The Power to Shape the "Political"

Amanda Shanor[*]

I. INTRODUCTION

The role of corporations in American life has become the focus of intense public and scholarly debate. How do corporations influence political outcomes? What norms or laws should structure corporate political participation? And who should decide what political interventions corporations make? These are vitally important questions that bear on how to deal with the pressing challenges of social media, money in politics, polarization, autocratic threats, and the influence of consolidated capital on governmental and democratic decision-making.

Most conversations about the role of corporations in politics, however, assume a definition of "political." This key term is commonly taken for granted or simply ignored—often standing in for a vaguely defined concept of politicians, regulatory agencies, lobbyists, and the money and information flows between them. The

[*] Assistant Professor and Wolpow Family Faculty Scholar, the Wharton School of the University of Pennsylvania. Thank you to the editors of the *University of Chicago Business Law Review*, including Anna Dincher and Maddie Fleming, for organizing this rich conversation and for their helpful comments and suggestions. I am grateful to Emily Chapuis, Sarah Light, Elizabeth Pollman, and Robert Post for helpful conversations and feedback that sharpened these ideas. All errors are my own.

idea of the "political" is under significant dispute, and its meanings have shifted dramatically, particularly over the last four decades.

This essay lays out an abbreviated genealogy of the "political" and the role of corporations in its development. Corporations have played an outsized role in shaping the boundaries and content of what is understood to be "political" both within multiple areas of law and in American culture more broadly, largely in ways that have limited market-regulating or redistributional governmental action.

This essay also explains that competing definitions of the "political" have led to fundamental contradictions in constitutional law. The term serves as a, if not the, dispositive concept in a range of doctrines. In takings law, for example, the "political" designates the sphere of appropriate governmental action. But the major questions doctrine operates on a near opposite definition: the "political" is the space of impermissible regulatory action. And, surprisingly, First Amendment law employs both concepts.

Recent political and ideological reconfigurations are putting new and different pressures on the "political." The influence of the business community and libertarianism have begun to wane as polarization has become more intense. The growing clash between identitarian populism—by which I mean the view that law should protect and advance a single cultural identity to the exclusion of other identities, other values, or pluralism—and previously-dominant libertarianism within the Republican coalition is likewise transforming cultural ideas of the political and its normative valance. The essay concludes by asking what that transformation may mean for the role of corporations in politics—and in shaping the boundaries of the "political" itself.

II. THE ORIGINS OF THE "POLITICAL"

This essay is premised on a straightforward proposition: legal concepts evolve over time.[1] The idea of the "political" has not been a historically static concept, but instead a remarkably dynamic one that has transformed in important ways.

The concept has done significant work in the twentieth and twenty-first centuries. The Supreme Court famously clashed with

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[1] A similar proposition serves as the basis for Reva Siegel's pathbreaking article, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997), on the evolution of the ways that legal systems enforce social stratification.

New Dealers over the scope and purpose of the regulatory state during the Lochner era. As Cass Sunstein has argued, during that period of laissez-faire constitutionalism, the Court defined constitutional freedom against a common law baseline—and so largely prohibited economic regulations, such as minimum wage laws, that reallocated wealth differently than common law principles.[2] During the mid-twentieth century, the Court embraced a New Deal vision of constitutional freedom that largely privileged democracy and government over business interests and consolidated wealth.[3] This constitutional framework saw the political as democratic government advancing the common good.

Beginning in the 1970s, the business community began to organize "across a broad front to seek a reorientation of American politics" away from that New Deal vision.[4] Many had come to believe that their key problems came from government and democracy, and through concerted cooperative action, they sought a political and constitutional revolution.[5] Over the last roughly forty years, the business community has been enormously successful in that effort, in significant part by persuading courts to adopt ideas of the "political" within constitutional law that advance libertarian-leaning market prerogatives, as a deep literature on First Amendment Lochnerism and deregulatory constitutionalism in

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2 Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987).

3 Amanda Shanor, *The Tragedy of Democratic Constitutionalism*, 68 UCLA L. Rev. 1302, 1319–20 (2022); President Franklin Delano Roosevelt, *Acceptance Speech for the Renomination for the Presidency Before the 1936 Democratic National Convention in Philadelphia* (June 27, 1936) (transcript available at The American Presidency Project, https://perma.cc/XFY6-XHRG) ("For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives. For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness. Against economic tyranny such as this, the American citizen could appeal only to the organized power of Government."); William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823, 1841 (2019) (arguing that a key goal of New Deal administration was to place democracy and administration over consolidated wealth).

4 JEROME L. HIMMELSTEIN, TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM 132 (1990); *see also* Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 154–63 (tracing the role of the business community and larger conservative legal movement in the libertarian turn of free speech jurisprudence).

5 Himmelstein, *supra* note 4, at 135–38; THOMAS BYRNE EDSALL, THE NEW POLITICS OF INEQUALITY 129 (1984); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 118 (2010) ("The organizational counterattack of business in the 1970s was swift and sweeping . . . . As members of coalitions, firms could mobilize more proactively and on a much broader front.").

part traces.[6] Those efforts have culminated in the adoption of libertarian ideas within a wide variety of constitutional doctrines[7]—for example within the First Amendment in cases such as *Citizen's United v. Federal Election Commission*, which expanded corporate money in politics,[8] and in separation of powers doctrines undermine the foundations of the New Deal administrative state, including in the context of the major questions and deference doctrines.[9] During this time, corporations and the business community have played an outsized role in shaping the meanings of the "political," both within law and within broader American culture—particularly in tilting its meaning in ways that advance libertarian outcomes or neoliberal market prerogatives.[10]

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[6] Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 161–62 (2021); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784, 1786–94 (2020); Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241 (2020); Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1700–10 (2019); Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2161 (2018); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 179 (2018); Gillian E. Metzger, *Forward: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 28–30 (2017); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1206–09 (2015); John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24 (2015); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1140 (2015); Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 234–37; Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917–22 (2016); Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 16–17 (2010); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 165–68 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 196–203, 211–13 (2014); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 2, 2013), https://perma.cc/Z9CP-4PTF. For early seminal work, see Thomas H. Jackson & John Calvin Jeffries Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 1–6, 30–33 (1979); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1386–88 (1984); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L. J. 375, 376–87; Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 935–42 (1993).

