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## Reverse Political Process Theory

Aaron Tang

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## ARTICLES

### Reverse Political Process Theory

*Aaron Tang\**

*Despite occasional suggestions to the contrary, the Supreme Court has long since stopped interpreting the Constitution to afford special protection to certain groups on the ground that they are powerless to defend their own interests in the political process. From a series of decisions reviewing laws that burden whites under the same strict scrutiny as laws that burden racial minorities, to the more recent same-sex marriage decision based principally on the fundamental nature of marriage (rather than the political status of gays and lesbians), it is now an uncontroversial observation that when it comes to applying the open-textured provisions of the Constitution, the Court sees no distinction between the powerless and powerful.*

*This Article challenges that conventional wisdom from a perhaps unexpected direction. I argue that the Court has gone further than to merely reject the political process theory of constitutional interpretation, under which*

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*powerless discrete and insular minority groups alone would be entitled to heightened judicial solicitude. In several doctrinal areas, the Court has reversed the theory's core prescription by conferring extra constitutional safeguards upon entities that, by any fair accounting, possess an outsized ability to protect their interests through the ordinary democratic process—all while withholding similar protections from less powerful counterparts.*

*After describing these doctrinal developments, this Article offers a critical account of the Court's long and tumultuous relationship with political process theory. I conclude that although opponents of the theory may have been fair to question its ability to restrain judges as a positive principle of constitutional adjudication, political process theory ought to retain force as a negative command. That is to say, even if one believes judges cannot avoid substantive value judgments when deciding which groups are so powerless as to warrant extraordinary protection from the democratic bazaar, attention to the political process should still require judges to stay their hand before granting special constitutional treatment to entities that are powerful enough to look out for themselves.*

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## INTRODUCTION

Under the standard account, the story of political process theory in American constitutional law has unfolded as a two-act tragedy.<sup>1</sup> In Act I, political process theory enters the scene as an answer to the “counter-majoritarian difficulty,”<sup>2</sup> or the inherent democratic tension presented when unelected judges strike down laws enacted by politically accountable legislators. The theory promises to stop judges from using the underdetermined provisions of the Constitution to bring about their preferred policy preferences by limiting judicial intervention to situations “when the . . . political market[] is systematically malfunctioning.”<sup>3</sup> Political process theory, in other words, resolves the counter-majoritarian difficulty by confining judges to the role of “referees” and not players in the game of lawmaking: it is only when the system is infected with “prejudice against discrete and insular minorities” that “curtail[s] the operation of th[e] political

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1. See, e.g., Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 223–26, 314–15 (1991) (describing the emergence of political process theory as well as its fall in the affirmative action context); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991) (describing political process theory’s ascendance and demise); Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1365–66 (2011) (arguing that despite the theory’s achievement of “canonical status,” it has “mostly fizzled in the case law,” as evidenced by the “use of strict scrutiny to strike down affirmative action programs challenged by whites” and the fact that “the Court has not . . . [adopted] heightened scrutiny for any new classification in decades”).

2. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

3. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980). Ely’s explication of political process theory expounds on the ever-famous footnote four of Justice Stone’s opinion for the Court in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), discussed *infra* notes 38–45.

proces[s]" that judges may engage in "more searching judicial inquiry" of resulting laws.<sup>4</sup>

Alas, political process theory's triumph is short-lived. If Act I is subtitled "political process theory," then Act II would be captioned "anti-political process theory." Indeed, Act II barely opens before critics from across the political spectrum challenge the theory's central claims.<sup>5</sup> The most devastating charge is that process theory invites the very value judgments by unelected judges that the theory sought to pretermitt.<sup>6</sup> As Professor Bruce Ackerman has explained, when a process-attuned court "undertakes to identify the prejudices that entitle a group to special protection," it cannot do so "without performing the substantive analysis of constitutional values that [the theory] hopes to avoid."<sup>7</sup> After all, how are judges to decide which groups have been sufficiently prejudiced in the democratic process to warrant special protection?<sup>8</sup> And so the tragic conclusion of Act II is the fall of process theory in cases like *Bakke* and *Croson*, where the Court holds that all race-based classifications are subject to strict scrutiny regardless of the group they burden; the powerless and powerful are to be treated one and the same.<sup>9</sup>

I argue in this Article that this conventional two-act telling is incomplete. In recent years, the Supreme Court has quietly written a third act to the play that is best captioned "reverse political process theory." For rather than merely rejecting the notion that politically powerless groups should be entitled to special judicial solicitude, the Court has swung further away from process theory's driving concern. It has swung so far, in fact, as to afford special protections via underdetermined constitutional provisions to politically powerful entities that are able to advance their interests full well in the

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4. *Carolene Prods.*, 304 U.S. at 152 n.4. Political process theory has another, less controversial precept that is not the focus of this Article: that strict scrutiny is warranted when legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Id.*; see *infra* note 42 and accompanying text.

5. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 197-99 (1990); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 142 (1982); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

6. See, e.g., Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 787 (1991) ("[D]istinguishing justifiable from unjustifiable disadvantaging [of minorities] quite plainly requires a substantive value choice . . ."); see also Brest, *supra* note 5, at 131 ("[M]ost instances of representation-reinforcing review demand value judgments not different in kind or scope from the fundamental values sort.").

7. Ackerman, *supra* note 5, at 737.

8. See *infra* Section I.B.

9. See *infra* notes 98-101 and accompanying text.

democratic arena—precisely the opposite of the kind of groups who animated the theory at the outset. The major plot development of Act III, in other words, is the Court’s inversion (and not just its rejection) of political process theory’s core tenet, that laws disadvantaging the powerless ought to receive stricter judicial scrutiny than laws disadvantaging the powerful.

This reversal has arguably occurred in a number of doctrinal areas, five of which are discussed in this Article. First, the Supreme Court has held that large multinational and U.S. corporations can no longer be subjected to general personal jurisdiction based on their continuous and systematic contacts with a forum state, overriding the rule ratified long ago by lawmakers in the form of state long-arm statutes.<sup>10</sup> The Court has reasoned, however, that the same quantum of contacts may be sufficient to impose general jurisdiction against smaller businesses, and that a far smaller quantum may be sufficient for purposes of general jurisdiction against individuals.<sup>11</sup> The upshot is that the largest, wealthiest, and most powerful corporations now enjoy a unique procedural defense under the open-textured Due Process Clause, despite the fact that those very corporations were unable to persuade state legislatures to enshrine the same rule.<sup>12</sup>

Second, the Court has fashioned enhanced protections for government defendants attendant to the doctrine of sovereign immunity, none of which are called for by the text of the Constitution. The most striking example is the “super-strong clear statement rule” that the Court has applied to determine whether a sovereign has waived its immunity from suit.<sup>13</sup> Following this much-criticized approach,<sup>14</sup> the Court has dismissed suits against sovereign defendants that have indisputably injured plaintiffs even where the relevant statutory text, purpose, and history are best understood as waiving the

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10. See *infra* Section II.A.

11. See *infra* Section II.A.

12. See *infra* Section II.A; see also *Daimler AG v. Bauman*, 134 S. Ct. 746, 771 (2014) (Sotomayor, J., concurring in the judgment) (“[T]o the degree that the majority worries . . . [about] the economic interests of multinational businesses . . . the task of weighing those policy concerns belongs ultimately to legislators . . . [and] the democratic process.”).

13. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 643 (1992) (arguing that the Court has created a “super-strong clear statement rule against” waivers of sovereign immunity).

14. See, e.g., Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. REV. 1245, 1252 (2014) (criticizing the Court’s “hostile and narrow construction” of immunity waivers); John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1130 (1993) (urging Congress to “revers[e] the rule of strict construction that is supported by nothing more than irrelevant history”).

sovereign's immunity.<sup>15</sup> This solicitude for sovereign defendants stands in stark contrast to the judge-made rules governing waiver of constitutional rights held by less powerful parties. For example, a person suspected of a crime who finds himself in police interrogation will be found to have waived his right to remain silent unless he affirmatively and unambiguously *invokes* it—the opposite of the rule afforded to sovereign defendants.<sup>16</sup> The Supreme Court has accordingly held that a suspect who remained essentially silent for nearly three hours of interrogation nonetheless waived his right to remain silent by subsequently answering a yes-or-no question.<sup>17</sup>

Third, in the aftermath of *Citizens United v. FEC*, corporations and unions both enjoy the right to use unlimited general treasury funds on political expenditures.<sup>18</sup> As Professor Benjamin Sachs has argued, however, that facial symmetry conceals a deeper inequality: whereas shareholders—many of whom face economic pressure to participate in the stock market—hold no right to opt-out of corporate political speech to which they object, objecting workers have a First Amendment right to opt-out of political speech by their unions.<sup>19</sup>

Fourth, Professor Reva Siegel has argued that Equal Protection law now affords greater protection to whites than it does to racial minorities in an important respect.<sup>20</sup> Whereas whites who challenge affirmative action policies receive the benefit of strict scrutiny even if they cannot show that the policies were motivated by any invidious government purpose, racial minorities challenging facially neutral policies with equally (or more) harmful effects receive a far more deferential brand of review *unless* discriminatory purpose can first be demonstrated.<sup>21</sup>

Fifth, police officer (and other individual state) defendants possess a qualified immunity defense to tort litigation that plausibly derives from constitutional principles of Due Process.<sup>22</sup> No individual

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15. For examples of this, see *infra* Section II.B.

16. See *Berghuis v. Thompson*, 560 U.S. 370, 385 (2010) (“[A] waiver of [the right to remain silent] may be implied through ‘the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.’” (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979))).

17. *Id.* at 385–87.

18. 558 U.S. 310 (2010).

19. See Benjamin Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012).

20. Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013).

21. *Id.*

22. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. (forthcoming 2018), <https://ssrn.com/abstract=2896508> [<https://perma.cc/3WAY-UE9V>].

officer, the theory goes, may be deprived of her property in a tort suit simply because she has made a reasonable mistake of law, a kind of fair notice concept that is implemented through a rule that officers may only be liable under § 1983 for violating clearly established law.<sup>23</sup> Yet this ignorance-of-the-law defense is famously unavailable to less politically powerful criminal defendants in mine-run criminal prosecutions.<sup>24</sup>

In each of these settings, there is a reasonable claim that the Supreme Court's inconsistent rulings—granting protection under open-textured constitutional provisions to some groups but not others—have privileged the more powerful class of litigants. Large corporations, sovereign defendants, whites, and individual state officers benefit from rules that the Supreme Court has refused to extend to small businesses, criminal suspects, racial minorities, and criminal defendants.

What should we make of this? This Article grapples with that question in four parts. Part I tracks the first two acts of the story of political process theory, recounting in brief form the rise and fall of the theory as an answer to the counter-majoritarian difficulty. Part II then describes how the Court has granted arguably greater constitutional protection to the powerful than the powerless in the five contexts just mentioned.

Part III offers a normative analysis of this development. I suggest that there are two coherent positions one might take. First, one could give up the critiques of process theory that prevailed in Act II and decide that when it comes to the difficult task of constitutional construction, judges may be in the business of picking which groups to afford special protections based on different background values they infer from the Constitution.<sup>25</sup> Second, one could acknowledge the inevitable role of normative values in the course of constitutional construction without sacrificing the anti-process theory criticisms raised during Act II.<sup>26</sup> Under this view, the proper approach to the cases described in this Article would be to treat laws disadvantaging more powerful entities the same as—that is to say, no more skeptically than—laws disadvantaging less powerful ones. Significantly, the background values supporting this approach may verge on something

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23. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

24. See *infra* Section II.E.

25. As I explain below, *infra* Section III.A, the starting point for the analysis here is the distinction between constitutional interpretation and construction. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

26. See Solum, *supra* note 25, at 104 (arguing that constitutional construction “cannot be ‘value neutral’ because we cannot tell whether a construction is correct or incorrect without” reference to “some kind of normative argument”).



of an overlapping consensus: critics of political process theory would be wary of judges inserting their own subjective preferences regarding corporate and government amenability to suit in place of policy choices made by elected officials, while process theory's proponents would agree that, at bare minimum, the politically powerful should receive judicial treatment no better than the powerless.

My own sense is that the latter position is more attractive in that it respects the will of democratic majorities exactly when the political process might be trusted the most—when the powerful groups that often win come out on bottom. If that is right, then the telling of process theory's third act should yield the following conceptual payoff. Even if one rejects the theory as an argument for when courts should strike down laws (i.e., when they disadvantage the powerless), one may nonetheless adopt the theory in its *reverse*: as a theory for when judges should be especially deferential to democratic choices (i.e., when they disadvantage powerful groups that can protect themselves).

Part IV applies this reverse conception of political process theory to the five cases discussed earlier. A conclusion follows, with some thoughts on how reverse political process theory might apply to the major issue that has emerged recently in the law of personal jurisdiction: whether corporations may be required to consent to general jurisdiction as a condition of doing business in a state.

A few caveats are in order before I turn to the substance. First, in describing the Court's jurisprudence in the personal jurisdiction, sovereign immunity, union opt-out, and other areas, I do not mean to imply that the Court has *purposefully* embarked on a process-driven path of interpreting the Constitution to the comparative advantage of politically powerful entities. Such an explicit move would be quite difficult to defend on its own terms, so it is no surprise that the Court has justified its decisions using non-process-based rationales internal to those doctrinal areas. Second, and illustrative of the initial caveat, the third act is in one sense only a partial picture: the Court has not granted additional protections to powerful entities in every doctrinal sphere. For instance, the primary controversy wrought by *Citizens United v. FEC* was to treat corporations on equal terms with individuals regarding campaign expenditure limits.<sup>27</sup> Nonetheless, I shall argue that it is still worth examining why the Court has often chosen to distrust the democratic process when it harms powerful business and government defendants, but not when it harms less powerful individuals and entities.

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27. 558 U.S. 310 (2010).

Third, I should acknowledge a pair of ways in which the Article's choice of cases on which to focus may seem somewhat less than intuitive. For one thing, personal jurisdiction, sovereign immunity, union opt-outs, and qualified immunity are not likely to spring to mind when one thinks of political process theory in doctrinal terms; the theory is instead most naturally associated with the Equal Protection Clause.<sup>28</sup> But the notion that political process considerations ought to be fair game when a judge confronts an underdetermined constitutional provision is not self-limiting to the Equal Protection Clause.<sup>29</sup> In that respect, one modest goal of this Article is to revive a broader understanding of political process theory's domain.

More significantly, most close followers of the Supreme Court would probably not name these cases if asked to identify the weightiest situations in which the Court has recently granted constitutional protection to powerful groups despite an uncertain textual foothold. More obvious cases might include the Court's extension of gun rights to a group powerfully represented by special interests in *D.C. v. Heller*,<sup>30</sup> or the expansion of economic privileges afforded to corporations under the First Amendment—so-called First Amendment *Lochnerism*.<sup>31</sup> Still others may think of the same-sex marriage debate as a circumstance where a minority group of debatable political strength received relief from the Court.<sup>32</sup>

I certainly agree that these cases present interesting political process issues, insofar as the underlying policy questions may be better entrusted to the ordinary democratic process in light of the underdetermined nature of the constitutional text in play and contestable arguments about the influence wielded by the groups seeking redress. But *Heller*, First Amendment *Lochnerism*, and same-sex marriage do not implicate the distinctive problem presented here: the Supreme Court's emerging pattern of not only granting protection from political defeat to powerful groups in the absence of determinate constitutional text, but doing so even as it withholds the same protection from similarly situated, less powerful counterparts. This

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28. See, e.g., Klarman, *supra* note 1 and accompanying text.

29. See ELY, *supra* note 3, at 172–79 (applying the theory to several open-textured constitutional provisions).

30. 554 U.S. 570 (2008).

31. See generally Jeremy Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

32. See *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (“[W]e have an eleven-year record marked by nearly as many [political] successes as defeats . . . ‘Don’t Ask, Don’t Tell’ is gone.”).

Article focuses on *that* development, leaving the other set of cases for a separate paper.<sup>33</sup>

## I. THE RISE AND FALL OF POLITICAL PROCESS THEORY

This Part presents the story of political process theory as it is commonly told. In Act I, the first subpart, I describe the theory's rise as an instruction to courts to grant greater constitutional protection to the politically powerless than the powerful. The next subpart, Act II, explains the theory's fall. The end result under the usual telling is that different groups receive equivalent protection from the Constitution, regardless of their political strength.

### A. Act I: Political Process Theory

For decades, the great villain of constitutional theory has been the counter-majoritarian difficulty.<sup>34</sup> In addition to coining the term, Professor Alexander Bickel described it best when he observed that, shorn of judicial review's "mystic overtones," the reality is that "when the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives" and "exercises control, not in behalf of the prevailing majority, but against it."<sup>35</sup> Without some theory to reconcile it, the Supreme Court's role as ultimate interpreter of the Constitution would seem to be in fundamental conflict with the principles of representative government that so deeply exemplify America's democratic innovation.<sup>36</sup>

33. See Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CALIF. L. REV. (forthcoming 2018).

34. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1014 (1984) ("The countermajoritarian difficulty proclaimed in *The Least Dangerous Branch* achieved its ascendancy over the modern legal mind by expressing an opinion that, after two full generations, had become the prevailing wisdom in both scholarly reflection and legal practice."); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 71 (1989) (noting that the "'counter-majoritarian difficulty' set the terms for the contemporary debate over judicial review").

35. To be sure, the fundamental concerns underlying Bickel's presentation of the counter-majoritarian difficulty predate even his seminal work, a fact Bickel himself recognized. See BICKEL, *supra* note 2, at 21–22 (quoting James Bradley Thayer's 1901 book, *John Marshall*, for the proposition that "the exercise of [judicial review] . . . is always attended with a serious evil, namely . . . to dwarf the political capacity of the people").

36. See ELY, *supra* note 3, at 5:

We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government. The very process of adopting the Constitution was designed to be, and in some respects it was, more democratic than any that had preceded it.

Political process theory is one attempt to answer this dilemma.<sup>37</sup> The seeds of the theory are first sown (in dicta) in footnote four of Justice Stone's majority opinion in *Carolene Products*.<sup>38</sup> In what is now the most renowned footnote in all of constitutional law, Justice Stone reserved two important questions:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>39</sup>

John Hart Ely's great contribution in his classic tome, *Democracy and Distrust*,<sup>40</sup> is to build a full theory of judicial review out of these halting paragraphs and the Warren Court jurisprudence that followed.<sup>41</sup> The former paragraph of the footnote gives rise to chapter 5 of *Democracy and Distrust*, in which Ely defends Warren Court decisions protecting voting rights and striking down prohibitions against political speech, both of which ensure full access to a properly functioning democratic process.<sup>42</sup> The latter paragraph precipitates chapter 6, where Ely advocates aggressive judicial review for the additional purpose of smoking out "laws directed at religious, national, and racial minorities and [laws] infected by prejudice against them."<sup>43</sup> This chapter responds to situations where "no matter how open the process, those with most of the votes" still unduly "vote themselves advantages at the expense of the others," the most striking example of

37. There are others, of course, including (most notably) originalism. The origins and evolution of, and present debates within, originalism exceed the scope of this paper.

38. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see ELY, *supra* note 3, at 75 (noting that political process theory is "foreshadowed" by footnote four).

39. *Carolene Prods.*, 304 U.S. at 152 n.4 (citations omitted).

40. See ELY, *supra* note 3.

41. I do not contend that Ely's arguments *actually* motivated the Court's reasoning or outcomes. Indeed, by the time *Democracy and Distrust* was published, the Court had already begun to back away from the prejudice prong. See *infra* notes 56, 64–67. It would be more accurate to say that Ely's articulation of political process theory came after the cases that support it than before. Nonetheless, this Article focuses substantially on Ely's expression of the theory in light of the powerful influence it has had on scholarly conversations. See, e.g., Ortiz, *supra* note 1, at 721 ("Few, if any, books have had the impact on constitutional theory of John Hart Ely's *Democracy and Distrust*.").

