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## RESPONSES

CONFRONTING POWER IN PUBLIC LAW<sup>†</sup>

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In his important and provocative Foreword, Professor Daryl Levinson criticizes American constitutional law for failing to attend sufficiently to questions of power, which he defines as “the ability to effect substantive policy outcomes by influencing what the government will or will not do.”<sup>1</sup> As Levinson details, structural constitutional law has focused on how power is distributed among governmental institutions. It has not consistently or adequately considered how power is — or should be — distributed among social groups. Ultimately, Levinson suggests that the narrow focus of separation of powers law and theory on “equalizing the power of government institutions” lacks normative force.<sup>2</sup> Equalizing power among interests and groups in society is a more worthwhile project than checking, balancing, and equalizing power among governmental institutions.<sup>3</sup> In the latter, he concludes, “it is hard to see any spark.”<sup>4</sup>

One might protest, in light of current electoral politics, that the possibility of unchecked presidential power does indeed have alarming “spark.”<sup>5</sup> But I fundamentally agree with Levinson’s analysis. Like

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<sup>†</sup> Responding to Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016).

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<sup>1</sup> Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 39 (2016); see also *id.* (“For most (though not all) purposes, ‘power’ in public law should be understood to refer to the ability of political actors to control the outcomes of contested decisionmaking processes and secure their preferred policies.”).

<sup>2</sup> *Id.* at 142.

<sup>3</sup> *Id.* at 142–43.

<sup>4</sup> *Id.* at 142.

<sup>5</sup> Indeed, Levinson acknowledges that this year’s presidential campaign raises concern about how the “imperial power” of the President may be put to use. *Id.* at 41 n.48. He also recognizes that there are good reasons for constitutional law “to care about how power is distributed among the branches of government or between the national government and the states.” *Id.* at 111.

Levinson, I have argued that separation of powers theory does not sufficiently attend to how power is distributed in society and therefore how power is actually exercised in government.<sup>6</sup> In particular, mounting empirical evidence demonstrates that economic elites exercise extraordinary power at every step of the political process.<sup>7</sup> Traditional separation of powers mechanisms, whatever their other virtues, do little to check or balance elites' concentrated power.<sup>8</sup> Given this political economy, I have argued, public law ought to focus more on facilitating the countervailing power of ordinary citizens and their organizations in governance.<sup>9</sup>

Thus, rather than taking issue with Levinson's effort to shift the focus from institutions to interests, I would like to fill in some of what his ambitious project leaves out — and pick up where it leaves off. In so doing, I will make two points. *First*, confronting particular social problems and their human consequences, rather than remaining at a high level of abstraction, can deepen the account of how power functions in public law. *Second*, confronting power's distribution with material detail can help elucidate a path for reform. That path, I will suggest, involves reducing legal barriers to collective action, while simultaneously creating new structures for citizens' collective engagement with government.

### I. WHAT THE FOREWORD LEAVES OUT

Levinson's Foreword is synthetic, expansive, and nuanced. But it is also, by design, relatively detached from actual problems of power — contemporary or historical.<sup>10</sup> It is decidedly not the piece's ambition to provide an account of how inegalitarian distributions of power affect ordinary people, nor to mine past or current political struggles to redistribute power. Rather, Levinson ultimately seeks to show that, in the abstract, "every law and policy . . . potentially serves to redistribute political power."<sup>11</sup>

The Foreword is thus largely agnostic on many real-world problems of power. Levinson cites recent studies about the excessive power

<sup>6</sup> Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015).

<sup>7</sup> See, e.g., MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 1 (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 576–77 (2014); see also Andrias, *supra* note 6, at 435–61 (collecting and analyzing literature).

<sup>8</sup> See Andrias, *supra* note 6, at 421–23.

<sup>9</sup> *Id.* at 427.

<sup>10</sup> Cf. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 288 (1999) (critiquing leading egalitarian writing for being "strangely detached from existing egalitarian political movements").

