right to jury trial). Michigan: MICH. CONST. art. IV, § 46 (preventing any law permitting the death penalty). Minnesota: Act of Apr. 22, 1911, ch. 387, 1911 Minn. Laws 572 (amending the punishment for murder to life in prison). New Jersey: Act of Dec. 17, 2007, ch. 204, §§ 1–2, 2007 N.J. Laws 1427, 1427–30 (amending the sentence for murder to life without parole). New Mexico: Act of Mar. 18, 2009, ch. 11, § 5, 2009 N.M. Laws 133, 140–41 (amending the sentence for capital felonies to life in prison). New York: *People v. LaValle*, 817 N.E.2d 341, 344 (N.Y. 2004) (finding New York’s “deadlock instruction” unconstitutional as coercive and viciating a death sentence). North Dakota: Act of Mar. 9, 1915, ch. 63, § 1, 1915 N.D. Laws 76, 76 (retroactively abolishing the death penalty for all crimes but one: murder by an inmate serving a life sentence); Act of Mar. 15, 1973, ch. 116, § 41, 1973 N.D. Laws 215, 300 (abolishing the death penalty prospectively for murder); *see also* Act of Apr. 15, 2013, ch. 104, § 11, 2013 N.D. Laws 400, 406 (adumbrating penalties that do not include the death penalty). Rhode Island: Act of May 9, 1984, ch. 221, § 1, 1984 R.I. Pub. Laws 524, 524 (abolishing the death penalty by amending the sentence for murder to life in prison). Vermont: *See* VT. STAT. ANN. tit. 13, §§ 7101–07 (1968), *invalidated by* *Furman v. Georgia*, 408 U.S. 238 (1972); *see also* *Stanford v. Kentucky*, 492 U.S. 361, 384 n.1 (1989) (Brennan, J., dissenting) (“Vermont’s decision not to amend its only law allowing the death penalty in light of *Furman* . . . leads to the conclusion that the State rejects capital punishment.”). West Virginia: W. VA. CODE ANN. § 61-11-2 (West 2014) (abolishing the death penalty for all convictions within the state). Wisconsin: The Death Penalty Repeal Act of 1853 (repealing the death penalty). Wisconsin was “the first state to permanently abolish the death penalty for all crimes.” *Wisconsin*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/wisconsin-o> (last visited Dec. 28, 2017). For a distillation of the legal landscape of state death penalty law, see Petition for a Writ of Certiorari at 11–21, *Tucker v. Louisiana*, 136 S. Ct. 1801 (2016) (No. 15-946), 2016 WL 355012 [hereinafter *Tucker Brief*]. Although Nebraska’s legislature recently invalidated the death penalty, including through a legislative override of a gubernatorial veto, Nebraska voters reinstated the death penalty in November of 2016 through a ballot initiative. L.B. 268, 104th Leg., 1st Sess. (Neb. 2015), *repealed by* Referendum 426 (Neb. Nov. 8, 2016); *see also* Krishnadev Calamur, *Nebraska Lawmakers Override Governor’s Veto of Death Penalty Repeal*, NPR (May 27, 2015, 5:52 PM), <http://www.npr.org/sections/thetwo-way/2015/05/27/410024375/nebraska-governors-veto-of-death-penalty-repeal-sets-up-override-vote> (describing the legislature’s override of the governor’s



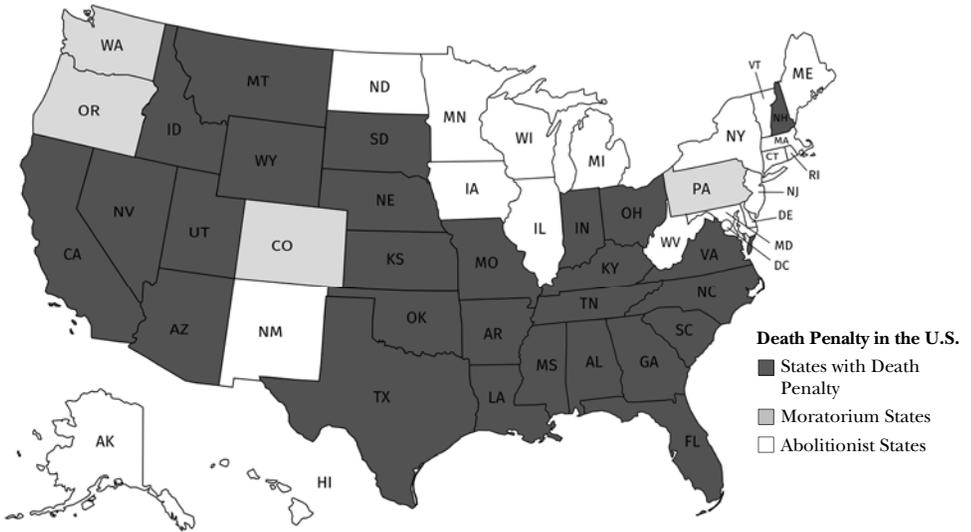
way of gubernatorial suspension.<sup>214</sup> Figure 2-B indicates those moratorium states, which are shaded grey; abolitionist states are unshaded.<sup>215</sup>

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214. See Tucker Brief, *supra* note 212, at 13–14. Colorado: Moratorium enacted May 22, 2013, last execution 1997, see Governor John W. Hickenlooper, Colo. Exec. Order No. D 2013-006 (May 22, 2013). Oregon: Moratorium enacted November 22, 2011, last execution 1997, see *Haugen v. Kitzhaber*, 306 P.3d 592, 609 (Or. 2013) (recognizing that the Oregon governor has authority to impose a moratorium); Press Release, Or. Governor John Kitzhaber, Governor Kitzhaber Issues Reprieve—Calls for Action on Capital Punishment (Nov. 22, 2011), <http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=589>. Pennsylvania: Moratorium enacted February 13, 2015, last execution 1999, see *Commonwealth v. Williams*, 129 A.3d 1199, 1211 (Pa. 2015) (upholding the Governor’s authority to suspend the death penalty through a reprieve initiated as the “first step in placing a moratorium on the death penalty in Pennsylvania”); Memorandum, Pa. Governor Tom Wolf, Death Penalty Moratorium Declaration (Feb. 13, 2015), <https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration>; *Pennsylvania*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/pennsylvania-1> (last visited Dec. 28, 2017) (“The last person executed was Gary Heidnick in 1999.”). Washington: Moratorium enacted February 11, 2014, last execution 2010, see Governor Jay Inslee, Remarks Announcing a Capital Punishment Moratorium (Feb. 11, 2014), [http://www.governor.wa.gov/sites/default/files/documents/20140211\\_death\\_penalty\\_moratorium.pdf](http://www.governor.wa.gov/sites/default/files/documents/20140211_death_penalty_moratorium.pdf); John Bacon, *Washington Governor Suspends Death Penalty*, USA TODAY (Feb. 12, 2014, 1:29 AM), <https://www.usatoday.com/story/news/nation/2014/02/11/washington-death-penalty-inslee/5394917> (noting that Washington last performed an execution in September 2010). In three states, the moratoria have been extended by the subsequent governor or by the enacting governor upon reelection. See Rick Anderson, *Washington State Has Eight People on Death Row—and No Plans to Ever Execute Them*, L.A. TIMES (Jan. 16, 2017, 5:00 AM), <http://www.latimes.com/nation/la-na-washington-death-penalty-2017-story.html> (noting that in Colorado and Washington, Governors Hickenlooper and Inslee, respectively, continued the moratoria on reelection, while in Oregon, Governor Kate Brown continued it). Pennsylvania’s moratorium was implemented by the current governor and remains in effect. See Sarah Mearhoff, *What Will Happen to Pennsylvania’s Death Penalty?*, PHILA. INQUIRER (May 28, 2017, 10:03 AM), <http://www.philly.com/philly/news/politics/state/what-will-happen-to-pennsylvanias-death-penalty-20170527.html> (noting that moratorium remains in effect while the governor awaits the results of a report by the Pennsylvania Task Force and Advisory Committee on Capital Punishment).

215. The abolitionist states are listed at *supra* note 212 and accompanying text.

FIGURE 2-B

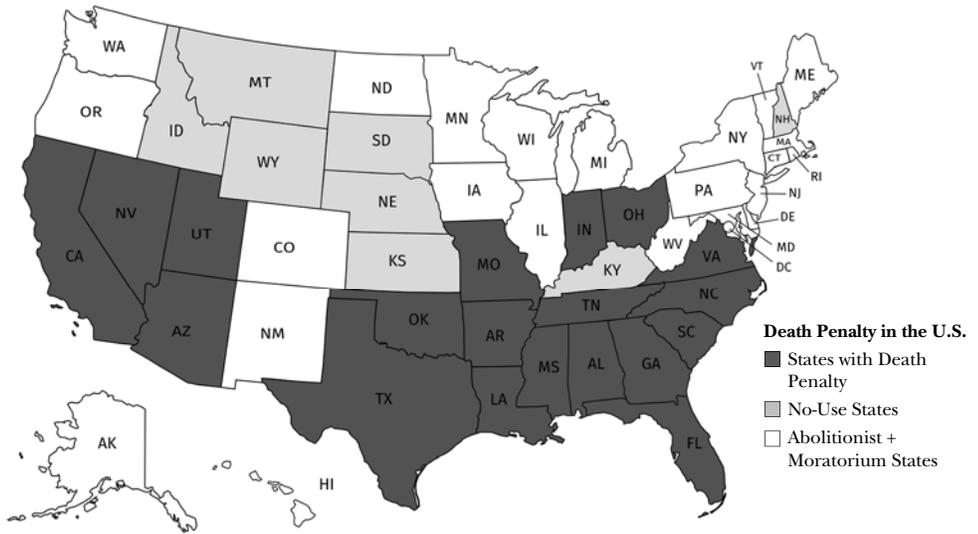


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The sum total of abolitionist and moratorium states are depicted in Figure 2-C below.