[7] Shanor, *supra* note 3.

[8] 558 U.S. 310 (2010).

[9] *See* West Virginia v. EPA, 597 U.S. 697 (2022); Loper Bright Enters. v. Raimondo, 603 U.S. ___ (2024).

[10] *See, e.g.*, Shanor, *supra* note 4, at 154–63. For decades, the business community, libertarian intellectuals, and the law and economics movement have used "political" as a derisive term to indicate overweening governmental action that inappropriately interfered with neutral market ordering. Looking beyond law to American culture, over the last 40 years, "political" has often indicated the line between the sphere of inappropriate governmental action and neutral market ordering. The stigma and delegitimization that is

For decades, the business community, libertarian intellectuals, and the law and economics movement have used "political" as a derisive term to indicate legislative or administrative action that inappropriately interferes with neutral market ordering. These ideas have been absorbed in American culture beyond law. The stigma and delegitimization that is evoked by describing corporate actions as "political" relies on the assumption that markets are, by definition, free, neutral, and apolitical.[11]

A. The Public/Private Distinction

The modern concept (or, really, concepts) of the "political" was built off earlier distinctions in constitutional law—including the distinctions of the public/private and social/civil/political rights. This Section traces the intellectual history of the idea.

Morton Horowitz famously described the public/private distinction as arising out of "a double movement in modern political and legal thought."[12] That shift ultimately produced the dichotomy still embedded in U.S. legal thinking between public law (constitutional, administrative, and criminal law) and private law (property, contracts, and torts). The concept of a distinctly public realm, Horowitz observed, arose from the advent of the nation-state and theories of sovereignty in the sixteenth and seventeenth centuries.[13] While "[o]n the other hand, in reaction to the claims of monarchs and, later, parliaments to the unrestrained power to make law, there developed a countervailing effort to stake out distinctively private spheres free from the encroaching power of the state."[14]

The public/private distinction did not become a central organizing principle within American and English law, however, until the nineteenth century, when the Industrial Revolution both solidified the market as the principal institution allocating social and economic interests and prompted lawmakers to develop then-

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evoked by describing corporate actions as "political" relies on the assumption that markets are, by definition, neutral and nonpolitical.

[11] This assumption has been robustly debunked both by realists from a theoretical perspective and behavioral economists from a factual one. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952); RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS 4–5 (2015); Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

[12] Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423 (1982).

[13] *Id.*

[14] *Id.*

innovative regulations to fight its effects. The chief worry animating the effort of nineteenth century judges and legal thinkers to draw a sharp distinction between the public and private realms was to "separate law from politics . . . [b]y creating a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics."[15]

Owen Fiss has aptly described the social theory underlying this view as one that took the market "as the basic ordering mechanism of society" and the state as an institution "created to serve certain discrete ends that exist prior to and independent of it."[16] The state's central goals were to facilitate exchange of goods, protect property rights, and deter activities like violence or fraud that inhibited "individuals from engaging in exchange or otherwise fully realizing their own ends."[17] The public realm, on that account, was the scope of the appropriate exercise of the police power.[18] Internal to the law, the line between these assertedly distinct realms frequently served as the cleft between relaxed and stringent judicial review.[19] As discussed below, the contemporary concept of the "political" now serves a similar function: drawing a line that determines the applicable level of review (and thereby often the outcome) within many constitutional law doctrines.

Legal Realists launched near-fatal attacks on the nineteenth-century, formalist distinction between the public and the private, arguing that private law, as much as public law, is necessarily structured by and reflects nonneutral normative and political choices—and that the operative question was what choices advanced the public interest.[20] But the threat of European fascism, totalitarianism, and communism presented during World War II

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15 *Id.* at 1425.

16 OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 47 (1993). *See generally* Sunstein, *supra* note 2 (arguing that the Lochner Court's concept of constitutional liberty reflected a baseline of common law entitlements).

17 *Id.*

18 Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751 (2009) (arguing that rights protected in the Lochner era were not the robust rights-as-trumps that have become a central feature of modern period).

19 *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

20 *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 491–93 (1923). Law and political economy scholars have more recently emphasized this observation. *See* David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 7 (2014) ("The very idea of a 'market' has no operational content without a series of prior political decisions that define and allocate economic rights, such as property and the power to contract.").

and the Cold War reanimated the desire of American legal thinkers to cabin the scope of politics during the mid-twentieth century.[21] Since then—perhaps most significantly through the Reagan Revolution and, later, the law and economics movement—business interests and libertarian thinkers further fostered the notion that markets are neutral, private institutions with which politics and regulation should not interfere.

