

CONTINGENT CONSTITUTIONALISM: STATE AND LOCAL
CRIMINAL LAWS AND THE APPLICABILITY OF FEDERAL
CONSTITUTIONAL RIGHTS

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ABSTRACT

Americans have long been bound by a shared sense of constitutional commonality, and the Supreme Court has repeatedly condemned the notion that federal constitutional rights should be allowed to depend on distinct state and local legal norms. In reality, however, federal rights do indeed vary, and they do so as a result of their contingent relationship to the diversity of state and local laws on which they rely. Focusing on criminal procedure rights in particular, this Article examines the benefits and detriments of constitutional contingency, and casts in new light many enduring understandings of American constitutionalism, including the effects of incorporation doctrine and the nation's mythic sense of shared constitutional commitment.

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TABLE OF CONTENTS

INTRODUCTION	145
I. CRIMINAL LAW AND CONSTITUTIONAL VARIABILITY	151
<i>A. Fourth Amendment</i>	151
<i>B. Sixth Amendment</i>	157
II. INSTITUTIONAL DESIGN	159
<i>A. Benefits</i>	161
<i>B. Detriments</i>	163
III. NEW UNDERSTANDINGS	169
<i>A. The Myth of Rights Nationalism</i>	169
<i>B. The Nexus Between Substantive Laws and Rights</i>	172
<i>C. Legal Spatiality</i>	175
<i>D. Incorporation's Legacy</i>	177
CONCLUSION	181

INTRODUCTION

Despite their many differences, Americans have long been bound by a shared sense of constitutional commonality. As John Jay observed in *The Federalist Papers*, “we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, protection.”¹ The sense was first given structural effect with the Constitution’s Supremacy Clause² and later with the Fourteenth Amendment, which served as a fulcrum to extend the U.S. Bill of Rights to the nation as a whole.³ As a consequence, federal constitutional rights today serve as a “floor” for the nation’s political subunits, which, although permitted to provide their residents more in the way of rights,⁴ can provide nothing less.⁵

Over the years this sensibility has been fortified by frequent denunciations of the perceived perils of constitutional disuniformity, especially as a result of nonfederal influence. Echoing Madison’s view that the “mutability” of state laws represented a “serious evil,”⁶ the Supreme Court in particular has lamented the specter of

1. THE FEDERALIST NO. 2, at 38-39 (John Jay) (Clinton Rossiter ed., 1961); see also Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 6, 7 (2008) (quoting 2008 speech of Justice Anthony Kennedy to the effect that “[t]he Constitution is the enduring and common link that we have as Americans”).

2. See U.S. CONST. art. VI, cl. 2 (providing that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby”).

3. See generally WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 2.1-2.6 (3d ed. 2007).

4. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (noting that the nation’s federalist structure does not “limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”).

5. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring) (noting that states lack the “power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights”); *Truax v. Corrigan*, 257 U.S. 312, 338 (1921) (“The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual.”).

6. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 THE FOUNDERS’ CONSTITUTION 644, 646 (Phillip B. Kurland & Ralph Lerner eds., 1987). At the Convention, Madison warned against states’ “constant tendency” to “encroach on the federal authority” and urged that the federal government “must countroul the centrifugal tendency of the States; which ... will continually fly out of their proper orbits and destroy the order & harmony of the political system.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164-65 (Max Farand ed., rev. ed. 1937).

citizens being subject to “arbitrarily variable protection.”⁷ Permitting federal rights to depend on state laws would allow protections to “turn upon ... trivialities,”⁸ resulting in rights “vary[ing] from place to place and from time to time.”⁹ The upshot, as Justice Scalia recently asserted, would be to “change the uniform ‘law of the land’ into a crazy quilt.”¹⁰

In reality, however, a crazy quilt does indeed exist. Although federal constitutional law nominally serves as the nation’s connecting sinew, its application, as this Article makes clear, hinges on state and local legal norms, which are highly variable and create a functionally irregular rights regime. For example, police authority to search and seize individuals, regulated by the Fourth Amendment, hinges on state and local decisions to criminalize particular behaviors, which themselves can be variously defined. Consequently, one’s Fourth Amendment freedom from search and seizure in California differs from that enjoyed in Florida, Texas, Maine, and the Dakotas. It also differs within states themselves, as a result of the significant criminal lawmaking authority of local governments.

The state of affairs stems from two central features of the nation’s governing structure. The first is federalism, the decentralizing effect of which preserves the authority of national political subunits to enact and enforce laws, especially relative to police power.¹¹ As the Court stated last Term in *Danforth v. Minnesota*, “[n]onuniformity is ... an unavoidable reality in a federalist system.”¹² There exists a “fundamental interest” in preserving this subnational authority, the

7. *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004).

8. *Whren v. United States*, 517 U.S. 806, 815 (1996).

9. *Virginia v. Moore*, 128 S. Ct. 1598, 1607 (2008) (quoting *Whren*, 517 U.S. at 815).

10. *Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring) (quoting U.S. CONST. art. VI, cl. 2); *see also, e.g.*, *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2584 n.9 (2008) (citation omitted) (asserting that the Sixth Amendment right to counsel “cannot be allowed to founder on the vagaries of state criminal law, lest the [counsel] attachment rule be rendered utterly ‘vague and unpredictable’”).

11. *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (“Under our federal system, the ‘States possess primary authority for defining and enforcing the criminal law.’”) (citation omitted); THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) (observing that the powers of state governments “extend to all the objects which ... concern the lives, liberties and properties of the people”); *id.* NO. 17, at 120 (Alexander Hamilton) (regarding states as the primary “guardian[s] of life and property”).

12. 128 S. Ct. 1029, 1041 (2008).

7-2 majority insisted, that cannot be constrained by “any general, undefined federal interest in uniformity.”¹³

The second catalyst is incorporation doctrine, which despite seeking the nationalization of the Bill of Rights in lieu of the historically variable state-based rights regime, has created a variable rights regime of its own. Federal rights apply to the nation as a whole, in substance, but their actual application depends on triggering conditions contained in state and local criminal laws. As a result of incorporation, such laws have come to serve as a legal endoskeleton of the federal rights regime, infusing the nation’s constitutional order with significant variability.

This Article examines how state and local criminal laws affect federal constitutional criminal procedure rights, a domain where life and liberty are most seriously imperiled.¹⁴ The discussion begins with a survey of how contingency plays out with respect to several core criminal procedure protections: the Fourth Amendment protection against unreasonable searches and seizures and Sixth Amendment rights to appointed counsel, freedom from police questioning, and trial by jury. Although federalism and incorporation have long defined American governance from a structural perspective, their real world impact on the actual distribution of federal constitutional rights has gone unaddressed.¹⁵ Part I remedies this

13. *Id.*

14. Subnational influence also evidences itself in other federal rights areas, perhaps most notably in procedural due process claims under the Fourteenth Amendment, where the availability of due process protections depends on whether a protectable interest exists under state or local law. *See, e.g.,* *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756-57 (2005). Similarly, whether a contract right exists, protectable by the Contracts Clause of Article I, often turns on state or local law, *see, e.g.,* *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); so, too, whether a takings claim is available under the Fifth Amendment, *see, e.g.,* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-28 (1992). With water rights, regional, not state or local, variation can be determinative of federal protection. *See* David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 *ECOLOGY L.Q.* 3, 7-8 (2005) (noting that in the western U.S. surface water rights are typically viewed as private property, unlike in the East).

15. Importantly, contingent constitutionalism is to be distinguished from the phenomenon of the U.S. adopting by incorporation state statutory norms. The Assimilative Crimes Act (ACA), for instance, dictates that state criminal laws govern federal criminal prosecutions of crimes committed on federal enclaves, such as national parks, when federal statutory law does not address the matter and state law does not conflict with federal policy. *See* 18 U.S.C. § 13 (2006). In *United States v. Sharpnack*, 355 U.S. 286, 297 (1957), the Court upheld an amended version of the ACA, which permitted federal adoption of state criminal laws enacted

oversight and highlights the critically important distributive consequences of the subnational normative variation that underlies the nation's constitutional order.

Part II examines the phenomenon from an institutional design perspective. Today, it is recognized that state, local, and federal governments significantly influence one another. Just as the nation is no longer understood to operate under a strictly dualist governance regime, with the respective governments hermetically separated from one another in their functions,¹⁶ it is well known that states affect the substantive shape of federal constitutional law. State preferences, for instance, are regularly considered by the federal judiciary in determining federal constitutional norms, ranging from whether there exists a right to engage in specific conduct under the Fourteenth Amendment,¹⁷ to six- versus twelve-member jury composition in noncapital cases under the Sixth Amendment.¹⁸ Federal courts also regularly lend constitutional credence to state preferences in assessing whether a particular application of the death penalty satisfies Eighth Amendment "evolving standards of decency."¹⁹ Finally, federal constitutional outcomes can depend on discrete community norms, such as those

on an ongoing basis, infusing federal law with the temporality of state laws. The ACA thus represents a prime example of what Henry Hart called the "interstitial" role of state substantive law vis-à-vis the federal government. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 498 (1954) (observing that "[t]he federal law which governs the exercise of state authority is obviously interstitial law, assuming the existence of, and depending for its impact upon, the underlying bodies of state law").

With contingent constitutionalism, federal law also "assum[es] the existence of" and "depend[s] for its impact upon, the underlying bodies of state law." *Id.* However, rather than using state and local law to affect federal statutory outcomes, such law is used to condition the availability of federal constitutional rights. For discussion of the influence that state and local criminal laws have on federal criminal case outcomes, including sentencing, see Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65 (2006).

16. On this recognition more generally, see, for example, Daniel J. Elazar, *Theory of Federalism*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1006 (Leonard W. Levy & Kenneth L. Karst eds., 2000); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995).

17. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562, 570-71 (2003) (invalidating a Texas law criminalizing adult consensual sodomy).

18. *Williams v. Florida*, 399 U.S. 78, 86, 98-100 (1970).

