

## ARTICLES

### THE POLITICAL PROCESS, EQUAL PROTECTION, AND SUBSTANTIVE DUE PROCESS

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#### ABSTRACT

*In its landmark decision in Carolene Products, the Supreme Court crafted a uniquely American solution to the counter-majoritarian dilemma present in any constitutional democracy: when unelected judges should substantively review policy choices made by elected legislators and executives. The political process theory underlying that decision is that a court with a history of decisions based on judicial ideology should limit close review of government actions to three situations: (1) when the action contravenes a specific provision of the Bill of Rights, (2) when the action threatens to improperly limit the political process, or (3) with regard to the broadly worded Due Process and Equal Protection Clauses, when courts determine that the political process does not work normally. The Supreme Court has not faithfully implemented this approach over the years. However, neither Justices nor commentators have developed a superior alternative approach. We believe that most Americans ought to prefer a return to Carolene Products, as superior (either philosophically or because of risk aversion) to leaving important constitutional precedents subject to the vagaries of highly partisan politics. Our approach builds upon insights of Justices Harlan Fiske Stone, Robert Jackson, and Thurgood Marshall. First, courts should consider challenges initially under the Equal Protection Clause. Second, the category of cases warranting heightened judicial scrutiny should be expanded to include those in which claimants can prove that they are excluded from the Madisonian factional “wheeling and dealing” that characterizes ordinary politics. Third, substantive due process claims should remain available, but only where claimants can demonstrate that animus or prejudice precludes their ability to use the political process to redress their grievances.*

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## INTRODUCTION

The fundamental problem of American constitutional law has been popularly named the “counter-majoritarian dilemma.” Coined by noted scholar Alexander Bickel, the problem arises because when the Supreme Court invalidates a legislative or executive act that, in the Justices’ judgment, violates the Constitution, the decision “thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.”<sup>1</sup> This issue is theoretically present in any constitutional democracy. However, the so-called “*Lochner* era” supplied a uniquely American problem for Justices, scholars, and theorists to address. Building over five decades, the 1930s saw a crisis in consti-

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<sup>1</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 17 (1962).

tutional law where progressive social legislation enacted by a plainly majoritarian political process (ratified in the 1936 landslide reelection of President Franklin D. Roosevelt) was being systematically invalidated by an ideologically divided Supreme Court. Moreover, the Court's majority was seen as imposing their own personal political and ideological preferences.<sup>2</sup>

Over seventy-five years ago, a re-formed Supreme Court<sup>3</sup> crafted a solution to this dilemma in *United States v. Carolene Products Co.*<sup>4</sup>: the broadly worded Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments would ordinarily be applied with great judicial deference to legislation. The Court rejected both a due process and an equal protection challenge to a federal law limiting the sale of a particular kind of milk. The Court reasoned that:

[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.<sup>5</sup>

However, in the Court's famous Footnote Four (the most celebrated footnote in American constitutional law<sup>6</sup>), the Court noted important exceptions when reviewing legislation that impaired the political process. Thus, "a correspondingly more searching judicial inquiry" might be required when "prejudice against discrete and insular minorities" existed that "tends

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2 For a recent summary of this important period in constitutional history, see JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010). Shesol quotes *Washington Daily News* columnist Ray Clapper: "President Roosevelt will not be thwarted throughout his second four years by five or six members of the court who happen to hold a political philosophy contrary to that which dominates the federal administration, most of the state governments, and more than 60 percent of the voters." *Id.* at 245.

3 The famous "switch in time that saved nine" that averted the constitutional crisis was the decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In that case, Justice Owen Roberts, who had previously voted with the 5-4 conservative majority of the Court to invalidate New Deal legislation in, for example, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down a federal regulation as to coal mining), split from his conservative brethren to join the majority in upholding the National Labor Relations Act. By 1938, two of the conservative Justices, Willis Van Devanter and George Sutherland, had retired and had been replaced by Hugo Black (a New Deal-favoring senator from Alabama) and Stanley Reed (who had been President Roosevelt's Solicitor General). David O'Brien, *Reed, Stanley Forman*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 712-13 (Kermit L. Hall ed., 1992); Tinsley E. Yarborough, *Black, Hugo Lafayette*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES*, *supra*, at 72-75.

4 304 U.S. 144 (1938).

5 *Id.* at 152.

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

seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>7</sup>

*Carolene Products* is a solution to America’s unique need to limit active review by a Court with a history of ideological interpretations of potentially unlimited concepts like “due process” or “equal protection.” Its theory is to limit close judicial scrutiny<sup>8</sup> to cases where courts determine that the political process does not work properly. This theory was extensively developed, at a general level, by John Hart Ely in his aptly named book, *Democracy and Distrust*.<sup>9</sup> It was specifically applied by one of us, in *Judicial Review and the National Political Process*, which argued that the political process works adequately to preserve the constitutional balance between the federal and state governments, and between Congress and the President, but that federal and state courts should actively protect individual liberties that were threatened by the political process.<sup>10</sup> As succinctly put by an international observer,

[t]o the counter-majoritarian objection, the Footnote’s answer lies within the realm of the value of majoritarian legitimacy itself: the only statutes which can be truly legitimate are those which are the product of a genuine majority will *and* where no group is ignored merely because it lacks adequate access to democratic decision-making.<sup>11</sup>

The Court’s doctrinal consistency with political process theory, however, has been uneven. Academics have subjected the theory itself to extensive criticism.<sup>12</sup> Today, the public discourse over “constitutional politics” largely ignores the political process approach.<sup>13</sup> We believe this is unfortu-

<sup>7</sup> *Carolene Prods. Co.*, 304 U.S. at 152–53 n.4.

<sup>8</sup> In this Article, we use the phrases “active” review or “close” scrutiny to describe any sort of non-deferential judicial review of the constitutionality of legislation on due process or equal protection grounds, in contrast with the deferential scrutiny used under the rational basis test originally set forth in *Carolene Products*. This Article focuses on *when* to forego deferential review. Beyond its scope is the precise standard (e.g. “strict scrutiny,” “intermediate scrutiny,” “congruence and proportionality”) that federal courts could use when closely scrutinizing legislation where it is appropriate to do so.

<sup>9</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>10</sup> JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

<sup>11</sup> Wojciech Sadurski, *Judicial Protection of Minorities: The Lessons of Footnote Four*, 17 *ANGLO-AM. L. REV.* 163, 166 (1988).

<sup>12</sup> The two leading critiques written following publication of *Democracy and Distrust* are Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980), and Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 *YALE L.J.* 1037 (1980). For an express restatement of this critique as part of a ten-year later symposium on *Democracy and Distrust* published by the *Virginia Law Review*, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 *VA. L. REV.* 747 (1991) [hereinafter Klarman, *The Puzzling Resistance*].

<sup>13</sup> For a revealing examination of constitutional politics in this regard, see *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the*

nate. The Court's petrification of categories of heightened scrutiny since the 1970s satisfies neither the left, the right, nor academic theorists. As others have noted, the academic criticism fails to offer any alternative superior to process theory. Nor do critics acknowledge its potential to channel and reduce judicial policy preferences, even if process theory does not entirely eliminate non-neutral judicial discretion.

Most critically, we are troubled by what we describe as the new "constitutional politics" that treats Supreme Court Justices no differently than elected or appointed officials who are directly or indirectly subject to popular control. That is, those who want judicial protection against laws restricting women's reproductive choices or LGBTQ equality, but favor legislation restricting corporate and financial power and affirmative action, urge voting for a presidential candidate who will appoint nominees that will accomplish these results. On the other hand, voters on the other side of the political divide support a candidate who will appoint Justices voting to overrule *Roe v. Wade*<sup>14</sup> and *Obergefell v. Hodges*<sup>15</sup> and maintain close and narrow scrutiny of

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*Judiciary*, 111th Cong. (2010). Each Senator gave an opening statement, virtually all complained about activism, and none referred to *Carolene Products* in their statements. Democrats voiced their frustrations. See *id.* at 3–4 (statement of Sen. Patrick Leahy) (criticizing judicial activism in *Bush v. Gore*, 531 U.S. 98 (2000) and *Citizens United v. FEC*, 588 U.S. 310 (2010)); *id.* at 12 (statement of Sen. Dianne Feinstein) (criticizing judicial activism in *McDonald v. City of Chicago*, 561 U.S. 742 (2010)); *id.* at 17, 32 (statements of Sens. Russell Feingold and Richard Durbin) (criticizing *Citizens United*); *id.* at 26–27 (statement of Sen. Charles Schumer) (complaining about a litany of conservative judicial activism); *id.* at 36–37 (statement of Sen. Ben Cardin) (praising a variety of Warren Court cases and later decisions protecting against "abuses of power, particularly by an overreaching government," while criticizing conservative decisions in *Citizens United* and a number of statutory cases where he argued the Court had reversed Congress's "clear intent"); *id.* at 40 (statement Sen. Sheldon Whitehouse) (criticizing judicial activism in *District of Columbia v. Heller*, 554 U.S. 570 (2008)); *id.* at 46 (statement of Sen. Edward Kaufman) (criticizing conservative majority for disregarding "settled law and Congressional policy choices in order to promote business interests at the expense of the people's interest"); *id.* at 48 (statement of Sen. Al Franken) (noting, explicitly, conservative complaints about judicial activism, but noting that Justice Thomas has voted to overturn more federal laws than Justices Stevens and Breyer combined). Republicans also voiced complaints. See *id.* at 5 (statement of Sen. Jeff Sessions) (complaining about Warren Court activism but noting gun rights hang on a single vote); *id.* at 14 (statement of Sen. Charles Grassley) (emphasizing that a judge should lack "an agenda to impose his or her personal politics and preferences from the bench"); *id.* at 20 (statement of Sen. Jon Kyl) (criticizing nominee's memos as a Supreme Court clerk, which expressed concern that the Court would cut back on abortion rights or rights of accused under the exclusionary rule); *id.* at 28–29 (statement of Sen. John Cornyn) (distinguishing, expressly, a "traditional" and "activist" vision of judges, noting that expansive criminal review is "activist" whereas the *McDonald* gun rights decision was "traditional").

The only reference to *Carolene Products* in the entire hearing appeared in a colloquy, when Senator Franken suggested that Justice Thurgood Marshall's jurisprudence on racial justice was grounded in that landmark precedent, and Justice-designate Kagan responded without agreeing or disagreeing with the suggestion. *Id.* at 291.

<sup>14</sup> 410 U.S. 113 (1973).

<sup>15</sup> 135 S. Ct. 2584 (2015).

congressional efforts to protect minority voting rights. American lawmakers understand constitutional politics; this explains why senators on the right and the left preserve the filibuster even when it may harm their short-term political interests. It is common in both constitutional politics (as with free speech) and ordinary politics (as with the Senate filibuster) for Americans and their officials to favor doctrines that may disadvantage them in the short-run, principally to protect their own interests in the long-run. While some Americans may prefer a Supreme Court of like-minded Justices willing to implement their own policy preferences, we believe it is wiser to prefer an alternative strategy because of a fear that the same process may result in a Supreme Court ready to implement opposing preferences.<sup>16</sup>

In light of the unpredictability of contemporary politics, and because of a proper understanding of our Constitution's system of separation of powers, we believe that most Americans should echo this longer-term approach exemplified by *Carolene Products*. That is, constitutional doctrine should channel fights about wise social policy to the legislative and executive branches unless there is some objective structural failure (i.e. a failure more than simply an unwillingness to adopt wise social policy).

In today's vernacular, then, we seek to "double down" on the approach of Justice Harlan Fiske Stone, a Republican who served as President Coolidge's attorney general before his nomination to the bench, but whose jurisprudence led to his elevation to Chief Justice by President Roosevelt. In so doing, we argue for the significant expansion of process-based review under equality principles, based on the insights of Justice Robert Jackson, President Roosevelt's attorney general before his nomination (and mentor of William Rehnquist), and the legendary Justice Thurgood Marshall. Specifically, we argue for a reinvigorated use of political process theory as a principled basis for extending close judicial scrutiny to additional categories of claimants, and to do so primarily under the Equal Protection Clause. In our view, Justice Jackson correctly observed that few rights not expressly protected in the Bill of Rights will be infringed if courts preclude discriminatory treatment. Properly analyzed, most claims for heightened scrutiny would be resolved under equality principles. We argue for retention of judicial protection of substantive claims under the Due Process Clause only in the special case of claimants whose rights are abused because of political animus or prejudice toward a type of conduct.

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<sup>16</sup> The literature seems to underplay this motivation for judicial restraint. *See, e.g.*, David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1254 [hereinafter Strauss, *Carolene Products*] (discussing the Court's transition from reviewing social welfare legislation). *Lochner* abandonment can be explained either by recognition of the Court's lack of expertise in economic matters or in the Court's "capitulating to the inexorable demands of the interest group state." *Id.*

In Part I, we briefly review the major criticism of process theory and synthesize the academic responses. In Part II, we detail the Court's inconsistent reliance on *Carolene Products* jurisprudence. We note the Court's reliance on political process theory to reject heightened scrutiny in certain equal protection contexts, but its failure to seriously engage with process theory regarding substantive due process. Specifically, we critique the Court's disinclination to properly apply in equal protection jurisprudence the implied Madisonian insights of Justice Stone's famous footnote. In Part III, we set forth several doctrinal proposals, building on powerful and underappreciated insights of Justice Jackson's *Railway Express Agency, Inc. v. New York* concurrence<sup>17</sup> and Justice Marshall's *City of Mobile v. Bolden* dissent.<sup>18</sup> Jackson argued that courts should prefer to exhaust equal protection analysis before considering substantive due process claims; Marshall articulated a principled difference between the ordinary political losses of a minority group on any given issue and the systemic inability of a group to participate in the pluralist factional bargaining that is the foundation of the Republic designed by the Framers (most notably James Madison<sup>19</sup>). These insights, we suggest, result in a more rigorous application of process theory to equal protection claims. Although this reinvigoration of *Carolene Products* should adequately resolve most claims, heightened judicial scrutiny should remain available under the Due Process Clauses when claimants can demonstrate, with regard to the exercise of those rights they claim to be "fundamental," that animus or prejudice precludes their ability to participate equally in the political process with other stakeholders. In Part IV, we apply this reinvigorated process-based doctrine to a variety of contentious constitutional issues.

### I. A "CHURCHILLIAN" DEFENSE OF PROCESS THEORY

We readily concede that critics of academic process-based jurisprudence have debunked the notion that process theory guides judges to decide difficult constitutional cases in a manner wholly void of substantive judicial preferences.<sup>20</sup> Our claim is more modest: a process-based jurisprudence for interpreting the Due Process and Equal Protection Clauses is superior to the alternatives. Judges inevitably must rely on insights from other disciplines to decide difficult cases. For example, originalism requires Justices to act as amateur historians.<sup>21</sup> Those who explicitly argue for particular sub-

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<sup>17</sup> *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949) (Jackson, J., concurring).

<sup>18</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 103 (1980) (Marshall, J., dissenting).

<sup>19</sup> THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

<sup>20</sup> For a more extensive understanding of their criticisms, see commentators cited in *supra* note 12.

<sup>21</sup> See, for example, *District of Columbia v. Heller*, 554 U.S. 570 (2008), where the majority and

stantive content generally ask Justices to act as amateur moral philosophers.<sup>22</sup> Our approach, we concede, asks Justices to act as amateur political scientists. We explain why we prefer that role.

#### A. *Original Intent and Textualism*

Both the Court and commentators have properly rejected both originalism and textualism as effective approaches for interpreting the Due Process and Equal Protection Clauses in a manner that minimizes the counter-majoritarian dilemma. The Court's first effort to interpret the indeterminately worded Due Process and Equal Protection Clauses came in the *Slaughter-House Cases*.<sup>23</sup> There, the majority suggested that the Due Process Clause might (as its wording literally suggests) be limited to procedural errors, and that the Equal Protection Clause directly barred only discrimination against Americans of African descent.<sup>24</sup> This approach has never been followed. Indeed, since then the Court has never held, either explicitly or implicitly, that only rights specifically enumerated in the Constitution were entitled to judicial recognition.<sup>25</sup>

The plurality opinion in *Planned Parenthood v. Casey*<sup>26</sup> and the recent majority opinion in *Obergefell v. Hodges*<sup>27</sup> both rejected the notion that the counter-majoritarian dilemma can be resolved by resorting to a historical exegesis of whether the drafters of the Due Process and Equal Protection Clauses intended that the challenged law or practice be struck down. This rejection is also implicit in extending the Equal Protection Clause to gender discrimination,<sup>28</sup> and in refusing to recognize a due process right to physician-assisted suicide based on "history, legal traditions, and practices."<sup>29</sup>

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principal dissent each engaged in an extensive historical inquiry into the origins of the Second Amendment.

<sup>22</sup> See, e.g., Tushnet, *supra* note 12, at 1044.

<sup>23</sup> 83 U.S. 36 (1873).

<sup>24</sup> Concluding that the broad language of the Clause was not limited solely to this sort of discrimination, Justice Samuel Miller suggested that the Clause might have broader force if Congress, exercising its power under Section Five of the Fourteenth Amendment, added what today we might call additional suspect classes. *Id.* at 81 (declining to rule on the applicability of the Equal Protection Clause outside the context of anti-Black discrimination until such time as "Congress shall have exercised its power").

<sup>25</sup> David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 380 (2003).

<sup>26</sup> 505 U.S. 833, 852 (1992) (plurality opinion) (declining to allow the state to impose "its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture").

<sup>27</sup> 135 S. Ct. 2584, 2597 (2015) (due process includes "most of the rights enumerated in the Bill of Rights" and also "certain personal choices central to individual dignity and autonomy").

<sup>28</sup> Compare *Bradwell v. Illinois*, 83 U.S. 130 (1872) (rejecting a Fourteenth Amendment challenge to a woman's exclusion from the Illinois bar), with *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (ac-



Moreover, both originalism and textualism freeze the Constitution and the role of the Court in protecting individual rights, and no Justice who has advocated this approach has ever secured a majority in agreement.<sup>30</sup> In addition, this approach is somewhat inconsistent with the landmark decision in *Bolling v. Sharpe*,<sup>31</sup> desegregating District of Columbia public schools (under the Due Process Clause) although those schools were racially segregated when Congress proposed the Fourteenth Amendment.

The Supreme Court's one-person/one-vote decisions<sup>32</sup> are also consistent with *Carolene Products*, and demonstrably inconsistent with reliance on textualism and originalism. Reapportionment schemes that favor a minority of voters seem precisely the sort of legislation undeserving of judicial deference contemplated by the second paragraph of Footnote Four. Yet there are very strong textual arguments (Section Two of the Fourteenth Amendment itself contains a remedy for malapportionment) against direct judicial intervention. Moreover, there is no plausible argument that drafters, ratifiers, or voters understood the amendment to outlaw malapportionment.<sup>33</sup>

Early in the *Lochner* era, noted constitutional scholar James Bradley Thayer suggested that the Court adopt the extremely deferential "clear mistake" rule, limiting judicial invalidation of popularly-enacted statutes.<sup>34</sup> The Court has not followed this path either.