This distinction between political and market interests crystalized over the twentieth century into what others have described as a view of law that, on the one hand, in private law "encases 'the market' from claims of justice and conceals it from analyses of power" and, on the other, "exclude[s] economic power and other structural forms of inequality" from consideration in public law, which is "restricted to narrowly defined differential treatment of individuals, especially by the state."[22] On this neoliberal account, the "political" is properly cabined within state action that facilitates market ordering and is blind to extant stratifying social categories,[23] particularly race. This means that property protection is defined to begin after significant entitlements have been redistributed, e.g. from indigenous and formerly enslaved people to current beneficiaries.[24]

B. Tripartite Civil, Political, and Social Rights

The contemporary concept of the "political" also traces its roots to the tripartite understanding of rights dominant in the

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[21] Horowitz, *supra* note 12, at 1427 ("Until World War II, twentieth-century progressivism emphasized the role of the state in creating institutions that would promote a public interest. In reaction to the spread of totalitarianism, progressivism after World War II capitulated to the argument that any substantive conception of the public interest was simply the first step on the road to totalitarianism."); Jeremy K. Kessler, *The Political Economy of "Constitutional Political Economy*,*"* 94 TEX. L. REV. 1527, 1548 (2016) (reviewing Joseph Fishkin and William Forbath's then-forthcoming *The Anti-Oligarchy Constitution* (2017)) ("Aided by economic failure at home and the ascendance of fascism and communism abroad, conservatives in Congress, the bar, and the press launched an all-out assault on the New Deal administrative state, decrying it as the anticonstitutional beachhead of domestic totalitarianism.").

[22] Britton-Purdy et al., *supra* note 6, at 1784, 1790.

[23] *See generally* Siegel, *supra* note 1, at 1111 ("We know that doctrines of heightened scrutiny have disestablished overtly classificatory forms of race and gender status regulation dating from the nineteenth century. Yet the doctrine of discriminatory purpose currently sanctions facially neutral state action that perpetuates race and gender stratification, so long as such regulation is not justified in discredited forms of status-based reasoning.").

[24] *Cf.* Johnson v. McIntosh, 21 U.S. 543 (1823) (indigenous Americans have no right to transfer property); Civil Rights Cases, 109 U.S. 3, 25 (1883) (striking down the Civil Rights Act of 1875, a public accommodations law, saying that formerly enslaved people must "take[] the rank of a mere citizen, and cease[] to be the special favorite of the laws").

nineteenth century. During Reconstruction, that theory taught that rights took three forms: civil, political, and social. The domain of social rights—which included questions of equality in schooling, marriage, and social status—was viewed as prior to and not regulable by the Constitution, and political rights, such as the right to vote or hold office, were largely seen as mere privileges. Only the regulation of civil rights (which entailed common law rights, including property and contract) was understood as subject to Fourteenth Amendment constraints.

In this paradigm, civil rights—"those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens"—were viewed as subject to constitutional (re-) ordering immediately after the passage of the Reconstruction Amendments. Social rights, by contrast, were seen as something for individual choice, beyond law.[25] Thus, the civil/social dichotomy separated the private domain into a small field of protected market-related rights and a larger domain of other relationships, which were left to (often discriminatory) social ordering. Line drawing between the civil and social spheres was crucial to two of the period's seminal Supreme Court cases—*Plessy v. Ferguson*[26] and the *Civil Rights Cases*[27]—which held that the Fourteenth Amendment did not require or empower Congress to require nondiscrimination in what were viewed as the "social" spaces of public accommodations.

Political rights in this triad were largely seen as privileges that a polity could extend at its discretion. On this view, "[t]he equality of the protection secured extends only to civil rights, as distinguished from those which are political or arise from the form of the government and its mode of administration."[28] Thus,

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[25] *Civil Rights Cases*, 109 U.S. at 22 ("Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."); *id.* at 59 (Harlan, J., dissenting) (agreeing with the majority that "[n]o government ever has brought, or ever can bring, its people into social intercourse against their wishes," but contending that "equality of civil rights which now belongs to every citizen" includes nondiscrimination in public accommodations).

[26] 163 U.S. 537 (1896).

[27] 109 U.S. 3.

[28] Ex Parte Virginia, 100 U.S. 339, 367 (1879) (Field, J., dissenting) (dissenting on the basis that white-only jury requirements regulate only political, not civil, rights and so Congress has no power to prohibit such requirements under the Thirteenth or Fourteenth

except the Fifteenth Amendment's prohibition on abridgement of the right to vote on the basis of race, the franchise could be constitutionally limited by sex, wealth, or other basis.[29]

Reva Siegel has captured how the ways that legal systems enforce social stratification change over time.[30] She argues that the tripartite rights framework, which was used to enforce social stratification following Reconstruction, evolved into the intent/impact distinction that emerged in equal protection jurisprudence in the 1970s.[31]

> Over the last several decades, this body of equal protection doctrine has abolished many traditional forms of race and gender status regulation, and so has transformed the face of the American legal system. But has it ended the state's role in enforcing race and gender stratification—or instead caused such regulation to assume new form? Viewed historically, this question might be recast in the following terms. The body of equal protection law that sanctioned segregation was produced as the legal system endeavored to disestablish slavery; the body of equal protection law we inherit today was produced as the legal system endeavored to disestablish segregation. Are we confident that the body of equal protection law we inherit today is "true" equal protection, or might it stand in relation to segregation as Plessy and its progeny stood in relation to slavery?[32]

As the next Section demonstrates, the concept of the "political" embedded in contemporary constitutional law reflects the ideas of multiple eras. Some represent a view of the "political" forged during the New Deal in opposition to laissez faire

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Amendments); *see also* Strauder v. West Virginia, 100 U.S. 303 (1880) (holding that the Fourteenth Amendment prohibits laws requiring white-only juries as an infringement on civil rights).