FIGURE 2-D

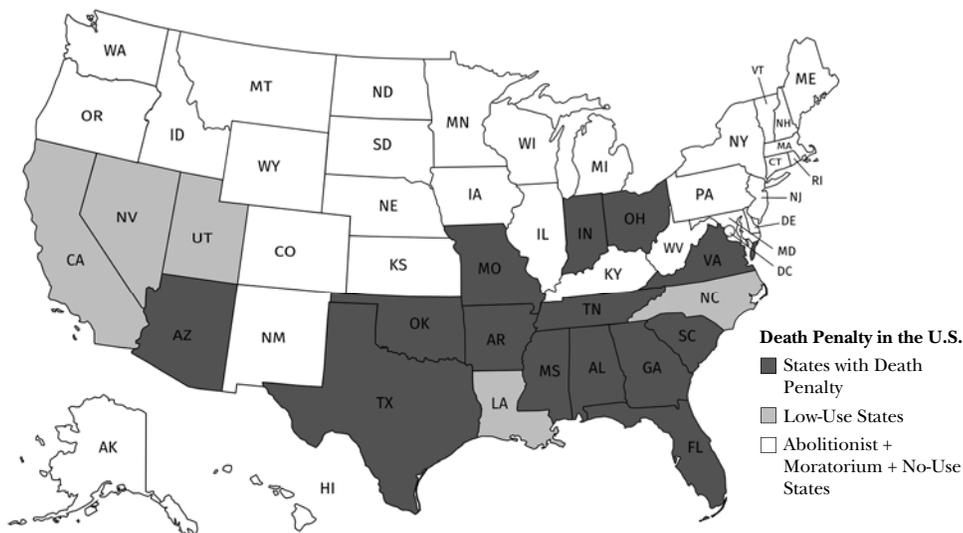


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The sum total of abolitionist, moratorium, and functionally abolitionist states are consolidated in Figure 2-E below.



FIGURE 2-F

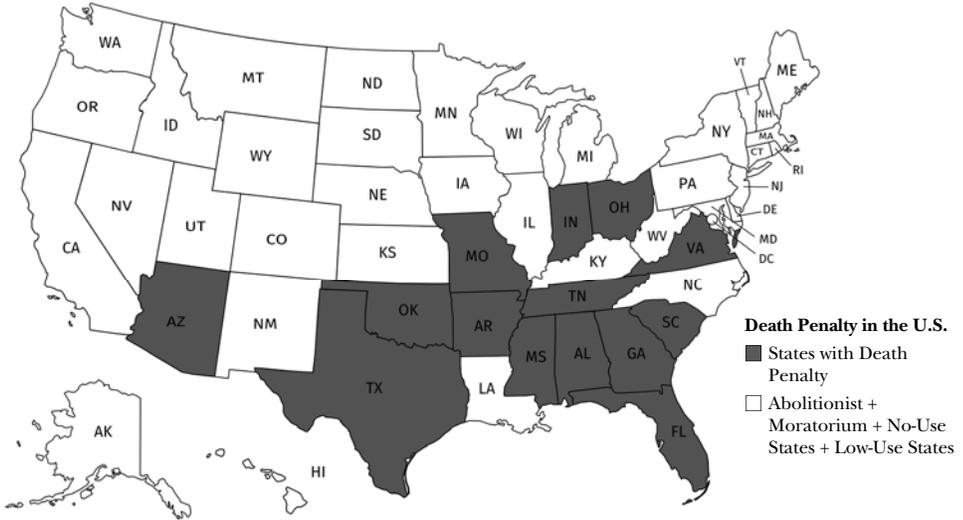


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Figure 2-G combines abolitionist states, moratorium states, no-use states, and low-use states.

(noting that in North Carolina, 11 death row inmates died of natural causes between 2006 and 2016); Marcella Corona, *Is Nevada's Death Penalty a 'Broken System?'*, J. SENTINEL (Mar. 31, 2017, 6:14 PM), <https://www.jsonline.com/story/news/politics/2017/03/30/nevada-proponents-prosecutors-battle-over-death-penalty-costs/99807022> (finding that no prisoner has been executed in Nevada since 2006); *Executions by State and Year: Utah*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/5741#UT> (last visited Dec. 28, 2017) (noting one execution since 2000); Liliana Segura, *Ten Years After Last Execution, California's Death Row Continues to Grow*, INTERCEPT (Jan. 17, 2016, 5:40 PM), <https://theintercept.com/2016/01/17/ten-years-after-last-execution-californias-death-row-continues-to-grow> (noting no executions in California since 2006). It is unclear whether Nevada will remain a "low use" state in light of an execution that had been scheduled for October 2017 but which remains on hold, despite the fact that the inmate scheduled for execution has expressed a steadfast desire to be put to death. See David Ferrara, *Letters to Judge Affirm Nevada Inmate's Desire to Die*, LAS VEGAS REV.-J. (Nov. 21, 2017, 6:33 PM) (describing Scott Dozier's letters to the judge requesting death regardless of how painful the experience might be, and noting that "[o]f the 12 men executed since Nevada reinstated the death penalty in 1977, 11 have been so-called volunteers"). Until recently, Arkansas would have been considered a low-use state. Arkansas did not execute anyone on death row between 2005 and 2016. See *Arkansas*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/arkansas-1> (last visited Dec. 28, 2017). However, in April 2017, the state indicated its intent to carry out 11 executions over an eight-day period, prior to the expiration of its supply of Midazolam, a lethal injection drug. See Mark Berman, *Fourth Arkansas Execution in Eight Days Prompts Questions About Inmate's Movements*, WASH. POST (Apr. 28, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/04/27/arkansas-readies-to-carry-out-last-planned-execution-before-drugs-expire>. Since that announcement, the state has carried out four of those executions. See *id.*

FIGURE 2-G



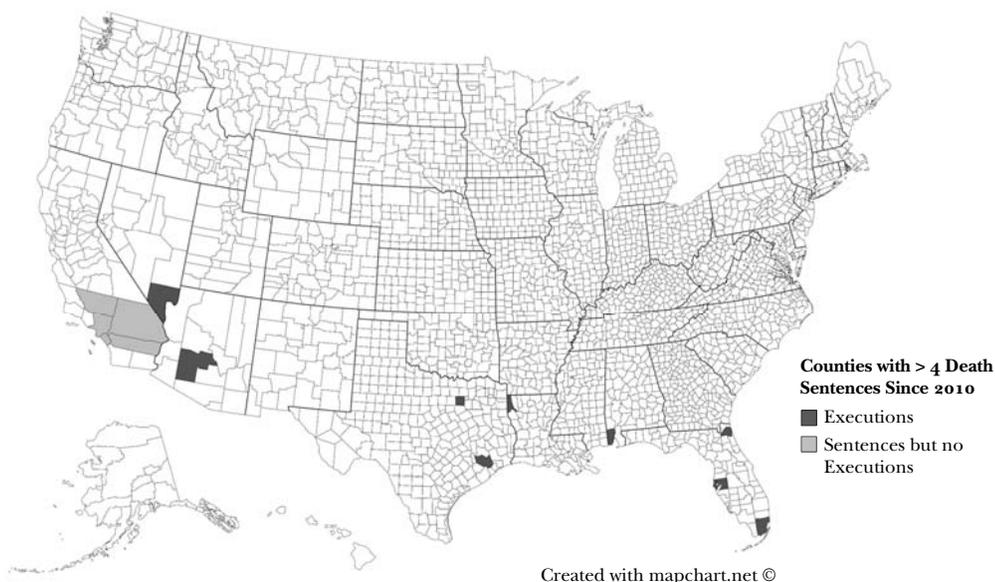
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In total, there are 39 jurisdictions—including 36 states, the District of Columbia, the federal government, and the U.S. military—that have either abolished the death penalty or have carried out so few executions (one or fewer executions per decade over the past half-century) that they are likely considered functionally abolitionist, at least under new majoritarian analysis. No wonder that a growing number of briefs by advocates of death penalty abolitionism—an arena once dominated by a *Marbury*-style litigation approach—currently advance consensus-oriented approaches to argue that capital punishment is far more counter-majoritarian than ordinarily believed.<sup>221</sup>

221. See, e.g., Petition for a Writ of Certiorari at 21–25, *Hidalgo v. Arizona*, No. 17-251 (Aug. 14, 2017), 2017 WL 3531089 (arguing that a combination of legislative trends, executive action, lack of executions, and geographic isolation undermine the constitutionality of the death penalty); Brief of Amicus Curiae Fair Punishment Project in Support of Petitioner at 3–18, *Hidalgo v. Arizona*, No. 17-251 (Sept. 15, 2017), 2017 WL 4162290 (same); see also Brief of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute as Amici Curiae in Support of Neither Party at 2–12, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280), 2015 WL 4624172 (invoking a strategy couched in new majoritarian approaches to seek a categorical bar on all life-without-parole sentences for juveniles). The Charles Hamilton Houston Institute and Criminal Justice Institute brief also noted *Obergefell*'s consideration of “referenda, legislative debates, and grassroots campaigns, as well as countless

The point becomes even clearer when counties are considered separately. The United States is home to more than 3,100 counties, yet death sentences are limited to a tiny fraction of those counties, where they are sought by an equally small number of prosecutors. The severe state of geographic isolation is highlighted in Figure 2-H. Counties that have sentenced five or more individuals to death since 2010 are shaded in black; those that have sentenced five or more individuals to death during that time but have not executed any inmates during that time are shaded in grey.

