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# Neutral Principles and Political Power: A Response to Reverse Political Process Theory

*Matthew A. Seligman**

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## INTRODUCTION

The past few decades of constitutional jurisprudence are a story of the decline and fall of the once-mighty political process theory.[1] From its unassuming origins in the ever-famous Footnote Four,[2] through its zenith in the Warren and Burger Courts' decisions,[3] and its canonical academic articulation in John Hart Ely's *Democracy and Distrust*,[4] political process theory lumbered on as a humbled titan through its elder years at the close of the last century. When the Supreme Court struck down state laws banning gay marriage in 2015, it did so largely on the ground that those prohibitions deprived same-sex couples of a substantive right to marry based on the Due Process Clause,[5] rather than the perhaps more obvious rationale that those laws discriminated

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1. *See, e.g.*, Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1365 (2011) (arguing that after its heyday, the "canonical" political process theory has "mostly fizzled in the case law").
2. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
3. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 233–34 (1982); Nyquist v. Mauclet, 432 U.S. 1, 12 (1977); Sugarman v. Dougall, 413 U.S. 634, 646 (1973); Application of Griffiths, 413 U.S. 717, 718 (1973); Graham v. Richardson, 403 U.S. 365 (1971).
4. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
5. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

against same-sex couples in violation of the Equal Protection Clause.[6] The political process theory that had supported much of the Court's constitutional law in the latter half of the twentieth century had fallen into neglect and disuse. Many of the great cases of the Warren Court rested on a rationale that the Court could now dismiss as an abandoned "*ancien regime*."[7]

Professor Aaron Tang contributes a third act to the tragedy of political process theory.[8] In Act I, the Court protected the politically powerless through more searching constitutional scrutiny of laws that disadvantaged them. In Act II, the Court abandoned that protective stance in favor of allegedly neutral principles of constitutional law that purported to eschew the value judgments its prior course had required.[9] After the theory's rise and then fall, Tang sees a new and troubling trend in the cases. He reads a "quietly written . . . third act to the play that is best captioned 'reverse political process theory.' "[10] That constitutional innovation goes beyond "merely rejecting the notion that politically powerless groups should be entitled to special judicial solicitude."[11] Rather, in this new act the Court has "swung so far . . . as to afford special protections via underdetermined constitutional provisions to politically power*ful* entities that are able to advance their interests full well in the democratic arena—precisely the opposite of the kinds of groups who animated the theory at the outset."[12] Across a range of doctrinal contexts, Tang advances the "claim that the Supreme Court's inconsistent rulings—granting protection under open-textured

6. *See id.* That more obvious, and arguably more morally resonant, course had already been charted by (among others) the Supreme Court of California. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by state constitutional amendment*, Prop. 8 (2008).

7. *See* Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (refusing to interpret Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin, to grant a private right of action for disparate-impact claims and distinguishing prior cases as arising under "the *ancien regime*"); *see also* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 77–78 (1992) (Scalia, J., dissenting) ("Although we have abandoned the expansive rights-creating approach exemplified by [cases decided in the 1970s], causes of action that came into existence under the *ancien regime* should be limited by the same logic that gave them birth."). *Alexander*, like the precedent it cast aside, was a statutory interpretation case. But it captures well and, due to the different dynamics inherent in statutory versus constitutional cases, more candidly the shift in perspective held by a majority of the Justices.

8. *See* Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427 (2017).

9. The Court's clearest rejection of the traditional political process theory came in *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (subjecting affirmative action policies disfavoring white applicants to strict scrutiny).