29 *See* Minor v. Happersett, 88 U.S. 162 (1874) (upholding state law that limited the franchise to men, holding that voting is not a privilege or immunity of citizenship, and noting that when the federal constitution was adopted in "no State were all citizens permitted to vote"). After the passage of the Fifteenth and Nineteenth Amendments and under the influence of the Cold War and work of the civil rights movement, civil and political rights jointly came to be understood as constitutionally protected "civil rights." *See, e.g.*, Harper v. Va. State Board of Elections, 383 U.S. 663 (1966) (holding that poll taxes violate the Equal Protection clause).

30 Siegel, *supra* note 1.

31 Washington v. Davis, 426 U.S. 229 (1976).

32 Siegel, *supra* note 1, at 1114.

constitutionalism. Others reflect the libertarian idea of the late twentieth and early twenty-first century business leaders in opposition to the New Deal expansion of the administrative state.

III. CONFLICTING CONTEMPORARY MEANINGS

This Part traces some of the diverse meanings of the contemporary notion of the "political" and details how the idea embraces inconsistent meanings both across and within various areas of constitutional law. This diversity of meaning is surprising and noteworthy because the "political" is a central concept across multiple areas of constitutional law. In some contexts, it defines the space of appropriate governmental decision-making, subject to lax judicial review, while in others it means the sphere of public discourse or inappropriately partisan governmental conduct, subject to searching judicial review. Because the decision about whether a governmental action is or regulates the "political" regularly determines the standard of review, the meaning and scope of the "political" often bear dispositively on a law's constitutionality. What is more, the meaning and scope of the "political" often determine the important separation of powers question of who decides what the law is.

A. Takings Law

In takings law, the "political" designates the sphere of appropriate state action. The decision of the government to take property is understood as a political judgement. As the Supreme Court has described:

> The legislature may determine what private property is needed for public purposes – that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.[33]

[33] Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

This political power encompasses not only whether to take, but also whether a taking is for a public purpose, which is given significant judicial deference. As the Court has explained, "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[34] Thus, the "political" defines the scope of lax judicial review: "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."[35]

What is more, courts assess whether regulatory takings constitute takings at all under a flexible and relaxed standard, often thereby foreclosing compensation.[36] *Penn Central Transportation Co. v. New York City*[37] is the leading case that set the standard for regulatory takings. It reasoned that:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.[38]

Regulatory takings law defines the "political" in a way resonant with New Deal era views formed in opposition to laissez faire

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[34] Kelo v. New London, 545 U.S. 469, 483 (2005).

[35] Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984); *see also* Berman v. Parker, 348 U.S. 26, 33 (1954) ("We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.").

[36] *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) ("To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.").

[37] 438 U.S. 104 (1978).

[38] *Id.* at 124 (quoting Pa. Coal Co. v. Mahon, 260 U. S. 393, 413 (1922)).

constitutionalism. On this account, the "political" is the proper space of legislative and executive decision making, and actions within that space should receive little or no judicial scrutiny.

B. The Major Questions Doctrine

The major questions doctrine operates on a near opposite definition: the "political" in that context defines impermissible regulatory action. The major questions doctrine, which is ostensibly a doctrine of statutory construction, operates as a—and perhaps increasingly the key—enforcement mechanism of the separation of powers.

The doctrine draws a line between most statutory delegations of authority and those that involve "major questions." In the seminal case establishing the doctrine, *West Virginia v. EPA*, the Court explained:

> [T]here are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.[39]

A clear-statement rule applies to such cases: Congress must clearly authorize the agency to act on issues of "economic and political significance."

The major questions doctrine has faced sharp criticism.[40] But the merits of the doctrine are not the point here. For our purposes, what matters is that the doctrine defines the "political" (or more precisely, issues of political significance) as that which is beyond agency action. And because gridlock will foreclose congressional enactment of a clear statement in many, perhaps most, important contests, a determination that a question is politically significant

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[39] West Virginia v. EPA, 597 U.S. 697, 721 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 159–60 (2000)).

[40] *Id*. at 2641 (Kagan, J., dissenting) ("Some years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."); Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 483–84 (2021) (asserting that recent cases apply the major questions doctrine as "a nondelegation canon"); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1946–48 (2017) (describing the doctrine as a "normative" canon that "is both a presumption against certain kinds of agency interpretations and an instruction to Congress").

will often place it beyond governmental action altogether. There is little doubt that was the aim of some in the *West Virginia* majority.[41] Contrary to takings law (and the political questions doctrine discussed below), the scope of "political significance" within the major questions doctrine, then, demarcates the space of impermissible agency action or perhaps impermissible governmental action more broadly.[42]

The major questions doctrine also demonstrates that the concept of the "political" is still very much contested, and not only between the Court's conservative majority and liberal dissenters. One disputed question is whether the scope of the "political" is limited to Congress—that is, whether Congress can ever delegate major questions to executive agencies if it does so clearly enough. In concurrence in *West Virginia*, for example, Justice Gorsuch elaborated his view on that question. He argued that "the doctrine applies when an agency claims the power to resolve a matter of great 'political significance,'" or to "end an 'earnest and profound debate across the country.'"[43] Justice Gorsuch takes what Justice Barrett describes as a "strong-form substantive" view that all major policy decisions must be made by Congress itself, not an agency, such that "political" to him means any policy choice that is more than mere "details."[44]