FIGURE 2-H



### B. NEW MAJORITARIANISM AND JUVENILE LIFE WITHOUT PAROLE

New majoritarianism also has implications for life-without-parole sentencing schemes—in particular for juvenile and nonviolent offenders. At the present time, only 21 jurisdictions ban juvenile life without parole (“JLWOP”) sentences.<sup>222</sup> Nevertheless, like the death penalty, juries seldom

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studies, papers, books, and other popular and scholarly writings” as part of its larger argument to invalidate JLWOP sentences for juveniles. Brief of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute as Amici Curiae in Support of Neither Party, *supra*, at 3.

222. See JOSH ROVNER, THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3 (2017), <http://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf> (noting that 20 states and the District of Columbia ban JLWOP); see also JUVENILE

impose JLWOP; there is a consistent trend in state legislation against the practice while, in other states, the practice is rarely if ever used; and, finally, JLWOP sentences are limited to an exceedingly small and isolated number of U.S. counties.<sup>223</sup>

Prior to the Supreme Court's 2012 ruling in *Miller*,<sup>224</sup> only a handful of states prohibited JLWOP.<sup>225</sup> In the relatively short period following *Miller*, 17 additional jurisdictions (16 states plus the District of Columbia) have invalidated the practice: four states in 2013;<sup>226</sup> two states in 2014;<sup>227</sup> three in 2015;<sup>228</sup> three more (plus the District of Columbia) in 2016;<sup>229</sup> and four more

SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES: JUNE 2017 SNAPSHOT 3-16 (2017), [https://www.juvenilelwp.org/wp-content/uploads/June%202017%20Snapshot%20of%20JLWOP%20Sentences\\_01.pdf](https://www.juvenilelwp.org/wp-content/uploads/June%202017%20Snapshot%20of%20JLWOP%20Sentences_01.pdf) (describing the status of each jurisdiction, demonstrating that the following jurisdictions have eliminated JLWOP: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, D.C., Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming).

223. See *infra* notes 243-44 and accompanying text.

224. See *supra* notes 170-73 and accompanying text (discussing *Miller*).

225. Alaska, Colorado, Kansas, and Kentucky. See ALASKA STAT. § 12.55.125 (2016) (prescribing no life sentences, but imposing a mandatory 99-year sentence under certain conditions); COLO. REV. STAT. ANN. § 17-22.5-104(2) (d) (IV) (West Supp. 2016); COLO. REV. STAT. ANN. § 18-1.3-401(4) (b) (I) (West 2013); KAN. STAT. ANN. § 21-6618 (2012); KY. REV. STAT. ANN. 640.040(1) (West 2014) (restricting sentencing for those younger than 16). Montana appears to retain discretionary life without parole, see MONT. CODE ANN. §§ 45-5-102(2), 46-18-222(1) (West 2008), but the State has only one individual currently serving such a sentence. See JUVENILE SENTENCING PROJECT, *supra* note 222, at 10 (stating that Montana “appears to give courts discretion to sentence juveniles to LWOP” and listing one person sentenced to life imprisonment).

226. Delaware, Massachusetts, Texas, and Wyoming. *Diatchenko v. Dist. Attorney*, 1 N.E.3d 270, 284-85 (Mass. 2013) (holding that JLWOP sentences violate the Massachusetts Constitution); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013); S.B. 2, 83rd Leg., 2d Spec. Sess. (Tex. 2013); H.B. 23, 62nd Leg., Gen. Sess. (Wyo. 2013). Like the initial six states, Delaware, Texas, and Wyoming implemented legislation outlawing JLWOP. Note that while Delaware retained the punishment, the state provides an opportunity for every juvenile sentenced to life without parole to seek resentencing after serving a portion of his or her sentence. Massachusetts became the first state to prohibit JLWOP through the courts that same year. The state's highest court determined that JLWOP violated the Massachusetts State Constitution, thus abolishing the practice. *Diatchenko*, 1 N.E.3d at 284-85.

227. Hawaii and West Virginia. H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014); H.B. 4210, 81st Leg., 2d Reg. Sess. (W. Va. 2014).

228. Connecticut, Nevada, and Vermont. S.B. 796, 2015 Gen. Assemb., Jan. Sess. (Conn. 2015); Assemb. B. 267, 78th Sess. (Nev. 2015); H. 62, 2015 Gen. Assemb., 73rd Sess. (Vt. 2015). Like many of the states before them, all three did so via legislation. See the bills cited *supra* in notes 225-27.

229. The District of Columbia, Iowa, South Dakota, and Utah. The District of Columbia, South Dakota and Utah followed the example of many earlier states by passing legislation aimed at prohibiting JLWOP. Comprehensive Youth Justice Amendment Act of 2016, 63 D.C. Reg. 15312, 15312-25 (Dec. 7, 2016) (effective Apr. 2017); S.B. 140, 2016 Leg. Assemb., 91st Sess. (S.D. 2016); H.B. 405, 2016 Gen. Sess. (Utah 2016). Iowa, however, joined Massachusetts, as only the second state to outlaw JLWOP through the court system. *State v. Sweet*, 879 N.W.2d 811, 836, 839 (Iowa 2016) (holding that JLWOP sentences violate the Iowa Constitution). Like Massachusetts, the Iowa Supreme Court found that JLWOP was in direct violation of Iowa's

in 2017.<sup>230</sup> This continuing momentum to eradicate JLWOP is of obvious constitutional import; after *Atkins*,<sup>231</sup> *Roper*,<sup>232</sup> and *Hall*,<sup>233</sup> it is fairly evident that a clear “consistency of the direction of change” points toward JLWOP’s abolition.

This growing consensus is apparent not just in the jurisdictions that have legally abolished JLWOP, but also in states that have more or less done so in practice. Fifteen additional states that still technically permit JLWOP have rendered the practice virtually obsolete. Five states have sentenced one or no persons to JLWOP in the last five years.<sup>234</sup> Six other states currently have zero individuals serving JLWOP sentences.<sup>235</sup> In addition, four states have five or fewer persons serving a JLWOP sentence from any time period.<sup>236</sup>

Additionally, a number of states have significantly curtailed their use of JLWOP through various legislative actions. For example, Florida, a former frequent user of JLWOP, has limited the practice to instances where the defendant “actually killed, intended to kill, or attempted to kill the victim” and was previously convicted of an enumerated felony.<sup>237</sup> North Carolina no longer allows the practice for felony-murder convictions, and Pennsylvania no longer imposes mandatory JLWOP for second-degree murder.<sup>238</sup>

constitution. *Id.*

230. Arkansas, California, New Jersey, and North Dakota. Fair Sentencing of Minors Act of 2017, S.B. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); Parole: Youth Offender Parole Hearings, S.B. 394, 2017–2018 Leg. (Cal. 2017); Assemb. B. 373, 217th Leg. (N.J. 2017); H.B. 1195, 65th Leg. (N.D. 2017).

231. See *supra* notes 145–53 and accompanying text.

232. See *supra* notes 154–61 and accompanying text.

233. See *supra* notes 162–64 and accompanying text.

234. Alabama, Arkansas, Iowa, and Maryland all have one, and Minnesota has zero. See John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 575 & n.233 (2016). Arkansas and Iowa have since legally abolished JLWOP. See *supra* notes 229–30 and accompanying text.

235. Maine, Missouri, Minnesota, New Mexico, New York, and Rhode Island. See S.B. 590, 98th Gen. Assemb., Reg. Sess. (Mo. 2016) (commuting existing sentences from life without parole to 25 years to life with parole eligibility); PHILLIPS BLACK PROJECT, JUVENILE LIFE WITHOUT PAROLE AFTER *MILLER V. ALABAMA* 44, 67–68, 79 (2015). The Minnesota Supreme Court acknowledged that *Miller* should be applied retroactively following the Supreme Court’s ruling in *Montgomery*. Jackson v. State, 883 N.W.2d 272, 279 (Minn. 2016). The court concluded that any JLWOP sentence handed down prior to *Miller* would be converted into a life sentence with a possibility for release after 30 years, while those sentenced after *Miller* would receive a hearing to determine the appropriate sentence. See *id.* at 275.