19. See Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1091 (2006).

of tribal reservations and military bases, and, relative to obscenity, local standards of decency.²⁰

Such instances, however, differ in important ways from the phenomenon considered here. Most fundamentally, contingent constitutionalism does not concern the substantive content of federal constitutional norms, but rather whether the norms themselves are actually triggered. The phenomenon thus operates organically as a matter of course, in “Red” and “Blue” and small and large jurisdictions alike,²¹ directly affecting the scope of constitutional protections available to the nation’s denizens. Moreover, rather than reflecting headcounts of aggregated preferences of subnational political units, contingent constitutionalism reflects—and instantiates—the actual individualized normative preferences of such units. As a result, state and local preferences, rather than creating constitutional norms from the top down, drive the application of federally recognized norms from the bottom up.

This design outcome has both benefits and detriments. Perhaps the most significant benefit is that state and local governments are assured a voice in the rights regime that the federal government superimposes upon them. Their normative preferences, embodied in their criminal laws, are directly reflected in the federal rights that their inhabitants are accorded. This symmetry, however, gives rise to a variety of difficulties. Most critically, tying federal rights to the majoritarian democratic preferences of jurisdictions in which individuals are physically located renders such rights captive to state and local political prerogative. Moreover, the very process of making federal rights contingent on state and local political borders, not national citizen status, negatively affects an array of other important values, including the nation’s shared sense of constitu-

20. See Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999).

21. On the increasing normative parcelization of the nation more generally, see BILL BISHOP & ROBERT CUSHING, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008); Paul Farhi, *Elephants are Red, Donkeys Are Blue; Color Is Sweet, So Their States We Hue*, WASH. POST, Nov. 2, 2004, at C1. While the nation’s modern-day heterogeneity has been doubted by some in principle, see, e.g., Edward L. Rubin & Malcolm Feely, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944 (1994), criminal justice norms have long constituted an area exhibiting significant state, local, and regional variation. See *infra* notes 41-53 and accompanying text.

tional commitment and the premise of rights equality associated with it.

Part III examines the several ways in which recognition of contingent constitutionalism casts in new light current and traditional understandings of the nation's constitutional order. Chief among these is that rights nationalism is a myth, one that ironically itself has been subverted by the very process of nationalization intended to temper the variability of subnational influence. Laying this myth to rest, despite risking loss of a measure of the nation's collective identity, has a variety of potential epistemic benefits. Members of the public and political leaders alike will hopefully gain greater awareness of the nexus between state and local substantive criminal laws and federal rights, holding promise for an enhanced (and long overdue) deliberateness in criminal law-making policy. Recognition of the contingent quality of federal rights also underscores the enduring importance of physical space to the application of legal norms. Despite sustained efforts at nationalization, federal rights remain highly sensitized to geography; their availability depends not on physical location on U.S. soil, but rather the substantive criminal law preferences of state and local governments.

Finally, recognition of contingency offers an important opportunity to reexamine the legacy of incorporation doctrine. For years, the process of incorporation inspired sharp judicial disagreement, with a prime concern centering on whether state law norms should figure in the delineation of federal constitutional rights. Such influence, of course, came to pass with the preferences of some (but not all) states being reflected in the rights ultimately identified by the Court and imposed as a constitutional floor on the nation as a whole. As this Article makes clear, the constitutional influence of subnational political units continues today, reflected not in the substantive content of constitutional rights, as in the formative era of incorporation, but rather in the availability of such rights, on the basis of their substantive criminal laws. As a result of this influence, the nation's ostensibly uniform federal rights regime in reality remains a crazy quilt of rights, marked by variability akin to that of pre-incorporation times.

I. CRIMINAL LAW AND CONSTITUTIONAL VARIABILITY

Historically, a sharp line divided the bundle of constitutional rights available to individuals ensnared in the state and federal criminal justice systems. Prior to the advent of selective incorporation in the mid-twentieth century, the rights regimes of the respective systems were quite distinct.²² Today, with almost all federal constitutional criminal procedure rights imposed on the states,²³ this stark differentiation is no longer in evidence. As it turns out, however, the mere fact that state and local governments must recognize a given federally originated right does not resolve whether the right will actually be made available. This is because criminal law preferences in both contexts play a critically important role in the extension of federal rights.

This Part addresses two key areas of constitutional criminal procedure in which this contingency has perhaps greatest effect: Fourth Amendment search and seizure doctrine and the Sixth Amendment's guarantees of counsel and a jury trial. As a result of the combined influence of federalism and incorporation—as well as the distinctly formalistic jurisprudential approaches adopted by the Supreme Court—subnational politics play a dispositive role in the availability of federal rights.

A. Fourth Amendment

Since 1961, when the Supreme Court made the Fourth Amendment's exclusionary rule applicable to the states,²⁴ substantive criminal law has figured centrally in the determination of whether the Amendment's protections extend to individuals. From a rule of law perspective, the existence of a substantive legal basis to justify a search or seizure should plainly serve as a constitutional

22. See generally Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 800-05 (2009).

23. See LAFAVE ET AL., *supra* note 3, § 2.6 (noting a handful of exceptions).

24. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). As a technical matter, the Fourth Amendment was made applicable to the states a dozen years before in *Wolf v. Colorado*, 338 U.S. 25 (1949); not until *Mapp*, however, was the decision fully felt when the exclusionary rule remedy was extended to the states. *Mapp*, 367 U.S. at 655, 660.

sine qua non. Only recently, however, did the Supreme Court clarify the role of state and local positive law vis-à-vis what constitutes an “unreasonable” search or seizure for Fourth Amendment purposes. Until 2001, in *Atwater v. City of Lago Vista*,²⁵ it remained an open question whether police, acting without a warrant but with probable cause that a minor offense occurred, had constitutional authority to arrest.²⁶ The five-member *Atwater* majority held that so long as probable cause exists that “even a very minor criminal offense” was committed in an officer’s presence—there, the failure to wear an automobile seat belt, punished only by a fine (not incarceration) under state law—an officer is constitutionally free to execute a custodial arrest.²⁷

Atwater provided police with significant warrantless arrest authority and underscored the critical importance of state and local law. So long as some lawful basis for an arrest is present, and probable cause exists that the misconduct occurred, an individual cannot reasonably be expected to remain free from police seizure.²⁸ The Court’s positivist orientation has echoed in several subsequent cases, each decided by 9-0 votes. In *Devenpeck v. Alford*,²⁹ the Court held that an arrest is constitutionally reasonable so long as it is anchored in some lawful basis, supported by probable cause, even if the basis initially identified is later deemed legally unjustified.³⁰ And in 2008, in *Virginia v. Moore*, the Court held that the Fourth Amendment’s exclusionary rule need not be applied when an officer executed a probable cause-based arrest for a minor traffic offense,³¹ even though, unlike in *Atwater*, state law did not authorize arrest under the circumstances.³²

25. 532 U.S. 318 (2001).

26. See, e.g., Francis H. Bohlen & Harry Shulman, *Arrest With and Without a Warrant*, 75 U. PA. L. REV. 485, 485-92 (1927); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771 (1993).

27. *Atwater*, 532 U.S. at 354.

28. *Id.*

29. 543 U.S. 146 (2004).

30. *Id.* at 152-53.

31. 128 S. Ct. 1598 (2008).

32. Indeed, state law expressly prohibited arrest under the circumstances. Thus was laid to rest the potential for a nonconstitutional statutory limit on arrest authority, previously identified by the Court as preferable. See *Atwater*, 532 U.S. at 352 (“It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration

These three decisions, although important in themselves, assume even greater significance when viewed in conjunction with an earlier decision, also decided unanimously, *Whren v. United States*.³³ In *Whren*, the Court held that probable cause to believe that a traffic safety law was violated justified a police decision to detain a motorist, regardless of whether the officer had an ulterior—perhaps unfounded—suspicion of more serious misconduct.³⁴ In addition to rejecting any Fourth Amendment limit on the discretionary arrest authority of police,³⁵ the Court restated its enduring reluctance to second guess the wisdom of substantive criminal laws, emphasizing that it was loath to undertake any effort to identify and limit possibly “exorbitant [criminal] codes” relative to Fourth Amendment strictures.³⁶

As a result, a simple calculus obtains: the more legal authority police have in a given jurisdiction, the less freedom of bodily movement and privacy is enjoyed by individuals “to be let alone.”³⁷ So long as police can invoke some lawful authority to arrest, and

without having to subsume it under a broader principle.”). Both before and after *Atwater*, several states imposed procedural limits on warrantless arrests, adopting laws requiring police to issue citations for minor offenses, except under extenuating circumstances, such as if the suspect would persist in the misconduct. See Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 445-46 (2002). Relegating arrest limits to the will of the political process, however, has had predictable results, such as in Texas, where *Atwater* arose, when the legislature passed and the governor vetoed a bill seeking to limit police arrest authority. *Id.* at 448.

33. 517 U.S. 806 (1996).

34. *Id.* at 819. In *Arkansas v. Sullivan*, 532 U.S. 769, 771-72 (2001), the Court affirmed *Whren* in the context of a full custodial arrest, holding that the subjective motivation of officers is irrelevant.

35. *Whren*, 517 U.S. at 817-18.

36. *Id.* at 818-19. On this reluctance more generally, see Louis D. Billionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1272-99 (1998). See also Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different From All Other Rights?*, 69 N.Y.U. L. REV. 781, 783 (1994) (observing that courts “do not substantively scrutinize the necessity and value of a particular criminal law even though a person’s liberty from incarceration hangs in the balance”).