10. Tang, *supra* note 8, at 1430.

11. *Id.*

12. *Id.* at 1430–31.

constitutional provisions to some groups but not to others—have privileged the more powerful class of litigants."[13]

Tang builds on this descriptive account of the Court's recent cases to offer a compelling normative claim: "[T]he proper approach to [the constitutional cases] 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."[14] He situates his view as an inversion of traditional political process theory. Where Ely and those who followed him conceived of political process theory as a theory for "when courts should strike down laws (i.e., when they disadvantage the powerless)," Tang's approach is the "*reverse*: [] a theory for when judges should be especially deferential to democratic choices (i.e., when they disadvantage powerful groups that can protect themselves)."[15] What was once a theory justifying targeted yet activist judicial review to protect the powerless is now a theory justifying the virtues of judicial deference to the political branches when democratically enacted policies burden the powerful.

Professor Tang's account is both theoretically insightful and morally intuitive. Its common sense appeal can seem impossible to deny: even if we cannot agree that the Constitution grants special protection to the least powerful among us, perhaps we can at the very least agree that it should not provide that special protection to the most politically powerful parties, those best equipped to advance their own interests in the pluralist bazaar of politics. That common sense appeal, moreover, should not mask the virtue of its potentially far-reaching implications for doctrine.[16]

This Response explores questions about Tang's descriptive account of the Court's recent cases and the place of his normative account within a broader theory of constitutional interpretation and implementation. First, it questions whether the doctrinal trends Tang identifies really are best explained by a special solicitude to politically powerful parties. If neutral principles—or, at least, *other* principles[17]—

13. *Id.* at 1433.

14. *Id.*

15. *Id.* at 1434.

16. *See id.* at 1447–65 (describing doctrinal implications of reverse political process theory to Due Process limitations on general personal jurisdiction, rules governing waiver of sovereign immunity versus constitutional criminal procedure rights, First Amendment opt-out rights, Equal Protection scrutiny of disparate impact racial discrimination versus affirmative action, and the scope of qualified immunity for mistakes of law).

17. For the remainder this Response, I use the term "neutral principle" to refer to any principle *aside* from a principle that favors or disfavors a party on the basis of its political power. That use may be somewhat over-inclusive based on the traditional definition of the phrase to refer to those "reasons that in their generality and their neutrality transcend any immediate result . . . ." Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19

can explain the cases while staying true to the Court's stated rationales, then we should be hesitant to adopt reverse political process theory as an explanatory account. Instead, it is possible his descriptive account is best understood as identifying the consequences of the Court *ignoring* political power. Second, it presses on Tang's claim that his preferred version of reverse political process theory forms an "overlapping consensus," which constitutional theorists of all stripes should support. It could be, on the contrary, that it satisfies no one: political process theorists want courts to go further than merely declining to favor the politically powerful, and constitutional theorists with different foundations (most prominently, but not exclusively, originalists) will see no reason to go that far in the first place.

In the end, Tang's contribution remains critical: even if we do not think that a preference for the powerful explains the recent cases, and even if we do not think that an aversion to that preference suffices as a unified constitutional theory, it stands as an important principle in the theoretical maelstrom of real constitutional adjudication.

## I. NEUTRAL PRINCIPLES, PATTERNS OF DECISION

Tang first diagnoses a trend, across a broad range of cases, that the Court's recent decisions tend to favor the politically powerful. He locates that trend in cases spanning at least five doctrinal contexts: general personal jurisdiction; waiver rules for sovereign and criminal defendants; First Amendment rights to opt out of compelled speech by corporations and unions; Equal Protection Clause standards in affirmative action and disparate impact cases; and mistakes of law in qualified immunity and criminal cases. In each context, he seeks to identify a pattern in which the Court has favored politically powerful parties over less politically powerful parties with respect to issues for which the application of other doctrinal principles would result in equal treatment, or even result in favoring the less powerful party. The crux of his descriptive claim, then, is that his comparisons are apt: that (for example) the Court's differing treatment of First Amendment opt-out rights in the corporate context versus the union context is not better explained by some principle other than that the Court is favoring the politically powerful.

