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## Rethinking Political Power in Judicial Review

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*For decades, scholars have argued that the proper judicial response when democratically enacted laws burden politically powerless minority groups is more aggressive judicial review. This political process approach, however, has fallen on deaf ears at the Supreme Court since the 1970s. Justice Scalia was thus accurate (if not politic) when he derided political process theory as an “old saw” of constitutional law.*

*There is a different role that political power may yet play. The key to seeing it is to focus on the other side of the political power spectrum. Courts can be attentive to situations when the groups burdened by a law are politically powerful, not just when they are powerless. Political power’s presence, I want to suggest, can be a good reason for judges to defer to democratically enacted laws, even if one thinks its absence is a bad reason to strike laws down.*

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*This Article advances a positive and normative case for an approach to judicial review that is attuned to political power. As a positive matter, it turns out the Supreme Court has employed such an approach in a number of decisions, including in opinions joined by six current Justices. And as a normative matter, treating political power as a reason for judicial deference may help unlock the democratic and institutional benefits of leaving contested constitutional questions to the political branches without sacrificing the role of courts in safeguarding individual rights.*

*The Article concludes by applying these insights to five contemporary disputes in constitutional law: the rise of First Amendment Lochnerism, gun control and the Second Amendment, same-sex marriage, due process limits on punitive damage awards, and the “closely regulated industries” exception to the Fourth Amendment warrant requirement.*

Introduction.....	1757
I. Political Power(lessness) in Constitutional Law .....	1762
A. Our Preoccupation with Powerlessness .....	1763
B. A Baselines Explanation.....	1769
II. The Positive Case for Political Power Doctrine.....	1775
A. Political Power at the Supreme Court.....	1776
1. Historic Cases .....	1776
2. Modern Cases .....	1781
B. The Three Steps of Political Power Doctrine .....	1785
1. Step One: Is the Constitution Underdeterminate? .....	1786
2. Step Two: Is the Burdened Group Politically Powerful? .....	1787
3. Step Three: Are Other Values Overriding? .....	1794
III. The Normative Case for Political Power Doctrine .....	1796
A. Democratic Values.....	1796
B. Institutional Capacity.....	1799
C. Institutional Legitimacy .....	1802
IV. Political Power and Some Present-Day Controversies.....	1806
A. First Amendment Lochnerism .....	1807
B. Gun Control .....	1811
C. Same-Sex Marriage .....	1815
D. Punitive Damage Limits .....	1817
E. The Fourth Amendment and Closely Regulated Industries.....	1819
F. Political Power Doctrine and Political Process Theory .....	1821
Conclusion .....	1825

## INTRODUCTION

What role should political power play in constitutional adjudication? Judges, lawyers, and scholars have grappled with the question for decades. After the Supreme Court famously observed in Footnote 4 of *United States v. Carolene Products Co.* that “discrete and insular minorities” may be entitled to special constitutional protection,<sup>1</sup> the Court identified “political powerlessness” as a key factor in deciding which groups should qualify.<sup>2</sup> Weighty arguments followed over the political obstacles faced by groups like the poor,<sup>3</sup> women,<sup>4</sup> the elderly,<sup>5</sup> and the intellectually disabled.<sup>6</sup> A similar debate figured prominently in the litigation over the right of same-sex couples to marry.<sup>7</sup> Even more recently, two important law review articles have proposed thoughtful, empirically grounded refinements to the Supreme Court’s approach to determining political powerlessness.<sup>8</sup>

All of these arguments share some important features. They focus on legal challenges brought by groups that lack influence in the political process. And they use this *absence* of political power to justify more *aggressive* judicial review.

But the coin of political power has two sides. The driving concern behind this Article is that we have been staring at the wrong one for too long. We should be attentive to situations when the entities or individuals burdened by a law are politically powerful, not just when they are powerless. Political power’s *presence*, I want to suggest, is a good reason for judges to *defer* to democratically enacted laws, even if one thinks its absence is a bad reason to strike laws down.<sup>9</sup>

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1. 304 U.S. 144, 152 n.4 (1938).

2. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (holding that persons residing in poor districts with little taxable wealth are not politically powerless and thus not a suspect class). The legal academy has written exhaustively about this approach as well, see *infra* Part I.A.

3. See *Rodriguez*, 411 U.S. at 28.

4. See *Frontiero v. Richardson*, 411 U.S. 677, 686, 686 n.17 (1973) (plurality opinion) (finding women to be a suspect class in part because women have faced “pervasive” discrimination in the political arena).

5. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (observing that the elderly are not politically powerless and thus not a suspect class).

6. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985) (finding that people with intellectual disabilities possess political influence and are not a suspect class).

7. See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioners at 19–20, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, & 14-574), 2015 WL 1004710 (arguing that gays and lesbians are a suspect class because they lack political power).

8. See Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 350–73 (2016); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1580–1601 (2015).

9. Despite its influence in the academy, the argument that judges should intervene—especially to protect politically powerless minority groups—has been widely criticized. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

Once we think about political power in this way, a set of interesting questions emerges. Does the Supreme Court ever consider political power in this fashion—that is, as a special reason to defer to the democratic process when the group burdened by a law possesses ample political influence? Would such an approach (call it the “political power doctrine”)<sup>10</sup> be desirable, as a normative matter? And how might the world of constitutional law be different if considerations of political power were deployed more broadly in this manner? This Article aims to answer those questions.

My desire to shift the focus of the debate over political power from its absence to its presence is motivated not just by a theoretical interest, but also by two practical considerations. First, the traditional approach to political power in judicial review, which treats powerlessness as a reason for courts to go on offense and invalidate the actions of the elected branches, seems unlikely to experience resurgence anytime soon. For all of the attention this political process approach—which Justice Scalia once described as an “old saw” in constitutional law<sup>11</sup>—has received in the academy and lower courts,<sup>12</sup> the Supreme Court has not recognized a new suspect class on the basis of political powerlessness for more than forty years.<sup>13</sup> Indeed, the Court has had three clear opportunities to recognize gays and lesbians as a new protected minority group, only to rule in their favor on different grounds.<sup>14</sup> Given the Court’s current makeup, an imminent return to the “old saw” era of political powerlessness as a trigger for more searching judicial review seems passing unlikely.

Second, inequality in our society today is at least arguably as much a function of dramatic growth on the far right tail of the political and economic power distribution—which is to say, the increasing concentration of influence among corporations and high-income individuals<sup>15</sup>—as it is a problem of rank

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10. In earlier work, I used the term “reverse political process theory” to describe this approach. See Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427 (2017). I did so because the approach treats a group’s political status as a reason to *defer* to legislation, which is the opposite of political process theory’s call for treating political status as a reason to strike laws down. See *infra* notes 51–52. On further reflection, I find the phrase “political power doctrine” to be more descriptively illuminating, as it focuses on the critical question of whether the group burdened by a law possesses political power—a finding that triggers heightened judicial deference.

11. See *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291, 325 (2014) (Scalia, J., concurring).

12. See *supra* notes 8–9; Stephanopoulos, *supra* note 8, at 1536, 1536 n.52 (noting that 501 federal and state cases have considered political powerlessness).

13. See *Frontiero v. Richardson*, 411 U.S. 677, 686, 688 (1973) (plurality opinion) (finding women to be a suspect class in part because women have faced “pervasive” discrimination in the political arena). If one does not include *Frontiero* on account of its status as a plurality opinion, the next most recent example of the Court recognizing a new suspect classification is noncitizens. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971); see also Ross & Li, *supra* note 8, at 325, 325 n.1.

14. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *Romer v. Evans*, 517 U.S. 620, 632 (1996).

15. See generally LARRY BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008) (describing the growth of income and political inequality).

discrimination against the have-nots.<sup>16</sup> That means any effort to redeem constitutional law’s function as an instrument of equal opportunity must take the phenomenon of outsized influence just as seriously as the phenomena of structural disadvantage and social prejudice. Others have already made important strides in this endeavor;<sup>17</sup> my objective here is to offer a theory of judicial restraint that is not only sensitive to mounting inequality in American society, but also consistent with an emerging understanding regarding the proper role of courts in adjudicating cases involving underdetermined provisions of the Constitution’s text.<sup>18</sup>

This is the second work in a larger project examining the relationship between political power and constitutional law. In a previous Article, I made the descriptive claim that the Supreme Court has, in recent years, reversed the core insight proposed by Footnote 4 of *Carolene Products*.<sup>19</sup> That is, rather than granting special solicitude to politically powerless minority groups, the Court has actually afforded heightened constitutional protection in several areas of law to entities that possess a superior ability to protect their interests through the democratic process.<sup>20</sup> I then sketched a tentative (and thumbnail) normative defense of a doctrine under which comparative political strength would be viewed as a reason for courts to defer to laws challenged on the basis of underdetermined constitutional text.<sup>21</sup> That doctrine should at least apply, I argued, in cases where the Court is asked to grant some constitutional protection to a relatively powerful group that it has *denied* to a less powerful counterpart.<sup>22</sup> So, for example, the Court has been wrong to grant government defendants a favorable clear statement rule against the waiver of their constitutional rights (in the context of sovereign immunity) when it has denied the same treatment to criminal suspects (in the context of the Fifth Amendment right to remain silent and right to counsel).<sup>23</sup>

This Article builds upon, and substantially broadens, that earlier work in three ways. First, it makes a positive claim that the Supreme Court actually

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16. That is certainly not to say the latter is no longer an issue, but to simply observe that inequality is the product of two factors: the disadvantages experienced by the least well-off and the comparative advantages enjoyed by the better-off.

17. See, e.g., GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* (2017); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 671 (2014).

18. For a discussion of this consensus, which agrees upon the existence of a “construction zone” that courts must occupy in adjudicating underdetermined constitutional provisions, see *infra* Part I.B.

19. See Tang, *supra* note 10, at 1447–65.

20. See *id.*

21. See *id.* at 1469–77.

22. See *id.* at 1473.

23. See *id.* at 1454–60, 1483–90.

*does* decide some cases using something resembling a political power doctrine (although it is fair to say the Court has not applied the doctrine, or acted consistently with it, in every case).<sup>24</sup> Across a range of constitutional challenges involving federalism, the Dormant Commerce Clause, the Second Amendment, the incorporation of rights against the states under the Fourteenth Amendment, and due process, the Court and its individual members have argued that the political power possessed by the group burdened by a law counsels in favor of judicial deference to that law. Six of the Justices currently on the bench have signed opinions pointing to political power as an affirmative reason to uphold legislation against constitutional attack, and careful examination has revealed no opinion rejecting that position.<sup>25</sup> The political power doctrine may already be a part of our law, it would seem; the question is whether the Court should apply it more uniformly.

Second, this Article constructs a fuller normative defense of political power doctrine and argues that the Court should in fact employ it more broadly. Courts ought to be more deferential to legislation that burdens politically powerful groups for three reasons: doing so is especially faithful to the democratic values that undergird our constitutional system; deference to laws that afflict influential groups wisely leaves hard policy issues in the branches that possess the greatest institutional capacity to resolve them; and the public's trust in the legitimacy of the judiciary is maximized when courts refrain from relieving powerful entities of the losses they've suffered in the ordinary political process.

Third, this Article describes how political power doctrine would play out in some of the hardest, most contentious issues of the day.<sup>26</sup> More specifically, I argue that the Supreme Court should be more deferential to laws that burden corporate speech (think *Citizens United*) given the underdetermined nature of the First Amendment and the great political influence possessed by corporations;<sup>27</sup> that the Court should defer to common gun control legislation (think *Heller*) in light of the uncertain history of the Second Amendment and the power enjoyed by groups like the NRA;<sup>28</sup> and that the Court was correct *not* to view political power as a reason to defer to state laws forbidding same-sex marriage because same-sex couples were not sufficiently influential at the time *Obergefell v. Hodges* was decided.<sup>29</sup> I also describe some advances that might be made were political power doctrine applied to a pair of important (yet less

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24. See *infra* Part II.

25. *Id.*

26. Thus, unlike in prior work, *supra* note 10, this Article considers the role political power ought to play in *all* constitutional cases involving litigants that possess substantial influence—not just those cases where the Court happens to have denied constitutional protection to some similarly-situated, less-powerful comparator group.

27. See *infra* Part IV.A.

28. See *infra* Part IV.B.

29. See *infra* Part IV.C.

headline-grabbing) debates in constitutional law: due process limits on punitive damages awards and the scope of the Fourth Amendment’s “closely regulated industries” exception to the usual warrant requirement.

Part I begins by describing the law and academy’s focus to date on political powerlessness in constitutional adjudication. Part I also offers twin explanations for why political power’s *presence* has not figured prominently in the conversation so far. For one thing, for much of our constitutional history courts have operated under a default “presumption of constitutionality.”<sup>30</sup> When this presumption is the baseline, paying heed to situations where the groups burdened by a law are politically powerful would merely reconfirm a posture of judicial deference that is already presumed. Commentators have recently recognized, however, that the presumption of constitutionality is all but dead.<sup>31</sup> For another, scholars and jurists across the methodological and ideological spectrums increasingly agree that the Constitution’s text is underdetermined in ways that leave judges little choice but to rely on normative values in selecting a method of constitutional construction.<sup>32</sup> The result of these two developments is a new baseline for the constitutional disputes that make it to the Supreme Court: they arrive as a judicial jump ball whose outcome will turn on normative argumentation. And when that is so, considerations of political power may have salience in counseling deference to the political branches where they did not before.

Part II provides the positive account. In a series of majority opinions in cases involving state challenges to Congress’s Taxing Power and Commerce Power, and in more recent separate opinions involving the Second Amendment, incorporation of the Bill of Rights, and same-sex marriage, the Court and its individual members have shown their support for treating political power as a factor in favor of judicial deference. Under a basic version of legal positivism,<sup>33</sup> these opinions—and the absence of substantive disagreement on the relevant point—suggest that political power doctrine already has a claim to being part of our law.

Drawing from these cases, Part II also outlines the steps for applying political power doctrine. First, the constitutional provision at issue must be found to be underdetermined, leaving a “construction zone” for judges to

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30. See, e.g., *Hardware Dealers’ Mutual Fire Ins. Co. of Wis. v. Glidden Co.*, 284 U.S. 151, 158 (1931) (relying on the presumption of constitutionality in upholding a Minnesota arbitration law against a Due Process challenge); *United States v. Carolene Products Co.*, 304 U.S. 144, 148 (1938) (similar reliance on presumption of constitutionality to uphold federal filled milk law).

31. See *infra* notes 116–117.

32. Compare Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 472 (2013) (explaining new originalist understanding that constitutional construction is “essentially driven by normative concerns”), with DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 45 (2010) (explaining how “judges will be influenced by their own views about fairness and social policy”).

33. See H.L.A. HART, *THE CONCEPT OF LAW* 97–107 (1961).

occupy.<sup>34</sup> Second, the group burdened by a law must be determined to be politically powerful, as measured by a set of objective factors primarily focused on the group's relative ability to secure its interests in the political process.<sup>35</sup> And third, the values furthered by deference to a law must be found to outweigh any values that weigh in favor of invalidating it.

Part III argues that this approach to resolving hard constitutional cases is normatively desirable. Democratic values, institutional legitimacy, and institutional capacity all support judges adopting a stance of heightened deference to legislative actions that burden groups that usually prevail in the ordinary rough and tumble of political battle.

Part IV applies this doctrine to the expansion of First Amendment rights of corporations (so-called First Amendment *Lochnerism*),<sup>36</sup> the Second Amendment's right to bear arms, the right to same-sex marriage, due process limits on punitive damages, and the Fourth Amendment's "closely regulated industries" exception. Part IV then uses these examples to show how political power doctrine differs in application from traditional political process theory. A conclusion follows.

## I.

### POLITICAL POWER(LESSNESS) IN CONSTITUTIONAL LAW

Notwithstanding the academy's love affair with a vision of judicial review that grants enhanced protection to society's least powerful groups, it has become fashionable for commentators to opine periodically on that vision's demise. Shortly after John Hart Ely published *Democracy and Distrust*, which masterfully constructed modern political process theory out of the seeds planted in *Carolene Products*,<sup>37</sup> Professor Laurence Tribe described the durability of process theories of constitutional law as "puzzling."<sup>38</sup> A decade later, Professors Daniel Farber and Philip Frickey provocatively asked, "Is *Carolene Products* Dead?"<sup>39</sup> In 2007, Professor Dan Coenen identified several reasons why the Court might "junk" political process theory altogether.<sup>40</sup> More

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34. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010).

35. See *infra* Part II.B.2; see also Stephanopoulos, *supra* note 8, 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.").

36. See Kenneth D. Katkin, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity*, 33 N. KY. L. REV. 365, 371 (2006).

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

38. See Tribe, *supra* note 9.

39. 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 (1991).

40. Dan T. Coenen, *The Future of Footnote Four*, 41 GA. L. REV. 797, 824 (2007).



recently, Professor David Strauss queried whether *Carolene Products* is “obsolete.”<sup>41</sup>

Subpart A of this Section describes the academy’s persistent preoccupation with political powerlessness in the face of strong evidence that the Supreme Court doesn’t really care about it. Subpart B offers a two-part explanation for why commentators have, nonetheless, focused on powerlessness rather than its inverse.

#### A. *Our Preoccupation with Powerlessness*

A sea of ink has been spilled debating the interaction between political influence and judicial review. I won’t be able to do justice to the many significant arguments that have been advanced.<sup>42</sup> What I do hope to do is train the reader’s eye on a common feature—really, an unspoken assumption—that is present throughout the debate: an overriding focus on *powerlessness*, rather than power itself.

As we have already seen, *Carolene Products* started the conversation by floating the potential connection between the amount of constitutional protection a group might receive and its (in)ability to avail itself of the “political processes ordinarily to be relied upon.”<sup>43</sup> The Supreme Court made its concern with political powerlessness even more explicit in a pair of cases in 1973. First, in *San Antonio Independent School District v. Rodriguez*, the Court rejected the argument that students residing in low-wealth school districts should be deemed a “suspect class” entitled to heightened scrutiny under the Equal Protection Clause, in part because this group had not been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>44</sup> Two months later, in *Frontiero v. Richardson*, a plurality of the Court reached the opposite conclusion regarding women, relying heavily on the “pervasive” discrimination women suffered, “perhaps most conspicuously, in the political arena.”<sup>45</sup>

Soon after these 1973 cases, advocates filed equal protection challenges seeking heightened constitutional protection for other arguably powerless minority groups, such as the elderly,<sup>46</sup> children born out-of-wedlock,<sup>47</sup> the mentally ill,<sup>48</sup> and persons with intellectual disabilities.<sup>49</sup> A common argument

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41. David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251 (2010).

42. For an overview of arguments on both sides, see Tang, *supra* note 10, at 1436–47.

43. *See id.* at 1437.

44. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). As the Court implicitly recognized, not every child residing in a low-wealth district is necessarily poor; there is some mixture of middle- and perhaps even upper-class parents in these districts. *See id.*

45. 411 U.S. 677, 686 (1973).

46. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

47. *See Mathews v. Lucas*, 427 U.S. 495, 506 (1976).

48. *See Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

49. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985).

pressed in these cases was that historical circumstances, such as outright discrimination or disfranchisement, had rendered the relevant group politically powerless and thus a suspect class deserving of special judicial concern.<sup>50</sup>

During this same timeframe, the legal academy advanced a similar argument for heightened judicial review under the Equal Protection Clause. Professor Milner Ball, for example, argued that “powerlessness” is what should distinguish groups that “qualif[y] for solicitous judicial attention.”<sup>51</sup> Ely likewise recognized the importance of political influence in his process-based theory of judicial review.<sup>52</sup> And over the decades that followed, commentators continued to discuss the role that powerlessness should play in constitutional cases.<sup>53</sup>

The academic discussion around powerlessness has, if anything, *grown* in recent years, even though the Court has all but abandoned the project of recognizing new suspect classes.<sup>54</sup> Much of this increase in scholarly attention stemmed from the same-sex marriage litigation that started with the Massachusetts Supreme Court’s 2003 ruling in *Goodridge v. Department of Public Health*,<sup>55</sup> and quickly expanded across the country. In some of these cases, courts spent hours of time at trial and pages upon pages of opinions evaluating whether gays and lesbians are politically powerless in the sense necessary to trigger heightened scrutiny under the Supreme Court’s equal protection jurisprudence.<sup>56</sup> The academy naturally took notice, offering its own refinements of powerlessness doctrine.<sup>57</sup>

However, when this debate reached the Supreme Court in *Obergefell v. Hodges*, the Court did not clarify its approach to political powerlessness;

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50. See, e.g., Motion for Leave to File Brief Amicus Curiae and Brief of Am. Ass’n on Mental Deficiency, et al., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (No. 84-468), 1985 WL 669784, at \*18 (“[D]isfranchisement has rendered [intellectually disabled persons] a politically powerless group, unable to participate effectively in the political arena and thus protect [themselves] from invidious legislation.”).

51. See Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059, 1079 (1974).

52. See ELY, *supra* note 37, at 161 (recognizing that “[p]olitical access is surely important” in deciding if a group should be entitled to heightened judicial protection).

53. See, e.g., Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1225 (2006) (arguing that ex-offenders are politically powerless and thus should be entitled to heightened review under the Equal Protection Clause).

54. See *supra* note 13; *infra* notes 57, 62, 69, 77.

55. 798 N.E.2d 941 (2003).

56. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 943–45, 950–53 (N.D. Cal. 2010) (describing exhaustive, conflicting expert testimony on the “political power of gays and lesbians”); Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1383 (2011) (noting that this combined testimony “consumed many hours and hundreds of transcript pages”).