236. Idaho (4), Indiana (5), Ohio (5), and New Hampshire (5). See JOHN R. MILLS ET AL., PHILLIPS BLACK PROJECT, NO HOPE: RE-EXAMINING LIFETIME SENTENCES FOR JUVENILE OFFENDERS 6 & n.16 (2015) (Idaho, Ohio, and New Hampshire); JUVENILE SENTENCING PROJECT, *supra* note 222, at 6 (Indiana).

237. FLA. STAT. ANN. § 775.082(1)(b)(1) (West 2017). The specific enumerated felonies are: “1. Murder; 2. Manslaughter; 3. Sexual battery; 4. Armed burglary; 5. Armed robbery; 6. Armed carjacking; 7. Home-invasion robbery; 8. Human trafficking for commercial sexual activity with a child under 18 years of age; 9. False imprisonment . . . ; [and] 10. Kidnapping.” *Id.* § 921.1402(2)(a).

238. S.B. 635, 2011 Gen. Assemb., Reg. Sess. (N.C. 2012); S.B. 850, 2011 Gen. Assemb., Reg.

Additionally, the state of Washington abolished JLWOP for criminal defendants under the age of 16.<sup>239</sup>

Not unlike the death penalty, the geographic isolation of JLWOP is revealing: The vast majority of past and current JLWOP sentences are heavily concentrated in a very small number of jurisdictions. Prior to *Miller*, roughly 64% of the approximately 2,500 JLWOP sentences across the country came from five states: California, Florida, Louisiana, Pennsylvania, and Michigan.<sup>240</sup> As previously mentioned, California has eliminated and Florida has significantly curtailed the practice, which only intensifies the outlier status of Pennsylvania, Louisiana, and Michigan.<sup>241</sup> Those three states dominate our nation's relationship with JLWOP despite making up less than nine percent of the U.S. population.<sup>242</sup>

This pattern of geographic isolation is illustrated in Figure 3-A below, which represents the counties nationwide that imposed a JLWOP sentence between 2012 and 2015.<sup>243</sup> As Figure 3-A reflects, the vast majority of our nation's counties imposed no such sentences. Only a small minority of counties are responsible for the entirety of nationwide JLWOP sentencing.<sup>244</sup>

Sess. (Pa. 2012).

239. S.B. 5064, 63d Leg., Reg. Sess. (Wash. 2014). Both the Illinois and New Hampshire legislatures increased their respective jurisdictional ages for adult court, which could have the effect of limiting the availability of JLWOP. See H.B. 2404, 98th Gen. Assemb. (Ill. 2013) (changing the jurisdictional age from 17 to 18); H.B. 305, N.H. Gen. Court, 2015 Sess. (N.H. 2015) (changing the jurisdictional age to 17 from 16).

240. See *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUM. RTS. WATCH, <https://www.hrw.org/news/2009/10/02/state-distribution-youth-offenders-serving-juvenile-life-without-parole-jlwop> (last updated Oct. 2, 2009, 4:23 PM).

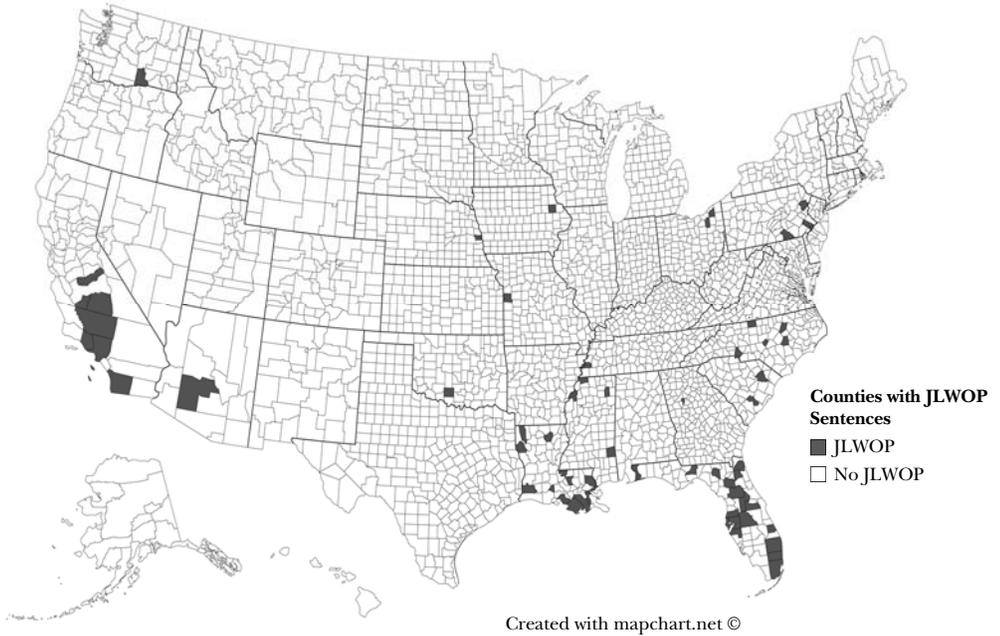
241. CAL. PENAL CODE § 1170(d)(2)A(i)–(ii) (West 2015) (limiting JLWOP to homicides involving torture and/or killing of a public safety official); FLA. STAT. ANN. §§ 775.082, 921.1402 (West 2017) (stating that JLWOP is only available to juveniles who commit capital murder after previously having been convicted of an enumerated violent felony).

242. Data from the 2010 U.S. Census provides that the total number of people living in Pennsylvania, Louisiana, and Michigan combined is 27,119,391, compared with the overall U.S. population of 308,745,538. PAUL MACKUN ET AL., U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 tbl.1 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

243. The issue is even starker when viewed on a local level, whether viewed through the lens of the last several years or historically. Since 2011, seven counties totaling less than five percent of the U.S. population have accounted for over 25% of all JLWOP sentences. MILLS ET AL., *supra* note 236, at 9 tbl.3. Five counties (Philadelphia, PA; Los Angeles, CA; Orleans, LA; Cook, IL; and St. Louis City, MO) alone account for more than 20%. *Id.* at 8 tbl.1. In the last decade, six counties were responsible for more than 20% of the JLWOP sentences imposed. *Id.* at 8 tbl.2. From 1953 through 2015, almost 22% of all JLWOP sentences were concentrated in just five counties. *Id.* at 8 tbl.1. The issue is most prevalent in Philadelphia County, Pennsylvania, where there are currently 300 people serving JLWOP sentences. PHILLIPS BLACK PROJECT, JUVENILE LIFE WITHOUT PAROLE IN PHILADELPHIA: A TIME FOR HOPE? 3 (2016).

244. Those counties are as follows: Arizona (Maricopa); California (Kern, Kings, Los Angeles, Madera, San Diego, Tulare, Ventura); Florida (Alachua, Broward, Clay, Duval, Escambia, Hillsborough, Lake, Leon, Manatee, Marion, Miami-Dade, Orge, Palm Beach, Pasco, Pinellas, Polk, St. Lucie, Suwannee); Georgia (Clayton); Iowa (Delaware); Louisiana (Bossier, Calcasieu,

FIGURE 3-A



\* \* \*

What is true about JLWOP<sup>245</sup> is also true about life-without-parole sentences for nonviolent<sup>246</sup> offenders: Both are out of step with the course of most lawmaking institutions. Nearly 30 U.S. jurisdictions currently prohibit life-without-parole sentences for nonviolent offenses;<sup>247</sup> there is a clear legal

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De Soto, East Baton Rouge, Jefferson, Lafayette, Lafourche, Orleans, Ouachita, St. Mary, St. Tammany, Terrebonne, West Feliciana); Mississippi (Coahoma, De Soto, Lee, Wayne); Missouri (Cass); Nebraska (Douglas); North Carolina (Lee, Mecklenburg, Nash, Rockingham, Wayne); Ohio (Geauga, Summit); Oklahoma (Stephens); Pennsylvania (Monroe, Montgomery, Philadelphia, York); South Carolina (Dorchester, Florence); Tennessee (Shelby); and Washington (Benton).

245. See Petition for Writ of Certiorari at 7–14, *Johnson v. Idaho*, No. 17-236 (Aug. 10, 2017), 2017 WL 3575738 (arguing that state-law trends abolishing JLWOP demonstrates that the practice no longer comports with the Eighth Amendment).

246. There is general agreement that an offense is “nonviolent” if it does not involve the use or threat of physical force or violence against another individual. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROFILE OF NONVIOLENT OFFENDERS EXITING STATE PRISONS 1 (2004), <https://www.bjs.gov/content/pub/pdf/pnoesp.pdf> (defining a nonviolent offense as one “which do[es] not involve a threat of harm or an actual attack upon a victim”).