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cording heightened scrutiny to sex-based classifications); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (contrasting the historical maltreatment of women in American law, epitomized in cases like *Bradwell*, with more contemporaneous advances in woman's rights). *But see* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 101 (2011) (mounting an originalist defense of the principle that the Constitution prohibits invidious sex discrimination).

<sup>29</sup> *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

<sup>30</sup> Even originalist approaches do not claim that due process and equal protection scrutiny is limited to those practices specifically intended to be barred by the Drafters of the Fifth and Fourteenth Amendments. Rather, originalist Judges have used language demanding evidence by the claimant that the asserted right has been "traditionally protected." *See, e.g.*, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 294 (1990) (Scalia, J., concurring) (citations omitted) ("It is at least true that no 'substantive due process' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference."); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) ("In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society."). These concerns are best seen as related to the approach limiting close review to interests "rooted" in "tradition," discussed in Subpart I.C.

<sup>31</sup> 347 U.S. 497, 500 (1954).

<sup>32</sup> *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that unequal apportionment of the population's in-state districts violates the Equal Protection Clause).

<sup>33</sup> *Strauss, Carolene Products*, *supra* note 16, at 1260.

<sup>34</sup> *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140-51 (1893). Thayer quoted favorably from an early decision by the Pennsylvania Supreme Court:

Whatever the benefits of an historical approach in theory, the Justices' actual record when assuming the role of amateur historian to interpret broad constitutional text in a manner designed to effectuate the expectations of those who drafted and ratified the relevant text provides another cautionary tale against originalism. As a prominent constitutional historian has observed, "[T]he ideal of 'unbiased' history remains an elusive goal, while the notion that the Constitution had some fixed and well-known meaning at the moment of its adoption dissolves into a mirage."<sup>35</sup> All nine members of the Court recently explored the history of the right to possess firearms, deeply immersing themselves in the drafting and ratification of the Second Amendment. Yet the Court still divided on traditional 5-4 ideological lines.<sup>36</sup> Indeed, when the views of lower court judges are added, we see little to commend history as a neutral basis for resolving the most difficult cases.<sup>37</sup> Perhaps the current apex of constitutional decisions, *Brown*

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For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.

*Id.* at 140 (quoting *Commonwealth v. Smith*, 4 Binn. 117 (Pa. 1811)).

<sup>35</sup> JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (1996). One of us has previously addressed the difficulties of original interpretation in the context of the Religion Clauses. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 2-5 (1995) [hereinafter CHOPER, LIBERTY].

<sup>36</sup> See *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment to the states); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (guaranteeing the right to possess a gun for self-defense).

<sup>37</sup> To take one prominent recent example, consider the treatment of recess appointments made by the President under Article II, Section Two of the Constitution. See U.S. CONST. art. II, § 2, cl. 3 (enabling the President "to fill up all Vacancies that may happen during the Recess of the Senate"). In 2013, a unanimous panel of the D.C. Circuit (all Republican appointees) relied on historical analysis to rule several such appointments made by President Obama unconstitutional because "the Recess" supposedly originally referred only to *intersession* recesses (those occurring between the two sessions of Congress) and the challenged appointments occurred during an *intrasession* recess (occurring within a single session of Congress). See *Canning v. NLRB*, 705 F.3d 490, 512 (D.C. Cir. 2013). Prior to *Canning*, such intrasession recess appointments had been upheld by the Eleventh Circuit in *Evans v. Stephens*, 387 F.3d 1220, 1224-25 (11th Cir. 2004) (en banc). There, the challenged appointment was made by President Bush, and the dissenting judges (contending that the appointment was unconstitutional) were both Democratic appointees. *Id.* at 1228 (Barkett, J., dissenting); *id.* at 1238 (Wilson, J., dissenting).

Following the D.C. Circuit's opinion, several other appellate courts jumped into the fray and broke down on predictable partisan lines. See, e.g., *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609 (4th Cir. 2013) (deciding, 2-1, to invalidate the recess appointments, with majority judges both being Republican-appointees and the dissenting judge being a Democratic-appointee); *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013) (deciding, 2-1, to invalidate the recess appointments, with majority judges both being Republican-appointees and the dissenting judge being a Democratic-appointee); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013) (declining, in an opinion authored by a Democratic-appointee, to con-

*v. Board of Education*, got it right in concluding that, in the difficult cases before it, history is “inconclusive.”<sup>38</sup>

### B. Rooted in Tradition

The Supreme Court has from time to time suggested that the Due Process Clause ought to protect rights not specified in the Bill of Rights that were “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>39</sup> Many important decisions, however, explicitly reject this doctrinal limit. Most recently, in *Obergefell v. Hodges*, the majority declared: “History and tradition guide and discipline this inquiry but do not set its outer boundaries.”<sup>40</sup>

The reference to a criterion of “rootedness” in “tradition” originated in dicta in a *Lochner*-era case.<sup>41</sup> However, it was given new life in Justice Arthur Goldberg’s *Griswold v. Connecticut* concurrence to justify careful scrutiny of state laws intruding on marital privacy concerning contraception.<sup>42</sup> Later, a majority adopted the phrase in a leading case constitutionalizing family law,

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consider a recess appointments clause challenge due to waiver, with a Republican-appointed judge dissenting and urging that the challenged appointments are unconstitutional). The lone exception to “party discipline” was the decision by Judge Roger Wollman of the Eighth Circuit, an appointee of President Reagan, to join his Democratic colleague in *RELCO Locomotives* in holding that the employer’s challenge to NLRB recess appointments was untimely. *Id.* at 769. Even here, this exception may prove the rule. See Lawrence L. Piersol, *In Dedication*, 46 S.D. L. REV. 1, 2 (2001) (opining that Judge Wollman was appointed by President Reagan “based only upon merit” and “despite his total lack of political influence or connections”).

When the case reached the Supreme Court, the four Democratic-appointees on the Court, joined by Justice Kennedy, all held that such intrasession recess appointments were constitutional (albeit affirming the D.C. Circuit on other grounds). *NLRB v. Canning*, 134 S. Ct. 2550, 2568 (2014). The four remaining Republican-appointees wrote separately and argued that the appointments were unconstitutional. *Id.* at 2592 (Scalia, J., concurring in the judgment).

<sup>38</sup> 347 U.S. 483, 489 (1954).

<sup>39</sup> This phrase originates in *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Court affirmed a murder conviction over claims that the defendant’s due process rights were violated because he was not present when the trial judge, jury, and counsel visited the scene of the crime. *Id.* at 105–06. The case solely involved procedural due process, specifically an interpretation of the application of the Fourteenth Amendment’s protection of liberty to rights arguably protected by the Sixth Amendment’s right to a fair trial. See also *Reno v. Flores*, 507 U.S. 292, 303 (1993) (analyzing whether immigration procedures, applied to detained immigrant juveniles, offended due process rights that were deeply rooted in tradition).

<sup>40</sup> 135 S. Ct. 2584, 2598 (2015). The opinion cites a similar proclamation in *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry”), which in turn quoted Justice Kennedy’s concurring opinion in *County of Sacramento v. Lewis*, 523 U.S. 833, 857–58 (1998) (rejecting claim that police were liable for injuries to passenger on motorcycle whose driver was object of high-speed chase).

<sup>41</sup> See *supra* note 39.

<sup>42</sup> 381 U.S. 479, 486–96 (1965) (Goldberg, J., concurring).

*Moore v. City of East Cleveland*.<sup>43</sup> There are two major problems with using the criterion of “rootedness” in lieu of demonstrable defects in the political process to justify close judicial scrutiny of substantive due process claims.

First, anchoring due process doctrine in “rooted traditions” is certainly no answer to America’s unique “counter-majoritarian dilemma” that gave rise to Footnote Four. Many of the New Deal’s harshest critics grounded their opposition to progressive social welfare legislation on the ground that among the liberties that were “deeply rooted” in American tradition was *laissez-faire* freedom from industrial regulation. Indeed, this was the case in *Lochner* itself.<sup>44</sup>

Second, such a test is neither workable nor analytically sound. Almost any current individual rights claim can be stated at such a degree of precision that claimants would find it almost impossible to demonstrate the claim’s roots (interracial marriage was widely barred). On the other hand, the same claim can be restated at a degree of generality that could encompass almost anything (interracial marriage is rooted in a long-recognized tradition of personal autonomy).<sup>45</sup>

The majority’s reliance on “roots” in the twin 1997 decisions concerning physician-assisted suicide, *Washington v. Glucksberg*<sup>46</sup> and *Vacco v. Quill*,<sup>47</sup> illustrates these problems. Chief Justice Rehnquist’s majority opinion in *Glucksberg* emphasized the need in substantive due process cases to examine “our Nation’s history, legal traditions, and practices.”<sup>48</sup> Noting (1) seven centuries of Anglo-American common law tradition to punish assisted suicide,<sup>49</sup> (2) the adoption of the common law approach barring assisted sui-

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<sup>43</sup> 431 U.S. 494, 503–04 (1977). Other cases invoking this concept include *Michael H. v. Gerald D.*, 491 U.S. 110, 122–31 (1989) (denying parental rights to a biological father after the presumptive father at birth exercised substantial responsibility), and *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1997) (rejecting claimed right of terminally-ill patient to physician-assisted suicide). In addition, the Court has explored whether a claimed right is “rooted” in “tradition” in the context of whether to apply specific provisions of the Bill of Rights to the states, see *McDonald*, 561 U.S. at 760–77 (applying the right to bear arms for personal self-defense), other claims regarding police practices, see, e.g., *Rochin v. California*, 342 U.S. 165, 171–72 (1952) (rejecting involuntary stomach pumping of a suspect as beyond pale consistent with traditions), and other procedural due process contexts, see, e.g., *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 69–75 (2009) (rejecting the right to access to evidence for DNA testing in post-conviction proceedings, absent congressional action).

<sup>44</sup> See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment . . .”).

<sup>45</sup> Neither of these arguments were dispositive in the Court’s holding that state laws interfering with interracial marriages were inconsistent with the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>46</sup> 521 U.S. at 710.

<sup>47</sup> 521 U.S. 793, 800–01 (1997).

<sup>48</sup> *Glucksberg*, 521 U.S. at 710.

<sup>49</sup> *Id.* at 711.

cide by the Colonies,<sup>50</sup> (3) the statutory criminalization of assisted suicide dating to 1828,<sup>51</sup> and (4) the general reaffirmance after reexamination of these bans,<sup>52</sup> the majority found that a right to assisted suicide was not deeply rooted in history and tradition.<sup>53</sup>

One difficulty with this reasoning is that *Lochner*, with the exception of the fourth point about recent affirmation, established that the right to contract with workers for low wages and long hours is deeply rooted in history and tradition.<sup>54</sup> In light of its focus on “rootedness,” it is not clear why the *Glucksberg* majority mentions, but does not explain the significance of, its conclusion that “the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues.”<sup>55</sup> Suppose that the evidence had been, to the contrary, that the States had “let sleeping dogs lie” without any serious reconsideration of the issue? Or suppose legislative debates showed that recent examinations were not “serious” or “thoughtful”? These problems illustrate our preference for a political process approach to a historic inquiry into “rootedness.”

*Glucksberg* argued that an approach anchored to a criterion of “deep roots” is one that “tends to rein in the subjective elements that are necessarily present in due process judicial review.”<sup>56</sup> To the contrary, this approach would mainly satisfy those result-oriented individuals whose policy preferences favor the petrification of existing Court doctrine. Others may find this an acceptable, albeit unprincipled, half-loaf. However, the Court’s precedents regarding interracial marriage, abortion, and personal sexual intimacy cannot meet this demanding historical test. Nor does the majority’s reasoning provide a principled understanding of *Lochner*’s widespread rejection. If the Court is justified in refusing to closely review economic due process claims, it cannot allow challengers the opportunity to obtain heightened scrutiny by showing that their practices are “rooted in history and tradition.” To do so requires a willful failure to recognize that New Deal regulations constituted unprecedented interference with free markets in violation of practices deeply rooted in our pre-industrial free market society.

*Glucksberg* also demonstrates the problem with articulating a “rooted tradition” with a workable level of specificity. The majority sought to distinguish the plurality opinion reaffirming abortion rights in *Casey*. It

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<sup>50</sup> *Id.* at 712.

<sup>51</sup> *Id.* at 715.

<sup>52</sup> *Id.* at 716–18.

<sup>53</sup> *Id.* at 723.

<sup>54</sup> *Lochner v. New York*, 198 U.S. 45, 53 (1905).

<sup>55</sup> 521 U.S. at 719.

<sup>56</sup> *Id.* at 722.

claimed that *Casey* protected “those personal activities and decisions that this Court has identified as so deeply rooted in our history or traditions, or so fundamental to our concept of constitutionally ordered liberty” that they warranted close scrutiny.<sup>57</sup> On the one hand, the actual practice of abortion was not permitted in the nineteenth century. On the other hand, a general right of personal and marital autonomy was well-recognized. The actual practice of physician-assisted suicide was likewise not permitted, but personal bodily autonomy was. All this fails to rein in subjectivity.<sup>58</sup>

Finally, reliance on roots means that courts should actively protect the claims of Tommie Granville to limit the visitation rights of her children’s biological grandparents because parental powers are rooted in tradition.<sup>59</sup> Yet because public education is not “rooted in tradition,” this approach means that federal judges should refuse the claims of Demetrio P. Rodriguez for some genuine justification for why his children’s public school education was so impoverished relative to the public schools of San Antonio’s affluent suburbs.<sup>60</sup> These examples make it difficult to find a theoretical or practical justification for this approach.

### C. *Open-Ended Proportionality Review*

Justices John Marshall Harlan and David Souter have articulated an alternative that does not as much respond to the counter-majoritarian dilemma as to reject or minimize it. The approach was first articulated in Harlan’s famous dissent to *Griswold*’s predecessor, *Poe v. Ullman*.<sup>61</sup> In his *Glucksberg* concurrence, Souter expounded upon Harlan’s dissent. Their position has three key components. First, the Court is obligated to continue its long tradition of reviewing the substantive content of legislation.<sup>62</sup> Second, this review does not identify “extratextual absolutes” but rather re-

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<sup>57</sup> *Id.* at 727.

<sup>58</sup> Adding to the difficulties with the majority’s reasoning, the opinion discusses at great length: how Washington law serves the state’s interest in preserving human life; the risk that suicides will be attempted by those with mental disorders; the troublesome impact on the ethics of the medical profession if physician-assisted suicide were lawful; the state’s interest in protecting vulnerable groups from abuse, neglect, or mistakes; and the risk that lawful assisted suicide will lead to voluntary euthanasia, with a paragraph about how the Dutch experience raises similar concerns. *Id.* at 728–35. In this way, the majority opinion reads more like a *Lochner*-era decision that scrutinizes but upholds socioeconomic legislation. *See, e.g.,* *Muller v. Oregon*, 208 U.S. 412, 421–23 (1908) (upholding state law restrictions on women’s ability to work while also acknowledging that this was a “disadvantage”).

<sup>59</sup> *Troxel v. Granville*, 530 U.S. 57, 65–68 (2000).

<sup>60</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4–5, 17–18, 30–35 (1973).

<sup>61</sup> 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

<sup>62</sup> *Glucksberg*, 521 U.S. at 763–64 (Souter, J., concurring in the judgment).

quires a balancing of clashing principles.<sup>63</sup> Third, legislation must be respected within a zone of reasonableness.<sup>64</sup>

Justice Souter suggested that this approach avoids the pitfalls of *Lochner*, which he characterized as going “astray by speaking without nuance of individual interests in property or autonomy to contract for labor.”<sup>65</sup> Rather, Souter called for careful judicial scrutiny “of the precise purpose being pursued and the collateral consequences of the means chosen.”<sup>66</sup> However, Justice Stone and his colleagues correctly understood that the problem *Carolene Products* sought to solve was not a lack of judicial nuance. Indeed, *Lochner*-era Justices did carefully review statutes to examine their “precise purposes” and the “collateral consequences.” In *Lochner* itself, a major flaw in the challenged statute identified by the majority was that the claimed purpose of health and safety was pretextual, while the actual legislative purpose was a raw wealth transfer from employers to employees.<sup>67</sup> In a number of other cases, the Court upheld regulations that a majority of the Justices found to be acceptable limits on economic liberty in light of the precise purposes and the means chosen.<sup>68</sup>

The Harlan-Souter approach seems to resemble the concept of “proportionality,” borrowed from German/French jurisprudence by the European Union, as the basis for judicial review of all legislative and administrative action. This doctrine subjects all legislation to judicial review of the fit between stated goals and the means chosen; the leading cases hold that European judges review legislation to determine “whether the means [the law] employs to achieve the aim correspond to the importance of the aim and whether they are necessary for its achievement.”<sup>69</sup> For all legislation, judges perform “a balancing exercise between the objectives pursued by the measure in issue and its adverse effects on individual freedom.”<sup>70</sup> At the same time, courts apply a deferential standard of review for much economic and social legislation, invalidating these statutes only if the measure is “manifestly inappropriate.”<sup>71</sup> The European context is quite different from this side of the Atlantic. European legislation is passed by a European parliament with far less democratic legitimacy than our

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<sup>63</sup> *Id.* at 764–65.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 772.

<sup>66</sup> *Id.*

<sup>67</sup> *Lochner v. New York*, 198 U.S. 45 61 (1905).

<sup>68</sup> *See, e.g., Bunting v. Oregon*, 243 U.S. 426, 438–39 (1917) (upholding labor limit on hours similar to the act invalidated in *Lochner*).

<sup>69</sup> TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 139 (2d ed. 2006).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 142–43.

institutions,<sup>72</sup> and European judges have no traditional ideological jurisprudence characterizing the American judiciary for over a century.<sup>73</sup> Nor is there any comparable history where judges systematically invalidated social policies with an unmistakable democratic mandate.