57. See, e.g., Schacter, *supra* note 56, at 1381–89, 1403 (assessing lower court same-sex marriage rulings and arguing that powerlessness “might be better conceptualized as . . . an aspect of past discrimination”).

indeed, Justice Kennedy’s majority opinion said not a word about the issue.<sup>58</sup> Rather than granting heightened scrutiny to same-sex couples on equal protection grounds, the Court instead ruled for them principally on the ground that marriage is a fundamental liberty protected under substantive due process.<sup>59</sup> The upshot is that, despite a clear opportunity to revive the political powerlessness doctrine as a tool for heightened judicial scrutiny, the Court has not recognized a new suspect class since the early 1970s.<sup>60</sup>

One possible explanation for this reluctance is that the Court may think the task of determining when a group lacks sufficient political power lies beyond the judicial ken.<sup>61</sup> Two recent law review articles tackle this concern. First, in *Political Powerlessness*, Professor Nicholas Stephanopoulos utilized a massive data set of survey responses to more than 2,000 public policy questions asked between 1981 and 2006, which he compared to actual federal-level policy changes.<sup>62</sup> Controlling for group size, he found that blacks, the poor, and women are relatively powerless at both the federal and state level, while Hispanics are relatively powerless at the federal level.<sup>63</sup> For example, as support among blacks for a federal policy change rises from 0% to 100%, “the odds of enactment *fall* from roughly 40% to roughly 30%.”<sup>64</sup> By contrast, whites are politically powerful: as their support for a federal policy change increases from 0% to 100%, the likelihood that it will be adopted increases from roughly 10% to 60%.<sup>65</sup> Males also enjoy great political influence,<sup>66</sup> as do the wealthy.<sup>67</sup> So if one agrees—as I do—with Stephanopoulos’s definition of political power as a group’s relative ability to see its “aggregate policy preferences” enacted by comparison to “similarly sized and classified groups,”<sup>68</sup> then political power (and its absence) seems quite measurable.

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58. See 135 S. Ct. 2584 (2015).

59. *Id.* at 2604–05.

60. See *supra* note 13.

61. See Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 130 (2016) (“[P]olitical process theory faces the descriptive challenge of assessing the amount of power different groups possess, as well as the normative challenge of deciding how much power these groups *should* possess. To this point, constitutional law has not made a great deal of progress on either front.”).

62. Stephanopoulos, *supra* note 8, at 1534. Professor Stephanopoulos also examines the relationship between different group statuses and political influence by examining more than 300,000 responses on *state*-level policy issues obtained as the result of exit polling data between 2000 and 2010. *Id.* at 1534–35 (describing methodology).

63. Stephanopoulos, *supra* note 8, at 1595.

64. *Id.* at 1583.

65. *Id.*

66. *Id.* at 1584.

67. *Id.* at 1586.

68. *Id.* at 1531. Moreover, this definition provides what strikes me as a good normative answer to Professor Levinson’s question over how much power groups *should* possess. See *supra* note 61. As Stephanopoulos puts it, “in a properly functioning political system, groups of about the same size and type should have about the same odds of getting their preferred policies enacted.” Stephanopoulos, *supra* note 8, at 1545.

Just months after Stephanopoulos's article was published, Professors Bertrall Ross and Su Li offered their own analysis with important and complementary findings. By coding demographic data on the composition of US congressional districts along three measures—the percent of the population living in poverty, the percent belonging to a labor union, and the percent living in rural areas—Ross and Li were able to identify whether changes in the size of a particular population group across districts influences lawmakers' voting behavior with respect to policies affecting that group.<sup>69</sup> The results are telling. As the rural or unionized proportion of a US Representative's constituency increases, so too does the likelihood that the representative will support legislation favorable to the relevant group—a sure sign of political power.<sup>70</sup> But the opposite relationship holds true when a representative's constituency is increasingly poor. Thus, a “10 percent increase in the percentage of poor in a congressional district was associated with an 11 percent *decrease* in the likelihood that the representative would vote favorably to the poor on [final] poverty-related legislative actions.”<sup>71</sup> In other words, laws benefiting the poor are enacted *in spite of* their political status, not because of it.

In sum, Stephanopoulos and Ross and Li show how political powerlessness is now ascertainable through empirical measures that were previously unknown to the Supreme Court. But these measures may be beside the point if the Court's disinclination to find new suspect classes is based on something other than methodological concerns.

There are at least two good reasons to think this is the case. First, as Professor Kenji Yoshino has explained, “[t]he closure of the heightened scrutiny canon [for politically powerless minority groups] can be fairly attributed to pluralism anxiety,” which he defines as an “apprehension of and about [our] demographic diversity” that several of the Court's more conservative Justices have expressed.<sup>72</sup> Second, at the very moment that the Court backed away from granting heightened protection to new powerless groups, it also adopted a new understanding of the Equal Protection Clause. That Clause, the Court reasoned, is animated by an anti-classification principle that forbids lawmakers to legislate based on certain characteristics, rather than an anti-subordination principle that would protect society's least advantaged groups.<sup>73</sup> Thus, for example, even in those situations where the Court has identified a suspect class, it has granted heightened scrutiny not just to the powerless minority group, but to *all* groups that may be classified along the

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69. See Ross & Li, *supra* note 8, at 358.

70. See *id.* at 365–67.

71. *Id.* at 368–70.

72. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751, 758 (2011).

73. See generally JACK M. BALKIN, *LIVING ORIGINALISM* 233–34 (2011) (explaining and critiquing the Supreme Court's concern with classifications as opposed to “group subordination through law”); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1471–77, 1497–99 (2004) (same).

relevant dimension.<sup>74</sup> As a result, even if the Supreme Court were to recognize new powerless minority groups for heightened constitutional protection, such a finding would lead to greater scrutiny of laws intended to *benefit* that group, too.<sup>75</sup> And if that is so, then the Court's current approach to equal protection really is a "non sequitur to . . . an[y] overarching concern with the distribution of power among social groups."<sup>76</sup>

Notwithstanding the Court's apparent disinterest in reviving political powerlessness as a major part of equal protection doctrine, prominent scholars continue to call for such a revival.<sup>77</sup> The important point for present purposes is that the dominant thrust of today's commentary still resembles that of the 1970s and 1980s. If the group burdened by a law is politically powerless, scholars insist, then that is a reason for courts to go on *offense* to strike that law down.<sup>78</sup>

Few commentators, by contrast, have discussed the presence of political power as a reason for courts to go on *defense*—that is, as a reason to show greater deference to laws burdening influential groups. To the extent scholars have considered affirmative political power, they have treated it as just one reason for deference and have suggested considering it only with respect to specific constitutional protections. Thus, for example, Professor Jesse Choper famously pointed to the political clout enjoyed by the States as one reason for courts to deem federalism challenges non-justiciable—an argument that moved the Court in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>79</sup> Professor Cass Sunstein has made a similar argument in evaluating the Court's decision to uphold the individual right to bear arms in *District of Columbia v. Heller*.<sup>80</sup>

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74. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (Powell, J., joined in relevant part by White, J.) ("All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened."). Note that while the Court has made this anti-classification logic explicit in the race and gender contexts, it has not yet addressed the issue in the context of laws benefiting other suspect classes.

75. See Reva B. Siegel, *The Supreme Court 2012 Term, Foreword: Equality Divided*, 127 HARV. L. REV. 1, 31–38 (2013) (describing how equal protection law came to protect whites from affirmative action policies notwithstanding their political influence).

76. See Levinson, *supra* note 61, at 133.

77. See Jesse H. Choper & Stephen F. Ross, *The Political Process, Equal Protection and Substantive Due Process* 7, 48–61 (Penn State Law Research Paper No. 5-2017, 2017), <https://ssrn.com/abstract=2952862> (arguing that courts should "double down" on political process theory as a method for adjudicating constitutional challenges under equal protection and substantive due process).

78. Note that I do not mean to discuss the role that power has played in structural constitutional disputes over, for example, separation of powers principles. For a convincing analysis of those kinds of debates, see Levinson, *supra* note 61.

79. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175–93 (1980); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 n.11 (citing Choper's work).

80. See Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 260 (2008) ("There is no special reason for an aggressive judicial role in protecting against gun control, in light of the fact that opponents of such control have considerable political power."). I am aware of one other literary gesture to political power as a reason for courts to defer. See Joseph

These are important examples of the kind of argument I am interested in. But the key move is to see how political power may warrant our attention as an independent reason for judicial deference *across the Constitution*;<sup>81</sup> it need not act as a mere supplemental rationale bounded to the confines of federalism or the Second Amendment.

Others in the academy have made related but distinct claims. One (older) school of argument has contended that courts should be deferential to laws that are enacted with the purpose of *benefitting* powerless minority groups—an argument that is commonly used to defend affirmative action.<sup>82</sup> Another school of argument is that courts should be attentive to political power when conducting *statutory* interpretation, rather than constitutional interpretation.<sup>83</sup> Yet another school argues for an anti-elitist approach to judicial review that would require heightened scrutiny of laws that *benefit* politically powerful groups.<sup>84</sup>

What continues to be missing is a vision of judicial review that (1) focuses on whether the group burdened by a given law is politically powerful, and (2) uses a political power finding to justify heightened *deference* to the law as against attacks brought under the Constitution's underdetermined provisions. The following two-by-two matrix shows the existing literature on political power and judicial review, where the lower right box represents the missing space that political power doctrine aims to occupy.

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Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 696 (2014) (concluding in final sentence that courts should “apply[] a strong presumption . . . toward upholding” laws “whose aim and effect is to act as a constitutional bulwark against oligarchy”).

81. See, e.g., *infra* Part IV.

82. See, e.g., John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) (arguing for deferential review of laws “advantag[ing] a minority”). Affirmative action policies may also be defended on the inverse ground that they burden powerful groups. See *id.* (noting that the “reasons for . . . employing a stringent brand of review” are “lacking” when the majority “disadvantage[s] itself”). Affirmative action policies may thus be justified both as a matter of deference to laws benefiting the powerless *and* laws burdening the powerful. But not all laws burdening the powerful function in this two-sided way. See, e.g., *infra* Part IV.

83. See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 153 (1994) (courts “ought to consider, as a tie-breaker, which party . . . will have effective access to the legislative process if it loses its case”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 472–73, 483 (1989) (“[C]ourts should resolve interpretive doubts [in statutes] in favor of disadvantaged groups.”).

84. See Andrias, *supra* note 17, at 487–88 (suggesting that “[c]ourts could impose more intense judicial review of legislative or executive action in circumstances where wealth has dominated”); Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, *supra* note 17, at 1516 (proposing “heightened scrutiny for legislation that . . . benefits the wealthy or harms the majority”); see also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 44 (1991) (collecting earlier proposals to use power as a reason for heightened scrutiny).

	<b>Judicial Focus on <u>Political Powerlessness</u></b>	<b>Judicial Focus on <u>Political Power</u></b>
<b>Courts on Offense (Invalidating Laws)</b>	<i>Carolene Products</i> FN4, John Hart Ely, and the “old saw” version of political process theory	The Anti-Elitist Approach to Judicial Review (see note 84 & articles cited therein)
<b>Courts on Defense (Deference to Laws)</b>	Laws advantaging powerless minorities should be upheld (e.g., affirmative action)	Political Power Doctrine

But if it is true that scholars have given little attention so far to political power as a reason for judicial deference, a natural question arises: *Why?*

#### B. A Baselines Explanation

Why has the academy been concerned with the judicial response to challenges brought by groups lacking political power, rather than groups that have it? I think two reasons possess some explanatory force. Changed circumstances, however, render both reasons less convincing today.

The first and more significant reason is rooted in the presumption of constitutionality that has prevailed at the Supreme Court for much of its history.<sup>85</sup> Arguments that courts should treat the actions of the elected branches with a default measure of respect have a long pedigree in our constitutional tradition.<sup>86</sup> For our purposes, the key moment was the New Deal “settlement” that took place in 1937.<sup>87</sup> Under the usual narrative, that settlement represented a dramatic shift in the Court’s approach to judicial review.<sup>88</sup> Prior to 1937, the Court had often struck down state and federal economic regulations (such as minimum wage and maximum hour laws) on the view that such laws interfered

85. For a thoughtful discussion of the presumption of constitutionality, see F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447 (2010) (arguing that the presumption is more sensible in counseling judicial deference to legislative *legal* determinations than *factual* determinations).

86. For the most renowned statement, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that courts may “only disregard [a legislative] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one.”).

87. For a succinct description, see Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 122–23 (2001).

88. See, e.g., WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 177–78* (1995). *But see* G. Edward White, *West Coast Hotel’s Place in American Constitutional History*, 122 YALE L.J. 69, 73 (2012) (disputing the accuracy of the standard account).

with the freedom of contract and exceeded congressional power.<sup>89</sup> But after President Roosevelt threatened to pack the Supreme Court to ensure that his New Deal programs would be upheld, Justice Owen Roberts changed his vote in *West Coast Hotel Co. v. Parrish*,<sup>90</sup> producing five firm votes to uphold state and federal economic laws moving forward.<sup>91</sup>

The result was a Supreme Court much more deferential to legislation produced through the ordinary political processes at both the state and federal level.<sup>92</sup> And one of the key doctrinal tools used to achieve this deferential posture was the presumption of constitutionality.<sup>93</sup> *Carolene Products* itself illustrates how that presumption operated. At issue in the case was a federal statute forbidding the shipment in interstate commerce of certain milk substitutes.<sup>94</sup> *Carolene Products* wished to ship just such a milk product, so it challenged the law on the ground that it exceeded Congress's power and violated the liberty of contract protected under the Fifth Amendment.<sup>95</sup>

In reasoning characteristic of post-settlement cases, the Court rejected the attack. In doing so, it identified some "affirmative evidence" in support of Congress's judgment regarding the "danger to the public health from the general consumption" of foods like the forbidden milk substitutes.<sup>96</sup> But critically, the Court also explained that this evidence was unnecessary in the first place because the Court could "rest [its] decision wholly on the presumption of constitutionality" that accompanies acts of Congress.<sup>97</sup> Under that presumption, "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation . . . is not to be pronounced unconstitutional" unless "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>98</sup> This rationale was not unique to *Carolene Products*; indeed,

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89. The Supreme Court's decision to invalidate a state maximum hour law for bakers in *Lochner v. New York* is commonly thought to symbolize this era of over-aggressive judicial review. *Lochner v. New York*, 198 U.S. 45 (1905); see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

90. See 300 U.S. 379 (1937).

91. See LEUCHTENBURG, *supra* note 88, at 177.

92. See Jack M. Balkin, "Wrong the Day It Was Decided:" *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 686 (2005) (describing the conventional wisdom that the "New Deal revolution produced a new breed of Justices who believed in judicial restraint and appropriate respect for democratic processes in ordinary social and economic regulation.").

93. One shorthand way to illustrate the increasing reliance on this presumption is to compare how often it was cited in cases before and after the Supreme Court's 1937 ruling in *West Coast Hotel*. Prior to that year, the Supreme Court referenced the presumption of constitutionality a total of twelve times in the forty-six-year period spanning 1890 to 1936. (I use 1890 as the starting point because that is the first recorded instance of the Court referencing the presumption). After 1937, however, the Court cited the presumption sixty-one times—a five-fold increase—in the next forty-six years.

94. See *United States v. Carolene Products Co.*, 304 U.S. 144, 145–46 (1938).

95. See *id.* at 146.

96. See *id.* at 148.

97. See *id.*

98. See *id.* at 152.



the Court relied on the presumption of constitutionality to sustain a great many statutes enacted by Congress and state legislatures alike.<sup>99</sup>

The adoption of this general presumption of constitutionality provides a strong explanation for why so little consideration has been given to political power in constitutional cases. For if there is already a *wholesale* institutional predilection for judges to defer to legislation based on a broad respect for the democratic process, then there is no reason to go hunting around for reasons for courts to defer on a *retail*, case-by-case basis (which is precisely what political power doctrine aims to do). Retail arguments for deference to laws would be duplicative,<sup>100</sup> akin to arguing that a criminal defendant should enjoy a presumption of innocence at trial if she possesses a strong alibi.<sup>101</sup>

The second, likely less significant reason courts and commentators have not attended to the relevance of political strength relates to methods of constitutional interpretation. Over the past several decades, some Justices have purported to decide constitutional cases on the basis of an originalist methodology that seeks to resolve modern-day constitutional disputes through close analysis of the Constitution's text and history.<sup>102</sup> Justice Scalia argued that the proper "manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people."<sup>103</sup> "When I find it—the original meaning of the Constitution," Justice Scalia accordingly explained, "I am handcuffed."<sup>104</sup> The original meaning of the Constitution, in other words, is the only meaning of the Constitution—and

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99. See, e.g., *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (relying on presumption of constitutionality to uphold the Multiemployer Pension Plan Amendments Act); *Madden v. Commonwealth of Ky.*, 309 U.S. 83, 88 (1940) (upholding state tax law by reference to the presumption of constitutionality); *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 195 (1938) (upholding state law against a dormant commerce clause challenge based on the presumption of constitutionality).

100. A presumption of constitutionality could in theory be "stacked," granting an even stronger-than-usual presumption of constitutionality to legislation challenged by politically powerful groups. But given the inevitable imprecision of such a rule, it is unsurprising that arguments of this kind were rarely if ever made.

101. When the constitutionality of legislation is presumed, what becomes relevant is a search for reasons to *depart* from that presumption. That is why Footnote 4 of *Carolene Products* was so path-breaking: it identified plausible cases for a "narrower scope for operation of the presumption of constitutionality." See 304 U.S. 144, 152 n.4 (1938).

102. A full accounting of this methodology is beyond the scope of this Article. For present purposes, originalism should be understood as a family of theories, essentially all of which agree with what Professor Solum has dubbed the "fixation thesis" and the "constraint principle." See Solum, *Originalism and Constitutional Construction*, *supra* note 32, at 456. Those precepts hold that the communicative content of the Constitution's text is fixed at the time of its origin and that constitutional construction should be constrained by this original meaning. See *id.* at 459–60.

103. See Justice Antonin Scalia, *Constitutional Interpretation the Old Fashioned Way*, Remarks at the Woodrow Wilson International Center for Scholars (Mar. 14, 2005), [http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional\\_Interpretation\\_Scalia.pdf](http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf) [https://perma.cc/4B2A-ZP4S].

104. *Id.*

that is how cases should be decided.<sup>105</sup> Although never a majority on the Court,<sup>106</sup> other Justices have espoused similar interpretive approaches.<sup>107</sup>

To the extent the Court has been influenced by originalist methodology in resolving constitutional disputes,<sup>108</sup> however, there would seem to be less room for judicial deference based on considerations of political power. After all, if the Constitution's text and accompanying historical record can be plumbed for a thumbs-up or thumbs-down answer to whether any given law is constitutional, then there is little need for a presumption of deference in particular cases.<sup>109</sup> A methodological commitment to originalism as a determinate, judge-constraining approach to resolving cases thus lies in tension with default presumptions in particular constitutional cases (whether due to the presence of politically powerful litigants or something else).<sup>110</sup>

Both of these reasons for ignoring political power are less convincing in the modern day. To start, there is strong evidence that the Court has benched the presumption of constitutionality. The simplest signal of the presumption's decline is that the Court now rarely cites it. As a baseline, during the Terms between 1941–1960 (shortly after the New Deal settlement), 1961–1980, and 1981–2000, the Supreme Court cited the presumption of constitutionality a

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105. To his great credit, Justice Scalia did acknowledge that not every constitutional dispute is easily resolved. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (“[W]hat is true is that it is often exceedingly difficult to plumb the original understanding of an ancient text.”). But that recognition did not deter him from concluding that “for the vast majority of questions the answer is clear.” *Id.* at 863.

106. *But see* Scalia, *supra* note 103 (arguing that “the reality is that, not very long ago, originalism was orthodoxy”).

107. Most notably, Justices Clarence Thomas, Hugo Black, and Neil Gorsuch. See, e.g., NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 145 (2010) (describing Justice Black as “the inventor of originalism”); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 15 (2006) (“[I]f any current justice can fairly be described as a committed originalist, it is Justice Thomas and not Justice Scalia.”); *How Does Neil Gorsuch Wield Originalism in His Decisions?*, PBS NEWSHOUR (Mar. 22, 2017), <https://www.pbs.org/newshour/show/neil-gorsuch-wield-originalism-decisions> [<https://perma.cc/SU6E-3YGR>] (responding to the question of whether he is an originalist, “I’m happy to be called that”).

108. For strong evidence that this influence has in fact occurred, see *District of Columbia v. Heller*, 554 U.S. 570, 581–619 (2008) (considering historical evidence of the Second Amendment's original public meaning); *id.* at 642–72 (Stevens, J., dissenting) (doing the same).

109. *Cf.* Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 275 (1993) (noting that once a court applies the presumption of constitutionality to a statute, “there is no need to find that the legislature has made a clear mistake before its actions can be invalidated—any old mistake, even an opaque one, is sufficient.”).

110. Unless, of course, the original meaning of the Constitution necessitates such a presumption, which I do not argue is true of the political power doctrine. *But see* Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1234 (2012); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 858 (2009) (arguing that default presumptions are implicit in the Constitution). By contrast, non-originalist approaches to constitutional adjudication leave space for presumptions, insofar as they recognize the inevitable role for normative values when the Constitution's meaning runs out. See, e.g., STRAUSS, *supra* note 32.

total of fourteen, thirty-three, and thirty-four times, respectively.<sup>111</sup> Between 2001 and 2017, however, a grand total of *six* opinions cite it.<sup>112</sup>

Another objective indication of the presumption's demise is in the Court's increasing propensity for ruling federal statutes unconstitutional. As Professor Evan Caminker has noted, the Supreme Court invalidated provisions of federal statutes in 135 cases from 1788 through 1994, or 0.6 invalidations per Term.<sup>113</sup> But in the seven-year period between 1995 and 2002 alone, the Court invalidated provisions of federal statutes in 33 cases, or 4.7 invalidations per Term.<sup>114</sup> To make matters starker, this seven-fold increase occurred alongside a rapid decrease in the number of cases the Court reviews, a product of the Court's growing reliance on its certiorari rather than mandatory appellate jurisdiction.<sup>115</sup>

These numbers lend credence to widespread claims in the academy that the presumption of constitutionality is now defunct. As Professor Rachel Barkow has argued, "the unmistakable trend is toward a view that all constitutional questions are matters for independent judicial interpretation and that Congress has no special institutional advantage in answering aspects of particular questions."<sup>116</sup> According to Barkow, the Court now "rarely engages in a threshold determination of whether the constitutional provision at issue contemplates that the political branches receive some deference in their interpretation."<sup>117</sup>

As to the methodological explanation, there is growing agreement among "new originalists" that the Constitution does not, in fact, provide determinate

111. This is based on a simple Westlaw search for Supreme Court opinions containing the phrase "presumption of constitutionality." To the extent that is under-inclusive, it would bias against finding cases that rely on the presumption in earlier rather than later years, since the more the phrase becomes a part of the common constitutional parlance, the more often it is to be cited in briefs and thus by the Court itself in future decisions.