<sup>11</sup> Levinson, *supra* note 1, at 138.

of wealthy interests in politics,<sup>12</sup> notes past struggles over, for example, black voting rights,<sup>13</sup> and mentions other fields, like labor law, where scholars have sought to shift the distribution of power toward workers and away from employers;<sup>14</sup> yet he ultimately demurs on whether any particular interests in our society wield too much or too little power.<sup>15</sup> Rather, he emphasizes the lack of any “well-developed or widely shared theory of what would count as a fair or equal distribution of power among groups and interests” and “the difficulties of assessing how much power different groups and interests in fact possess.”<sup>16</sup>

There are costs, however, to abstracting legal discussions of power — to talking about power without detailing its effects and without taking a normative position on its distribution. For one elaboration of those costs, consider the Supreme Court’s 2015 Term and Justice Sotomayor’s dissent in *Utah v. Strieff*.<sup>17</sup> *Strieff* presents the question whether the discovery of a preexisting arrest warrant attenuates the connection between an unlawful investigatory stop and evidence seized during a search incident to arrest, such that the evidence is admissible. The majority concludes that it does.<sup>18</sup>

In response, Justice Sotomayor challenges lawyers, law professors, and citizens to move beyond abstraction. “Do not be soothed by the [majority] opinion’s technical language,”<sup>19</sup> she implores, laying bare, in vivid detail, the power exercised by the state in the policing of mostly “black and brown” communities.<sup>20</sup> “[U]nlawful ‘stops,’” she writes, “have severe consequences much greater than the inconvenience suggested by the name.”<sup>21</sup> She urges the reader to confront the systemic power dynamics that result, in part, from doctrinal choices: “[Do] not pretend that the countless people who are routinely targeted by police

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<sup>12</sup> See, e.g., *id.* at 38 nn.34–35, 127 n.538, 134–35 nn.575–83.

<sup>13</sup> See, e.g., *id.* at 120–28.

<sup>14</sup> See *id.* at 137–38 nn.597–601 (citing JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 127–51 (2010); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 154–55, 168–71, 203–06 (2013)); see also *id.* at 113–20 (discussing scholarship about regulatory capture).

<sup>15</sup> *Id.* at 140; see also *id.* at 119 (recognizing that “[t]he very concept of ‘capture’ depends upon a normative account of how much political power various groups should rightly possess, setting a baseline from which to measure disproportionate influence” without offering a normative account).

<sup>16</sup> *Id.* at 140; see also *id.* at 141 (explaining that the Foreword’s ambition is not to advance a particular reform agenda but rather to suggest that “[c]onstitutional thought might make greater progress by redirecting its focus from the power of government institutions to the power of groups in society — and correspondingly from structural constitutional law to a broader range of legal regimes that serve to redistribute democratic power”).

<sup>17</sup> 136 S. Ct. 2056 (2016).

<sup>18</sup> *Id.* at 2059.

<sup>19</sup> *Id.* at 2064 (Sotomayor, J., dissenting).

<sup>20</sup> *Id.* at 2070.

<sup>21</sup> *Id.* at 2069.

are ‘isolated.’”<sup>22</sup> And, she warns, you too could be one of the many innocent people “subjected to the humiliations of these unconstitutional searches” and sentenced, by arrest, to “the ‘civil death’ of discrimination by employers, landlords, and whoever else conducts a background check.”<sup>23</sup>

Justice Sotomayor’s stripping of the technical gloss, of the usual legal abstractions, draws attention to how the Court’s doctrine allocates power among societal actors — with significant impacts on people’s lives.<sup>24</sup> She also forces the reader to confront how, even before cases reach the Court, they have already been fundamentally shaped by the distribution of power in society. “[I]t is no secret,” she writes, “that people of color are disproportionate victims of this type of scrutiny.”<sup>25</sup> To that end, Justice Sotomayor might also have observed that the same communities subject to unconstitutional and debasing searches are also served by chronically underfunded and short-staffed public defenders, weakening their ability to influence courts. Indeed, she might have noted that *Strieff* itself is part of a Supreme Court docket in which the government is a skilled, repeat player but criminal defendants are almost never represented by expert counsel.<sup>26</sup> And she could have pointed out that these inequities combine with felon disenfranchisement laws, many dating to the Jim Crow era, to reduce the political power of the same communities.<sup>27</sup>

Profound inequities in power are by no means limited to criminal law. Consider employment and consumer law, and, in particular, the problem of mandatory arbitration clauses in contracts of adhesion — an issue the Court is likely to confront again in the near term.<sup>28</sup> Consumers, employees, and small businesses are routinely required, as a condition of doing business, to sign contracts that require them to arbitrate, rather than litigate, any claims. Emphasizing that courts must “rigorously enforce” arbitration agreements according to their terms,

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<sup>22</sup> *Id.* at 2071.