247. See FAIR PUNISHMENT PROJECT, FACT SHEET: NONVIOLENT LIFE WITHOUT PAROLE 1–2

trend against subjecting nonviolent offenders to the harshest and most punitive sentences;<sup>248</sup> actual life without parole sentences are increasingly rare for nonviolent offenders;<sup>249</sup> and the remaining life without parole sentences for nonviolent offenders are largely isolated to a very small number of counties.<sup>250</sup> These developments and trends suggest that a punishment once seen as appropriate and necessary by large majorities is becoming “more and more out of step with contemporary punishment norms.”<sup>251</sup>

## V. NORMATIVE IMPLICATIONS OF NEW MAJORITARIANISM

Beyond its practical significance, new majoritarian constitutionalism has important implications for theoretical debates regarding the role of extrinsic markers in constitutional decisionmaking. Unlike traditional approaches that tend to look entirely to state legislation and expansive models that consider an open-ended array of sources, new majoritarian constitutionalism makes better use of extrinsic indicators to determine where the majority position on a given issue *really* lies. While this theory is not an exact science, it is bounded by a relatively fixed set of extrinsic markers, and thus it provides a relatively high degree of consistency and predictability. New majoritarian constitutionalism can thus foster greater durability to constitutional law, ensuring buy-in while remaining flexible enough to keep constitutional doctrine current with broader legal developments. It is a viable middle-ground position between traditional majoritarian state-polling on the one hand and subjective, judge-driven counter-majoritarian jurisprudence on the other.

### A. RETHINKING MAJORITARIANISM AND THE ROLE OF THE COURT

New majoritarian constitutionalism is more than a theory of mere outsourcing. Rather, it emphasizes the role of courts in rendering decisions about how extrinsic sources should figure within the larger constitutional equation—avoiding “the misguided impression that judicial decisions are inevitable, meaning that the Court’s composition is largely irrelevant.”<sup>252</sup>

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(2017), <http://fairpunishment.org/wp-content/uploads/2017/05/FPP-NVLWOP-fact-sheet-May-2017.pdf> (containing a complete list of statutory provisions for all 29 jurisdictions that do not permit life without parole for nonviolent offenses).

248. See Sarma & Cull, *supra* note 169, at 547 (noting a “slow but steady rollback of mandatory minimum laws” since 1998, particularly for nonviolent offenders).

249. See Application for Leave to File Motion for Post-Conviction Relief at 33–36, *Seales v. State*, No. 2017-m-744 (Miss. June 2, 2017) (noting that “remarkable level of infrequency” with which life-without-parole sentences are given for nonviolent offenses); Sarma & Cull, *supra* note 169, at 567–68 (discussing the increasing rarity of life without parole sentences for nonviolent offenses).

250. Application for Leave to File Motion for Post-Conviction Relief, *supra* note 249, at 36 (“Life-without-parole sentences for nonviolent offenses are handed down in a geographically skewed and isolated manner.”).

251. Sarma & Cull, *supra* note 169, at 580.

252. Driver, *supra* note 42, at 758.

Indeed, new majoritarian constitutionalism indicates just how important the perspectives of the individual Justices can be, as *the Court* articulates which sources are most revealing of majority viewpoints—and how those sources should be marshalled. In that regard, new majoritarianism can preserve a role for the Court in the incremental development of new constitutional decisions.<sup>253</sup>

### 1. Recalibrating the Majoritarian/Outlier Dichotomy

While new majoritarian constitutionalism relies on extrinsic sources to shore up constitutional doubt, it is far less skeptical about interceding into ongoing disputes of political significance than traditional majoritarian theory. In that sense, new majoritarian constitutionalism occupies a middle ground that can bridge the divide between classic counter-majoritarian and majoritarian views. This theory also brings new perspective to the traditional dichotomy between majoritarian and outlier legal regimes.

Take *Roper*, for example. While some commentators have celebrated *Roper* as a counter-majoritarian decision<sup>254</sup>—after all, the Court invalidated legislative sentencing schemes that appeared to have majoritarian support—such a view of *Roper* may not be entirely correct. *Roper* demonstrates why a seemingly “majoritarian” set of state laws, when considered in their proper context, are really outliers. Once the Court recalibrates its lens into extrinsic sources by examining the laws in action, it can perform a more fine-grained analysis to determine where the majority position on a given issue really lies—a process the Court engaged in *Roper*<sup>255</sup> and a host of other cases.<sup>256</sup> The cases indicate why the challenged laws were *themselves* counter-majoritarian, inviting judicial override through more creative uses of extrinsic indicators.

New majoritarian analysis helps make sense of, and assimilate, constitutional decisions that appear to lie beyond ordinary explanation. While *Lawrence* has been described as puzzling “given the extreme deference the

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253. *Cf. id.* at 797 (observing that the Court’s ability to protect minority rights has steadily improved since the Warren Court).

254. See David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT’L L. 1, 13–14 (2006) (noting that the Court in *Roper* and *Lawrence* rendered “countermajoritarian decisions” by “invalidat[ing] laws enacted by democratically elected legislatures” and analyzing both cases through the prism of counter-majoritarianism); see also MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 316 (1973) (noting that the Court in *Furman* acted in counter-majoritarian fashion by curbing “the human capacity for destructiveness against the strong tide of the urge to punish”).

255. See *supra* notes 154–61 and accompanying text.

256. See, e.g., *supra* text accompanying notes 124–28 (discussing new majoritarian approach in *Coker v. Georgia*, 433 U.S. 584 (1977)); *supra* text accompanying notes 145–53 (same approach in *Atkins v. Virginia*, 536 U.S. 304 (2002)); *supra* notes 154–61 (same approach in *Roper v. Simmons*, 543 U.S. 551 (2005)); *supra* text accompanying notes 129–33 and 162–64; (same approach in *Hall v. Florida*, 134 S. Ct. 1986 (2014)); *supra* text accompanying notes 165–69 (same approach in *Graham v. Florida*, 560 U.S. 48 (2010)).

Court has traditionally shown when applying” rational basis review,<sup>257</sup> the case makes sense from the perspective of new majoritarianism.<sup>258</sup> Like *Roper*, the Court’s more nuanced reading of actual, on-the-ground practices made clear that the challenged anti-sodomy regimes lacked majoritarian support and were in fact outliers.

By now it should be clear, as a purely positive matter, that cases like *Roper* and *Lawrence* make far more dynamic use of extrinsic sources than the literature ascribes to the Supreme Court. Nevertheless, scholars continue to describe these cases as exercises in traditional state-polling. While Corinna Lain does not dispute the correctness of the outcomes in *Lawrence*, *Roper*, and *Atkins*, she argues that the Court improperly couched its decisions in the perspectives of state legislatures,<sup>259</sup> adopting an “explicitly majoritarian”<sup>260</sup> approach grounded in “state counting”<sup>261</sup> that “shatters the conventional understanding of the Court as a countermajoritarian institution.”<sup>262</sup> Mary Sigler argues, similarly, that the Court’s death penalty jurisprudence, by relying on extrinsic indicators, falls into a “[m]ajoritarian [t]rap”<sup>263</sup> that undermines the force of the ruling itself. As she explains, “reliance on majority preferences to determine the scope and application of a constitutional right vitiates the protection afforded by that right.”<sup>264</sup>

But these critiques may overlook how dynamic majoritarian analysis has become—with unexpected benefits for some (though not all) litigants challenging the status quo. A more comprehensive new majoritarian approach, when used properly, can demonstrate how legal regimes that at first blush appear majoritarian are truly outliers. Thus, scholars who favor more counter-majoritarian rulings should consider how a more fine-grained inquiry into majoritarianism can be useful and important to protecting constitutional rights.<sup>265</sup>

Some consensus scholars have espoused a theory of constitutional development that comes closer to a new majoritarian approach. Barry Freidman’s work on consensus, for example, often describes constitutional change as a dialogic process of judicial review and public response, with the Court constrained by, and in constant conversation with, “the people”—a

257. Klarman, *supra* note 25, at 437; *see also id.* at 437–38 (noting that “[u]ntil 1961 every state in the nation had a law forbidding same-sex sodomy” and “[i]t strains credulity to suggest that” states with anti-sodomy laws “were acting irrationally”).

258. *See supra* notes 138–44, 177–82 and accompanying text (discussing Justice Kennedy’s close examination of the relevant state laws’ histories and purposes and their infrequent enforcement).

259. Lain, *supra* note 10, at 372–73.

260. *Id.* at 405.

261. *Id.* at 374.

262. *Id.* at 369.

263. Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 412 (2011).

264. *Id.*

265. *See supra* Parts III.C & IV.

process that incorporates a role for all three branches.<sup>266</sup> In that sense, Friedman sees a consensus-based approach as potentially obviating, and possibly curing, the counter-majoritarian difficulty.<sup>267</sup> On this view, “judicial review does not require some special justification given that when courts engage in it, they [necessarily] adhere to the will of the majority.”<sup>268</sup> While Friedman at times comes close to describing a more traditional, state-counting approach to majoritarian constitutionalism,<sup>269</sup> he leaves open the possibility that if “the principle of deference to governmental decisions” is insufficient, “the court turns to broader evidence of what majoritarian desire might be.”<sup>270</sup> Although Friedman does not always explain the exact dialogue he has in mind, or the actual criteria courts use to engage in this conversation, his dialectical model could certainly be congenial to a new majoritarian approach.