112. *Id.*

113. See Evan Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 74 (2003).

114. *Id.*

115. See Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1369 (2006) (finding, for example, that the Court decided 235 cases via signed opinion in 1930, compared to just 83 in 2000).

116. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 302 (2002).

117. *Id.*; see also e.g., Kramer, *supra* note 87, at 137 (arguing that "the Rehnquist Court has repudiated the New Deal's judicial presumption of constitutionality"). The best descriptive explanation for the presumption's downfall is that advocates from both sides of the political spectrum increasingly see the Court as an attractive venue for vindicating their preferred policies. Compare *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (striking down state same-sex marriage bans), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (striking down Texas law regulating abortion providers), with *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) (striking down federal campaign finance law banning corporate expenditures), and *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (striking down D.C. law forbidding firearm possession), and RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 253 (2004) (arguing against the presumption of constitutionality and in favor of a "presumption of liberty").

answers to every dispute.<sup>118</sup> Professor Lawrence Solum has argued that the vague nature of many core provisions of the Constitution renders “ineliminable” the existence of a “construction zone” in which judges must use normative values to decide cases.<sup>119</sup> Or as Professor Keith Whittington has explained, the answers to many constitutional challenges “cannot be discovered in the text through more skillful application of legal tools.”<sup>120</sup> In these cases, “[s]omething external to the text—whether political principle, social interest, or partisan consideration—must be” relied upon to decide specific disputes.<sup>121</sup> That kind of approach, of course, begins to look a lot like non-originalist approaches to constitutional adjudication that also rely on both textual and extra-textual considerations.<sup>122</sup>

On this understanding of originalism, the key takeaway is that laws attacked on constitutional grounds do not arrive at the Supreme Court in one of two (and only two) flavors: unconstitutional as determined by the original public meaning of the text, or constitutional as determined by the same. There is a spectrum between these two poles, a grey area of uncertainty that the Constitution’s original public meaning alone cannot unwind.<sup>123</sup> Since many of the hard constitutional disputes that come to the Court fall in this area,<sup>124</sup> values-based argumentation is indispensable in constitutional law. If judges cannot answer constitutional questions based on text and history alone, other factors must enter into the equation, such as precedent, structure, ethical commitments, and prudential concerns.<sup>125</sup> Just what factors properly belong in the judge’s toolkit—and how these factors should relate to one another as part

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118. For a discussion of the history and nature of this new understanding, see Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011).

119. Solum, *supra* note 32, at 523–34.

120. See KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 1 (1999).

121. *Id.* at 6.

122. See Colby, *supra* note 118, at 750 (“[O]ne cannot help but be struck by the extent to which the New Originalism’s decision-making process mirrors that of its nonoriginalist rivals; today’s originalists are engaging in the same maneuvers that nonoriginalists have been practicing for decades.”).

123. See, e.g., Solum, *supra* note 32, at 501–502 (using a venn diagram to show “borderline cases” that fall outside the “core of determinate meaning” with respect to disputes over the Constitution’s provisions granting power to the three branches).

124. See *id.* Of course, not every originalist shares this understanding. See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009) (arguing that “the evidence suggests that ambiguity and vagueness were [to be] resolved by considering evidence of history, structure, purpose, and intent”).

125. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991); see also Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMM. 145 (2018) (describing eleven topics, or modalities, of constitutional argument).

of an overarching “law of construction”—is now a crucial methodological question for constitutional law.<sup>126</sup>

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Taken together, the downfall of the presumption of constitutionality and the rise of the new originalism open the door to a judicial approach that is sensitive to political power. Because of the former, constitutional challenges to democratically enacted laws arrive at the Court as a jump ball. There is no presumption that the elected branches will win. Because of the latter, there is agreement that something more must figure into the Justices’ decision-making in hard constitutional cases than just the Constitution’s original public meaning. The Justices have to find *normative* reasons to rule in either direction—to strike down the law or uphold it. And if that is right, then one plausible reason to uphold laws that burden groups with ample political power is that doing so would further important democratic and institutional values.<sup>127</sup> Political power doctrine, in other words, could be a helpful tool in our broader law of constitutional construction. As we shall see next, perhaps it already is.

## II.

### THE POSITIVE CASE FOR POLITICAL POWER DOCTRINE

There is a reasonable argument that our law already embraces heightened judicial deference in cases where politically powerful entities are challenging their losses in the democratic bazaar. Subpart A sets forth that case; subpart B teases out the three defining features of a political power doctrine that could be applied in future cases across the domain of constitutional law.

A word about methodology. The debate within positivism over how our shared legal commitments ought to be discerned is no more settled than the debate between positive and normative legal theories writ large.<sup>128</sup> Although choosing a particular approach to positivism undoubtedly has consequences,<sup>129</sup> I focus here for the sake of simplicity on opinions issued by the Supreme Court as a tool for identifying the content of our law.<sup>130</sup> In other words, my positive

126. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1130 (2017); Balkin, *supra* note 125, at 181–83 (arguing for an eleven-part list of rhetorical commonplaces to guide constitutional construction).

127. See *infra* Part III.

128. See Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1329 (2017) (“[L]egal positivists have long debated which facts are the important ones in determining the existence and content of law.”); Adrian Vermeule, *Connecting Positive and Normative Legal Theory*, 10 U. PA. J. CONST. L. 387, 387 (2008) (“Positive and normative legal theory . . . often seem radically disjunct.”).

129. See, e.g., Barzun, *supra* note 128, at 1377 (noting that the question of which competing positivist theory to choose “is one of the most fiercely debated in jurisprudential circles these days”).

130. Others have defended this approach quite ably. See, e.g., Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 47, 60–61 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2370–71 (2015).

account concentrates on whether the Supreme Court exhibits a practice of deciding constitutional cases by reference to the political strength of the litigants before it.

*A. Political Power at the Supreme Court*

In a number of opinions of both historic and modern vintage, the Supreme Court has pointed to the political clout held by groups that are burdened by a law as a reason to uphold the law against constitutional attack. I subdivide those cases here along a rough chronological dimension, discussing a number of older cases first before turning to more modern-day invocations of political power.

Dividing the cases in this way allows us to see not only that political power doctrine enjoys some historical pedigree, but also that a majority of the Court's current members continue to apply it.<sup>131</sup> Moreover, dividing the cases by chronology creates a useful space to consider why the Court has bothered to care about political power in some older cases notwithstanding my earlier argument that such concern would be irrelevant in light of the presumption of constitutionality.<sup>132</sup> The answer is that many of the older cases rely on the political power of the litigants challenging a law in order to narrow or overrule prior constitutional invalidations. In other words, the Court cared about political power precisely in those cases where the presumption of constitutionality no longer applied, and where the Court was looking for reasons to grant the very deference it had previously discarded. That, of course, is how I have described the modern-day relationship between the presumption and judicial review.<sup>133</sup>

Before presenting the cases below, I want to foreground how they all occurred outside the equal protection context, the area of law where the old saw of political powerlessness has long been at issue. This suggests that the great attention paid to equal protection law (and its concern for powerless minority groups) may have blinded us to a meaningful pattern of cases in other domains of constitutional law where the Court has cared about political power. Widening our lens from the specific field of equal protection law allows us to take stock of this fact.

*1. Historic Cases*

The Supreme Court has identified political power as a reason for judicial deference in three lines of cases involving, respectively, state immunity from

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131. See Barzun, *supra* note 128, at 1346–47 (noting two different versions of Hart's rule of recognition, which determines what counts as law in a given legal system: one that "begins and ends with current practice (to determine if judges 'accept' a given rule)" and another that "asks judges to examine a rule's pedigree").

132. See *supra* Part I.B.

133. *Id.*

federal taxation, Tenth Amendment limits on Congress’s Commerce Clause power, and the Dormant Commerce Clause.

*State Tax Immunity.* The Supreme Court’s watershed decision in *McCulloch v. Maryland* established that states may not tax instruments of the federal government because the “power to tax involves the power to destroy.”<sup>134</sup> In 1871, the Supreme Court adopted the inverse proposition in *Collector v. Day*, holding that the states are “equally exempt from Federal taxation.”<sup>135</sup> The effect of this state tax immunity ruling was a series of cases in which the Supreme Court invalidated federal tax laws as they applied to the states. *Day* itself invalidated a federal income tax on the salary of a state judge; future cases expanded the immunity to other contexts where federal authorities sought to tax states in their performance of traditional government functions such as the offering of municipal bonds and selling of oil and gas.<sup>136</sup>

By the late 1930s, however, the Supreme Court had gotten cold feet.<sup>137</sup> A key case in this retrenchment was *Helvering v. Gerhardt*, which upheld a congressionally enacted income tax on salaries received by employees of the Port of New York Authority.<sup>138</sup> The Court began its opinion in *Helvering* by noting the “implied restriction” on federal taxing power recognized in *Collector v. Day*—that is, a restriction not found in the text of the Constitution.<sup>139</sup> The Court then quickly pivoted to explain why state tax immunity should henceforth be “narrowly limited.”<sup>140</sup> Most prominently, the Court explained that in this line of cases, the group burdened by federal tax legislation comprised nothing less than the states and “the people of all the states” who “are represented in Congress,” and who “[t]hrough that representation . . . exercise the national taxing power” in the first place.<sup>141</sup> When the group burdened by a challenged law is this influential, the Court reasoned, “resort to the usual processes of political action . . . provides a readier and more adaptable means [of redress] than any which courts can afford.”<sup>142</sup> After all, the Court pointed out, “[t]he very fact that when” the States and their people “are exercising [the national taxing power] they are taxing themselves serves to guard against its abuse.”<sup>143</sup>

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134. 17 U.S. 316, 431 (1819).

135. 78 U.S. 113, 127 (1870).

136. See Eduard A. Lopez, *The Constitutional Doctrines of State Immunity from Federal Regulation and Taxation After Garcia v. San Antonio Metropolitan Transit Authority*, 4 J.L. & POL. 89, 95, 95 n.37 (1987) (collecting cases).

137. See *id.* at 95 (noting that the trend in expanding state immunity “eventually reversed during the 1930s”).

138. 304 U.S. 405, 424 (1938).

139. *Id.* at 414.

140. *Id.* at 416.

141. *Id.*

142. *Id.*

143. *Id.*

The political power rationale for deferring to federal tax legislation was just as explicit in *New York v. United States*,<sup>144</sup> a 1946 case that all but marked state tax immunity's last stand.<sup>145</sup> That case involved a Congressional tax law applied against New York on revenue it had earned from the sale of mineral water. The Court again deferred to Congress, ruling against the states challenging the tax. And again it emphasized two core aspects of its reasoning. First, the tax immunity itself was not a command that could be fairly discerned from the Constitution itself.<sup>146</sup> And second, the group challenging the law had robust influence over the democratic process that produced it. Only "the representatives of all the States," the Court took pains to point out, "can pass such a taxing measure and they alone in their wisdom can grant or withhold immunity from federal taxation of such State activities."<sup>147</sup>

*Tenth Amendment Limits on the Commerce Clause.* The Supreme Court also relied on the political influence of the states as a reason to uphold federal legislation in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>148</sup> The question presented in *Garcia* was whether Congress had the power under the Commerce Clause to enact the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the states.<sup>149</sup> Just as in *Helvering* and *New York*, the state tax immunity cases, the Court in *Garcia* did not write on a blank slate. Nine years earlier, the Court had held in *National League of Cities v. Usery* that the Tenth Amendment precluded Congress from enforcing those provisions against the states in "areas of traditional governmental functions."<sup>150</sup> The issue in *Garcia* was whether to abide by or overrule *Usery*.

The Court opted to overrule it.<sup>151</sup> Its reasoning turned principally on the same two factors that drove the outcomes in *Helvering* and *New York*: the underdetermined nature of the relevant constitutional text and the fact that the group burdened by the law being challenged—the states—possesses abundant political power. To the first point, Justice Blackmun's majority opinion wryly

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144. 326 U.S. 572 (1946).

145. See Lopez, *supra* note 136, at 101 ("The current status of the doctrine immunizing states from federal taxation is uncertain, since the Court's ambiguous decision in *New York v. United States* was the last time the Court applied the doctrine.").

146. *New York*, 326 U.S. at 577 (describing the origin of its earlier rulings in favor of state tax immunity as based not on "anything said in the Constitution but [rather] the supposed implications of our federal system").

147. *Id.* at 582–83. Note that the Supreme Court has also recognized the importance of political power in the opposite context of intergovernmental tax immunity. Thus, the Court observed in *Washington v. United States* that state taxes may be permissible on federal instrumentalities when the same tax falls on a politically influential set of state citizens, too. See 460 U.S. 536, 545 (1983) ("A 'political check' is provided when a state tax falls on a significant group of state citizens who can be counted upon to use their votes [to] keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government.").

148. 469 U.S. 528, 552 (1985).

149. *Id.* at 530.

150. 426 U.S. 833, 852 (1976).

151. *Garcia*, 469 U.S. at 531.



noted that “[o]f course, the Commerce Clause by its specific language does not provide any special limitation on Congress’ actions with respect to the States.”<sup>152</sup> To the second, the Court described at length the unique advantages the states enjoy in influencing federal legislation.<sup>153</sup> Critically, the Court also pointed to the substantial victories states had exacted out of the federal legislative process as proof of their political power. Thus, for example, the Court observed that “the States have been able to direct a substantial proportion of federal revenues into their own treasuries,” resulting in the growth of state grant programs “from \$7 billion to \$96 billion” in a twenty-five year period.<sup>154</sup> “Moreover,” the Court explained, “at the same time that the States have exercised their influence to obtain federal support, they have been able to exempt themselves from a wide variety of [statutory] obligations imposed by Congress under the Commerce Clause.”<sup>155</sup> In short, the Court found compelling evidence that the powerful “political position of the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause.”<sup>156</sup> And in light of the states’ political influence,<sup>157</sup> there was no reason to construct a special rule in their favor out of vague constitutional text.

It is useful to pause here to consider an important commonality among *Helvering*, *New York*, and *Garcia*. In each of these cases, the Court wished to uphold legislation against constitutional attack despite the existence of precedent suggesting the contrary outcome. Thus, earlier cases like *Collector v. Day* and *National League of Cities v. Usery* had effectively displaced the

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152. *Id.* at 547. To the extent the Tenth Amendment is also relevant, that provision also provides no clear textual answer to the question. *See* U.S. CONST. amend X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *United States v. Darby*, 312 U.S. 100, 124 (1941) (“The amendment states but a truism that all is retained which has not been surrendered.”).

153. *Id.* at 551 (discussing various structural constitutional guarantees that the states enjoy in selecting federal officials, such as through setting electoral qualifications and participating in the electoral college).

154. *Id.* at 552.

155. *Id.* at 553 (recognizing that the “Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act all contain express or implied exemptions for States and their subdivisions”).

156. *Id.* at 553–54.

157. In candor, not every Justice agreed with this view of expansive state political power. *See id.* at 587–88 (O’Connor, J., dissenting) (“[R]ecently, the Federal Government has, with this Court’s blessing, undertaken to tell the States the age at which they can retire their law enforcement officers, and the regulatory standards, procedures, and even the agenda which their utilities commissions must consider and follow. The political process has not protected against these encroachments on state activities.”). Nor do the states *always* prevail upon Congress to enact laws beneficial to state interests. *See, e.g.,* Amicus Curiae Brief of Four United States Senators in Support of Petitioner at 20, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) (noting Congress’s failure “from 2001-2017 to secure passage of legislation to overrule *Quill*” notwithstanding support from the states). What matters, though, is whether a group’s failure in the legislative process happens *in spite of* its ability to secure reasoned consideration of its legal and policy arguments—a sign that there are more forceful and more popularly-supported arguments on the other side.

presumption of constitutionality that would have otherwise attached to the tax laws and regulations at issue in *Helvering, New York*, and *Garcia*. No wonder, then, that the Court saw fit to point to the states' political power in the later cases: that power was a convincing reason to restore the posture of deference that the Court had earlier rejected.

*The Dormant Commerce Clause.* Challenges in the Dormant Commerce Clause context are typically brought by private industry against state laws that discriminate against or burden interstate commerce and thus harm the industry's business interests. A good example is the case of *Minnesota v. Clover Leaf Creamery Co.*,<sup>158</sup> in which dairy companies challenged a Minnesota environmental law forbidding the retail sale of milk in nonreturnable, nonrefillable plastic containers.<sup>159</sup> The dairy company pleaded that the law impermissibly burdened interstate commerce by requiring it and other companies that wished to sell milk in the state to package their products in paper containers.<sup>160</sup>

The Supreme Court was unmoved. Significantly, the Court pointed out that "there is no reason to suspect that the gainers [from the law] will be Minnesota firms, or the losers out-of-state firms."<sup>161</sup> In fact, several of the entities challenging the law—including the named respondent, the Clover Leaf Creamery Company—were "Minnesota firms."<sup>162</sup> And where the groups who are "adversely affected by [a law]" and thus challenge it on constitutional grounds are "major in-state interests," the Court reasoned, that political influence stands as "a powerful safeguard against legislative abuse" by the state's lawmakers.<sup>163</sup> *Clover Leaf Creamery* thus holds that courts should be especially deferential to state laws challenged on Dormant Commerce Clause grounds when the companies opposing the laws include in-state commercial interests with the political sway needed to protect their interests in the statehouse.<sup>164</sup>

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158. 449 U.S. 456 (1981).

159. *Id.* at 458.

160. *Id.* at 472–73.

161. *Id.* at 473.

162. *Id.* at 473, 458 n.1.

163. *Id.* at 473 n.17.

164. The explanation for why the Court looked to political power in the Dormant Commerce Clause context is different than for the state tax immunity and Tenth Amendment cases. In the latter, the Court had already overridden the presumption of constitutionality such that political power was relevant as a new reason to again defer to the challenged laws. *See supra* notes 145–146. In the former, the Court looks to political power only after it finds that a law is facially neutral towards out-of-state commerce. When that is so, the Court's test is to balance the local benefits of the law being challenged against its burdens on commerce. *Clover Leaf Creamery*, 449 U.S. at 472. Political power matters at this balancing stage, because the burdens on commerce are less severe when in-state industry has the incentive to fight the challenged law in the democratic process. As I have argued, *see supra* Part I.B, now that the presumption of constitutionality has largely been withdrawn, the question facing the Justices in many constitutional disputes is a similar balancing exercise among normative values—and so political power may appropriately be considered.

Other Dormant Commerce Clause cases use similar reasoning,<sup>165</sup> which I won't belabor here (other than to note that Justice Kagan has joined a relevant opinion).<sup>166</sup> The major point is that, just as in the state tax immunity and Tenth Amendment contexts, the Court has relied on the political influence possessed by groups challenging a law as a reason to rule against them when the relevant constitutional provisions provide no clear answer. And stepping back, one may begin to see the contours of an approach to political power that can apply not just across disparate fields of constitutional law, but also based on the clout held by different kinds of entities (e.g., the states and powerful in-state industries). I look next at more recent cases invoking this doctrine.

## 2. Modern Cases

Opinions in three recent (and high-profile) Supreme Court decisions—*District of Columbia v. Heller*, *McDonald v. City of Chicago*, and *Obergefell v. Hodges*—provide further indication that the Court recognizes the relevance of political power as a factor counseling deference to the elected branches. These opinions are supportive in a pair of ways but also debatable in another that warrants mentioning up front.

They are supportive first because of their recentness. In addition to a recent opinion joined by Justice Kagan,<sup>167</sup> the relevant opinions in these cases have been joined by six of the Justices currently on the Court. The opinions also span a range of constitutional provisions, including the Second Amendment right to bear arms, the incorporation of the Bill of Rights against the states, and substantive due process. Especially when one takes into account the diverse areas of law at issue in the historic cases discussed above, this

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165. See, e.g., *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444, n.18 (1978) (noting special deference to state highway laws because “their burden usually falls on local economic interests as well as other States’ economic interests, thus insuring that a State’s own political processes will serve as a check”); *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 187 (1938) (reasoning that the fact that the regulations in question “affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse”).

166. Justice Kagan joined a dissenting opinion written by Justice Ginsburg in *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015). *Wynne* involved a challenge to a Maryland income tax system that does not grant resident taxpayers a county tax credit against income tax paid to another jurisdiction for income earned therein. *Id.* at 1792. A six-Justice majority struck down the tax. *Id.* The relevant point is that Justice Ginsburg sought to defend the tax because it applied the same rate to residents’ in-state and out-of-state income. *Id.* at 1815. When that is so, she reasoned, the tax should be upheld because “the existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.” *Id.* (internal alterations omitted). The majority did not reject the idea that political influence might be relevant in an appropriate case involving a neutral, non-discriminatory law. See *id.* at 1797 (“[I]f a State’s tax unconstitutionally discriminates against interstate commerce, it is invalid regardless of whether the plaintiff is a resident voter or nonresident of the State.”); see also *supra* note 164 (explaining how political power is relevant to Dormant Commerce Clause challenges to neutral laws). The majority also argued that the voters in this case were actually not powerful in any case because they comprised “only a distinct minority of [Maryland’s] residents.” *Wynne*, 135 S. Ct. at 1798.

167. See *supra* note 166.

shows the potential that political power doctrine might be applied trans-substantively, across the Constitution's many underdetermined provisions.

I must concede, however, one notable deficiency in my reliance on *Heller*, *McDonald*, and *Obergefell*. Unlike the cases canvassed in the preceding Section, none of the opinions I rely on in this Section are opinions of the Court. Worse yet, all three opinions are *dissents*. While this no doubt weakens my position, I do not think it is fatal. As a number of lower courts and commentators have recognized, separate dissenting opinions may be added together to establish a controlling rule.<sup>168</sup>

*District of Columbia v. Heller*. The first relevant recent dissenting opinion to rely on political power was Justice Stevens's dissent in *Heller*. The case involved a Second Amendment challenge to a Washington, D.C. law prohibiting the possession of handguns inside one's home.<sup>169</sup> The Court invalidated the law, relying on a deep dive into the history of the Second Amendment to show that it "conferred an individual right to keep and bear arms."<sup>170</sup>

Justice Stevens was more circumspect. In an opinion joined by two current members of the Court (Justices Ginsburg and Breyer), Justice Stevens argued at length that the Second Amendment's history did not support an individual right to bear arms nearly as definitively as the majority had suggested; the history instead pointed towards a right of the states to maintain a militia.<sup>171</sup> And using moves suggestive of a concern for political power,<sup>172</sup> Justice Stevens proceeded to justify a posture of deference by pointing to the political access of groups burdened by the D.C. law. "[A]dherence to a policy of judicial restraint would be far wiser" than invalidating D.C.'s gun control measure, Justice Stevens argued, because "no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control."<sup>173</sup>

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168. See, e.g., *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) ("We need not find a legal opinion which a majority [of Justices] joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'"); Michael L. Eber, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 210 (2008) (flagging the scholarly position that "'five aligned votes' [can] create a 'binding precedent' regardless of the opinion from which those votes are derived").