<sup>23</sup> *Id.* at 2070 (citing Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1805 (2012)).

<sup>24</sup> *Id.* at 2069.

<sup>25</sup> *Id.* at 2070.

<sup>26</sup> See Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 1988 (2016).

<sup>27</sup> See Editorial, *The Movement to End Racist Voting Laws*, N.Y. TIMES (Oct. 5, 2016), <http://www.nytimes.com/2016/10/05/opinion/the-movement-to-end-racist-voting-laws.html> [<https://perma.cc/W8U4-LLTX>].

<sup>28</sup> See Petition for a Writ of Certiorari at 7–13, *Epic Sys. Corp. v. Lewis*, No. 16-285 (U.S. Sept. 2, 2016), <http://www.scotusblog.com/wp-content/uploads/2016/09/16-285-cert-petition.pdf> [<https://perma.cc/JW4Z-X265>] (describing circuit split on the question whether an arbitration agreement that requires an employee to waive collective proceedings is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act that guarantee employees the right to engage in concerted action).

the Supreme Court has required arbitration even when the contracts deny the possibility of collective action or impose other procedural hurdles.<sup>29</sup> In so doing, the Court has tended to obfuscate the striking disparity of power underlying the contracts — as well as the way the arbitration doctrine effectively deprives many consumers, employees, and small businesses of the power to vindicate their legal rights. Justice Kagan had this critique in *American Express Co. v. Italian Colors Restaurant*<sup>30</sup>: “Here is the nutshell version of this case, unfortunately obscured in the Court’s decision. . . . The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”<sup>31</sup> Indeed, the monopolist also gets to limit the power of citizens to affect substantive policy outcomes of government by post hoc rendering statutory rights unenforceable.

As these and other recent cases show,<sup>32</sup> the problem of power in public law is neither abstract nor theoretical. While it may be difficult to assess precisely “how much power different groups and interests in fact possess,”<sup>33</sup> it is not difficult to observe the systemic power inequities that underlie many of these cases and that, in turn, are shaped by the Court’s decisions.<sup>34</sup>

Moreover, as these cases illustrate, the human stakes of law’s distribution of power are significant. By arbitrarily denying power to certain groups, we fail to recognize or validate the equal moral worth of persons: we “risk treating members of our communities as second-class citizens.”<sup>35</sup> By failing to grant citizens effective power to vindicate hard-fought statutory rights, we undermine the rule of law.<sup>36</sup> And, ultimately, when citizens lack effective power to “influenc[e] what the government will or will not do,”<sup>37</sup> whether because of the outsized influence that economic elites and big business wield in governance or because of other factors, like systemic racial or gender subordination,

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<sup>29</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)) (reviewing case law).

<sup>30</sup> 113 S. Ct. 2304.

<sup>31</sup> *Id.* at 2313 (Kagan, J., dissenting).

<sup>32</sup> See Levinson, *supra* note 1, at 41–43 (noting other cases from the 2015 Term that implicate issues of power).

<sup>33</sup> *Id.* at 140.

<sup>34</sup> Of course, the Court’s decisions do not always exacerbate systemic power inequities. As Levinson points out, some judicial intervention from the 2015 Term can be understood as contributing to the empowerment of racial minorities and women. *Id.* at 42–43 (citing, for example, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016)).

<sup>35</sup> See *Utah v. Strieff*, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting); see also Anderson, *supra* note 10, at 312 (arguing that “[e]galitarian political movements oppose such hierarchies” and “assert the equal moral worth of persons”).

<sup>36</sup> See *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting) (arguing that the majority’s decision “prevents the effective vindication of federal statutory rights”).