#### D. Common Law Reasoning

David Strauss, among others, has argued that Supreme Court interpretations of broad constitutional text are akin to common law reasoning.<sup>74</sup> Melvin Eisenberg explains that common law reasoning involves the articulation of “social propositions”—based on morality, experience, or views of the way the world works—that justify judge-made doctrinal rules.<sup>75</sup> According to Eisenberg, precedents are followed when judges find the case *sub judice* involves similar social propositions, and are consistently distinguished when judges find the case involves either different or additional social propositions.<sup>76</sup>

Employing this perspective, *Carolene Products* can be read as concluding that the right of a dairy to sell filled milk is distinguishable from rights explicitly guaranteed by the Bill of Rights. Moreover, the dairy’s freedom from discrimination vis-à-vis other milk products is distinguishable from differential treatment of African Americans. Justice Stone explained why: the political process cannot ordinarily be trusted to prevent undue infringement on those rights explicitly protected by the Bill of Rights.<sup>77</sup> Nor can it be re-

<sup>72</sup> The principal legitimacy of the European Union lies in the ability of each national parliament, through its ministers, to control the EU Executive. Adam Cygan, *The Role of National Parliaments in the EU’s New Constitutional Order*, in 1 EUROPEAN UNION LAW FOR THE TWENTY-FIRST CENTURY: RETHINKING THE NEW LEGAL ORDER 154 (Takis Tridimas & Paolisa Nebbia eds., 2004). Other than treaty amendments adopted by each parliament or national referenda, there is no ordinary legislation enacted by European institutions that rival the repeated adoption by American state legislatures and the Congress of social legislation at risk in the *Lochner* era. *See id.* at 154–56.

<sup>73</sup> *See, e.g.*, Michael Malecki, *Judicial Behavior Behind Mask and Shield: Modeling the European Court of Justice* 8 (paper presented to Am. Pol. Sci. Ass’n, 2009), <https://ssrn.com/abstract=1450856> (explaining that ideological divisions among U.S. Supreme Court Justices are more apparent given public dissents, while capturing influences on European courts is more complicated).

<sup>74</sup> *See, e.g.*, Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (using a theory of constitutional common law to analyze the U.S. Supreme Court’s 1974 Term); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 903 (1996) (“Once constitutional interpretation is seen as a process akin to the common law, instead of as a matter of fidelity to an authoritative direction, the existing, settled practice becomes much less problematic.”). For an analysis of differences between constitutional and common law reasoning, see Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 942 (2005).

<sup>75</sup> MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 75 (1988).

<sup>76</sup> *Id.* (“Whether a precedent can consistently be distinguished turns chiefly on whether applicable social propositions justify different treatment of the two cases, given the social propositions that support the rule of the precedent.”).

<sup>77</sup> *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower



lied upon to prevent unfair treatment of African Americans. However, the political process works well enough to protect against undue infringements of the rights and fair treatment for sellers of filled milk. Implicitly, the Court signals an experiential claim that active judicial scrutiny of all infringements on liberty and all differential treatment of those affected by law improperly frustrates the democratic process's design for a good society.

Footnote Four is highly significant, in this regard, because it implicitly rejects a number of other plausible rationales for distinguishing between African Americans and filled milk sellers in determining the scope of due process and equal protection scrutiny. There are myriad ways to explain why the experience and treatment of Americans of African descent might justify their special treatment in the courts. Their freedom was a major purpose of the bloodiest war in our nation's history; the Fourteenth Amendment can be seen as supplementing the Thirteenth Amendment in specifically barring government from discriminating against former slaves; that the Fourteenth Amendment was in direct response to the Black Codes adopted by post-Reconstruction southern states. Moreover, the Court's disdain for active judicial scrutiny of social and economic legislation, based on the disastrous record of its *Lochner*-era predecessors, did not raise the same problems as active scrutiny of race-based government discrimination. *Carolene Products*, however, alluded to none of these, firmly anchoring its jurisprudence in the political process approach. This is not to suggest that any of these factors, or additional concerns beyond the scope of this Article, might justify active scrutiny of laws designed to harm racial minorities. Rather, we see *Carolene Products* as the more satisfactory solution to the quandary posed by *Slaughter-House Cases* about what groups, other than descendants of slaves, warrant such scrutiny.<sup>78</sup>

Nor did Justice Stone foreshadow claims for racial equality by distin-

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scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.”).

<sup>78</sup> Cf. Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685, 695 (1991) (parsing the precise language of Footnote Four to suggest that the reference to “discrete and insular minorities” may refer to groups other than blacks and religious and national-origin minorities). There is much to this claim. Farber and Frickey correctly observe that *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954), focused on the stigmatic effects of racial classifications on minority children, not the shortcomings in the political process. Farber & Frickey, *supra*, at 692. *Loving v. Virginia*, 388 U.S. 1, 10 (1967), reasoned in part that the original purpose of the Fourteenth Amendment was to eliminate all “state sources of invidious racial discrimination;” it was not to bar racial discrimination that is the result of a political process where racial minorities cannot freely wheel and deal with others. Farber & Frickey, *supra*, at 692. Farber and Frickey conclude that limiting *Brown* and its progeny to process theory “divests [these cases] of much of their normative power while simultaneously rendering them vulnerable to attack as rooted in weak political science.” *Id.* at 686–87.

guishing the claims of the Carolene Products Company for equal treatment in milk policy from the claims of Oliver Brown for equal treatment in educational policy because Carolene Products could sell other kinds of milk, while Oliver Brown's daughter could not change her race. The argument for immutability as a relevant criterion for determining the types of groups to be preferred for active judicial protection under the Equal Protection Clause came later. It was first provided for gender discrimination as a supplement to an explicit political process-based justification for heightened scrutiny by the plurality in *Frontiero v. Richardson*.<sup>79</sup> Mutability does provide a coherent basis to distinguish race and gender from milk selling or other categories where the Court subsequently rejected careful scrutiny. However, in contrast with a political process analysis, the criterion of immutability as the principal (or exclusive) justification for active judicial review is not consistent with other aspects of the Court's jurisprudence. For example, the Court has applied careful scrutiny to state classifications discriminating against non-citizens eligible to become United States citizens, although this group's status was plainly mutable.<sup>80</sup> Moreover, although we share the normative ethical concern with people being classified based on a trait over which they have no control, we agree with Professor Ely that there is not "any reason to suppose that elected officials are unusually unlikely to share" that concern.<sup>81</sup>

Although David Strauss persuasively demonstrates that the Court's

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<sup>79</sup> 411 U.S. 677, 686 (1973) ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .'" (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972))).

<sup>80</sup> See *Nyquist v. Mauclet*, 432 U.S. 1, 13–14 (1977) (holding that state classifications based on alienage were inherently suspect and therefore, subject to close judicial scrutiny).

<sup>81</sup> ELY, *supra* note 9, at 150. For a nice deconstruction of the criterion of immutability and why it collapses into the inquiry about prejudice, see *Ortiz*, *infra* note 123, at 732. Although a majority of Justices suggested that sexual orientation is immutable in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015), the district court had previously justified heightened scrutiny of a same-sex marriage ban in part based on an inquiry focused not on "whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon." *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 990 (S.D. Ohio 2013). The Supreme Court of Canada has similarly adopted a standard for heightened scrutiny that focuses on whether a trait is a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs[.]" *Egan v. Canada*, [1995] 2 S.C.R. 513, 528. In *Egan*, the Supreme Court of Canada analogized sexual orientation to religion. *Id.* at 549–50. Given Professor Ely's insights, we see no particular advantage in judges' determining whether a personal cost is "acceptable" rather than focusing on political process issues. See also Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 12 (2015) ("Asking whether a characteristic is immutable, in either the new or old sense, focuses attention on the victims of discrimination and their blameworthy or costly choices, rather than the systemic effects of biases that are not required for the workplace to function.").

“common law constitutionalism” constrains unbridled judicial discretion,<sup>82</sup> it fails to provide a satisfying alternative to process theory as a basis for applying the Due Process and Equal Protection Clauses. Professor Eisenberg’s model of common law reasoning requires courts to base new doctrines on empirical, moral, or experiential propositions that are widely shared in the community.<sup>83</sup> Applied rigorously, this model would greatly limit desirable new precedents. Indeed, the Stone Court’s overruling of *Lochner* would have been hard to justify under Eisenberg’s model. At the time, a significant minority of Americans (and four of their colleagues on the bench) continued to believe that liberty of contract was morally justified and regulation of the market was likely to result in economic harm. On the other hand, if a lower bar is set for experiential or moral bases for social propositions (of the sort needed to justify the privacy decisions in *Griswold* and its progeny), then common law constitutionalism leaves a great deal to judicial discretion. On today’s Court, this means that most key decisions turn on Justice Kennedy’s personal moral philosophy. In the future, decisions will turn on the vagaries of presidential politics (most of which are not related to moral philosophy of the sort at issue before the Court).

#### E. “Fundamental” Rights

Finally, we consider two related arguments that solve the counter-majoritarian dilemma by rejecting it. In *Griswold*, Justice Goldberg invoked the Ninth Amendment as showing “a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments, and an intent that the list of rights included there not be deemed exhaustive.”<sup>84</sup> He opined that the right of marital intimacy thus warranted heightened judicial scrutiny. Goldberg reasoned that it would be inconceivable that legislatures should have the freedom to adopt horrific intrusions into marital intimacy such as mandatory sterilization.<sup>85</sup> Complementing this view is the contemporary argument for close scrutiny of rights that five Justices believe are “fundamental”: close scrutiny is consistent with democratic

<sup>82</sup> Strauss, *supra* note 74, at 887–88 (referencing the *method* of judge made law, constrained by prior precedent). Of course, common law doctrine itself is distinct from constitutional doctrine because it is far easier for the legislature to overturn a common law rule by statute than, at least at the federal level, it is to amend the Constitution.

<sup>83</sup> EISENBERG, *supra* note 75, at 15, 29 (arguing that moral propositions and empirical/policy propositions must “fairly be said to have substantial support in the community”); *id.* at 17 (noting that the judge is a “participant-observer” who determines if norms are “widely shared”).

<sup>84</sup> *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring).

<sup>85</sup> *Id.* at 486–87 (“[T]he concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.”).

principles because voters can alter unwise decisions by electing Presidents who will appoint Justices to do so.<sup>86</sup> (In this way, the Supreme Court is no more counter-majoritarian than the National Labor Relations Board.)

This argument seems to reconceptualize the theory of separation of powers by suggesting that the role of the Supreme Court is to exercise broad and unfettered discretion to correct seriously misguided decisions by elected officials. To accomplish this, it is important that the Justices are not immediately responsive to politics (otherwise there is no difference between their judgments and those of legislators). However, this theory ultimately grounds itself on the Justices' political responsiveness, through replacement by presidential appointment.

This position is problematic for a number of reasons. First, there is history: the Framers saw the benefits of a body of government that would have some ultimate democratic legitimacy but would not be immediately responsive to every momentary political whim that captured the electorate. This is precisely the role designed for the Senate.<sup>87</sup> Second, the degree of responsiveness is quite haphazard. Even in the 2016 election, when there were many explicit calls for voters to choose a candidate because of their ability to impact the Court, it is troublesome that cases involving contentious constitutional issues, like abortion or corporate speech, would be decided by the Court based on whether many voters had more antipathy toward Hillary Clinton or Donald Trump.<sup>88</sup> Americans can choose instability in ordinary social policy if they wish; in theory, elected officials could enact and repeal national health care following each election. It is far more problematic to have constitutional politics feature similar instability.<sup>89</sup> Responsiveness is also based on the arbitrariness of the health of the Justices: the notion that agricultural regulations and minimum wage laws might

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<sup>86</sup> For a discussion and critique of this idea, see John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts are no Different from Legislatures*, 77 VA. L. REV. 833, 843–45 (1991).

<sup>87</sup> THE FEDERALIST NO. 62, at 379 (James Madison) (Clinton Rossiter ed., 1961) (seeing the Senate as a corrective for “the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions” because of the Senate’s smaller size and “a tenure of considerable duration”).

<sup>88</sup> Cf. Ariane de Vogue, *What 2016 Means for the Supreme Court*, CNNPOLITICS (Sept. 11, 2015, 5:35 AM), <https://www.cnn.com/2015/09/11/politics/supreme-court-2016-election/index.html>.

<sup>89</sup> Indeed, such instability would not even be predictable, as individual Justices might decide to vote against their own views for the sake of continuity. See, e.g., *People v. Lewis*, 88 Ill. 2d 129, 165–66 (1981) (Goldenhersh, C.J., concurring) (explaining how three justices who dissented from prior decision upholding the death penalty under the Illinois Constitution would now concur in the validity of the statute, lest the law change simply from the retirement of one of the justices voting in the majority and his replacement with a justice who shared their view of the statute’s unconstitutionality).

have been approved earlier in the Great Depression had one of the conservative “Four Horsemen” taken ill seems unsatisfying as a way to design a government. Third, if Presidents run on mandates to appoint Justices who will overrule *Roe v. Wade* or *Citizens United*, then senators will also be accountable to their own constituents for voting to confirm these Justices.<sup>90</sup> The logic of this scenario is that senators will refuse to confirm Supreme Court nominees whose personal philosophies the senators cannot defend on the election hustings. The likely result here is that the only Justices who can be nominated and confirmed are compromise candidates whose beliefs on specific constitutional issues are acceptable to a President and at least fifty senators. It is not clear how anyone benefits from this scenario. Moreover, as John Hart Ely observes, there is somewhat of a paradox that senators would seek a political court, which relies on the unspoken premise that the very same Senate cannot be counted on to deliver desirable outcomes.<sup>91</sup>

Risk aversion to being in the minority is another reason why ordinary Americans, as well as Supreme Court Justices, should reject an approach that enshrines every judgment about “fundamental rights” among five of the Justices into a constitutional mandate or prohibition. This phenomenon explains why virtually no major figure in American politics seriously calls for a new constitutional convention, although virtually all of them find aspects of our Constitution they would like to change. As a matter of institutional politics, it explains why, despite gridlock, senators will not abolish the filibuster. At the non-constitutional level, it explains in part why the Administrative Procedure Act remains virtually unchanged from 1946, even though there have been times when a President’s party controlled both Houses and could have plausibly marshalled the votes to weaken the standards for judicial review of agency decisions made by the President’s appointees. It also indicates why broad “super-statutes” like the Sherman Act and the National Labor Relations Act (once an equilibrium settled between the pro-labor Wagner Act and the pro-business Taft-Hartley Act) remain unchanged despite temporary majorities who could modify them.

We concede that it would be rational for someone whose overwhelming concern is LGBTQ rights, or unlimited political spending by individuals and corporations, or someone who is deeply skeptical of political institu-

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<sup>90</sup> See ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 99 (1989) (explaining that Senator Kennedy’s “landmark” speech announced that the Senate should not “content itself with examining a nominee’s personal integrity and legal qualifications” but that its constitutional duty required it to “take politics and ideology fully into account”).

<sup>91</sup> Ely, *supra* note 86, at 835. Between its powers under the Spending Clause, the Commerce Clause, and Section Five of the Fourteenth Amendment, there is very little that a Congress could not do to achieve desired rights protection, needing only a deferential Supreme Court to stay out of its way.

tions and generally likes the center-right philosophy of Justice Anthony Kennedy, to favor the status quo. But in light of the complete unpredictability of politics, it is not only rational but preferable to adopt Justice Stone's Footnote Four approach, and to channel fights about wise social policy to the legislative and executive branches unless there is some objective structural failure (i.e. a failure distinctively more than a failure to adopt wise social policy).

*F. Process Theory is Substantially Restraining*

We acknowledge that determining when the political process works sufficiently to protect those who wish to exercise liberties is not a precise science. For that matter, nor is the Court's determination of whether close scrutiny reveals a "compelling state interest" or when a Fourth Amendment challenge reveals a "reasonable" search. Although the *Carolene Products* doctrine is not perfect, our argument is that it is superior to the alternatives in restraining judicial policymaking.

A political process approach involves a more limited role for a judiciary that has often shown itself over the course of American constitutional history to be ideologically divided. Any formula can be molded or even distorted by willful judges. But the political process approach is likely to be *more* neutral: the judicial inquiry is procedural rather than substantive. Moreover, the courts would use the same political science techniques and judicial standards to ascertain whether a group whose claims receive sympathy from either progressives or conservatives face prejudice that precludes their ability to wheel and deal in the legislative process. Thus, the political process approach applies to claims by political conservatives that political processes are not adequate to protect the "rights" of state governments<sup>92</sup> or property owners.<sup>93</sup> Likewise, the same test applies to claims by political liberals that political processes are not adequate to protect women, sexual mi-

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<sup>92</sup> Compare *United States v. Lopez*, 514 U.S. 540, 578 (1995) (Kennedy, J. concurring) (discussing an absence of "structural mechanisms" to require elected officials to achieve a principled balance in federal/state relations), with *United States v. Morrison*, 529 U.S. 598, 647 (2000) (Souter, J., dissenting) (stating that the Founders' judgment was that politics will properly "mediate between state and national interests").

<sup>93</sup> See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 6 (1990) (providing a discussion of how the Fifth Amendment's Takings Clause responded to concerns that the ordinary political process, especially in light of the actual treatment of property holders during the Revolutionary period, led to "a general suspicion of the people. . . a permanent propertyless majority which would be fluid in its composition, but fixed in its inevitability."); see also Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 *DUKE L.J.* 1457, 1469-70 (2005) (discussing the difficulty of finding "judicially discoverable and manageable standards" for regulatory takings).

norities, or the poor (at least in certain contexts).

Because of the attractiveness of process jurisprudence, we propose that the Court should use Footnote Four criteria to determine which liberties warrant close judicial scrutiny under the Due Process and Equal Protection Clauses. This focus may result in a body of doctrine that is more workable, consistent with core precedents, and accepted modern constitutional principles, than exists at present.

## II. THE COURT'S UNEVEN FIDELITY TO *CAROLENE PRODUCTS*

In this Part, we sketch how *Carolene Products* has strongly influenced equal protection jurisprudence, particularly in providing the rationale for rejecting claims of close judicial scrutiny. Less clearly, individual opinions have suggested that process jurisprudence plays an important role in the Justices' approach to federalism issues. Otherwise, *Carolene Products*'s influence is opaque, leading one commentator to observe that Footnote Four's focus on powerlessness "has mostly fizzled in the case law."<sup>94</sup> Although other commentators have suggested that the Court's affirmative action rulings constitute a rejection of *Carolene Products*, we suggest a more nuanced answer.<sup>95</sup> Moreover, several important decisions regarding judicial limits on the scope of Congressional power to enforce the Civil War Amendments are not fully reconcilable with Justice Stone's insights. Finally, we lament the failure of the Court's due process jurisprudence to discuss process-based jurisprudence in any meaningful way.

### A. Heightened Equal Protection Scrutiny and Process Jurisprudence

In the area of equal protection, the insights of process jurisprudence were most forcefully articulated by the Supreme Court in *Vance v. Bradley*:

The Constitution presumes that, *absent some reason to infer antipathy, even im-*

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<sup>94</sup> Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1365 (2011). Even with regard to equal protection principles that seem to apply *Carolene Products*, the Court does not expressly cite the case. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 220 (1991).

<sup>95</sup> See Klarman, *The Puzzling Resistance*, *supra* note 12, at 753.