169. *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008).

170. *Id.* at 595.

171. See *id.* at 640–62 (Stevens, J., dissenting) (arguing that the original understanding of the Second Amendment encompassed a right to bear arms for the purpose of maintaining a militia).

172. See *supra* Part II.A.1.

173. *Heller*, 554 U.S. at 680 n.39. Note that Justice Stevens's language in *Heller* could be construed as reflecting ordinary political process theory in that he could be read as saying gun rights activists are not a powerless discrete and insular minority group. When considered together with his later overt reference in *McDonald* to the gun industry's political power, see *infra* note 177, however, the better reading is that Justice Stevens believed the industry's great political influence was itself an affirmative reason to defer to D.C.'s handgun ban.

*McDonald v. City of Chicago*. The law at issue in *Heller* was challenged under the Second Amendment, which applies directly to the laws of Congress (and by extension, the District of Columbia).<sup>174</sup> That ruling on its own, then, was not enough to invalidate similar gun control laws in the states, for the Court had yet to decide that the Second Amendment applied to the states in the first place. That was the issue in *McDonald v. City of Chicago*, in which five Justices held that the Second Amendment does in fact limit the power of state lawmakers.<sup>175</sup>

The key opinions to focus on are Justice Stevens's and Justice Breyer's dissents. Justice Stevens's opinion expressed in perhaps the clearest form yet the notion that courts should defer to legislatures when they burden powerful groups. "[T]he Court's imposition of a national standard" by incorporating the Second Amendment against the states was "unwise because the elected branches have shown themselves to be perfectly capable of safeguarding the interest in keeping and bearing arms."<sup>176</sup> "[N]o one disputes that opponents of [gun] control have considerable political power."<sup>177</sup> Indeed, Justice Stevens continued, if a "State or locality has enacted some improvident gun-control measures, as petitioners believe Chicago has done, there is no apparent reason to infer that the mistake will not eventually be rectified by the democratic process."<sup>178</sup>

Justice Breyer's dissent, which Justices Ginsburg and Sotomayor joined,<sup>179</sup> echoed similar themes. To start, Justice Breyer indicated that his reliance on the presence of political influence requires a threshold determination that the relevant constitutional text and history is underdetermined.<sup>180</sup> And as to political power, he also argued that the

174. See *McDonald v. City of Chi.*, 561 U.S. 742, 754 (2010) ("The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government . . ."); U.S. CONST. art. I, § 8, cl. 17 ("The Congress shall have power . . . to exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States.").

175. Four Justices voted to apply the Second Amendment by virtue of its incorporation into the Due Process Clause of the Fourteenth Amendment; Justice Thomas reached the same conclusion based on the Fourteenth Amendment's Privileges and Immunities Clause. *McDonald*, 561 U.S. at 791 (plurality op.); *id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).

176. *McDonald*, 561 U.S. at 904 (Stevens, J., dissenting).

177. *Id.*

178. *Id.* at 905 (internal quotation marks omitted).

179. Justice Sotomayor has also authored an opinion relying on political power to justify deference to legislative action. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 771 (2014) (Sotomayor, J., concurring in the judgment) ("[T]o the degree that the majority worries [that *forum non conveniens* and change of venue] are not enough to protect the economic interests of multinational businesses . . . the task of weighing those policy concerns belongs ultimately to legislators.").

180. *McDonald*, 561 U.S. at 918 (Breyer, J., dissenting) ("I thus think it proper, above all where history provides no clear answer, to look to other factors in considering whether a right is sufficiently 'fundamental' to remove it from the political process in every State. I would include among those factors" the question whether incorporation will "help maintain the democratic form of government that the Constitution foresees.")

democratic process should be left to resolve gun control debates given the political influence possessed by gun control opponents.<sup>181</sup> In particular, Justice Breyer noted how influential the opponents of gun control were in the legislative process that led to the very Illinois law at issue.<sup>182</sup> In sum, the dissenting Justices believed there was no need for judges to second-guess the gun control laws adopted in every state because the political process can be trusted to work when the burdened groups hold great influence.

*Obergefell v. Hodges*. Two of the Court's current conservative Justices have also argued that political power counsels deference to democratic action in the context of state same-sex marriage bans. Chief Justice Roberts's principal dissent in *Obergefell v. Hodges*, which Justice Thomas joined, made the key maneuvers.<sup>183</sup>

First, the Chief observed that the right to same-sex marriage is neither "enumerated" nor supported by the Constitution's history.<sup>184</sup> Second, in the absence of clear guidance from the text or history, the Chief Justice argued that the right approach is for judges to defer to challenged laws when the groups attacking those laws have political influence. Thus, the Chief wrote that "[t]he majority today neglects [a] restrained conception of the judicial role" by seizing "for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question."<sup>185</sup> Indeed, the Chief Justice observed, the Court took this question out of the democratic process "just when the winds of change were freshening at [the challengers'] backs,"<sup>186</sup> that is, at a time when same-sex couples were wielding great political influence. For "[s]upporters of same-sex marriage," the Chief argued, "ha[d] achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view."<sup>187</sup> Same-sex couples' track record of political triumph in the rough and tumble of ordinary politics, the Chief lamented, "ends today."<sup>188</sup>

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181. See *id.* at 924 (noting that "opponents of regulation" have been able to "cast doubt on the[] studies" showing the effect of gun bans); *id.* at 926 ("[T]here is no institutional need to send judges off on this 'mission-almost-impossible.' Legislators are able to 'amass the stuff of actual experience and cull conclusions from it.'").

182. *Id.* at 928 (explaining how local lawmakers were moved to hold "a community referendum on" whether to enact a local handgun ban "at the urging of ban opponents").

183. Justice Thomas also joined a dissenting opinion filed by Justice Scalia in *Romer v. Evans*, which similarly pointed to the alleged political power of the gays and lesbians burdened by a law as a reason to uphold it. See 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (defending Colorado's law as an attempt to "preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores").

184. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613, 2616 (2015) (Roberts, C.J., dissenting).

185. *Id.* at 2612.

186. *Id.* at 2625.

187. *Id.* at 2611.

188. *Id.* at 2612.

To summarize the positive case: The Supreme Court has relied on political power considerations to justify upholding actions of the elected branches in cases involving intergovernmental tax immunity, the Tenth Amendment, and the Dormant Commerce Clause. Six of the Justices currently on the bench have joined opinions that make the same argument, one in a Dormant Commerce Clause case,<sup>189</sup> three in the Second Amendment and Bill of Rights incorporation context,<sup>190</sup> and two in the substantive due process context.<sup>191</sup> While some of the opinions I have discussed were dissents, in none of the cases did the majority dispute the proposition that political power's presence weighs in favor of judicial deference. That makes sense, of course, since some of the Justices in the majority in each case would use the same political power argument in other opinions.<sup>192</sup> What remains is the impression that the Court believes political power ought to be a relevant factor when the Constitution's original public meaning does not conclusively decide a case.

### B. *The Three Steps of Political Power Doctrine*

Before considering a normative defense of political power doctrine, it makes sense to be precise about what, exactly, the doctrine is and how it functions. A close reading of the cases just discussed suggests that the doctrine can be applied in three steps. First, a court asks whether the constitutional provision at issue underdetermines the case—that is, whether the text's original public meaning provides a single, determinate answer to the dispute or whether there are multiple answers that could be consistent with the Constitution's original understanding.<sup>193</sup> If the provision is underdetermined, a court next asks whether the group challenging the law is politically powerful. Finally, if the group is powerful, that counts in favor of leaving the disputed policy question up for debate in the political process, rather than forever resolving the question by judicial fiat in favor of the powerful group. However, other normative

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189. See *supra* note 166 (Justices Kennedy and Kagan).

190. See *supra* notes 171–182 (Justices Ginsburg, Breyer, and Sotomayor).

191. See *supra* notes 183–188 (Chief Justice Roberts and Justice Thomas).

192. For example, Chief Justice Roberts and Justice Thomas were in the majority in *Heller* and *McDonald*. The fact that they did not dispute the relevance of the gun lobby's political influence was prescient in that they would rely on the same political power consideration in disputing the majority's ruling in *Obergefell*. See *supra* notes 185–186.

193. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987). One need not accept my placement of original meaning as a standalone, threshold inquiry. While my own view is that the Constitution's original public meaning should in fact constrain the universe of acceptable outcomes in constitutional cases for reasons powerfully articulated by scholars such as Jack Balkin and Lawrence Solum (see BALKIN, *supra* note 73; Solum, *Constraint Principle*, *infra* note 244), political power doctrine could also function if arguments about the constitutional text were weighed on equal footing at step three alongside other pluralist arguments rooted in structure, precedent, prudence, and the other usual modes of constitutional argument. See *infra* Part II.B.3 (describing the pluralist process of weighing normative values in constitutional construction).

factors—such as the rule of law virtues of abiding by precedent or other consequences—may be overriding.

1. *Step One: Is the Constitution Underdeterminate?*

When a court is confronted with a case where a litigant challenges action by a political branch on constitutional grounds, the first question to ask is whether the constitutional challenge at issue is determined by the document's original public meaning or whether it instead falls into the "construction zone." I mentioned this debate earlier, and a great deal of literature explores the distinction.<sup>194</sup> The key point for now, however, is to distinguish between the two kinds of constitutional disputes.

On the one hand are disputes whose answers *can* be found by recourse to the Constitution's original understanding. Professor Solum offers the example of Article I's declaration that each state shall have "two Senators."<sup>195</sup> Thus, if the loser of a US Senate election were to sue in court arguing that, even though he lost, he should still be seated as a state's third senator, there is no role for normative tools of constitutional construction to play in resolving that challenge.

That is of course an especially easy case, but there are harder cases, too. The Supreme Court relied on text and history alone in *Powell v. McCormack*, for example, to conclude that Adam Clayton Powell was entitled to his seat in Congress because the House of Representatives could not exclude someone who meets the Constitution's expressly prescribed qualifications.<sup>196</sup> Many other constitutional provisions offer similar clarity upon close analysis, especially when it comes to rules governing the structure of our government.<sup>197</sup> If, as in these cases, the evidence about original public meaning decides the dispute, that is the end of the matter—political power considerations have no role to play.

On the other hand are disputes that the Constitution's original public meaning does *not* determine. There is great debate among scholars as to how large this so-called construction zone is, which I can do little more than flag, but many agree now at least that it exists.<sup>198</sup> And each of the cases discussed above where the Court has relied on political power quite plausibly falls into the construction zone. For instance, there is no clear answer in the Constitution

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194. See *supra* Part I.B. The most comprehensive exposition is Professor Solum's account in *Originalism and Constitutional Construction*. See Solum, *supra* note 32, at 469–72, 495–503 (explaining the ubiquity and ineliminability of the construction zone).

195. See Solum, *supra* note 32, at 469; U.S. CONST., art. I, § 3, cl. 1.

196. See 395 U.S. 486, 522–47 (1969) (exhaustively analyzing founding-era history).

197. See Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1658–79 (2016) (collecting cases where the Supreme Court decides disputes over constitutional rules by recourse to originalist sources, which Professor Greene shows happens most often in the context of separation of powers).

198. See Solum, *supra* note 32, at 472.



or its history as to whether (or when) Congress may tax the instrumentalities of a state,<sup>199</sup> or whether Congress's commerce power reaches to the regulation of traditional state functions.<sup>200</sup> The same may certainly be said of the constitutional challenges in *Heller* and *Obergefell*.<sup>201</sup> In each of these cases, vagueness or ambiguity in the relevant constitutional language, gaps in the document, or even outright contradictions leave the constitutional interpreter unable to choose among multiple answers that would be consistent with the document's original understanding.<sup>202</sup> And where that is so, judges are left with little choice but to apply normative considerations to resolve the case.<sup>203</sup>

## 2. *Step Two: Is the Burdened Group Politically Powerful?*

Assuming that a statute is challenged under a constitutional provision that does not determine the dispute, the next question is whether the group burdened by the statute is politically powerful, by which I mean that it possesses sufficient resources to oppose the law in the democratic process. Phrasing the question this way raises a few important questions: Whose political power matters? How should power be measured? And how much power is necessary to trigger judicial deference?

*Whose political power matters?* The first issue is figuring out the proper object of the political power analysis. One might think, for instance, that the focus of the analysis should be the actual party litigants before the court and whether those litigants possess adequate influence in the political arena. But that would be too narrow a view. Laws do not burden just the litigants in court; they burden a class of individuals and entities. Insofar as a primary objective of political power doctrine is to enable a healthy democratic process to sort out difficult policy disputes,<sup>204</sup> the real question is whether the *entire group* of individuals or entities burdened by a law possesses sufficient political influence to have a reasonable chance at persuading elected lawmakers to change their minds.<sup>205</sup>

199. See *Helvering v. Gerhardt*, 304 U.S. 405, 411 (1938) (noting that “[t]he Constitution contains no express limitation on the power of either a state or the national government to tax the other”).

200. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (“[T]hat the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution” under the Tenth Amendment “offers no guidance about where the frontier between state and federal power lies.”).

201. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting) (“[T]he majority’s approach has no basis in principle or tradition.”); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 265 (2009) (“In *Heller*, the majority read an ambiguous constitutional provision as creating a substantive right that the Court had never acknowledged in the more than two hundred years since the amendment’s enactment.”).

202. See *Solum*, *supra* note 32, at 469–72.

203. See *id.* at 472 (“[C]onstruction is essentially driven by normative concerns.”).

204. See *infra* Part III.A.

205. Focusing on the amount of political influence held by the *entire group* of burdened individuals and entities helps to resolve an apparent puzzle implicated when a single law imposes

To illustrate, the Supreme Court in *Garcia* did not just ask whether the state of Texas (whose sovereign interests were specifically implicated in the case at bar) had sufficient political power to warrant deference to Congress's work in enacting the FLSA under the Commerce Clause. The Court instead asked whether *all of the states in the aggregate* had sufficient power, because all states were required under the FLSA to change their employment practices.<sup>206</sup> The same is true with respect to all individual gun owners and organizations dedicated to gun ownership in *Heller* and all same-sex couples in *Obergefell*: the dissenting Justices in those cases were interested in deferring to a legislative process in which (in the Justices' view) the losing groups as a whole had ample resources and opportunity to voice their views.<sup>207</sup>

*What is the proper measure of political power?* With the right targets of a political power analysis identified, the next question is what exactly a court ought to be measuring when it engages in a political power determination. One answer is rooted in political theory; another would look to a discrete set of commonsense, fact-based indicators of political influence.

In terms of theory, political power doctrine could inquire whether the group in question enjoys sufficient "power," however that concept is conceived, under some "correct" vision of our politics. This mode of inquiry, of course, forces one to offer an answer to an intractable contest between different theories of politics with which the Supreme Court itself has seemed to struggle. As Professor Bertrall Ross has argued, the Court's evolving equal protection jurisprudence reflects evolving (and conflicting) views about the nature of our political system; the rights-expansive Warren Court understood our politics in pluralist terms, whereas the more recent Rehnquist and Roberts

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different burdens on multiple classes of persons and entities, only some of whom may be powerful. Because the key issues are whether the losers in the political process are able to continue the democratic debate and whether the policy outcome was the product of a process in which lawmakers were exposed to opposing arguments, *see infra* Part III, the existence of additional powerless losers does not change the level of deference to which laws are entitled when they burden the powerful. To illustrate, New Deal legislation such as the FLSA, which imposed a minimum wage and limited child labor, is entitled to deference because it burdened powerful industries' access to labor markets. The fact that the law also burdened (in theory) the right of laborers to work at a below-minimum wage and the right of children to certain occupations—both of which are plausibly powerless groups—does not change this fact because their opposition to the FLSA (such as it was) would have been mediated through the influential voices of industry opponents.

There may be exceptions. One might imagine a cartel-like hypothetical, where a powerful actor within an industry supports legislation burdening the entire industry in order to stamp out its weaker competitors. In that scenario, it might be appropriate to inquire into the power possessed by just the weaker entities since the powerful actor actually supported—and benefitted from—the law's enactment.

206. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) ("The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation."); *id.* at 553–54 (describing how "the political position of the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause").

207. *See supra* text accompanying notes 182, 187.

Courts have seemed to adopt a version of public choice theory.<sup>208</sup> Under the pluralist view, “[w]ell-organized groups bargain and compromise with each other in a competitive pluralist political marketplace to secure favorable legislation,” and the sign of political power is a given group’s ability to participate in this wheeling-and-dealing.<sup>209</sup> Under the public choice model, smaller special interest groups enjoy advantages in political organization over their larger, more diffuse counterparts that enable them to “engage in rent-seeking behavior to secure advantages for themselves at the expense of the larger public.”<sup>210</sup>

One way to determine if a group possesses sufficient influence for purposes of political power doctrine, then, would be to ask whether it qualifies as powerful on one’s preferred theory of politics. Under a pluralist account, for instance, states would seem well-positioned to bargain for favorable laws; indeed, senators have a direct hand in forestalling burdensome federal regulation and a myriad of interest groups have offered states their support.<sup>211</sup> But on a public choice account, laws regulating the states might represent a classic instance where the burdens are felt by a diffuse class of persons (state citizens) who lack the incentive to organize in opposition. The choice of political theories could lead to different power determinations in the same-sex marriage context, too. On a pluralist account, there is reason to worry that gays and lesbians may be systematically excluded from the pluralist marketplace.<sup>212</sup> On a public choice theory, by contrast, the group’s very minority status might be said to confer upon it an organizing advantage.

It is plain to see that a theory-based approach to measuring power bottoms out on a normative vision of politics about which reasonable people (not to mention jurists) will disagree. My own sense, then, is that it would be preferable to try to identify a set of more objective, fact-based measures of political power. Four factors in particular should be worthy of judicial consideration: majority electorate status, a track record of legislative success, statistical evidence of political strength, and input-based measures regarding a

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208. See Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565 (2013).

209. *Id.* at 1581.

210. *Id.* at 1611.

211. As evidence of the wide array of interest groups that support states’ rights, consider just a sample of the organizations that filed amicus briefs in support of the broader reading of the Tenth Amendment ultimately rejected in *Garcia*. See, e.g., Brief for the Nat’l League of Cities & Nat’l Governors’ Ass’n et al. as Amici Curiae Supporting Appellees, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (No. 82-1913); Supplemental Brief of the Nat’l Inst. of Mun. Law Officers as Amicus Curiae Supporting Appellees, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (No. 82-1951); Brief Amici of the Nat’l Pub. Emp’r Labor Relations Ass’n, 12 of its State Affiliates, and the City of Eugene, Or. Supporting Appellees, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Nos. 82-1913, 82-1951).

212. See *infra* Part IV.C.

group's influence (such as lobbying expenditures and political campaign contributions).

The first factor courts should look to is whether the burdened group comprises a majority of the relevant electorate. Where that is so, a strong presumption should arise that the group can adequately defend its own interests in the usual political process, such that legislative action burdening those interests is entitled to a strong dose of respect from the courts. The Supreme Court's decisions in the state tax immunity and Tenth Amendment cases are a testament to this notion; as the Court wrote in *Helvering*, where it deferred to federal taxation of state activities, "the people of all the states . . . are represented in Congress," and "[t]hrough that representation they exercise the national taxing power."<sup>213</sup> Thus, "[t]he very fact that when they are exercising it they are taxing themselves serves to guard against its abuse through the possibility of resort to the usual processes of political action."<sup>214</sup>

In many cases, of course, the burdened group will not amount to a majority of the voting population. Even then, though, it remains possible to discern objective evidence of political power by focusing on legislative *outcomes*. On this view, we should all agree that a group is rightly thought of as powerful if, over some reasonable period of time, it routinely sees its preferred policy views enacted into law.<sup>215</sup> Professor Stephanopoulos adopts this outcome-oriented view, and the Supreme Court took a similar approach in *Cleburne*.<sup>216</sup> I find the approach attractive, too, given that the essence of power is the ability of a group "to *win*, not merely to play the game."<sup>217</sup>

Courts should examine, then, whether the burdened group has experienced a track record of success in obtaining legislatively conferred benefits or exemptions from laws imposing generally applicable regulatory burdens. That kind of success bespeaks political strength regardless of whether the afflicted group is an electoral majority. Sometimes both factors will be present, as in the context of challenges to federal regulation brought by the States under the Tenth Amendment. *Garcia* is clearest on this point, where the Court describes how the states (whose citizens vote in Congressional elections)

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213. *Helvering v. Gerhardt*, 304 U.S. 405, 416 (1938).

214. *Id.*

215. To be sure, this approach is not without problems of its own. For one thing, an outcome-oriented approach would not help in cases where a group's preferences are enacted due to merely incidental agreement with other groups. Nor would it offer an easy way of accounting for groups' varying intensity of preference across issues. But these problems might wash out somewhat over the long run when enough issues are taken into account. And even if not, these imprecisions do not strike me as so fundamental a problem (or so much less precise than other tools of constitutional construction) as to render political power completely inoperable.

216. See Stephanopoulos, *supra* note 8, at 1531 (explaining why enactment of preferred policies is what counts); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 433 (1985) (describing the "distinctive legislative response" to the intellectually disabled as proof of their political clout).

217. Stephanopoulos, *supra* note 8, at 1531.

have also succeeded immensely in the federal legislative arena in obtaining billions of dollars of block grants and special exemptions from otherwise generally applicable laws.<sup>218</sup> But other times a group lacking strength in numbers will also enjoy outsized legislative success, such as the pharmaceutical industry, which has defeated every one of the last 134 Congressional attempts to lower prescription drug prices.<sup>219</sup>

It would be fair to worry, though, that judicial attention to stories of legislative success may run a kind of cherry-picking risk. While a substantial track record of success can fairly be considered evidence of political strength, it is also the case that many groups win in the democratic process at least *some* of the time. How to distinguish, then, between the degree of success that signals political power and success that is too occasional or episodic?