Before proceeding further, a methodological point sets the stage for the forthcoming critique. A descriptive account of the Court's cases must be clear on what it purports to describe. Tang wisely disavows the

(1959); *see also* Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 9–10 (2011).

claim that he's offering a descriptive account of what the Court generally or Justices individually *think* they're doing:

> 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 rationales internal to those doctrinal areas.[18]

Not only would such an "explicit move" be normatively indefensible, as Tang recognizes, it would also simply be inconsistent with the rationales found in the Court's opinions. Nor does it seem that Tang argues that the Court has advanced those "non-process rationales" in bad faith, as mere fig leaves to obscure its true commitment to a process-based preference for the politically powerful. There is no denying that some Justices are particularly sympathetic to legal arguments advanced by, for example, the U.S. Chamber of Commerce on behalf of large businesses. But it beggars belief that Justice Ginsburg, author of the Court's opinion in *Daimler AG v. Bauman* on behalf of eight Justices,[19] is one of them. Nonetheless, Tang thinks "it is still worth examining *why* the Court has often chosen to distrust the democratic process when it harms powerful business and government defendants,[20] but not when it harms less powerful individuals and entities."[21]

But what sort of *why* are scholars after, if not a synthesis of the Court's stated or unstated rationales or, at least, a causal story of the non-doctrinal factors that influence its outcomes? The answer may simply be "the best reading of the cases." That sort of analysis has a distinguished pedigree. For example, in her prior life as a law professor, Justice Kagan once argued that "notwithstanding the Court's protestations . . . First Amendment law, as developed by the Supreme

18. Tang, *supra* note 8, at 1434.

19. *See* 134 S. Ct. 746 (2014).

20. In addition to the questions I raise below about Tang's descriptive account, *infra*, that account presupposes a workable conception of the distinction between the politically powerful and the politically powerless. The question of how to identify a politically powerful party is, as Tang recognizes, a vexed one. Tang, *supra* note 8, at 1442. One prominent proposal for the measure of political power is the ability of a group to translate its policy preferences into outcomes. *See* Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1531 (2015). Another approach supplements outcome-effectiveness with the ability to acquire the means of political influence, like lobbyists. *See* Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CAL. L. REV. 323 (2016). Tang wades further into this debate in a forthcoming piece. *See* Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CAL. L. REV. (forthcoming 2018).

21. Tang, *supra* note 8, at 1434 (emphasis added).

Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."[22] Though she concluded that "the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting," she also conceded that "[t]he self-conscious rationalization and unification of bodies of law is not something to expect from the modern judiciary."[23] The scope of her descriptive account, then, was limited accordingly: she claimed "not that the Court self-consciously constructed First Amendment doctrine to ferret out improper motive, but that for whatever uncertain, complex, and unknowable reasons, the doctrine reads as if it had been so constructed."[24] But if the pattern of decisions does not reflect an underlying mechanism that produces those outcomes—neither doctrine, nor psychology, nor sociology—we may wonder what deeper significance that pattern represents.

Holding that question aside for now, there is reason to question whether the pattern Tang identifies actually fits the cases better than the alternatives in the first place. In particular, in each doctrinal context he considers there is a different explanatory principle that fits the cases at least as well as the notion that the Court was "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."[25]

First, consider general personal jurisdiction. The Court held in *Daimler AG* that a court may exercise general personal jurisdiction over a corporation only if that corporation is " 'essentially at home' in the [forum] State."[26] It pointed to the place of incorporation and the principal place of business as paradigmatic, though not necessarily exclusive, fora in which a corporation is "at home."[27] It also "clarif[ied]" that "the general jurisdiction inquiry does not 'focus solely on the magnitude of the defendant's in-state contacts.' "[28] Rather, the inquiry depends on "an appraisal of a corporation's activities in their entirety, nationwide and worldwide" because a "corporation that operates in many places can scarcely be deemed at home in all of them."[29] Tang,[30]

22. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

23. *Id.* at 415.

24. *Id.*

25. *See* Tang, *supra* note 8, at 1447.

26. *Daimler AG v. Bauman*, 134 S. Ct. 746, 771 (2014).