Professor Klarman also suggests that the Court's commercial speech doctrine is inconsistent with process-based jurisprudence. *Id.* at 756–57. In our more limited view, the centrality of free speech and exchange of ideas signals a justification for heightened scrutiny for any kind of expression, and the scope of judicial protection for such expression is beyond the scope of this Article. We emphasize that Footnote Four contemplated three discrete exceptions to deference. In reverse order, these are when prejudice or antipathy precludes reliance on the political process by a minority, when laws directly impede the political process, or when the Court is asked to interpret the "specific" rights guaranteed in the Bill of Rights.

*provident decisions will eventually be rectified by the democratic process* and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.<sup>96</sup>

In many subsequent cases where the Court has rejected close judicial scrutiny, it has explicitly reasoned that the claimant had failed to demonstrate the shortcomings in the political process that would justify closer judicial review. A prime example is *San Antonio v. Rodriguez*, where the majority rejected a claim for strict judicial scrutiny of vastly unequal financing of Texas public schools.<sup>97</sup> The Court explicitly limited close judicial scrutiny of equal protection challenges to three categories that were necessary to justify "extraordinary protection from the majoritarian political process": a group must be "saddled" by "disabilities," have been subject to "a history of purposeful unequal treatment," or "relegated to [ ] a position of political powerlessness."<sup>98</sup>

The Court's equal protection jurisprudence in other cases has likewise extended close scrutiny to challenged discrimination because of announced shortcomings in the political process. Thus, the Court has closely reviewed state laws discriminating against non-citizens on whom federal law has conferred permanent resident status<sup>99</sup> and against children born outside of wedlock.<sup>100</sup> In *Plyler v. Doe*, the Court distinguished *Rodriguez's* rejection of close scrutiny regarding an asserted fundamental right to education, in striking down a statute barring undocumented alien children from public schools.<sup>101</sup> Most specifically, Justice Blackmun, concurring, explained that children who are denied an education will be placed "at a permanent political disadvantage."<sup>102</sup> Such children and their parents had no votes, and were thus "relegated to [ ] a position of political powerlessness" that justified special judicial protection.<sup>103</sup>

The Court's justification for extending closer judicial scrutiny to discrimination against women is instructive in developing the importance of

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<sup>96</sup> 440 U.S. 93, 97 (1979) (emphasis added).

<sup>97</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

<sup>98</sup> *Id.* at 28.

<sup>99</sup> *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (noting that classifications based on alienage are "inherently suspect and subject to close judicial scrutiny").

<sup>100</sup> *See Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (citing *Trimble v. Gordon*, 430 U.S. 762, 767 (1977)) (detailing how classifications based on illegitimacy must be "substantially related to permissible state interests" to be considered valid under the Fourteenth Amendment).

<sup>101</sup> 457 U.S. 202, 223 (1982) (Blackmun, J., concurring).

<sup>102</sup> *Id.* at 234.

<sup>103</sup> *Rodriguez*, 411 U.S. at 28.



the Court's perceptions of the political process as it affects groups adversely affected by social welfare legislation. In *United States v. Virginia* (the "VMI case"), a near unanimous majority reaffirmed precedents departing from rational basis scrutiny to demand an "exceedingly persuasive justification" to justify gender-based government action.<sup>104</sup> The first decision to explicitly acknowledge heightened scrutiny for gender-based discrimination was *Frontiero v. Richardson*, where Justice William Brennan, writing for four Justices, acknowledged that a prior decision striking down a state probate law favoring men, purportedly on rational basis grounds, was really a "clearly justified" departure from rational basis scrutiny.<sup>105</sup> *Frontiero* cited a history of "gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes."<sup>106</sup> Significantly, Justice Brennan observed that, although "the position of women in America has improved markedly in recent decades," women still faced "pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."<sup>107</sup>

Dissenting alone in the *VMI* case, Justice Antonin Scalia pointedly questioned why gender discrimination warranted such judicial attention:

It is hard to consider women a "discrete and insular minorit[y]" unable to employ the "political processes ordinarily to be relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns.<sup>108</sup>

Justice Scalia went on to cite passage of federal statutes such as the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Women's Business Ownership Act of 1988, and the Violence Against Women Act of 1994<sup>109</sup> to demonstrate the political prowess that women possess. Justice Ruth Bader Ginsburg's majority opinion indirectly responded, finding close scrutiny to be still justified, concluding that "[t]oday's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, 'our Nation has had a long and unfortunate history of sex discrimination.'<sup>110</sup>

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<sup>104</sup> 518 U.S. 515, 531 (1996) (citing *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136–37 (1994) and *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

<sup>105</sup> 411 U.S. at 684.

<sup>106</sup> *Id.* at 685.

<sup>107</sup> *Id.* at 685–86 (emphasis added).

<sup>108</sup> 518 U.S. at 575 (Scalia, J., dissenting).

<sup>109</sup> *Id.* at 575–76 (citations omitted).

<sup>110</sup> 518 U.S. at 531 (quoting *Frontiero*, 411 U.S. at 684). In a similar vein, consider the specific liber-

The logic of *Carolene Products* and *Frontiero* suggest that the time may come when Justice Scalia's claim is accepted by a majority of the Justices. Inherent in the doctrine of Footnote Four must be the notion that, if the Court can justify careful scrutiny of legislation on the grounds that it disadvantages a group that has been found to be victimized by prejudice and antipathy, it can also determine that challenged legislation is no longer the product of such victimization and prejudice.<sup>111</sup>

The Court's current equal protection doctrine mandates close scrutiny for legislative policies that seek to remedy racial injustice by conscious steps that favor racial minorities.<sup>112</sup> Dissenting Justices and commentators have emphatically complained that these decisions should be largely left to the political process, and the Court's role represents a perversion of equality jurisprudence.<sup>113</sup> Because our argument is solely that process jurisprudence should guide the threshold question whether to defer or more closely scrutinize legislative and executive choices, and not to the particular non-deferential doctrine the Justices adopt, we do not believe that affirmative action doctrine *necessarily* represents a rejection of *Carolene Products*.

Affirmative action is, like many difficult questions of constitutional law, a

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ties entrenched in the Bill of Rights: free expression, religious liberty, self-protection through arms, preserving the home from military quartering or searches, preserving property rights, and myriad rights of targets of law enforcement. While these liberties vary in importance, controversy, and independent moral justification, almost all are mutable, but share one thing in common: the apparent perception of those in the ratification process that demanded a Bill of Rights that these liberties were unlikely to be protected by the political process. Unlike the case of a "discrete and insular minorit[y]" entitled to "extraordinary protection from the majoritarian political process" based on a judicial determination of prejudicial antipathy, *see Vance v. Bradley*, 440 U.S. 93, 113–14 (1979) (Marshall, J., dissenting) (citations omitted), those protected by specific provisions of the Bill of Rights retain their protection even if judges no longer find that special protection is warranted. Many today would assert that gun owners are fully capable of protecting their own interests in the political process, but the current Court concluded that the purpose of the Second Amendment reflected the concern of those involved in demanding a Bill of Rights that these interests would not be adequately protected in Congress. *District of Columbia v. Heller*, 554 U.S. 570, 595–600 (2008) (determining that the Founders codified the Second Amendment in order to preserve a citizen militia, with self-defense being a "central component" of that right).

<sup>111</sup> *See* David Schraub, *Unsuspecting*, 96 B.U. L. REV. 361, 419–22 (2016) (discussing whether the Supreme Court can remove a group from the "suspect class" category when the Court demonstrates that "democratic bodies can be trusted to legislate on" that class).

<sup>112</sup> *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (applying strict scrutiny to legislative plans wherein students were allocated slots to particular schools based on racial classifications with the intended purpose of ensuring racial diversity).

<sup>113</sup> *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (criticizing as "untenable" the analogy between "a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination"); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735–36 (1974) (noting that reasons for employing stringent review are lacking when "the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself").

contentious issue of public policy. Language in a number of opinions suggests a reasoning that is consistent with *Carolene Products*. Justices have approved heightened scrutiny to ensure that statutes purporting to benefit racial minorities do not harm them. Justices have also argued that, although affirmative action schemes may benefit specific minority race individuals, they end up harming racial minorities by generating hostility toward them by other racial groups and perpetuating stereotypes that harm efforts to end racial animosity.<sup>114</sup> To be clear, we are not claiming that this reasoning accurately describes the subjective thinking of every Justice who has voted to invalidate affirmative action policies,<sup>115</sup> nor that we necessarily agree with this reasoning. Our modest goal is simply to refute the claim that affirmative action jurisprudence necessarily signals the death of process jurisprudence.

### B. Federalism and Process Jurisprudence

Likewise, in the area of federalism, the current division on the Supreme Court can be explained, at least to a significant degree, by the Justices' differing assessments of the claim that close judicial scrutiny of federalism claims is unnecessary because the political process adequately protects states' rights. For example, in *South Carolina v. Baker*,<sup>116</sup> the Court rejected a Tenth Amendment challenge to federal tax on state bonds. Citing *Garcia v. San Antonio Metropolitan Transit Authority*, the Court held "that States must

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<sup>114</sup> See, e.g., *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (O'Connor, J., plurality) (citation omitted) (noting the "danger of stigmatic harm" when race-based classifications are used outside of remedial settings); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (Powell, J., plurality) (arguing that preferential treatment for a particular class may not be used to "enhance the societal standing" of that class, and that such treatment may reinforce stereotypes). Chief Justice Roberts articulated clearly the instrumental view that affirmative action harms the goal of racial equality: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748.

<sup>115</sup> Professors Farber and Frickey, *supra* note 78, at 719–20, criticize *Carolene Products* as justifying the use of the Equal Protection Clause as a sword against, rather than a shield protecting, racial minorities with regard to affirmative action. As noted above, many adhere to the view that the Fourteenth Amendment uniquely protects racial minorities. Under this view, judicial protection of racial minorities against discrimination is akin to judicial protection of wealthy media corporations, gun owners, or property owners whose rights are expressly protected by the original understanding of the relevant constitutional amendments: *Carolene Products* simply doesn't speak to heightened scrutiny in these areas where the Constitution has explicitly spoken. We are not inclined to jettison the powerful insights in Footnote Four over a concern about affirmative action in pursuit of racial justice. The fact is that judges who favor the need for race-conscious societal remedies are unlikely to find that individuals disadvantaged by affirmative action are really deprived of an opportunity to wheel and deal to redress their grievances. See *id.* at 689 ("[A]ffirmative action has survived (at least at the federal level) as the result of normal pluralist politics, in which the opponents have not lacked for a voice.").

<sup>116</sup> 485 U.S. 505, 511–12 (1988).

find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”<sup>117</sup> The Court explicitly cited Footnote Four in concluding: “[I]t suffices to observe that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.”<sup>118</sup>

Reaching a different conclusion but asking the same questions, Justice Kennedy used process analysis to justify a more searching review and the need for justiciable limits on Congress’s constitutional power to regulate interstate commerce. He explicitly rejected the argument that constitutional federalism values could be protected by the political process. Kennedy noted an “absence of structural mechanisms” to require federal officials to preserve the federal/state balance and “the momentary political convenience often attendant upon their failure to do so.”<sup>119</sup> In contrast, Justice Souter, in dissent, explicitly argued that the political process is sufficient to preclude active judicial scrutiny of Congress’s determination that its regulatory legislation had a sufficient impact on interstate commerce to warrant national legislation.<sup>120</sup>

### C. *Substantive Due Process and (the lack of) Process Jurisprudence*

Modern jurisprudence has not satisfactorily developed workable and analytically sound criteria for determining when judges should closely scrutinize claims that are not grounded in those liberties explicitly guaranteed in the Bill of Rights.<sup>121</sup> For over a century, the U.S. Supreme Court has struggled with how closely to scrutinize legislation claimed to infringe *non-specific* liberties that are contended to be protected from deprivation without

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<sup>117</sup> *Id.* at 512–13 (citing 469 U.S. 528, 537–54 (1985)).

<sup>118</sup> *Id.* (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938)).

<sup>119</sup> *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

<sup>120</sup> *See id.* at 604 (Souter, J., dissenting) (arguing that a judicial policy of relative deference to Congress’s Commerce Clause determination reflects “respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress’s political accountability in dealing with matters open to a wide range of possible choices”).

<sup>121</sup> *See, e.g., United States v. Carlton*, 512 U.S. 26, 41–42 (1994) (Scalia, J., concurring) (criticizing the “picking and choosing among various rights to be accorded ‘substantive due process’ protection” as being the product of “policymaking rather than neutral legal analysis”); ELY, *supra* note 9, at 14–20 (indicating the Court’s substantive due process jurisprudence as incoherent and instead urging that the judiciary intercede only when there is a blockage in the political process); JoEllen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1272 (1993) (“[T]he reasons why these rights ought to be deemed fundamental were never really articulated with reference to any positive conception of the person or of society, nor were they meaningfully related to the rights claims presented by groups without significant political power.”).

due process of law,<sup>122</sup> in contrast with legislation infringing *specific* liberties entrenched in the Bill of Rights.<sup>123</sup> As with equal protection, there is widespread agreement that the close scrutiny of most social and economic legislation under the Due Process Clause that characterized the “*Lochner* era” was a judicial mistake.<sup>124</sup> The challenge has been to identify those “extraordinary” circumstances where liberty-infringement warrants heightened judicial protection.<sup>125</sup>

<sup>122</sup> See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (“[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.”); *Griswold v. Connecticut*, 381 U.S. 479, 481–83 (1965) (surveying due process jurisprudence in the course of finding a constitutional right to privacy); *Lochner v. New York*, 198 U.S. 45, 56 (1905) (asking whether a maximum hour law for bakers represents “a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty”). There is a large and lively cottage industry of legal scholarship that seeks to answer this very question. See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011) (seeking to reestablish *Lochner*’s legitimacy as a proper understanding of the Constitution’s due process protections); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (defending constitutional interpretation that evolves in accordance with shifting societal understandings of their constitutional entitlements); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (arguing that *Lochner* was not wrong because it represented an aggressive form of judicial review, but because it misapplied the constitutional value of neutrality).

<sup>123</sup> In *Carolene Products* itself, the claim was that the ban on sale of filled milk violated the general prohibition on Due Process in the Fifth Amendment, so the Court’s reference in Footnote Four to a “specific prohibition,” 304 U.S. at 152–53 n.4, should be understood to exclude additional substantive due process claims.

Professor Daniel Ortiz, in *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 727 (1991), suggests that Footnote Four’s exception to judicial deference for acts violating specified constitutional rights “embodies a type of theory strikingly different from those embodied in” concerns about legislation targeting the political process or legislation reflecting prejudice that animates the second and third paragraphs of the Footnote. Another view is that many, if not all, of the first eight amendments reflect explicit understandings of rights that, because of prejudice, are unlikely to be protected by Madisonian factional bargaining in the political process.

<sup>124</sup> See *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690 (1999) (describing *Lochner* as a “discredited substantive-due-process case”); *Griswold*, 381 U.S. at 481–82 (1965) (declining to rely on *Lochner* because the Supreme Court does “not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions”); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner* . . . —that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.”); see also, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 270 (2012) (placing *Lochner* along with *Dred Scott* and *Plessy v. Ferguson*, in “the lowest circle of constitutional Hell”); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 391 (2011) (noting that *Lochner* is the case most frequently identified as being part of the constitutional “anticanon”); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373–74 (2003) (“You have to reject *Lochner* if you want to be in the mainstream of American constitutional law today.”). But see BERNSTEIN, *supra* note 122 (arguing in favor of *Lochner*’s legitimacy as a proper understanding of the Constitution’s due process protections).

<sup>125</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

It is somewhat curious, then, that the Court has never seriously considered applying its landmark Footnote Four analysis to solve this problem.<sup>126</sup> Such an approach would extend close judicial scrutiny beyond rights explicitly listed in the Constitution to those rights presented by individuals saddled with difficulties that tend “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>127</sup> These political disabilities arise out of the claimed right, rather than the claimant’s status. Claimants seeking close review of “substantive due process” claims should succeed upon demonstrating that the presumption that “improvident decisions will eventually be rectified by the democratic process”<sup>128</sup> does not apply to their situation.<sup>129</sup> We explain this test below.

### III. REINVIGORATING *CAROLENE PRODUCTS* IN MODERN DUE PROCESS AND EQUAL PROTECTION DOCTRINE

We propose to reinvigorate *Carolene Products* as the preferable doctrine to deal with the American counter-majoritarian dilemma. First, we suggest, per Justice Jackson, that judges should analyze challenges to laws under the Equal Protection Clause before subjecting these laws to substantive due process review. Second, per Justice Marshall, we articulate a test for claimants to demonstrate the necessary failure of political processes in order to obtain close scrutiny, focusing on the claimants’ inability to participate in the normal factional bargaining inherent in legislative deliberations. Third, we return to Justice Stone’s insights in *Carolene Products*, which was in part a substantive due process case, to offer a preferred criterion to justify close scrutiny for rights not expressly protected in the Constitution. We suggest that judges should focus on whether, based on the claimants’ exercise of their putative rights, they are unable to meaningfully use the political process to redress grievances.

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<sup>126</sup> One possible suggestion is offered by David Strauss, *supra* note 124, at 374, who observes that “there is no consensus on why [*Lochner*] is wrong.” If *Carolene Products* was Justice Stone’s solution to *Lochner*, and there is no consensus that the problem with *Lochner* was close judicial scrutiny of labor legislation when employers had ample means to protect themselves in the political process, then there can be no real consensus on the appropriate approach for substantive due process.

<sup>127</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>128</sup> *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

<sup>129</sup> As we discuss below, a number of significant due process issues can be resolved, in our view, on equal protection grounds. Beyond the specific scope of the Article but related to our thesis is our view that close scrutiny under the Equal Protection Clause should also follow the three-category test articulated in *Rodriguez*. See *supra* note 97.

### A. Equal Protection First

Footnote Four may have led equal protection doctrine from the “last resort” of constitutional arguments<sup>130</sup> to a “mainstay of constitutional law.”<sup>131</sup> However, the Court should go further and embrace Justice Jackson’s *Railway Express* insight that judicial scrutiny under the Equal Protection Clause (or its implied Fifth Amendment equivalent) is preferred to substantive due process review.<sup>132</sup> The majority opinion by Justice William Douglas for himself and six colleagues was unexceptional: the Court upheld, against a due process and equal protection challenge, a municipal regulation barring advertising on business delivery vehicles.<sup>133</sup> The Court deferentially affirmed the judgment of New York City officials that truck advertising was a traffic hazard.<sup>134</sup> The claimant argued that gaudy Times Square advertisements posed an equal traffic hazard, as did self-advertisements on business-owned trucks exempted from the regulation.<sup>135</sup> The majority rejected these arguments, simply concluding that these concerns did “not contain the kind of discrimination against which the Equal Protection Clause affords protection.”<sup>136</sup> One reason that this decision appears in the leading constitutional law casebooks, though, is Justice Jackson’s concurrence. A scarred veteran of the *Lochner*-era judicial attack on social legislation (he served as Solicitor General and Attorney General in the Roosevelt Administration<sup>137</sup>), Jackson observed that active judicial review under the Due Process Clause “frequently disables all government.”<sup>138</sup> He argued that:

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, *that*

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<sup>130</sup> *Buck v. Bell*, 274 U.S. 200, 208 (1927).