Happily, the recent works by Stephanopoulos and Ross and Li show that statistical measures of political strength can help illuminate this difference. By analyzing large troves of data regarding policy preferences held by specific groups and those policies' odds of enactment, Stephanopoulos finds, for instance, that whites, males, and the wealthy have a much greater ability to see their desired policy outcomes enacted into law than comparator groups.<sup>220</sup> And Ross and Li find that labor unions and farmers possess great influence insofar as lawmakers in districts with higher proportions of those groups are much more likely to vote in favor of the groups' preferred policies.<sup>221</sup> In addition to looking for a pattern of success in the legislature, then, judges can consider sophisticated statistical measures of group influence as well.

Still, there are some groups for whom these first three factors—majority electorate status, a track record of legislative victories, and statistical measures of influence—may paint an unclear picture of power. Laws burdening corporations or specific industry sectors raise one example. While some industries may enjoy an obvious track record of legislative success, corporations neither vote nor have been the subject of robust statistical analysis regarding their ability to actually achieve legislative policy preferences. So where the aforementioned factors leave an uncertain conclusion as to a group's political power, courts would be wise to look as well to *input* measures of influence, such as lobbying and campaign expenditures and the ability to get one's preferred candidates elected to office.<sup>222</sup> Using those measures, corporations as a whole seem to possess strong political influence.<sup>223</sup> And while it will be more complicated to make determinations on an industry-by-industry basis to the extent some constitutional rule might apply to some subset

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218. See *supra* notes 154–155.

219. See *infra* note 325.

220. See *supra* notes 65–67.

221. See *supra* note 70.

222. See Ross & Li, *supra* note 8, at 379–81.

223. See, e.g., Tang, *supra* note 10, at 1478–82.

of corporate interests,<sup>224</sup> the Supreme Court in *Clover Leaf Creamery* seems to have thought such analysis possible (at least in the context of the dairy industry).<sup>225</sup>

*How much power is enough to trigger deference?* Knowing whose power matters and how to measure it only gets us part of the way. A viable political power doctrine must also provide some account of how much power a burdened group must have before the Court should take a more deferential approach to judicial review.

The most intellectually defensible answer is also the least doctrinally satisfying. That answer begins by observing that political power is not dichotomous; it occurs along a spectrum. So the more politically influential the burdened groups may be, the more deferential the Court should be in proportional response. That approach, of course, suffers from some of the same criticisms as the oft-discussed spectrum approach to equal protection review.<sup>226</sup> Among other things, it would be difficult for lower courts to apply in a predictable manner, and it would arguably empower judges to allow their personal preferences to override neutral application of the law.<sup>227</sup>

If that option is off the table, my sense is that the best answer is that deference to the legislative process serves important normative ends when the group seeking relief possesses at least a median level of political influence relative to similarly situated groups.<sup>228</sup> The idea here is that if one starts from the proposition that a hypothetical median group in society holds an appropriate amount of political influence, then any group that is at or above the median level in terms of its relative ability to see its policy preferences enacted is a group whose losses should not be second-guessed.<sup>229</sup> Or put another way, those are the kinds of losses that it will be preferable for normative reasons to let the democratic process, rather than the courts, unwind.<sup>230</sup>

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224. See, e.g., Part IV.E (describing the role the political power doctrine might play in the Fourth Amendment's "closely regulated industries" jurisprudence).

225. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981) (describing in-state dairies, milk retailers, and milk container producers as "major state-interests" who count as a "powerful safeguard against legislative abuse" when they join in a suit challenging a state law).

226. See generally Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (describing the longstanding debate over whether the Equal Protection Clause should be applied using three tiers of scrutiny or instead a unitary spectrum-like test).

227. See Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62 (1992) (describing the advantages of constitutional rules rather than standards, including their ability to "require decisionmakers to act consistently").

228. See *infra* Part III.

229. If outcome measures of political power are unavailable, then we would want to pay attention to the input measures discussed earlier, such as lobbying, campaign contributions and expenditures, and general legislative success. Note that identifying an actual median political group is not the point, since that task will be indeterminate absent the most exceptional informational circumstances. The idea is instead for judges to envision some hypothetical group with median power as a point of reference for inquiring into the burdened group's influence level.

230. See *infra* Part III.

But if that all sounds too wishy-washy, there is another way to cash out the political power standard. Some groups will strike a judge as “clearly” powerful in the Thayerian sense<sup>231</sup>—groups that all reasonable-minded jurists would agree possess at least a median-level ability to enact their preferred policies (and likely much greater ability than that). States, corporations, whites, males, and wealthy individuals seem to fit within that category at a first cut;<sup>232</sup> there may be others. Then there are other groups that reasonable jurists would all agree possess a *below*-median level ability to influence lawmakers; the poor would seem an obvious example. Finally, there are groups about whom reasonable jurists would disagree regarding whether they are above or below the median level of political clout—perhaps members of the LGBT community, women, and Hispanics may fit this category. For these groups, the lack of consensus should persuade a judge *not* to make a finding of political power and thus not to apply greater deference to challenged laws, or at least not for that reason. Constitutional disputes affecting these groups should instead be resolved using other normative considerations that judges often use, such as history, structure, precedent, prudential concerns, and ethical commitments.<sup>233</sup>

One final point. I do not pretend to have an unassailable answer to the objection that determining how much power is “enough” is an inherently subjective exercise incapable of neutral application. There is room for disagreement, both in deciding where the line should be drawn for triggering judicial deference and in deciding whether a given group passes that line. My point, though, is that for the category of cases to which political power doctrine can apply—cases that are not determined by the Constitution’s original public meaning—*any* judicial resolution will involve subjectivity. That political power determinations are contested, in other words, makes political power doctrine no different from any other approach to resolving cases, including originalism itself.<sup>234</sup> The benefit of political power doctrine is that getting it wrong in either direction isn’t the end of the world. If a group is wrongly identified as powerful, the result is to prioritize the democratic process over other normative considerations that judges may prefer. If a group is wrongly identified as lacking power, the result is to decide the case based on those other normative considerations anyhow; political power goes out the window as a tool of construction.<sup>235</sup>

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231. See Thayer, *supra* note 86.

232. See *supra* note 220.

233. See BOBBITT, *supra* note 125, at 12–13.

234. See, e.g., Scalia, *supra* note 105 (acknowledging that originalism does not provide a clear answer to every dispute).

235. See Tang, *supra* note 10, at 1473–74 (describing the consequences of false positives and false negatives). Indeed, one important concession to make about the political power doctrine is how little work it would do in a meaningful number of cases. In cases where a burdened group is of uncertain political power, a decision will ultimately be based on other normative arguments that are familiar to constitutional law. But at least in situations where a burdened group is clearly able to

### 3. *Step Three: Are Other Values Overriding?*

Let's stipulate that the group burdened by a law under attack is properly identified as politically powerful (and that the constitutional provision relied upon does not determine the dispute). What follows? *Must* a court automatically defer to the legislature's policy choice, or may it rely on other overriding normative values to strike the law down?

From a purely descriptive standpoint, the Supreme Court hasn't spoken decisively on this question. In some cases, the Court seems to treat the political power possessed by burdened groups as dispositive in its own right. In *Garcia*, for example, the Court deferred to Congress's decision to apply the FLSA's wage and hour requirements to the states after finding that "the internal safeguards of the political process have performed as intended" in "the factual setting of these cases."<sup>236</sup>

By contrast, the Court in other cases seems to have relied on political power as one factor among many, such that it might be overridden if other factors point in favor of invalidating the law. For example, in *Clover Leaf Creamery*, the Court directly weighed the burdens of Minnesota's milk container law (which were deemed minimal due to the presence of powerful in-state industries)<sup>237</sup> against the law's benefits.<sup>238</sup> Justice Breyer's dissent in *McDonald* likewise considers other normative concerns in resolving an uncertain constitutional dispute.<sup>239</sup>

My own take is that the latter approach, which treats political power as one factor among many in the course of constitutional construction, is more fitting. Thus, for example, a court might find even after recognizing the political influence of a burdened group that *stare decisis* and the rule of law virtues of abiding by precedent outweigh the normative values served by judicial deference. One plausible example of this scenario might be the Supreme Court's abortion jurisprudence, if one believes (contrary to my own view)<sup>240</sup> that women seeking abortions are politically powerful. For even in that

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protect its interests in the political process with as much force as a median group, we should acknowledge the special democratic and institutional reasons to yield to legislative judgment.

236. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

237. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981).

238. *Id.* at 473 ("Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems.").

239. *See McDonald v. City of Chi.*, 561 U.S. 742, 918 (2010) (Breyer, J., dissenting) (expressing how he "thus think[s] it proper, above all where history provides no clear answer, to look to other factors" such as "the nature of the right; any contemporary disagreement about whether the right is fundamental; the extent to which incorporation will further other, perhaps more basic, constitutional aims; and the extent to which incorporation will advance or hinder the Constitution's structural aims.").

240. *See Stephanopoulos, supra* note 8, at 1584 (finding that as female support for a federal policy increases from 0% to 100%, "the likelihood of adoption falls from roughly 80% to roughly 10%"). To the extent the relevant group is defined as all pro-choice advocates rather than just women,



event, a Court could reasonably decide that leaving undisturbed a now forty-four-year-old precedent regarding the right to abortion would serve normative ends that outweigh the democratic value of returning the issue to state lawmakers.<sup>241</sup> Conversely, one could argue that similar rule of law virtues and broad principles of federalism militate in favor of the Supreme Court's decisions restricting Congress's power to abrogate state sovereign immunity, even though the Constitution underdetermines that issue and the States are politically powerful.<sup>242</sup>

Other examples surely exist, each with their own set of counterarguments. My argument here is simply that political power doctrine is one viable tool of constitutional construction that the Court has found useful when our founding document and history leave difficult contemporary disputes unanswered. Insofar as the doctrine is rooted in normative values,<sup>243</sup> it is defeasible in light of other tools of construction that are themselves based on normative values—and that may prove more compelling in individual cases.

But what exactly are those other values and tools of construction? To this point, I have largely sidestepped the question of what, exactly, are the permissible set of considerations that judges may consult in the course of constitutional construction. This is a question of titanic proportions (and difficulty) that exceeds the scope of this Article. For present purposes, I wish to identify with, and rely on, a rich literature of constitutional pluralism—the view that “law is a complex argumentative practice with plural forms of constitutional argument.”<sup>244</sup> This view is most widely associated with Phillip Bobbitt, who famously articulated six widely recognized modalities of constitutional argumentation: arguments based on constitutional text, history, structure, precedent, ethical commitments, and prudential concerns.<sup>245</sup> To use

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the lack of success experienced by such advocates at the national level in recent policy debates also disproves the claim that the relevant group is politically powerful. *See, e.g.*, Julie Hirschfeld Davis, *Trump Signs Law Taking Aim at Planned Parenthood Funding*, N.Y. TIMES (Apr. 13, 2017) <https://www.nytimes.com/2017/04/13/us/politics/planned-parenthood-trump.html> [<https://perma.cc/3Q7V-WSZ9>].

241. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–61 (1992) (describing the virtues of *stare decisis*, including that “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”).

242. For an argument that the text and history of the Eleventh Amendment are consistent with a more modest reading that simply limits the state-citizen diversity jurisdiction-conferring clause in Article III, such that the scope of state sovereign immunity is underdetermined, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

243. *See infra* Part III.

244. *See* Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 14 (April 11, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215) [].

245. *Supra* note 125. Other pluralist accounts include, among others, Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987);

the language of constitutional pluralism, one way of understanding this Article's core argument is that when groups burdened by a law possess political power, that fact triggers structural, ethical, and prudential arguments about democracy, institutional capacity, and institutional legitimacy that weigh in favor of legislative deference.<sup>246</sup> And while all of this talk of weighing these many (often competing) forms of argument may paint a picture of constitutional construction and judging in hard cases that is less precise and robotic than some would like, such is the real world. We do ourselves no favors when we paper over that truth.

### III.

#### THE NORMATIVE CASE FOR POLITICAL POWER DOCTRINE

The Supreme Court's tradition of relying on political power considerations is one decent reason to find the approach attractive in and of itself.<sup>247</sup> After all, normative legal theory has long sought to "leverage from 'is' to 'ought'" on the grounds that "tradition can serve as a source of norms."<sup>248</sup> But there are three more important normative arguments for deference to laws that burden politically powerful groups. Those arguments sound in democracy, institutional capacity, and institutional legitimacy.<sup>249</sup>

#### A. Democratic Values

Constitutional law scholarship has a storied relationship with democracy. Alexander Bickel's *The Least Dangerous Branch* authored perhaps the most important chapter, sparking academics to confront head-on the anti-democratic nature of judicial review—a project that continues to this day.<sup>250</sup> For at its

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and Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994).

246. See *infra* Part III. Importantly, because the political power doctrine I have articulated prioritizes the Constitution's text—such that the original public meaning of that text constrains the judicial decision maker—it would be more accurate to describe my approach as a species of what Professor Solum has called the "originalist variant" of constitutional pluralism. Solum, *supra* note 244, at 111. Put another way, as a tool of constitutional *construction*, the political power doctrine necessarily prioritizes the original public meaning of the text before Bobbitt's five other modalities of argument may be consulted. See *id.*

247. See *supra* Part II.A.

248. Vermeule, *supra* note 128, at 391. Of course, as Professor Vermeule notes, the argument from tradition raises a troubling sort of paradox, since deciding new cases in accordance with old precedent leads to the new cases contributing less information "to the collective wisdom." *Id.* at 392–93.

249. I want to acknowledge that a truly comprehensive and adequate normative defense of the political power doctrine would entail a separate paper of its own. Given space constraints, my hope is that the thoughts below constitute a step in the right direction, with a fuller defense to be constructed down the road.

250. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (providing historical evidence that American constitutionalism is a project in which citizens were expected to implement the Constitution, with judges taking a relative backseat).

heart, Bickel explained, that power of review involves the ability “to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision.”<sup>251</sup> That, Ely would say, “is a charge that matters” because our society has “from the beginning . . . accepted the notion that a representative democracy must be our form of government.”<sup>252</sup> And our democratic system, Bickel argued, may produce both “better [policy] decisions” and a “coherent, stable—and *morally supportable*—government” by requiring the consent of the governed.<sup>253</sup>

Political power doctrine would further these democratic values. To start, a judicial presumption of deference to legislative acts ensures that the *people* get to make the law in contested spaces through their elected representatives. When a law falls into a constitutional grey zone, such that judicial resolution would entail judges deciding its fate based on their own normative priors, there is profit to be made in letting the people sort it out through the process of public discourse, lobbying, and voting.<sup>254</sup> That process leads to public buy-in, which can be renewed periodically by revisiting the debate.<sup>255</sup> Deference can thus produce benefits for democratic values that are both retro- and prospective, as past decisions by a majority are left in place and the issue remains live for ongoing debate. Judicial invalidation on the basis of uncertain textual and historical warrants, by contrast, forever removes the issue from the people’s purview, resulting in the atrophy of democratic engagement on the matter.<sup>256</sup>

This democracy-forcing picture is too simplistic in an important respect, however. Judicial deference to the political branches furthers democratic values *only to the extent democracy is actually working*. And we can be most confident that our democracy is working—that it is fairly attending to the interests of *all* citizens, no matter their individual degree of influence—when the losers in a given policy action are the ones who usually come out on top. To

251. BICKEL, *supra* note 250, at 20.

252. ELY, *supra* note 37, at 5.

253. BICKEL, *supra* note 250, at 20. My argument does not turn on the outcome of debates over the virtues of more modern majoritarian visions of representative democracy and more republican visions of representative democracy common at the founding. That is because the relevant debate here is between enabling judges (whom all agree are unelected) to settle the meaning of underdetermined constitutional provisions and allowing our elected representatives to do so instead.

254. *See, e.g.,* Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291, 312 (2014) (describing the right of the people to “speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process”).

255. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting): When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again.

256. Short of amendment through Article V’s arduous procedure.

put it another way, leaving a tough issue in the political arena can plausibly produce public buy-in and meaningful ongoing engagement when the ones who've lost in that arena had a fair chance going into the debate and have the means to persuade their fellow citizens and lawmakers to change their minds in the future. But when laws burden groups that are unable to influence lawmakers or the public and are thus unable to combat their losses moving forward, democratic values do not figure in as prominently.<sup>257</sup> In this respect, a power-sensitive doctrine of judicial review may be thought of as a lowest cost-avoider approach to uncertain constitutional cases under which the burdens of a judicial decision should be placed on the party that can "most cheaply avoid them."<sup>258</sup>

The approach I have described is related to what Professor Solum has called "Originalist Thayerianism."<sup>259</sup> That theory, which Solum attributes to separate works by Professors Michael Paulsen and Gary Lawson,<sup>260</sup> is a democracy-oriented rule of construction under which "judges [w]ould defer to decisions made by the political branches" when "the meaning of the text is unclear or uncertain."<sup>261</sup>

I depart from this approach, however, insofar as it is over-inclusive. Deference to the political branches fails to serve democratic values when the political branches are *themselves* anti-democratic. To give an example, if one thinks the Equal Protection Clause's original public meaning underdetermines the fate of school segregation,<sup>262</sup> the Originalist Thayerian approach would require deference to the Topeka School Board school segregation policy

257. So judges in such cases should look for guidance in other normative considerations. See *supra* note 125.

258. Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1097 (1972) (summarizing the lowest cost avoider theory of tort law).

259. See Solum, *supra* note 32, at 472–73. Professor Adrian Vermeule provides a similar theory rooted in institutional concerns, as opposed to originalist methodological ones. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 246 (2006) (arguing that originalism is inferior for institutional reasons to a practice of "remitting judges solely to the enforcement of a narrow set of clear and highly specific texts, while committing open-ended [provisions] such as the Constitution's guarantees of equal protection and due process, to legislative enforcement").

For reasons explained later, *infra* Part IV.F, my approach also differs from what Professor Solum has called "Representation-Reinforcement Thayerianism," which encompasses *Carolene Products* Footnote 4 and Ely's political process theory. See Solum, *supra* note 244, at 125.

260. See Lawson, *supra* note 110; Paulsen, *supra* note 110.

261. Solum, *supra* note 32, at 473.

262. Compare Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991) ("Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation . . . twenty-four of the thirty-seven states then in the union either required or permitted racially segregated schools."), with Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995) ("[B]etween one-half and two-thirds of both houses of Congress voted in favor of school desegregation and against the principle of separate but equal" in a number of votes shortly after the 14th Amendment was ratified).

challenged in *Brown v. Board of Education*. But what democratic values would that deference further, given that the political branches in segregated areas throughout the country had proven incapable of fairly considering the issue of segregation for decades? In such situations, it makes more sense for courts to locate a judicial resolution in other normative concerns such as precedent and ethical or prudential reasoning.

The Originalist Thayerian approach is then right that “the value of democratic legitimacy” may properly persuade “judges to defer to the political branches” in disputes where the Constitution is not clear.<sup>263</sup> But it should do so in cases where the ones who’ve lost in the political branches have sufficient power to contest their losses in that same arena. Political power doctrine reflects this understanding.

### B. Institutional Capacity

A second reason for deferring to laws burdening powerful groups sounds in institutional capacity. The basic argument is that we should most trust the judgment of legislatures for comparative institutional reasons when what is at issue is whether laws burdening powerful groups violate some vague provision of the Constitution.

A good starting point is Professor Adrian Vermeule’s institutionalist examination of judicial review, which reaches the same result as the Originalist Thayerian position for reasons of institutional capacity rather than democracy. To Vermeule, a fair assessment of “institutional capacities and systemic effects,” should lead judges to “defer to legislatures on the interpretation of constitutional texts that are ambiguous . . . or embody aspirational norms whose content changes over time with shifting public values.”<sup>264</sup> Vermeule’s account is sophisticated and persuasive. What I want to point out here is that the comparative institutional strengths of legislatures and courts point more convincingly towards deference to lawmakers when they’ve burdened politically powerful groups rather than marginalized ones.<sup>265</sup>

Vermeule argues that legislatures are better situated than courts to resolve underdetermined constitutional disputes. He bases this conclusion on a cost-benefit analysis of vesting decision-making in either branch once one takes into account their relative capacities and the systemic costs of either choice. With respect to benefits, “[t]here is no particular reason to believe that judges are better positioned than legislators to update constitutional principles” given their

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263. Solum, *supra* note 32, at 473.

264. VERMEULE, *supra* note 259, at 230. Vermeule agrees that constitutional provisions that set forth clear rules should be enforced by judges. *See id.* at 272–73.

265. To be clear, I am not calling for *heightened* judicial review when laws burden powerless groups. That is the old saw approach to political process theory that has been critiqued relentlessly, including by Vermeule himself. *See id.* at 239–42. For more on the differences between the political power doctrine and the political process theory, see *infra* Part IV.F.

“distinctive and rather narrow expertise” and “insulation in the form of reduced information about what actual people desire and believe.”<sup>266</sup> By contrast—and this is critical—Vermeule argues that “[t]he need to secure reelection forces federal and state legislators into closer contact with a broader range of views, professions, and social classes than most judges encounter.”<sup>267</sup> This superior legislative access to the relevant information renders the benefits of judicial review “conjectural at best.”<sup>268</sup>

In contrast to judicial review’s speculative benefits, Vermeule contends that layering judicial review on top of the legislatures’ own judgment (in deciding whether to enact a law in the first place) increases systemic costs, particularly the uncertainty costs associated with citizens needing to “look to the successive decisions of two institutions to determine constitutional law.”<sup>269</sup> The cost-benefit calculation is thus quite straightforward. Judicial review of underdetermined constitutional provisions would produce, at best, speculative benefits against certain, significant costs. So we should leave such decisions to legislatures.<sup>270</sup>

It is not self-evident, however, that letting courts decide how to update vague constitutional provisions invariably leads to minimal benefits in every case. Not every case involving a law challenged on some underdetermined constitutional ground is equally situated. In some cases, we should trust the legislature to strike the right balance precisely because of the way the legislature goes about gathering information in a superior fashion—whether it is evidence about a complicated policy’s effects or evidence about society’s evolving views of a controversial issue. But in other cases, the legislature’s usual information gathering mechanisms, which are attuned especially to groups that possess the means to lobby for their preferred policies,<sup>271</sup> may function more as pathology than pathway to decisional accuracy. In those cases, the courts may actually suffer fewer institutional drawbacks.