37. *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting); see also Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 358 (1998) (identifying the Amendment’s core protection as “the ability of the individual to refuse to accede to the government intrusion”); Jed Rubinfeld, *The End of Privacy*, 61 STAN. L. REV. 101 *passim* (2008) (arguing that the core safeguard of the Fourth Amendment is the protection of personal security and physical liberty).

they follow the substantive letter of the law,³⁸ their authority to execute a warrantless arrest attaches.³⁹ And with this power, as allowed by a long line of Supreme Court decisions, comes the expansive authority to search the bodies, possessions, and automobiles of arrestees.⁴⁰

The foregoing calculus, when viewed in the abstract, however, significantly understates the actual operative force of the substantive criminal law. Unlike areas of civil and commercial law, which have become increasingly homogenized nationwide over time,⁴¹ criminal law has retained its diversity.⁴² One sees significant variation in both the kinds of behaviors that warrant criminalization in states⁴³ and the definitions of mutually proscribed misconduct.⁴⁴ States also vary significantly in the punishments they prescribe,⁴⁵ which can affect officers' warrantless authority to enter suspects' homes⁴⁶ and effectuate *Terry* stops based upon reasonable suspicion.⁴⁷ The depth and breadth of these differences directly

38. To date, at least, police typically are not forgiven for mistaken understandings of law; a mistake of law will render a seizure constitutionally unreasonable, triggering possible application of the exclusionary rule. *See, e.g.*, *United States v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002); *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998). The Eighth Circuit, however, has adopted a more generous position: it forgives "objectively reasonable" police mistakes of law. *See, e.g.*, *United States v. Washington*, 455 F.3d 824, 827 (8th Cir. 2006).

39. *See Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) ("[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed.").

40. *See* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority To Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 381-82 (2001).

41. *See* Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 267 (2003) (noting that state commercial law "has become close to a single, unified body of law").

42. *See* *Rochin v. California*, 342 U.S. 165, 168 (1952) (noting that "crimes ... are what the laws of the individual States make them").

43. *See* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 259 (2005) (surveying distinctions).

44. *See* Logan, *supra* note 15, at 76-77.

45. *Id.*; *see also* *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984) (noting that "the classification of state crimes differs widely among the States").

46. In assessing the Fourth Amendment reasonableness of such entries, the Court looks to the gravity of the suspected misconduct, "the best indication" of which is the penalty prescribed by a jurisdiction. *Welsh*, 466 U.S. at 754; *see also* *Illinois v. McArthur*, 531 U.S. 326, 328 (2001).

47. *See, e.g.*, *Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004) (holding that police can execute a stop "when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor"); *State v. Bennett*, 520 So. 2d 635 (Fla. Dist. Ct. App. 1988) (same); *Blaidsell v. Comm'r of Pub. Safety*, 375 N.W.2d 880, 881-84 (Minn. Ct. App.

correlates to variable Fourth Amendment protections in the respective states.

Importantly, moreover, the corpus of state laws is complemented by those enacted by myriad local governments, which enjoy significant criminal lawmaking power pursuant to their home rule authority. Although the substance of local laws must comport with state and federal constitutional expectations, local governments typically are limited only to the extent that their laws are preempted by or conflict with extant state law.⁴⁸

These limits, however, have little practical effect.⁴⁹ Local police power is especially pervasive relative to misconduct of a less serious, public order nature, reflecting the felt need of localities to tailor their laws to their unique social and political conditions.⁵⁰ For instance, one regularly sees in local codes prohibitions against such behaviors as obstruction of public space, littering, aggressive panhandling, automobile cruising, excessive noise, drug paraphernalia and simple drug possession, possession of weapons other than firearms, sleeping in public places, and assault.⁵¹ Local prerogative is also manifest in “refinements” to existing state criminal laws,⁵²

1985) (same).

48. See generally George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417, 423-33 (1995) (providing overview of preemption and conflict doctrines).

49. See SANDRA M. STEVENSON, 1 ANTIEAU ON LOCAL GOVERNMENT LAW § 21.05[2], at 21-32 (2d ed. 2000) (“The reality is that state legislatures seldom legislate on all state or general concerns, and a social and political vacuum would exist if a home rule entity desired to impose controls on those matters within its own borders and was not permitted to do so.”).

50. See *Horton v. City of Oakland*, 98 Cal. Rptr. 2d 371, 375 (Cal. Ct. App. 2000) (“The general fact that state legislation concentrates on specific areas, and leaves related areas untouched has been held to demonstrate a legislative intent to permit local governments to continue to apply their police power according to the particular needs of their communities in areas not specifically preempted.”) (internal quotations omitted).

51. For a broader survey of such offenses, see Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1426-28 (2001).

52. See *City of Spokane v. White*, 10 P.3d 1095, 1098 (Wash. Ct. App. 2000) (“A local ordinance does not conflict with state law merely because one prohibits a wider scope of activity than the other does.”); C. DALLAS SANDS ET AL., LOCAL GOVERNMENT LAW § 14.38, at 14-109 (1997 & Supp. 2000) (noting permissible sweep of “[r]efinements of detail which are reasonably related to differing local conditions and which are consistent with the broad parameters of the state law”).

with local laws, for instance, containing distinct substantive requirements or a particularized geographic focus.⁵³

Local laws thus at once significantly increase the accumulated reach of police authority and add an expansive layer of normative diversity, which varies from locality to locality.⁵⁴ The upshot is that police authority to search and seize individuals is geographically diversified both vertically within states and horizontally between states. The authority also varies over time: laws not in existence at one time may be codified at another, and vice versa,⁵⁵ and these laws themselves undergo definitional changes over time.⁵⁶ When one further considers that judicial understandings of probable cause, the existence of which the Court now considers synonymous with Fourth Amendment reasonableness,⁵⁷ are subject to significant variation,⁵⁸ and that police and prosecutorial enforcement norms can differ significantly among and within states,⁵⁹ the variability assumes an even more comprehensive scale.⁶⁰

53. See Logan, *supra* note 51, at 1430-31 (providing examples).

54. See 6 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 23.13, at 723 (3d ed. 1997 & Supp. 2008) (“[T]he range of conduct prohibited by ordinances is extremely broad and signifies the importance of municipal control of offenses against the sovereignty of the state, conceiving the municipality to be an arm and agency of that sovereignty.”).

55. See Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 35-36 (1995) (noting same and providing examples).

56. Logan, *supra* note 43, at 308 & n.270 (providing statutory examples).

57. See *supra* notes 25-27 and accompanying text.

58. See *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (observing that both reasonable suspicion and probable cause are “fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed”); *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (calling probable cause a “fluid concept” not “readily ... reduced to a neat set of legal rules”).

59. See, e.g., DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY (Lloyd E. Ohlin & Frank J. Remington eds., 1993); WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 75-79 (1965). Variability is further enhanced by some, but not all, states enacting laws that mandate arrest in specified circumstances, such as domestic abuse. See Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1522 (2007).

60. Variability, it is worth mentioning, also stems from nonstatutory state and local policies on which Fourth Amendment protections can hinge. See, e.g., *United States v. Knights*, 534 U.S. 112, 114, 117-18 (2001) (predicating probationer’s ability to resist a search on state-imposed conditions); *Colorado v. Bertine*, 479 U.S. 367, 375-76 (1987) (requiring that lawful auto inventory searches be conducted pursuant to local police department criteria).

B. Sixth Amendment

Sixth Amendment doctrine is also directly tied to state and local legal variability. The right to appointed counsel depends on whether a jurisdiction elects to impose upon conviction “actual imprisonment”⁶¹ or probation conditions enforceable through imprisonment.⁶² Additionally, the right to have one’s case decided by a jury turns on whether conviction will result in incarceration for more than six months.⁶³ Because states vary considerably in their recourse to incarceration⁶⁴ and the punishments they prescribe for offenses,⁶⁵ there exists corollary variability in counsel and jury rights.⁶⁶ And again, local governments augment this variability both in the interstate and intrastate context, because although as a general rule localities cannot punish less than or in excess of concurrent state criminal laws,⁶⁷ they often do so.⁶⁸

These distinct policy preferences and constitutional outcomes significantly affect governments and the individuals they prosecute. When governments are less punitive, either with respect to the use of incarceration or the quantum of punishment, they avoid the need to extend jury and appointed counsel rights, with consequent resource savings, but negative consequences for individuals. The disadvantages associated with lack of trial counsel have long been known⁶⁹ and uncounseled convictions can later be used both to

61. See *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979).

62. See *Alabama v. Shelton*, 535 U.S. 654, 674 (2002).

63. See *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970).

64. See, e.g., Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 222, 226-27 (Michael Tonry & Richard S. Frase eds., 2001) (noting variations in state sentencing guidelines systems); Kevin R. Reitz, *The Federal Role in Sentencing Law and Policy*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 125 (1996) (surveying significant state-level variations in incarceration rates).

65. See Logan, *supra* note 43, at 259 & n.13.

66. With respect to the appointed counsel right in particular, wide variations in state criteria for indigence inject additional variability. See Adam J. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 572 (2005); see also Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2050 (2006) (noting that a majority of state criminal defendants are indigent).

67. See MCQUILLIN, *supra* note 54, § 17.15, at 597-607 (noting same).

68. See Logan, *supra* note 51, at 1433-35 (providing examples).

69. See *Argersinger v. Hamlin*, 407 U.S. 35, 36 (1972) (noting that “[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges

enhance punishment for subsequent convictions⁷⁰ and justify deportation.⁷¹ Similarly, by withholding the jury trial right governments gain a major strategic advantage, depriving defendants of the option to threaten exercise of the right, with its associated adverse impact on dockets and justice system resources.

Facially, the Supreme Court's decisional law tying counsel and jury rights to the severity of government sanction threatened benefits from a welcome symmetry. In reality, however, the symmetry has been undercut by state and local policies that serve to avoid federal constitutional requirements, which the Supreme Court has refused to check. Jury trial and counsel rights can be avoided when jurisdictions impose punishments entailing extensive nonincarcerative sanctions.⁷² Likewise, jurisdictions can avoid the need for jury trials by combining several less serious offenses for trial, even though their consecutive sentencing exposes the defendant to a total sentence in excess of six months.⁷³

Another way in which counsel rights are affected relates to the Sixth Amendment doctrine limiting the ability of police to question a suspect once the right to counsel has attached. Here, unlike the right to counsel and jury, which involve differences in punishment, differences in the substantive definition of crimes injects variability. Under the Court's precedent, the right to counsel attaches when a "critical stage" has been reached in the adjudication process—for example, arraignment or a preliminary hearing.⁷⁴ Thereafter, police can deliberately elicit information from a defendant only relative to an uncharged offense,⁷⁵ requiring courts to assess the substantive definitions of the crimes charged.⁷⁶ As a result, the breadth or

dismissed as are defendants who face similar charges without counsel") (citing AMERICAN CIVIL LIBERTIES UNION, LEGAL COUNSEL FOR MISDEMEANANTS, PRELIMINARY REPORT 1 (1970)); *see also* *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (calling the counsel right "indispensable to the fair administration of our adversary system of criminal justice").