<sup>131</sup> Farber & Frickey, *supra* note 78, at 690.

<sup>132</sup> *See Ry. Express Agency v. New York*, 336 U.S. 106, 111–12 (1949) (Jackson, J. concurring) (arguing that the Equal Protection Clause should be the preferred method of challenging municipal laws or ordinances because successful equal protection challenges, unlike substantive due process claims, do not prohibit a municipality from regulating certain subject matter).

<sup>133</sup> *Id.* at 107–11.

<sup>134</sup> *Id.* at 111.

<sup>135</sup> *Id.* at 110.

<sup>136</sup> *Id.*

<sup>137</sup> For a personal review, see ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* (1941).

<sup>138</sup> *Ry. Express Agency*, 336 U.S. at 112 (Jackson, J., concurring).

*there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.* Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.<sup>139</sup>

The varied rationales used by the Justices in *Griswold v. Connecticut*<sup>140</sup> to strike down a state law barring individuals from using or aiding others to use a contraceptive illustrate Justice Jackson's insight. In fact, judges and commentators have struggled for decades to develop a workable and analytically sound rationale for striking down the statute under the Due Process Clause. The majority opinion by Justice Douglas and the concurring opinion by Justice Goldberg are difficult to reconcile with *Carolene Products*'s view that close judicial scrutiny of legislation under the Due Process Clause be limited to laws infringing specific provisions of the Bill of Rights, laws interfering with the political process, and laws targeted against discrete and insular minorities. Justice Byron White's concurring opinion was more in keeping with both *Carolene Products* and Justice Jackson's insights. He concluded that a "substantial burden of justification"—i.e., heightened scrutiny—was appropriate because the statute's "clear effect" was to inequitably "deny *disadvantaged citizens* of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control."<sup>141</sup> Noted political scientist Martin Shapiro observed, in this re-

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<sup>139</sup> *Id.* at 112–13 (emphasis added); see also Powell, *supra* note 6, at 1090 (describing the view that the use of equal protection in protecting minority interests does not, unlike substantive due process, result in judicial imposition of "its own substantive values and distributive preferences on the Constitution and on the people of the United States").

If Justice Jackson's views expressed here were adopted and strictly applied, it would preclude legislative experimentation that enacted reforms "one step at a time." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). But the concern articulated in *Carolene Products*'s Footnote Four, that close scrutiny may be justified when prejudice tends "seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," 304 U.S. at 153 n.4, reflects the presumption that ordinarily the political process will extend successful reforms more broadly or will repeal experiments that did not work out. Where a legislature singles out a discrete and insular group, saddled with disabilities that preclude their effective participation in the political process under the guise of "one step at a time" reform, there is no basis to apply *Williamson*'s observation about regulation that applied to a significant trade group capable of presenting its own interests before the Oklahoma legislature.

<sup>140</sup> 381 U.S. 479 (1965).

<sup>141</sup> *Id.* at 503 (White, J., concurring) (emphasis added). Justice White intimated that judicial scrutiny was more justified than for substantive due process claims "which derive merely from shifting economic arrangements." *Id.* (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)). But he did not fully explain precisely *why* closer scrutiny was justified nor how to distinguish economic issues warranting deference from other claims.



gard, how the facts of the case were crucial: “middle-class women received birth control information and purchased birth control supplies, and the Connecticut statute was enforced only to block the operation of birth control clinics that would bring these services to the poor.”<sup>142</sup> Indeed, the appellants in the case were the executive director of the State’s Planned Parenthood League and the medical director of the League’s New Haven clinic.<sup>143</sup> We believe this precisely fits Justice Jackson’s sage insight that the surest way to protect liberty is to insist that restrictions be applied equally: there is a very strong likelihood that the legislature would not have sustained these restrictions, had they been meaningfully applied to preclude all Connecticut women from obtaining contraception. Viewed from an equality lens, there was little justification for allowing affluent suburbanites to obtain birth control pills denied to poor women in New Haven.

### B. Proving Powerlessness

Unfortunately, *Carolene Products* does not precisely specify how claimants prove that their opportunities to use “those political processes ordinarily to be relied upon to protect minorities” are seriously curtailed.<sup>144</sup> The Court provided a bit more guidance in *Rodriguez*, but not much. The Court suggested, in the disjunctive, that proof of historical subordination “or” powerlessness might suffice, but it did not specify the details of the political powerlessness needed by a group to justify “extraordinary protection from the majoritarian political process.”<sup>145</sup> The precise standards remain under-

<sup>142</sup> Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T 218, 229 (Vincent Blasi ed., 1983).

<sup>143</sup> *Griswold*, 381 U.S. at 480; see also Cary Franklin, *Griswold and the Public Dimension of the Right to Privacy*, 124 YALE L.J. FORUM 332, 332 (2015), <http://www.yalelawjournal.org/forum/griswold-and-the-public-dimension-of-the-right-to-privacy> (identifying *Griswold* as part of the Warren Court’s “poverty” cases because the effect of the Connecticut law was to block access to contraception by the poor); Melissa Murray, *Overlooking Equality on the Road to Griswold*, 124 YALE L.J. FORUM 324, 325–26 (2015), <http://www.yalelawjournal.org/forum/overlooking-equality-on-the-road-to-griswold> (noting how *Griswold*’s companion case, *Trubek v. Ullman*, presented a potential alternative framing of the privacy right that emphasized equality *within* a marriage as opposed to a traditional model of male-breadwinner/female-homemaker); Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. FORUM 349, 357 (2015), <http://www.yalelawjournal.org/forum/contraception-as-a-sex-equality-right> (contending that “[e]quality values anchor not only a right to access contraception free from government interference,” but also government’s interest in equalizing access to contraception for those for whom it is otherwise blocked).

<sup>144</sup> 304 U.S. at 152 n.4.

<sup>145</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); see also, e.g., Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 333 (2016) (explaining that the Court finally articulated a suspect class status that asked whether the group had political power). Some courts have attempted to resolve this problem by comparing the group at hand with women, blacks, and other social classes which have already received

articulated,<sup>146</sup> and a thorough review of equal protection precedents show the Court's varied use of many different standards since the 1960s.<sup>147</sup>

We find insightful and persuasive the views expressed in the context of racial discrimination in voting rights by Justice Marshall, in his dissent in *Mobile v. Bolden*.<sup>148</sup> He pointedly distinguished what he described as the valid claim that a state had denied minority race voters "equal access to the political process" from the claim of proportional representation. Echoing the prior year's judgment in *Vance v. Bradley*, Justice Marshall noted that the Court's presumptive faith in the political process suggested that ordinarily even groups that lose elections can protect their own interests against improvident decisionmaking.<sup>149</sup> To show a defect in the political process requiring judicial intervention, Marshall reasoned, required proof by a discrete political minority that "historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy."<sup>150</sup> Later in his opinion, he suggested another important criterion: whether a group's "electoral discreteness and insularity *allow dominant political factions to ignore them*."<sup>151</sup>

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heightened judicial scrutiny. See, e.g., *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 452–53 (Conn. 2008) (adopting this approach with respect to sexual orientation). But overall, lower courts have been markedly inconsistent in their attempts to apply the *Rodriguez* factors to new claimants. See David Schraub, Comment, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437, 1453–60 (2010) (comparing rulings on same-sex marriage in various courts).

<sup>146</sup> See Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1530 (2015) (describing the court's "conflicting and atheoretical pronouncements" and scholar's inconsistent views on powerlessness"); see also Schacter, *supra* note 94, at 1376 ("[J]ustices have had very little to say about what the idea of political powerlessness means and requires, and even less to say about the underlying idea of democracy informing the Court's assessment of the political process.").

<sup>147</sup> See Ross & Li, *supra* note 145, at 329–40 (analyzing decisions confronting political powerlessness).

<sup>148</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 104–05 (1980) (Marshall, J., dissenting). Justice Marshall's judgment was ultimately vindicated when Congress, acting pursuant to its constitutional power under Section Two of the Fifteenth Amendment, effectively overturned the majority's holding that a voting rights claim required proof of intent to harm minority race voters. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134 (codified at 52 U.S.C. § 10301 (2016)); see *Hayden v. Pataki*, 449 F.3d 305, 313 (2d Cir. 2006) (noting that this language was enacted "largely in response to the Supreme Court's decision in [*Bolden*]").

<sup>149</sup> *Bolden*, 446 U.S. 55, 111 n.7 (Marshall, J., dissenting) ("For example, many of these persons might belong to a variety of other political, social, and economic groups that have some impact on officials. In the absence of evidence to the contrary, it may be assumed that officials will not be improperly influenced by such factors as the race or place of residence of persons seeking governmental action. Furthermore, political factions out of office often serve as watchdogs on the performance of the government, bind together into coalitions having enhanced influence, and have the respectability necessary to affect public policy.").

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 122 (emphasis added). Justice Marshall's concern about the political process was also reflected in a less politically charged opinion in a baseball antitrust case, *Flood v. Kuhn*, 407 U.S. 258 (1972). Marshall dissented from the majority judgment that Congress, through "positive inac-

Justice Marshall's expressed concern about problems associated with dominant factions ignoring smaller factions was, of course, one of the precise worries leading to Madison's optimism about the prospects for the American Republic. Madison conceded in Federalist No. 10 that unchecked democracy had led to instances where measures were enacted "not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."<sup>152</sup> However, "factious combinations" are less to be dreaded in the larger society he contemplated, because in such a nation:

you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.<sup>153</sup>

Likewise, in Federalist No. 51 Madison predicted that the "multiplicity of interests" present in the United States meant that "a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good."<sup>154</sup>

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tion," had decided not to overrule a 1922 judgment exempting baseball from the Sherman Act although every other professional sport was subject to competition law. Rather, Marshall opined that Congress had not acquiesced in the judicially-created exemption:

"Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But . . . baseball was isolated and distinguished from all other sports.

. . . [T]here are only some 600 major league baseball players. Whatever muscle they might have been able to muster by combining forces with other athletes has been greatly impaired by the manner in which is Court has isolated them."

*Id.* at 292 (Marshall, J., dissenting). See discussion *infra* accompanying note 182, indicating that we do not read Justice Marshall's focus on groups who can be ignored by dominant political factions to be limited to those who necessarily are discrete and insular.

<sup>152</sup> THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

<sup>153</sup> *Id.* at 83.

<sup>154</sup> THE FEDERALIST NO. 51, at 324–25 (James Madison) (Clinton Rossiter ed., 1961). We prefer the Madison-Marshall approach to the powerless test proposed by Professor Stephanopoulos, *supra* note 146, 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.") (emphasis omitted). Stephanopoulos acknowledges that pluralism typically protects minorities but that "sometimes a group is unable to cut deals with its counterparts, and so ends up being outvoted on item after item." *Id.* We believe that the *Carolene Products* presumption should only be overcome by a conclusion that animus or prejudice toward the group is the cause of their inability to cut deals with counterparts. It might be that a group is outvoted on "item after item" because they demand to preserve one single public policy that currently exists and are unwilling to part with it as the price of their other grievances. Or perhaps a group is constantly outvoted because they refuse to compromise in any way. Finally, given that *Carolene Products* is a specific response to the *Lochner* era, we are wary of the breadth of Stephanopoulos' definition: there may well be a variety of business owners, for example, whose aggregate policy preferences (freedom from any government regulation of their business) are less likely to be enacted than other similarly sized groups, but who still have the ability to cut deals and have their interests accommodated to some degree in the legislative process.

Professor Ely makes the same point in elaborating on Footnote Four. He rejected the argument that discreteness and insularity were sufficient for a minority group to claim heightened scrutiny. Ely emphasized that this was not “what Justice Stone meant.”<sup>155</sup> Rather, Stone intended to refer to the “sort of ‘pluralist’ wheeling and dealing by which the various minorities that make up our society typically interact to protect their interests.”<sup>156</sup> Closer scrutiny was required only for “those minorities for which such a system of ‘mutual defense pacts’ will prove recurrently unavailing.”<sup>157</sup>

Especially given the tentative wording of Footnote Four,<sup>158</sup> we agree with Professor Ely’s restatement of the political process theory underlying the footnote’s third paragraph. Thus, it is the *unwillingness of other factions to form coalitions with certain minority groups, even when overlapping “multiplicity of interests” make temporary “mutual defense pacts” mutually beneficial, that Footnote Four means by “prejudice.”*<sup>159</sup> We believe this restatement more accurately expresses the theory than Professor Ely’s phrasing elsewhere in his book, when he focuses more narrowly on differential treatment of a group “largely for the sake of simply disadvantaging its members.”<sup>160</sup> Indeed, under current doctrine, those who can demonstrate that a challenged statute largely reflects an intent to disadvantage a target group does not need to justify heightened scrutiny under *Carolene Products*. This is because the Supreme Court has held that such “animus” is irrational and thus fails the presumptive deferential test for which Footnote Four is the exception.<sup>161</sup> Our position is that a group ought to qualify for judicial protection from majoritarian political processes not only if it can show hostility, but also *that its numbers or concerns are so minimized by elected officials that its concerns are not addressed.*

The ongoing debate about national health insurance provides a useful

<sup>155</sup> ELY, *supra* note 9, at 151.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Justice Stone’s law clerk, who went on to a career as a prominent academic, observed that “[t]he modest hope was that the Footnote would catalyze thoroughgoing analysis and discussion by bar, bench, and academe, and that a complete and well-rounded doctrine would eventuate.” Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1099 (1982).

<sup>159</sup> THE FEDERALIST NO. 51, at 324–25 (James Madison) (Clinton Rossiter ed., 1961); ELY, *supra* note 9, at 151; Strauss, *Carolene Products*, *supra* note 16, at 1257 (explaining that “insular” groups are those with whom other groups “will not form coalitions . . . and, critically, not because of a lack of common interests, but because of ‘prejudice.’”).

<sup>160</sup> ELY, *supra* note 9, at 153.

<sup>161</sup> *See, e.g., Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (holding that state constitutional amendment adopted by referendum that barred local governments from outlawing discrimination on sexual orientation failed rational basis scrutiny because analysis of breadth of amendment and reasons offered for it “seems inexplicable by anything but animus toward the class it affects”); *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (holding that the desire “to harm a politically unpopular group cannot constitute a legitimate governmental interest” (emphasis omitted)).

illustration of how the political process ordinarily works to allow groups and their representatives to prioritize and bargain with competing groups to vindicate their most important concerns. Proponents of the Affordable Care Act maintained that access to health care is a “right” that the government must provide to all Americans.<sup>162</sup> In contrast, many opponents focused on how the Act’s mandate that individuals purchase health insurance violated the “right” of Americans to decide for themselves what kind of insurance to purchase.<sup>163</sup> Nine Justices should not determine which one of these competing “rights” claims is valid, because there is no evidence that the political process cannot resolve it. If factions intensely opposed to “Obamacare” had been willing to compromise on other issues of key importance to key factions within the winning coalition, these groups might well have prevailed.<sup>164</sup>

In Footnote Four, Justice Stone pointedly noted that prejudice against minorities was a “special condition,” an exception from normal circumstances where “political processes [are] ordinarily to be relied upon to protect minorities.”<sup>165</sup> The contrast between circumstances where political processes fail to protect minorities and political processes can work to protect minorities may be illustrated by contrasting the political power of African Americans in Mobile, Alabama in the 1970s with that of gay and lesbian voters in San Francisco, California during the 1980s.

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<sup>162</sup> See, e.g., Edward M. Kennedy, *Health Care as a Basic Human Right: Moving from Lip Service to Reality*, 22 HARV. HUMAN RTS. J. 165, 168 (2009) (“The time has come to recognize quality, affordable health care as a basic right for all Americans, not just an expensive privilege for the few.”); Edward M. Kennedy, Speech before the Democratic National Convention (Aug. 25, 2008) (transcript available at [http://www.cnn.com/2008/POLITICS/08/25/kennedy.dnc.transcript/index.html?eref=rss\\_latest](http://www.cnn.com/2008/POLITICS/08/25/kennedy.dnc.transcript/index.html?eref=rss_latest)) (“[T]his is the cause of my life—new hope that we will break the old gridlock and guarantee that every American—north, south, east, west, young, old—will have decent, quality health care as a fundamental right and not a privilege.”).

<sup>163</sup> See, e.g., Josh Blackman, *The Libertarian Challenge to Obamacare: How the Constitutional Challenge to Obamacare Pitted Liberty Against Power*, REASON (Sept. 24, 2013, 7:00 AM), <http://reason.com/archives/2013/09/24/the-libertarian-challenge-to-obamacare> (contending that the health care mandate “offends libertarian principles of individual autonomy and free choice”); Robert E. Moffit, *Obamacare and the Individual Mandate: Violating Personal Liberty and Federalism*, HERITAGE FOUNDATION (Jan. 18, 2011), <http://www.heritage.org/research/reports/2011/01/obamacare-and-the-individual-mandate-violating-personal-liberty-and-federalism> (“At its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage. It’s about an individual’s right to choose to participate.” (quoting *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010))).

<sup>164</sup> Because of the highly partisan nature of modern politics, these compromises were not even proposed. But one can easily imagine that Obamacare would not have barely passed with the narrowest majorities without the strong support of organized labor. Republicans might have been able to trade support for labor law reform for the AFL-CIO’s opposition to Obamacare; likewise with many other specific proposals of interest to factions within the winning Democratic coalition.

<sup>165</sup> *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

At the time, Mobile was governed by three commissioners elected city-wide. No African American had ever been elected, even though African Americans comprised approximately one-third of the population.<sup>166</sup> Nor was it likely that a white candidate would be elected with a bi-racial coalition of support. In a Voting Rights Act proceeding, the trial judge found that where there is a white candidate “identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs. . . . a white backlash occurs which usually results in the defeat of . . . the white candidate identified with the blacks.”<sup>167</sup> As a result, during the 1970s, any efforts to displace the white politicians governing Mobile with a bi-racial coalition would have been doomed to failure. Court-ordered reform replaced the commissioners with a mayor and a council elected by district and required that budgets receive votes of five of seven councilmembers in order to assure a multi-racial coalition. Only then, white business leaders were able to join with representatives of the African American community to develop new initiatives for the city, based in part on a willingness of the white leaders to address historic discrimination in municipal services in black neighborhoods in return for black support for downtown redevelopment and other civic initiatives.<sup>168</sup> The ability of these civic leaders to address minority concerns without backlash is critical for political processes to work to protect minorities,<sup>169</sup> as Justice Stone envi-

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<sup>166</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 122–23 (1980) (Marshall, J., dissenting) (“[N]o Negro had ever been elected to the Mobile City Commission, despite the fact that Negroes constitute about one-third of the electorate, and that the persistence of severe racial bloc voting made it highly unlikely that any Negro could be elected at large in the foreseeable future.”).