Consider some outcomes that Vermeule himself highlights as following from his approach. He begins by conceding, much to his credit, a difficult point under his institutionalist brand of deferential judicial review: “the Court would not have declared segregated public schooling unconstitutional” in *Brown v. Board of Education*.<sup>272</sup> But that cannot be considered in isolation, he argues, for his approach also would have stopped the Court from “declar[ing] a constitutional right to own slaves” as in *Dred Scott v. Sandford*, or

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266. VERMEULE, *supra* note 259, at 273–74, 279.

267. *Id.* at 279.

268. *Id.*

269. *Id.* at 275.

270. *Id.* at 275–76.

271. See ELMER E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA 35 (1960) (“The flaw in the pluralist heaven is that the heavenly choir sings with a strong upper-class accent.”).

272. See VERMEULE, *supra* note 259, at 280–81.

“invalidat[ing] a generation’s worth of legislation against child labor,” as in *Hammer v. Dagenhart*.<sup>273</sup> The point is that there is no approach to judicial review that can get every case right given judges’ limited information, bounded capacities, and self-interest.<sup>274</sup> So, taking that as given, an approach that leaves all decisions involving underdetermined provisions in the legislature is preferable because on balance it will yield more good outcomes (i.e., no *Dred Scotts* and *Hammer v. Dagenharts*) than bad ones (i.e., *Plessy v. Ferguson*s).<sup>275</sup>

But is it really true that no approach can get all (or more plausibly, *more*) of these cases right? There’s an important difference between *Brown* on the one hand, and *Dred Scott* and *Hammer v. Dagenhart* on the other. In the latter two cases, the Congress enacted laws that burdened persons or entities that were politically powerful on any fair account—slave owners in *Dred Scott* and major industries in *Hammer*.<sup>276</sup> Such enactments are precisely the kind of moments when we should have the greatest confidence in the capacity of lawmakers to update the meaning of vague constitutional provisions in accordance with social conditions. For lawmakers in those moments have heard the arguments pressed by powerful sectors of the population and have decided nonetheless that societal values have changed so as to require those groups to lose anyhow.

What is more, the legislatures say no to those powerful groups not just in the face of their political influence, but also in the face of strong constitutional arguments<sup>277</sup> and ample evidence that the powerful groups are able to muster regarding the adverse effects of the challenged legislation. The evidentiary point is especially salient in the context of the kinds of tough policy questions often at issue today. Take, for example, the question of gun control, where powerful gun rights groups can use their resources and channels of influence to present the strongest possible scientific or research-based case in favor of their preferred positions.<sup>278</sup>

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273. *Id.* at 281; *see also* *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

274. *See* VERMEULE, *supra* note 259, at 257–58.

275. *Id.* at 281.

276. More specifically, the laws at issue in the cases were the Missouri Compromise, which forbade slavery in certain territories of the Louisiana Purchase (in *Dred Scott*, 60 U.S. at 432), and a federal law forbidding the sale in interstate commerce of goods produced in factories using child labor (in *Hammer*, 247 U.S. at 268).

277. Thus, for example, constitutional law governing Congress’s Commerce Clause authority was settled *against* Congress’s power to enact the child labor law struck down in *Hammer*. *See* 247 U.S. at 272 (noting that the narrow view of the Commerce Clause relied upon to invalidate Congress’s law had “been recognized often in this court”).

278. *See, e.g.,* *McDonald v. City of Chi., Ill.*, 561 U.S. 742, 922 (2010) (Breyer, J., dissenting) (“[D]etermining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make.”); *id.* at 924 (noting how “opponents of regulation” have been able to “cast doubt on” studies showing the positive effects of gun control regulation). Or consider the type of evidence that powerful industry groups can present to state lawmakers regarding the burdens that laws would have on important in-state industries. *See* *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981).

So, all of the legislature's institutional strengths come into play when evaluating laws it has enacted to the detriment of politically savvy groups. But the same is not true in cases like *Brown*, which involve laws that burden groups that lack access to, and influence over, the legislature. Vermeule's logic is telling here, as he lauds legislative capacity to the extent "the need to secure reelection forces . . . legislators into closer contact with a broader range of views, professions, and social classes."<sup>279</sup> The operative phrase here is the "need to secure reelection." That interest advantages political elites that lobby, donate to candidates, spend on electioneering, and vote at high rates. In cases like *Brown*, this dynamic counts *against* trust in the Topeka school board's policy choice because electoral pressures discouraged the school board from acquiring relevant information about new social conditions. Judges holding life tenure do not suffer from the same electoral pressures, so in these cases there is something to gain by leaving the outcome to the courts' traditional set of "interpretive and jurisprudential materials."<sup>280</sup> In this way, institutional capacity also supports a more refined approach to legislative deference that is sensitive to political power.<sup>281</sup>

### C. Institutional Legitimacy

The final normative appeal of political power doctrine is, concededly, the most tentative. Here is the thrust of it. I take it to be uncontroversial that the institutional legitimacy of the judiciary—by which I mean public trust and confidence in the courts—is a valuable objective.<sup>282</sup> Judicial deference to the actions of political branches, I want to suggest, tends to further that objective when courts uphold laws burdening politically influential groups. By contrast, courts risk undermining their own institutional legitimacy when they intervene to rescue such groups from political defeat. Importantly, the same dynamic seems less apt to occur when courts intervene to strike down laws burdening powerless groups.<sup>283</sup>

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279. VERMEULE, *supra* note 259, at 279.

280. *Id.* at 275.

281. Of course, requiring some judicial attention to political power increases systemic decision costs to the extent citizens will be uncertain of how courts will come out on a given political power determination. As suggested, one answer is to adopt a kind of Thayerian clarity requirement with respect to the political power determination itself, which would treat groups of debatable political strength as not-powerful and thus not triggering heightened legislative deference. *See supra* notes 231–233.

282. *See, e.g.,* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (joint opinion of Justices O'Connor, Kennedy, & Souter) ("The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means.").

283. These conclusions are qualified in an important sense, as there is insufficient public opinion polling data to prove them in an empirically satisfying way. So, this argument is convincing only to the extent one thinks the examples here are generalizable.



Start with the situation where the Court must decide whether a vague provision of constitutional text forbids the enactment of some law burdening a politically powerful group. History suggests that striking down the law, and in that sense salvaging a victory for the powerful group from its legislative defeat, may erode public confidence in the Court over time. Here, again, *Lochner* and *Dred Scott* provide powerful examples.

I have already described the *Lochner* era briefly, that infamous period of judicial review in American history where the Supreme Court imposed its preferred laissez-faire economic policy views onto society through its contested understanding of substantive due process and congressional power.<sup>284</sup> For now, the relevant point is that this period of judicial interventionism “coincided, predictably, with the nation’s most sustained period of popular clamor about judicial review.”<sup>285</sup> As Professor Barry Friedman recounts, even without popular opinion polls, it is “unequivocal that extremely large numbers of people were frustrated deeply by their inability to control or overturn” the Supreme Court’s decisions during the *Lochner* era, with the result being “a colossal loss of faith in the efficacy of law itself.”<sup>286</sup> For fair reason: the Court’s intervention on behalf of corporate interests and the “moneyed classes”<sup>287</sup> overrode the legislative successes of large social movements championing progressive advances such as child labor and workplace safety laws, workmen’s compensation, and maximum hour and minimum wage laws.<sup>288</sup>

A similar harm to the Court’s legitimacy (and that of law more broadly) accompanied *Dred Scott*, which struck down Congress’s attempt to outlaw slavery in certain territory north of the 36°30’ parallel as a violation of the substantive due process rights of slaveholders to their property.<sup>289</sup> There is some debate over the status of this ruling, which is arguably dicta in view of the Court’s simultaneous ruling that it lacked jurisdiction over the case.<sup>290</sup> But what is not contested is the public uproar that followed. As Professor Friedman explains, “The Court’s decision [in *Dred Scott*] set off a firestorm of criticism, wounding the Court as it has not been since.”<sup>291</sup> *The New York Evening Post*,

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284. See *supra* note 89. But see DAVID E. BERNSTEIN, REHABILITATING LOCHNER 23 (2011) (arguing that the bakery law challenged in *Lochner* was actually protective legislation aimed at driving out small, nonunion bakeries).

285. BARRY FRIEDMAN, THE WILL OF THE PEOPLE 167 (2009).

286. *Id.* at 168; see also *id.* at 187–91.

287. *Id.* at 171.

288. See *id.* at 168–71.

289. *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857):

[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

290. See Greene, *supra* note 89, at 406.

291. FRIEDMAN, *supra* note 285, at 112.

for example, foresaw nothing short of the “end of the Supreme Court; for a judicial tribunal, which is not rooted in the confidence of the people, will soon either be disregarded as an authority or overturned.”<sup>292</sup>

What unites these two examples is not just that the Supreme Court struck down laws that enjoyed broad popular support, as revealed by public outcry in response to each judicial intervention. It is also the case that the ones burdened by the laws—major industry in the *Lochner* era and slaveholders in *Dred Scott*—clearly enjoyed great political influence.<sup>293</sup> In that sense, although one hesitates before drawing too much from individual examples, it seems appropriate to suggest that the Court’s legitimacy may be most at risk when it decides to rescue politically powerful groups from their legislative defeats, overriding the preferred policies of a democratic majority in the process.<sup>294</sup>

By contrast, the Court seems to preserve its legitimacy when it *defers* to laws burdening powerful groups. A good example here is the New Deal settlement after the *Lochner* era, when the Court began to uphold popular economic regulations and social safety net provisions. This about-face was accompanied by a revival in public trust in the Court. The strongest evidence of this can be seen in how quickly the public changed its views on President Roosevelt’s court-packing plan. Whereas support for the plan outstripped opposition by a narrow margin before Justice Owen Robert’s “switch in time,”<sup>295</sup> a sign of the public’s reduced faith in the Court, “support for the [court packing] plan began to decline” shortly after the Court began to uphold the popular laws it had previously struck down.<sup>296</sup> Trust in the nine-member Court, it seems, was restored by its decision to defer to laws burdening powerful corporate interests.

When the Supreme Court confronts laws afflicting less powerful groups, however, an opposite effect on the Court’s legitimacy seems plausible. Here, again, two examples reveal the point over time. First, in *Brown v. Board of Education*, the Court invalidated school segregation policies that burdened

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292. *The Supreme Court of the United States*, EVENING POST: N.Y., Mar. 7, 1857; see also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 415–19 (1998) (describing contemporary critiques of the Court’s ruling).

293. See David Schultz, *Liberty v. Elections: Minority Rights and the Failure of Direct Democracy*, 34 HAMLIN J. PUB. L. & POL’Y 169, 180 (2013) (describing growing corporate influence during the Progressive Era); MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 128–30 (2006) (describing the political influence of southern slaveholders).

294. One possible more recent example of this dynamic is the public’s reaction to the Supreme Court’s unpopular decision permitting unlimited corporate campaign expenditures in *Citizens United v. FEC*, 558 U.S. 310 (2010). See *infra* Part IV.A; Dan Eggen, *Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html> [<https://perma.cc/ZWE2-YR7P>] (“Eight in 10 poll respondents say they oppose the high court’s Jan. 21 decision to allow unfettered corporate political spending, with 65 percent ‘strongly’ opposed.”).

295. See FRIEDMAN, *supra* note 285, at 225.

296. *Id.* at 233.

politically powerless African Americans. While the immediate aftermath of the ruling may have been divisive,<sup>297</sup> there is little doubt that *Brown* stands today as one of the Court's great accomplishments—and greatest sources of public confidence.<sup>298</sup> Conversely, the Court's decision to defer to the political branches' decision to intern Americans of Japanese descent in *Korematsu* has been a lasting blemish on the Court's reputation.<sup>299</sup>

*Korematsu* shows that judicial deference to the political branches is not *always* a good thing for the Court's legitimacy. Deference appears more confidence-inspiring when the ones who've lost in the political arena are powerful groups that can usually defend themselves (like the slaveholders burdened by the Missouri Compromise or the corporate interests burdened by New Deal era economic regulations). Conversely, contrasting the responses to *Lochner* and *Dred Scott* against *Brown* suggests that judicial intervention on behalf of powerful groups may be particularly corrosive of the public's faith. So a political-power-based switch for judicial deference makes sense for reasons of institutional legitimacy, as well.

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I have suggested that judicial deference to legislation burdening powerful groups furthers important normative ends rooted in democratic and institutional considerations. For the reader who finds herself in agreement,<sup>300</sup> a fourth value may be added to the equation: the notion that a judicial rule regarding political power can serve an important constraining function on judges themselves, forcing them to squarely consider and identify which of two very different kinds of "situation-types" are implicated in a given case.<sup>301</sup>

To be more specific, when legislatures act, one of two things is often true. Sometimes, lawmakers may impose burdens on persons or entities who are so great in number or who possess such political savvy and resources that convincing reasons must have motivated the legislature to act in the first

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297. *Id.* at 245 ("Polls over the summer showed that slightly more than half the country agreed with the *Brown* decision.").

298. See JACK M. BALKIN, WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID xi (2002) ("*Brown* has become a symbol of the role of courts in a democracy."). This, of course, despite the fact that *Brown*'s actual impact on civil rights and educational opportunity has been hotly contested. See, e.g., Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 489 n.158 (2005) (collecting competing accounts of *Brown*'s impact).

299. See Greene, *supra* note 89, at 398–402, 456–60 (describing *Korematsu*'s place in, and path to, the anticanon).

300. For the reader who thinks legislatures are equally deserving (or undeserving) of deference no matter the circumstance—i.e., whether they burden a weak minority group in order to advantage a powerful majority or whether they burden the powerful in order to assist the less so—the additional reason offered here will have little purchase.

301. The concept of "situation types" comes from Karl Llewellyn, who famously lauded the power of "situation sense," or judges' ability to use experience and training to discern the case type into which a given dispute falls, thereby suggesting an appropriate outcome. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, 60, 121–57 (1960).

place.<sup>302</sup> Other times, lawmakers may respond to a felt policy dilemma by imposing costs on persons who lack the means and expertise needed to defend their interests at the statehouse.<sup>303</sup> If the losers in both situations sue under some underdeterminate constitutional provision, then a judge who applies political power doctrine may not throw up her hands and defer to the legislature's judgment with equal force in each case. The judge must instead articulate reasons why a burdened group's legislative defeat is of the sort we should be inclined *not* to second-guess—such as the group's track record of legislative success or its regular access to lawmakers.<sup>304</sup> By forcing judges to provide such reasons, political power doctrine can increase the odds of the correct “situation sense” being applied,<sup>305</sup> and help to discipline judges in their exercise of power.<sup>306</sup> As recent literature has shown, judges can in fact utilize their “legal training and experience” to overcome the kind of motivated reasoning that might otherwise tug their instincts in the direction of their subjective policy preferences.<sup>307</sup>

#### IV.

##### POLITICAL POWER AND SOME PRESENT-DAY CONTROVERSIES

How might some contemporary disputes play out if political power doctrine were used in the course of constitutional construction? I consider five examples here: the rise of First Amendment protections for corporations, gun control and the Second Amendment, same-sex marriage, due process limits on punitive damages awards, and the Fourth Amendment's “closely regulated

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302. See, e.g., *supra* Part II.A.1 (describing cases where Congress burdens all state citizens and where state lawmakers burden powerful in-state industries).

303. See, e.g., *supra* Part III.C (discussing *Brown* and *Korematsu*). One could add a third type of common situation, where a law burdens groups whose influence is uncertain. As I've suggested, judges in this circumstance would leave political power considerations to one side and resolve the underdetermined constitutional issue by recourse to the other common modes of argument. See *supra* Part II.B.3.

304. For an example of an opinion doing exactly this, consider *Garcia v. San Antonio Metropolitan Transit Authority*, where Justice Blackmun explains all of the political advantages and successes enjoyed by the States in Congress. See *supra* notes 148–157. For an example of an opinion that fails to justify deferring to the legislature in view of the power possessed by a burdened group, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (concluding that the “winds of change were freshening” at the backs of same-sex marriage challengers); *id.* at 2611 (conceding that only eleven states permitted marriage between members of the same sex as of the time of decision).

305. See generally LLEWELLYN, *supra* note 301, at 178–91 (arguing that rules serve an important function in guiding judges to recognize the correct situation type).

306. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (“A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power.”).

307. See Dan M. Kahan et al., “Ideology” or “Situation Sense?” *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 354, 373 (2016) (using an experimental study to show that judges, unlike law students, are able to set aside their predispositions in the course of legal reasoning to arrive at like results on controversial cases).

industries” exception.<sup>308</sup> A concluding sub-part uses these examples to discuss how a judicial focus on political power would differ in application from political process theory’s traditional focus on powerlessness.

#### A. First Amendment Lochnerism

There is growing recognition that corporate interests today are successfully waging constitutional attacks against unfavorable laws under the First Amendment akin to the challenges brought under substantive due process during the *Lochner* era.<sup>309</sup> I want to focus here on two exemplar cases—*Sorrell v. IMS Health, Inc.*,<sup>310</sup> and *Citizens United*—and how they might have come out had the Supreme Court employed political power as a tool of constitutional construction.

*Sorrell*. Perhaps the best example of the Supreme Court’s recent trend towards First Amendment deregulation in favor of corporate interests is *Sorrell v. IMS Health, Inc.* The case involved a Vermont pharmaceutical law enacted in response to studies showing that US patients had been prescribed expensive, brand-name drugs at huge aggregate costs even though those drugs were *less effective* than generic counterparts.<sup>311</sup> States like Vermont (as well as Maine and New Hampshire)<sup>312</sup> responded by forbidding pharmacies to sell prescription records revealing individual doctors’ prescribing practices and prohibiting pharmaceutical companies from using the same.<sup>313</sup> Doing so, lawmakers believed, would make it harder for pharmaceutical companies to market their branded drugs on a doctor-by-doctor basis, thereby leveling the playing field with generic drugs (for which no such marketing campaigns were undertaken).

In a 6-3 opinion written by Justice Kennedy, the Court struck down the law. The Court’s reasoning was not rooted in text, history, or structural accounts of the Constitution. Instead, the majority relied on a combination of precedential, consequentialist, and ethical arguments.<sup>314</sup> Thus, the majority began its analysis by resolving to apply heightened scrutiny by reference to

308. I discuss a set of other examples in Tang, *supra* note 10, all of which share a certain characteristic: they are cases where the Court grants constitutional protections to powerful groups that it has previously denied to less influential ones. *See id.* at 1477–95.

309. *See* Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 135 n.3, 5 (collecting recent academic discussions of this emerging pattern).

310. 564 U.S. 552 (2011).

311. *See, e.g.*, Robert Cardarelli, et al., *A Cross-Sectional Evidence-Based Review of Pharmaceutical Promotional Marketing Brochures and Their Underlying Studies: Is What They Tell Us Important and True?*, 7 BMC FAM. PRAC. 13, 14 (2006) (finding prescription of branded blood pressure medications increased U.S. health care costs by \$3 billion in 1996 despite presenting more side effects than generics).

312. *Sorrell*, 564 U.S. at 562.

313. *Id.* at 559–60.

314. *See generally* BOBBITT, *supra* note 125, at 10–22 (discussing modalities of constitutional argument).

precedent.<sup>315</sup> The Court then ruled the State’s justifications for its law insufficient in light of the possible adverse consequences the Court perceived for health care consumers<sup>316</sup> and the Court’s ethical commitment to letting individuals, rather than government, “assess the value of the information.”<sup>317</sup>

The Court’s analysis made no mention of the fact that the law’s challengers were among the most politically powerful corporate interests in the country: big pharma.<sup>318</sup> But what if it had?

Attention to political power would quite plausibly have led the Court to come out the other way. To start with the first of political power doctrine’s three steps,<sup>319</sup> there is little doubt that the original public meaning of the First Amendment underdetermines the question of whether states may pursue their public health interests by limiting the ability of pharmaceutical companies to purchase information about individual doctors’ prescribing practices. As Professor Solum has remarked about the Free Speech Clause broadly, “Because the text is general, abstract, and vague, we are in the construction zone.”<sup>320</sup> This means that “[i]n a particular case, more than one outcome may be consistent with the communicative content of the constitutional text.”<sup>321</sup> Professor Ronald Krotoszynski, Jr. has argued more specifically that “[a]s a matter of textualism or originalism, the commercial speech doctrine, at least as applied to the states, does not wash.”<sup>322</sup>

At step two, the group burdened by this law—big pharmaceutical companies—clearly has at least as much power as the median political player in our society once one considers the four factors that signify political

315. The majority chiefly uses precedent to reject the argument that the law is ordinary commercial regulation subject to rational basis review. *See Sorrell*, 564 U.S. at 565–71. As Justice Breyer’s dissent shows, however, there is also strong precedent in support of the more deferential approach. *See id.* at 584 (Breyer, J., dissenting) (noting that “[t]he Court has also normally applied a yet more lenient approach to ordinary commercial or regulatory legislation that affects speech in less direct ways” and collecting cases).

316. *Id.* at 578 (noting “the State’s ‘unwarranted view that the dangers of [n]ew drugs outweigh their benefits to patients.’”).

317. *Id.* at 579.

318. *See* Jen Hayden, *Amidst Deadly Painkiller Epidemic, Big Pharma Spent \$880 Million to Influence Politicians Nationwide*, DAILY KOS (Sept. 19, 2016), <https://www.dailykos.com/stories/2016/9/19/1571872/-Amidst-deadly-painkiller-epidemic-Big-Pharma-spent-880-million-to-influence-politicians-nationwide> [<https://perma.cc/Z9FW-JXDX>] (describing pharma’s influence in state and federal elections); *see also infra* notes 324–325.

319. *See supra* Part II.B.1.

320. Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1951 (2013).

321. *Id.* *See also, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 256 (2017) (“[T]he early history of speech and press freedoms undercuts the mythological view that foundational principles of modern doctrine inhere in the original Speech Clause.”).