70. *See Nichols v. United States*, 511 U.S. 738, 746-47 (1994).

71. *See Logan*, *supra* note 51, at 1445.

72. *See Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (counsel right); *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 539-40, 543-45 (1989) (jury trial right).

73. *See Lewis v. United States*, 518 U.S. 322, 323-24 (1996).

74. *See Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583 (2008); *Fellers v. United States*, 540 U.S. 519, 523 (2004).

75. *See McNeil v. Wisconsin*, 501 U.S. 171, 175-76, 179 (1991).

76. *See Texas v. Cobb*, 532 U.S. 162, 167 (2001) (reiterating and defining the Court's "offense-specific" test).

narrowness with which jurisdictions define closely related crimes can determine whether an incriminating statement must be suppressed.⁷⁷

II. INSTITUTIONAL DESIGN

The constitutional variability just discussed is the byproduct of conscious institutional choices within the nation's decentralized federalist system, which reserves to subnational political subunits considerable lawmaking authority.⁷⁸ While the Constitution's Supremacy Clause ensures that federal law, federal treaties, and the U.S. Constitution prevail nationally, in practice subnational law generally must yield only when it poses a conflict. The decision to insert an affirmative command, as opposed to permitting Congress to enjoy veto power over state laws, was the source of sharp disagreement during the Framing Era. The negative approach, advocated by James Madison and James Wilson, however, was defeated at the Convention.⁷⁹ As a result, state and local laws were permitted to take immediate effect upon enactment, subject only to possible later judicial challenge, based on conflict, not mere policy disagreement.⁸⁰ Subnational authority was subsequently reinforced

77. Sixth Amendment law was thus made to parallel Fifth Amendment double jeopardy jurisprudence. *See id.* at 173 (invoking *Blockburger v. United States*, 284 U.S. 299 (1932)). Substantive law variations thus also affect whether individuals have been twice "put in jeopardy" for the same offense.

78. As a technical matter, local government power does not derive from federalism as such, with its primary focus on state-federal relations, and explicit grounding in the Constitution. *See* Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1629 (2008). Rather, it stems from the similarly decentralized nature of state-local government relations, which the Court has treated as synonymous with state-federal relations. *See* Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 983-84 (2007); *see also* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 441 (2002) (observing that in a "functional analysis of the values that federalism serves, the significance of local governments is enormous").

79. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 171-77 (1996); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232-60 (2000).

80. *See* James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 355, 359-60 (2008).

by the Tenth Amendment,⁸¹ and federalist understandings of the limited reach of federal police power authority.⁸²

This authority assumed added importance with selective incorporation. Whereas before state and local governments acted largely outside the federal constitutional sphere,⁸³ during the mid-twentieth century the Supreme Court, using the Fourteenth Amendment's Due Process Clause as a fulcrum, imposed on states virtually all of the Bill of Rights provisions, including the Fourth⁸⁴ and Sixth Amendments.⁸⁵ As a result, state and local substantive criminal laws—and the normative choices they embody—came to figure centrally in federal constitutional law. No longer did they merely co-exist in detached importance from federal constitutional law. Rather, they came to govern the nature and extent of constitutional rights available to the nation's denizens.

Constitutional contingency is thus an unintended byproduct of constitutional nationalization that is subversive of the very enterprise itself.⁸⁶ Indeed, any express effort to afford national

81. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

82. See *supra* note 11; see also *Powell v. Texas*, 392 U.S. 514, 536 (1968) (observing that the criminal law “has always been thought to be the province of the States”); *Screws v. United States*, 325 U.S. 91, 109 (1945) (“Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.”); Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 747-48 (2006) (observing that “American federalism cannot be fully understood without reference to the police power, for ... ‘police power’ was the name Americans chose in order to designate the whole range of legislative power not delegated to the federal government and retained by the states”).

83. See *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (Pet.) 243, 249 (1833) (observing that the Bill of Rights “contain[s] no expression indicating an intention to apply [its provisions] to the state [or local] governments”). States of course were constrained by limits imposed in the body of the Constitution itself, such as the Ex Post Facto Clause. See U.S. CONST. art. I, § 10, cl. 1. Moreover, according to one commentator, antebellum state courts in practice “understood the Bill [of Rights] to set out general constitutional principles applicable to state legislatures and executives alike.” Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 MINN. L. REV. 1, 3 (2007).

84. See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

85. See, e.g., *Brewer v. Williams*, 430 U.S. 387, 397-98 (1977).

86. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 432 (1819) (rejecting the claim that states should be permitted to obstruct federal power and stating that “[t]his was not intended by the American people. They did not design to make their government dependent on the States”); Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 902 (2005) (observing that the “core purpose of the Supremacy Clause

importance to state and local laws would—as at the country’s origin⁸⁷—have very likely inspired significant backlash. This Part examines the consequences of contingent constitutionalism, which despite its undesigned origins, has significant benefits as well as detriments.

A. *Benefits*

A chief benefit of contingent constitutionalism relates to its federalism-enforcing characteristics: it permits state and local normative choices to be maintained, at once preserving what the Anti-Federalists lauded as subnational “individuality”⁸⁸ and voiding the political self-abnegation typically associated with absorption into a federal union.⁸⁹ Contingent constitutionalism thus operates in tandem with broader structural political safeguards in the national legislative arena, posited by Herbert Wechsler and others down the years.⁹⁰ Yet here the process is far more direct and pervasive in effect. Whereas Wechsler’s political safeguards model

was to prevent the states from interfering with the unified operation of federal law”).

87. As William McClaine asserted at the North Carolina ratifying convention, “[t]o permit the local laws of any state to control the laws of the Union, would be to give the general government no powers at all.” 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 181 (Jonathan Eliot ed., 2d ed. 1888). “[A] part,” as was argued, was never to control the “whole.” *Id.* To Samuel Adams, the idea that there should be a sovereignty within a sovereignty (“Imperium in Imperio”) was a “Solecism in Politics.” H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1526 (1987) (quoting Letter from Samuel Adams to H.A. Cushing (Dec. 3, 1787), in 4 WRITINGS OF SAMUEL ADAMS 324 (Harry A. Cushing ed., 1908)).

88. See SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 239 (1993) (quoting Dr. Johnson of Connecticut who observed that that the Anti-Federalists saw “the states as ‘so many political societies,’ each with its ‘individuality,’ while the [Federalists] considered the states as merely ‘districts of people composing one political Society’”).

89. See Sanford Levinson, *Looking Ahead When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353, 361 (2004) (observing that “[t]he possibility that local values will in fact be trumped by national ones is the price one pays for entering into a federal union”).

90. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For more recent expositions in the same vein, see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1993); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

envisions state political interests being served and reflected by virtue of congressional representation,⁹¹ with contingent constitutionalism the decisions of state and local political actors actually drive federal outcomes—of a constitutional, not typically statutory, nature—without mediation by federal actors. Political preferences, rather than at best remotely influencing federal decision-making processes, enjoy direct real-time effect in states and localities.

This directness has several broader institutional advantages. Most fundamentally, it ensures that federal constitutional rights remain vitally connected to state and local values. As a consequence, “dead hand” problems are avoided,⁹² resulting in what might be thought a variant of popular constitutionalism.⁹³ The tying of state and local law to federal rights also avoids a situation akin to what Judge Henry Friendly called the “spurious uniformity” of law that had prevailed until *Erie Railroad v. Tompkins*,⁹⁴ whereby “federal general common law” was superimposed on states.⁹⁵ Federal outcomes, rather, are driven by the normative preferences of jurisdictions in which they take shape.

Consistent with federalist ideals, there thus exists a greater chance that more citizens will be satisfied by locally specified normative preferences.⁹⁶ With substantive law and constitutional outcomes so calibrated, citizens unhappy with the impact of the

91. See Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1681-82 (2008).

92. See Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 382 (1997) (asserting that it is “antidemocratic for a contemporary majority to be governed by values enshrined in the Constitution over two hundred years ago”); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1998) (“The first question any advocate of constitutionalism must answer is why Americans of today should be bound by the decisions of people some 212 years ago.”).

93. Popular constitutionalists seek to make democratic choice, not federal judicial fiat, the arbiter of contestable federal constitutional provisions. They thus focus on constitutional meaning, not application, as here. For an overview of the movement, see Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006).

94. Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

95. A key difference, however, is that here we have a “matter [] governed by the Federal Constitution,” a realm that the *Erie* Court emphasized remained subject to federal control. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

96. See generally Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1686 (2007).

policies of their state or local governments can exercise their exit rights.⁹⁷ As a consequence, yet another federalist ideal is possibly promoted: intergovernmental competition,⁹⁸ relative to criminal justice—a domain in which perhaps the greatest subnational normative diversity exists and the federal government has long deferred.⁹⁹

Finally, by anchoring federal rights in state and local normative preferences, contingent constitutionalism ensures that such norms remain cabined in their place of origin, as Madison wished.¹⁰⁰ The norms, with their attendant federal constitutional consequences, are federalized but not nationalized. State and local “experiments,” as Justice Brandeis famously envisioned, can be undertaken “without risk to the rest of the country.”¹⁰¹

B. Detriments

Just as permitting federal rights to hinge on state and local law has benefits, it has troubling ramifications. Most fundamentally, the resulting highly variable rights regime undermines the historic effort to foster a shared sense of nationhood. Federal constitutional rights, rather than being categorically available nationwide, vary.