27. *Id.*

28. *Id.* at 762 n.20 (quoting Sotomayor, J., concurring in the judgment).

29. *Id.*

30. *See* Tang, *supra* note 8, at 1447–54.

following Justice Sotomayor's opinion concurring in the judgment,[31] observes that one consequence of this "proportionality" approach is that it appears to treat large and small businesses differently. The very same quantum of contacts in a forum state that *is* enough to render a smaller business subject to general personal jurisdiction may *not* be enough for a larger business because that quantum of contacts can represent a relatively insignificant proportion of the large business's overall operations.[32]

We are presented, then, with two different principles to explain the Court's decision. Tang sees in this disparity a "heightened protection" for the more powerful group (larger businesses) that the Court does not confer on the less powerful group (smaller businesses). The Court's opinion, for its part, proffered a rationale that had nothing to do with favoring more politically powerful large businesses. Instead, it explained its decision as a limitation on general personal jurisdiction to only those places where a business is truly "at home"—a rule that applies equally to large and small businesses. The underlying idea appears to be that every business, large and small, should be subject to general personal jurisdiction only in a handful of places that are predictable in advance. To make that idea even more concrete, we could imagine the Court adopting a rule that a business is subject to general personal jurisdiction only in the three fora with which it has the most contacts. That hypothetical rule treats large and small businesses the same both formally and, in an important respect, substantively—even though it, like the Court's actual rule in *Daimler AG*, leads to the asymmetry in application that Tang and Justice Sotomayor observe. Why, for Tang's purposes, is the "right" principle to attribute to the case the principle that it favors the powerful, rather than the neutral principle that the Court itself stated?

Second, consider First Amendment opt-out rights. Both corporations and unions may spend unlimited amounts of money on independent political expenditures.[33] So far, so equal.[34] The alleged asymmetry comes in individuals' rights to opt out of contributing to those independent political expenditures. As Tang puts it, "whereas

31. *See Daimler AG*, 134 S. Ct. at 772 (Sotomayor, J., concurring in the judgment).

32. *See id.* ("Whereas a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be.").

33. *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010).

34. I hold aside the question of whether corporations really are more politically powerful than unions. *See* Tang, *supra* note 8, at 30 & n.181. With respect to war chests to finance independent expenditures, they may be. But unions are historically much more effective at getting their members to get out to vote and to vote the party line than corporations are in exerting comparable political influence over their shareholders. So, as Tang recognizes, the calculation of the relative political power of corporations and unions is no easy task. *See id.*

labor unions must allow employees to opt out from those expenditures as a matter of First Amendment law, corporations are permitted to spend their funds without affording a similar opt-out right to shareholders."[35] But that statement of the law at the very least glosses over distinctions on which the Court has said it relied.

The story here is convoluted (and that is part of the point): public sector employees have a First Amendment right to opt out of paying fees to support the union's political activities because otherwise state law would compel those employees to subsidize political views with which they might disagree.[36] There is an obvious difference between private shareholders and public-sector employees—the state compels the latter to contribute to the union, but does not compel the former to buy shares.[37] And First Amendment doctrine has a longstanding state-action requirement.[38] Private sector union members have an analogous right to opt out, and that might seem incongruous because there is no comparable state action with private employers. But private sector employees' opt-out right is based on the National Labor Relations Act ("NLRA") and not in the First Amendment—or at least, not according to the Supreme Court.[39] Accordingly, the alleged asymmetry between individuals' First Amendment right to opt out of corporate versus union speech can be explained by the application of the state-action requirement along with the traditional tools of statutory interpretation applied to the NLRA. In light of that neutral explanation of the doctrine, indeed an explanation that emerged from disparate doctrinal rules drawn from different lines of cases over the course of six decades,

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35. Tang, *supra* note 8, at 1461.

36. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977). The reason is that state law may compel nonmembers to pay an "agency fee" to support collective bargaining by the union.