42. ELY, *supra* note 3, at 105–25.

43. *Id.* at 76, 135–79.

which is “how our society has treated its black minority (even after that minority had gained every official attribute of access to the process).”<sup>44</sup>

Stated in summary form, chapters 5 and 6—corresponding to what are known now as the access and prejudice prongs, respectively—call for judicial scrutiny when “(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility . . . and thereby deny[] that minority the protection afforded other groups by a representative system.”<sup>45</sup>

The access prong is relatively uncontroversial and remains in force today.<sup>46</sup> It is Ely’s prejudice prong that has drawn the most fire,<sup>47</sup> and which accordingly forms the focal point of this Article. For it is also the prejudice prong that does so much of the heavy lifting when it comes to validating many of the Supreme Court’s most important decisions. Chief among them is *Brown v. Board of Education*.<sup>48</sup> As many scholars have argued, *Brown*’s holding cannot be easily defended on originalist grounds, for segregated schools were the norm during and well after the Reconstruction Era.<sup>49</sup> Nor can *Brown* be rationalized under Ely’s access prong. De jure school segregation policies caused many kinds of harm, but they did not block the channels of political change like laws restricting the franchise or laws burdening political expression.<sup>50</sup> The prejudice prong, by contrast, is built precisely for cases like *Brown*, where majorities prevent politically powerless minority groups from

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44. *Id.* at 135.

45. *Id.* at 103.

46. See BORK, *supra* note 5, at 197 (observing that the access prong “poses no special challenge to constitutional theory”); Klarman, *supra* note 6, at 773 (“[O]nly the prejudice prong of political process theory . . . has been shown to be unworkable.”).

47. See Klarman, *supra* note 6, at 773; see also *supra* note 4.

48. 347 U.S. 483, 489 (1954), supplemented by 349 U.S. 294 (1955).

49. See, e.g., Klarman, *supra* note 1, at 252 (“Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful; twenty-four of the thirty-seven states then in the union either required or permitted racially segregated schools.”); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955) (similar). *But see* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995) (uncovering the fact that “between one-half and two-thirds of both houses of Congress voted in favor of school desegregation and against the principle of separate but equal” in a number of votes shortly after the Fourteenth Amendment was ratified—historical evidence that “constitute[s] the best available evidence of [the Amendment’s] meaning”).

50. *But see* Klarman, *supra* note 6, at 805–19 (arguing forcefully that *Brown* is defensible under the access prong because black Americans were disfranchised throughout the South and suggesting that, had black Americans enjoyed full political access, desegregation in the South may have occurred organically through the democratic process).

receiving important government benefits on fair terms, despite their formal access to the democratic process.

And what of the counter-majoritarian difficulty? Ely's response is as elegant as it is simple. Political process theory does not call on judges to "dictate substantive results" in lieu of democratic majorities.<sup>51</sup> After all, as Ely agrees, "[i]n a representative democracy, value determinations are to be made by our elected representatives."<sup>52</sup> But there are times when our democracy is "systematically malfunctioning," when "the *process* [itself] is undeserving of trust"—in particular, when those in power permit minorities to access the process as a technical matter, but nevertheless act out of prejudice against them.<sup>53</sup> It is on these occasions when judges should intervene to enforce the rules of the game. Ely's theory is thus a "participation-oriented, representation-reinforcing approach to judicial review":<sup>54</sup> judges should act to ensure the integrity of the participatory processes that lie at the heart of our nation's system of governance. Where the other theories of constitutional interpretation fail to align the work of judges with the democratic spirit of our charter, political process theory treats that very spirit as the driving purpose of judicial review. What could be more majoritarian, more democratic than that?

The early 1970s were a tidemark point for political process theory at the Supreme Court.<sup>55</sup> The theory's most ringing endorsement occurred in *Graham v. Richardson*, a 1971 case involving state laws preventing lawfully present noncitizens from receiving welfare benefits.<sup>56</sup> The Court struck down the laws with a direct cite to *Carolene Products*, explaining that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close

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51. ELY, *supra* note 3, at 102–03.

52. *Id.* at 103.

53. *Id.*

54. *Id.* at 87.

55. There is some irony here in two respects. First, political process theory is often associated with the Warren Court. Yet Chief Justice Warren retired in 1969; it is instead during the early years of the Burger Court when footnote four reached the apex of its influence. Second, John Hart Ely published *Democracy and Distrust* in 1980, drawing on the emergence of *Carolene Products* in the 1970s. Yet by the time the book was published, political process theory was already on the decline. See *infra* Section I.B.

56. 403 U.S. 365 (1971). More specifically, *Graham* concerned an Arizona law that required lawfully admitted noncitizens to reside in the United States for fifteen years before receiving benefits as well as a Pennsylvania law forbidding noncitizens from receiving welfare benefits altogether. But see *Mathews v. Diaz*, 426 U.S. 67, 82–83 (1976) (applying rationality review to federal law discriminating on the basis of alienage without regard for political power concerns). For a discussion of potential explanations for the divergent treatment of state and federal laws burdening noncitizens, see Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 *FORDHAM L. REV.* 155, 173–86 (2014).

judicial scrutiny” because “[a]liens as a class are a prime example of a ‘discrete and insular’ minority . . . for whom such heightened judicial solicitude is appropriate.”<sup>57</sup>

The political process rationale underlying *Graham* is easy to appreciate. Aliens are not permitted to vote,<sup>58</sup> and so are uniquely powerless to protect their interests in the pluralist system. And given the stark we-they dynamic that can manifest between citizens and noncitizens, laws depriving aliens from equal receipt of government benefits (despite their lawful presence and their full participation in local, state, and federal taxation) would seem to stem from a special risk of distortion and prejudice in the democratic process, thereby warranting active judicial intervention. Following this process-oriented reasoning, the Court went on to strike down laws forbidding aliens to hold competitive civil service positions,<sup>59</sup> to be admitted to the practice of law,<sup>60</sup> to receive aid for higher education,<sup>61</sup> and to serve as notary publics.<sup>62</sup>

The Court referenced the *Carolene Products* framework in other cases as well. Although it declined to hold that the elderly,<sup>63</sup> poor,<sup>64</sup> and nonnuclear-family cohabitants<sup>65</sup> constitute discrete and insular minorities warranting additional protection, the salient point is that the Court recognized in these cases that heightened scrutiny *would* be appropriate for certain groups lacking the ability to protect themselves politically—and them alone. As the Court explained in *San Antonio v. Rodriguez*, a group may “command extraordinary protection from the majoritarian political process” if it possesses “traditional indicia of

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57. *Graham*, 403 U.S. at 372 (citation omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

58. See 18 U.S.C. § 611 (2012) (federal law proscribing voting by noncitizens in federal elections); ELY, *supra* note 3, at 161 (recognizing that “[a]liens cannot vote in any state”).

59. *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973).

60. *In re Griffiths*, 413 U.S. 717, 718 (1973).

61. *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977).

62. *Bernal v. Fainter*, 467 U.S. 216, 228 (1984).

63. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (“[O]ld age does not define a ‘discrete and insular’ group . . . in need of ‘extraordinary protection from the majoritarian political process.’ Instead, it marks a stage that each of us will reach if we live out our normal span.” (citation omitted)).

64. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973) (“We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. . . . [T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . .”).

65. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (“Close relatives are not a ‘suspect’ or ‘quasi-suspect’ class.”).

suspectness” including, among other things, the fact that it has been “relegated to . . . a position of political powerlessness.”<sup>66</sup>

Reflecting back on the impact of political process theory in an address to the *Columbia Law Review*, Justice Lewis Powell noted that by 1982, *Carolene Products* footnote four had been cited no fewer than twenty-eight times in the Supreme Court Reporter.<sup>67</sup> But just as importantly, Justice Powell pointed out that citation counts could not express the theory’s full reach, given that the theory profoundly influenced the way the justices conceived of the Equal Protection Clause.<sup>68</sup> The Court, it seems, had come around to the idea that politically powerless groups should receive special treatment under the Constitution—treatment that would not be available to more powerful groups burdened by similar laws.<sup>69</sup>

### B. Act II: Anti-Political Process Theory

Political process theory’s heyday did not last long. By the 1980s, leading thinkers from both sides of the political continuum expressed serious concerns with the theory’s ability to defeat the counter-majoritarian difficulty.<sup>70</sup> And as the composition of the Supreme Court shifted, so too did its willingness to grant special judicial solicitude to some groups but not others due to their comparative political power.

The key to process theory’s fall was in its inability to answer in satisfactory terms the following question: *Who should be entitled to heightened protection?*<sup>71</sup> In order for the theory to circumvent the counter-majoritarian difficulty, that question must be susceptible to an

66. *Rodriguez*, 411 U.S. at 28; see also *Lyng*, 477 U.S. at 638 (“As a historical matter, [nonnuclear family units] have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless.”).

67. Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 n.4 (1982).

68. See *id.* (arguing that the “influence of Footnote 4 cannot be measured accurately by simple enumeration of cases in which it has been cited” and noting that the footnote had a “pervasive influence” on the Court’s Equal Protection doctrine).

69. Justice Powell was more circumspect. See *id.* at 1089 (“I do not embrace [political process] theory one hundred percent; nor do I condemn it.”).

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

71. There were other critiques, but none more directly at odds with political process theory’s purported promise of constraining judges to a role consistent with democratic will. Thus, for example, Professor Tribe has taken issue with Ely’s claim that the Constitution is principally concerned with process (and not substance) in the first place. See, e.g., Tribe, *supra* note 5, at 1067. Judge Bork has argued that the problem with granting heightened protection to some groups who lose in the democratic process is that nothing in the Constitution specifically calls for such an approach. BORK, *supra* note 5, at 197–98.



objective, value-free answer. For if heightened constitutional protection is to be doled out to groups based on nothing other than the personal predilections of the unelected judges hearing a case, there is nothing particularly democratic about process-based judicial review.

During process theory's reign, the Supreme Court's primary approach to this puzzle was to inquire whether the group at issue had been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."<sup>72</sup> The Court also considered other factors, such as whether the group suffered a history of discrimination, was the victim of stereotyping, or shared an immutable characteristic,<sup>73</sup> but political powerlessness was the "central process inquiry" and thus the "quintessential process theory concern."<sup>74</sup>

Yet as critics have noted, political powerlessness is not some simple, dichotomous concept,<sup>75</sup> easy to discern as some objective fact.<sup>76</sup> That is because minorities are *supposed* to lack political power.<sup>77</sup> Minority groups lose in the political process all the time, and that is how it should be—no one thinks, for example, that our democracy has fallen victim to some systematic malfunction when the majority imposes a higher income tax on the wealthiest one percent, or when legislatures enact laws punishing the few among us who like to commit burglary.<sup>78</sup> So what is really needed is a way of discerning which groups are losing in the "pluralist's bazaar" for perfectly acceptable reasons

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72. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *see also Plyler v. Doe*, 457 U.S. 202, 218 (1982).

73. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 684–88 (1973) (affording heightened scrutiny to women after examining the nation's history of sex discrimination, "gross, stereotyped distinctions between the sexes," and the immutability of sex as "determined solely by the accident of birth," in addition to the lack of political power held by women); *Rodriguez*, 411 U.S. at 28 (noting relevance of whether a group has been "subjected to . . . a history of purposeful unequal treatment").

74. *See Ortiz, supra* note 1, at 732–35; Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 326 (2016) (describing political powerlessness as the "key issue within suspect class doctrine").

75. *See* Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1536–45 (2015) (noting how courts and scholars have applied at least five different and inconsistent definitions of political powerlessness).

76. *But see id.* at 1594, 1598–99 (arguing that powerlessness is, in fact, objectively ascertainable by modeling "how responsive policy outcomes are to different groups' preferences, controlling for the groups' size and type" and finding black Americans, women, and the poor to be politically powerless by this measure).

77. *See, e.g., Ackerman, supra* note 5, at 719 ("To put the point simply, minorities are *supposed* to lose in a democratic system—even when they want very much to win and even when they think (as they often will) that the majority is deeply wrong in ignoring their just complaints.").

78. *See ELY, supra* note 3, at 154.

and which groups are losing for reasons that, in Ely's own open-ended words, "in some sense are discreditable."<sup>79</sup>

The Court offered its most reasoned answer to this challenge in *City of Cleburne v. Cleburne Living Center*, where it described the core of the political powerlessness inquiry as whether a group has "no ability to attract the attention of lawmakers."<sup>80</sup> At a surface level, this has some appeal: a group that cannot so much as get its voice heard in the pluralist arena is surely one that lacks political power. The problem is, how is one to know whether a group has been heard sufficiently by lawmakers without some substantive, baseline conception of the "proper" amount of attention? One could, in theory, tally up the number of meetings a group is able to get with lawmakers, but even then how do we know the "right" number of meetings a group ought to receive? In the end, *Cleburne's* notion of powerlessness as inability to attract lawmaker attention bottoms out on the same elemental problem: many minority groups aren't *supposed* to get lawmaker attention whenever they want it, which means we need to have an (inescapably substantive) notion of how much is enough.

Still more troubling for process theory is the critique famously levied by Professor Ackerman.<sup>81</sup> Even if one assumes that the *Cleburne* definition of political powerlessness is a workable one, it is not clear that discrete and insular minorities—the kind of groups most often thought of as deserving special protection in our pluralist system, such as black Americans<sup>82</sup>—will be adjudged powerless under that metric to begin with. That is because there are some clear *advantages* to being a discrete and insular group: such groups have lower organization costs and are less susceptible to the free rider problem precisely because they are easily identifiable and concentrated.<sup>83</sup> If anything, "[i]t is the members of anonymous or diffuse groups who . . . have the greatest cause to complain that pluralist bargaining exposes them to systematic—and undemocratic—disadvantage."<sup>84</sup> A judge who takes seriously process theory's call to give special protection to the politically

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79. *Id.* at 152.

80. 473 U.S. 432, 445 (1985); *see also id.* at 472 n.24 (Marshall, J., concurring in the judgment in part and dissenting in part) ("The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs.")

81. Ackerman, *supra* note 5, at 724–31.

82. *But see* Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 66 (2008) (pointing out that black Americans were actually a majority or near-majority in several states in the Jim Crow South).

83. Ackerman, *supra* note 5, at 724–31.

84. *Id.* at 737.

powerless could thus reasonably conclude that (1) black Americans *do* have sufficient power as measured by their ability to elect representatives dedicated to their interests, and (2) it is the middle class that actually lacks political power because that group's diffuseness leaves it unable to block laws forcing it to pay special subsidies to more organized and insular minorities.<sup>85</sup>

Of course, the overriding point of this line of attack is not that judges have picked the wrong groups for special protection, but rather that the very act of choosing the "right" groups is all in the eye of the (judicial) beholder. A theory of constitutional interpretation that can permit judges to give additional scrutiny to laws afflicting the entire middle class as plausibly as it can for laws affecting black Americans is pretty quickly a theory beset by judicial discretion at the cost of democratic legitimacy. That is what political process theory set out to avoid.

Ely apparently recognized that political powerlessness as measured by a group's ability to attract lawmaker attention cannot serve process theory's necessary sorting function.<sup>86</sup> In his view, the better way to distinguish between groups worthy and unworthy of heightened protection lay in social psychology.<sup>87</sup> "The cases where we ought to be suspicious" of a legislative classification are "those involving a generalization whose incidence of counter-example is significantly higher than the legislative authority appears to have thought it was."<sup>88</sup> This will be most often true, Ely notes, when legislators act to benefit people like themselves to the disadvantage of those unlike themselves.<sup>89</sup> Cases where lawmakers benefit others at their own expense, or assist one group at the expense of another (neither of which they belong to) do not raise similar concerns.<sup>90</sup> Critically, Ely notes that social interaction among different groups can reduce the risk of stereotypes. As Ely

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85. *See id.* at 728 ("[I]t is precisely the diffuse character of the majority forced to pay the bill for tariffs, agricultural subsidies, and the like, that allows strategically located Congressmen to deliver the goods to their well-organized local constituents.").

86. *See ELY, supra* note 3, at 153 (arguing that the focus of process theory should "switch[] the principal perspective . . . from the purely political to one that focuses more on the psychology of decision").

87. *Id.*; *see also id.* at 158 ("For years social psychologists have understood . . . that '[t]he easiest idea to sell anyone is that he is better than someone else' . . ." (quoting GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 372 (1954))).

88. *Id.* at 157.

89. *Id.* at 159 ("By seizing upon the positive myths about the groups to which they belong and the negative myths about those to which they don't . . . legislators, like the rest of us, are likely to assume too readily that not many of 'them' will be unfairly deprived, nor many of 'us' unfairly benefitted by a classification.").

90. *Id.* at 159-160.

eloquently puts it, “[t]he more we get to know people who are different in some ways, the more we will begin to appreciate the ways in which they are not, which is the beginning of political cooperation.”<sup>91</sup>

Yet this approach is ultimately dependent on judicial value judgments, too. To know whether a minority group has been the victim of improper stereotyping in the legislature, Ely argues that we need to know whether the majority is interacting with the minority in a way that effectively builds bonds of social empathy.<sup>92</sup> But how do we know if the majority is treating a minority group the way they “should”? Without a baseline value judgment, there is little way to distinguish, for example, among (i) a minority group comprising gun owners who are the target of social hostility in a liberal urban center with restrictive gun control laws, (ii) a group comprising racial minorities in an intolerant community, (iii) a small number of individuals who wish to start a nudist colony despite an ordinance banning public indecency, and (iv) a religious minority that abides by a practice of plural marriage. In each case, legislation disadvantaging the minority group could reflect political powerlessness and thus warrant heightened scrutiny. To Ely, the way to decide whether to grant extra protection is to make a judgment call on which groups have been sufficiently integrated into society to override our concern that the majority may have acted based on improper stereotypes. In other words, Ely would have judges act as social referees, ascertaining whether the majority is interacting “properly” with various minorities.<sup>93</sup> It is not hard to see how this leaves ample room for judges’ personal preferences to enter prominently into the decisional process in any given case.

In the end, the anti-process theory consensus that emerges among leading thinkers proves too much for our protagonist. As then-Associate Justice Rehnquist presaged in a dissenting opinion in 1973:

It would hardly take extraordinary ingenuity for a lawyer to find ‘insular and discrete’ minorities at every turn in the road. Yet, unless the Court can precisely define . . . the terms and analysis it uses . . . the Court can choose a ‘minority’ it ‘feels’ deserves ‘solicitude’ and thereafter prohibit the States from classifying that ‘minority’ differently from the ‘majority.’<sup>94</sup>

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91. *Id.* at 161.

92. As Professor Ortiz observes, mere mixing of groups cannot be enough to build these bonds; no two groups intermingled more than men and women, yet improper gender stereotypes “have long resisted serious revision.” Ortiz, *supra* note 1, at 740.

93. *See id.* at 741 (“Ely’s two major analytical moves—from political to psychological and then to sociological analysis—only displace the point at which substantive values flood in.”).

94. *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

Professor Laurence Tribe (no ideological compatriot of Justice Rehnquist) likewise argued that political process theory “sounds pretty good—until we ask how we are supposed to distinguish such ‘prejudice’ from principled, if ‘wrong,’ disapproval?”<sup>95</sup> In his view,

The crux of any determination that a law unjustly discriminates against a group . . . is not that the law emerges from a flawed process . . . but that the law . . . denies those subject to it a meaningful opportunity to realize their humanity. Necessarily, such an approach must look beyond process to identify and proclaim fundamental substantive rights.<sup>96</sup>

And if that is so, then process theory is no salve to the counter-majoritarian problem because it bottoms out on the need for judicial value judgments.

