The Politically Powerful and Judicial Review

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Aaron Tang, *Rethinking Political Power in Judicial Review*, __ **Cal. L. Rev.** __, (forthcoming 2019), available at SSRN.

Courts and commentators have long debated the proper role of judicial review in democracies, particularly the question of how deferential courts should be when determining whether to uphold legislation. Much constitutional adjudication is devoted to understanding phrases that are reasonably susceptible to various meanings, even when history and precedent are consulted. In those situations, how certain should jurists be that their interpretations of constitutional phrases or terms are correct before they vote to invalidate democratically enacted legislation?

At least two facts drive and complicate the answer to this question. First, we live in a land where the people purportedly govern themselves; there must be some limitations on the ability of unelected judges to invalidate legislation. Second, we live in a land where history has taught that, when left unchecked, elected officials sometimes trample individual rights and subjugate politically powerless minorities with impunity. Attentive to both of these facts, adherents of the political process theory of judicial review advocate for a judiciary that is deferential to politically accountable branches unless (1) the law undermines the capacity of citizens to make political change or (2) the law burdens a politically unpopular group. Under John Hart Ely's traditional understanding of political process theory, when a law "clog[s] the channels of political change," or targets a politically powerless group, this should increase courts' readiness to invalidate a potentially unconstitutional law.

Aaron Tang's forthcoming article persuasively makes the case that this traditional articulation of political process theory provides an incomplete accounting of the ways that political power can and should inform judicial review. Political process theory, he contends, is not just about political powerlessness; it is also about political powerfulness. Not only should courts be more willing to invalidate legislation that burdens politically powerless groups; they should also be *less* willing to invalidate legislation that burdens politically powerful groups.

Tang's observation has both descriptive and normative dimensions. s a descriptive matter, he identifies ways that the Supreme Court has invoked groups' political powerfulness as a reason to defer to elected officials' legislative choices. For example, the Court cited the political influence of taxpayers while upholding legislation taxing state workers. More recently and famously, the Court upheld legislation burdening States, citing States' political power in our constitutional design. The Court cited unique advantages that States have in the federal legislative process, particularly the equal suffrage that each State receives in the Senate. Garcia v. San Antonio Metropolitan also cited victories that States had achieved in the national political arena, including federal revenues that are directed to State treasuries and exemptions from broad swaths of legislation.

The Supreme Court further relied on political power when upholding legislation against challenges under Dormant Commerce Clause jurisprudence. In upholding legislation in *Minnesota v. Clover Leaf Creamery*, the Court observed that the law most adversely affected powerful in-state interests. Those "major in-state interests" stood as "a powerful safeguard against legislative abuse."

Tang notes that in recent cases, a range of justices from across the ideological spectrum have cited groups' political power as a reason to uphold legislation involving gun rights and same-sex marriage, albeit in dissent. Dissenters in McDonald v. City of Chicago argued that the elected branches were capable of safeguarding interests in keeping and bearing arms, adding that "no one disputes that opponents of [gun] control have considerable political power." Chief Justice Roberts' dissent in Obergefell v. Hodges emphasized that supporters of same-sex marriage "ha[d] achieved

considerable success persuading their fellow citizens—through the democratic process—to adopt their view."

In addition to persuasively showing that a number of justices do invoke political power as a ground to uphold legislation, Tang argues that they should do so. This would bolster democratic values and perhaps even judicial legitimacy. When constitutional text is ambiguous, it is generally sound to defer to politically accountable bodies, so long as the political process is working as it should. In our democratic republic, legislation is understood to be a valuable expression of majoritarian will. When a constitutional challenge is based on ambiguous text, history, and precedent, it is hardly clear that judges should always err on the side of invalidating the people's political choices.

Moreover, in the face of indeterminate constitutional text, principles and values assist judges with close calls; but it is not apparent why their principles and values are institutionally more sound or legitimate than those of the people's elected representatives. This is more true when a law burdens a group with outsized political power, because a majority of voters overcame powerful forces to enact their will. Further, courts may weaken their own legitimacy by regularly invalidating legislation designed to tame politically powerful forces in the face of ambiguous text.

Tang offers concrete examples of cases that would potentially yield a different result if the Court focused more consistently and explicitly on political power when determining whether to defer to a legislative choice. His most compelling examples attack so-called "First Amendment Lochnerism." The Supreme Court has relied on ambiguous constitutional text to invalidate the people's attempts to check corporations' runaway financial influence over American elections. Citizens United relied on ambiguous text to (1) invalidate congressional limits on corporate expenditures and (2) overrule precedent that was more deferential to elected officials' choices. Large corporate interests are politically powerful in our electoral system, particularly compared to most juridical or natural persons.

Tang's contribution is remarkably timely. The role of political powerlessness in constitutional adjudication appears to be waning. The Court has not identified a new suspect class for equal protection purposes in roughly forty years. *Trump v. Hawaii* upheld government action burdening non-citizens and religious minorities, with nary a mention of those groups' relative inability to protect themselves in the political process. Tang highlights ways that political power does and should play a role in constitutional adjudication, as have a broad range of justices. This suggests that the phenomenon may survive the shifting ideological winds. Tang's observations can and should shape the future of judicial review in powerful ways.

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