37. The most promising argument here, it seems to me, is that compulsory public retirement plans which then invest in publicly-traded corporations which then engage in political activities constitute state-compelled speech. But note the structure of that argument: that once we properly apply already-recognized neutral principles to relatively new factual phenomena, we recognize a constitutional violation.

38. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 834 (1982).

39. *See* Communication Workers of America v. Beck, 487 U.S. 735 (1987). The Court interpreted Section 8(a)(3) of the NLRA to require such opt-out rights for private sector employees because that statutory provision was "in all material respects identical" to a provision in the Railway Labor Act ("RLA") which the Court had previously interpreted to provide such opt-out rights. *Id.* at 745. And the Court had also previously held that, because the RLA "pre-empt[ed] all state laws banning union-security agreements, the negotiation and enforcement of such provisions in railroad industry contracts involves 'governmental action' and is therefore subject to constitutional limitations." *Id.* at 761 (citing Railway Employees v. Hanson, 351 U.S. 225 (1956)). And so the Court did not hold that private sector employees have a First Amendment right to opt out of agency fees that support political activities—rather, it held that they had a statutory right to do so, because that statute was textually identical to a different statute in which the employees *did* have a constitutional opt-out right. *Beck*, 487 U.S. at 762–63.

in what respect are the cases better described by Tang's diagnosis that the Court favors the politically powerful?

Principles aside from a preference for the politically powerful can explain the alleged asymmetries in the remaining three doctrinal contexts that Tang addresses as well. Tang is quite correct that rules governing waiver of sovereign immunity are more favorable to the government than rules governing waiver of some constitutional criminal procedure rights are to criminal defendants. He is also correct that qualified immunity protects government officers from liability based on mistakes of law to a greater extent than criminal law protects defendants who make similar mistakes of law. But in both contexts, the doctrine can plainly be explained by a preference in favor of the government and against criminal defendants. That may or may not be a justifiable preference, but either way, it is not a preference in favor of a politically powerful group. Indeed, to assign the government itself a measure of political power seems like a category mistake—traditionally understood, politically powerful and powerless groups exist outside the government and the measure of their power is their ability to *influence* the government. That, after all, was the entire point of political process theory in the first place. So whatever the judicial preference in favor of the government is, it is not a preference in favor of the *politically* powerful.[40]

Finally, even the difference in the Court's standard of review in affirmative action cases versus disparate impact cases can be explained by a neutral principle that Tang recognizes: the idea that the Constitution prohibits only intentional discrimination.[41] Tang, drawing on Professor Reva Siegel's work, suggests that the driving factor in the Court's application of strict scrutiny in affirmative action cases is the "effect" of the race classification, and following that logic to its conclusion would require the Court to reduce the barriers to disparate impact claims.[42] But the alleged doctrinal disparity can again be explained by a neutral principle that appears on the face of the Court's cases: the Constitution protects only against harms like stigma and denigration that flow uniquely from a governmental policy based in explicit and intentional racial classification.

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40. Although it may not make sense to think of the government itself as politically powerful, it is quite sensible—and quite true—that groups of government employees are politically powerful. One might think, therefore, that the strength of qualified immunity reflects the political power of (for example) law enforcement unions. That's an unlikely explanation, however, because virtually every governmental entity indemnifies its officers for both damages liability and litigation costs in cases arising from conduct committed within the scope of their employment. *See, e.g.*, 28 C.F.R. § 50.15.

41. *See* Tang, *supra* note 8, at 1462–63.

42. *See id.*

To be clear: I do not mean to defend any of these neutral principles. Some I believe are socially inadvisable, and some I believe are morally indefensible. Rather, my point is that insofar as Tang's descriptive project is one of rational reconstruction of the doctrine, there are perhaps better explanations for the shape the doctrine has taken than a preference by the Court for the politically powerful.