97. See Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1344-50 (2004) (discussing “foot voting” and contrasting it with “ballot box voting”). The possibility, although remote relative to the great majority of governmental policies, likely has special salience with criminal procedure rights, as evidenced in the migration of southern blacks northward in search of fairer treatment. See DANIEL M. JOHNSON & REX R. CAMPBELL, *BLACK MIGRATION IN AMERICA: A SOCIAL AND DEMOGRAPHIC HISTORY* 84-85 (1981).

98. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991):

[Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

99. See *supra* notes 41-60 and accompanying text; see also, e.g., PHILLIP W. ROEDER, *PUBLIC OPINION AND POLICY LEADERSHIP IN THE AMERICAN STATES* 99, 116, 203 (1994) (commenting on the consistent preferences reflected in public opinion polls for criminal justice matters being handled by state and local governments, not the U.S.).

100. See THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961) (expressing satisfaction that a “flame” might ignite in one state yet “be unable to spread a general conflagration through the other States”).

101. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

One's residence, or indeed even the happenstance of one's physical location when alleged misconduct occurs—not federal citizenship—determines the availability of federal rights, a situation reminiscent of the state-centrism of antebellum times.¹⁰²

Making federal rights and protections available in principle to the nation as a whole, but in actuality having them rely on one's particular geographic location within the nation, raises obvious fairness concerns.¹⁰³ Although theoretically similarly situated as Americans,¹⁰⁴ the constitutional rights we enjoy in fact vary based on the state or locality in which we are located. Importantly, this democratically driven variability has been permitted to operate in a manner largely unchecked by judicial mediation. Despite accepted modern understandings of the judiciary's counter-majoritarian structural role,¹⁰⁵ the Court has consistently defended legislative

102. See Seth Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 984 (2002):

At the time of the Civil War, Robert E. Lee resigned his federal commission, and renounced his oath of allegiance because as a "Virginian" he could not bear to honor that oath. It is hard today to find a citizen of the United States who conceives of her primary identity as a "Virginian" or a "Pennsylvanian."

103. Similar arguments have been leveled against varied interpretations of federal statutory law. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 39 (1994) ("[N]ational uniformity of federal law ensures that similarly situated litigants are treated equally; this is considered a hallmark of fairness in a regime committed to a rule of law."); Comm'n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 206 (1975) ("[D]ifferences in legal rules applied by the circuits result in unequal treatment of citizens ... solely because of differences in geography.").

104. See *Edwards v. California*, 314 U.S. 160, 182 (1941) (Jackson, J., concurring) (recognizing "United States citizenship [as] the dominant and paramount allegiance among us"); Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 2-3 (2006) (surveying other manifestations of national citizenship). It is perhaps more accurate to say that such individuals are *factually* similarly situated, inasmuch as they committed (or omitted) the same acts, yet are charged (or not charged) in accord with varied state and local laws.

105. The view of the Framers on majoritarianism has of course been the subject of scholarly disagreement. Compare Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937, 940-50 (2008), and Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understandings of Due "Process of Law,"* 77 MISS. L.J. 1, 138-40 (2007), with Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 *passim* (1991). The adoption of the Fourteenth Amendment and subsequent efforts at incorporation, however, largely transformed constitutional understandings. Amar, *supra*, at 1136-37 (noting how post-incorporation "the Bill [of Rights] was pressed into the service of protecting vulnerable minorities from dominant social majorities").

prerogative in its constitutional criminal procedure decisions. With respect to search and seizure limits, for instance, the Court's decision to equate Fourth Amendment reasonableness with probable cause that *any* infraction was committed¹⁰⁶ empowered police to freely deploy criminal codes.¹⁰⁷ Similarly, the Court's decision to condition Sixth Amendment jury trial and counsel rights to the type and degree of punishment threatened,¹⁰⁸ rather than deferring to the Amendment's explicit extension to "all criminal prosecutions,"¹⁰⁹ directly tied these rights to majoritarian will.¹¹⁰ Its subsequent refusal to limit state efforts to avoid constitutional strictures, for instance by "stacking" charged offenses,¹¹¹ enabled legislatures to avoid even the constitutional limits the Court saw fit to impose.

While the counter-majoritarian role of courts has remained controversial in some quarters,¹¹² serving to protect political minorities

106. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (stating that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").

107. As noted earlier, however, the Court's deference to state legislative judgment has been selective with respect to Fourth Amendment limits on the warrantless arrest authority of police. While urging in *Atwater* that nonconstitutional, for example, legislative or administrative limits be used in lieu of judicially imposed constitutional limits, the Court in *Virginia v. Moore*, 125 S. Ct. 1598 (2008), refused to enforce such a state limit with the federal exclusionary rule. See *supra* note 32. The end result, again, has been to facilitate the effects of incorporation, without federal judicial mediation.

108. See *supra* notes 61-63 and accompanying text.

109. U.S. CONST. amend. VI; see also U.S. CONST. art. III, § 2, cl. 3 (providing that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by jury"). For a persuasive argument in favor of a broadened reading relative to the jury trial right in particular, consistent with the Framers' design, see Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J.L. & PUB. POL'Y 7 (1994). As Lynch notes, the Court has not seen fit to extend its "petty offense" determinative distinction to numerous other Sixth Amendment rights, including speedy trial, assistance of counsel, and confrontation of witnesses. *Id.* at 11-12.

110. Even if the Court were to broaden the right's availability in accord with the Amendment's text, however, the contingency described here would still result in rights variation. This is because jurisdictions vary in their labeling of misconduct as "criminal," a categorical prerequisite to attachment of Sixth Amendment rights. See Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1281-82 (1998).

111. See *Lewis v. United States*, 518 U.S. 322, 323-34 (1996); see also *supra* note 73 and accompanying text.

112. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d ed. Yale Univ. Press 1986) (1962); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 17 (1990).

and nullify views held by majorities,¹¹³ contingent constitutionalism highlights the perils of unadulterated majoritarianism: federal constitutional rights are permitted to turn solely on the variable political preferences of state and local governments.¹¹⁴ As John Hart Ely recognized almost three decades ago, “it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.”¹¹⁵

Yet this is precisely the outcome here. Rather than ameliorating possible imperfections in the political process, contingent constitutionalism privileges and imbues them with federal constitutional effect. While contingency itself is the perhaps unavoidable result of the nation’s decentralized federalist system and incorporation doctrine, the judicial imposition of uniform procedural rules, the application of which turns on diverse underlying substantive triggering conditions, fosters its attendant disparity. The consequences of contingent constitutionalism have, in significant part, ultimately also been enabled and perpetuated by the federal judiciary’s ongoing failure to mediate its influence,¹¹⁶ such as by refusing to limit the warrantless arrest authority of police.¹¹⁷

113. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135 (1980).

114. For an interesting account of this variability, revealing the importance of particularized state-level political dynamics, democratic processes, and governance approaches, leading to very different crime control policies, see Vanessa Barker, *The Politics of Punishing: Building a State Governance Theory of American Imprisonment Variation*, 8 PUNISHMENT & SOC’Y 5 (2006).

115. ELY, *supra* note 113, at 69. A similar insight motivated James Madison, who recognized that liberty was threatened not so much by arbitrary acts of government, at odds with those governed, “but from acts in which the Government is the mere instrument of the major number of the constituents.” Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 298 (Robert A. Rutland & Charles F. Hobson eds., 1977).

With criminal laws in particular, it is perhaps more accurate to say that legislative, not democratic, majoritarianism is at play. As Bill Stuntz has observed, the political appeal of criminal laws does not always depend on support from a majority of voters, given the significant political benefit attending criminal legislation in general. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 528 (2001).

116. Indeed, it is fair to say that the judiciary’s concurrent effort to impose uniform procedural standards while eschewing regulation of the underlying substantive laws on which they rely has resulted in predictable disuniformity. Cf. Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 993-96 (2001) (noting difficulties created by federal decoupling of state civil laws from their accompanying procedures).

117. Ironically, the Court’s ongoing effort to impose readily administrable “bright-line”

Finally, contingent constitutionalism suffers from the absence of any complementary self-limiting legislative mechanism. Like many other rights, criminal procedure protections can be conceived in terms of their “positive” and “negative” quality. As Isaiah Berlin famously noted,¹¹⁸ negative liberty ensures “freedom from” government action, thought by many to be the primary focus of the Bill of Rights.¹¹⁹ “Positive liberty” imposes a comparatively rare responsibility on government,¹²⁰ encompassing what David Sklansky has termed “quasi-affirmative rights,” obligations triggered when the government seeks to impinge on individuals in some way, such as depriving them of physical liberty.¹²¹

Contingent constitutionalism is especially sensitized to negative liberties. A foremost example lies in the Fourth Amendment’s protection against unreasonable searches and seizures, which, as discussed, is directly tied to the existence and definition of state and local substantive criminal laws.¹²² With more such law comes less freedom from search and seizure. The same can be said of the negative right embodied in the Sixth Amendment’s freedom from police questioning after the right to counsel attaches. The greater the gamut of substantive law available to government, the lower the likelihood that police will be prevented from questioning criminal suspects and later use the information obtained in prosecutions.¹²³

rules to guide police—exemplified by *Atwater* and other cases—has had the broader unintended effect of making application of the Fourth Amendment significantly more variable.

118. See Isaiah Berlin, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND* 191, 203-06 (1997); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 868 (1986).

119. See, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (asserting that the nation’s constitutional framework embodies a “charter of negative rather than positive liberties”); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864-74 (2001). For contrary views, as a matter of characterization or normative preference, see, for example, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2309 (1990), and Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379, 382-85 (1993).

120. See Currie, *supra* note 118, at 864.

121. See David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1230, 1238-39 (2002).

122. This is not to say that Fourth Amendment protections are wholly negative in character. For instance, the right to a “prompt” judicial assessment of the grounds for a warrantless arrest and the warrant expectation itself—especially at play in home entries—are “quasi-affirmative” in nature. See *id.* at 1241-43.