<sup>37</sup> Levinson, *supra* note 1, at 39.

we erode, even eviscerate, democracy. As history instructs, lacking effective access to and power over democratic processes and institutions, people may well turn elsewhere, including in ways that surprise political elites.

In short, confronting the human dimension of power hierarchies helps bolster Levinson's argument that constitutional theory should care about how power is distributed — and not just among governmental institutions.

## II. WHERE THE FOREWORD LEAVES OFF

Levinson closes his Foreword by arguing that “pockets of public law” ought to be linked to one another and to structural constitutionalism “by a common concern with balancing and diffusing power.”<sup>38</sup> I'll put the point more bluntly: there is a critical need for a range of structural, power-shifting reforms to our law, our economy, and our democracy.<sup>39</sup>

What such reforms might look like and how they might be achieved are difficult questions. As Levinson highlights, the challenge of locating, measuring, and redistributing power is significant; the task is already, or could be, the subject of scholarship in numerous substantive fields — including labor, antitrust, financial regulation, and tax — as well as for scholars writing in constitutional and administrative law.

For his part, Levinson imagines either “calling upon courts (and legislatures) to marshal the resources of administrative law, the law of democracy, constitutional rights jurisprudence, and any number of other regulatory fields with an agenda of redistributing and equalizing political power among groups in society” or, more modestly, pushing some or all of these areas of law “toward a more explicit and sustained focus on the distribution and practical efficacy of democratic-level power.”<sup>40</sup> Yet, given the scope and focus of his piece, he understandably abjures any concrete proposal.<sup>41</sup>

In addition, although Levinson counsels against despair, he offers little reason to believe that “calling upon” courts and legislatures will accomplish much. Rather, he questions the ability of courts to make necessary descriptive and normative assessments.<sup>42</sup> And history suggests Levinson is correct. While courts may play an important role in supporting or stymieing efforts to create more egalitarian distributions of power, they are rarely the sole or leading force for change.<sup>43</sup>

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<sup>38</sup> *Id.* at 142.

<sup>39</sup> *Accord* K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 3 (2016).

<sup>40</sup> Levinson, *supra* note 1, at 140.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 82, 141–42.

<sup>43</sup> *See* Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591, 1609–15 (2016) (discussing history of courts' hostility to workers organizing and problems with appealing to

Where, then, might a sympathetic reader turn to think about how public law might actually achieve a more egalitarian distribution of power?<sup>44</sup> One place to look is to historical and contemporary social movements that have opposed, and are opposing, hierarchies of power.<sup>45</sup>

Ongoing low-wage worker campaigns provide one source. Workers seeking higher minimum wages, new scheduling and benefit laws, limits on private domination, and new protection for those long or newly excluded from labor and employment regimes (think restaurant and domestic workers or Uber drivers) are attempting to shift the distribution of power in politics and governance, as well as in the economy.<sup>46</sup> In so doing, they are pushing against doctrine that restricts their ability to act collectively through strikes, protest, and other concerted action while developing new structures for participation in policymaking.<sup>47</sup> Here, an opinion *not* written in the 2015 Term casts a long shadow. As Levinson points out, the Court in *Friedrichs v. California Teachers Ass'n*<sup>48</sup> “came within a vote of doing away with mandatory representation fees and thereby decimating public sector unions,” with potentially devastating effect on the extent of political power wielded

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courts for labor rights); Andrias, *supra* note 6, at 487–503 (concluding that institutional design reform — namely reform aimed at building countervailing organization, as well as more familiar election law and lobbying reform — is a more promising avenue for limiting the concentrated power of economic elites than is an expanded role for the judiciary); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 312–13 (2001) (“Claims on the text of the Constitution made by mobilized groups of Americans outside the courthouse helped bring into being the understandings that judges then read into the text of the Constitution.”).

<sup>44</sup> Of course, those motivated by different normative goals would likely look to different historical and contemporary struggles.