The Supreme Court began to demonstrate affinity to this critique as early as the 1970s when it refused to extend suspect class status to new groups such as the poor and intellectually disabled.<sup>97</sup> And the Court dealt its fatal blows to political process theory in a pair of affirmative action cases where it explicitly declined to treat a racial group’s powerlessness as the touchstone for strict scrutiny, instead viewing race as a two-way ratchet where laws burdening whites and minorities are to be reviewed on equal terms. Thus, in *Bakke*, five justices agreed that affirmative action programs in higher education should be subject to strict scrutiny even though whites are not a powerless minority.<sup>98</sup> As Justice Powell observed, the political process rationale “has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny”; racial classifications are instead “subject to stringent examination without regard to” a burdened group’s political strength.<sup>99</sup> And in *Croson*, five justices rejected a political process rationale for reviewing affirmative action in government hiring under less stringent scrutiny.<sup>100</sup> Absent

95. Tribe, *supra* note 5, at 1073.

96. *Id.* at 1077.

97. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973) (declining to afford suspect class status to the poor); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985) (same for the intellectually disabled).

98. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978) (Powell, J., joined in relevant part by White, J.) (reviewing affirmative action program under strict scrutiny even though the program did not burden a discrete and insular minority); *id.* at 361–62 (Brennan, J., concurring in the judgment and dissenting in part) (joined by White, J., Marshall, J., and Blackmun, J.) (stating that even in cases where race is used to advantage minorities, “our review under the Fourteenth Amendment should be strict”).

99. *Id.* at 290 (Powell, J.).

100. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those

strict scrutiny into *all* race-based measures, Justice O'Connor explained, "there is simply no way of determining what classifications are 'benign' efforts to assist a powerless group and "what classifications are in fact motivated by illegitimate notions of racial inferiority."<sup>101</sup>

So it was that by the end of Act II, different groups would no longer receive different constitutional protections based on their relative political influence.<sup>102</sup> We now live in an era of anti-political process theory,<sup>103</sup> where the politically powerless and powerful are to be treated the same—or so the standard two-act narrative would have us believe.

## II. ACT III – REVERSE POLITICAL PROCESS THEORY

Over the past quarter century, the Supreme Court has gone beyond treating powerless and powerful groups equivalently under the Constitution's various open-ended provisions. In several lines of cases, the Court has instead reversed political process theory's prescription, extending heightened protection to groups who may reasonably be understood as more politically powerful than others to whom the Court has not afforded similar treatment. This Part canvasses these cases; I return in Part IV to consider whether they might come out differently were one to view the presence of political power as a reason to *defer* to democratically enacted laws rather than the absence of such power as a reason to strike laws down.

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burdened or benefited by a particular classification."); *id.* at 520 (Scalia, J., concurring in the judgment) (same).

101. *Id.* at 493 (plurality opinion); *see also* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1634 (2014) (rejecting the theory that "any state action with a 'racial focus' that makes it 'more difficult for certain racial minorities than for other groups' to 'achieve legislation that is in their interest' [should be] subject to strict scrutiny").

102. By way of postscript, it is notable in *Obergefell* that the Supreme Court did not adopt the Solicitor General's argument in favor of same-sex marriage on the ground that "[c]lassification on the basis of sexual orientation" should be "subject to heightened equal-protection scrutiny" because "lesbian and gay people are a minority group with limited political power." Brief for the United States as Amicus Curiae Supporting Petitioners at 11–12, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004710. Rather than reviving a political power based approach to equal protection, *Obergefell* instead relied principally on the substantive due process right to marriage. *See* 135 S. Ct. at 2599.

103. *See* Soucek, *supra* note 56, at 195 ("[R]ecent cases show no special concern for protecting historically vulnerable groups of people.").

### A. General Personal Jurisdiction

Prior to 2014, it had been settled for more than sixty years that a corporation could be subject to general personal jurisdiction in a given forum state—that is, that the company could be sued in the forum on claims unrelated to its activity therein—so long as the corporation had continuous and systematic contacts with the forum.<sup>104</sup> In an unbroken line, case after case and treatise after treatise repeated this rule.<sup>105</sup> Indeed, “[t]he law was so well settled that large corporations” with substantial contacts in forums outside their places of incorporation and principal places of business “did not even challenge general jurisdiction” in numerous leading cases.<sup>106</sup>

Whatever its merit, this settled rule had the clear benefit of treating large and small businesses alike: two companies with identically continuous and systematic contacts with a forum state were equal before the state’s courts, regardless of whether one was a multinational, big-box retailer and the other a small, family-owned business.

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104. See *infra* notes 105–106 and accompanying text. General jurisdiction has also always been permissible in a state where a corporate defendant is incorporated or has its principal place of business. But the real issue is whether an individual plaintiff who lives in some other state where a corporate defendant has a significant presence can bring her action against the company in that other state—a question that can often determine whether the plaintiff’s claim gets heard at all in light of the significant costs associated with forcing the plaintiff to retain counsel and litigate a claim across the country.

105. See, e.g., *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (recognizing that “continuous corporate operations within a state” may be “so substantial” as to permit suit against a company on claims “arising from dealings entirely distinct from [its] activities”); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 (1952) (same); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (general jurisdiction permissible where corporation engages in “continuous and systematic general business contacts” with the forum); 36 AM. JUR. 2D *Foreign Corporations* § 417 (2011) (same); 16D CORPUS JURIS SECUNDUM *Constitutional Law* § 1937 (2005) (same). Even after the Supreme Court’s 2011 holding in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), that general jurisdiction is limited to places where corporations are “at home,” commentators continued to agree that the longstanding “continuous and systematic” contacts test was good law. See, e.g., 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1067.5 (Supp. 2014) (“*Goodyear* . . . simply reaffirms that defendants must have continuous and systematic contacts with the forum in order to be subject to general jurisdiction.”).

106. Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 105 (2015). Thus, for example, Cornett and Hoffheimer point out that the manufacturers in the *World-Wide Volkswagen* and *Goodyear* cases did not raise personal jurisdiction defenses because they assumed they would be subject to general jurisdiction based on their extensive manufacturing and sales operations in the forum states. *Id.* at 105 n.13.

The Supreme Court made a “radical departure” from this approach in its 2014 decision in *Daimler AG v. Bauman*,<sup>107</sup> holding that (outside of a company’s state of incorporation and principal place of business) corporate general jurisdiction would not be based on a company’s in-state contacts alone, but rather on an “appraisal of a corporation’s activities in their entirety, nationwide and worldwide.”<sup>108</sup> The bigger the company, in other words, the more likely it would be able to escape general jurisdiction.

To fully appreciate *Daimler*’s significance requires a brief recap of the law that preceded it. As is familiar to first-year civil procedure students, the Supreme Court held in the canonical 1945 case of *International Shoe* that state courts may exercise power over the person of out-of-state corporate defendants without contravening the Due Process Clause so long as the corporation possesses sufficient contacts with the state.<sup>109</sup> *International Shoe*’s contacts-based approach was permissive, not mandatory, however, which meant that it was up to each state to decide by legislative act just how far to go. A number of states responded in the late 50s and 60s by enacting long-arm statutes extending to the limits of the Due Process Clause; others enacted statutes that permitted jurisdiction based on certain common acts within the state, although these, too, were often construed as reaching to the outer limit of the Due Process Clause.<sup>110</sup>

Critically, state legislatures enacted these statutes in the immediate aftermath of the Supreme Court’s 1952 decision in *Perkins v. Benguet Consolidated Mining Co.*,<sup>111</sup> which the Court has since called the “textbook case of general jurisdiction appropriately exercised over a foreign corporation.”<sup>112</sup> *Perkins* involved a lawsuit against a Philippine corporation brought in an Ohio state court where the underlying claim had nothing to do with the state. The company argued that the Due Process Clause did not permit it to be haled into Ohio court, but the Supreme Court disagreed. The Court held that the presence of the

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107. Tanya J. Monestier, *Where Is Home Depot “At Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 236 (2014).

108. 134 S. Ct. 746, 762 n.20 (2014). For full disclosure, I clerked at the Supreme Court during the Term in which *Daimler* was issued. The opinions expressed in this Article reflect only my own views and not those of the Court or any of its individual Justices.

109. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

110. See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 497 (2004) (noting that twenty state long-arm statutes explicitly authorize personal jurisdiction to the limits of the Due Process Clause and twelve have been interpreted to do the same by state courts).

111. 342 U.S. 437 (1952).

112. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 928 (2011) (internal quotation marks omitted).



company's president, corporate files, and funds in Ohio amounted to a "continuous and systematic, but limited, part of its general business" in Ohio that was "sufficiently substantial" to permit general jurisdiction.<sup>113</sup>

As a consequence, when state lawmakers decided shortly after *Perkins* to authorize personal jurisdiction to the full extent of the Due Process Clause, the resulting statutes are best understood as incorporating *Perkins's* holding. That is, state legislatures would have understood their statutes to confer general jurisdiction at least over foreign<sup>114</sup> businesses that, like the defendant in *Perkins*, carry on "continuous and systematic" contacts in the state (such as the presence of some corporate files, bank accounts, and high-level employees), even if such contacts amount to only a "limited part of [the defendant's] general business" across the country and world.<sup>115</sup> To be sure, state lawmakers *could have* chosen a more restrictive approach under which corporations would be subject to general jurisdiction only if, for example, the state were the company's place of incorporation or principal place of business. But they chose not to.

The Supreme Court displaced this legislative choice in *Daimler*. The case involved claims by twenty-two Argentinian residents against the German auto manufacturer on the theory that Daimler's Argentinian subsidiary collaborated with state security forces to kidnap and torture certain Argentinian workers (including the plaintiffs).<sup>116</sup> Plaintiffs brought their suit in California federal court, and Daimler moved to dismiss for lack of personal jurisdiction.<sup>117</sup> Although the suit had no connection to California, and although Daimler itself (a German company) had little direct contact with the State, Plaintiffs argued that the court could exercise general jurisdiction over Daimler by imputing to Daimler the considerable California contacts of its U.S. subsidiary, MBUSA.<sup>118</sup> For its part, Daimler did not dispute that MBUSA had sufficient contacts with California (in the form of numerous offices, employees, and billions of dollars of vehicle sales) to warrant general jurisdiction over MBUSA; nor did it dispute that if those contacts could be imputed to Daimler, they would justify general jurisdiction over

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113. *Perkins*, 342 U.S. at 438, 447–48.

114. By "foreign corporation," I mean a company neither incorporated in nor having its principal place of business in the forum state. A foreign corporation so-defined could accordingly be incorporated elsewhere in the United States, or abroad.

115. *Perkins*, 342 U.S. at 438.

116. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

117. *Id.* at 752.

118. *Id.*

Daimler, too.<sup>119</sup> Those concessions were unremarkable insofar as the absolute quantum of MBUSA's California contacts far exceeded the contacts that the corporate defendant in *Perkins* had with Ohio. Daimler instead argued that MBUSA's contacts could not be attributed to Daimler in the first place.<sup>120</sup>

The district court agreed with Daimler, but the Ninth Circuit reversed, holding that MBUSA's California contacts were attributable to Daimler on an agency theory.<sup>121</sup> Daimler petitioned the Supreme Court for review of this attribution holding, and the Court granted cert on that question.<sup>122</sup>

In its merits brief, however, Daimler raised the argument it had conceded: that even if MBUSA's contacts were attributable to Daimler, and even if those contacts were enough for MBUSA to be subject to general jurisdiction in California, Daimler "would still be a German corporation headquartered in Germany" and thus not itself subject to general jurisdiction under the Due Process Clause.<sup>123</sup> The import of Daimler's argument was clear. If accepted, general jurisdiction would no longer be based solely on the quantum of a company's *absolute* level of in-state contacts, the approach taken by the Supreme Court itself in *Perkins* and reflected in state long-arm statutes. Courts would instead measure a company's in-state contacts *proportionally* against the company's nationwide and worldwide business operations.<sup>124</sup> Under such an approach, large foreign corporations (like Daimler) with a pervasive presence in many forums across the United States and the world would be free from general jurisdiction in all of them precisely because of their extensive contacts elsewhere.<sup>125</sup> Smaller businesses with more limited foreign presences would have no such luck.

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119. *Id.* at 758; *see also id.* at 763 (Sotomayor, J., concurring). Note that MBUSA was neither incorporated in nor had its principal place of business in California, meaning that its contacts with the state represented the only basis for general jurisdiction. *Id.* at 751.

120. *Id.* at 752–53.

121. *Id.* at 753.

122. Petition for Writ of Certiorari at \*i, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965), 2012 WL 379768 (question presented is "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State").

123. Brief for Petitioner at \*31 n.5, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3362080; *see also* 134 S. Ct. at 764 (Sotomayor, J., concurring in the judgment) ("[T]he Court decides this case on a ground that was neither argued nor passed on below, and that Daimler raised for the first time in a footnote to its brief.").

124. *See Daimler*, 134 S. Ct. at 762 n.20.

125. *See id.* at 760 (holding that even if MBUSA is subject to general jurisdiction in California, the same contacts would be too "slim" for the same outcome for Daimler). A large domestic corporation would at least be susceptible to general jurisdiction in the place of its incorporation and principal place of business.

The Court agreed with Daimler. Even if MBUSA's significant California contacts could be imputed to Daimler, and even if those contacts were enough to subject a business like MBUSA to general jurisdiction in California, the Court reasoned, they were not sufficient to yield the same result for a larger company like Daimler.<sup>126</sup> To the extent the Court offered any first-principles defense for this ruling, it rooted its decision in its concern that even large companies should be subject to general jurisdiction in a small, predictable number of states.<sup>127</sup>

To see how larger corporations are now treated more favorably than their small business competitors, consider two different companies. One is a family-owned business that specializes in the sale of electronics.<sup>128</sup> The company is headquartered and incorporated in New York and operates stores in New York, New Jersey, Connecticut, and Pennsylvania, with the vast majority of its non-New York stores located in New Jersey.<sup>129</sup> The second company is Apple, headquartered and incorporated in California.<sup>130</sup> Now imagine that the two companies are the target of separate lawsuits in New Jersey court (where our imaginary plaintiffs reside), and that each suit alleges that a company employee tortiously harassed a customer who tried to return a defective product. (Assume that the suit against Apple is founded on allegations

126. *Daimler*, 134 S. Ct. at 760:

Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.

127. *See id.* at 761–62:

If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

(internal quotation marks omitted).

128. For example, P.C. Richard & Son, which is a family-owned appliance, television, and electronics store. *See, e.g., P.C. Richard & Son*, WIKIPEDIA, [https://en.wikipedia.org/wiki/P.C.\\_Richard\\_%26\\_Son](https://en.wikipedia.org/wiki/P.C._Richard_%26_Son) (last visited July 15, 2017) [<https://perma.cc/2H8F-SQSP>].

129. *See id.* (listing New York corporate headquarters); Searchable New York Corporations Database, NEW YORK DEPARTMENT OF STATE, DIVISION OF CORPORATIONS, STATE RECORDS & UCC, <https://www.dos.ny.gov/corps/> (last visited July 15, 2017) [<https://perma.cc/7NX5-DYYX>] (follow "Corporations and Business Entity Database Searches" hyperlink; then search for "P.C. Richard & Son") (listing P.C. Richard & Son, LLC as incorporated in New York); Store Locator, P.C. RICHARD & SON, <http://www.pcrichard.com/storelocator/store-landing.jsp> (last visited July 15, 2017) [<https://perma.cc/HA7X-W6K8>] (listing store locations).

130. *Apple Inc.*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Apple\\_Inc](https://en.wikipedia.org/wiki/Apple_Inc) (last visited July 15, 2017) [<https://perma.cc/S9SR-HBFD>].

that physically took place in California and that the suit against the family-owned business was based on allegations at a store in Pennsylvania.) May a New Jersey court compel either defendant to respond to the suit?

For Apple, the answer is no.<sup>131</sup> The suit itself has no connection to New Jersey (because the underlying events occurred in California), so the court cannot exercise specific jurisdiction.<sup>132</sup> And Apple can escape general jurisdiction under *Daimler* given Apple's extensive "nationwide and worldwide" presence. As *Daimler* holds, "[a] corporation that operates in many places can scarcely be deemed at home [and subject to general jurisdiction] in all of them."<sup>133</sup> Thus, despite the fact that Apple has a pervasive presence in New Jersey (including \$182.8 billion in sales and twelve stores with numerous employees), a court would hold that it is fundamentally unfair to require Apple to defend the case in New Jersey.<sup>134</sup>

The family-owned business, by contrast, might well be put to the burden of defending the case in New Jersey.<sup>135</sup> That is because, unlike Apple, the small business does not have a pervasive "nationwide and worldwide" presence to offset its substantial New Jersey contacts; the small business is instead capable of being at home both in New York (where it is incorporated and has its headquarters) and New Jersey (where most of its non-New York stores are located). Reflecting on this incongruity, Justice Sotomayor lamented in her separate opinion in *Daimler* that under the majority's rule, "a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum," whereas "a small business will not be."<sup>136</sup>

But that is not the only comparative advantage that large corporations enjoy when it comes to evading suit on procedural grounds. Large corporate defendants are also much better off than individual defendants, a fact that may be even more troubling. In *Burnham v.*

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131. See *Gray v. Apple Inc.*, No. 13-CV-7798(KM)(MAH), 2016 WL 4149977, at \*4 (D.N.J. Aug. 3, 2016).

132. *Id.* at \*3.

133. *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20 (2014).

134. *Gray*, 2016 WL 4149977, at \*4 ("[T]hese business contacts, although obviously substantial, continuous, and systematic, do not displace the . . . default rule of *Daimler*.").

135. For support, a plaintiff could point to *Daimler* itself, where the Court proceeded on the assumption that MBUSA would be "at home" in California due to its extensive presence there, even though it was incorporated and principally based elsewhere. See 134 S. Ct. at 758 (accepting defendants' concession throughout the litigation that MBUSA is "at home" in California, but not accepting the same concession as to *Daimler* itself).

136. 134 S. Ct. at 772 (Sotomayor, J., concurring).

*Superior Court of California, County of Marin*, the Supreme Court held that an individual defendant is subject to general jurisdiction in a particular forum state if she makes a *single* visit to the state and is served with process while there.<sup>137</sup> Yet where that contact would be sufficient to justify general jurisdiction over the individual defendant, a large corporation can evade general jurisdiction in the same state despite a far more pervasive presence, whether measured in terms of physical storefronts and manufacturing facilities, number of employees, or even billions of dollars' worth of sales—as long, of course, as the corporation is big enough to have extensive contacts across the country and world as well.<sup>138</sup> To continue with our running example, this means Apple would be able to sue our hypothetical customer (perhaps for defamation, in retaliation for the customer's suit) *in any state in the country* where the customer happens to visit so long as Apple serves him with process there. Yet the only forum where the customer can sue Apple is California.

### *B. Waiver Rules for Sovereign & Criminal Defendants*

Another doctrinal area in which the Supreme Court has afforded special protection to a powerful group that it has withheld from a similarly situated, arguably less powerful one is with respect to the waiver rules it has applied to sovereign and criminal defendants.

Starting with sovereign defendants, it is a “point of departure unquestioned” that “neither a state nor the United States can be sued as defendant in any court in this country without their consent.”<sup>139</sup> States and the federal government accordingly enjoy a jurisdictional immunity from suit,<sup>140</sup> although that immunity can be waived.<sup>141</sup> The critical question that often arises in cases involving government defendants is thus whether the sovereign has *in fact* waived its immunity from the suit at hand.<sup>142</sup>

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137. 495 U.S. 604 (1990).

138. See *Daimler*, 134 S. Ct. at 766–67 (Sotomayor, J., concurring in the judgment); *Gray*, 2016 WL 4149977, at \*4.

139. See *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883). But see Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001) (arguing that “sovereign immunity, for government at all levels, should be eliminated by the Supreme Court”).