123. See *supra* notes 74-77 and accompanying text.

With positive liberties, such as the Sixth Amendment rights to appointed counsel and jury trial, the relation between state and local law and federal constitutional rights is more nuanced. As discussed, Supreme Court case law calibrates the availability of both rights to the punishment preferences of state and local governments.¹²⁴ The greater the liberty deprivation faced by defendants, the greater the onus to extend protections. If a government wishes to incarcerate an individual, as opposed to requiring a fine or community service, then the government must shoulder the costs of paying for appointed counsel if the individual is indigent.¹²⁵ Similarly, if a government wishes to punish a crime by a prison term in excess of six months, the Sixth Amendment jury trial right is triggered.¹²⁶ There is thus a quid pro quo, requiring that government ante up in accord with the extent of individual liberty threatened.¹²⁷

From a political process perspective, the nature of the right in question thus logically bears significance. With negative rights, given the acknowledged modest political influence of criminal defendants and the well known political appeal of appearing tough on crime,¹²⁸ legislatures can often lack incentive to constrain their zeal to enact criminal laws.¹²⁹ Positive rights, with their attendant affirmative governmental obligations, however, have significant resource consequences, and thus can be expected to have special resonance for legislators and taxpayers alike. Yet even here the constraint is possibly less than appears because governments have

124. See *supra* notes 61-68 and accompanying text.

125. See *Moore v. Jarvis*, 885 F.2d 1565, 1572 (11th Cir. 1989).

126. See *Baldwin v. New York*, 399 U.S. 66, 69 n.6 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968).

127. On the tendency of the Court to tie constitutional rights to punishment interests of the State, and the difficulties the approach presents more generally, see Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1959-61 (2004).

128. See WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* 85-109 (2009).

129. See, e.g., *Illinois v. Krull*, 480 U.S. 340, 365-66 (1987) (O'Connor, J., dissenting) (noting that "[l]egislators by virtue of their political role are more often subjected to the political pressures that may threaten Fourth Amendment values than are judicial officers"). Countervailing pressure is especially likely to be absent in instances of laws mainly enforced against out-of-state visitors. See Wayne A. Logan, *Policing in an Intolerant Society*, 35 CRIM. L. BULL. 334, 365 n.132 (1999) (noting an observation of Justice Stevens to this effect in oral argument in *Knowles v. Iowa*, 525 U.S. 113 (1998)).

been afforded latitude to avoid their affirmative obligations—such as by stacking several less serious charges, permitting the jury trial requirement to be avoided.¹³⁰

Of course, whether the grant of legislative preeminence yields aggregate social benefit depends on the nature of the legislative enterprise itself. Based on experience to date, however, the structural absence of a self-limiting legislative incentive, combined with a lack of judicial willingness to regulate the substantive criminal law, presents valid cause for concern, especially relative to negative rights. For better or worse, the lack of limiting influence has resulted in creation of a *de facto* regime of positivist constitutionalism, based on the normative preferences of individual states and localities.

III. NEW UNDERSTANDINGS

Contingent constitutionalism thus has an array of consequences, which, although not resulting from overt design, are nonetheless quite significant. This Part considers how acknowledgment and awareness of these consequences casts in new light the traditional understandings of the American constitutional order.

A. The Myth of Rights Nationalism

Perhaps most notably, the discussion here lays to rest the enduring myth of rights nationalism. Even though federal constitutional rights are understood to extend equally across the land, in reality they can and do vary considerably in their availability, not only from state to state, but also within states themselves, the latter as a result of the law-making authority of local governments. Understanding of the phrase “We the People of the United States”¹³¹ is thus complicated anew. While in antebellum times the phrase was conceived as a plural noun, the Civil War inspired a linguistic transformation. The “United States” came to be conceived as an “is”

130. See *Lewis v. United States*, 518 U.S. 322, 323-34 (1996); see also *supra* text accompanying note 73.

131. U.S. CONST. pmb1.

not an “are.”¹³² No longer was the union seen as merely an assemblage of independent sovereigns, nor were its people to be foremost identified with their states. Rather, as the text of the Fourteenth Amendment made clear, the political identity of Americans was to be dual in character,¹³³ and over time American self-identity has assumed an increasingly nationalist cast.¹³⁴

Ongoing efforts at nationalization have been attenuated, however, both as a result of federalism, itself a historically contested notion,¹³⁵ and, ironically, the nationalistic Fourteenth Amendment, as a result of incorporation.¹³⁶ There is no mistaking that the union heterogeneously remains, as Madison long ago posited, based upon assent “given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.”¹³⁷

Legal myths, as Alexis de Tocqueville long ago recognized, have always figured centrally in American governance,¹³⁸ and are not easily dispelled. Like other myths, rights nationalism has survived not so much because of its veracity, but rather because of its

132. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 859 (1988) (“Before 1861 the two words ‘United States’ were generally rendered as a plural noun: ‘the United States *are* a republic.’ The war marked a transition of the United States to a singular noun.”). For a revisionist take of this account, focusing on the use of the plural noun itself in post-Civil War Supreme Court opinions, see Minor Myers, *Supreme Court Usage & The Making of an “Is,”* 11 GREEN BAG 2D 457 (2008).

133. See U.S. CONST. amend XIV, § 1 (“All persons born or naturalized in the United States ... are citizens of the United States and of the State in which they reside.”).

134. See Todd E. Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 VAND. L. REV. 329, 349-51 (2003) (surveying manifestations of this tendency).

135. See EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE 17-52 (2007) (noting ongoing disputes over the meaning and effect of federalism); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502 (1994) (remarking that “[t]here are, after all, two sides to federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable”).

136. See *supra* notes 83-85 and accompanying text.

137. THE FEDERALIST NO. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961).

138. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 150 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835) (observing that “[t]he government of the Union rests almost entirely on legal fictions”). For the classic exposition on legal myths more generally, see LON L. FULLER, *LEGAL FICTIONS* (1967). For more recent discussions see, for example, Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123 (1989); Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971 (2009); Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435 (2007).

functional benefit.¹³⁹ As historian Karen Armstrong has noted, a myth “is true because it is effective, not because it gives us factual information.”¹⁴⁰ Americans, it would seem, are content to labor under the conceit that they are bound by a uniformly available body of federal constitutional rights,¹⁴¹ akin to Robert Cover’s “nomos,”¹⁴² expressive of collective national identity. This despite the empiric reality that access to such rights very much depends on the particular state and local polities in which they find themselves.

In the final analysis, it might be that explicit recognition of rights variability actually fosters, not lessens, Americans’ allegiance to their national union. Indeed, federal deference to state and local norms in particular, a hallmark of contingent constitutionalism, might well have such an effect, especially among proponents of decentralized federalism. This is because subnational political preferences are given direct and individualized force, rather than being subsumed (and perhaps ignored), such as occurs in the effort to “count” such preferences in the name of achieving a national consensus vis-à-vis given constitutional rights.¹⁴³ Even if not, however, a more informed understanding of the nation’s actual constitutional idiom would constitute a major improvement over the unrealistic unidimensional understanding that has reigned to date.

139. See SHIRLEY PARK LOWRY, *FAMILIAR MYSTERIES: THE TRUTH IN MYTH* 3 (1982) (describing a myth as “a story whose vivid symbols render concrete a special perception about people and their world”).

140. KAREN ARMSTRONG, *A SHORT HISTORY OF MYTH* 10 (2005).

141. See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 130 (2001) (noting that “our sense of national identity as a people literally constituted by the Constitution is linked indissolubly with ideals of common constitutional rights.... [N]ational ideals require national enforcement as an affirmation of our shared nationhood”); KEITH E. WITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 11 (1999) (“The Constitution helps create a national identity.”); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 2027 (2003) (“From the very founding of the republic, the Constitution has been viewed by Americans as the preeminent and all-encompassing symbol of American nationhood.”).

142. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 28 (1983).

143. See *supra* note 19 and accompanying text.

B. The Nexus Between Substantive Laws and Rights

Recognition of contingent constitutionalism also adds to our understanding of the interactive relationship between substantive criminal laws and constitutional rights, and the nature of such rights.

The connection has been drawn most effectively by Professor Bill Stuntz, who in a series of articles observed that judicially imposed constitutional limits have actually encouraged the proliferation of substantive criminal laws,¹⁴⁴ which courts have left largely unregulated.¹⁴⁵ The discussion here confirms this interaction but augments it in an important way, noting the influence of the state and local criminal laws themselves on the effectuation of federal constitutional norms.¹⁴⁶ Revealing this latter influence has two chief consequences.

First, doing so has the potential to facilitate a much needed self-reflection in the criminal lawmaking process.¹⁴⁷ Because contingent constitutionalism operates without explicit authorization, unlike the federal Assimilative Crimes Act and similar provisions,¹⁴⁸ the causal effect of state and local laws—and the availability of federal constitutional rights—can be left undeliberated and un contemplated.¹⁴⁹

144. See William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 782 (2006); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 56 (1997) [hereinafter Stuntz, *Uneasy Relationship*]. On the sometimes elusive distinction between criminal law substance and procedure, see GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 7-24 (1998).

145. See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 11-12 (1996).

146. Cf. Stuntz, *Uneasy Relationship*, *supra* note 144, at 6-12 (noting how state funding and resource decisions can also affect the availability of federal constitutional rights such as the right to adequate counsel).

147. See Joshua Dressler, *Kent Greenawalt, Criminal Responsibility, and the Supreme Court: How a Moderate Scholar Can Appear Immoderate Thirty Years Later*, 74 NOTRE DAME L. REV. 1507, 1531 (1999) (“Penal codes too often are little more than a conglomeration of statutes enacted by legislators seeking political advantage, who have no real interest in determining whether the finished product is just or rational.”). On the point more generally, see, for example, Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 644 (2005).

148. See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 111 (2008).

149. As a general rule, such is not the case with federal statutory law. See *Jerome v. United States*, 318 U.S. 101, 104 (1943) (noting that “we must generally assume, in the absence of

State and local constituencies might well approve of particular substantive laws if fully informed of their constitutional ramifications; but then again, they might not.¹⁵⁰ After all, they, not the federal government, must bear the very significant costs of policing, adjudication, and imprisonment, as well as impact on their rights and liberties.