If not a rational reconstruction of the doctrine, what might his descriptive account involve? One unlikely possibility is that he means to ascribe unstated and unconscious motives or preferences to at least some members of the Court. That move, an old standard of the Critical Legal Studies movement, seems to me premature, at least in some of the doctrinal contexts Tang considers. There is, as yet, insufficient evidence to support the hypothesis that the Court's personal jurisdiction jurisprudence, which currently commands the concurrence of eight Justices, is *sub silentio* driven by class affinity biases. A prudent epistemic principle for these problems is a jurisprudential version of Hanlon's Razor: do not be quick to attribute to judicial preference for the politically powerful that which is adequately explained by explicitly invoked neutral principles.[43] And even if there were adequate evidence to infer that unconscious preferences explained the Court's cases, it would raise the specter of what Professors Eric Posner and Adrian Vermeule have called the "inside/outside fallacy" when it comes to Tang's normative proposal: "[T]he analyst . . . combin[es] ideal with nonideal theory in an incoherent way, positing nonideal motivations for purposes of diagnosis and then positing idealized motivations for purposes of prescription."[44] But I don't take Tang's descriptive account to ascribe motives or biases, at least not as an essential element, and so I don't think he makes that mistake.

The remaining possibility, and the one that I think best captures Tang's insight, is that he has catalogued a range of doctrinal contexts in which the fair-minded application of neutral principles has the consequence of protecting the politically powerful. Those consequences are ones we ought to care about. The problem he identifies is therefore not one of doctrinal incoherence, or of hidden agendas, but rather one of blindness to an important dimension of the practical world in which

43. Hanlon's Razor itself holds: never attribute to malice that which is adequately explained by stupidity. Its source is unknown, but may derive from Goethe: "misunderstandings and neglect create more confusion in this world than trickery and malice. At any rate, the last two are certainly much less frequent." JOHANN WOLFGANG VON GOETHE, THE SORROWS OF YOUNG WERTHER (1774).

44. Eric Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1744 (2013); *see also id.* at 1745 ("In a typical pattern, the diagnostic sections of a paper draw upon the political science literature to offer deeply pessimistic accounts of the ambitious, partisan, or self-interested motives of relevant actors in the legal system, while the prescriptive sections of the paper then turn around and issue an optimistic proposal for public-spirited solutions.").

constitutional doctrine operates. A fair descriptive account of these cases across the contexts he considers is that the Court applies neutral doctrinal principles that simply ignore political power. The *consequence* of that approach is that its decisions sometimes, indeed frequently, result in constitutional frameworks that favor the politically powerful. And that, he rightly argues, is a problem.

## II. THE PLACE OF REVERSE POLITICAL PROCESS THEORY

The most intuitive part of Tang's project is its prescription: the Court ought to attend more carefully to how its constitutional jurisprudence interacts with the political power of the parties to which its cases apply. His reverse political process principle has significant intuitive and moral appeal. It seems quite hard to justify the Court intervening in the political process when its democratic institutions have produced an outcome that disadvantages a type of party that is quite capable of advocating on its own behalf in that process. As he puts it, "surely the process can be 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."[45] The reasonable implication of that policy outcome is that the disadvantaged but powerful parties were given a fair hearing and just lost on the merits in a political dispute. Such a policy can emerge from the political fray only if the politically powerful group's adversaries band together to exert their collective influence to overcome the powerful party's opposition to the policy that disadvantages it. The political dialogue that precedes that policy's adoption can be presumed to have given fair hearing to the interests and complaints of the politically powerful group that will be disadvantaged by it. The counter-majoritarian difficulty,[46] which challenges the legitimacy of judicial *intervention* in the political process and has long been considered to be the primary theoretical challenge in the justification of judicial review, simply does not apply if a court *defers* to a democratically-enacted outcome that disfavors the politically powerful. And indeed, that counter-majoritarian difficulty bites deeper if the group on whose behalf the judiciary intervenes usually wins in the political process. Accordingly, when powerful parties "capable of defending their own interests before Congress and statehouses" lose a fair political fight, "there is no strong reason to privilege a judicially constructed outcome"