140. See *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (“Sovereign immunity is jurisdictional in nature.”).

141. See John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771.

142. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 241 (1984) (recognizing that a “sovereign’s immunity may be waived” and examining whether “the State of California has waived its immunity to suit in federal court”). Such a waiver typically happens through one of

In some cases, the text of the statute in which the waiver of sovereign immunity is allegedly found either obviously does or does not constitute an applicable waiver.<sup>143</sup> In other cases, however, the relevant statute may not be perfectly clear in either direction. The issue that arises in these cases is how a court should go about deciding if the statute amounts to a waiver. Should the court approach the task as it would any other issue of statutory interpretation—that is, should it use “traditional tools of statutory interpretation—to examine markers of congressional intent”?<sup>144</sup> Or should it adopt a strong presumption in the sovereign’s favor and decline to find a waiver of immunity so long as the statute at issue may be plausibly (even if not best) interpreted that way?

The Supreme Court has adopted the latter approach. In a long legacy of cases, it has announced that a waiver of sovereign immunity must be a “clear declaration” by the sovereign<sup>145</sup> and “strictly construed, in terms of its scope, in favor of the sovereign.”<sup>146</sup> The ultimate source of these clear statement and strict construction rules is no mystery: the Court has explained that they are rooted in a concern for “weighty and constant values” of “constitutional” character.<sup>147</sup> The upshot of this constitutional concern is that even where a textually ambiguous statute is best understood in light of its context, purpose, and legislative history to waive a sovereign’s immunity, the Supreme Court will nonetheless permit the sovereign to evade liability for the wrongs it has committed.<sup>148</sup>

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three routes: the sovereign may voluntarily waive its immunity as a unilateral act; Congress may enact a federal statute inducing states to waive their immunity in exchange for federal funds; or Congress may abrogate a state’s immunity using its Fourteenth Amendment enforcement power. See Aaron Tang, *Double Immunity*, 65 STAN. L. REV. 279, 290–91 (2013) (describing categories of waivers).

143. *Compare, e.g., Meyer*, 510 U.S. at 480, 483 (holding that a provision of federal law providing that the Federal Savings and Loan Insurance Corporation “shall have power . . . [t]o sue and be sued” constitutes a clear waiver of the entity’s sovereign immunity), *with Orff v. United States*, 545 U.S. 596, 601–02 (2005) (holding that a statute that grants consent “to join the United States as a necessary party defendant in any suit to adjudicate” certain contractual rights does not waive the government’s immunity from suit where a plaintiff sues the United States alone).

144. *Yates v. United States*, 135 S. Ct. 1074, 1087 (2015).

145. *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (internal quotation marks omitted).

146. *Lane v. Pena*, 518 U.S. 187, 192 (1996); see generally Nagle, *supra* note 141 (discussing clear statement rules applicable to sovereign immunity waivers). *But see Sisk, supra* note 14, at 1254 (arguing that the strict construction canon for waivers of federal immunity has “fallen into twilight” in a number of recent cases).

147. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991).

148. Indeed, the Supreme Court has gone so far as to hold that when considering a sovereign immunity defense, “evidence of congressional intent must be both unequivocal and textual,” which is to say that “recourse to legislative history” is both “unnecessary” and “futile.” *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989).

To better appreciate the significance of this approach, consider *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, which involved claims by an association of nursing homes that the State of Florida had underpaid Medicaid reimbursement amounts by failing to implement a cost-based payment system in the time frame required under federal law.<sup>149</sup> The threshold issue in the case was whether the State of Florida had waived its immunity. To that point, the nursing homes pointed out that the State had enacted a law deeming the Florida Department of Health and Rehabilitative Services—the specific state defendant in the case—a “body corporate” with “the power . . . to sue and be sued.”<sup>150</sup> Similar “sue and be sued” language had been found in previous cases to amount to a clear waiver of *federal* sovereign immunity, and so one might have thought the issue easily resolved in favor of the nursing homes.<sup>151</sup> For its part, the State argued that a waiver of immunity should be found “only where stated by the most express language,” which in its view was not present here.<sup>152</sup>

The Court sided with the sovereign defendant. The Florida statute did not waive the State’s immunity, the Court reasoned, because it was not sufficiently clear.<sup>153</sup> While the statute’s concession that the Department could “be sued” was naturally viewed as a waiver of immunity, that waiver could plausibly be construed as extending only to suits in state court, not federal court.<sup>154</sup> And critically, rather than asking whether that state-court-only interpretation was the better one in light of the statute’s text, purpose, and history (which said nothing about the distinction between state and federal court suits), the Court ruled for the sovereign defendant on the rationale that the statutory waiver merely *might* be interpreted in its favor.<sup>155</sup>

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149. 450 U.S. 147, 148 (1981).

150. *Id.* (quoting FLA. STAT. § 402.34 (1979)).

151. *See, e.g.,* FDIC v. Meyer, 510 U.S. 471, 480 (1994) (discussing the Court’s history of liberally interpreting “sue-and-be-sued waivers”).

152. *Fla. Dep’t of Health & Rehab. Servs.*, 450 U.S. at 150 (internal quotation marks omitted).

153. *Id.*

154. *Id.*

155. *Id.* For another example of the powerful impact of the clear statement sovereign immunity rule, consider *Dellmuth v. Muth*, where the Supreme Court dismissed a suit brought by parents of a disabled child who was forced to transfer to a private school when the public school where he was enrolled took more than a year to review challenges to his individualized education plan. 491 U.S. 223, 225–26 (1989). The Court refused to find a waiver of the state’s immunity even though the statute at issue, the Education of the Handicapped Act (EHA), was “replete with references to the states.” *Id.* at 232 (internal quotation marks omitted). Indeed, the Court ruled against the parents despite conceding that the EHA’s “statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA.”

Another more recent example highlights the degree to which the Court's special sovereign immunity waiver rule benefits government defendants. In *Sossamon v. Texas*, a Texas inmate sued the State over a prison policy that prohibited inmates from using a particular prison chapel for religious worship.<sup>156</sup> The inmate alleged that this policy violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which forbids substantial governmental burdens on religious exercise unless they are "the least restrictive means of furthering" a "compelling governmental interest."<sup>157</sup> No party disputed that Texas had waived its immunity from the inmate's *suit* by accepting federal funds pursuant to RLUIPA's clear statement that "[a] person may assert a violation of [the statute] as a claim . . . in a judicial proceeding and obtain appropriate relief against a government."<sup>158</sup> Texas instead argued that it had not waived its immunity from the particular remedy sought in the case—monetary damages—because a *second* layer of its sovereign immunity was implicated. This second layer, Texas claimed, required an additional clear statement of waiver as to the State's immunity from monetary relief even in a suit to which it had already consented.<sup>159</sup>

Of course, an honest reading of the very provision of RLUIPA that waived the State's immunity from suit also suggests that the State waived its immunity from monetary damages. That provision authorizes inmates not just to bring actions "against a government" defendant, but also to "obtain *appropriate* relief," and it is a long-standing presumption in American law that monetary relief is by default the appropriate remedy unless parties specifically decide otherwise.<sup>160</sup> Indeed, excluding a monetary remedy due to the absence of an additional clear statement regarding damages would mean presuming that Congress, by authorizing suits against states for

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*Id.* In the Court's view, "such a permissible inference, whatever its logical force, would remain just that: a permissible inference." *Id.*

156. 563 U.S. 277, 282 (2011).

157. *Id.* at 281 (citing 42 U.S.C. § 2000cc-1(a) (2012)).

158. *Id.* at 282 (quoting 42 U.S.C. § 2000cc-2(a)).

159. See Brief for the Respondents at 13, *Sossamon*, 563 U.S. 277 (No. 08-1438), 2010 WL 3806515:

Congress may not *presume* that the full panoply of judicial relief will be available in the course of requiring a waiver from suit. On the contrary, "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims[.]"

(first alteration in original).

160. See, e.g., *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992) ("[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief.").



“appropriate relief,” actually meant only to permit suits for injunctive relief, even though such relief is the remedial exception—and often the more intrusive form of relief at that.<sup>161</sup>

Yet the Supreme Court did not find this logic persuasive. Even though the Court agreed that it was a “plausible interpretation” to construe the State’s waiver of its immunity from suits for “appropriate relief” as extending to ordinary claims for ordinary damages, the Court held that the phrase “appropriate relief” was not “so free from ambiguity that we may conclude that the states . . . have unequivocally expressed intent to waive their sovereign immunity to suits for damages.”<sup>162</sup> A sovereign defendant sued for damages thus gets the benefit of a strict construction rule not just once, but twice: the court will dismiss a suit against the sovereign unless it has unequivocally waived its immunity from suit, and even if such a waiver is found, the sovereign may still avoid liability if the relevant statute does not explicitly reference monetary damages.

So the Supreme Court has gone out of its way to grant extra protection to sovereign defendants when deciding whether they have waived their right to immunity.<sup>163</sup> But it has not done the same when the waiver of other constitutional rights is at issue, even when those rights are held by less powerful individuals in more high-stakes settings.

Take the Fifth Amendment right against self-incrimination.<sup>164</sup> The Supreme Court explained in *Miranda v. Arizona* that this “privilege is so fundamental to our system of constitutional rule” that persons subjected to custodial interrogation must be informed that they have the right to remain silent.<sup>165</sup> Yet the Court has not held that waivers of this critical right will be subject to a strict, clear statement rule akin to the rule for discerning whether a sovereign has waived its immunity. Rather, “a waiver of *Miranda* rights may be implied through the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.”<sup>166</sup> In other words, a suspect’s

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161. See Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1329 (2001).

162. *Sossamon*, 563 U.S. at 288 (emphasis added).

163. The Supreme Court itself has characterized this immunity as a right held by sovereigns. See *Alden v. Maine*, 527 U.S. 706, 741 (1999) (“[T]he sovereign’s right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution.”).

164. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself.”).

165. 384 U.S. 436, 467–68 (1966).

166. *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010) (internal quotation marks omitted).

silence—the active exercise of the very right he seeks to preserve—can actually be an indicator that the suspect intended to *waive* his rights. The Supreme Court accordingly held in *Berghuis v. Thompkins* that a suspect who remained virtually silent during nearly three hours of questioning nonetheless waived his right against self-incrimination when he answered an officer's question.<sup>167</sup> The Court reasoned that suspects who seek to avail themselves of their right against self-incrimination should instead proactively assert that right by “unambiguously invok[ing]” *Miranda* and “end[ing]” the interrogation.”<sup>168</sup>

That is exactly the opposite of the rule enjoyed by sovereign defendants, who will be presumed to *retain* their right to immunity unless they have unequivocally waived it. Illustrating the reach of this rule, the Eighth Circuit has held in the aftermath of *Berghuis* that a criminal suspect's statements to police that “Nah, I don't want to talk man” and “No, I don't think I wanna” (in response to police asking whether he would like to answer questions) were “not an unambiguous invocation of [the] right to remain silent” such as would be needed to trigger the right's protections.<sup>169</sup>

A similar approach exists in the context of a suspect's right to counsel during police interrogation. In *North Carolina v. Butler*, the Supreme Court explicitly rejected a rule under which suspects must expressly waive their right to counsel before their statements may be admitted against them (the analogous approach to waiver taken in the sovereign immunity context).<sup>170</sup> The Eleventh Circuit has thus held that a defendant waived his right to have counsel present during police interrogation even though the defendant refused to sign a form waiving his *Miranda* rights and asked police officers to “go ahead and run the lawyers” before questioning.<sup>171</sup>

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167. *Id.* at 386–87.

168. *Id.* at 386. The *Berghuis* Court found support for an unambiguous invocation rule in its felt need for “an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed.” 560 U.S. at 381 (internal quotation marks and alterations omitted). Of course, the strict construction rule that sovereign defendants enjoy in the immunity context is equally (or perhaps more) objective and easy to apply—that is, the Court could have held that individual suspects must unambiguously *waive* their right to silence before police can question them. The need for a bright-line rule, in other words, cannot alone explain why the Supreme Court has required criminal suspects to unambiguously *invoke* their rights, while at the same time granting sovereign defendants immunity unless they unambiguously *waive* them.

169. *United States v. Adams*, 820 F.3d 317, 320–23 (8th Cir. 2016).

170. 441 U.S. 369, 375–76 (1979) (“[A]n explicit statement of waiver is not invariably necessary to support a finding that the defendant waived . . . the right to counsel . . .”).

171. *Mincey v. Head*, 206 F.3d 1106, 1132 (11th Cir. 2000).

These cases demonstrate that even as government defendants receive the benefit of all doubt (including in situations where a good faith reading of the relevant statutes reveals that the government intended to waive its immunity), criminal suspects get no such solicitude.<sup>172</sup> Indeed, even suspects who try proactively to invoke their rights—akin to a sovereign defendant passing a law that affirmatively invokes its immunity—are routinely found to have waived them nonetheless.<sup>173</sup>

### C. Opting Out from Corporate & Union Political Speech

The general jurisdiction and sovereign immunity cases represent the clearest examples of the Court's practice of granting constitutional protection to groups that are reasonably regarded as more powerful than similarly situated counterparts who have been denied protection. But there are arguably others, too. I touch more briefly on three candidates now, starting with unions in the aftermath of *Citizens United*.

No argument concerning politically powerful groups and the Constitution would be complete without some discussion of *Citizens United*,<sup>174</sup> a probusiness ruling that has been prominently criticized as among the worst decisions of the current Supreme Court era.<sup>175</sup> The core holding of *Citizens United*, though, does not implicate reverse political process theory. That is because the principle underlying the Court's decision to allow unlimited independent campaign expenditures by corporations was one of *equality* between corporations and

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172. Not every right enjoyed by the accused is subject to such a loose waiver rule. For example, a criminal defendant may plead guilty and waive her right to trial only if the waiver is voluntary and knowing. See *Brady v. United States*, 397 U.S. 742, 748 (1970). One explanation for this divergence is that the conservative justices of the modern Supreme Court era have simply been skeptical of *Miranda's* wisdom in the first place, adopting a strict waiver rule in order to undermine that decision without directly overruling it. But the analogy to *Brady* itself is revealing. In that case, the Court rooted the voluntary and knowing waiver requirement in the fact that a defendant who pleads guilty “stands as a witness against himself,” an act from which “he is shielded by the Fifth Amendment from being compelled to do.” *Id.* Yet that is what is at stake in the interrogation context, too.

173. See *supra* notes 167, 169 and accompanying text.

174. *Citizens United v. FEC*, 558 U.S. 310 (2010).

175. See, e.g., Jeffrey Rosen, *Ruth Bader Ginsburg Is an American Hero*, NEW REPUBLIC (Sept. 28, 2014), <https://newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise> [<https://perma.cc/XZW3-FT2H>] (Justice Ginsburg names *Citizens United* as the worst ruling issued by the current Court); Nick Wing, *John McCain: Citizens United Is 'Worst Decision Ever' . . . 'Money Is Money,' Not Free Speech*, HUFFINGTON POST (Oct. 12, 2012, 9:40 AM), [http://www.huffingtonpost.com/2012/10/12/john-mccain-citizens-united\\_n\\_1960996.html](http://www.huffingtonpost.com/2012/10/12/john-mccain-citizens-united_n_1960996.html) [<https://perma.cc/2FUT-RG2N>] (same for Senator John McCain).

individuals—not a desire to afford corporations *additional* constitutional safeguards.<sup>176</sup> In that sense, *Citizens United* may fit most neatly in Act II’s anti-political process narrative, as a continuation of a line of cases treating corporations on equal constitutional terms with less powerful individuals.<sup>177</sup>

There is, however, a subtle way in which *Citizens United* (in concert with prior Supreme Court rulings) arguably did grant corporations special constitutional treatment compared to less powerful entities. After *Citizens United*, both labor unions and corporations are able to spend unlimited general treasury funds on political expenditures. But whereas labor unions must allow employees to opt out from those expenditures as a matter of First Amendment law,<sup>178</sup> corporations are permitted to spend their funds without affording a similar opt-out right to shareholders.<sup>179</sup> As Professor Sachs has persuasively explained, defenses of this asymmetry on grounds of differential state action or compulsion are tenuous at best.<sup>180</sup> Thus, to the extent unions may be understood as possessing less political

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176. See *Citizens United*, 558 U.S. at 365 (ruling that “the Government may not suppress political speech on the basis of the speaker’s corporate identity”). *Citizens United*’s ruling regarding corporate campaign expenditures is not a clear instance of reverse political process theory at work for another reason. The ruling may be best understood in terms of Ely’s access prong, rather than the prejudice prong (the subject of this Article). Under the former, intervention is warranted to protect “the channels of political participation and communication.” See ELY, *supra* note 3, at 76. The arguments over *Citizens United* thus address whether limits on corporate expenditures promote or frustrate political dialogue; they are not about corporations’ power to protect themselves in the political process. See, e.g., Pamela S. Karlan, *The Supreme Court 2011 Term Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 30 (2012) (identifying access prong arguments regarding *Citizens United*); Evan Barret Smith, *Representation Reinforcement Revisited: Citizens United and Political Process Theory*, 38 VT. L. REV. 445, 446 (2013) (same). To see the point more clearly, imagine a law forbidding political signs in the front yard of any house worth more than one million dollars. That law would (and should) be suspect under the access prong, notwithstanding that the affected homeowners likely have substantial power in the usual political channels.

177. See, e.g., *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (holding that the Fifth Amendment Double Jeopardy Clause applies to corporations); *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (rejecting claim that corporations do not possess Fourth Amendment rights).

178. See Sachs, *supra* note 19 (identifying and criticizing this asymmetry); see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977) (recognizing an opt-out right for public employees); *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988) (finding the same for private employees ostensibly as a matter of statutory interpretation, but guided by First Amendment avoidance concerns).

179. See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 n.34 (1978) (rejecting the analogy between compelled speech claims by dissenting employees in the union context and shareholders in the corporate context).

180. See Sachs, *supra* note 19, at 827–51. Note that there is arguably greater state action in the public employment context, since in that setting government directly requires workers to contribute fees to a union as a condition of retaining one’s job. But the private employment and private investment contexts seem quite analogous.

influence than corporations—a debatable proposition,<sup>181</sup> to be sure—one might view this asymmetry as another instance of the Court granting heightened judicial solicitude to more powerful entities.<sup>182</sup>

#### *D. Discriminatory Purpose & Equal Protection*

Professor Reva Siegel has suggested another respect in which the Supreme Court has arguably conferred greater protection upon more powerful groups than less powerful ones: in the interaction between the Court's approach to affirmative action policies and its discriminatory purpose framework for reviewing facially neutral laws with a disparate racial impact.<sup>183</sup> More specifically, whereas affirmative action programs burdening whites are reviewed under strict scrutiny, facially neutral laws burdening racial minorities are reviewed under a discriminatory purpose framework that is “extraordinarily difficult” for plaintiffs to satisfy.<sup>184</sup>

The two kinds of laws at issue are, of course, distinct in an important way: the affirmative action policies explicitly reference race, whereas the policies challenged under the discriminatory purpose framework do not. That may be reason enough to reject this as an instance of powerful entities receiving *special* protection, since one could conclude that the different outcomes are driven by categorically different kinds of laws.<sup>185</sup>

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181. Compare Liz Kennedy & Sean McElwee, *Do Corporations & Unions Face the Same Rules for Political Spending?*, DEMOS 3 fig.1 (July 23, 2014), <http://www.demos.org/sites/default/files/publications/CorpExplainer.pdf> [<https://perma.cc/A36V-MTW8>] (noting that political spending during the 2012 election cycle by 501(c)(4) organizations, largely comprising corporate dark money, exceeded that of labor unions by roughly eight times), with WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 153 (1994) (finding organized labor to possess greater ability to obtain legislative reversal of unfavorable judicial rulings than big business).

182. A second way in which the Court arguably affords corporations special protection (albeit of a subconstitutional nature) is through its certiorari process, where the Court grants discretionary review in a disproportionate number of cases affecting business interests. See Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471 (2013).

183. See Siegel, *supra* note 20, at 44–51; see also Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1609 (2013) (arguing that, due to the Court's move from pluralist interest group theory to public choice theory, the Court now shows “trust of democratic majorities’ treatment of minorities” even as it “closely scrutinize[s] laws enacted by majoritarian institutions that” burden majority groups).