Consciousness of the nexus between substantive criminal laws and the application of federal constitutional rights thus holds the promise, however remote, of enhanced legislative decision making and policy outcomes.¹⁵¹ Moreover, to the extent that desuetude is regarded a problem,¹⁵² jurisdictions will be incentivized to reexamine their criminal codes, ameliorating the long recognized predilection for stasis.¹⁵³ With this awareness, in short, the criminal lawmaking political process can at last perhaps be imbued with a conscious deliberative quality that courts have long unjustly attributed to it.¹⁵⁴

plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide”).

150. Cf. Charles B. Kornmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 FED. SENT. R. 71, 71 (2000) (observing that “Congress enacts statutes, very likely with little, if any, thoughts as to how severely they impact Native Americans”).

151. Such a prospect was identified by Justice Brennan in the context of the Sixth Amendment right to appointed counsel. Having the right attach whenever prison is authorized, not only when imposed—as the majority in *Scott v. Illinois* held—would ideally encourage reconsideration of criminal codes, a prospect he believed “long overdue.” *Scott v. Illinois*, 440 U.S. 367, 388 (1979) (Brennan, J., dissenting) (“A state legislature or local government might determine that it no longer desired to authorize incarceration for certain minor offenses in light of the expense of meeting the requirements of the Constitution.”); see also Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1125 (2006) (urging states to decriminalize nonserious misdemeanors to lessen caseloads).

Suffice it to say, however, such consciousness can have less beneficial results, such as when, rather than decriminalizing certain minor offenses, a jurisdiction instead favors legislation consciously designed to avoid triggering jury trial demands. See, e.g., Yolanda Woodlee, *D.C. Crime Package Swipes at Gunrunners*, WASH. POST, Mar. 30, 1994, at D1.

152. See, e.g., Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1341-42 (2008).

153. See Alexander M. Bickel, Foreword, *The Passive Virtues*, 75 HARV. L. REV. 40, 62-63 (1961).

154. See, e.g., *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (presuming that criminal laws are predicated on conscious political choices that “[b]alanc[e] relative hardships”); *United States v. Balint*, 258 U.S. 250, 254 (1922) (presuming that criminal laws

Second, recognition of the constitutional influence of state and local laws has more basic epistemic significance. Laid bare as a constitutional modality, it highlights the value choices the nation's federalist system has embraced over the years. These choices are perhaps best conceived in comparison to the role subnational preferences have played in the creation of national constitutional norms noted at the outset,¹⁵⁵ what Timothy Zick has called "constitutional empiricism."¹⁵⁶ With its empirical approach, the Court has employed a variety of methods to quantify state preferences as an ostensibly objective means of constitutional interpretation. This purported objectivity is misleading, however, for in actuality the methods used reflect an array of underlying normative biases¹⁵⁷ and fail to accurately gauge broader democratic preferences.¹⁵⁸ Moreover, quantification itself can readily reduce to an empty formalism devoid of constitutional norms and values. "[I]t is a calculation," as Zick observes, "rather than a constitution, that is being expounded."¹⁵⁹

Contingent constitutionalism, by contrast, lacks such defects. To be sure, it similarly derives from a process of social and political construction, but its outcomes stem in unmediated form from value choices reflected in incorporation doctrine, decentralized federalism, and prior precedent of the Court—not variable post hoc judicial construction. An unreconstructed constitutionalism is thus at work, directly reflective of state and local normative preferences, permitting a more robust operational understanding of American constitutionalism.

are enacted with an awareness and appreciation of any "possible injustice[s]" associated).

155. See *supra* notes 17-20 and accompanying text.

156. See Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 115 (2003).

157. *Id.* at 185-94; see also *id.* at 192-93 (noting that empiricism "does not take place in a staid, sterile laboratory; it is part of a highly charged adversarial process, one which results in the definition of constitutional rights, powers, and values").

158. Among other shortcomings, use of state "head counts" fails to reflect actual aggregate population-based preferences, unqualifiedly attaching equal weight to large and small population states. See Jacobi, *supra* note 19, *passim*; Note, *State Law as "Other Law": Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1685 (2007).

159. Zick, *supra* note 156, at 220.

C. Legal Spatiality

Recognition of contingent constitutionalism also sheds new light on traditional understandings of legal spatiality. Historically, of course, laws have been imbued with a deep sense of territoriality. Entry into a jurisdiction, and exit from it, typically determines both applicable legal expectations and the rights available to individuals. True to dominant Westphalian notions of sovereignty, as Kal Raustiala has noted, “where you are determines what rules you are governed by.”¹⁶⁰

Certainly within the territorial bounds of the U.S. in modern times, no controversy has existed over whether federal constitutional rights “follow the flag.” The discussion here, however, renders uncertain what is meant by “flag.” Although being present in the U.S. requires recognition of the bundle of rights tied to the national flag, it matters what state or local flag, so to speak, flies. National rights extend in principle, based on one’s presence on U.S. soil, but the actual availability of such rights depends on the normative content of state and local substantive criminal laws. Federal constitutional rights, though not spatially delimited in a formal sense, are spatially conditioned on state and local criminal laws, in a functional sense. Despite the absence of textual support,¹⁶¹ and the Framers’ predisposition to have liberty relate primarily to persons rather than places,¹⁶² location thus has critical significance.

Ultimately, this spatiality risks creation of what Gerald Neuman has referred to as “anomalous zones,” enclaves where constitutional norms are excepted from.¹⁶³ To Neuman, creating such carve-outs is “a dangerous enterprise. Anomalous zones may become, quite literally, sites of contestation of the polity’s fundamental values. When an anomalous zone is defined so that mere presence in the

160. KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW*, at v (2009).

161. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 19 (2002) (observing that “the Constitution’s provisions are not textually restricted by either the population or the geographic area to which they apply”).

162. See, e.g., U.S. CONST. amends. IV, V, X, XIV; see also, e.g., *Katz v. United States*, 389 U.S. 347, 351 (1967) (noting that the “Fourth Amendment protects people, not places”).

163. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996) (internal quotation marks omitted).

zone results in suspension of the rule, its subversive potential is magnified.”¹⁶⁴ Although not as troubling as the rights exceptionalism experienced by Haitian and Cuban refugees detained at Guantanamo Bay U.S. Naval Base in Cuba, considered by Neuman in his 1996 article, or, surely, the more recent overt geographic manipulation of rights of alleged terrorists housed at the Base,¹⁶⁵ the domestic constitutionalism examined here operates by a similar organizing principle. Its pervasive nature, in all fifty states, the District of Columbia, and localities, itself underscores the persistent strict territorialism of American constitutional law.¹⁶⁶ This territorialism persists despite the increasingly “flat” and borderless nature of the world at-large,¹⁶⁷ and the judiciary’s own willingness to afford rights to U.S. citizens beyond the nation’s physical borders.¹⁶⁸ The discussion here thus adds to the broader literature on the influence of geography on rights,¹⁶⁹ highlighting in particular how U.S. constitutional rights are refracted through the lens of state and local government normative preferences.

164. *Id.* at 1233-34.

165. On the issue of Guantanamo’s asserted rightlessness more generally, see Johann Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1 (2004).

166. See, e.g., Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2504 (2005) (noting with respect to international applications that “federal courts continue to cling to the notion that American law is tethered to territory—that simply by moving an individual around in space, the rights that individuals enjoy wax and wane”).

167. See, e.g., THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 7 (2005); Raustiala, *supra* note 166, at 2548 (“The evolution of American law has been a process in which formalistic categories based on spatial location and geographic borders were rejected in favor of more supple, contextual concepts such as ‘effects’ and ‘minimum contacts.’”).

168. See, e.g., *Reid v. Covert*, 354 U.S. 1, 7 (1957) (holding that Fifth and Sixth Amendment protections extend to U.S. citizens abroad); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157, 167 (2d Cir. 2008) (holding that Fourth Amendment reasonableness expectations extend to U.S. citizens abroad); cf. *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008) (holding that foreign detainees held at Guantanamo cannot be deprived of the “constitutional privilege of habeas corpus,” except in “conformance with the Suspension Clause”).

169. In addition to Professor Raustiala’s work, see, for example, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1368 (1996); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 835 (2007); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 584 (2006).

D. Incorporation's Legacy

Finally, recognition of contingent constitutionalism obliges reconsideration of the long-running debate over incorporation doctrine. For decades, judicial titans battled over the validity of using the Fourteenth Amendment to impose on states the criminal procedure protections of the Bill of Rights.¹⁷⁰ Even after the Court settled on an approach of selective incorporation, principled dissent remained over the imposition of federal constitutional norms on state and local criminal justice systems.¹⁷¹

Others expressed alarm over the likely diminution of federal rights themselves. The second Justice Harlan, for instance, warned of the “major danger” incorporation posed to federal standards,¹⁷² averring in *Duncan v. Louisiana* that “provisions of the Bill of Rights may be watered down in the needless pursuit of uniformity.”¹⁷³ Two years later, in *Williams v. Florida*,¹⁷⁴ Harlan condemned the Court’s decision to eschew the federal requirement of unanimous twelve-member juries in the interest of deferring to common state approaches.¹⁷⁵ Adoption of a six-member jury system, he complained, “dilutes a federal guarantee in order to reconcile the logic of ‘incorporation’ ... with the reality of federalism.”¹⁷⁶ Later decisions by the Court supported Harlan’s recognition, such as vis-à-vis constitutional expectations regarding persons qualified to issue arrest warrants¹⁷⁷ and preside over the trial of misdemeanants.¹⁷⁸

The discussion here confirms the interrelation of incorporation and federalism, but exposes another way that subnational governments affect the nation’s constitutional order. Not only do they help determine the substantive content of national constitutional norms,

170. See generally Jerold H. Israel, Foreword, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982).

171. *Id.* at 314-25.