Justice Barrett, writing in concurrence in *Biden v. Nebraska*, which struck down the administration's loan forgiveness plan, took a different approach. She recognized the contested nature of the doctrine, saying "there is an ongoing debate about its source and status" and that she takes "seriously the charge that the doctrine is inconsistent with textualism."[45] Barrett's concurrence focuses on clarifying how the doctrine squares with textualism. She argues that attention to context is crucial in textualism, and

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[41] Biden v. Nebraska, 600 U.S. 477, 508–15 (2023) (Barrett, J., concurring) (parting with the view that the doctrine is a "strong-form substantive canon" that imposes a "clarity tax" to "prevent Congress from getting too close to the nondelegation line" or that "reflect[s] the judgment that it is so important for Congress to exercise '[a]ll legislative Powers,' that it should be forced to think twice before delegating substantial discretion to agencies—even if the delegation is well within Congress's power to make." Barrett articulates a basis for the doctrine that, she argues, "is different from a normative rule that *discourages* Congress from empowering agencies.").

[42] *West Virginia*, 597 U.S. at 764 (Kagan, J., dissenting) (the majority contends that in "'certain extraordinary cases'—of which this is one—courts should start off with 'skepticism' that a broad delegation authorizes agency action" and "labels that view the 'major questions doctrine.").

[43] *Id.* at 743 (Gorsuch, J., concurring) (quoting NFIB v. OSHA, 595 U.S. at 117 and Gonzales v. Oregon, 546 U.S. 243, 267–268 (2006)).

[44] *Biden*, 600 U.S. at 508–15 (Barrett, J., concurring).

[45] *Id*. at 507.

"[b]ecause the Constitution vests Congress with '[a]ll legislative Powers,' a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch."[46]

Justice Kagan, writing in dissent, articulates an opposing view, similar to the New Deal era articulation that prevails in takings law.[47] On her account, the "political" encompasses both Congress and the Executive because they are democratically accountable; it is the space of appropriate democratic action and policymaking. The major questions doctrine is "a danger to a democratic order" because it takes away the power of Congress to delegate broadly and the Executive to effectuate those delegations—instead, handing those key decisions to the Court, which "is, by design, as detached as possible from the body politic."[48] The major questions doctrine thus allows the Court to "substitute[] itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation's most important, as well as most contested, policy decisions."[49]

The invention of the major questions doctrine appears to have been a strategic decision to create a tool that would permit the invalidation of laws the judiciary opposes in a way that is more targeted than First Amendment invalidation and does not carry the cultural baggage or existing precedent entailed in resuscitating the non-delegation doctrine. In this sense, we can understand the doctrine to reflect libertarian ideas of the proper scope of the "political." Sounding this note, Justice Kagan, in dissent in *West Virginia*, accused the majority of inventing the doctrine as a "get-out-of-text-free card" because it had a broader goal to "[p]revent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence."[50]

The targeted and selective nature of major questions doctrine, however, also connects its definition of the "political" with

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[46] *Id.* at 515.

[47] The majority in the same case stated that it invalidated the agency's loan forgiveness plan because "[t]he economic and political significance of the Secretary's action is staggering by any measure. Practically every student borrower benefits, regardless of circumstances." *Id.* at 502.

[48] *Id.* at 544 (Kagan, J., dissenting).

[49] *Id.* at 534.

[50] West Virginia v. EPA, 597 U.S. 697, 779–80 (2022) (Kagan, J., dissenting); *id.* at 783 ("The Court, rather than Congress, will decide how much regulation is too much"); *see also* Biden v. Nebraska, 600 U.S. at 534 (Kagan, J., dissenting) ("[T]he majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts.").

identitarianism. It is teed-up as a scalpel able to invalidate "extraordinary" laws, where First Amendment invalidation—which has been the dominant form of constitutional deregulation for roughly the last forty years—can be seen as an axe that can cut across ideological lines.[51] As much analysis has argued, the doctrine's lack of any definition of what constitutes "major" or "significant" questions means that it can be invoked to selectively strike down statutes reflecting ideas at odds with the views of the current Court's conservative supermajority.[52] Justice Barrett has aptly described this as a concern that the doctrine allows the court to "exchange[] the most natural reading of a statute for a bearable one more protective of a judicially specified value."[53] Or within the framework of identitarianism, "political significance" can be defined as governmental action reflecting out-group goals or values.

C. The Political Questions Doctrine

The political questions doctrine, grounded in Article III's cases and controversies requirement, defines "the political" in a way that does not at all resemble the idea's meaning in the major questions doctrine—despite the fact that the political questions doctrine, like major questions, is "essentially a function of the separation of powers."[54] Political questions are those that are nonjusticiable under *Baker v. Carr*'s six-part test:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate

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[51] For example, an evenhandedly deregulatory First Amendment that invalidated a public accommodations law which required a website company to design sites for LGBTQ+ weddings, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023), might also invalidate a law compelling doctors to make statements aimed at deterring pregnant people from seeking abortions.

[52] Biden v. Nebraska, 600 U.S. at 523–24 (Kagan, J., dissenting) ("Then, as in this case, the Court reads statutes unnaturally, seeking to cabin their evident scope. And the Court applies heightened-specificity requirements, thwarting Congress's efforts to ensure adequate responses to unforeseen events. The result here is that the Court substitutes itself for Congress and the Executive Branch in making national policy about student-loan forgiveness. Congress authorized the forgiveness plan (among many other actions); the Secretary put it in place; and the President would have been accountable for its success or failure. But this Court today decides that some 40 million Americans will not receive the benefits the plan provides, because (so says the Court) that assistance is too 'significan[t].'").