184. Siegel, *supra* note 20, at 3.

185. More specifically, one could believe the Equal Protection Clause instantiates an anticlassification principle rather than an ant子ordination principle, in which case the mere mention of race in the affirmative action policies is what is driving the results in these cases. See generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification*

Yet as Professor Siegel argues, the Court's "divided" approach to equal protection is incongruous in an important sense. What drives the Court's concern for the rights of racial majority members in the affirmative action context is *effect*, not *purpose*: whites who are denied a benefit receive the protection of strict scrutiny precisely because of the material and stigmatic effects of the state's policies.<sup>186</sup> These harmful effects trump the fact that the state in adopting an affirmative action policy may well have been motivated by the perfectly benign purpose of supporting historically disadvantaged communities.<sup>187</sup> But when it comes to facially neutral laws that have dire effects on racial minorities in the form of disproportionate arrest rates, prison sentences, and so on, the roles of effect and purpose are inverted to the detriment of minority groups. The harmful effects of state action go out the window, and the state will prevail simply because it will be difficult to prove that it acted out of invidious purpose (though the same could be said of affirmative action programs, too).<sup>188</sup>

#### *E. Mistakes of Law in Qualified Immunity & Criminal Law*

A fifth area of law that may fit within the narrative of reverse political process theory is how the Supreme Court has treated mistake of law arguments in the different contexts of qualified immunity and criminal prosecution.<sup>189</sup> The doctrine of qualified immunity "protects government officials from liability for civil damages" even if their conduct violated a plaintiff's constitutional or statutory rights, so long as such conduct did not run afoul of "clearly established law."<sup>190</sup> Qualified immunity's origins are the subject of some debate.<sup>191</sup> But under one view relevant here, the defense may be said to stem from the "doctrine of constitutional fair notice" rooted in the Due Process Clause.<sup>192</sup> Holding government officials liable for actions that were not clearly in violation of individual rights at the time of commission, the argument goes, might contravene the due process principle that one is entitled to fair notice of the contours of the law before being deprived of

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*or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (describing the history of, and debate between, these two views of equal protection law).

186. *Id.* at 49–50.

187. *Id.* at 39.

188. *Id.* at 47.

189. I am indebted to Ryan Williams for suggesting this example.

190. *Pearson v. Callahan*, 555 U.S. 223, 231, 243 (2009) (internal quotation marks omitted).

191. *See* Baude, *supra* note 22.

192. *See id.* at 30–33 (noting the potential due process underpinning of qualified immunity, but challenging its fit in light of how the doctrine is actually applied).

their property in a civil suit.<sup>193</sup> On this reading, individual officers are insulated from liability for their reasonable mistakes of law by virtue of the Due Process Clause.

This constitutional fair notice principle, however, does not apply generally to *criminal* defendants who are prosecuted for violating laws of which *they* were not aware.<sup>194</sup> The Supreme Court has accordingly often (but not always) rejected due process defenses raised by criminal defendants who lacked knowledge of the laws they were jailed for violating.<sup>195</sup> This asymmetry is in one sense striking: whereas ignorance of the law is a due process defense for government officers against personal liability in a civil suit (for which the officers are frequently indemnified by the government in any case),<sup>196</sup> it is not a defense in the arguably more consequential situation where a person faces considerable prison time.

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I do not mean for this section to have canvassed the full scope of the Court's inversion of process theory. It is possible, for instance, that other comparable cases abound. There are also important normative arguments that may be advanced in defense of the asymmetry in the cases just discussed, which I will explore further below.<sup>197</sup>

For present purposes, though, my aim is to make a modest suggestion. Across a variety of doctrinal areas, the Supreme Court seems to be granting constitutional protection to some groups that it is not granting to others in substantially similar circumstances.

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193. *Id.*

194. For thoughtful discussion of this asymmetry, see generally Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998), and Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 BYU J. PUB. L. 71 (2013).

195. See, e.g., *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564 (1971) (rejecting defendant's due process argument that it could not be prosecuted for violating a federal regulation prohibiting transportation of sulfuric acid because it lacked knowledge of the law); *United States v. Freed*, 401 U.S. 601, 609 (1971) (same for prosecution of regulation forbidding possession of hand grenade); *United States v. Balint*, 258 U.S. 250, 252 (1922) (same for prosecution under federal narcotics law). *But see Lambert v. California*, 355 U.S. 225, 228–30 (1957) (reversing conviction under Los Angeles law requiring felons to register their presence under Due Process fair notice principles).

196. See Armacost, *supra* note 194, at 586 n.12. Note that police officers seem to possess substantial political influence, at least if their ability to get federal legislative support is a relevant measure. See, e.g., Radley Balko, *A New GOP Bill Would Make It Virtually Impossible to Sue the Police*, WASH. POST (May 24, 2017), [https://www.washingtonpost.com/news/the-watch/wp/2017/05/24/a-new-gop-bill-would-make-it-virtually-impossible-to-sue-the-police/?utm\\_term=.10392cbc4537](https://www.washingtonpost.com/news/the-watch/wp/2017/05/24/a-new-gop-bill-would-make-it-virtually-impossible-to-sue-the-police/?utm_term=.10392cbc4537) [<https://perma.cc/4JAT-Q8T5>] (describing the “Back the Blue Act” and how it would shield officers from liability).

197. See *infra* Part IV.

Moreover, the category of litigants who are winning protection seems to be, at least debatably, more politically powerful than the group of litigants who are not. I turn next to the question of what, if anything, we should make of this development.

### III. A CRITIC'S REVIEW

What should we make of political process theory's third act? I think two positions are worth exploring and defending, although a little bit of background on the type of constitutional questions at issue in the third act cases may be helpful. Section A of this Part provides that background; Sections B and C present the different takeaways one might draw from the preceding narrative.

#### A. *The Interpretation-Construction Distinction*

It is useful to start by clarifying two distinct moments that occur when a judge decides a constitutional case: constitutional *interpretation* and constitutional *construction*.<sup>198</sup> Whereas interpretation is the act of uncovering the semantic content, or linguistic meaning, of the relevant text, construction is the act of identifying the text's legal effect.<sup>199</sup>

Sometimes the act of construction does no further work, for instance, where the text is specific enough for interpretation to dictate directly the outcome of a case.<sup>200</sup> Thus, the question whether the thirty-one-year-old LeBron James was old enough to be President of the United States as of the 2016 election is fully answered by the interpretive endeavor; one need only consult Article II's command that no person is eligible to be President "who shall not have attained to the Age of thirty five Years."<sup>201</sup>

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198. The significance of this distinction has been heavily discussed and cogently explained in the literature; my aim here is not to make any novel claims about it, but rather to tee up how it shapes a critical analysis of political process theory's third act. See generally Solum, *supra* note 25 (discussing the interpretation-construction distinction); see also KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 5–9 (1999); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011).

199. Solum, *supra* note 25, at 100–05.

200. Note that I refer to *constitutional* interpretation and construction here simply because I am concerned about the Constitution in this Article, though the same points could be made about other sources of law, such as statutory or contract law.

201. U.S. CONST. art. II, § 1, cl. 4; see also Solum, *supra* note 25, at 107 (noting that "interpretation has already done the work" with respect to the command that "[t]he Senate of the United States shall be composed of two Senators from each state.").



But in other cases, “the semantic content of the text constrains but does not fully specify the legal content of constitutional doctrine.”<sup>202</sup> That is because much of the Constitution is vague as to specific disputes.<sup>203</sup> To use the cases discussed in Part II as an example, one fully exhausts the linguistic meaning of “Due Process of Law” long before arriving at an answer to whether and when the Constitution permits a corporation to be haled into court in a forum that has no connection with the suit.<sup>204</sup> The text of the Constitution is also indeterminate with respect to whether a court should interpret waivers of state and federal sovereign immunity as it would any other legislative act, or whether it must instead construe all ambiguities in the sovereign’s favor.<sup>205</sup> The answers to these questions “cannot be discovered in the text through more skillful application of legal tools”; judges must look to something else.<sup>206</sup>

The most important observation for present purposes is that whereas the act of interpretation is empirical, the act of construction is inherently normative.<sup>207</sup> That is to say, the “something else” that judges must rely on in constitutional construction is ultimately a normative theory. As Professor Lawrence Solum has explained, constitutional construction “cannot be ‘value neutral’ because we cannot tell whether a construction is correct or incorrect without resort to legal norms. And legal norms, themselves, can only be justified by some kind of normative argument.”<sup>208</sup> Thus, the real question is not *whether* judges may rely on normative arguments when the text runs out and they are left to construct the Constitution, but rather *what* normative argument(s) they should consult.

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202. Solum, *supra* note 25, at 108.

203. See Barnett, *supra* note 198, at 68–69.

204. See *infra* note 250 and accompanying text.

205. See *infra* Section IV.B.2.

206. See WHITTINGTON, *supra* note 198, at 1.

207. See Solum, *supra* note 25, at 104 (“[T]heories of construction are ultimately normative theories: because constructions go beyond linguistic meaning, the justification for a construction must include premises that go beyond linguistic facts.”).

208. *Id.*; see also WHITTINGTON, *supra* note 198, at 6 (“Something external to the text—whether political principle, social interest, or partisan consideration—must be alloyed with it in order for the text to have a determinate and controlling meaning within a given governing context.”).

*B. Position One: Act III Is Supported by Different, Non-Process-Based Normative Theories*

The first position one might take in response to political process theory's third act is to defend the Supreme Court's acts of construction by taking a catholic view of the normative values that judges may use in deciding cases. Thus, even though the Court itself has remained opaque as to the values underlying its sovereign immunity clear statement rule,<sup>209</sup> one could justify the rule by pointing to the broader values behind immunity itself such as separation of powers,<sup>210</sup> the ability for government to function effectively by protecting its treasury,<sup>211</sup> and federalism (as to state sovereign immunity).<sup>212</sup> With respect to general jurisdiction, one might defend the pro-big business rule announced in *Daimler* by pointing to the importance of corporate efficiency in our national economic system,<sup>213</sup> to the benefits of certainty and predictability in jurisdictional rules,<sup>214</sup> or to a desire to conform U.S. jurisdictional practices to those in foreign countries.<sup>215</sup> The asymmetrical availability of opt-out rights from objectionable speech for union workers but not corporate shareholders may be defended on the

209. See Nagle, *supra* note 141, at 774 (“The Court has not explained why it created such a strong clear statement rule for waivers of federal sovereign immunity.”).

210. See *id.* at 814–15 (observing that “[s]overeign immunity may be seen to protect the constitutional separation of powers”); see also Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 522 (2003) (suggesting that sovereign immunity “may have been thought to preserve an aura of judicial independence”); Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 900 (2010) (arguing that sovereign immunity “enhances democratic rule and fortifies the separation of powers between the political and judicial branches”).

211. See Katherine Florey, *Sovereign Immunity’s Penumbra: Common Law, “Accident,” and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 787 (2008) (noting that courts often defend sovereign immunity by reference to the “need to safeguard the public treasury”); Ernest A. Young, *Its Hour Come Round at Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century*, 35 HARV. J.L. & PUB. POL’Y 593, 596 (2012) (arguing that state immunity is “tied” to “protecting the fiscal health of the States”).

212. See *infra* note 283.

213. See *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127 (Del. 2016) (interpreting *Daimler* and reasoning that “[i]n our republic, it is critical to the efficient conduct of business, and therefore to job- and wealth-creation, that individual states not exact unreasonable tolls simply for the right to do business”); see also John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 163 (2016) (arguing that because personal jurisdiction has “significant economic consequences” through its role in plaintiffs’ choice of forum, “courts should evaluate [it] under the Dormant Commerce Clause as well as the Due Process Clause”).

214. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (“Simple jurisdictional rules . . . promote greater predictability.” (internal quotation marks omitted) (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010))).

215. See *id.* at 762–63 (noting the “transnational context of this dispute” and pointing to European Union regulations that restrict general jurisdiction to places of incorporation and principal places of business).

ground that only union workers suffer cognizable harm to their freedom of conscience because the link between shareholders and corporate speech is too attenuated to render shareholders complicit in what companies say.<sup>216</sup> And so on.

Each of these normative justifications is plausible and likely to be persuasive to at least some reasonable minds. Thus, one takeaway might be that, as soon as it is admitted that we are in the “construction zone” in the Act III cases,<sup>217</sup> the Court’s constructions are all defensible because the different normative theories underlying them are defensible.

The trouble with this move is that it comes at the cost of the charge that proved so successful during Act II, where leading constitutional theorists criticized political process theory for its inability to curtail judges to neutral principles of adjudication.<sup>218</sup> For once one contends that judges should pick and choose which of any of a multitude of background normative values are worth pursuing, there is no persuasive, principled way to reject political process theory *itself* as one of those theories.<sup>219</sup> Put another way, the act of defending the constitutional constructions in *Daimler* and the sovereign immunity waiver cases by reference to debatable normative theories simply reintroduces the counter-majoritarian difficulty at a different level in the judicial decisionmaking process.<sup>220</sup> Judges may not sneak in their

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216. James D. Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 VA. L. REV. 1969, 2008–16 (2016).

217. See Solum, *supra* note 25, at 108.

218. See *supra* Section I.B.

219. To be sure, one could try to defend the normative values that underpin *Daimler* and (or) the sovereign immunity cases while simultaneously advancing arguments against the use of political process theory as a permissible source of constructive guidance. Such an undertaking is certainly beyond the scope of this Article. The only point I wish to make here is that it is not obvious that such a line can be convincingly drawn. Defenders of the general jurisdiction and sovereign immunity waiver rules may point to the fact that their preferred values—for example, national economic efficiency, separation of powers, and federalism—are strongly reflected in the text and spirit of various constitutional provisions and structures. Yet the same can surely be said of the value of preserving the sanctity of the political process. See ELY, *supra* note 3, at 87 (arguing that the Constitution’s provisions are “overwhelmingly concerned” both with “procedural fairness in the resolution of individual disputes” as well as with “ensuring broad participation in the processes and distributions of government”). *But see* Michael C. Dorf, *The Coherencism of Democracy and Distrust*, 114 YALE L.J. 1237, 1246 (2005) (arguing, counter to Ely’s reading of the Constitution, that “democratic participation as an interpretive über-principle cannot be derived from the Constitution’s text and structure standing alone”).

220. See Nagle, *supra* note 141, at 808 (“[J]udicial selection and enforcement of the favorite values of the judiciary” through clear statement rules “is countermajoritarian.”); *cf.* Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 820 (1999) (“Moreover, if federalism decisions are permitted to violate textualist principles, but decisions in other areas

policy preferences through contested historical arguments or subjective judgments as to which groups lack sufficient political power, but they may wind up in the same place through their choice of normative theories that inform the process of constitutional construction.

One reaction to this dilemma is that this is the best we can do—perhaps debates among justices over which background normative theories to pursue is an inescapable (or even laudable) part of our constitutional design.<sup>221</sup> Yet not every theory of constitutional construction is similarly situated; “[t]he claim that theories of constitutional construction must be normative does not imply that judges who engage in constitutional construction must resort to their own beliefs about morality or politics in particular cases.”<sup>222</sup> For instance, a normative theory rooted in the rule of law virtues of deference to decisions made by democratic bodies would take judges’ personal views substantially out of the equation.<sup>223</sup>

That, of course, is not the theory the Supreme Court has followed in the general jurisdiction, waiver, and other cases; those decisions are instead distinctly counter-majoritarian. The crux of the first response to political process theory’s third act is thus to place the outcomes reached in those cases (and the various values that undergird them) on a higher plane than the desire to abide by the will of democratic majorities.

### *C. Position Two: The Act III Cases Violate “Reverse” Political Process Theory*

Alternatively, one could take the position that the concern for neutral principles of adjudication that prevailed during political process theory’s downfall in Act II is an equally persuasive basis for attacking the Court’s Act III decisions. On this view, the proper response to the inevitable need for constitutional construction is not to throw one’s hands up and concede that any normative theory will do in the construction zone, but rather to identify normative theories that are themselves sensitive to the counter-majoritarian difficulty.

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are not, then the federalism cases may come to be viewed as illegitimate decisions that derive from the political preferences of the justices rather than the Constitution.”).

221. See Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 92 (2016) (“Constitutional construction is a matter of judgment; it uses all available modalities of argument as sources of wisdom or insight about how to continue the constitutional enterprise in the present.”).

222. *Solum*, *supra* note 25, at 105 (emphasis omitted).

223. See *id.* at 105–06; see also, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

One such theory would be to focus on the political process, although not in the way political process theory is typically expressed. Rather than serving as a positive principle that demands additional constitutional protection for the politically powerless, the theory could be recast as a negative command: judges should not second-guess the choices of the political branches when the groups burdened by those choices are capable of protecting themselves.<sup>224</sup> The right response to the third act in the story of political process theory, in other words, might be to *reverse* the theory's prescription into an *ought-not*, rather than an *ought*.

Why might this approach be normatively attractive? A fuller defense is the burden of another paper,<sup>225</sup> but a thumbnail sketch is warranted now. The core idea is that the very concern for democracy that underpinned the counter-majoritarian critique and the fall of political process theory in Act II should counsel judges to be cautious before striking down laws burdening powerful groups on the basis of underdetermined constitutional text and contestable normative values. Indeed, to the extent the losers in the democratic process in the Act III cases—large corporations, sovereign and individual officer defendants, and members of the racial majority—are capable of defending their own interests before Congress and statehouses, there is no strong reason to privilege a judicially constructed outcome over the outcome of the democratic process. If anything, calls for letting the political process work itself out are especially persuasive in this context. For rather than forever removing a policy question from a legislature's purview on the basis of underspecified constitutional text and history, reverse political process theory would require judges to leave the matter for debate in the political sphere, trusting that the powerful group that lost this time around may yet prevail in the future.

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224. This negative command is notably different from the school of argument that legislation benefiting powerful groups ought to be construed, when ambiguous, against such groups. See *infra* note 300; see also Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 487–90 (2015) (suggesting greater judicial solicitude for less wealthy groups during review of executive action). Such arguments reflect Ely's basic premise that aggressive judicial action may be warranted to protect powerless groups, albeit imported from the constitutional to the statutory and administrative law domains. Professor Ganesh Sitaraman has identified a related point in his important work on economic power and constitutional law, where he suggests, among other things, a more aggressive form of judicial review when legislation harms diffuse majorities of middle-class Americans to the benefit of the economically powerful. See Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1514–16 (2016). My focus is instead on when judicial deference is especially justified, namely when politically powerful entities seek to challenge on constitutional grounds a policy outcome they were fully capable of fighting in the democratic process—in particular when the Supreme Court has refused similar intervention on behalf of less powerful groups.

225. See Tang, *supra* note 33.

An idea is one thing, but implementation is another. So how might the theory be carried into operation by courts? This question implicates two subspecies of concern, one about *weight* and another about *scope*. How much weight should the presence of political power bear when it runs into tension with other normative values in the course of constitutional construction? And to what scope of cases should reverse political process theory even apply?

Taking the weight question first, there are two kinds of approaches a court might take.<sup>226</sup> One would be to use reverse political process theory as an overriding, threshold trigger for deference to the actions of the political branches. Under that approach, if a group seeking recourse from legislative defeat under some underdetermined constitutional provision is deemed politically powerful, the court would automatically decline to intervene on the group's behalf without consulting other normative considerations.<sup>227</sup>

A second way would be for courts to treat a finding of political powerfulness more modestly, as just one legitimate modality courts may consult when they construct answers to difficult constitutional questions left unanswered by our founding document.<sup>228</sup> If the group seeking constitutional redress from legislative defeat is politically powerful, in other words, that would place a thumb on the scale in favor of upholding the law. But other normative values could tip the scale in the other direction. Thus, rather than treating political power as a first-order consideration demanding deference to legislative action, a court taking the more modest approach would treat political strength as just one factor among many in the process of constitutional construction.