172. See *Duncan v. Louisiana*, 391 U.S. 145, 182 n.21 (1968) (Harlan, J., dissenting).

173. *Id.*

174. 399 U.S. 78 (1970).

175. *Id.* at 129 (Harlan, J., dissenting) (citation omitted).

176. *Id.*

177. See *Shadwick v. City of Tampa*, 407 U.S. 345, 345-46 (1972) (deferring to local practices in allowing such warrants to be issued by nonlawyer clerks).

178. See *North v. Russell*, 427 U.S. 328, 339 (1976) (deferring to state practices in approving use of lay magistrates in a two-tier system for misdemeanor trials).

based on judicial consideration of their particular preferences and characteristics, but they also determine whether the putative federal floor of rights is applicable at all.¹⁷⁹ The highly variable end result, stemming from the diversity of state and local criminal law norms,¹⁸⁰ is reminiscent of a state of affairs widely condemned in pre-incorporation times—a national landscape marked by a “checkerboard of human rights.”¹⁸¹

Stepping back, over four decades after the process of selective incorporation caused such great alarm, the Warren Court’s “criminal procedure revolution” seems not so revolutionary after all. We now know that many of the Court’s landmark decisions of the 1960s were in fact often majoritarian in nature, reflecting the preferences of subnational polities¹⁸² and at times their desires for greater national rights uniformity.¹⁸³ Even more important, the “constitutional strait jacket”¹⁸⁴ purportedly imposed on them has been loosened by the federal judiciary, which has not only limited

179. History has thus provided an irony worth noting. Justice Harlan’s preference for case-by-case determinations of the constitutionality of state practices, while failing to persuade the Court, has in a sense won out: federal rights today are in fact available on an ad hoc basis. For more on Harlan’s approach, see Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125 (2005).

180. Diversity is especially marked with respect to the less serious crimes that dominate nonfederal criminal justice systems. Although state criminal codes are largely duplicative relative to serious common law crimes such as murder and robbery, they show significant variation with less serious crimes, and localities add to this diversity with their laws targeting malum prohibitum and other less serious misconduct.

181. FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 39-40 (1970) (noting that “[i]n a nation where state lines had otherwise become so unimportant, this checkerboard of human rights had to be short lived”); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 274 (1973) (expressing concern that increased mobility “made America too much one country” to justify deference to state and local diversity).

182. See Kenneth Katkin, “Incorporation” of the Criminal Procedure Amendments: *The View from the States*, 84 NEB. L. REV. 397, 400-02 (2005); Corrina Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1364-65 (2004).

183. Such was the case, for instance, with the Sixth Amendment-based right of indigent accused felons to appointed counsel. See MELVIN I. UROFSKY, *THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY* 171 (2001) (noting that when the Court decided *Gideon v. Wainwright* in 1963, forty-five states afforded indigents a right to appointed counsel).

184. See *Ker v. California*, 374 U.S. 23, 45 (1963) (Harlan, J., concurring) (condemning incorporation because “States, with their differing law enforcement problems, should not be put in a constitutional strait jacket”); Israel, *supra* note 170, at 315 (citing other opinions to this effect).

the reach and content of criminal procedure rights,¹⁸⁵ but also made their availability contingent upon subnational legal norms.¹⁸⁶

As a result, today we have a national constitutional rights regime that while having the patina of uniformity is, in actuality, functionally akin to the nonuniform regime incorporation doctrine sought to replace.¹⁸⁷ As in the pre-incorporation era,¹⁸⁸ subnational political units can, if they wish,¹⁸⁹ operate outside the federal constitutional rubric. They do so not on the basis of outright defiance of federal

185. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 147-48 (1997) (observing that such rights have been “hollowed out from within”).

186. See also David J. Bodenhamer, *Reversing the Revolution: Rights of the Accused in a Conservative Age*, in *THE BILL OF RIGHTS IN MODERN AMERICA* 126, 142 (David J. Bodenhamer & James W. Ely, Jr. eds., 2008) (noting prevailing deference to legislative majorities and respect for state and local authority under the guise of federalism).

187. See Israel, *supra* note 170, at 337-38.

For the pre-1960's Court, which gave more weight to interests of federalism, the fundamental fairness doctrine was obviously preferred because it readily allowed greater leeway to the state systems. For the Court of the 1960's, which gave greater weight to expanding the protection of the accused, the selective incorporation doctrine was preferred; it made immediately available a large body of federal precedent that extended the rights of the accused substantially beyond the fundamental fairness decisions of the past.

Id.

188. See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 146 (2001) (observing that “[f]or almost all of our history, the federal government and each of the States operated independently in defining, investigating, and prosecuting crime. The Bill of Rights' limitations on government did not apply to the States, which were free to protect—or not protect—individual liberties as they saw fit”).

189. Such a desire, as discussed, would likely vary in accord with the nature of the right potentially implicated. With negative rights, such as the Fourth Amendment protection against unreasonable searches and seizures, a legislative decision to criminalize behavior expands police power authority, which typically enjoys great political popularity. See *supra* notes 128-29 and accompanying text. With positive or quasi-affirmative rights, such as the Sixth Amendment counsel and jury trial rights, motivation might lie in the significant cost and resource savings associated with not having to extend rights. See Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe—and for the United States*, 32 TULSA L.J. 1, 7 (1996) (asserting that incorporation “made the criminal justice system cumbersome ... [and] expensive”); *supra* notes 61-66 and accompanying text.

dictate,¹⁹⁰ but rather by virtue of mere application of their substantive criminal laws.¹⁹¹

The resulting variability has, to date, curiously failed to raise federal judicial concern. Indeed, as discussed, the Supreme Court has played a key role in facilitating the influence of state and local criminal laws on the nation's constitutional order. While post-incorporation concern over constitutional disuniformity prompted elimination of the "silver platter" doctrine,¹⁹² resulting in the application of U.S. constitutional norms in state and federal criminal proceedings alike, regardless of whether state, local, or federal police are involved,¹⁹³ the more subtle yet far more pervasive occurrence of contingent constitutionalism continues apace.

In the final analysis, recognition of contingent constitutionalism provides added evidence of the importance of state constitutional law. While to date the promise of the "new federalism"¹⁹⁴ has gone largely unfulfilled,¹⁹⁵ the revealed contingent quality of the federal rights floor should provide new reason to reverse the trend. In a

190. As Marc Miller and Ron Wright have noted, the federal constitutional "floor" is not always strictly followed by state courts in their interpretations of federally prescribed rights. Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 230-31 (2008). For discussion of the comparatively rare instance of state courts' outright flouting of federal constitutional doctrine more generally, see Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501 (2008).

191. Federal constitutional law is thus in effect doubly selective in its incorporation, as a result of both the federal courts determining which constitutional provisions warrant incorporation, and the availability of the rights themselves turning on underlying state and local substantive law.

192. See *Mapp v. Ohio*, 367 U.S. 643, 657 (1961); *Elkins v. United States*, 364 U.S. 206, 221 (1960).

193. See James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 233 (1996). As Professor Diehm notes, however, similar incongruities have resisted judicial remedy since then on the basis of more liberty-protective standards in states based upon their own constitutional norms. See *id.* at 261.

194. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

195. To date, for instance, only six states have interpreted their own constitutions to forbid police arrests for minor offenses, as permitted by the Supreme Court's *Atwater* decision. See Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O'Connor's Dissent in Atwater v. City of Lago Vista*, 79 MISS. L.J. (forthcoming 2009). On the tendency of state courts to eschew independent and rights-enhancing interpretations of their own state constitutions more generally, see Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005).

true case of back to the future, rights could once again principally emanate from, and be prescribed by, their states of origin, as was the case before incorporation.¹⁹⁶

CONCLUSION

Just as we now know that federal statutory¹⁹⁷ and constitutional¹⁹⁸ law varies throughout the nation, as a result of distinct judicial interpretations, the discussion here underscores how federal constitutional rights vary in their application, as a result of the diverse body of state and local substantive criminal laws upon which they rely. Although federal constitutional rights in theory extend nationwide, in actuality their application is contingent upon state and local criminal laws, reflecting the nation's time-honored localist orientation vis-à-vis police power matters.¹⁹⁹

In practical effect, the federal rights pantheon is thus continually constructed anew. This reconstruction, unlike the informal amendment process identified by commentators,²⁰⁰ does not entail substantive modification of federal rights. Rather, it concerns the distribution of such rights, by virtue of the substantive criminal laws enacted and enforced by subnational polities, an unexamined yet critically important aspect of the nation's constitutional order. Even though the focus here has been on criminal procedure rights,

196. See Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1073 (1998). Greater rights protection, of course, can also emanate from state or local legislative intervention, such as with enhanced availability of counsel or jury trial rights, or procedural limits on the warrantless arrest authority of police (backed by a statutory exclusionary rule remedy). The prospects for such expansions, however, are limited by the same political process concerns identified in the text.

197. See, e.g., Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1575 (2008) (noting widespread variation in interpretation of federal statutory laws).

198. See, e.g., Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1483 (2005) (recognizing that "even narrowly focused federal rights often have nonuniform application, simply by virtue of various federal district courts, and federal appellate courts ... coming to different conclusions on the same issue").

199. See *supra* notes 11, 82 and accompanying text (noting historic expectation that state and local governments should have primary responsibility over police power matters).

200. See, e.g., Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 DRAKE L. REV. 925 *passim* (2007) (surveying literature on influence of nonjudicial actors in forging new constitutional meanings).

this should not obscure the reality that other federal rights, such as those designed to protect property interests,²⁰¹ also hinge upon variable state and local legal norms. This Article, it is hoped, will inspire additional work on a phenomenon with rich theoretical implications and major practical significance for Americans.

Whether contingent constitutionalism is good or bad on balance remains open to debate. What is clear, however, is that despite the mythical sway of rights nationalism, the actual lived constitutional experience of Americans is marked by a highly contingent, crazy quilt of available rights, which will likely endure for years to come.

201. *See supra* note 14 (providing examples of contingency outside realm of criminal procedure).