## 2. New Majoritarianism and Political Power

While advocates of *Marbury*-style judicial review are not wrong to see the Court as playing a critical role in elevating the position of historically marginalized groups, their dim view of extrinsic indicators can overstate the need for a purely judicially driven approach. By arguing that the whole point of constitutional adjudication is to keep matters of certain fundamental rights out of the hands of the majority, *Marbury*-backers risk undermining the way groups can build on political gains as part of a larger, majoritarian-based legal strategy. Indeed, some civil libertarian advocates could, perhaps unwittingly, promote mechanisms that make it harder for more severely marginalized populations to seek judicial redress. Sigler argues, for instance, that because criminal defendants are among the most unpopular members of society and

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266. See Friedman, *Dialogue*, *supra* note 3, at 580–81 (“[T]he everyday process of constitutional interpretation integrates all three branches of government: executive, legislative, and judicial. Our Constitution is interpreted on a daily basis through an elaborate dialogue as to its meaning. All segments of society participate in this constitutional interpretive dialogue, but courts play their own unique role. Courts serve to facilitate and mold the national dialogue concerning the meaning of the Constitution, particularly but not exclusively with regard to the meaning of our fundamental rights.” (footnotes omitted)).

267. As Justice O’Connor once explained: “[W]e rely on the confidence of the public in the correctness of those decisions. That’s why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust.” See FRIEDMAN, *WILL OF THE PEOPLE*, *supra* note 3, at 371 (quoting Sandra Day O’Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust*, CT. REV., Fall 1999, at 10, 13).

268. Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1232–33 (2010); see also *id.* at 1233 (arguing that, owing to the accord between courts and the people, “the ‘counter-majoritarian’ problem that has so beguiled the academy is, in the broad terms often stated, hardly a problem at all”).

269. He writes “[t]he Court turns time and again to a head count of states to discern the majority practice. My own name for this practice is *polling*, and it is a technique prevalent throughout constitutional cases.” Friedman, *Dialogue*, *supra* note 3, at 597.

270. *Id.* at 601.

lack the popular support or political power needed to change laws, it is impractical to rely on extrinsic indicators to protect their rights.<sup>271</sup> Lain argues, similarly, that a majoritarian approach insufficiently protects a group that is more likely to face ill-treatment by legislative bodies:

Capital defendants are about as unpopular a minority as one can find (for obvious and perfectly legitimate reasons) . . . . The politics of death only exacerbate their vulnerability, leaving little reason to trust other institutional actors to exercise self-restraint. In short, the death penalty context presents the quintessential case for the Court's countermajoritarian function. If there is any place one would want and expect the Supreme Court to guard against majoritarian overreaching, it is a capital case.<sup>272</sup>

Were it true that criminal defendants had made virtually no gains through ordinary political processes, the argument for an exclusively *Marbury*-based approach would be stronger. After all, objective indicators would be of little avail to criminal defendants, as there would be no emerging majoritarian politics on which to wage a consensus-based litigation strategy. But the Supreme Court has repeatedly invoked the majoritarian gains of criminal defendants in cases such as *Coker*,<sup>273</sup> *Atkins*,<sup>274</sup> *Roper*,<sup>275</sup> *Hall*,<sup>276</sup> and *Graham*<sup>277</sup> by marshaling extrinsic indicators in new ways, thus expanding constitutional protections for these constituencies. Recent death penalty rulings are a reflection of political successes, not failures, and the cases allow the Justices to tap into emerging developments to gain a better insight into where majority opinion actually lies. But the arguments by Sigler and Lain risk understating—and, worse, under-utilizing—the power that some criminal defendants and others have gained through the political and judicial processes, which can be harnessed as part of a successful litigation strategy. Given those prior gains, a purely counter-majoritarian strategy is not necessarily the best hope—and certainly not the only hope—for obtaining vindication through the courts. Moreover, a *Marbury*-based approach runs the risk of asking too much of the courts, falling on the deaf ears of judges who would be unlikely to accept the invitation to issue *Marbury*-style, supremacist decisions.<sup>278</sup> In this way, the

271. Sigler, *supra* note 263 at 412–14.

272. Lain, *Deciding Death*, *supra* note 11, at 4–5 (footnotes omitted).

273. *Coker v. Georgia*, 433 U.S. 584 (1977); *see supra* text accompanying notes 124–28.

274. *Atkins v. Virginia*, 536 U.S. 304 (2002); *see supra* text accompanying notes 145–53.

275. *Roper v. Simmons*, 543 U.S. 551 (2005); *see supra* notes 154–61 and accompanying text.

276. *Hall v. Florida*, 134 S. Ct. 1986 (2014); *see supra* text accompanying notes 129–33 and 162–64.

277. *Graham v. Florida*, 560 U.S. 48 (2010); *see supra* text accompanying notes 165–69.

278. With the election of Donald Trump, the likelihood of the Supreme Court entertaining such a *Marbury*-based approach in constitutional rights cases in the near future seems remote. *See* Paul Barrett & David Ingold, *One of the Biggest Reasons Republicans Stick by Trump*, BLOOMBERG BUSINESSWEEK (July 10, 2017, 3:00 AM), <https://www.bloomberg.com/news/features/2017-07->

*Marbury*-or-nothing argument risks overstating the need for a counter-majoritarian court to vindicate individual rights in all circumstances.

To be sure, the Court's rights doctrines could go further—perhaps they should, and perhaps they will.<sup>279</sup> But the apparent lack of progress is not necessarily a function of a lack of counter-majoritarianism. Courts have invalidated a host of statutes using extrinsic indicators, and as Part IV demonstrated, the Court is well poised to invalidate the death penalty and other sentencing practices under new majoritarian constitutionalism. Thus, counter-majoritarianism is not a necessary condition to strong judicial review in context of constitutional rights.<sup>280</sup> The civil libertarian critique of majoritarian-based constitutional approaches overlooks the untapped, rights-bearing potential of such a framework, which is not necessarily an impediment to strong and effective judicial review.

Under a new majoritarian framework, the Court need not wait for a supermajority of the states to adopt a particular practice to find that practice majoritarian in nature. Nor should the Court have to wait, given the well-established public choice constraints on legislatures, both state and federal, that prevent legislative change even when such change would conform with strong majoritarian views.<sup>281</sup> Once it becomes apparent that the status quo is no longer supported by actual legal practices, the Court is well positioned to invalidate laws in the name of majoritarianism.

### 3. New Majoritarianism at the Political Periphery

Of course, Sigler and Lain are correct that a consensus-based approach can do little for groups who enjoy no political power whatsoever. In those cases, and with respect to those groups, an expanded model of consensus—if not a *Marbury*-style approach—is more critical.<sup>282</sup> Indeed, a Court resorting exclusively to extrinsic markers can do very little to improve the lot of those who have failed to secure *any* political traction. Herein lies a danger of any constitutional theory couched in majoritarianism. At its narrowest, the idea of a purely consensus-based Constitution risks turning the Bill of Rights on its head, transforming a part of the Constitution intended as a check on the majority into a mere expression of it. For such groups, all but the most expansive approaches would likely fall flat. To the extent that new majoritarianism relies on emerging political gains by various groups, those who have failed to secure any political victories would have a hard time galvanizing extrinsic sources of meaning to their advantage. For this reason,

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10/trump-begins-the-rightward-shift-of-americas-courts.

279. See *supra* Part IV (noting how a new majoritarian approach could lead to the toppling of the death penalty and juvenile life without parole).

280. See *supra* Part III.C.

281. See *supra* note 67 and accompanying text.

282. See *supra* Part III.B.

groups outside the political mainstream are unlikely to benefit from majoritarian constitutionalism.

Groups facing such headwinds will likely turn to more expansive approaches, and *Obergefell*'s reliance on such a broad array of influences—from “debates” and “grassroots campaigns” to “studies, papers, books, and other popular scholarly writings”<sup>283</sup>—could be a boon to groups that have made few gains through the ordinary political process.<sup>284</sup> Not surprisingly, *Obergefell* has been cited by groups who have secured far fewer of the successes through the political branches that the LGBT movement has achieved.<sup>285</sup>

Of course, Justice Kennedy's articulation of such an expansive list of extrinsic sources in *Obergefell* raises a question about stopping points: Are there any indicators under an expansive approach that do *not* have some kind of legal or constitutional meaning? It would be difficult under such an expansive regime—if not impossible—to distinguish between those indicators that carry constitutional weight and those that do not. For this reason, the features of new majoritarianism—which can be quite expansive in their own right—provide an attractive middle ground position between the narrowest range of extrinsic sources of meaning on the one hand and an open-ended (if not unbounded) list on the other.