The latter, more measured role for a finding of political power is tempting and easier to justify, although it has the tradeoff of leaving more discretion to judges in the course of weighing competing values.

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226. This is oversimplified for the sake of expositional clarity. A court could attach a weight to reverse political process theory that runs along something of a spectrum—from threshold inquiry, to one factor among many, to last-case factor to consider when all else runs out. I acknowledge these different positions while maintaining that the two approaches discussed at greater length are the most promising to consider.

227. This approach shares some theoretical roots with an approach Professor Larry Solum has described as “Originalist Thayerianism.” See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 472–73 (2013). Under Originalist Thayerianism, courts confronting underdetermined constitutional provisions should “defer to the decisions made by the political branches.” *Id.* at 473. My approach would counsel similar deference to the political branches in cases where the class of entities burdened by a law is politically powerful. By contrast, challenges against laws burdening nonpowerful entities would be resolved by recourse to other normative values that are typically used in the process of constitutional construction. See Balkin, *supra* note 221.

228. See Balkin, *supra* note 221 (discussing methods of construction).

Ultimately, however, one's view on how much weight to attach to reverse political process theory as a normative frame of decision for judges may turn in part on the second application question I've flagged: the scope of cases to which the theory should apply to begin with.

There are many situations where courts consider constitutional challenges to action by the political branches brought by ostensibly powerful litigants. Must a court make a (contested!) judgment about political strength in every such case? This startling possibility brings to the foreground the need to clear away a substantial set of cases when reverse political process theory should *not* apply: cases where the specific litigant in court may be politically powerful, but the constitutional rule the litigant advocates is generally applicable to persons or entities across the spectrum of political power. Thus, for example, a court should not reject a race-based Equal Protection challenge brought by a politically influential member of a racial minority simply because that person happens to be individually quite powerful; reverse political process theory (like political process theory itself) is a theory about when the *groups* affected by democratic action are able to defend their interests politically in the aggregate. Likewise, a court should not decline to apply reverse political process theory simply because an individual litigant in court lacks power where the litigant belongs to a group that is influential in the aggregate. To use one of the Act III cases to illustrate, political power would matter in the general personal jurisdiction context even if the specific corporate defendant at issue was not Daimler, but a struggling multinational company currently in bankruptcy proceedings that has ceased making political expenditures.

But another problem of scope remains: Should judges factor political power into their decisionmaking *anytime* a law may be said to burden a group that, in the aggregate, possesses arguably outsized political strength? The obvious trouble with such a broad scope of application is that it puts immense pressure on the ability of courts to correctly ascertain what groups are politically powerful and what groups are not. That, in turn, points up the strongest counterargument to reversing political process theory's core command: the fact that using political power as a reason to defer to democratically enacted laws is not free of judicial value judgments either. After all, to know if a group is politically powerful, a judge has to make some substantive judgment of what political power is and who has enough of it—a judgment that is

irreducibly substantive and value-laden.<sup>229</sup> And if that is so, then reverse political process theory may not be free from counter-majoritarian critiques either.

This concern, I submit, is not so worrisome—at least when one limits the application of reverse political process theory to the kinds of situations canvassed in this Article, where the Supreme Court has considered claims for constitutional protection by two (or more) groups and where it has decided to grant relief only to the relatively more powerful group.<sup>230</sup> To see why, look at what actually turns on the political power judgment under the doctrine of reverse political process theory. Whether under the weaker one-factor-among-many approach, or the stronger threshold approach, a judicial determination that the group burdened by a given law possesses enough power to defend its own interests merely points to a posture of deference to the elected bodies that adopted the law. The substantive judgment called for is thus just a stepping stone to greater respect for majoritarian will, not a launching pad for judicial policy preferences.

To play out the logic further, suppose that a judge decides to apply reverse political process theory in a given constitutional case, yet gets the political power determination wrong (whether due to personal bias or not). If the judge mistakenly identifies the burdened group as powerful even though it is actually powerless (i.e., a false positive), there is no harm to democratic will because the net result of the mistake is just to defer to the legislature's judgment.<sup>231</sup>

Or perhaps the judge gets it wrong in the other direction, concluding that a group is politically powerless when in actuality it is able to protect its interests adequately (i.e., a false negative). Unlike in the usual version of political process theory, where that mistake would lead to aggressive judicial intervention into policies adopted through the majoritarian process,<sup>232</sup> a finding of powerlessness in process theory's more modest version triggers no special scrutiny of majoritarian laws at all. Instead, it simply removes one factor—the presence of political strength—from a judge's decisionmaking calculus, leaving the judge to decide whether reversal of the legislature's policy

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229. See *supra* Section I.B; see also Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 119 (2016) (describing the difficulty with making the “motivating determination that some group has ‘too much’ power”).

230. See *supra* Part II.

231. The same would be true of political process theory as it is traditionally understood.

232. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (“[W]here legislation affects discrete and insular minorities, the presumption of constitutionality fades because traditional political processes may have broken down.” (internal quotation marks omitted)).



choice on constitutional grounds may be warranted for some other reason. Thus, for example, a judge would need to identify a constitutional history indicative of special protection for the burdened group,<sup>233</sup> a desire to respect precedent (which in turn produces benefits for the judiciary's institutional credibility),<sup>234</sup> or other background constitutional values discussed earlier.<sup>235</sup> If the judge goes on to strike down the law, it will be those other values—not any finding with respect to political power—that do the legwork.

At this point, it is fair to wonder whether we are just back in the same dilemma described in the previous section,<sup>236</sup> where judges are free to reach their preferred policy outcomes by consulting any of a number of contested normative theories. But the important difference is that we only arrive at this state of affairs if a judge makes an initial category error with respect to the burdened group's political strength.

Judges will be unlikely to err in this direction, I submit, once one recalls the cases I've described in Act III. How much political power is "enough" for a group to defend its own interests adequately may be difficult to ascertain on an absolute basis, at least without relying on value-ridden judgments.<sup>237</sup> But political power is much more susceptible to empirical determination as a relative concept—a point Professor Nick Stephanopoulos has demonstrated quite convincingly through his ground-breaking work measuring the relative political influence of various subgroups based on extensive survey data.<sup>238</sup> Accordingly, when a court confronts a request for constitutional protection by a group that is more politically powerful than a comparable group to which the Court has previously *denied* the same protection, the risk of a biased, subjective determination of political power is substantially mitigated.<sup>239</sup>

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233. See, e.g., Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) ("From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks.").

234. See, e.g., Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988) ("A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law."); see generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 41–45 (2010) (discussing virtues of a precedent-based, common-law approach to the Constitution).

235. See *supra* Section III.B.

236. See *supra* Section III.B.

237. See *supra* Section I.B.

238. See Stephanopoulos, *supra* note 75, at 1572 (explaining how statistical analysis of large datasets containing information about individuals' policy preferences can reveal whether certain groups are "relatively powerless" when compared with similar counterparts).

239. There will assuredly be some instances in which a comparison of two groups' political strength may not reveal a clear advantage in either direction. See, e.g., Section III.C (discussing

There are other possible answers to the legitimate concern that political power may be too difficult for judges to measure in an objective, value-free manner. For example, one could vary the answer to the question of how much *weight* to attach to the theory based on how demonstrable political power is in different categories of cases. Thus, the stronger threshold approach to a political power finding might be appropriate in cases where the Supreme Court has previously withheld constitutional protection from a similarly situated, less powerful group. By contrast, treating political power as one factor among many—i.e., as a reason to rule against the powerful challengers to a law that is defeasible in light of other normative values, such as a concern for precedent or particular consequences—may be more appropriate in cases where there is no less powerful comparator to use as a guidepost.<sup>240</sup>

Finally, courts could adopt a closure rule to deal with cases where a group is not susceptible to easy identification as powerful or powerless.<sup>241</sup> Under that approach, in cases where there is strong evidence that a group possesses political power, that will count as a reason to defer to the challenged law. But in close cases, the court would throw political power considerations out the window and decide the matter based on the other normative values that are already used to resolve hard cases—the same approach the court would take if the group at issue were clearly powerless.<sup>242</sup>

The critical point is that when judges are asked to strike down democratically enacted laws under vague constitutional provisions that supply no ready answer, our confidence in whether the democratic process can be trusted to work should count for *something*. Just *how much* is a reasonable question to ask. But surely the process can be

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disparate treatment of unions and corporations under the First Amendment). But so long as the Court has denied constitutional protection to some group of at least similar political strength, it would be incongruous to grant the same protection to another. More fundamentally, the need for such line drawing does not turn an intrinsically pro-democratic theory into a counter-majoritarian one. Professor Thayer, for example, famously argued that a judge should only strike down a law “when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question.” Thayer, *supra* note 223, at 144. Judges can make mistakes in the course of applying that rule, too—for instance finding a “clear” constitutional violation when in fact the violation is open to debate. Yet Thayer’s approach remains manifestly majoritarian, for its default position is for judges to trust the work of elected officials. Just so for political process theory’s negative command, which can be thought of as a special call for deference when the group seeking relief from political defeat is more powerful than another group to which the Court has already denied protection.

240. I make this argument in separate work. See Tang, *supra* note 33.

241. For a discussion of the concept of “closure rules” generally, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1110–11 (2017).

242. See *supra* Section III.B.

understood as functioning more smoothly when the groups that have the greatest access to lawmakers (and often win as a result) nonetheless come out on bottom in a given instance. Judges should not blind themselves to that reality.

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As the preceding paragraphs suggest, my own inclination is that the second response to the most recent Act of political process theory is more persuasive than the first. The same criticisms that convinced the Court to get out of the business of conferring extra protection upon politically powerless groups should convince the Court to do the same with respect to groups that happen to be politically powerful.

One possible virtue of reframing political process theory as a negative command is its ability to attract something of an overlapping consensus.<sup>243</sup> Critics of political process theory who are motivated by a concern over the convergence between unelected judges' policy preferences and the outcomes of constitutional construction should agree with the theory once it is reframed as a negative command against special judicial solicitude for the powerful (just as they would for the powerless).<sup>244</sup> And although proponents of political process theory might prefer to see the theory's positive vision put into effect, they should agree at a minimum that once that vision is rejected,<sup>245</sup> the powerful should not receive special judicial protection that has been denied to the powerless.

None of this is to imply, of course, that no other normative theory may be used when constructing the Constitution. There is often no way to avoid hard value judgments when the constitutional text has run out; evidence regarding original applications,<sup>246</sup> historical practice,<sup>247</sup> precedent,<sup>248</sup> and other values may well all come into play.<sup>249</sup> The lesson of political process theory's third act, however, is this: there should be

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243. See JOHN RAWLS, A THEORY OF JUSTICE 340 (1971).

244. Cf. Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1952 (suggesting that, to the extent originalists are motivated by "a distrust of the institutional capacity of judges to make objective morally-correct decisions, then the[ir] theory of constitutional construction would do well to avoid a reliance on the judges' own beliefs about political morality").

245. See *supra* Section I.B.

246. See *supra* note 233 and accompanying text.

247. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559, 2562–64 (2014) (giving "significant weight" to historical practice when interpreting the Recess Appointments Clause).

248. See *supra* note 234 and accompanying text.

249. See *supra* Section III.B.

no need for unelected judges to turn to these contested value judgments in the first place when the ones asking the judiciary to invalidate the fruits of the democratic process are powerful groups seeking constitutional protections that the Court has already denied the less powerful.

#### IV. APPLYING REVERSE POLITICAL PROCESS THEORY

How might the cases described in Act III come out if the Supreme Court were to treat political power as a reason to defer to democratically enacted laws? I take up that thought exercise presently. In doing so, two types of arguments emerge as the strongest reasons to think the Court may have gotten the Act III cases right after all. First, for some of the cases, there is a plausible argument that the group that I've implied is politically powerful may actually be less so than the counterpart whom the Court has denied protection. And second, there is an argument that some of the pairwise comparisons I have offered are not entirely fitting, such that categorical differences between the underlying constitutional issues may account for the divergence in outcomes, political power notwithstanding.

##### *A. General Jurisdiction*

Should large, multinational corporations have comparably greater ability to evade general jurisdiction in a given forum state than small business or individual defendants? It goes almost without saying that the Constitution does not answer this question outright on any textualist or originalist account; the Due Process Clause tells us precious little about when a foreign company may be haled into court on claims unrelated to the forum (much less whether a company's in-state contacts should be judged on an absolute or proportional basis).<sup>250</sup> That means a judicial resolution under the aegis of the Due Process Clause must come, if at all, through constitutional construction.

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250. U.S. CONST. amend. XIV; see also Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 258 (noting that "American courts received no helpful common-law heritage" with respect to "territorial jurisdiction among the states"). In fact, to the extent originalism would point in any direction, it seems likely that it would counsel *against* *Daimler's* restrictive approach. By the time the Fourteenth Amendment was ratified, "courts had already been engaged in several decades of expansion of jurisdiction over out of state corporations," including by considering a corporation to be "present" in a state if it "conducted a sufficient amount of business" in the state. Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, 46 N.M. L. REV. 1, 13 (2016).

If the Court had used reverse political process theory as a tool of construction, it likely would have rejected *Daimler's* request to rewrite the decades of general jurisdiction law ensconced in state long-arm statutes. On virtually any account, large corporations are more powerful than small business and individual defendants, and there is no argument that the two situations are inapt comparisons. All of these cases, after all, are about the same constitutional rule: whether and when the Due Process Clause shields a defendant from suit in a forum for unrelated conduct.

The best arguments to the contrary challenge whether large corporations actually possess outsized political influence. There are two plausible arguments that the answer may be “no.” First, perhaps *Daimler's* rule is aimed at protecting foreign corporations (as in, those incorporated and with their headquarters outside the United States<sup>251</sup>) from the ill effects of jurisdictional statutes enacted by Congress and state legislative bodies that, as a structural matter, restrict foreign companies from participating in their political processes. Federal law, after all, prohibits foreign corporations from making contributions in connection with any federal, state, or local election,<sup>252</sup> so one might argue that the democratic process is “malfunctioning” in the sense that long-arm statutes are enacted by domestic lawmakers whom foreign companies are forbidden to influence. On this view, foreign corporations might be seen as similarly situated to lawfully present noncitizens, a group deemed sufficiently powerless by the Court to receive heightened scrutiny in the 70s.<sup>253</sup> Neither group can vote,<sup>254</sup> and foreign companies might even be less powerful in that lawfully present noncitizens can at least make campaign contributions.<sup>255</sup>

The trouble with this argument is that it misses the critical way in which corporations actually influence lawmakers: through

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251. *Cf. supra* note 114 and accompanying text.

252. *See* 52 U.S.C. § 30121 (2012). Congress has a role in that it has ultimate authority to approve the Federal Rules of Civil Procedure, which set the limits of federal court jurisdiction. *See* FED. R. CIV. P. 4(k)(1) (providing, as relevant, that service or a waiver of service establishes personal jurisdiction over a defendant who is subject to the same in the state where the district court is located). Thus, foreign corporations could complain that they are prohibited from advocating their interests before Congress with respect to personal jurisdiction as exercised by federal courts. The argument as to state legislative bodies is more direct: foreign corporations may argue that they are forbidden to lobby or influence state lawmakers in an effort to enact more restrictive long-arm statutes.

253. *See supra* notes 56–62.

254. *Supra* note 58.

255. *See* 52 U.S.C. § 30121(b)(2) (2012) (defining “foreign nationals”—who are prohibited from making campaign contributions—to exclude persons who are lawfully admitted for permanent residence).

independent expenditures, not campaign donations. In the aftermath of *Citizens United*, where corporations are no longer prohibited from making direct expenditures to influence elections,<sup>256</sup> foreign multinational corporations can use their U.S. subsidiaries to channel unlimited funds to super-PACs and other entities dedicated to electioneering, incurring the favor of their preferred lawmakers in the process.<sup>257</sup> It has accordingly become commonplace for foreign corporations to spend vast sums of money on their preferred political causes, oftentimes avoiding public disclosure laws in the process by channeling money through IRS-recognized 501(c)(6) trade associations and 501(c)(4) social welfare organizations.<sup>258</sup> As one commentator notes, trade associations like the American Petroleum Institute—an organization influenced significantly by the Saudi Arabian oil company, Aramco—can now “cloak multinational and even foreign corporate election spending under an American flag.”<sup>259</sup>

Moreover, even if there were a legitimate concern that foreign companies are structurally unable to participate adequately in U.S. elections through the just-described means, that argument would not prove enough. *Daimler*’s pro-big business rule does not apply only to foreign corporations, but also to U.S. companies doing business across the fifty states.<sup>260</sup> While federal law and twenty-two states do prohibit U.S. corporations from direct contributions to federal and state political campaigns, respectively, the other states permit corporations to give money to state campaigns—six states even allow corporations to give an unlimited amount of money to state campaigns.<sup>261</sup> In a majority of

256. *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

257. See Corey R. Sparks, Note, *Foreigners United: Foreign Influence in American Elections After Citizens United v. Federal Election Commission*, 62 CLEV. ST. L. REV. 245, 252 (2014) (explaining how foreign corporations can “contribute money to organizations that are permitted to influence elections”); *Explainer: Can Foreign Companies Make Political Donations?*, IT’S A FREE COUNTRY (Jan. 20, 2012), <http://www.wnyc.org/story/181667-explainer-can-foreign-companies-make-political-donations/> [<https://perma.cc/SE57-ZK5W>] (describing how foreign corporations use their U.S. subsidiaries to “form PACs and spend money on campaigns”).

258. Sparks, *supra* note 257, at 253–54; see also Lee Fang, *Never Mind Super PACs: How Big Business Is Buying the Election*, NATION (Aug. 29, 2012) <https://www.thenation.com/article/never-mind-super-pacs-how-big-business-buying-election/> [<https://perma.cc/7V6A-XC64>] (describing ability of foreign corporations to channel secret dollars into U.S. elections through 501(c)(6) trade associations, which are not required to disclose their donors).

259. Fang, *supra* note 258.

260. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 773 n.12 (2014) (Sotomayor, J., concurring in the judgment) (“[T]he principle announced by the majority would apply equally to preclude general jurisdiction over a U.S. company that is incorporated and has its principal place of business in another U.S. State.”); see also *supra* notes 131–134 and accompanying text.

261. See 52 U.S.C. § 30118 (2012) (banning corporate contributions in federal elections); Brian Cruikshank, *Contribution Limits Overview*, NAT’L CONF. ST. LEGIS., <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits->

states, in other words, large U.S. companies have at least as much influence over lawmakers as ordinary citizens. And even in the other states, it remains the case that all U.S. companies can spend unlimited amounts on direct campaign expenditures after *Citizens United*.

But it might be said that these domestically incorporated large corporations suffer a different kind of political power deficit. Some state and local government constituencies may harbor pro-local-business attitudes, which manifest in opposition to large corporations.<sup>262</sup> That opposition may come in various forms, such as bills targeting large companies for special adverse treatment—think Maryland’s “Walmart Tax” on companies with more than ten thousand workers who do not pay eight percent of their payrolls on employee health insurance costs—or unusually harsh jury verdicts in civil litigation.<sup>263</sup> And so the Supreme Court’s decision in *Daimler* might be understood as an attempt to correct for this political power deficit, ensuring that local citizens cannot impose special costs on large companies incorporated in other states out of pure social hostility.

There are several responses to this argument. One is that the hostility held by certain segments of the population against large corporations *itself* stems from the view that lawmakers are in the pockets of big business.<sup>264</sup> Social hostility against big business is thus a response to outsized corporate influence over the political process in the first place, with the goal being not to end big business altogether, but to force big business to participate and compete on equal terms.<sup>265</sup>

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overview.aspx [https://perma.cc/44H9-AKSK] (describing state laws regarding corporate contributions to state elections).

262. One might contend that political process theory should be limited to benefitting groups of *people*, not *entities*, who are the subject of social prejudice. Entities (like corporate and sovereign defendants), however, are just the aggregations of the interests of individuals, and so there is no theoretical reason to draw a line between the two.