<sup>45</sup> For innovative recent scholarship examining historical struggles over power distribution in public law, and, in particular, efforts to reduce the economic and political domination of elites, see WILLIAM J. NOVAK, *A NEW DEMOCRACY: LAW AND THE CREATION OF THE MODERN AMERICAN STATE, 1866–1932* (forthcoming 2017) (manuscript at 2–3, 47–67) (on file with the Harvard Law School Library) (examining the emergence of the modern democratic state from 1866 to 1932 and arguing that “reformers of that period had a much thicker and more substantive conception of what was entailed by democracy than the comparatively thin renderings of deliberation, representation, voting, or office that prevail at present,” *id.* (manuscript at 48)); RAHMAN, *supra* note 39 (examining how Progressive Era reformers sought to shift distributions of power and establish a more robust democratic approach to governance); and Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, & the Constitution of Opportunity*, *NOMOS* (forthcoming) (on file with the Harvard Law School Library). See also Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 733–34 (2016) (reviewing DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014)) (drawing attention to how Wall Street lawyers triumphed over “the more left-wing political, economic, and legal voices,” *id.* at 733, or “antilegalists” of the New Deal, *id.* at 734, in fashioning the administrative state and defining the sources for its legitimacy).

<sup>46</sup> See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016).

<sup>47</sup> See *id.*; see also Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623 (2016).

<sup>48</sup> 136 S. Ct. 1083 (2016) (per curiam).

by workers generally.<sup>49</sup> The issue might ultimately return to the Court; in the meantime, unions, still adequately funded, are seeking to build new organizations and more power for workers, while their opponents are seeking to weaken the power of worker organizations through new legislation.<sup>50</sup>

Or consider the movement around policing — the subject of *Strieff*. As scholars have argued, Black Lives Matter is neither quixotic nor aimless. Rather, it is an effort of citizens to hold police departments accountable, an effort of “[t]raditionally powerless populations” to exercise power over constitutional norms and governmental action.<sup>51</sup> And, as has more recently become clear, it is also an effort to make broader changes to how power is organized in society, including by democratizing community institutions.<sup>52</sup>

These concrete struggles and others, both historical and contemporary, highlight the inevitability of actual disagreement and contestation, not just deliberation, if power is to be shifted in governance. To that end, the ongoing social movements embrace two interrelated paths: First, they contest doctrine, legislation, and legal practice that disempower organization, reduce availability of collective action as a tool, and enable social and economic domination. Second, they work to build new structures to facilitate countervailing power of civic organizations in government; they seek to remake policymaking bodies to grant workers, consumers, citizens, and residents greater influence in substantive outcomes.<sup>53</sup>

To support, deepen, and build on existing efforts — to transform possibly fleeting social movements into durable and effective forms of citizen power — lawyers, policymakers, and legal scholars ought to pursue these two strategies in a wide range of substantive areas and venues. Doing so, however, will involve attention to the actual reality of how power is distributed as well as normative judgments and real struggle about where and by whom power should be held.

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<sup>49</sup> Levinson, *supra* note 1, at 42–43.

<sup>50</sup> See Andrias, *supra* note 46, at 21 n.88, 47–69.

<sup>51</sup> Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 396, 407 (2016); cf. MICHELLE ALEXANDER, *THE NEW JIM CROW* (rev. ed. 2011) (arguing that the criminal justice system functions as a contemporary system of racial control and hierarchy).

<sup>52</sup> *A Vision for Black Lives: Policy Demands for Black Power, Freedom & Justice*, A MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org> [<https://perma.cc/AQ5J-Y4ED>]; see also Robin D.G. Kelley, *What Does Black Lives Matter Want?*, BOS. REV. (Aug. 17, 2016), <https://bostonreview.net/books-ideas/robin-d-g-kelley-movement-black-lives-vision> [<https://perma.cc/M48W-EQ7J>] (characterizing the Black Lives Matter agenda as a “remarkable blueprint for social transformation”).

<sup>53</sup> For a similar argument in favor of enabling “citizen audits” and building countervailing power, see K. Sabeel Rahman, *Policy-making as Power-Building* (Ford Foundation Convening June 2016), [http://www.scholarsstrategynetwork.org/sites/default/files/rahman\\_policymaking\\_as\\_power\\_building.pdf](http://www.scholarsstrategynetwork.org/sites/default/files/rahman_policymaking_as_power_building.pdf) [<https://perma.cc/ASU2-5PCP>]; see also Andrias, *supra* note 6, at 499–503.