While there may be other constitutional theories and lines of precedent that better protect new and evolving legal movements than majoritarian-based frameworks,<sup>286</sup> new majoritarianism highlights how developments outside the court can have important bearing on judicial decisionmaking. On this theory, persuading a district attorney's office or governor's office can be as important a development as persuading the legislature or a court of last instance in a particular state. New majoritarianism promotes a development of

283. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

284. See *supra* notes 108–12 and accompanying text.

285. See *supra* note 221 and accompanying text.

286. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (finding Colorado's constitutional amendment, repealing ordinances that prohibited discrimination on the basis of homosexuality, to be constitutionally invalid and “inexplicable by anything but animus toward the class”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (finding the City of Cleburne's zoning ordinance, requiring special use permits for homes for the mentally disabled, constitutionally invalid due to “irrational prejudice against the mentally retarded”); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 537 (1973) (finding federal legislation, which excluded from the food stamp program households with unrelated and unmarried individuals living together, to be constitutionally invalid and “specifically aimed at the ‘hippies’ and ‘hippie communes’” (citation omitted)); *Diaz v. Brewer*, 656 F.3d 1008, 1014–15 (9th Cir. 2011) (finding Arizona's termination of healthcare benefits for state employees' same-sex partners constitutionally invalid due to animus); *Ariz. Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1069–72 (D. Ariz. 2013) (finding that Arizona's revocation of driver's license eligibility for certain deferred action recipients likely amounted to an equal protection violation based on improper animus), *rev'd on other grounds*, 757 F.3d 1053 (9th Cir. 2014). See generally Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. (forthcoming 2018) (noting how rational basis review has been critical for emerging social movements seeking to vindicate constitutional rights through litigation).

constitutional law through the interplay amongst a range of actors—legislators, governors, jurors, and others—who may reflect popular will as well as any legislative body.

### B. NEW MAJORITARIANISM AND INSTITUTIONAL PROCESS

In order for majoritarian constitutionalism to be not just “a mindset, but also a process of constitutional interpretation,”<sup>287</sup> its parameters should be defined as clearly and carefully as possible. By anchoring constitutional theory in more traditional law-making sources—state law and legislative trends, executive branch policies and decisions, the practices of judges and juries, and geographic isolation—new majoritarian constitutionalism shows a respect for political process while providing the Court with discretion to make the best use of those conventional sources. The theory offers a relatively high degree of consistency over time, enhancing norms of predictability and long-term stability in constitutional interpretation. New majoritarianism thus has the advantage of promoting important institutional process values, such as stability and transparency, while reinforcing the centrality of dialogue in evolving constitutional meaning.

#### 1. New Majoritarianism and Legal Uncertainty

Even as the Court has made repeated use of new majoritarian approaches to resolve the constitutionality of various legal regimes, certain aspects of the Court’s analysis remain largely unexplained—and unresolved. For example, the Court has not identified whether a “specific number of states [constitutes] a recognized tipping point.”<sup>288</sup> Moreover, phrases such as “consistency of the direction” seem to rely on uncertain and inexact interpretations about relevant trends in the law.<sup>289</sup> Some scholars find these approaches to be unusual, or confusing—especially when the Court equates states that technically allow certain punishments to be nevertheless “functionally equivalent to states that have prohibited the penalty” when “circumstances in those states nullify the need for legislative action.”<sup>290</sup> These commentators find statements like this to be overly vague, if not opaque, expressions of the law, and they call for a more bright-line, rule-based jurisprudence instead.

For Sigler, the Court’s consensus-oriented analysis “lacks political legitimacy—not because it incorporates the Court’s own judgment, but because it fails to specify the actual grounds of decision or provide a meaningful opportunity for critical evaluation of its reasoning.”<sup>291</sup> Ian Farrell

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287. Driver, *supra* note 42, at 769.

288. Smith et al., *supra* note 68, at 2407; *see also* *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (noting that legislative trends can indicate emerging consensus but not specifying the actual number of states necessary to establish such a trend).

289. *Atkins*, 536 U.S. at 315.

290. Smith et al., *supra* note 68, at 2408; *see supra* Part III.C.1.

291. Sigler, *supra* note 263, at 415.

also rejects the Court's current approach in capital cases that relies on objective indicators of meaning such as state law, preferring a formal approach to judicial review grounded in a heightened scrutiny framework.<sup>292</sup> Farrell argues that strict scrutiny should apply where there is a reason to suspect that a punishment is disproportionate—such as where a punishment seems excessively harsh; the offender is a juvenile, mentally disabled, or unique in some other way; or where the offense is an omission.<sup>293</sup> A heightened scrutiny approach would place the burden on the government to show that the challenged sentence is needed to further the traditional aims of punishment (retribution, incapacitation, or deterrence). On the other hand, in situations not involving some kind of suspect-category defendant (for instance, an adult sentenced to prison), there would be no heightened scrutiny, placing the burden on the party challenging the punishment.<sup>294</sup>

There are undoubtedly some advantages to the kind of formal approach Farrell and others propose. But such a framework would also dramatically reduce judicial discretion and make it harder for the Court to draw upon extra-judicial developments in sorting out the resolution of various legal questions. A bright-line approach would also confine the Court, diminish judicial flexibility, and reduce the Court's ability to marshal extrinsic sources to determine whether the legal regime in question really enjoyed majoritarian support.

Neither is the Court's case law in this area entirely opaque or unclear. After all, the Court has relied upon a fairly consistent set of factors across a range of cases to establish the criteria that guide future cases. Thus, those who criticize consensus-based approaches tend to be "too quick to overlook" the value and staying power of the Court's routine reliance on extrinsic indicators.<sup>295</sup> Given the unexpected legal outcomes that majoritarian constitutionalism has helped produce, the better approach would be to clarify, not scrap, majoritarianism so that "the Court [can] gauge societal consensus while reducing the perception that consensus analysis is outcome-driven."<sup>296</sup> As one group of scholars puts it, "[w]hen it comes to consensus analysis the Court should mend it not end it."<sup>297</sup>

Scholars have argued that the Court should be more "explicit about how each indicator of consensus stacks up in every case,"<sup>298</sup> and while such an exacting approach could have some advantages, the Court's recent decisions

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292. Farrell, *supra* note 68, at 303–04, 311–13. Farrell describes his method as "inspired by—but not identical to—the 'tiers of scrutiny' review applied under the Fourteenth Amendment." *Id.* at 316.

293. *Id.* at 316.

294. *Id.*

295. See Smith et al., *supra* note 68, at 2400.

296. *Id.*

297. *Id.*

298. *Id.* at 2433.

have gone quite far in laying out the indicia that “count” in determining constitutional meaning.<sup>299</sup> Although some will argue that open-textured constitutional frameworks are too easily manipulated, the malleability of the Court’s current approach can have benefits. Legal patterns that at one time seem peripheral to the doctrine can reveal themselves to be more legally (and constitutionally) significant at a later time.<sup>300</sup> In this regard, any legal uncertainty caused by new majoritarian constitutionalism is a byproduct of its adaptability and its recognition that seemingly majoritarian practices can, upon closer inspection, constitute legal outliers.

Finally, it should be noted that legal uncertainty is not necessarily a problem, especially when the Court uses vague standards to occupy a gap left by the political branches. To the extent there is some elasticity to those extrinsic markers that “count” in the constitutional equation, the judicial articulation of relevant constitutional standards may necessarily be imprecise, if only so that those standards can change shape and evolve over time.<sup>301</sup> Instead of reducing constitutional law to a static enterprise, new majoritarian constitutionalism promotes deeper transsubstantive values while supporting the possibility of an evolving doctrine of constitutional law.

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299. See *supra* notes 129–37, 138–44, 145–53, 154–61 and accompanying text.

300. Smith et al. also argue that the Court “should count functionally abolitionist states as abolitionist states” by considering the actual use of a given penalty when deciding whether a state is abolitionist or retentionist. Smith et al., *supra* note 68, at 2433. But this modification, which the authors claim to be more ambitious, is really just a continuation of the Court’s current approach. Indeed, like many of the other recent, more novel mechanisms for determining consensus, an evaluation of the actual usage of a particular penalty seems like a reasonable way to more accurately gauge consensus, as opposed to relying on traditional indicia such as legislative enactments. Given that more than 80% of all U.S. jurisdictions have “not sentenced anyone to death since 2004 or . . . not executed anyone over the same time period,” their usage criterion seems like a logical next step in the Court’s new majoritarian analysis. *Id.* at 2451. Indeed, Part IV shows how the Supreme Court will likely use that factor to invalidate various forms of sentencing in future cases, notably the death penalty and juvenile life without parole.

301. Commentators writing in other areas of the law have at times written positively about the benefits of uncertainty in legal doctrine. Richard Hasen argues, for example, that “unmanageable judicial standards have much to commend them” when the Court wades into new and uncertain places. Richard L. Hasen, *The Benefits of “Judicially Unmanageable” Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1503 (2002). When the Court enters “the political thicket, unmanageability may be one of the best tools available for finding the right paths.” *Id.* Accordingly, “the more controversial the Court’s normative political theory underlying the claim in a particular case, the more it should strive to articulate legal standards that leave wiggle room for future Court majorities to modify.” *Id.* at 1473. New decisions can then build on the earlier, more tentative ones. As the Court becomes more engaged with an emerging doctrine, vagueness can begin to give way to clarity. At that point, “as judicial confidence grows, perhaps because of extended experience, the argument for depth grows as well.” Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 840 (2008). In that sense, a new majoritarian orientation can be fully commensurate with a theory of strong judicial review and even point the way toward a workable form of judicial supremacy that bridges the divide between traditionally Left- and Right-leaning Justices.