<sup>167</sup> *Bolden v. City of Mobile*, 423 F. Supp. 384, 388 (S.D. Ala. 1976). The district court identified a single instance of a white politician being elected to the commission with substantial black support in the case of Joseph N. Langan, who served from 1953 to 1969. *Id.* However, once the Voting Rights Act expanded the number of enfranchised black voters, Langan’s association with the black population became an insurmountable political liability, and he was defeated for reelection in 1969 and again in 1972. *Id.* The court contrasted the at-large scheme in the City with a smaller, single-member state senate race where the population was evenly divided on racial lines; although a white candidate narrowly prevailed over a black opponent, both candidates appealed for votes of both races. *Id.*; see also Patsy Busby Dow, Joseph N. Langan: Mobile’s Racial Diplomat 47–48 (June 1993) (Master’s Thesis in History, University of South Alabama) (on file with author) (recounting overt campaigning against Langan based on his support among black voters); *id.* at 54–56 (describing Langan’s 1969 defeat facing opposition from white supremacists and a boycott by many black voters impatient with slow racial progress).

<sup>168</sup> Interview with Michael C. Dow, Mayor of Mobile (1989–2005) (Sept. 8, 2016). The district court in the Voting Rights Act case had found a substantial lack of responsiveness of the all-white city commission to the needs and concerns of the one-third of their constituents who were black. *Bolden*, 423 F. Supp. at 389–92 (“The at-large elected city commissioners have not been responsive to the minorities’ needs. The 1970 population of the city is 64.5% white and 35.4% black.”).

<sup>169</sup> See *Mobile*, 446 U.S. at 123 (Marshall, J., dissenting) (suggesting that this backlash can be avoided by preserving the “protection against vote dilution recognized by our prior cases . . . as a mini-

sioned. Given the keen importance of basic municipal services and avoidance of police brutality to the Mobile African American community, there surely were issues of greater importance to a fraction of white voters who could coalesce with black voters for a majority coalition. Indeed, white business leaders, as well as African American neighborhood activists, were stymied by the policies of the Mobile commissioners. However, in the polarized politics of 1970s Alabama, a bi-racial coalition was not possible; any effort to solicit black votes would result in a strong “white backlash.”<sup>170</sup>

In contrast, significant municipal legislation advancing rights of same-sex couples and limiting discrimination on the basis of sexual orientation was adopted by the San Francisco Board of Supervisors at a time when LGBTQ voters played a major role as a faction within the governing coalition.<sup>171</sup> The political dynamic at the time featured some candidates primarily concerned with promoting business development and others with protecting neighborhoods from undue development.<sup>172</sup> Many candidates

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mally intrusive guarantee of political survival for a discrete political minority that is effectively locked out of governmental decisionmaking processes”); *id.* at 98 (White, J., dissenting) (observing that such backlash tended to exist in a state of “severe racial polarization” of voting patterns, “with ‘white voting for white and black voting for black if a white is opposed to a black,’ resulting in the defeat of the black candidate or, if two whites are running, the defeat of the white candidate most identified with blacks.” (quoting *Bolden*, 423 F. Supp. at 388)).

<sup>170</sup> *Id.* (detailing how “[c]ity officials and police were largely unmoved by Negro complaints about policy brutality and ‘mock lynching,’” perhaps because a “‘political fear of white backlash vote when black citizens’ needs are at stake.” (quoting *Bolden*, 423 F. Supp. at 392)). *Bolden* played a prominent role in congressional debates over the passage of the 1982 amendments to the Voting Rights Act, and Congress ultimately decided to soften the decision’s strict intent requirements and instead allow proof of discrimination via assessment of the “totality of the circumstances.” 52 U.S. Code § 10301(b) (2016). See generally Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983). The political dynamic described herein was, of course, even more obvious prior to passage of the Voting Rights Act. As David Strauss points out:

It was the kiss of death for a politician in a Jim Crow state to be seen as aligned with African Americans; indeed, politicians competed with each other to declare their hostility to civil rights for African Americans. In 1938, there was not much doubt about what at least one “discrete and insular minority,” subject to prejudice, looked like.

Strauss, *Carolene Products*, *supra* note 16, at 1258 (citing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 10–17 (2004) (describing the historical factors related to the “deterioration of race relations [that] grew out of the interplay between regional developments and national ones.”)).

<sup>171</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 130 (1999) (noting San Francisco’s passage in 1978 of an ordinance prohibiting discrimination in employment, housing, and public accommodations on the basis of sexual orientation).

<sup>172</sup> See, e.g., RANDY SHILTS, *THE MAYOR OF CASTRO STREET: THE LIFE & TIMES OF HARVEY MILK* 69 (1982) (describing an interaction between Supervisor Milk (who was openly gay) and prospective voters in which he centered his candidacy on opposition to runaway development and on preserving tracts of low-income housing); *id.* at 194 (noting squabbles between Milk and developers on the campaign trail, and describing as the “centerpiece of Milk’s legislative agenda” an “ordinance to discourage the real estate speculation that was running rampant throughout San Francisco”); see *al-*

realized that failure to embrace a gay rights agenda would cost them support from LGBTQ voters, who constituted an important element of the electorate. Indeed, one local politician defeated in a mayoral primary by candidates with stronger LGBTQ support observed that the “gay vote is a key element for any elected official in San Francisco.”<sup>173</sup> Of critical importance, endorsing additional protections for LGBTQ San Franciscans would *not* cost candidates among most straight voters.<sup>174</sup>

These examples illustrate (a) the sort of antipathy that *Vance v. Bradley* presumes does not ordinarily exist in the political process, in contrast to (b) the Madisonian dynamics that are more typical. Usually, groups whose policy preferences are not shared by the majority of voters lose. But most voters have varying intensity of preferences with regard to the myriad issues facing their elected officials. If improvident legislation is really unfair in targeting a particular faction, then ordinarily that faction can trade their support on issues of lesser concern for success in redressing their particular grievances. The adamant opposition of active members of the National Rifle Association to restrictions on firearms possession well-illustrates this point.<sup>175</sup> While the white majority in Mobile may have been concerned about issues of minor importance to African Americans, black residents were primarily interested about decent sidewalks, municipal services, and fair police practices in their community. While the straight majority in San Francisco may have been concerned about environmental and economic issues, LGBTQ residents were focused primarily on ending discrimination on the basis of sexual orientation.<sup>176</sup>

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*so* Robert Reinhold, *Divided San Francisco Eyes Election*, N.Y. TIMES (Oct. 21, 1987), <http://www.nytimes.com/1987/10/21/us/divided-san-francisco-eyes-election.html?pagewanted=all> (showing that two gay Democratic clubs divided between two mayoral candidates, and, with gay-rights issues “thus neutralized, the main issues are affordable housing, rent control, downtown growth, fiscal problems and neighborhoods.”).

<sup>173</sup> DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 344 (1999) (quoting Supervisor John Molinari). LGBTQ support was critical in the coalition electing George Moscone mayor over a more conservative opponent. *Id.*

<sup>174</sup> Indeed, infamous county supervisor Dan White, who later assassinated Mayor Moscone and Supervisor Milk, only voted against an anti-discrimination ordinance after Milk refused to support an unrelated municipal initiative that White was championing. SHILTS, *supra* note 172, at 198. We thank Professor Matthew Coles, a former ACLU advocate instrumental in securing adoption of gay rights legislation, for his insights in this regard.

<sup>175</sup> The ability of even smaller groups to have an outsized influence on politics because of their ability to pour vast financial resources into campaigns supporting or opposing candidates based on specific issues is beyond the scope of this Article.

<sup>176</sup> As Wojciech Sadurski observes:

The enthusiasts of a pluralistic model of politics claim that the political power of minorities is actualized through their entering alliances and coalitions with each other: by forming mutually beneficial pacts various minoritarian groups can amplify their political in-



The key to our contrast between these case studies is not simply the results. As Justice Marshall emphasized, results are not the concern of a judicial inquiry into an inability to participate equally in the political process. Rather, the significant dynamic was that Mobile's black voters were systematically ignored until white business leaders could credibly form alliances with black leaders. In San Francisco, LGBTQ voters were the objects of keen competition for coalition-building by other factions. These factors must be the center of the inquiry.

For these reasons, we disagree with those judicial decisions finding that LGBTQ voters were not powerless because they were able to secure some legislative victories or elect some members to office. As Jane Schacter observes, the passage of anti-discrimination legislation protecting a group from some obstacles may be evidence that there is sufficient societal prejudice directed at the group in respect to other matters to warrant judicial protection by way of heightened review of other decisions that may affect such matters.<sup>177</sup> As Bertrall Ross and Su Li observe, prior legislation barring discrimination against a group might reflect now-outmoded ideological preferences and thus do not demonstrate a current ability of that group to redress grievances politically.<sup>178</sup> (Beyond the scope of this Article is the workability question of how the federal courts should treat groups that may

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fluence on these issues where their particular interests are affected. But the whole point of *Carolene* is that to some groups this path is not available: for instance because they are too weak economically to effectively play political games, or so unpopular among the electorate that supporting their cause is for politicians a liability rather than an asset, or because widespread social stereotyping makes other groups unwilling to enter into coalitions with them. These are all *objective* indicia of disability related to the past history of legal and social discrimination, to a lower social status of a group, and to objective victimization by popular ideologies.

Sadurski, *supra* note 11, at 179 (citing ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 83 (1970)).

<sup>177</sup> Schacter, *supra* note 94, at 1382, 1394. As prejudice evolves, it is common for many to show outrage at particular forms of discrimination but tolerate others. Many abolitionists were racists. See Richard B. Russell, "Talking of Unconscionable Niggers . . .," 104 HARV. L. REV. 1949, 1950 (1991) (reviewing WILLIAM S. MCFEELY, *FREDERICK DOUGLASS* (1991)). Civil rights advocates took particular care to focus public and judicial attention on discrimination in public education rather than discriminatory statutes banning inter-racial marriage. See Dorothy E. Roberts, *Loving v. Virginia As A Civil Rights Decision*, 59 N.Y.L. SCH. L. REV. 175, 183–85, 192 (2015) (describing the NAACP's strategic choice to avoid interracial marriage ban litigation). Grudging supporters of civil rights legislation were more comfortable barring discrimination in public accommodations than in employment. See Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOW. L.J. 841, 861–62, (2005) (explaining how efforts to curtail discrimination in employment floundered while lobbyists sought school desegregation).

<sup>178</sup> Ross & Li, *supra* note 145, at 380 ("In relying on favorable legislative actions as the measure of political power, the Supreme Court overlooks other reasons why legislators support laws, including partisanship and ideology. Because a simple count of favorable legislative actions is not necessarily proof of a group's political power, the Court should supplement this measure with others.").

be courted in some states and localities and remain pariahs in others.)

Particularly when evaluating electoral practices, the Court has in some cases focused on the inability of racial minorities to form multi-racial political coalitions.<sup>179</sup> This inability was one of several factors upon which the Court found a Texas reapportionment scheme unconstitutional. The Court examined actual results (virtually no minority race candidates elected to the legislature), but also considered the lack of appeal to African American voters by successful candidates, and “racial campaign tactics” directed to white voters to defeat candidates who enjoyed support of African American voters.<sup>180</sup> In contrast, the Court had previously upheld an Indiana reapportionment scheme against claims that having all candidates from Marion County (metropolitan Indianapolis) run on a county-wide basis diluted black votes. Although recent elections resulted in a disproportionately low number of African American state representatives, the Court concluded this was due to the partisan defeat of the Democratic Party, which included African American candidates and relied heavily on black votes for its success.<sup>181</sup>

Justice Marshall’s insights bring clarity to a judicially-manageable test

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<sup>179</sup> In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court held that proof of a Fifteenth Amendment violation required more than an inability to participate in the political process. *Id.* at 75. Rather, the Court required a showing that state electoral statutes were adopted for the purpose of discriminating against minority race voters. *Id.* at 65–66. In that case, the challenged at-large scheme of electing municipal legislators had been enacted in the early 1900s, when African Americans were effectively precluded from voting. *Id.* at 58. Thus, the Court reasoned, racial discrimination could not have been the purpose of the at-large requirement. *Id.* at 69–74. Exercising its powers under section 2 of that Amendment, Congress responded by enacting the Voting Rights Act of 1982 to overturn *Bolden* and direct courts to focus on whether the purpose or effect of state practices deprived specific groups of their ability to participate equally in the political process. In determining whether a state’s electoral practices constitute illegal vote dilution, one scholar has observed:

Behind each judicial determination that a particular voting system frustrates the electoral aspirations of minority voters stands an indictment of majoritarian processes. The racially polarized voting inquiry gives the Court a healthy basis for skepticism concerning the majoritarian premise implicit in respect for the outcomes of elections.

Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1860 (1992). Among those who may seek to demonstrate, pursuant to the argument of this Article, that the political process cannot be relied upon to protect them and thus close scrutiny is justified under the Due Process Clause, some particular tests used in Voting Rights Act litigation may be appropriate, but a detailed analysis of any particular claim is beyond the scope of this Article.

<sup>180</sup> *White v. Regester*, 412 U.S. 755, 767 (1973) (“[A]s recently as 1970 [organizations were] relying upon ‘racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community.’” (quoting *Graves v. Barnes*, 343 F. Supp. 704, 727 (W.D. Tex. 1972))).

<sup>181</sup> As the court noted in *Whitcomb v. Chavis*:

The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system.

403 U.S. 124, 153–55 (1971).

for political powerlessness. It accepts Justice Stone's presumption that, ordinarily, those aggrieved by government action can protect themselves through the political process. It properly focuses on the extraordinary inability of those claimants who cannot build coalitions to redress grievances. In this way, it responds to the criticism of political science-influenced legal scholars who correctly observe that claimants in this category are not limited to minorities who are "discrete and insular."<sup>182</sup>

### C. Substantive Due Process Under Footnote Four

As we illustrate in Part IV, it is difficult to imagine many claims warranting careful scrutiny that involve government activity applied generally rather than selectively. Nonetheless, courts should continue to engage in heightened scrutiny if a challenger demonstrates that a putative "right" has been infringed because those adversely affected cannot meaningfully use the political process to "wheel and deal" with others to secure a redress of their grievances on similar terms to other stakeholders. This would occur when animus or prejudice is directed not at a demographic group (as in equal protection analysis), but at a group defined by the conduct in which they wish to engage.

Reasoning by analogy should govern how the rigorous application of process theory to substantive due process claims would evolve. Claimants whose grievances seem more akin to the Carolene Products Company should lose. Claimants whose grievances seem more akin to those groups recognized by the Court to be in need of heightened scrutiny—racial and religious minorities, non-citizens, and (at least for now) women—should secure close scrutiny. Exemplifying this approach, the Connecticut Supreme

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<sup>182</sup> One such legal scholar provided:

Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristics from the ones *Carolene* emphasizes—groups that are "anonymous and diffuse" rather than "discrete and insular." It is these groups that both political science and American history indicate are systematically disadvantaged in a pluralist democracy.

Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–24 (1985). For an insightful response to Ackerman's critique, with regard to how ideological or other prejudice could preclude politicians from entering into coalitions with certain groups, see Farber & Frickey, *supra* note 78, at 700–01. In particular, they observe that "part of the 'political processes ordinarily to be relied upon to protect minorities' may be a legislator's ideological commitment to fair treatment, which may not extend to 'second-class citizens.'" *Id.* at 702. Moreover, the authors note that the public choice theory of advantages to insular groups touted by critics of *Carolene Products* suggests that discrete and insular minorities have advantages in bargaining. Under this theory, minority groups should almost always preclude a bloc voting majority from defeating candidates supported by a politically cohesive, geographically insular minority group. However, numerous lower courts have found, in Voting Rights Act litigation, that bloc voting to preclude effective political participation of racial minorities is precisely what has occurred. *Id.* at 707.

Court, applying to a state constitutional challenge what it perceived to be the same equal protection methodology that federal courts use,<sup>183</sup> justified close judicial scrutiny for a sexual orientation classification on the ground that LGBTQ individuals had less political power than racial minorities or women.<sup>184</sup> Likewise, the U.S. Supreme Court reasoned (in dictum) that claims of the mentally retarded did not justify heightened scrutiny, because the degree of their powerlessness could not be meaningfully distinguished from many other economic or social claimants.<sup>185</sup>

Because public choice theory demonstrates distortions in the political process, some commentators contend that federal judges should closely review a wide variety of due process challenges.<sup>186</sup> In our judgment, Justice Stone had it right: this sets the bar too low. Indeed, scholars have shown that this may well have been the case in *Carolene Products* itself.<sup>187</sup> The distinction between public interest legislation and special interest legislation is ordinarily in the eye of the beholder. For example, some critics have suggested that environmental laws reflect special interest pleading by clean industries;<sup>188</sup> at the same time, industry defenders of captured federal agencies often maintain that the regulatory regime is superior public policy to the vagaries of an unregulated market. Giving judges the discretion to closely scrutinize any legislation that might have resulted in some unfair advantages in the political process would invite the same constitutional crisis that *Carolene Products* was designed to prevent. Rather, as the Court has held with regard to equal protection jurisprudence, the focus should be on whether the claimant can provide a justification for “extraordinary protec-

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<sup>183</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 423 (Conn. 2008) (“On occasion intermediate scrutiny as been applied to review of a law that affects an important, though not constitutional, right.”).

<sup>184</sup> *Id.* at 452–54.

<sup>185</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985). The Court nonetheless concluded that a particular zoning ordinance was borne of “an irrational prejudice against the mentally retarded” and thus failed the rational basis test. *Id.* at 450.

<sup>186</sup> See, e.g., John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J. L. & PUB. POL’Y 195, 201 n.20 (1997) (“[T]he Constitution should be as concerned with guarding against the power of the concentrated minorities as it is with protecting discrete and insular minorities.”).