[53] *Id.* at 520 (Barrett, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 111 (2010)).

[54] Baker v. Carr, 369 U.S. 186, 217 (1962).

> political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[55]

Political questions are thus questions that must be left to Congress or the Executive.

The Court has been clear, however, that "political" is a term of art for case and controversy purposes. The scope of the colloquial notion of "political," by contrast, is broader: "[u]nless one of [the above] formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'"[56] Thus, voting rights cases, for example, are not treated as political questions, even if they are clearly political cases.

In its discussion of the justiciability of Guaranty Clause claims, the Court elaborated that political questions are in a different sphere—not that of constitutional litigation. In *Gomillion v. Lightfoot*, for example, the Court explained that while "in form" Tuskeegee had merely altered the municipality's "metes and bounds," the case was lifted "'out of the so-called 'political' arena and into the conventional sphere of constitutional litigation" because "the inescapable human effect of this essay in geometry and geography [was] to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights."[57] "When a State exercises power wholly within the domain of state interest, it is

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[55] *Id.*; *see also* Coleman v. Miller, 307 U.S. 433, 454–55 ("In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."); Nixon v. United States, 506 U.S. 224, 228 (1993) (involves a political question . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'").

[56] Baker v. Carr, 369 U.S. at 217.

[57] Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."[58]

D. The First Amendment

First Amendment law surprisingly adopts opposite views: in some contexts, the "political" indicates the sphere of public discourse and the most stringent constitutional protection, while in others it demarcates the space of proper democratic control, subject to lax or no judicial review.

In current First Amendment law there is a prominent divide between the sort of searching judicial review applicable to regulations of political speech—say, advocacy of a political candidate or contributions to a campaign—and regulations of expression in commercial life—say, limits on misleading advertising, a required nutrition label, or the regulation of contracts. For this reason, whether something is deemed "political" speech often determines the constitutionality of its regulation.

This divide traces back nearly a century. The Supreme Court did not protect political expression until the early twentieth century and did not consider commercial speech "speech" protected by the First Amendment at all until the mid-1970s. Since that time, the business community has advocated, largely successfully since the 1990s, for the courts to expand the scope of "the political," causing the First Amendment to take a markedly libertarian turn. The evolution of these doctrines tells a story of changing and deeply contested meanings of "the political."

In one of its earliest First Amendment cases, the Court articulated the fundamental importance and constitutional value of political speech, saying that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[59] Since that time, the Court has repeatedly emphasized the unique constitutional value of political speech—and the attendant need for its stringent judicial protection. Political speech, it has said, "is at the heart of the First Amendment's

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[58] *Id.*

[59] Stromberg v. California, 283 U.S. 359, 369 (1931).

protection[s]"[60] and "at the core of what the First Amendment is designed to protect."[61] It is now well-established that "[c]ore political speech occupies the highest, most protected position" in our constitutional order.[62] The reason why goes to the premise of our democracy: "[t]he constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[63]

Speech in economic life, by contrast, holds a different position and reflects distinctive constitutional values. The Supreme Court first considered the constitutional status of commercial speech in 1942 in *Valentine v. Chrestensen*, a case involving flyers advertising a submarine exhibit.[64] The Court tersely rejected the advertiser's claim for constitutional protection to distribute those flyers. It held that it is "clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[65] Instead, "[w]hether, and to what extent," it can be regulated "are matters for legislative judgment."[66] "The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated."[67] This understanding, articulated shortly after the New Deal revolution, like takings caselaw, understands the "political" to be the scope of

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60 First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978); *see also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.").

61 Virginia v. Black, 538 U.S. 343, 365 (2003).

62 R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting Carey v. Brown, 447 U.S. 455, 467 (1980))); Citizens United v. FEC, 558 U.S. 310 (2010) ("For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'") (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (opinion of Roberts, C.J.)); *Citizens United*, 558 U.S. at 349 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.").

63 N.Y. Times v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

64 316 U.S. 52 (1942).

65 *Id.* at 54.

66 *Id.*

67 *Id.* at 54–55.

proper state action over which the judiciary applies lax, if any, scrutiny. On this account, the commercial is fully under the control of the political. As Justice Rehnquist explained, "[f]or in a democracy, the economic is subordinate to the political."[68]

It was not until the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, which involved the state's ban on pharmaceutical advertising, that the Court deemed commercial speech "speech" for First Amendment purposes.[69] The Court articulated the unique value of commercial speech, saying the "First Amendment's concern for commercial speech is based on [its] informational function." Elaborating on that function, it explained:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Thus, the Court framed the architecture of the commercial speech doctrine around the informational needs of the public as decisionmakers in both economic and political life.

The political/economic distinction embedded in First Amendment doctrine in the middle of the twentieth century reflected that same distinction adopted in U.S. constitutional law more broadly during the New Deal.[70] This dichotomy has been vigorously challenged and unsettled in the courts, particularly since

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[68] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 599 (1980) (Rehnquist, J., dissenting); Va. State Board of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 787–88 (1976) (Rehnquist, J., dissenting) ("It is one thing to say that the line between strictly ideological and political commentaries and other kinds of commentary is difficult to draw, and that the mere fact that the former may have in it an element of commercialism does not strip it of First Amendment protection. But it is another thing to say that because that line is difficult to draw, we will stand at the other end of the spectrum and reject out of hand the observation of so dedicated a champion of the First Amendment as Mr. Justice Black that the protections of that Amendment do not apply to a 'merchant who goes from door to door selling pots.'").