263. For a discussion of Maryland’s Walmart Tax, which (perhaps indicative of the political influence held by large corporations) was ultimately struck down on federal preemption grounds, see *Retail Industry Leaders Ass’n v. Fielder*, 475 F.3d 180, 183 (4th Cir. 2007), and Kathlynn Butler Polvino et. al., *ERISA as an Obstacle to Fair Share Legislation and Other State Initiatives to Expand Coverage to the Uninsured and Underinsured*, 1 J. HEALTH & LIFE SCI. L. 99, 101 (2007). I thank Stephen Sachs for pointing out this helpful example.

264. See, e.g., Tim Hains, *Trump Reaches Out to Sanders Supporters*, REALCLEARPOLITICS (June 22, 2016), [https://www.realclearpolitics.com/video/2016/06/22/trump\\_reaches\\_out\\_to\\_sanders\\_supporters\\_lets\\_fix\\_americas\\_rigged\\_system\\_together.html](https://www.realclearpolitics.com/video/2016/06/22/trump_reaches_out_to_sanders_supporters_lets_fix_americas_rigged_system_together.html) [https://perma.cc/E7FD-RYD6] (“[T]he whole economy [is] rigged by big businesses who want to leave our country, fire our workers, and sell their products back into the U.S. with absolutely no consequences . . .”).

265. See, e.g., *Bernie Sanders on Corporate Regulation*, FEEL THE BERN, <http://feelthebern.org/bernie-sanders-on-corporate-regulation/> (last visited Sept. 10, 2017) [https://perma.cc/EGL4-R5V6] (“Bernie Sanders believes we cannot continue to allow our nation’s wealthiest corporations to avoid paying their fair share of taxes.”).

Moreover, the evidence regarding corporate influence in politics is overwhelming. By virtually any account, big business has more political power than small business, and certainly more power than the diffuse grouping of individual defendants. To start, there is no dispute that large corporations spend an enormous amount on lobbying and other political expenditures. For instance, a 2014 report showed that between 2007 and 2012, “two hundred of America’s most politically active corporations spent a combined \$5.8 billion on federal lobbying and campaign contributions.”<sup>266</sup> The impact of such spending is equally clear. The same report found that the \$5.8 billion in lobbying and campaign spending netted those corporations a staggering \$4.4 trillion in federal contracts and subsidies.<sup>267</sup>

At the state level, a 2015 taxpayer watchdog report found after examining more than 4,200 state economic incentive programs that “big businesses overall were awarded ninety percent of the dollars,” even though the programs were supposed to be “equally accessible to small” companies.<sup>268</sup> An earlier report from the same organization found that \$110 billion worth of state and local incentive deals over a three-year-period—seventy-five percent of the total dollar value of all such deals in the relevant database—went to a select group of global parent companies.<sup>269</sup> It is awfully difficult to conclude that large corporations, which receive tens of billions of dollars in state and local tax subsidies each year, are politically powerless before those same units of government simply because one state passed a tax aimed at making Walmart pay more in health insurance for its employees (or because some local juries may harbor pro-local attitudes). Indeed, recent media coverage has revealed an important pathway through which large corporate interests are uniquely able to efficiently and effectively influence state legislation: the conservative American Legislative

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266. Bill Allison & Sarah Harkins, *Fixed Fortunes: Biggest Corporate Political Interests Spend Billions, Get Trillions*, SUNLIGHT FOUND. (Nov. 17, 2014, 9:26 AM), <https://sunlightfoundation.com/2014/11/17/fixd-fortunes-biggest-corporate-political-interests-spend-billions-get-trillions/> [https://perma.cc/8359-8QTC].

267. *Id.*; see also Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 574–75 (2014) (identifying influence advantage enjoyed by business interest groups compared to non-economic-elite individuals and nonbusiness interest groups).

268. Greg LeRoy, et al., *Shortchanging Small Business: How Big Businesses Dominate State Economic Development Incentives*, GOOD JOBS FIRST 3 (Oct. 2015), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/shortchanging.pdf> [https://perma.cc/GTR5-Y686].

269. Philip Matera, *Subsidizing the Corporate One Percent*, GOOD JOBS FIRST, 1 (Feb. 2014), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/subsidizingthecorporateonepercent.pdf> [https://perma.cc/Q6M3-6H8Y]. For a general discussion of big business’s political power, see Andrias, *supra* note 224, at 440–42.



Exchange Council (“ALEC”), which drafts model probusiness legislation for introduction in statehouses across the nation.<sup>270</sup> ALEC claims, for example, to produce model legislation leading to more than one thousand bills introduced in states each year, with seventeen percent of them passing.<sup>271</sup>

In the end, then, asking whether local or state constituencies are sometimes able to coalesce around laws that disadvantage large corporate interests is not the right question. In our political system, no group is immune from occasional losses, and corporations are no different. What judges need to know for purposes of deciding whether to defer to state long-arm statutes that ratified a more expansive version of general jurisdiction over large corporations is whether that group of entities is less powerful than small business and individual defendants, all else equal. The evidence of large corporations’ success in state and federal policy just given strongly suggests that the answer is no.

And that, in turn, provokes the following question: Why did the Supreme Court feel the need to second-guess the legislative determinations of state lawmakers who, after *Perkins* was decided in 1952, decided to embrace a broad view of general jurisdiction in their various long-arm statutes? Big business was perfectly free to articulate its economic disagreements with *Perkins*’s approach to general jurisdiction, with ALEC a ready-made instrument to demand state-level change. And there is no reason to think the (unelected) justices were better situated to evaluate those concerns than their politically accountable counterparts in statehouses across the country. Put simply, from a process perspective, personal jurisdiction would seem to be a classic instance in which an open-ended provision of the Constitution is better served through deference to a properly functioning democratic process than by overriding that process with judicial value preferences imposed from on high.<sup>272</sup>

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270. See Mike McIntyre, *Conservative Non-Profit Acts as a Stealth Business Lobbyist*, NY TIMES (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?pagewanted=all> [https://perma.cc/4MMB-3KK7].

271. *Id.*

272. Note that one could arguably reach a different outcome depending on whether one applies a threshold or one-factor-among-many approach to reverse political process theory. On the threshold approach, the finding that large corporations are relatively more powerful than small business and individual defendants would lead to a court automatically declining to grant special protection to big businesses. But on a one-factor-among-many approach, the desire to defer to a healthy democratic process could be trumped by other normative values if a judge believed, for example, that the value of corporate efficiency or jurisdictional simplicity outweighs a desire to leave difficult public policy decisions in the hands of elected officials.

### B. Waiver Rules

There are two variants of responses to the claim that the Supreme Court has granted special protection to sovereign defendants regarding waiver of rights that it has withheld from criminal suspects. First, one might contend that sovereign defendants actually aren't particularly powerful by way of comparison. Second, perhaps the different nature of the constitutional rights at issue—sovereign immunity on the one hand, and the Fifth Amendment right against self-incrimination on the other—should matter. Put differently, maybe the two rights are just incommensurable and the fact of greater protection for the more powerful group shouldn't trouble us.

#### 1. Are Sovereign Defendants Politically Powerful?

Perhaps sovereign defendants are not especially powerful by comparison to criminal suspects. One argument to that effect is that sovereign defendants are not really political participants, much less powerful ones, to begin with.<sup>273</sup> To the extent sovereign defendants in the litigation context are really just the aggregate actions of the individual government officials alleged to have committed a wrong, those officials don't lobby the lawmakers with the power to waive immunity. If anything, government officials actually face special disabilities to political participation in the form of prohibitions against lobbying and partisan activity.<sup>274</sup>

But if political power is understood as an entity's relative ability to achieve its preferred policy outcomes,<sup>275</sup> then government defendants may be quite powerful indeed. For one thing, even though government actors may be barred from lobbying and certain forms of partisan activity, some government officials have by virtue of their office an outsized ability to influence the broader public on policy issues by speaking and writing in public fora. The Washington Attorney General,

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273. See Levinson, *supra* note 229, at 38 (“[T]he ultimate holders of power in American democracy are not government institutions . . . but democratic-level interests.”).

274. See, e.g., 5 U.S.C. §§ 7323, 7324 (2012) (delineating Hatch Act limitations on political activities of federal employees); 18 U.S.C. § 1913 (2012) (“No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any [communication] intended or designed to influence in any manner a Member of Congress . . .”).

275. Cf. Stephanopoulos, *supra* note 75, at 1531 (“A group is relatively powerless if its aggregate policy preferences are less likely to be enacted than those of similarly sized and classified groups.”).

to use one relevant example, has taken to the op-ed pages to advocate voter action to narrow the State's sovereign immunity waiver.<sup>276</sup>

More importantly, the sovereign interest in avoiding the burdens of suit is powerfully represented by surrogates—a strong indication of a group's ability to thrive politically.<sup>277</sup> The most notable surrogate here is the anti-tax community, exemplified by the group Americans for Tax Reform. That entity has persuaded forty-eight U.S. senators, a majority of the U.S. House of Representatives, and a total of nearly 1,400 elected officials to pledge their opposition to “any and all efforts to increase” taxes at the federal and state levels.<sup>278</sup> Perhaps unsurprisingly, opposition to current tax rates among the public is widespread; poll respondents believe by a three-to-two margin that the current amount of federal income tax they pay is too high,<sup>279</sup> and sixty-nine percent say that taxes are either “extremely important” or “very important” in influencing their position on the presidential election.<sup>280</sup> Given that efforts to preserve or expand sovereign immunity are commonly framed in terms of reducing government spending (and in turn keeping tax rates down),<sup>281</sup> it is fair to say that the sovereign interest in retaining immunity is represented quite forcefully in our pluralist system.

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276. See, e.g., Rob McKenna, *Here's a Money-Saving Idea – Stop Abusive Lawsuits Against Washington Taxpayers*, SEATTLE TIMES (Aug. 24, 2010, 3:54 PM), <http://www.seattletimes.com/opinion/heres-a-money-saving-idea-8212-stop-abusive-lawsuits-against-washington-taxpayers/> [<https://perma.cc/A2ZX-ZZ3Y>] (outlining the Washington Attorney General's argument in an op-ed for legislation narrowing the State's waiver of immunity).

277. See Ackerman, *supra* note 5, at 720 (describing pluralist model in which “myriad pressure groups, each typically representing a fraction of the population, bargain with one another for mutual support”). But see Ross & Li, *supra* note 74, at 377 (noting that “some favorable legislative actions arise from factors other than a group's political strength”).

278. See *Take the Taxpayer Protection Pledge*, AMS. FOR TAX REFORM, <http://www.atr.org/take-the-pledge> (last visited July 16, 2017) [<https://perma.cc/WB8T-BZ3F>] (making federal and state tax pledges available for download); *Taxpayer Protection Pledge Database*, AMS. FOR TAX REFORM, <http://www.atr.org/pledge-database> (last visited July 16, 2017) [<https://perma.cc/9XG5-YADQ>] (showing number of federal elected officials who have signed the pledge); *About the Taxpayer Protection Pledge*, AMS. FOR TAX REFORM, <http://www.atr.org/about-the-pledge> (last visited July 16, 2017) [<https://perma.cc/6RSG-7YKD>] (“Nearly 1,400 elected officials, from state representative to governor to US Senator, have signed the Pledge.”).

279. *Taxes*, GALLUP, <http://www.gallup.com/poll/1714/taxes.aspx> (last visited July 16, 2017) [<https://perma.cc/S99M-VL35>] (noting that, as of April 2016, fifty-seven percent of respondents believe that taxes are “too high,” compared with thirty-seven percent who say taxes are “about right” and just three percent who say they are “too low”).

280. Frank Newport, *Democrats, Republicans Agree on Four Top Issues for Campaign*, GALLUP (Feb. 1, 2016), <http://www.gallup.com/poll/188918/democrats-republicans-agree-four-top-issues-campaign.aspx> [<https://perma.cc/M4XU-BG76>].

281. See McKenna, *supra* note 276 (framing sovereign immunity as a way to save money for Washington taxpayers).

A second argument pertains to state (as opposed to federal) immunity in particular. A significant number of contested cases involve situations where the relevant language bearing on state immunity appears in a federal statute enacted by Congress, not a state law waiving the state's own immunity.<sup>282</sup> In such cases, a process theorist might contend that the clear statement sovereign immunity waiver rule corrects a defect in the political process because federal lawmakers are unduly prejudiced against state interests. As Professor Ernest Young has put it, clear statement rules can “enhance states’ political representation in Congress by providing notice when federalism values are threatened.”<sup>283</sup>

Of course, whether the representation of state interests in Congress is in need of enhancement in the first place is hardly self-evident. Professor Herbert Wechsler long ago observed that because the “people to be represented” by the House and Senate are “*the people of the states*,” federalism interests—at least “[t]o the extent [they] have real significance”—“cannot fail to find reflection in the Congress.”<sup>284</sup> Dean Jesse Choper went further, suggesting that because “state representation in the national executive and legislature places the President and Congress in a trustworthy position to view the issues involved in federalism disputes,” the Court should declare federalism disputes nonjusticiable.<sup>285</sup> And the Supreme Court has at times shown affinity to this political safeguards theory, reasoning most notably in *Garcia v. San Antonio Metropolitan Transit Authority* that state sovereignty is “more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”<sup>286</sup> So too here; the people who vote for Congress can make sure that Congress enacts laws that preserve state sovereign immunity—assuming, of course, the people think it is worth preserving to begin with. States may therefore not always get their way with respect to federal law, but in that sense they

282. See, e.g., *supra* note 155 (waiver of state immunity in *Dellmuth v. Muth* arguably contained in the Education of the Handicapped Act); *supra* note 160 and accompanying text (waiver of state immunity in *Sossamon* arguably contained in RLUIPA).

283. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 121 (2004).

284. 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, 546–47 (1954).

285. Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1556–57 (1977).

286. 469 U.S. 528, 552 (1986); see also *Helvering v. Gerhardt*, 304 U.S. 405, 416 (1938) (reasoning that because “the people of all the states . . . are represented in Congress . . . [t]he very fact that when they [exercise the national taxing power] they are taxing themselves serves to guard against [the taxing power’s] abuse”).

are no different than any other group that sometimes wins and sometimes loses in the pluralist marketplace: they come by their losses honestly.

To be certain, a number of scholars have taken issue with the political safeguards theory of federalism, most significantly with the suggestion that political safeguards render judicial review of federalism issues unnecessary altogether.<sup>287</sup> But even if one agrees that the courts should remain involved, it is not at all obvious why they should do so by creating clear statement rules. As Professor William Marshall has explained, “it is at least incongruous to assume that Congress, as a body comprised of representatives from the various states,” can “protect states’ interests if it is also assumed” that “legislators’ allegiance and duties to the interests of the states as states may not even rise to a level of consciousness.”<sup>288</sup> There is, quite simply, no reason to think congressmen and senators are so ignorant of their states’ desire to avoid costly suits, and so ignorant of the possibility of federal law exposing their states to such suits, that the political process would be defective absent a clear statement rule.

A third argument goes further, contending that *all* sovereign defendants, state and federal, are actually unfairly prejudiced by the political process because the people harbor a deep, anti-government sentiment that may manifest in an overriding desire to hold the government legally accountable for its wrongs.<sup>289</sup> The trouble with this argument is that it is far from clear that popular resentment with government translates into a desire to broaden government amenability to suit for private wrongs. It is just as plausible (and perhaps more so) to think the people will express their disapproval by voting out incumbent officials or even trying to shrink government altogether by cutting taxes. The latter course would seem to point in the opposite direction of broad waivers of sovereign immunity, insofar as waivers actually *increase* government outlays.

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287. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 103–06 (2001) (criticizing calls for declaring federalism disputes nonjusticiable); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460 (2001) (challenging the view that “political safeguards represent the only protections for federalism” because such an “exclusive theory is simply inconsistent with the Constitution’s text, structure, and original understanding”).

288. William P. Marshall, *The Eleventh Amendment, Process Federalism and the Clear Statement Rule*, 39 DEPAUL L. REV. 345, 353–54 (1990).

289. To the antigovernment sentiment point, see Art Swift, *Approval of Congress Inches Up to 20% in September*, GALLUP (Sept. 16, 2016), [http://www.gallup.com/poll/195632/approval-congress-inches-september.aspx?g\\_source=congress&g\\_medium=search&g\\_campaign=tiles](http://www.gallup.com/poll/195632/approval-congress-inches-september.aspx?g_source=congress&g_medium=search&g_campaign=tiles) [https://perma.cc/CT75-ANX4] (finding twenty percent of voters approve of Congress’s performance and seventy-six percent disapprove).

More fundamentally, the government agencies and officials who are targets of most suits against the state are at bottom just agents of the people themselves. The notion of the people as principals who hold deep-rooted prejudice against their own agents that results in a systematic bias against them (yet who stop short of terminating the principal-agent relationship itself) is thus rather odd. And while there is undoubtedly some proper point of equilibrium between protecting one's agents from the burdens of litigation and ensuring that one's agents are accountable for wrongdoing, there is little reason to think the people are unable to strike that balance fairly and properly for themselves.

## 2. Are Sovereign Immunity & the Right to Remain Silent Incommensurable?

If sovereign defendants are properly understood to be more politically powerful than criminal suspects, another response to comparing the waiver rules that apply to sovereign defendants and criminal suspects is that the two are like apples and oranges. Because the two lines of cases involve different constitutional values, this response charges, we cannot draw any conclusions from the fact that the Supreme Court has applied a clear statement waiver rule to the more powerful group while denying it to the less powerful one.

This is an argument that would matter if there were something different about the text or history of the relevant constitutional provisions to shape judicial construction. But there isn't. True, *Miranda* rights are often criticized as the product of judicial construction, as opposed to an inherent part of the Fifth Amendment right to be free from self-incrimination.<sup>290</sup> Yet sovereign immunity can easily be criticized on similar grounds. Whereas the Self-Incrimination Clause at least appears in the Constitution, there is no textual hook for federal sovereign immunity and an imperfect one at best for state immunity.<sup>291</sup>

That means both lines of doctrine are in some sense the product of constitutional construction, an especially plausible understanding given that we are not debating the merits of the underlying rights themselves, but rather the judge-made rules governing when those

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290. See, e.g., *Texas v. Cobb*, 532 U.S. 162, 173 (2001) (describing *Miranda* warnings as "a judge-made preventative rule to protect a suspect's desire not to speak").

291. See generally Tang, *supra* note 142, at 286–88. But see Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1871–72 (2012) (arguing that state sovereign immunity is a background rule for which no reflection in the Constitution's text is needed).

rights have been waived. And if that is so, then considerations of political power would seem fair game in both constructive contexts.<sup>292</sup>

There are two grounds for nonetheless distinguishing between the immunity and criminal suspect waiver contexts once we enter the construction zone with political power as a tool for decision. One is that the criminal suspect waiver setting entails case-specific findings regarding individual instances of police conduct, whereas waivers of sovereign immunity entail something more—namely, exercises of statutory interpretation. This distinction might matter in the sense that political process theory is often framed as an approach that grants heightened judicial protection when the *legislative* process has malfunctioned due to prejudice against some powerless minority group.<sup>293</sup> Reverse political process theory, in other words, might have a lot to say about what goes on in state assembly meetings where waivers of sovereign immunity are debated, but little to say about what happens in police rooms where waivers of individual rights occur.

But as Professor Michael Klarman has convincingly argued, that is too myopic a view of process theory. “The political process perspective would be a toothless constitutional theory indeed if, while constraining the legislative decisionmaking process, it remained silent regarding legislative delegations of entire subject matter areas,” such as criminal procedure, “to the purview of unelected officials.”<sup>294</sup> Legislatures can thus malfunction in two different ways—by adopting laws that directly burden politically powerless groups, or by refusing to legislate in a relevant area at all, thereby leaving discretion to government officials who act with predictable prejudice against those same groups. Either malfunction activates political process theory’s call for judicial scrutiny.<sup>295</sup> And so conversely, it is fair for reverse political process theory to compare the ability of government defendants to preserve their immunity with the ability of criminal suspects to persuade lawmakers to enshrine more rights-protective police policies.