<sup>187</sup> See generally Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (1987). Miller concluded that the challenged statute was “an utterly unprincipled example of special interest legislation.” *Id.* at 398. The effect was to deprive consumers “of a healthful, nutritious, and low-cost food” and to harm children’s health by “encouraging the use as baby food” of a rival product that was 42% sugar. *Id.* at 399. Miller’s point is that Footnote Four thus demonstrates the Court’s determination to “keep its hands off economic regulation, no matter how egregious the discrimination or patent the special interest motivation.” *Id.*

<sup>188</sup> See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 896 n.140 (1987) (listing articles discussing this criticism).

tion from the majoritarian political process.”<sup>189</sup>

To best illustrate our theory, we offer an example from recent history. A large number of states have legalized medical marijuana.<sup>190</sup> We are not aware of evidence that the political processes in those states continuing to prohibit demonstrably ill people from achieving symptomatic relief from derivatives of cannabis (assuming the laws are actively enforced) are distorted by animus or prejudice. However, it is almost certainly true that this was the case several decades ago, when many voters and their representatives attributed marijuana use to a “drug counter-culture.”<sup>191</sup> In that context, efforts by advocates of medical marijuana to trade the votes of their supporters for other political concessions may well have failed, because of the hostility that was a part of the cultural wars of the late twentieth century. To be sure, such laws might still survive careful scrutiny on demonstration of alternative means of symptomatic relief or of undue risks that medical marijuana would be diverted to illegal markets.<sup>192</sup> But the *Carolene Products*’s presumption of rational basis review ought to have been dispensed with if claimants could have made a persuasive case regarding prejudice to their marijuana use.

For over seventy-five years, the Supreme Court has sought to deal with the “counter-majoritarian dilemma” by doctrines that explicitly or implicitly reflect an independent judicial determination that the political process was inadequate to protect those aggrieved by government action that infringes unenumerated liberties. Although the Court’s articulation of “inadequacy” is incomplete and sometimes muddled, a body of constitutional principles and doctrines that limit free reign of judicial discretion—i.e. limiting principles—

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<sup>189</sup> San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); see, e.g., Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 324 (2016) (describing the high burden of demonstrating that a class is politically powerless). Overall, lower courts have been markedly inconsistent in their attempts to apply the *Rodriguez* factors to new claimants. See David Schraub, Note, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437, 1453–60 (2010) (discussing inconsistent application of the “politically powerless” label in gay rights litigation).

<sup>190</sup> See D. Mark Anderson, Benjamin Hansen & Daniel I. Rees, *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*, 56 J.L. & ECON. 333, 334 (2013) (discussing the proliferation of medical marijuana laws among the states). In 2016, voters in California, Nevada, Maine, and Massachusetts voted to legalize recreational marijuana use. *Legal Marijuana and a Higher Minimum Wage: States That Passed Key Ballot Measures in 2016*, FORBES (Nov. 11, 2016, 10:04 AM), <http://www.forbes.com/sites/datadesign/2016/11/11/legal-marijuana-and-a-higher-minimum-wage-states-that-passed-key-ballot-measures-in-2016/#4ddfc937cb9>. Montana, North Dakota, Arkansas, and Florida all voted to legalize medical marijuana use. *Id.* Arizona, which requires a super-majority, rejected marijuana legalization even though 52% of voters supported it. *Id.*

<sup>191</sup> Powell, *supra* note 6, at 1090 (arguing, by way of example, that the “drug cult” could be considered a “discrete and insular minority” in some sense).

<sup>192</sup> This was the rational basis that the Court used to uphold the effect of medical marijuana on interstate markets in *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

require a principled application of the limit. Creating a presumption of validity for most legislative acts, while reserving close scrutiny for only some legislative acts, requires clear criteria for distinguishing between the two. Here, we recommend for judicial consideration a test of political powerlessness focusing on inability to “wheel and deal,” as suggested by Professor Ely and explicated by Justice Marshall. A constitutional theory based on the political process requires judges to judge the political process.

As we have conceded earlier, our approach is neither perfect nor value-free. A judicial determination that prejudice animates laws against private homosexual conduct but not laws against indecent exposure does require judges to make a substantive value choice.<sup>193</sup> The judicial decision, however, would not be based on the judge’s view of which right is “fundamental” in a substantive sense of moral philosophy.<sup>194</sup> As Professor Lawrence Sager explained:

The initial premise is that there are indeed rights—a significant body of principles derived from the Constitution—that restrain governmental decisionmaking. It is then observed that the majoritarian processes of government are unreliable as respecters of at least some of these rights, and that the judiciary thus has a legitimate role in the articulation and enforcement of these rights. On this reading, rights themselves exist independent of process; it is the claim for active judicial enforcement of rights that is process-based.<sup>195</sup>

We therefore disagree with process theory critics who claim that the substantive value choices required to assess whether the political process is reliable are indistinguishable from the value choices required using substantive theories of justice or fundamental rights.<sup>196</sup> To illustrate, consider a

<sup>193</sup> See ELY, *supra* note 9, at 152 (emphasis added) (stating that prejudice is where a minority is “barred from the pluralist’s bazaar, and thus finding itself on the wrong end of the legislature’s classifications, for reasons that in some sense are discreditable”); Farber & Frickey, *supra* note 78, at 698 (arguing that *Carolene Products*’s “broader spirit” is “solicitude for ‘out-groups’” in its reliance on prejudice, and “the difference between a prejudice and a justified preference is normative”). We agree with Professor Klarman that a theory of prejudice cannot be void of substance, as that term was used by Justice Stone and further refined by Professor Ely to include both the refusal to deal with others out of simple hostility as well as a systematic devaluing of a particular group’s interests through stereotypical judgments. Klarman, *The Puzzling Resistance*, *supra* note 12, at 784. Given our project of using political process theory to minimize and channel, rather than eliminate, judicial value judgments, we do not share Klarman’s view that a process-based jurisprudence must be “shorn of its prejudice prong.” *Id.* at 819; cf. Strauss, *Carolene Products*, *supra* note 16, at 1266 (emphasis added) (“[T]he entire point of the *Carolene Products* approach is to enable courts to avoid controversial moral issues” like homosexuality).

<sup>194</sup> Cf. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1075–76 (1980) (stating that legislation against homosexuals is based on principles of morality which view certain sexual activities as wrong).

<sup>195</sup> Lawrence G. Sager, *Constitutional Triage*, 81 COLUM. L. REV. 707, 717 (1981) (reviewing CHOPER, *supra* note 10).

<sup>196</sup> See, e.g., Ortiz, *supra* note 123, at 735 (noting a switch in Ely’s work from a purely political focus to

challenge to a statute requiring mandatory sterilization of persons afflicted with mental retardation.<sup>197</sup> Although the Supreme Court has previously found that this group is not politically powerless (in the context of a land use challenge),<sup>198</sup> the question judges should answer under our approach does not go to the substance of the propriety of sterilization. Rather, we suggest that judges examine the legislative process to ascertain why advocates for people with intellectual disabilities were unable to prevent enactment of the legislation. In sum, although a political science inquiry into prejudice is not value-free, it is more constrained than a moral philosophy inquiry into defining fundamental rights.<sup>199</sup>

#### IV. WHAT WOULD RIGOROUS APPLICATION OF PROCESS THEORY LOOK LIKE?

We agree with Justice Stone that the political process ordinarily works to protect groups unfairly aggrieved by legislation. We also agree with Justice Jackson that the most effective practical guaranty against arbitrary and unreasonable government is to require equal treatment.<sup>200</sup> Thus, we expect that the Supreme Court's need to carefully scrutinize legislative actions under the Due Process Clause would be quite rare. For most due process claimants, rational basis review would remain in place.<sup>201</sup> For most of the remaining group where there is a political process failure, the case would proceed on equal protection grounds. However, when a claim cannot be resolved under equal protection principles, courts should consider extending

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a focus on the psychology of decision making).

<sup>197</sup> Such a statute was infamously upheld in *Buck v. Bell*, 274 U.S. 200, 205, 208 (1927).

<sup>198</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435, 445 (1985); see also *supra* note 185 and accompanying text.

<sup>199</sup> If, as Michael J. Klarman, *The Puzzling Resistance*, *supra* note 12, at 747, observes, John Hart Ely sought to “confront, or perhaps more accurately to circumvent, the countermajoritarian difficulty,” then our goal is rather to minimize it.

<sup>200</sup> See *supra* text accompanying notes 137–41.

<sup>201</sup> Courts have found laws to lack rational basis when the judge concludes that the statute is not motivated by a *rational* basis but by an *irrational* animus. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (noting that a constitutional amendment limiting a local government's ability to redress anti-LGBTQ discrimination “seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests”). Another scenario for judicial invalidation of a statute as lacking a rational basis would be an outmoded law that neither the government nor any intervenor defends. Cf. *Poe v. Ullman*, 367 U.S. 497, 501–02 (1961) (Frankfurter, J.) (discussing a law passed in 1879 prohibiting the use of contraceptives which never gave rise to government prosecutions despite open sale of contraceptives); Alexander M. Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 59 (1961) (detailing the minimal instances in which a Connecticut law against contraceptives was used to prosecute individuals providing access to contraceptives).

meaningful judicial protection from majoritarian political processes to some substantive due process claimants. To justify heightened protection, these claimants must demonstrate that animus or prejudice (as we have used that term)<sup>202</sup> precludes their ability to participate equally with other stakeholders in the political process. In this Part, we suggest how our proposed reinvigoration of *Carolene Products* would apply in a variety of instances.<sup>203</sup> We conclude that courts applying this new standard would reach similar results under equal protection jurisprudence in many cases where current doctrine permits heightened substantive due process review. The most likely areas where doctrine might evolve differently are claims involving family law, deprivation of “fundamental” rights by the poor, and the exercise of religiously-based practices not protected by current Free Exercise Clause doctrine.

#### A. *Desirability of Resolving Cases Under the Equal Protection Clause*

One illustration of our thesis concerns the Court’s long line of cases wrestling with a satisfactory basis for according close scrutiny to laws affecting family privacy. Many of these cases may be better resolved under the Equal Protection Clause. Where a political process analysis does not justify close scrutiny, we believe that the decisions were wrong.

We begin with two cases often cited as the progenitors of a right to privacy recognized under the Due Process Clause.<sup>204</sup> In *Meyer v. Nebraska*, the Court reversed the conviction of a private school teacher for teaching (during recess) reading in the German language, in violation of a state law outlawing instruction in other languages before ninth grade.<sup>205</sup> In *Pierce v. Society of Sisters*, the Court invalidated an Oregon statute requiring students to

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<sup>202</sup> See *supra* text accompanying note 159.

<sup>203</sup> We do not discuss the potential application of this doctrine to the issue of regulatory takings. The Court’s muddled doctrine in this area may well benefit from a rigorous reconsideration (for an insightful analysis, see Jamison E. Colburn, *Splitting the Atom of Property: Rights Experimentalism as Obligation to Future Generations*, 77 GEO. WASH. L. REV. 1411 (2009)), and *Carolene Products*’s political process approach may make an important contribution to such reconsideration. But the Court’s current doctrinal rules suggest that these claims are analyzed as “takings” of “property.” See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540, 548 (2005) (reversing a claim because it was not a taking and applying rational basis review to the due process claim); Colburn, *supra*, at 1448 (stating that the Court often examines confiscation of property under a Takings Clause analysis). Thus, following the framework of Footnote Four, these claims are arguably—today, at least—with regard to rights “within a specific prohibition in the Constitution,” and beyond the scope of substantive due process. Cf. Colburn, *supra*, at 1440 (stating that although *Lingle* “minimized the degree to which substantive due process and takings scrutiny had mixed,” in truth “these two had virtually merged”).

<sup>204</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (identifying those two cases that recognized rights to make choices about education).

<sup>205</sup> 262 U.S. 390, 403 (1923).



attend public schools through the eighth grade.<sup>206</sup> Both decisions took place in the midst of the *Lochner* era. In *Meyer*, Justice James McReynolds explained that the statute interfered with liberty guaranteed by the Fourteenth Amendment, which the Court defined as:

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>207</sup>

This articulation obviously is much broader, and grounded in a far different constitutional theory, than the one the Court would later articulate in *Carolene Products*. We believe that close judicial scrutiny in these cases may be better justified today on alternative grounds: by determining whether there was a sufficient likelihood that the Nebraska statute reflected prejudice based on national origin directed at German-Americans in the wake of World War I, and whether the Oregon statute reflected prejudice against those religions (particularly Roman Catholicism) that required adherents' children to attend parochial schools. Under our approach, this would raise questions about the ability of the political process to adequately balance conflicting policy interests in these cases. These become equality cases, not ones of substantive due process.

In a similar vein, we believe that state laws limiting the sale of contraceptive devices or medication would be unlikely to survive politically if the laws were uniformly applied.<sup>208</sup> As enforced, the Connecticut statute invalidated in *Griswold* realistically posed no real barrier to most married couples in that state, but only to those who were poor. Comparably, the Massachusetts law struck down in *Eisenstadt*, which limited sales of contraceptive devices to married couples, allegedly seeking to limit premarital sex, had previously survived equal protection review despite the legislature's decision to permit over-the-counter condom sales.<sup>209</sup>

As to whether federal judges should depart from the *Carolene Products*'s presumption of rational basis review for legislative restrictions on a woman's ability to terminate a pregnancy,<sup>210</sup> there is much to the view that abortion restrictions should be closely justified on equal protection grounds,

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<sup>206</sup> 268 U.S. 510, 534–35 (1925).

<sup>207</sup> 262 U.S. at 399.

<sup>208</sup> We discuss this in our text accompanying *supra* notes 140–42.

<sup>209</sup> See Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. FORUM 349, 352 (2015) (discussing *Commonwealth v. Corbett*, 29 N.E.2d 151 (Mass. 1940)).

<sup>210</sup> Given the scope of this Article, we do not discuss the precise doctrines that should emerge from equal protection scrutiny of particular abortion-restricting statutes.

as uniquely applying to women, for the same reasons that discrimination against women continues to be closely justified.<sup>211</sup> Justice Bertha Wilson of the Supreme Court of Canada articulated this position in her concurring judgment to Canada's counterpart to *Roe v. Wade*.<sup>212</sup> She noted that a decision on whether to have an abortion is one with profound effects for the pregnant woman, with complex and varied circumstances usually resulting in "powerful considerations militating in opposite directions."<sup>213</sup> Justice Wilson observed that it is:

probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.<sup>214</sup>

For this reason, the "right to reproduce or not to reproduce . . . is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being."<sup>215</sup>

Our analysis also makes us reluctant to base the result in *Obergefell v. Hodges*<sup>216</sup> protecting same-sex marriage on the importance of marriage to our society and to the parties in the litigation. As earlier noted, prior cases suggest that legislation motivated by animus may be said to be irrational (because, like "love," it is based on emotion rather than analytic reasoning). Consequently, the challenged limits on marriage fail even the deferential test set forth in *Carolene Products*.<sup>217</sup> Indeed, Justice Kennedy himself had found such animus in other cases classifying on the basis of sexual orientation.<sup>218</sup> We believe that heightened scrutiny would be better justified by a judicial finding that, despite significant changes in social attitudes, irrational prejudice and stereotype remain in a significant number of states, thus war-

<sup>211</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (arguing that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship status." (citing Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002-28 (1984); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992)).

<sup>212</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 161-84 (Can.) (Wilson, J., concurring).

<sup>213</sup> *Id.* at 171.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 172.

<sup>216</sup> 135 S. Ct. 2584 (2015).

<sup>217</sup> See, e.g., *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (holding that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest").

<sup>218</sup> See *United States v. Windsor*, 570 U.S. 744, 768 (2013) (finding that DOMA was "designed to injure" a class of persons); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (holding that the challenged law was "born of animosity toward the class of persons affected").

ranting the conclusion that legislation targeting Americans on the basis of sexual orientation will not be corrected by the political process.<sup>219</sup>

The same-sex marriage issue also illustrates another important limitation on our thesis. Many states adopted restrictions on same-sex marriage through direct democracy by initiatives or referenda. Our approach would require a different doctrine for review of these cases. Justice Stone's assumption that minorities can usually protect themselves in the political process is premised on the Madisonian compromises with other factions that occur regularly as part of political bargaining among elected *legislators*. This assumes that minorities can prevail by obtaining support for policies that may be weakly opposed by the majority, in exchange for their own support for other policies strongly favored by other factions. This sort of wheeling and dealing is nearly impossible to achieve on single-issue questions presented directly to voters, where the minority will almost always lose.<sup>220</sup>

### B. *Return to San Antonio*

Reinvigoration of *Carolene Products* invites a review of the Court's inconclusive jurisprudence concerning claims of the poor. We emphasize again that our argument for application of political process theory to these challenging issues focuses solely on standards that justify close judicial scrutiny. It may be that further careful examination will reveal that poor claimants meet the standard we articulate here; whether there is a workable and judicially manageable standard to secure relief for their particular claims is beyond the scope of this Article.

The Supreme Court has never fully considered whether, in respect to any specific legislative policy choice, the political process is adequate to protect the poor. Specifically, *San Antonio v. Rodriguez* did not reject the claim that the poor were a "*Carolene* minority." Rather, the Court rejected the argument that the plaintiff's challenge to Texas's school financing scheme discriminated against the poor as a class.<sup>221</sup> As Ross and Li persuasively

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<sup>219</sup> Cf. text accompanying notes 105–10, *supra*, justifying heightened scrutiny of gender-based legislation based on continuing obstacles to the political process for women.

<sup>220</sup> Accord Schacter, *supra* note 94, at 1395, 1403 (discussing the political access or power of minority groups); see also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1100 (1991) (explaining the concept that multi-racial legislative bodies are needed because "only after previously excluded groups were successful within the electoral process would the white majority learn to accept black representatives as colleagues in collective governance").

<sup>221</sup> The Court noted:  
[A]ppellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that

demonstrate, language in later opinions, stating that poverty is not a “suspect” classification, was entirely bootstrapped from earlier language and did not represent a considered rejection of a claim under either the standards set forth in Footnote Four or in *Rodriguez*.<sup>222</sup>

The expenditure of funds is surely subject to constitutional equality jurisprudence. If Texas had provided unequal funding based on a formula explicitly affording less per-pupil spending for schools with higher percentages of minority race students, this would be unconstitutional. So too would a scheme funding programs for boys and not for girls.<sup>223</sup> But it would read too much into the insights provided by Justices Stone, Jackson, and Marshall to find a judicially enforceable constitutional mandate to remedy wealth inequality by ordering additional resources (either from higher taxes or redistribution from *different* government programs).

Under Footnote Four, the principal focus with regard to claims of the poor is whether they face antipathy that precludes their ability to “wheel and deal” in the legislative process. While resolving this issue is beyond the scope of this Article, recent work by Ross and Li offer some important insights. We agree with them that the presence (or lack thereof) of impoverished representatives in Congress or state legislatures is not dispositive, nor is the existence of some programs designed to alleviate poverty (especially those enacted many years ago based on different ideological motivations of elected officials).<sup>224</sup> We find most salient, regarding their extensive empirical study of voting in the House of Representatives, evidence that the presence of poor voters in a congressional district correlates *negatively* to voting on legislation that would benefit the poor—in stark contrast to statistically significant positive correlations between voting and the presence in a district of union members and farmers.<sup>225</sup>

We are more ambivalent about their finding that significantly lower voting levels in poor precincts also explains the lack of responsiveness of legislatures to the needs of the poor. We appreciate the cycle of despair that could lead poor Americans to withdraw from the political process.<sup>226</sup> However, we do not believe that this poses the sort of barrier to participation anticipated in Footnote Four. Part of ordinary politics is that some groups

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the poorest families are not necessarily clustered in the poorest property districts.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 22–23 (1973).