[69] 425 U.S. at 761–73.

[70] *Compare* Lochner v. New York, 198 U.S. 45 (1905) *with* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

the 1990s, with litigants arguing that the stringent review for political speech should be applied not only to expression in the marketplace but, often, even universally.[71]

At the urging of the business community, the scope of "the political" has expanded, transforming the First Amendment into a powerful deregulatory tool that reflects libertarian ideals. We can see this in the concomitant rise of corporate political speech rights and the near collapse of the commercial speech doctrine. Corporate speech was not considered "speech" for constitutional purposes at all until the 1970s, and it was not until 1978 that the Court established that corporations could engage in political speech for constitutional purposes.[72] By 2010, the Court held that the First Amendment prohibits the government from limiting corporate political contributions from treasury funds.[73] As the political speech rights of corporations expanded, the near opposite occurred in commercial speech. The business community successfully persuaded the courts to increase the stringency of the commercial speech doctrine, so that it more closely paralleled the rules for political speech, and to narrow the scope of the commercial speech doctrine (so that more regulations would face the more stringent political speech rules).[74] At the same time, it persuaded courts to expand the scope of what counts as "speech" for constitutional purposes (known in the academic literature as the coverage of the First Amendment) to encompass more of economic life, so that more economic regulations can be challenged on First Amendment grounds.[75] Today, for example, it is ordinary course for businesses to argue, for example, that selling a cake, selling data, or disclosing climate-related information to investors constitutes political speech.[76]

The Court's union agency fee cases also vividly illustrate the expansion of "the political" in First Amendment law. *Abood v.*

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71 This is the one-size-fits-all argument that "speech is speech" and should all be subject to stringent review. *See* Shanor, *supra* note 4 at 189, 192–96; Post & Shanor, *supra* note 6 at 177–78.

72 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1975).

73 Citizens United v. FEC, 558 U.S. 310 (2010).

74 Shanor, *supra* note 4.

75 Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. LAW REV. 318 (2018).

76 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 584 U.S. 617 (2018) (selling a cake); Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011) (selling data); Chamber of Commerce Opening Br. at 60, Chamber of Com. v. SEC, https://perma.cc/TQR5-R55Y (arguing that the SEC's climate disclosure rule "more specifically compels 'political speech.' Climate change is a 'sensitive political topi[c]' subject to robust debate and raises many contested questions, including climate change's long-term consequences and corporations' responsibilities to address it.").

Detroit Board of Education held that agency fees may constitutionally cover union expenditures for activities that are "germane" to the union's collective bargaining activities, but not its political or ideological projects.[77] That is, in *Abood*, the Court adopted the midcentury distinction that largely deferred to and permitted governmental control over economic life but extended robust judicial protection to political speech (and monies funding it). It reasoned that "compelled contributions for political purposes unrelated to collective bargaining implicated First Amendment interests because they interfere with the values lying at the 'heart of the First Amendment[—]the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.'"[78]

By the start of the twenty-first century, however, the Court had significantly undercut that distinction by expanding the domain of the political, and so the scope of labor regulation subjection to strict scrutiny. In *Janus*, the Court adopted the view that collective bargaining in the public sector is "inherently 'political'" speech.[79] Everything that public sector unions do, the Court reasoned, was political because "core issues such as wages, pensions, and benefits are important political issues"—such that agency fees could not be constitutionally compelled to fund it.[80]

Businesses have pushed for the political to encompass even previously completely uncovered speech, including consumer and shareholder fraud. The courts have been clear that fraud receives no constitutional protection whatsoever; it does not constitute "speech" for constitutional purposes.[81] Nonetheless, ExxonMobil opposed subpoenas issued to it by state attorneys general—who were investigating whether the company defrauded customers by misrepresenting what it knew about whether its products

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77 Janus v. AFSCME, 585 U.S. 878, 887 (2018) (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977)).

78 Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 472 (1997) (quoting *Abood*, 431 U.S. at 234–35); *see also* Keller v. State Bar of Ga., 496 U.S. 1, 13 (1990) ("*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining.").

79 *Janus*, 585 U.S. at 920 (quoting *Abood*, 431 U.S. at 226).

80 *Id.*

81 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.").

contribute to global warming—on free speech grounds.[82] The company contended that those investigations were "an impermissible content-based restriction on speech" because their effect was to "deter ExxonMobil from participating in the public debate over climate change now and in the future."[83] Exxon's argument assumed that even if the company had engaged in fraud, that fraud was strictly protected political expression. Why would the company take such an aggressive position? Because even knowingly false statements in the political domain—termed public discourse in First Amendment theory—are often robustly protected.[84] There is, in other words, a long line of doctrine defining the "political" as the space of public debate into which the government may not constitutionally intervene.

Other areas of First Amendment law, however, define the political similar to its meaning in takings law—that is, as the proper space of legislative and executive action. As discussed above, the government may generally not compel individuals to subsidize private (that is, non-governmental) political expression. At the same time, there is "no First Amendment right not to fund government speech"—including politically contentious governmental expression (say, advocacy of a war).[85] The caselaw often justifies this distinction on the grounds "that government speech is subject to democratic accountability," meaning "'traditional political controls.'"[86] In explaining why compelled subsidies for advertisements marketing U.S. beef did not violate the First Amendment, for example, the Court reasoned:

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[82] Robert Post, *Exxon-Mobil Is Abusing the First Amendment*, WASH. POST. (June 24, 2016), https://perma.cc/7TLB-G3QX.