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292. True, one might justify the differential outcomes by taking a one-factor-among-many approach to reverse political process theory and concluding that (1) a pro-sovereign normative value overrides the democratic value of letting the sovereign immunity waiver issue sort itself out without judicial intervention, and (2) no similar pro-criminal-suspect normative value exists in the Fifth Amendment waiver context. Such an approach is surely defensible as a normative matter, but it is worth being clear that normative values would be doing that work.

293. See *supra* notes 51–54 and accompanying text.

294. Klarman, *supra* note 6, at 765–66.

295. See *id.* at 765 (“A credible political process theory must not only superintend the legislative process for systemic biases, but also ensure that legislatures retain responsibility for making important policy choices that govern society.”).

A second critique comes at the problem from the opposite direction, arguing that the special protection sovereign defendants receive in the waiver context is *just* a matter of statutory interpretation, one that should not trigger process theory concerns in the first place. Ely's original project, after all, was to fashion a theory of judicial review for when unelected judges could legitimately *strike down* democratically enacted laws under the Constitution.<sup>296</sup> The Court may be motivated by underlying constitutional values in the sovereign immunity cases,<sup>297</sup> but it does not invalidate any laws, instead interpreting statutes in an arguably counterfactual fashion for lack of a sufficiently explicit waiver.

But should this distinction matter that much? A court may thwart the will of the majority whether it believes the Constitution requires it to strike down a duly enacted law or to interpret it to mean something contrary to its intended effect. Counter-majoritarian acts of statutory *interpretation* are theoretically subject to legislative correction, of course, unlike acts of statutory invalidation.<sup>298</sup> Recent empirical work suggests, though, that this phenomenon is somewhat rare, verging on one or two overrides per year in the aftermath of "a very significant fall off" in congressional overrides since 1998.<sup>299</sup> This reality lends force to scholarly calls for political process theory to apply with some force to statutory rulings, too.<sup>300</sup> For given the lack of legislative responsiveness to contestable Supreme Court statutory interpretations, there may be little practical difference between a ruling that a particular statute is not as clear as the Constitution requires to waive sovereign immunity and a ruling that such a waiver would be constitutionally impermissible altogether.<sup>301</sup>

The implication is that statutory waivers of immunity should be interpreted in just the same way as any other statute—there is no

296. See ELY, *supra* note 3, at 4–5 ("When a court invalidates an act of the political branches on constitutional grounds," it is "telling the people's elected representatives that they cannot govern as they'd like.").

297. See *supra* note 183 and accompanying text.

298. See ELY, *supra* note 3, at 4 ("[I]n non-constitutional contexts, the court's decisions are subject to overrule or alteration by ordinary statute.").

299. See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1332 fig.1, 1341 (2014) (identifying just three overrides in four of the last seven biennial congressional sessions evaluated).

300. See, e.g., ESKRIDGE, *supra* note 181, at 153 (arguing that courts "ought to consider, as a tie-breaker, which party . . . will have effective access to the legislative process if it loses its case, and to decide the case *against* the party . . . with significantly more effective access"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 472–73, 483 (1989) (proposing that "courts should resolve interpretive doubts in favor of disadvantaged groups").

301. See Eskridge & Frickey, *supra* note 13, at 598 (criticizing clear statement rules as "almost as countermajoritarian as now discredited *Lochner*-style judicial review").



constitutional cause to grant sovereign defendants extraordinary protection from the usual political process. Or at the least, such defendants should receive no greater judicial solicitude than criminal suspects who have been powerless to advance their interests before state legislatures.

### *C. Opt-Out Rights*

Applying reverse political process theory to the case of opt-out rights from union and corporate political speech yields a notably different outcome from the preceding examples. The Court's current approach of requiring an opt-out right in the union political speech setting, but not the corporate setting, may be defensible on political process grounds.

The reason is not because the underlying constitutional issues are materially different. Both circumstances, after all, involve the same constitutional question: whether First Amendment principles should entitle objecting persons to opt out of financing the political speech of an intermediary. The First Amendment underdetermines that question in various ways (Is money "speech"? Do compelled subsidies "abridge" the right to free speech, even if so?), so we are in the construction zone. But once one examines political power as a reason for deference to legislative choices, a fair assessment of the relevant political actors reveals that the Court's asymmetrical treatment at least arguably aligns with the reality of relative political strength.

To understand how, the crucial move is to be very clear about *whose political power* matters. The comparison one wants naturally to draw is between the political power of corporations and unions because that is the level of comparison where the brunt of the respective opt-out rules is most often discussed.<sup>302</sup> Even at that level, though, it bears noting that it is not at all obvious in light of existing data whether corporations are really more powerful than unions; Professor Eskridge has found that unions are actually more able to persuade Congress to override unfavorable judicial statutory interpretations than corporations.<sup>303</sup>

But the political power comparison that matters here for purposes of reverse political process theory is not between unions and corporations; it is between their workers and shareholders—the ones

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302. See, e.g., Sachs, *supra* note 19, at 802 (framing the issue as a debate over "the symmetrical treatment of unions and corporations").

303. ESKRIDGE, *supra* note 181, at 153.

actually seeking relief from the courts in the form of a First Amendment opt-out right from compelled subsidies.<sup>304</sup> At that level, it becomes quite plausible to think that the group to which the Supreme Court has granted First Amendment protection (dissenting union workers) may be less politically powerful as a class than the group to which it has not (dissenting shareholders).

One problem with this comparison is that we are left to rely in large part on a gut-level intuition regarding political strength. There is no ready source of data on the relative likelihood that dissenting union workers and dissenting corporate shareholders will see their policy preferences enacted in law, which is the comparison we would need to decide whether reverse political process theory demands judicial deference to democratically enacted laws requiring all workers to subsidize union political speech.<sup>305</sup> But in the absence of such data, it would likely be reasonable for a court to conclude that the relative political power of the two groups is too uncertain and too subjective to serve as a basis for deciding these cases.

#### *D. Discriminatory Purpose*

There is a somewhat stronger case for viewing political power as a reason to treat affirmative action policies burdening whites with the same level of judicial deference as facially neutral policies with disparate impacts on minority groups.

To start, this is an area where the empirics concerning relative power are at their most convincing. Using an enormous data set of survey responses compiled over twenty-five years on respondents' preferences regarding more than two thousand public policy issues, Professor Stephanopoulos has shown a strong, positive correlation between whites' issue preferences and likelihood of enactment at the federal level, accompanied by a negative relationship between blacks' issue preferences and likelihood of enactment.<sup>306</sup> Thus, "as white [policy] support increases from 0% to 100%, the likelihood of adoption increases from about 10% to 60%," holding all other variables constant.<sup>307</sup> By contrast, as "black support rises from 0% to 100% . . .

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304. More specifically, the best analogue is between workers who wish to opt out from fees used to support union political speech and shareholders who seek a similar right to opt out from their investments being used to finance corporate political speech.

305. See generally Stephanopoulos, *supra* note 75 (applying this comparative methodology to huge datasets to determine political power of various other groups).

306. See *id.* at 1583.

307. *Id.*

the odds of enactment *fall* from roughly 40% to roughly 30%.”<sup>308</sup> A similar relationship exists when white and Hispanic policy preferences and likelihood of enactment are compared.<sup>309</sup> In short, there is commanding evidence that whites really are more politically powerful, as a relative matter, than racial minority groups.

So if the comparatively greater scrutiny that the Court has applied to affirmative action policies burdening whites is to survive, it must be on the basis of some underlying constitutional difference between challenges to affirmative action laws and facially neutral laws with disparate racial impact. As noted earlier, the obvious distinction to draw is that the former category classifies by race explicitly, whereas the latter does not.<sup>310</sup> On this line of thought, the Court’s practice of treating democratically enacted affirmative action policies more skeptically than facially neutral policies with a disparate impact can be justified by an understanding of the Equal Protection Clause as embodying an anti-classification principle rather than an anti-subordination principle. And in fact, the conventional contemporary account of the Supreme Court’s equal protection jurisprudence holds that the Court has proceeded in exactly this fashion.<sup>311</sup>

Whether the Equal Protection Clause truly stands for a color-blind, anti-classification principle as opposed to an anti-subordination or anti-caste principle is beyond the scope of this Article.<sup>312</sup> If one believes the only permissible reading is that the Clause implements a color-blind rule, then political power is of no consequence. But where power may have some purchase is if one believes that the text and history of the Clause alone cannot answer that question. It may be, in other words, that the choice between an understanding of the Clause as a promise of a color-blind Constitution and a promise that laws may not

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308. *Id.*

309. *Id.* at 1583–84.

310. *See supra* note 185 and accompanying text.

311. *See, e.g.,* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470 (2004) (observing that many today “understand *Brown* to have ended the era of segregation in America by declaring the constitutional principle that government may not classify on the basis of race”).

312. Much has been written about this debate and the seeming lack of originalist support for the color-blind view of the Equal Protection Clause. *See, e.g.,* Bickel, *supra* note 49, at 58 (finding that “as originally understood,” the Fourteenth Amendment was meant to invalidate racial discrimination in neither “jury service, nor suffrage, nor antimiscegenation statutes, nor segregation,” a fact that cannot be squared with the anti-classification view); Klarman, *supra* note 1, at 244–45 (explaining the lack of historical support for the anti-classification view of the original understanding of the Equal Protection Clause); *see also* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012) (describing ways in which originalists have yet to engage with core questions about the meaning of the Fourteenth Amendment, including the Equal Protection Clause).

“perpetuate . . . the subordinate status of a specially disadvantaged group”<sup>313</sup> is one ultimately grounded not in legal materials and primary sources, but normative values.

If that is so, then reverse political process theory may help pretermit the need for judges to decide which substantive value they prefer, since the distinct value of deference to democratic will could drive the outcome instead. On that approach, a court would be required to treat affirmative action policies burdening whites with no greater deference than facially neutral laws with a disproportionate burden on minorities because the policies that whites are challenging in court are laws that they were more capable of fighting in the ordinary political arena.<sup>314</sup> If the Court isn’t going to intervene to protect the less powerful group, then it shouldn’t insulate the more powerful group from its political losses, either.

Or, a court could go in the opposite direction and decide for normative reasons that facially neutral policies with a disparate impact on racial minorities and affirmative action policies should *both* be reviewed stringently. The only approach that would not work is the one we have, under which the Court actively shelters the more powerful group from its legislative defeats, even as it leaves less powerful minority groups to fend for themselves.

### *E. Mistakes of Law*

The case for treating mistake of law defenses in the qualified immunity context more like the same defense in the criminal prosecution context is a close call. On the one hand, surely police and other government officer defendants are, as a class, more capable of persuading lawmakers to enact legislation actually codifying a qualified immunity defense than are criminal defendants to enshrine a statutory mistake of law defense. While there is no data directly comparing the relative political influence of these two groups, Professor Stephanopoulos’s work finds a strong correlation between policy enactments and the preferences of different income groups.<sup>315</sup> And it

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313. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976).

314. See John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) (“When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for . . . employing a stringent brand of review, are lacking.”).

315. See Stephanopoulos, *supra* note 75, at 1586 (“[A]s support at the ninetieth percentile [of wealth] increases from 0% to 100%, the odds of policy enactment rise from about 10% to 70%. But

takes no great leap of faith to conclude that the average government officer falls in a higher income decile than the average criminal defendant.

On the other hand, perhaps there is something distinctive about due process fair notice principles in the qualified immunity and criminal defense mistake of law settings. I think a decent argument can be made along the following lines: the surface-level similarity between the officer liability and criminal law contexts, where we want to avoid punishing someone for conduct that they reasonably did not know was wrongful, masks a deeper difference. Government officers occupy a role in which the public interest *requires* them to take some action; persons considering a criminal course of conduct have no similar claim. Thus, the public interest is best served when officers are empowered to respond to difficult situations in often exigent circumstances (think of an officer facing a split-second decision over how to end a dangerous high-speed car chase<sup>316</sup>). And that can be achieved by granting officers a buffer zone to act in difficult gray areas of the law where their conduct will not result in personal liability.<sup>317</sup>

By contrast, when a person considers a course of potentially unlawful behavior—say, possessing a hand grenade or transporting dangerous chemicals<sup>318</sup>—that is not the sort of circumstance where society has an interest in affirmatively encouraging tough, on-the-spot decisions. Thus, if a reasonable person would have some reason to think the conduct at issue might be illegal, the burden rests on them to verify it. A government official, however, should get more leeway, whether because there may be greater exigency demanding action or because deciphering the bounds of judicial precedents is more difficult than reading criminal statutes and regulations.<sup>319</sup> The take-home point is this: just how much notice is “due” to these two different sets of actors may depend in part on society’s interests in bearing the cost of their mistakes. And society’s interest may be meaningfully higher when it

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as support at the tenth percentile [of wealth] varies over the same range, the likelihood falls from roughly 50% to 20%.”).

316. See, e.g., *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014).

317. Or as the Fourth Circuit has put it, “Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.” *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

318. See *supra* note 195.

319. For other arguments in defense of the asymmetrical treatment of mistake-of-law defenses in these two contexts, see Larkin, *supra* note 194, at 100–11.

comes to insulating officers from reasonable mistakes for all the reasons given.<sup>320</sup>

### CONCLUSION

In one sense, what I have argued should be uncontroversial. In our democratic system, the primary place for sorting out debates over public policy should be statehouses, not courthouses. Regardless of what one thinks judges should do when the losers of those debates are powerless groups who are systematically disadvantaged in the pluralist bazaar, there is little reason for courts to distrust the outcomes of the legislative process when the losers are *powerful* entities whose preferences usually prevail (at least if what is meant by distrust is the construction of special constitutional rules out of underdetermined text and history). That is especially the case, I have argued here, when courts have denied the same special treatment to powerless groups before.

Yet the prevailing trend seems to be heading the other way. For instance, the emerging issue in the law of personal jurisdiction after *Daimler* is whether corporations may be found to have consented to general jurisdiction by virtue of registering to do business within a state (and appointing an agent for service of process).<sup>321</sup> Commentators have largely coalesced around the view that the Due Process Clause forbids states to do so.<sup>322</sup> Much of the analytical foundation for that conclusion

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320. *But see id.* at 73 (arguing for equal treatment by granting more generous protection to criminal defendants because “[i]f the law is willing to countenance reasonable mistakes that government officials make, it also should be willing to forgive the reasonable mistakes that the rest of us make”). Note that there are many powerful arguments in the scholarship that the Court has gone too far in affording qualified immunity to mistakes by government officials. *See, e.g.*, Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117 (2009); Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 411 (2016). Far from contradicting these persuasive accounts, I mean only to suggest that there is a colorable argument that some base-level difference exists that may justify differential treatment between the criminal and qualified immunity mistake-of-law contexts.

321. *See, e.g.*, Jack Preis, *The Next Personal Jurisdiction Issue for the Supreme Court*, PRAWFSBLAWG (Sept. 19, 2016, 10:11 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/09/the-next-personal-jurisdiction-issue-for-the-supreme-court.html> [https://perma.cc/S3MV-WED2] (suggesting the consent issue “will percolate up to the Court by the October 2018 term”).

322. *See, e.g.*, Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1346 (2015) (“Registration to do business as a basis for general jurisdiction . . . rests on dubious constitutional footing.”); *see also* Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 436–44 (2012) (similar); Kevin D. Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1613–14 (2015) (similar).

is an extension of the reasoning set forth in *Daimler*.<sup>323</sup> But how would a Court rule if it took political process theory's negative command as the starting point for its analysis instead?

To test that question, assume a state enacts a law that explicitly declares that compliance with its registration and appointment laws is both necessary to do business in the state and constitutes a corporation's consent to general jurisdiction.<sup>324</sup> The text of the Due Process Clause obviously does not answer whether this is permissible. The threshold version of reverse political process theory would therefore ask whether corporations possess more political power to fend for their own interests in the democratic process than some less powerful group that the Court has already denied constitutional protection in a similar circumstance.

As noted above, it is an uncontroversial proposition that corporations possess a healthy dose of political power.<sup>325</sup> And the Court has recently refused to extend similar constitutional protections to a less powerful group in the analogous context of conditions on motor vehicle licensing. In that setting, the Court has held that a state may condition receipt of a driver's license on consent to a blood draw to determine one's blood-alcohol content.<sup>326</sup> The burdened groups in both contexts possess an important interest—the ability to drive and the ability to do business in a state—that may be necessary in the modern economy. And the state seeks to condition both interests on consent to a practice it could not perform directly under the Constitution—

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323. See, e.g., *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 142 (Del. 2016) (reversing prior interpretation of Delaware registration statute as authorizing consent to general jurisdiction “[i]n light of *Daimler*”); Benish, *supra* note 322, at 1625 (“After *Daimler*, registration statutes cannot serve as a constitutional basis for general jurisdiction . . .”).

324. There are two distinct issues at play in the registration-as-consent cases: first, whether a corporation *actually* consented to general jurisdiction by virtue of registering to do business and appointing an agent, and second, whether such consent would violate the Due Process Clause. The Delaware Supreme Court rejected registration-as-consent on the first ground, largely because “[n]othing in the statutes explicitly says that by having to register . . . and to appoint a registered agent . . . a foreign corporation was waiving any objection to [general] personal jurisdiction.” *Cepec*, 137 A.3d at 142; see also Monestier, *supra* note 322, at 1386 (similar). In order to avoid the first (statutory) question and get directly at the second (constitutional) one, my hypothetical posits that a state puts companies on clear notice that consent to general jurisdiction is a consequence of compliance with its corporate registration and appointment statutes.

325. See *supra* Section IV.A. Note that the analysis would be slightly different here, since the corporate consent statute burdens *all* corporations, big and small—not just the largest companies (as was true of *Daimler*). Yet even if small business were itself powerless, the fact that its interests are aligned with big business's interests in this context suggests that there is no malfunction of the political process with respect to any of the burdened entities.

326. See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) (noting that the Court has “referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply”).

warrantless blood draws and general jurisdiction outside of a company's state of incorporation and principal place of business. To be certain, drivers who sometimes have a few drinks (and who may accordingly fear the results of a blood test) are hardly a classic politically powerless minority group. But they could well constitute a diffuse and anonymous majority that faces obstacles to organization in our pluralist system.<sup>327</sup> At the least, such drivers are less politically apt to defend their interests before state legislatures than corporations faced with registration consent statutes that threaten to dramatically increase their litigation exposure. And so given that the Court has decided not to intervene to protect the less powerful class of individual drivers, it should not intervene to protect the more powerful group of corporations, either.<sup>328</sup>

Whether the Court will actually decide this issue with political process considerations in mind is, of course, ultimately little more than conjecture. But the kernel of insight I hope to have established is this: a candid judiciary would acknowledge that, like with so many important constitutional questions that arise over time, the answer to whether states may require corporations to consent to general jurisdiction by registration cannot be located in the text and history of the Due Process Clause. The Court may well choose to construct an answer to that question that favors corporations. But if it does so, it would be taking an implicit view on who should decide this complex issue of economic policy—unelected judges or democratically elected lawmakers. In my view, when one considers the political influence of the corporate entities seeking relief, the better answer is elected lawmakers. But as political process theory's third act reveals, that answer is in recent years too often the proverbial road not taken.<sup>329</sup>

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327. See *supra* notes 80–84 and accompanying text.

328. It bears emphasizing that I am not wedded to this particular outcome, only to parity of treatment between the two groups. Thus, if the Court wishes to rule that registration by consent is an unconstitutional condition, that would be reasonable enough so long as the same analysis is followed for implied consent laws governing blood draws.

329. ROBERT FROST, *THE ROAD NOT TAKEN* (1916), *reprinted in* *THE ROAD NOT TAKEN: A SELECTION OF ROBERT FROST'S POEMS* 270–71 (Louis Untermeyer ed. 2002).



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