<sup>222</sup> See Ross & Li, *supra* note 145, at 331, 333, 342–43 (recounting how *Maher v. Roe* and *Harris v. McRae* misused *Rodriguez* to refuse to declare the poor a suspect class).

<sup>223</sup> See *United States v. Virginia*, 518 U.S. 515, 534–46 (1996) (holding that an all-male state university violated the Equal Protection Clause).

<sup>224</sup> Ross & Li, *supra* note 145, at 348–49.

<sup>225</sup> *Id.* at 367.

<sup>226</sup> *Id.* at 378.

may be easier to organize, and others may require particularly charismatic candidates, or more fervent and creative efforts to increase voter participation, to be able to ensure that the political process addresses their concerns. To be sure, however, if low rates of political participation are due to laws designed to impede voting, then—per the second paragraph of Footnote Four—courts should carefully scrutinize those electoral laws.<sup>227</sup> On the other hand, if the principal cause of unresponsiveness is voter ennui rather than legislative hostility, active judicial intervention should not proceed.

To justify heightened scrutiny under *Carolene Products*, a poor plaintiff would need to clearly identify unequal treatment of a discrete class of the poor, and then demonstrate why that class warrants extraordinary protection from majoritarian political processes. In the context of a renewed challenge to school financing schemes, we offer a few thoughts as to how judges should analyze this issue. First, the plaintiff would need to show that the scheme specifically discriminates against the poor, as opposed to those who happen to live in low-property districts (or to show that people who live in low-property districts are systematically disabled from redressing their grievances politically). Second, the plaintiff must demonstrate that the state's reliance on local property tax revenues as the principal sources of school funding was primarily motivated by a disregard for the needs of poor voters, rather than strongly held countervailing policy concerns (regarding local control, tax policy, and the like). Thoughtful substantive judicial discretion is inevitable in making this determination, and evidence of such disregard in prior unsuccessful efforts to use political processes to redress grievances would be highly relevant.<sup>228</sup>

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<sup>227</sup> See, e.g., *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (invalidating a Texas voter identification law); *NAACP v. McCrory*, 831 F.3d 204, 239 (4th Cir. 2016) (striking down as racially discriminatory certain provisions of a North Carolina law requiring photo identification, which reduced early voting and eliminated same-day registration).

<sup>228</sup> Legislative motivations fall on a spectrum, between statutes solely designed to prejudice a minority, see, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (noting a bizarre racial gerrymander to exclude almost all black voters from a city), to those clearly designed to fulfill a compelling state interest. A judge persuaded that a claim is highly important to a challenger unable to secure legislative relief, in the face of weak justifications, may well conclude that “prejudice” is at work. For example, in *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 259 (1979), seven Justices sparred over whether an absolute preference for any minimally qualified veteran for jobs in the Massachusetts civil service constituted unlawful discrimination on the basis of sex. Feeney argued that less than 2% of Massachusetts women were veterans (in part due to discriminatory federal military regulations), and that forty-six states and the federal government recognized veterans in ways less exclusionary than an absolute preference. The majority rejected the claim, finding no evidence that the preference was enacted “because of” its adverse effects on women, rather than “in spite of” this effect. *Id.* at 279. On this specific point, we are inclined to agree with Justice Marshall’s dissenting opinion. He notes that until 1971 the preference had not applied to jobs “especially calling for women,” *id.* at 285 (Marshall, J., dissenting), thus rejecting the majority’s view that the ev-

In a similar vein, we believe that the Court's rejection of a challenge to a federal law providing medical aid to poor women for childbirth but not abortion should be reconsidered.<sup>229</sup> The proper focus should be on the sort of medical care provided to indigent men, compared to indigent women. We question whether the political process worked when male-dominated legislatures enacted substantive restrictions on reproductive choice. Indeed, the distinction here may well be analogized to a statute that funded care for prostate cancer but not ovarian cancer.<sup>230</sup>

Under *Caroline Products*, the cases involving the poor also require a re-characterization of other prior claims. For example, in *Dandridge v. Williams*, the majority declined to carefully scrutinize a Maryland law that capped welfare benefits for large families.<sup>231</sup> Here, the relevant discrimination was not between the poor and other groups. Assuming that the Maryland legislature was likely to provide the same amount of annual appropriations for welfare no matter how it was allocated, the policy question would be whether more of it should go to poor families with a large number of children as opposed to poor families with only a few children. The proper *Carolene Products* focus should have been on whether, as between these two groups, large families faced prejudice in the legislative process.

### C. Family Law Generally

Much of the constitutionalization of family law is not supported by a *Carolene Products* theory.<sup>232</sup> The Court has granted extraordinary judicial protection from majoritarian political processes with regard to state laws affecting divorced parents seeking to shield their children from grandparent visitation.<sup>233</sup> Lower courts have closely reviewed cases where state child

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idence did not show a "collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts civil service." *Id.* at 279 (majority opinion). That said, we are more ambivalent about whether the real issue in this case was sex discrimination. As Justice Stevens (joined by Justice White) noted in his concurrence, in addition to the nearly three million women disadvantaged by the statute, there were almost two million disadvantaged non-veteran men. *Id.* at 281 (Stevens, J., concurring). It is unclear why these two groups' combined political efforts would be insufficient to secure legislative redress, although under our approach a plaintiff would have the opportunity to make such a case.

<sup>229</sup> See *Harris v. Macrae*, 448 U.S. 297, 326 (1980); *Maher v. Roe*, 432 U.S. 464, 470–71 (1977).

<sup>230</sup> Cf. ELY, *supra* note 9, at 248–49 n.52 (noting caustically that "the middle class is now effectively entitled to the abortions that prior to *Roe v. Wade* only those rich enough to fly to Japan could afford, but the poor are not. No *Carolene Products* Court this.").

<sup>231</sup> 397 U.S. 471, 486 (1970).

<sup>232</sup> For the view that the Court's constitutionalization of family law has resulted in both bad constitutional doctrine and bad substantive family law, see David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 530 (2008).

<sup>233</sup> See *Troxel v. Granville*, 530 U.S. 57, 72 (2000) (finding a visitation order to be unconstitutional).

welfare authorities subjected parents to termination proceedings,<sup>234</sup> among others. We believe that evidence is lacking that those adversely affected by these sorts of laws are saddled with such political disabilities that they cannot get redress from the political process through ordinary factional combination with others who care more about other issues. We understand the revulsion articulated in Justice Goldberg’s *Goldfarb* concurrence to a hypothetical statute requiring sterilization of all husbands and wives after two children had been born to them. However, there is no evidence in American history that such a law—broadly applied to cover all families—would ever be enacted by Congress or a state legislature (absent some apocalyptic scenario out of science fiction).<sup>235</sup>

We believe that the political process theory provides an answer to the view that surely the Constitution must protect marital privacy or parental rights given their importance in American society. It is the same answer to Chief Justice John Roberts’ argument in *Sebelius* that surely the Constitution must protect against Congress passing a statute forcing Americans to eat broccoli.<sup>236</sup> These positions reflect an unwarranted lack of faith in the political process. In short, neither Congress nor any state legislature would seriously consider significantly limiting marriage to all its citizens nor force Americans to eat broccoli.<sup>237</sup>

#### D. Personal Autonomy and the “Right to Die”

As noted earlier,<sup>238</sup> the Court’s rejection of substantive due process and equal protection claims regarding physician-assisted suicide exemplify the difficulties with the Court’s existing approach. In our view, the same result

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<sup>234</sup> See, e.g., *In re J.P.*, 648 P.2d 1364, 1374–77 (Utah 1982) (striking down a statute that permitted termination of parental rights based upon a finding that “such termination will be in the child’s best interests”).

<sup>235</sup> If any subset of Americans were targeted by such an enormous intrusion into family life, an equal protection challenge building upon Justice Jackson’s *Railway Express* insight would likely be the preferred way to protect these citizens.

<sup>236</sup> See *Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558 (2011).

<sup>237</sup> Michael Klarman articulates this well:

[T]he fascinating aspect of the sterilization hypothetical is [Justice Goldberg’s] blithe assumption that a law generating such widely spread costs (as opposed to one concentrating burdens upon a politically impotent minority as did the sterilization law in *Skinner* [*v. Oklahoma*, 316 U.S. 535 (1942)]) must be unconstitutional. I would have thought that such a law could not pass a democratically elected legislature (Connecticut is not China, after all) unless the need for it was deemed compelling. And if population concerns were sufficiently urgent that the majority was prepared to sterilize itself, what would justify the Supreme Court’s mandating that the balance be struck on the individual liberty side of the equation?

Klarman, *The Puzzling Resistance*, *supra* note 12, at 827.

<sup>238</sup> See *supra* notes 46–58 and accompanying text.

would be better achieved by invoking *Carolene Products*, which none of the Justices notably chose to cite. The majority's reliance on "roots" and "tradition" fails to meaningfully distinguish *Lochner* and is not reconcilable with *Roe* and *Casey*. The concurring opinions by Justices Souter and Stevens, which involve what we would call close scrutiny, do not even attempt to identify flaws in the political process to warrant such scrutiny. Justice O'Connor's concise concurrence has much more to commend it, in our judgment:

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure. As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. In such circumstances, "the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance."<sup>239</sup>

Unfortunately, while Chief Justice Rehnquist and Justice Souter sparred with each other's handiwork, neither saw fit to explain why Justice O'Connor's approach was not preferred. Justice Breyer, in a separate concurrence, opined that her "views, which I share, have greater legal significance than the Court's opinion suggests."<sup>240</sup>

Likewise, the Court's companion equal protection opinion in *Vacco v. Quill*<sup>241</sup> exemplifies the benefits of a *Carolene Products* approach. *Vacco* upheld New York's criminalization of assisted suicide against an equal protection challenge made by terminally ill patients who were not on life support, because those who were on life support could hasten death by ending treatment.<sup>242</sup> The Court concluded that it was "important and logical; it is certainly rational" to distinguish between assisting suicide and withdrawing life-sustaining treatment.<sup>243</sup> It went on to offer additional reasons suggesting that the Justices actually agreed with the legislative distinction.<sup>244</sup>

Our approach, echoing Justice O'Connor's, would ask whether those citizens who support physician-assisted suicide (either for themselves or loved ones) are precluded by prejudice or animosity from securing desired legislative

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<sup>239</sup> *Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring) (citations omitted).

<sup>240</sup> *Id.* at 789 (Breyer, J., concurring in the judgment).

<sup>241</sup> 521 U.S. 793 (1997).

<sup>242</sup> *Id.* at 796–98.

<sup>243</sup> *Id.* at 800–01 (citation omitted).

<sup>244</sup> *Id.* at 801–09 (supporting their finding by differentiating between refusing treatment and assisted suicide based on traditional legal notions of causation and intent that "not surprising[ly]" many courts and state legislatures have adopted, and thus "[l]ogic and contemporary practice support . . . [this] longstanding and rational distinction").



changes through the political process.<sup>245</sup> The Court doesn't mention this critical question. Indeed, the only *Glucksberg* brief to address it was the *amicus* brief filed in support of the Washington law by the Oregon Attorney General.<sup>246</sup>

*E. Practices of Religious Minorities Not Protected by the Free Exercise Clause*

In *Employment Division v. Smith* (the “*Peyote* case”), the Court held that the Free Exercise Clause of the First Amendment did not preclude an Oregon law that seriously impaired religious practices, as long as the prohibition was motivated by a secular purpose and not applied in a discriminatory manner.<sup>247</sup> Our political process approach suggests that a different result might be achieved under the Due Process Clause by some religious groups, if they can show the requisite prejudice precluding their access to the political process. This is particularly true where stereotypes or prejudice may apply to the particular religious practices involved. Indeed, we believe the *Peyote* case provides a compelling illustration.

Almost all religious groups are minorities. Yet in many cases, religious groups exemplify Justice Stone's insight about the ability of minority groups to redress grievances politically. Ordinary state and federal legislation often requires government to specifically accommodate religious groups. For example: Congress enacted an explicit statute to this effect after the *Smith* decision;<sup>248</sup> Oregon, like many states, exempted the use of wine in religious ritu-

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<sup>245</sup> Indeed, Washington voters enacted a Death with Dignity Act in 2008, with the support of the incumbent governor. *Washington Death with Dignity Act: A History*, DEATH WITH DIGNITY, <https://www.deathwithdignity.org/washington-death-with-dignity-act-history> (last visited Feb. 15, 2018). Oregon voters had previously enacted such legislation in 1997. Death with Dignity Act, OR. REV. STAT. ANN. §§ 127.800–127.897 (West 2017). To date, two state legislatures have revised their statutes to permit some form of physician-assisted suicide. End of Life Option Act, CAL. HEALTH & SAFETY CODE § 443 (West 2016); Patient Choice at End of Life, VT. STAT. ANN. tit. 18, §§ 5281–93 (West 2013).

<sup>246</sup> The brief provided:

Unlike state laws that may be subject to more careful scrutiny because of their impact on racial, national, religious or other discrete subgroups, Washington's ban on assisted suicide affects all citizens equally. Death eventually comes to each of us, and each of us may face difficult end-of-life decisions for ourselves and for loved ones. Precisely for that reason, there is no basis to assume that the legislative choice made by Washington disproportionately impacts any group of citizens or is the result of malicious or benign discrimination against any group. *Cf. Romer v. Evans*, 116 S. Ct. 1620 (1996) (invalidating Colorado law as failing to further legitimate state objectives, thus violating the Equal Protection Clause, because the law was motivated only by hostility and maliciousness toward a segment of the State's citizens).

Brief of Amicus Curiae State of Oregon in Support of Petitioners State of Washington, et al. at 11–12, *Washington v. Glucksberg*, 521 U.S. 702 (No. 96-110).

<sup>247</sup> 494 U.S. 872, 878, 882 (1990). One of us has extensively criticized this decision on First Amendment grounds beyond the scope of this Article. CHOPER, LIBERTY, *supra* note 35, at 2–3.

<sup>248</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

als from normal limits on alcohol sale and distribution;<sup>249</sup> the federal government and many states likewise exempt the use of peyote when used in religious rituals.<sup>250</sup> Our suggested inquiry, under the Due Process Clause, would be whether Oregonians desiring to use peyote for religious rituals were blocked by prejudice from the political process. Evidence of animus directed at Native Americans, or fears that users were part of unpopular “subcultures,” would support more searching judicial scrutiny. In contrast, substantial evidence that use of a drug subject to recreational abuse could not be meaningfully contained to religious users would justify a conclusion that the decision reflected strong public policy rather than prejudice.

In general, courts should ask why a claimant was not able to prevail legislatively. Active animus, as well as evidence that the claimant group was so small in number that they could be effectively ignored in respect to the substantive issue alleged, despite the strong impact on their own lives, supports the invocation of Footnote Four to justify closer judicial scrutiny.

### CONCLUSION

Any constitutional democracy faces the challenge of reconciling legislative choices made by elected representatives or their designees and the ability of unelected judges to invalidate these choices. American constitutional history shows that the role of the Supreme Court in interpreting the Constitution faced a unique crisis in the 1930s, when a series of laws enacted by elected officials were jeopardized by judicially-developed interpretations of the Due Process and Equal Protection Clauses that allowed courts to invalidate laws based on the Justices’ personal economic philosophy. America’s unique resolution of the “counter-majoritarian dilemma” was articulated in the landmark *Carolene Products* decision. In that case, the Court held that courts should ordinarily review challenged legislation with great deference. However, Justice Stone went on to reserve careful non-deferential judicial scrutiny for cases where the political process itself could not be relied upon, due to prejudice or other failings, to adequately protect those unfairly affected by improvident legislation.

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<sup>249</sup> OR. REV. STAT. ANN. § 471.410(4) (West 2014) (specifically exempting sacramental wine given or provided as part of a religious rite or service); OR. ADMIN. R. 845-010-0300 (2017) (allowing religious organizations to obtain a free permit to import sacramental wine).

<sup>250</sup> See 21 C.F.R. § 1307.31 (2017) (“The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church . . .”). For a list of states, see *Smith v. Emp’t Div.*, 763 P.2d 146, 148 n.2 (Or. 1988).

This resolution responds to the specific context of American constitutional politics. Justices have generally expressed a faith in the legitimacy of the political process. Nonetheless, from the *Lochner* era, through the Warren Court's recognition of new substantive due process claims, to the Roberts Court, our history features decisions that seem to turn radically on the ideological preferences of a majority of the Justices. *Carolene Products* seeks to channel the judicial focus in a manner less reliant on personal ideology.

These concerns may not be present in other constitutional democracies. For example, the 1996 South African Constitution is explicitly built on a compromise, quite different than the problem that Alexander Bickel and other American scholars addressed. Its framers created a constitutional text that is both broad and detailed, to be enforced by a new Constitutional Court. This compromise reflected the distrust of the white minority in the national legislature, sure to be dominated by the African National Congress, as well as a particular trust in the first court, to be composed entirely of nominees of the first President of a democratic Republic of South Africa, Nelson Mandela.<sup>251</sup> Coming nearly two centuries after constitutional review by judges was established in the United States, this reflected a deliberate policy choice to vest considerable discretion in the judiciary to mediate and demand justifications from a majoritarian political process that had never existed in their nation. These circumstances are quite different than those encountered in American constitutional politics. Although these and other jurisdictions struggle, as does any constitutional democracy, with questions about the legitimacy of judicial review, these responses illustrate the unique context in which the issues arise given each country's history and constitutional politics.

Over time, our Court has not been rigorous or precise in tying its active scrutiny of challenges under the Due Process Clauses to the theory of *Carolene Products*. We propose a return to the roots of modern constitutional theory in two ways. First, courts should avoid many due process claims by directing that judges first analyze constitutional challenges to legislation under the Equal Protection Clause. Second, the appropriate test for heightened scrutiny of equality claims should focus on whether the claimant cannot secure a redress of grievances from the political process, through the normal "wheeling and dealing" between multiple interest groups with multiple interests that ordinarily characterize the business of Congress and state legislatures. Third,

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<sup>251</sup> See HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 179–80 (2000) (differentiating between apartheid era courts and the new Constitutional Court appointed with "impeccable anti-apartheid credentials"); STEPHEN ROSS, HELEN IRVING, HEINZ KLUG, COMPARATIVE CONSTITUTIONAL LAW 560 (2014) (explaining Mandela's appointment of the initial Constitutional Court).

for substantive due process claims of general application, courts should limit such scrutiny to those claimants whose decision to exercise their liberties form, on the basis of that choice, a minority such that majoritarian political processes cannot protect them. Where claimants disadvantaged by legislation can form political factions capable of combining with others to redress their grievances politically, courts should decline to intervene.