322. Ronald J. Krotoszynski, Jr., *The Wages of Crying Wolf Revisited: The Essential Consanguinity of Lochner, Roe, and Eastern Enterprises*, 1 GEO. J.L. & PUB. POL’Y 133, 142 n.61 (2002).

strength.<sup>323</sup> While pharmaceutical companies do not constitute a majority of the electorate, and while we lack advanced statistical measures of the degree of responsiveness that lawmakers have to big pharma's policy preferences generally, we do have unambiguous evidence of its powerful influence based on input-measures and a track record of success. As to inputs, pharmaceutical companies have spent a jarring \$2.3 billion lobbying Congress over the past decade, more than any other industry.<sup>324</sup> And as to a record of legislative success, it is no surprise that of the 134 proposals to limit prescription drug prices that have been introduced in Congress since 2005, not a single one has made it out of committee.<sup>325</sup>

The question at step three is more equivocal: do the normative values relied upon by the majority in *Sorrell* outweigh the democratic values and institutional capacity and legitimacy values that counsel deference to Vermont's law? My own instinct is that they do not. To start, precedent is largely a draw. There are Supreme Court opinions applying both heightened and minimal review to economic regulations that adversely affect corporate speech.<sup>326</sup> But prudential and ethical consequences weigh in favor of deference. For its part, the majority did not conclude that allowing pharmaceuticals to market their branded drugs directly to doctors would be a net good for health care outcomes.<sup>327</sup> Instead, it left the "resolution of that debate" to an unregulated free speech market in which big pharmaceutical companies can wine and dine doctors to persuade them to write their preferred prescriptions.<sup>328</sup>

Letting big pharmaceutical companies speak (and letting prescribing doctors listen) in this way would surely further their respective liberty interests. But the value of doing so pales in comparison to the values furthered by leaving Vermont's chosen policy in place. As to institutional capacity, elected legislators are far better situated than courts to resolve the questions of what is best for patients and whether the law at issue is consistent with society's free

323. See *supra* notes 214–225.

324. And it's not particularly close. According to the Center for Responsive Politics, drug makers spent \$240 million lobbying in 2015 while the insurance industry came in second at \$157 million. Gina Chon, *Rising Drug Prices Put Big Pharma's Lobbying to the Test*, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/business/dealbook/rising-drug-prices-put-big-pharmas-lobbying-to-the-test.html> [<https://perma.cc/G43S-8DXY>].

325. *Id.*

326. See *supra* note 315.

327. See *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578 (2011). ("There are divergent views regarding detailing and the prescription of brand-name drugs. Under the Constitution, resolution of that debate must result from free and uninhibited speech.")

328. *Id.* (noting, but not resolving, the "divergent views regarding detailing and the prescription of brand-name drugs"); see also Charles Ornstein et al., *How Money from Pharmaceutical Companies Sways Doctors' Prescriptions*, ATLANTIC (Mar. 21, 2016), <https://www.theatlantic.com/health/archive/2016/03/how-money-from-pharmaceutical-companies-influences-doctors-prescriptions/474399/> [<https://perma.cc/VR6A-XLZA>] (finding that "[d]octors who got money from drug and device makers—even just a meal—prescribed a higher percentage of brand-name drugs overall than doctors who didn't").

speech norms. Lawmakers, after all, have access to exhaustive research studies on the effects of pharmaceutical marketing campaigns on patient health and health care costs. They are also far more likely to be inundated with evidence against regulation from the powerful pharmaceutical lobby than from consumer advocacy groups.<sup>329</sup> And it is precisely their job to be in touch with the evolving values of their constituents.

For related reasons, democracy and institutional legitimacy concerns also support deferring to the legislature. When legislators enact laws burdening pharma *in spite* of the unbalanced playing field of political influence, that is a sign of democracy in action, not in dysfunction. In these instances, judicial interference in the democratic process teaches citizens that their views on the policy debate (and the limits imposed by the First Amendment) are irrelevant. And when the Supreme Court tells a majority of Vermont voters that they are actually powerless to pass their preferred health regulations because wealthy drug companies possess some overriding liberty claim (that is neither textually nor historically evident in the Constitution), one can see how the Court's legitimacy might suffer in ways not unlike during the *Lochner* era.<sup>330</sup>

*Citizens United*. A similar analysis applies to the Court's decision in *Citizens United* to strike down a federal ban on corporate campaign expenditures made out of general treasury funds.<sup>331</sup> At step one of political power doctrine, the First Amendment's vague text and history do not determine whether government may place limits on corporate spending of this kind, as both answers are consistent with the communicative content of the Free Speech Clause.<sup>332</sup> That brings us to step two, where it is fair to say, based on their track record of legislative success and outsized participation in political inputs such as lobbying and campaign expenditures, that corporations as a whole (along with labor unions, who were similarly burdened by the law struck down in *Citizens United*) enjoy political influence clearly in excess of the median player in the political process.<sup>333</sup>

The harder task comes in constructing an answer to the dispute at step three. In my view, once the values associated with political power doctrine are brought to bear, the combined weight of precedential, prudential, and ethical

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329. See, e.g., *Pharma Lobbying Held Deep Influence Over Policies on Opioids*, ASSOCIATED PRESS (Sept. 18, 2016), <https://apnews.com/9b72ea1408f845eaa26638a652df2912> [<https://perma.cc/G674-8AVW>] (finding that the pharmaceutical lobby spent \$880 million compared to \$4 million by advocacy groups on opioid addiction).

330. See *supra* Part III.C.

331. See *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010).

332. See *supra* notes 320–322; compare Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 880–82 (2016) (arguing that *Citizens United* is incompatible with the original public understanding of the First Amendment), with *Citizens United*, 558 U.S. at 385–93 (Scalia, J., concurring) (defending the majority opinion on originalist grounds).

333. See Tang, *supra* note 10, at 1481–82 (describing measures of political influence held by corporations).



considerations support deference to Congress's judgment in enacting the corporate expenditure ban.

As an initial matter, precedent weighs in favor of deferring to Congress insofar as the *Citizens United* majority had to expressly overrule parts of two prior decisions to reach its preferred result.<sup>334</sup> The majority was moved to do so by what may be described as an ethical commitment (to granting corporations the same access to the marketplace of political speech as individuals) and a prudential defense (the view that siding with corporations would not corrupt public officials).<sup>335</sup>

Those arguments are contestable in their own right, as others have ably argued.<sup>336</sup> What I want to suggest is that even taking them as true doesn't decide the case once one accounts for the normative values served by political power doctrine. For a judge must weigh the majority's concern for protecting corporate speech against the democratic value of letting the American people regulate their electoral process as they see fit, the superior capacity of elected officials to evaluate a corporate expenditure ban's effects on and consistency with free speech values, and the benefits that deference to Congress can produce for the Court's institutional legitimacy.<sup>337</sup> Considering these values allows one to acknowledge that a ban on corporate campaign expenditures may or may not lead to a more robust political speech arena without undesirable political corruption. But the real question is *who should make this determination*. Recognizing the political strength of the groups burdened by the ban helps us see why it would be wiser to leave the choice to elected lawmakers.

### B. Gun Control

As has been discussed, *Heller* and *McDonald* held, respectively, that the Second Amendment guarantees an individual right to possess a handgun in one's home and that this right applies to the states by virtue of the Fourteenth Amendment.<sup>338</sup> The majority's reasoning in *Heller* is as originalist as it comes, concluding that Washington, D.C.'s handgun ban violates the Second

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334. 558 U.S. at 365 (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and a portion of *McConnell v. FEC*, 540 U.S. 93 (2003)).

335. *Id.* at 340–41, 356–61.

336. See, e.g., Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 155–58 (2010) (describing the majority's view of the First Amendment in *Citizens United* as a safeguard for liberty that cannot be squared with differential treatment for corporate speakers); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 21–27 (2012) (identifying and criticizing the Court's narrow view of corruption in *Citizens United*).

337. Indeed, concerns over institutional legitimacy would seem to be at their apex in a case like *Citizens United*. One recent poll showed that just 22% of Americans agree with that decision—fewer than any other major case included in the survey. See FIX THE COURT SURVEY 6 (2018), <https://fixthecourt.com/wp-content/uploads/2018/06/Fix-the-Court-national-SCOTUS-poll-toplines.pdf> [<https://perma.cc/T8HY-BS3U>].

338. See *supra* notes 169–170, 175.

Amendment as publicly understood at the founding, in light of available historical evidence.<sup>339</sup> *McDonald's* analysis largely mirrors *Heller's*, as the Court answered whether the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment by asking whether "the right to keep and bear arms is . . . deeply rooted in this Nation's history and tradition"—virtually the same question posed in *Heller*.<sup>340</sup> In neither case did the majority see the need to rely on prudential or ethical tools of constitutional construction, precisely because the outcome in each was determined by its originalist mode of inquiry.

Framed in terms of political power doctrine's three steps, then, the majority in *Heller* and *McDonald* would have deemed political power considerations immaterial at step one because the Second Amendment itself commands the invalidation of the challenged gun control laws. In the majority's view, there was simply no construction zone for normative values to fill. That explains why the majority in each case saw no need to confront the dissents' argument that deference to the legislatures was proper in view of the power held by gun proponents.<sup>341</sup>

But does the original public meaning of the Second Amendment conclusively answer whether a locality may ban handgun possession in the home? Several prominent originalists have debated the question. Professors Solum and Nelson Lund have both written approvingly of the *Heller* majority's reliance on the original understanding of the Second Amendment's semantic content to find an individual right to bear arms for self-defense.<sup>342</sup> Other originalists have disagreed, explaining (in accordance with the evidence mustered by Justice Stevens in dissent) how the proper original public understanding of the right is limited by the Amendment's purpose of guaranteeing the people the right to form a militia.<sup>343</sup> Significantly, however, even Solum and Lund have acknowledged the Court's failure to confront adequately the role that constitutional construction must play in deciding

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339. *District of Columbia v. Heller*, 554 U.S. 570, 576–619 (2008) (determining the Second Amendment's meaning by reference to its original public understanding).

340. *McDonald v. City of Chi., Ill.*, 561 U.S. 742, 767 (2010).

341. *See supra* Part II.A.2.

342. *See* Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 975 (2009) ("Justice Scalia's focus on the linguistic meaning or semantic content of the text of the Second Amendment explains his conclusion—that the Second Amendment provides for an individual right to possess and carry weapons."); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1368 (2009) ("*Heller's* successful effort at originalism begins and ends with its persuasive demonstration that the Second Amendment protects an individual and private right to keep and bear arms, at least for the legitimate purpose of self defense.>").

343. *See, e.g.*, Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 596 (2009) (arguing that the militia theory of the Second Amendment "has far more historical support in the period leading up to ratification"); Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008) (explaining how intra-textualism leads to a militia-oriented right); *accord* U.S. Const. amend. II ("A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.>").

whether the challenged gun control laws *actually* violate the Second Amendment, however it is originally understood.<sup>344</sup>

I have neither the space nor the expertise to add to this debate. Suffice it to say that if one thinks the outcomes of *Heller* and *McDonald* are determined without recourse to any tools of constitutional construction, what follows will carry little weight. But if one thinks that the text and history of the Second Amendment are consistent with two interpretations—one that invalidates bans on home gun possession and one that does not (whether because the right is limited to militia purposes or because infringements may still be justified on consequentialist grounds)—then the real issue is how to choose among the two.

Political power doctrine can help point the way. If at step one the fate of in-home gun possession bans is underdetermined, the next question is whether the group burdened by such laws is politically powerful. There is strong evidence to suggest that gun proponents, especially as represented by the National Rifle Association, clearly enjoy at least a median level of political influence by virtue of their numerosity, track record of legislative success, and outsized contribution to the inputs of political influence. As to numerosity, a significant number of Americans—30 percent—report that they currently own a gun.<sup>345</sup> That isn't a majority of the electorate, but more than half of persons who do not currently own a gun say that they could “see themselves owning one in the future.”<sup>346</sup> All told, two out of every three American adults either currently owns, or could see themselves owning, a gun—a sign of raw democratic power that should leave judges less inclined to second guess gun control legislation for democratic and institutional reasons. Gun proponents' record of legislative success is also telling: despite mass shootings like the Sandy Hook Elementary School tragedy, states continue to pass more laws each year *expanding* gun rights than laws limiting them.<sup>347</sup> Finally, gun proponents score highly on input measures of influence, too. The NRA alone spends fifteen times more on lobbying than gun control advocacy groups.<sup>348</sup> And self-identified gun rights supporters are four times more likely to donate money and write a politician about the issue than gun control advocates.<sup>349</sup>

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344. See Solum, *supra* note 342, at 975 (noting that “both ‘infringement’ and ‘the right to keep and bear arms’ are vague, and hence that construction is required”); Lund, *supra* note 342, at 1368 (“The fundamental problem with the *Heller* opinion is its failure to admit that some questions about the original meaning of the Constitution cannot be answered on the basis of a bare textual and historical inquiry.”).

345. KIM PARKER ET AL., PEW RESEARCH CENTER, AMERICA'S COMPLEX RELATIONSHIP WITH GUNS: AN IN-DEPTH LOOK AT THE ATTITUDES AND EXPERIENCES OF U.S. ADULTS 16 (June 22, 2017), <http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/06/06151541/Guns-Report-FOR-WEBSITE-PDF-6-21.pdf> [<https://perma.cc/Z2V5-MXP4>].

346. PARKER, *supra* note 345.

347. See *id.*

348. See *id.* Although the absolute amount (\$3 million per year) is smaller than many business groups. *Id.*

349. See James Surowiecki, *Taking on the NRA*, NEW YORKER (Oct. 19, 2015).

In presenting these figures, I should be candid in admitting that they provide evidence of gun proponents' political clout at the *national* level. Gun rights activists may not be so powerful in the states or localities where gun control legislation is actually enacted. This raises the important question whether political power should be measured locally or nationally. Others have argued for a local approach, at least when one is deciding if a group *lacks* political power.<sup>350</sup> That is sensible; I see no principled reason why a group that lacks influence in one legislature should be found powerful simply because it holds more clout somewhere else.

That said, one major difference where political power is our focus is that a group's strength at the *federal* level opens the door to national pre-emptive legislation, which would effectively displace any losses suffered locally. For example, gun rights groups have persuaded lawmakers to introduce bills in Congress creating a federal right for holders of state concealed firearm permits to carry their arms in other states.<sup>351</sup> So it may be that political power is more properly evaluated on a nationwide than local basis. For the time being, I can only gesture towards this possibility with the promise of a future paper that will specifically examine political power's geographic puzzle.<sup>352</sup>

If one agrees that gun rights advocates clearly possess a median level of political power, the next task is to apply our normative tools of constitutional construction. In my view, those tools support deference to legislative judgment. As a starting point, precedent as of *Heller* suggested that the Second Amendment protects gun ownership so long as it bears a "reasonable relationship to the preservation or efficiency of a well-regulated militia."<sup>353</sup> But more importantly, any vagaries in the meaning of that Amendment and any debate over the consequences of gun control measures are best entrusted to the wisdom of elected lawmakers who hear from (and are heavily influenced by)<sup>354</sup> powerful groups like the NRA. A legislative choice to enact a ban despite the pressure from gun proponents is strong evidence that these laws actually serve some public health benefit and are consistent with societal views about the uncertain meaning of the Second Amendment. And while such a conclusion may burden our national ethos of individual liberty, other commitments like the

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350. See, e.g., Stephanopoulos, *supra* note 8, at 1562 n.203.

351. See Will Baude, *A Better Constitutional Basis for the Concealed Carry Reciprocity Act of 2017*, WASH. POST (Mar. 23, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/23/a-better-constitutional-basis-for-the-concealed-carry-reciprocity-act-of-2017/?utm\\_term=.1fa0028741b5](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/23/a-better-constitutional-basis-for-the-concealed-carry-reciprocity-act-of-2017/?utm_term=.1fa0028741b5) [<https://perma.cc/YBV4-LQKA>].

352. Similar questions arise with respect to political power over time. What if a group is powerful at time-one, thereby triggering judicial deference, but then loses that power by time-two? Or vice versa? A similar problem bedeviled political process theory. See Stephanopoulos, *supra* note 8, at 1562 n.203 (collecting arguments regarding the fact that powerlessness may change over time). It remains to be seen if that is true of power doctrine, too.

353. *United States v. Miller*, 307 U.S. 174, 178 (1939).

354. See *supra* notes 348–350.

value of leaving policy choices to vibrant, ongoing debate among the people and their elected representatives seem overriding.

### C. Same-Sex Marriage

What of political power and the same-sex marriage litigation? In one sense, *Obergefell* and *Heller* are similar in that the dissents in both cases relied on political power without any rejoinder from the majority. But unlike in *Heller*, where the conservative majority thought the fate of D.C.’s handgun ban was determined by the original meaning of the Second Amendment alone, no proponent of same-sex marriage in *Obergefell* advanced the same claim about the Due Process Clause of the Fourteenth Amendment. In the framework of political power doctrine, this is a classic example of an underdetermined constitutional provision at step one.

The dispute in *Obergefell* really turned on steps two and three. As to step two, Chief Justice Roberts’s principal dissent took the view that same-sex couples are politically powerful: “Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view.”<sup>355</sup> That conclusion unlocked the Chief’s ability to point to democratic and institutional values at step three. The Court’s decision to “steal[] this issue from the people,” the dissent worried, “will for many cast a cloud” of democratic illegitimacy over “same-sex marriage, making a dramatic social change that much more difficult to accept.”<sup>356</sup> Further, the majority’s intervention threatens the “humility and restraint in deciding cases according to the Constitution and law” that together protect the “legitimacy of this Court.”<sup>357</sup> By contrast, the Chief argued, deference to the legislature would have been consistent with the Court’s limited institutional capacity, as “a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing [his] own perceptions on fellow citizens.”<sup>358</sup>

The *Obergefell* majority did not engage with the dissent directly,<sup>359</sup> but its analysis can plausibly be defended on political power terms. To start, it is fair to conclude that same-sex couples are not politically powerful in that they do not clearly possess the same clout as the median group in the political process. While empirical measures of the kind used by Stephanopoulos, Ross, and Li are not readily available, numerous data points suggest that gays and lesbians

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355. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–12 (2015) (Roberts, C.J., dissenting).

356. *Id.* at 2612; *see also id.* at 2625 (“There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds.”).

357. *Id.* at 2624.

358. *Id.* at 2622.

359. Few of Justice Kennedy’s most famous majority opinions do. *See, e.g., Obergefell*, 135 S. Ct. 2584 (no mention of, or response to, arguments advanced by “the dissent”); *Citizens United v. FEC*, 558 U.S. 310 (2010) (same); *Lawrence v. Texas*, 539 U.S. 558 (2003) (same).

actually suffer from a deficit of political influence. Consider, most significantly, the record-of-legislative-success factor.<sup>360</sup> As of 2013, shortly before *Obergefell* was decided, an astounding thirty-one states had enacted constitutional amendments limiting marriage to heterosexual couples and seventeen more had placed statutory limits on marriage rights.<sup>361</sup> The Chief Justice's argument about the success of gays and lesbians thus reflects *judicial* progress in overriding popular legislative defeats, not some emerging trend of political power. As political scientist Gary Segura explained, when legislative outcomes are actually considered, the picture is much different: gays and lesbians lost nearly 100 percent of ballot initiatives,<sup>362</sup> continue to be underrepresented in elected office,<sup>363</sup> and remain the target of social disapproval and hate crimes.<sup>364</sup>

In light of all this, it cannot be said with confidence that the decision by popular majorities in forty-eight states to preclude same-sex couples from the institution of marriage reflects a well-functioning democracy where decisions are driven by an even-handed assessment of the evidence (for example, about the impacts on children<sup>365</sup>), societal values, or the meaning of the Constitution. State lawmakers may have instead been attuned to the powerful voices opposing gay marriage,<sup>366</sup> many of which argued that gays and lesbians are "morally inferior."<sup>367</sup> And where that is true, there is little reason to think gays and lesbians will view their legislative defeats as fair and unbiased losses that ought to be contested in the same political arena in the future.

It is important to be clear about the limited implications of what turns on this point. Political power doctrine does *not* contend that gays and lesbians' lack of influence at the time of *Obergefell* is an affirmative reason for courts to intervene on their behalf. What I *am* arguing is that calls for deference to laws banning same-sex marriage that sound in democracy and institutional capacity

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360. Gays and lesbians are also a small minority of the voting population. See Frank Newport, *Americans Greatly Overestimate Percent Gay, Lesbian in U.S.*, GALLUP (May 21, 2015), <http://news.gallup.com/poll/183383/americans-greatly-overestimate-percent-gay-lesbian.aspx> [<https://perma.cc/A7VP-BWQQ>].

361. ALISON M. SMITH, CONG. RESEARCH SERV., RL31994, SAME-SEX MARRIAGES; LEGAL ISSUES 1–2, 30–31, 31 n.a (May 6, 2013), <https://fas.org/sfp/crs/misc/RL31994.pdf> [<https://perma.cc/7M5L-FPJW>]. By the time *Obergefell* was decided, eleven states had amended their statutory marriage definitions to permit marriage between persons of the same sex—yet even this was arguably in response to judicial rulings to the same effect. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting).

362. See Transcript of Proceedings at 1554, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW) (testimony of political scientist Gary Segura).

363. *Id.* at 1556–57.

364. *Id.* at 1560–68.

365. See *Obergefell*, 135 S. Ct. at 2600–01 (discussing effects on children).

366. See Transcript of Proceedings, *supra* note 362, at 1565 (testimony of Gary Segura stating that organized religious opponents of same-sex marriage are "the chief obstacle for gay and lesbian political progress," and it is "difficult to think of a more powerful social entity in American society than the church").

367. *Id.* at 1566.

and legitimacy—the kind of arguments advanced by the Chief Justice’s dissent—are unconvincing because they are based on the premise that burdened groups have enough influence to activate the advantages of legislative decision making in the first place. When that influence is lacking, and when the Constitution’s original public meaning is underdeterminate, it is reasonable for courts to rely more heavily on other normative considerations to resolve a case.