## 2. New Majoritarianism and Constitutional Dialogue

A lack of legal clarity—while frustrating—is not always unintentional and can even be part of a healthy dialogic process toward a more durable constitutional understanding. Indeed, the Supreme Court has for decades worked out various legal rules through the gradual articulation of oblique legal standards. And there are values—including legal-process benefits—to taking such an approach. The less the Court resolves, the more other institutions—primarily legislatures—have the room to act. Seen this way, new majoritarianism reflects a belief in a legal process in which court action will spawn a larger multi-branch dialogue inside (and outside) the legislature.

Some criminal-law scholars have observed the ways legal uncertainty inherent within some of the Court's more open-ended rulings can exert a positive function. Writing explicitly in the criminal sentencing context, Mary Fan sees the uncertainty in recent sentencing decisions as “a gentler way to nudge officials toward policies and sentences that do not push the gray area of constitutionality while keeping within the Court's historically cautious role in checking penal choices.”<sup>302</sup> Fan concludes that “[u]ncertainty as to where the constitutional line extends may lead to greater deliberation informed by the standards and values underscored as guidelines.”<sup>303</sup>

New majoritarian constitutionalism can help to induce conversation both within and without traditional legal frameworks and institutions, and in novel ways. Whereas a purely Court-centric, *Marbury*-style approach tends to close off debate by internalizing the decisionmaking process, new majoritarianism continues to look outward, engaging a range of institutions, inducing more citizen deliberation and democratic engagement with law. In that sense, such an approach may adapt to changing circumstances in ways that are more durable and lasting.

New majoritarianism also presents enhanced possibilities for dialogue, not only among the coordinate branches but also with the larger society. Unlike a purely Court-based model or the traditional approach to consensus, the hybrid model of new majoritarianism serves a deliberative purpose that a *Marbury*-or-nothing approach fails to achieve. Majoritarian-based decisions are helpful in arenas where dialogue about values and societal norms dominate, drawing upon more functionalist frameworks allowing decisionmakers to carefully consider, examine, and converse about legal and constitutional meaning.<sup>304</sup> Interested parties must contemplate the principles

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302. Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 609 (2012).

303. *Id.*

304. Cf. Seana Valentine Shffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1214 (2010) (noting how open-ended frameworks, couched in “[l]egal standards[,] are often valued for their flexibility and their susceptibility to nuanced, context-sensitive interpretation” (emphasis omitted)).

underlying the decision and engage with the issue personally, stimulating meaningful thought and discussion. This type of opinion may not be appropriate for all constitutional cases, but it can be quite beneficial for some.

In many ways, new majoritarianism flips the conventional understanding of judicial dialogue on its head: Rather than *reflect* the position of the nation on contentious issues, new majoritarianism can be a mechanism to *facilitate* and *induce* that dialogue outside the Court and engage the public on pressing issues.<sup>305</sup> In areas where the nation remains divided, new majoritarianism is an important mechanism for engaging extra-judicial institutions on various questions. In other words, new majoritarian methodology is useful where state-polling, or polling more generally, proves inconclusive. The Court's creative marshaling of traditional markers of objective meaning can have important dialogue-reinforcing effects beyond the Court.

Among those scholars who favor the consensus-oriented approach, Barry Friedman's characterization of constitutional dialogue appears to be congenial to new majoritarian constitutionalism.<sup>306</sup> On Friedman's account, the Court does not make the ultimate decision about the content of constitutional meaning—the Court remains quite constrained—but it still plays a role in the development of the law by facilitating a dialogue on the meaning of fundamental rights with extra-judicial participants.<sup>307</sup> Thus, the Court's "role is dialogic: courts interpret the Constitution, but they also facilitate and mold a societywide constitutional dialogue. Through this societal dialogue the document takes on meaning."<sup>308</sup> Unlike those strands of consensus constitutionalism that align with a more traditional take on judicial outsourcing, Friedman appears to leave additional room for the Court to shape the context in which consensus is achieved.

Criminal law scholars have already noted ways that the Court's national consensus decisions can be dialogue-inducing for the rest of the nation. Mary Fan argues ways that the functionalist reasoning in decisions like *Graham* are less about the Court reflecting a national consensus and more about the Court *shaping* that consensus.<sup>309</sup> As she explains, *Graham* "made deliberation important again in a heated arena where full evaluation of the benefits and

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305. One finds a similar idea in the work of Alexander Bickel. See BICKEL, *supra* note 1, at 240–43 (contrasting the Court's ability to foster a broader national consensus on the issue of racial segregation with its inability to do so on the subject of capital punishment); see also Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 33 n.106 (1999) ("Professor Bickel's entire project concerning 'the passive virtues' rests on the assumption that the Court, if it does its job right, can move the nation in the direction of a national consensus on difficult issues . . . . This is, for instance, clearly what he sees as having happened on the question of racial segregation, and it is, in his view, what could have happened but did not with respect to the death penalty.").

306. See also *supra* notes 266–70 and accompanying text.

307. Friedman, *Dialogue*, *supra* note 3, at 653.

308. *Id.* at 583.

309. Fan, *supra* note 302, at 609.

costs of ratcheting up penal severity had dramatically receded.”<sup>310</sup> Supreme Court Justices have made similar remarks about the need to induce deliberation outside the Court. Consider, for instance, remarks by Justice Kennedy in a speech about criminal sentencing reform:

The debate on the purposes of prison—should it be deterrence, should it be prevention, should it be rehabilitation—has gone on for a long time. But please don’t think it’s a tired debate. That . . . debate must be renewed given the number of people we have in our prisons. We have to find some way to bridge the gap between skepticism about rehabilitation and the fact that so many of your fellow citizens and your fellow humans are being maintained in prison . . . . There are . . . reasons for incapacitation. But that simply can’t be the sole function of our prisons . . . . It is not acceptable for all of our prisoners and for all of our prisons to borrow a sign from Mr. Dante’s *Inferno*: “Leave aside all hope ye who enter here.”<sup>311</sup>

In short, the idea of dialogue has emerged as a significant factor in the Court’s new majoritarian jurisprudence. While the criteria for Court action are not entirely self-evident, they take note of (without requiring) legislative success and are driven by a consensus-based approach across various institutions (and not just legislatures) about the best way to determine the majority position on a given legal question.

Commentators discussing the Court’s LGBT jurisprudence have reached similar conclusions. Larry Tribe, commenting on *Obergefell*, sees Justice Kennedy’s ruling

as deliberately fostering and enriching broad public debate regarding issues like same-sex marriage. That ambition is not far removed from the idea . . . that the Court should play an educative role in society, furthering the public’s knowledge and understanding both of the Constitution and of the vast array of legal issues that the Court confronts each year.<sup>312</sup>

Speaking more broadly to Justice Kennedy’s judicial philosophy, Tribe argues that his jurisprudence “has always been fundamentally rooted in the importance of fostering dialogue among ordinary citizens and, in a sense,

310. *Id.* at 605.

311. Anthony M. Kennedy, Justice, U.S. Supreme Court, Keynote Address at the American Bar Association Annual Meeting (Aug. 9, 2003), <https://www.c-span.org/video/?177772-2/keynote-address&showFullAbstract=1> (providing quoted remarks at time stamps 27:41 to 29:15 and 31:02 to 31:15).

312. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 26–27 (2015); *see also id.* at 23 (“Justice Kennedy’s opinions have repeatedly emphasized the notion that, through the decisions it announces and the reasons it offers for those decisions, the Court does more than resolve the particular ‘cases’ and ‘controversies’ entrusted to it for resolution. He has observed: ‘By our opinions, we teach.’”).

even among the very clauses of the Constitution itself.”<sup>313</sup> This aspect of Justice Kennedy’s decisionmaking is vividly on display in the sentencing, due process, and equal protection contexts discussed earlier.<sup>314</sup> Throughout those cases, new majoritarian constitutionalism induces conversation both within and without traditional legal frameworks and institutions—making inter-branch dialogue possible and producing more citizen deliberation and democratic engagement with the law.

## VI. CONCLUSION

During the past several decades, the Supreme Court has made creative use of extrinsic sources of meaning through a comprehensive analysis of the actual decisions of courts and juries, legislative trends, executive branch practices, and geographic disparities within various jurisdictions. The Court’s decisions have implications both for looming constitutional issues and deeper normative debates; moreover, the case law provides a reframing of the way commentators have traditionally thought about constitutional consensus. To those commentators who equate majoritarianism with state-polling and nothing else, new majoritarian constitutionalism shows a side of consensus-based jurisprudence that is worthy of deeper reflection and additional consideration. And to those who criticize majoritarian-based constitutionalism for its underappreciation of the Court’s counter-majoritarian function, a new, more dynamic understanding of majoritarianism can demonstrate how superficially majoritarian laws can, on further reflection, be deemed legal outliers and prone to judicial override.

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313. *Id.* at 23; *see also id.* at 24 (“The focus on the importance of dialogue, both among people and institutions at any given time and across the centuries, is evident throughout *Obergefell*. It becomes most explicit when Justice Kennedy describes the multitude of ways in which ‘new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.’” (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015))).

314. *See supra* Part III.