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45. Tang, *supra* note 8, at 1475–76.
46. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

based on a Constitutional right "over the outcome of the democratic process."[47]

The more difficult problem is discerning how Tang's reverse political process principle fits into a broader constitutional theory. He suggests that his view can form an overlapping consensus shared by political process theorists and their opponents.[48] Political process theorists, for whom judicial intervention is justified precisely in those cases where the democratic process disadvantages the politically powerless, should surely recoil at judicial intervention to protect the powerful. And their opponents, who reject political process theory precisely on the ground that it required judges to impose value judgments based on who deserved protection, surely will not object to winning at least this pocket of judicial deference. But although the result—refraining from judicial intervention in this particular class of cases—is one entailed both by political process theory and by many of its opponents' theories, that result in itself just means that the various constitutional theories agree on the outcomes in this particular set of cases.[49]

The implication thus might be, instead of forming an overlapping consensus, that none of the theoretical contenders can support his view outright. Although several types of constitutional theories may endorse the *outcomes* his principle entails, none will endorse the principle itself. Tang recognizes that, at least for a political process theorist, his principle is at best a second-best solution.[50] A political process theorist, though she may agree that judicial intervention is unwarranted in cases where a democratically-enacted policy burdens the powerful, may see his view as a half measure. The opponents of political process theory may, for their part, be reluctant to go as far as he does. For many such views, the political power of the

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47. Tang, *supra* note 8, at 1470.

48. *See id.* at 1476 (citing JOHN RAWLS, A THEORY OF JUSTICE 340 (1971)).

49. Tang's use of the concept of overlapping consensus thus diverges from Rawls', which referred in the first instance to structures of government that are consistent with divergent "conceptions of the good": "a workable conception of justice . . . must allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life . . . affirmed by the citizens of democratic societies." John Rawls, *The Idea of an Overlapping Consensus*, OXFORD STUDIES J. LEGAL STUDIES 1, 4 (Spring 1987). For example, the paradigmatic case with which Rawls was concerned was the justification of political systems that could govern a morally diverse population of peoples committed to different religious ideologies. *Id.* It is less clear that the idea as Rawls meant it applies to differing theories of judicial review. *See* John Rawls, *The Basic Structure as Subject*, §§ 2, 9, *in* VALUES AND MORALS (Alvin I. Goldman & Jaegwon Kim eds., 1978).

50. *See* Tang, *supra* note 8, at 1476 ("[A]lthough 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, the powerful should not receive special judicial protection that has been denied to the powerless.").

parties is simply irrelevant to the identification of the appropriate constitutional rule of decision. An originalist, for example, may reject the idea that constitutional construction ought to be informed by political power dynamics at all.[51] Whether they do or not depends on what norms the originalist has adopted to fill the theoretical space of constitutional construction. Other opponents of political process theory, particularly those committed to judicial deference to the political branches more generally, may, like political process theorists, view Tang's view as a mere half measure—but even worse, they may see his principle as getting the right result in at least a few cases, but for the wrong reason. The upshot is that it is hard to see how Tang's reverse political process theory principle fits into a comprehensive constitutional theory.

## CONCLUSION

That, however, is a weak criticism in the real world of constitutional lawmaking. Tang's view is not that his principle follows from every (or even any) comprehensive theory. Rather, he recognizes that "other normative theor[ies] may be used when constructing the Constitution."[52] That perspective comports with how the Court actually decides constitutional cases. It is not a political process theory Court, and notwithstanding occasional suggestions to the contrary, it is not an originalist Court either. It is a pluralist Court, one that builds constitutional doctrine by drawing on the full range of constitutional principles to inform its decisions. And so his principle—which remains deeply morally intuitive—may serve as one important guidepost among many in the evolution of our constitutional law.

51. *See, e.g.*, RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016).

52. Tang, *supra* note 8, at 1476.