Seen in this light, the *Obergefell* majority’s decision is a defensible weighing of normative considerations at step three. As a prudential matter, one of the most consequential effects of a decision in either direction is the impact on children of same-sex couples. As the majority puts it, “children suffer the stigma of knowing their families are somehow lesser” when same-sex marriage is not recognized on equal terms—a stigma that is accompanied by the “significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.”<sup>368</sup> And in terms of overarching ethical principles that may be derived from the Constitution more broadly, treating individuals with dignity regarding private, personal life choices recognizes the “abiding connection between marriage and liberty.”<sup>369</sup> In the absence of overriding consequentialist concerns on the other side of the scale, *Obergefell* is a reasonable act of constitutional construction.

#### D. Punitive Damage Limits

Political power doctrine may also shed light on some less prominent (yet still difficult) areas of constitutional law. One such area is due process limits on punitive damages awards in state court. The Supreme Court has twice invalidated such awards because they were too large. First, in *BMW of North America, Inc. v. Gore*, the Court struck down a \$2 million punitive damages award imposed against an American car distributor for secretly repainting the plaintiff’s car.<sup>370</sup> The Court found the amount “grossly excessive” because it was 500 times greater than the actual damages suffered by the plaintiff.<sup>371</sup>

Seven years later, in *State Farm Mutual Automobile Insurance Company v. Campbell*, the Court invalidated a \$145 million punitive damages award against an insurance company.<sup>372</sup> Although the plaintiffs there had suffered \$1 million in compensatory damages due to State Farm’s egregious handling of an insurance claim, the Court was persuaded that the ratio of punitive to compensatory damages was too high when compared to the degree of reprehensibility of the company’s conduct.<sup>373</sup>

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368. *Obergefell*, 135 S. Ct. at 2600.

369. *Id.* at 2599.

370. 517 U.S. 559, 574 (1996).

371. *Id.* at 574.

372. 538 U.S. 408, 418 (2003).

373. *Id.* at 424–25.

Was the Supreme Court correct to impose these limits on state court punitive damages awards as a matter of federal constitutional law? The Justices and commentators have vetted the question at length.<sup>374</sup> For now, I wish simply to point out that political power doctrine offers good reasons for the Court to stay out of the field.

As an initial matter, the original public meaning of the Due Process Clause does not clearly resolve whether state court punitive damages awards are subject to federal constitutional limits, much less whether any individual award is grossly excessive.<sup>375</sup> So we are in the realm of constitutional construction. Within that realm, it seems fair to conclude that, when state legislatures decide to leave punitive damage awards uncapped, their choice burdens a group that clearly possesses at least a median level of political power: wealthy defendants (both corporate and individual) against whom juries may impose large awards.<sup>376</sup> Although wealthy defendants certainly aren't a majority of the electorate, if there is any ironclad finding in Stephanopoulos' extensive analysis, it is that the wealthy enjoy immense advantages when it comes to achieving their preferred policy aims.<sup>377</sup> And from an input perspective, wealthy individuals and corporations famously contribute to political campaigns at far higher rates than the middle class or poor.<sup>378</sup>

The conclusion that uncapped punitive damages awards burden wealthy defendants triggers a host of democratic and institutional reasons to favor a legislative policy resolution. To start, when lawmakers *decline* to set punitive damage caps in the face of powerful lobbying efforts by wealthy corporations,<sup>379</sup> that signals a healthy democratic process that places the desires

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374. See, e.g., *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting) (criticizing the Court's punitive damages case law as "insusceptible of principled application"); Jim Gash, *Punitive Damages, Other Acts Evidence, and the Constitution*, 2004 UTAH L. REV. 1191, 1191 (2004) (arguing that "[t]he United States Supreme Court is actively engaged in a hostile takeover of the punitive damages jurisprudence that historically has been owned and operated by the states").

375. See *Gore*, 517 U.S. at 599 (Scalia, J., dissenting) ("The Constitution provides no warrant for federalizing" determinations of the reasonableness of punitive damages awards).

376. This highlights how the political power doctrine may be applicable in cases where powerful groups challenge legislative *inaction* to protect their interests, not just legislative action that burdens their interests. In the punitive damages context, wealthy corporate defendants (like BMW and State Farm) ask the courts to override the choice by state lawmakers *not* to impose some upper bound on the amount of punitive damages a jury may award. Inasmuch as this choice also reflects a functioning discourse over public policy, the democratic and institutional reasons for deference are equally applicable.

377. See Stephanopoulos, *supra* note 8, at 1586 (finding that as support for a policy increases from 0% to 100% among persons in the ninetieth percentile of wealth, the odds of enactment increase from 10% to 70%, whereas the same increasing support among persons in the tenth and fiftieth percentiles *reduces* the odds of enactment from 50% to 20%).

378. See generally Nicholas Confessore et al., *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES (Aug. 1, 2015), <https://www.nytimes.com/2015/08/02/us/small-pool-of-rich-donors-dominates-election-giving.html> [<https://perma.cc/ETP3-DLK5>].

379. See, e.g., Mary Ellen Klas, *Legislators Role Out Bill to Snuff Damages for Tobacco Victims*, MIAMI HERALD (Feb. 18, 2015), <https://www.miamiherald.com/news/state/florida/article10642436.html> [<https://perma.cc/R799-5LYG>].



of citizens more broadly over special interests (subject, of course, to continued debate). Furthermore, elected officials seem well-suited to weighing the pros and cons of punitive damages caps and crafting finely tuned limits that respect the interests of wealthy defendants and individual plaintiffs. Indeed, many state legislatures have enacted such caps: some prefer fixed dollar limits, others impose maximum ratios to compensatory damages, and still others take into account factors such as the defendant's net worth.<sup>380</sup> Judicial review of whether some individual damage award is grossly excessive seems fraught by comparison.<sup>381</sup> And the institutional legitimacy of the Supreme Court seems especially at risk given that the invalidation of individual damages awards overrides not just the state legislature's refusal to enact a statutory cap, but also the judgment of a local jury whose very purpose is to serve as the "voice of the community" in issuing a punitive damages award.<sup>382</sup>

#### E. *The Fourth Amendment and Closely Regulated Industries*

A final area of law that might benefit from considering political power is the Fourth Amendment's exception to the warrant requirement for "closely regulated" industries. Under that exception, "intrinsically dangerous" industries that "have such a history of government oversight that no reasonable expectation of privacy could exist . . . for a proprietor" may be searched under a more relaxed Fourth Amendment standard.<sup>383</sup> Between 1970 and 1987, the Court found four industries to fall within this exception: automobile junkyards, mining, firearms dealing, and liquor retail.<sup>384</sup> But after 1987, substantial uncertainty emerged regarding whether other industries should be added to the list. For example, lower courts identified pharmacies, day care facilities, nursing homes, barbershops, and even rabbit dealers as "closely regulated" enough.<sup>385</sup>

The Supreme Court finally weighed in again in the 2015 case of *City of Los Angeles v. Patel*. At issue in *Patel* was a Los Angeles ordinance requiring all hotels to keep a guest register and to present that register to police upon request—without a search warrant.<sup>386</sup> The city's rationale was to "deter criminals from operating on the hotels' premises."<sup>387</sup> But are hotels of

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(describing efforts by an army of "95 lobbyists including a who's who of players close to . . . key Republican legislative leaders" to apply punitive damages cap retroactively).

380. Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 116 (2008).

381. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 604–07 (1996) (criticizing the "guideposts" offered by the Court as little more than "crisscrossing platitudes").

382. *Id.* at 600.

383. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454–55, 2455 n.5 (2015).

384. *Id.* at 2454.

385. See *id.* at 2461 (Scalia, J., dissenting) (noting examples of "closely regulated industries" as determined by lower courts).

386. See L.A., CAL. MUN. CODE § 41.49.

387. *Patel*, 135 S. Ct. at 2452.

sufficient inherent danger, and are they closely regulated enough, to trigger the exception from the warrant requirement? The *Patel* majority answered “no,” because hotels are not intrinsically dangerous, and because the licensing, taxation, and sanitation regulations of the hotel industry in California are not quite extensive enough.<sup>388</sup>

Regardless of whether the Court’s conclusions as to dangerousness and the extent of hotel regulations are right, the question is whether the Court should have made them in the first place, rather than democratically accountable legislators. When elected officials weigh the interests of public safety against the privacy interests of the hotel industry—and come out against the hotels, as was the case in Los Angeles—that is arguably the kind of legislative judgment most deserving of our trust. After all, the hotel industry has developed an influential lobbying arm,<sup>389</sup> and it is hardly obvious that the industry lacks the kind of resources needed to fight burdensome legislative proposals. Of course, if evidence emerged showing that hotels actually lacked a median-level ability to participate in the political debate over the Los Angeles ordinance,<sup>390</sup> a judge would be on solid ground concluding that the burdened entity did not clearly possess sufficient political power to trigger the institutional and democratic reasons for legislative deference. But absent such evidence, a judge could reasonably conclude that it is wiser to leave the reasonableness of warrantless hotel registry search laws to legislatures that, unlike the courts, would be able to revisit the issue periodically as called upon by affected parties.

Not every industry is politically powerful. There is no influential rabbit dealers’ lobby, for instance.<sup>391</sup> And one may find it hard to evaluate the power of other business sectors, such as barbershops and day cares.<sup>392</sup> In these kinds of cases, a court could reasonably conclude that the affected industry does not clearly possess a median amount of political influence. The result would be to reduce the strength of democratic and institutional arguments for deferring to

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388. *Id.* at 2455–56, 2455 n.5.

389. For reference, there are over 2,000 hotels in Los Angeles alone. *See id.* at 2456. The hotel industry has also demonstrated increasing national prominence in recent years. *See* Julie Sickel, *The U.S. Hotel Industry’s Lobbying Muscle & What It Wants to Accomplish*, BUS. TRAVEL NEWS (June 19, 2017), <http://www.businesstravelnews.com/Lodging/The-US-Hotel-Industrys-Lobbying-Muscle-What-It-Wants-to-Accomplish> [<https://perma.cc/C6HB-PSYH>]; Christopher Versace, *Hotel’s Lobbying Campaign Will Hurt Consumers*, FORBES (June 11, 2015), <https://www.forbes.com/sites/chrisversace/2015/06/11/hotels-lobbying-campaign-will-hurt-consumers/#66d5ebcd3ada> [<https://perma.cc/SL4F-VN2B>].

390. One reasonable argument to this effect would be that even if hotels generally have political influence, this is not the sort of issue that they would care about because the persons whose privacy is actually burdened by the law are hotel guests, many of whom are either unaware of or do not object to warrantless registry searches.

391. *Cf.* *Lesser v. Espy*, 34 F.3d 1301, 1306–07 (7th Cir. 1994).

392. *See, e.g., Stogner v. Commonwealth of Ky.*, 638 F. Supp. 1, 3 (W.D. Ky. 1985) (finding barbershops to be a “closely regulated industry”); *Rush v. Obledo*, 756 F.2d 713, 720–21 (9th Cir. 1985) (finding daycares to be a “closely regulated industry”).

the legislature's choice to permit warrantless searches. Whether such searches should be permissible would then turn on a weighing of the remaining modalities of constitutional argumentation, such as relevant precedent, ethical commitments to liberty and societal expectations of privacy, and prudential considerations regarding the need for warrantless searches in the first place. By contrast, when there is strong evidence that a given industry is powerful but has simply lost in the legislative debate, there is value in letting that democratically enacted choice stand.

*F. Political Power Doctrine and Political Process Theory*

Readers may wonder whether there is any difference between the political power doctrine I have described and its predecessor, political process theory. One of political process theory's necessary implications, after all, was that when a group is *not* powerless—that is, where it might be thought of as possessing some “sufficient” amount of power—then the legislature is entitled to a presumption of constitutionality. In that sense, traditional political process theory would seem to entail political power doctrine as its necessary flipside.

One response is simply to admit the overlap, yet urge political power doctrine's relevance anyhow. If political power doctrine is just the under-theorized and under-explored inverse of political process theory, in other words, it may be time to theorize and explore it more fully.

But another response is to be clear about how the two theories diverge. One key to seeing this divergence is to recognize the way in which each approach posits a different understanding of the background universe of constitutional adjudication. Political process theory functioned in a dichotomous world where statutes challenged under the Constitution fit into one of two categories: presumptively constitutional and presumptively not. The following chart shows this world as expressed in *Carolene Products* Footnote 4.<sup>393</sup>

<b><u>Presumptively Unconstitutional</u></b>	<b><u>Presumptively Constitutional</u></b>
<ul style="list-style-type: none"> <li>• Laws that burden politically powerless minority groups</li> <li>• Laws that restrict access to the political process</li> <li>• Laws that facially violate the Constitution's specific prohibitions</li> </ul>	<ul style="list-style-type: none"> <li>• All other laws</li> </ul>

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393. See 304 U.S. 144, 152 n.4 (1938).

I have argued, however, that this dichotomous world view no longer reflects reality.<sup>394</sup> With the presumption of constitutionality on the outs and an emerging consensus that there exists an area of constitutional construction where cases turn on normative argumentation,<sup>395</sup> we live now in what might be more accurately viewed as a four-column world:

<b><u>Unconstitutional Per Se (Interpretation)</u></b>	<b><u>Unconstitutional Per Quod (Construction)</u></b>	<b><u>Constitutional Per Quod (Construction)</u></b>	<b><u>Constitutional Per Se (Interpretation)</u></b>
Laws that are unconstitutional as determined by the Constitution's original public meaning	Modes of argument (history, precedent, structure, ethical and prudential commitments) → strike down law	Modes of argument (history, precedent, structure, ethical and prudential commitments) → uphold the law	Laws that are constitutional as determined by the Constitution's original public meaning

The far-left and far-right columns (in white) correspond to cases that can be resolved via constitutional interpretation, where the original public meaning of the Constitution determines the dispute in either direction. The middle two columns represent the zone of constitutional construction, where the original public meaning constrains, yet underdetermines, the dispute's outcome. Here, all cases must be resolved by recourse to normative argumentation, which I have stipulated to mean a version of constitutional pluralism that considers historical, structural, precedential, ethical, and prudential modalities once the text itself runs out.<sup>396</sup> In the left of the two middle columns, those normative arguments weigh in favor of striking down the law; in the right, they weigh towards upholding it.

If this four-column world more persuasively reflects constitutional decision-making than the two-column era of the presumption of constitutionality, then political power doctrine may be thought of as supplying one normative framework for deciding whether a law should be placed in the third column (and upheld) rather than the second (and struck down). Namely, that should be the outcome when the group burdened by a challenged law clearly possesses a median amount of political influence and other values are not overriding. If the burdened group does not enjoy this level of political power, then the law may still be upheld or invalidated; it's just that other normative arguments will have to determine which outcome is more appropriate.

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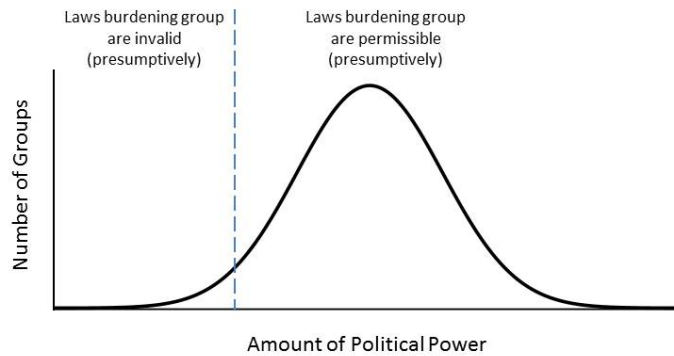
394. See *supra* Part I.B.

395. See *id.*

396. See *supra* notes 244–246.

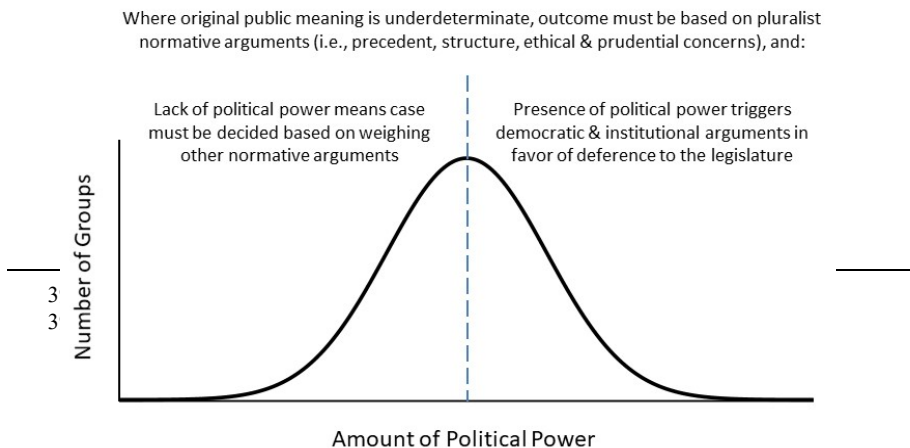
Another way to see the difference between political process theory and political power doctrine is to focus on what turns on a political power determination in both approaches. Under traditional political process theory, laws are presumptively constitutional,<sup>397</sup> and a finding of political powerlessness operates as a reason to depart from that default and strike down a law.<sup>398</sup> The graph below demonstrates this dynamic.

### Traditional Political Process Theory



Under political power doctrine, by contrast, the permissibility of laws challenged on underdetermined constitutional grounds is decided through a weighing of normative arguments, where a finding of political power activates democratic and institutional values in favor of deference to legislatures. Thus, unlike political process theory, where powerlessness is *itself* the reason to strike down the challenged law, powerlessness on this account has no affirmative role to play. If a law burdens some powerless group, the Court will still need to consult pluralist arguments based on structure, history, precedent, and ethical and prudential commitments for invalidating or upholding the law. The graph below portrays this more nuanced approach.

### Political Power Doctrine



The cases just discussed illustrate the differences between the two approaches. Consider a case like *Obergefell*. On the old saw process theory approach,<sup>399</sup> everything turns on whether gays and lesbians are held to be a discrete and insular minority group that is politically powerless (and thus on the left side of the dotted line).<sup>400</sup> If they are, that very fact would trigger strict scrutiny and the near-certain invalidation of state marriage bans; if they are not, the bans would be upheld under rational basis review. Under political power doctrine, by contrast, the absence of power does not itself determine the outcome. For once a court concludes that gays and lesbians are not clearly as powerful as the median group in the political process (and thus to the left side of the dotted line),<sup>401</sup> that fact merely reduces the force of the democratic and institutionalist arguments for deference and allows other arguments—like the consequences of the marriage bans on children and individual liberty—to supersede.<sup>402</sup>

The concrete difference between the two theories is also palpable in the First Amendment context. The concern for powerlessness was just one part of political process theory's broader concern for reinforcing representative democracy.<sup>403</sup> Process theory also advocated heightened scrutiny of laws that “chok[e] off the channels of political change,” including laws that restrict free speech.<sup>404</sup> It is therefore quite plausible that First Amendment *Lochnerism* and its attendant concern for increasing the flow of speech would be consistent with political process theory.<sup>405</sup> Political power doctrine, however, would treat the burdened corporations' political influence as a strong reason to find the normative values associated with legislative deference more weighty than the values served by judicial interference.

Cases involving legislation that authorizes warrantless searches of “closely regulated businesses” might also come out differently under the two theories. Political process theory would likely decide these cases under the default presumption of constitutionality, finding no reason to be particularly distrustful of laws burdening businesses (short of a particular business so

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399. This is assuming, contrary to the Court's actual decision, that the case is decided on an equal protection basis. See *supra* note 59. That itself identifies one difference between the two approaches, as the political power doctrine is intended to apply across the Constitution's various underdeterminate provisions.

400. See *supra* note 7.

401. See *supra* notes 231–233.

402. See *supra* Part IV.C.

403. See ELY, *supra* note 37, at 105–81 (describing the access and prejudice prongs of the political process theory).

404. *Id.* at 103.

405. See, e.g., Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 701 (2004) (arguing that federal campaign finance regulations are arguably inconsistent with Ely's political process theory). Note that this is likely more true of political speech regulations than commercial speech regulations.

lacking power as to approach a discrete and insular minority group).<sup>406</sup> A focus on political power would be more nuanced. In the absence of a presumption of constitutionality, normative reasons would be needed to decide a given case in either direction. And for the reasons given earlier, the normative values of democracy and institutional capacity and legitimacy are more forceful when lawmakers have burdened powerful business interests.<sup>407</sup>

Other cases would likely come to the same result, albeit through a different decision-making pathway. In the gun control and punitive damages cases, for instance, either approach would result in deference to the political branches. But whereas the political process approach would do so by relying on the general default presumption of constitutionality (which neither gun proponents nor wealthy defendants could displace by arguing that they are powerless), political power doctrine would conclude that, given the political influence held by the burdened groups, the institutional and democratic values of deferring to the legislatures' choices outweigh the prudential and ethical arguments in favor of overriding them.

#### CONCLUSION

I have argued that legislative enactments burdening politically powerful groups hold a special kind of democratic and institutional pedigree that courts should take into account. I have *not* argued that this fact somehow renders constitutional adjudication easy (or even easier). Like other methods for resolving disputed questions of constitutional law, political power doctrine ultimately involves some degree of judgment. Whether a constitutional provision underdetermines a dispute, and how competing normative considerations cash out, are each questions that reasonable people may disagree on in any case.

That is also true—perhaps *especially* true—when it comes to determining how much power is possessed by a group that has lost in the political arena. The key point, though, is whether you believe something should turn on this question. So many in the academy have argued that it should, at least when the burdened group is *powerless*.<sup>408</sup> But why should we care only about the negative half of the political power spectrum? The Court itself has cared about the other side in a number of cases,<sup>409</sup> and that concern properly reflects the democratic and institutional benefits of letting the political branches resolve difficult constitutional questions—at least when they affect powerful interests.<sup>410</sup>

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406. See ELY, *supra* note 37, at 172–73.

407. See *supra* Part III.

408. See *supra* Part I.A.

409. See *supra* Part II.A.

410. See *supra* Part III.

So, people may disagree whether gun rights groups are sufficiently powerful to warrant leaving the uncertain Second Amendment up for grabs in the political branches, or whether corporations should have to press their Free Speech deregulation claims in legislatures in light of their political clout. And people may disagree over whether gays and lesbians were actually so powerful as to justify leaving same-sex marriage to the ordinary democratic process. But so long as we agree that *political power matters*, a theory of judicial deference rooted in that fact may be worthy of our attention, even though the inverse theory has fallen on hard times.