[83] Plaintiff's Original Pet'n for Declaratory Relief 23 (Apr. 13, 2016), Exxon Mobil Corp. v. Walker, No. 017-284890-16 (Tarrant Cty. D.Ct. TX); Roger Sowell, *ExxonMobil Fights Back Against Climate Zealots*, SOWELL'S LAW BLOG (Apr. 16, 2016), https://perma.cc/NT7Y-KCY6.

[84] United States v. Alvarez, 567 U.S. 709, 723 (2012) (noting that fraudulent speech generally falls outside First Amendment coverage (citing Va. State Board of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)); Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033, 2085 (2022) ("While the Court acknowledged that the government may regulate false statements in certain contexts such as 'to effect a fraud or secure moneys or other valuable considerations, say, offers of employment,' it rejected the government's argument that 'false statements, as a general rule, are beyond constitutional protection.' In other words, the First Amendment offers a sweeping commitment to protecting a speaker's right to say what they want in public discourse.").

[85] Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 562 (2005).

[86] *Id*. at 563 (quoting Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)).

> [T]he beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

"Political" in this context thus means nearly the opposite of what it does within the First Amendment's political/commercial distinction: it delineates the space of proper governmental action.

The Court took a similar view of the political when weighing the constitutionality of mandatory assessments for generic advertising of stone fruit such as peaches and plums. The Court made clear that the challengers' objection did not constitute a "political or ideological disagreement" or "crisis of conscience" for constitutional purposes.[87] The opinion instead characterized the objection as a nonconstitutional dispute with appropriately adopted policy choices:

> We are not persuaded that any greater weight should be given to the fact that some producers do not wish to foster generic advertising than to the fact that many of them may well object to the marketing orders themselves because they might earn more money in an unregulated market. . . . The basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market. . . . On occasion it is appropriate to emphasize the difference between policy judgments and constitutional adjudication. . . . Doubts concerning the policy judgments that underlie many features of this legislation do not, however, justify reliance

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[87] *Glickman*, 521 U.S. at 472.

> on the First Amendment as a basis for reviewing economic regulations. Appropriate respect for the power of Congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders . . . . In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers 'do not wish to foster' generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.[88]

The political also takes a similar meaning in the context of public funding cases. Concurring in *National Endowment for the Arts v. Finley*, for example, Justice Scalia observed that the law earmarking NEA funds for projects the government deemed to be in the public interest was "no more discriminatory, and no less constitutional, than virtually every other piece of funding legislation enacted by Congress."[89] Noting that *Rust v. Sullivan* had held that "'[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program,'" he observed that "when Congress chose to establish the National Endowment for Democracy [at issue in *Rust*] it was not constitutionally required to fund programs encouraging competing philosophies of government—an example of funding discrimination that cuts much closer than this one to the core of political speech which is the primary concern of the First Amendment."[90]

The concept of the political in First Amendment jurisprudence has followed a dynamic evolution and its legally-embedded meanings are now internally contradictory.

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[88] *Id.* at 474–77; *id.* at 472 ("Neither the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message.").

[89] 524 U.S. 569, 597 (1998) (Scalia, J., concurring).

[90] *Id.* (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

IV. CONTESTATION OF THE POLITICAL AND THE FUTURE OF CORPORATE INFLUENCE IN AN ERA OF POLARIZATION

Just as the history of the "political" has long been contested, it remains so today. These foregoing concepts of the political are currently being challenged by identitarianism, by which I mean the view that law should protect and advance a single cultural identity to the exclusion of other identities, other values, or pluralism. This includes not only the forms of social polarization and identity sorting that define the present moment, but also contestation by the conservative Christian legal movement in opposition to changes in cultural attitudes about sex and gender.[91]

The rapid rise of identiarianism and polarization are now pushing "the political" to mean deplorable ideas associated with the out-group. Both in law and beyond it, identitarian advocacy is pushing the political to mean the improper, often guileful or morally corrupt, favoring of out-group members or out-group ideas. This shift threatens to undermine the power of the business community to shape the scope of this key concept in both law and U.S. culture.

A raft of social science literature has established that "[t]he rise of affective polarization—most notably, the tendency for partisans to dislike and distrust those from the other party—is one of the most striking developments of twenty-first-century U.S. politics."[92] Particularly since the beginning of the twenty-first century, Americans have grown more socially polarized along partisan lines.[93] On the right, this has taken the form of a powerful "new coalition [that] is focused on questions of national identity, social integrity and political alienation."[94] In work with Sarah Light, I have described how this coalition—formed in part by pro-

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91 *See* Amanda Shanor & Sarah E. Light, *Anti-Woke Capitalism, the First Amendment, and the Decline of Libertarianism*, 118 NW. UNIV. L. REV. 347, 391, 397–403 (discussing social science research on polarization and describing the overlap of prominent conservative identarian movements, including the conservative Christian legal movement).

92 James N. Druckman, et al., *Affective Polarization, Local Contexts, and Public Opinion in America*, 5 NATURE 28 (2020).

93 *See, e.g.*, Christopher Weber & Samara Klar, *Exploring the Psychological Foundations of Ideological and Social Sorting*, 40 POL. PSYCH. 215, 215–16 (2019).

94 Nate Hochman, *What Comes After the Religious Right?*, N.Y. TIMES (June 1, 2022), https://perma.cc/FU4N-MKRV; *Id.* (noting this change represents a "broad shift in conservatism's priorities and worldview").

Trump forces and in part by the conservative Christian legal movement—is leading a war on "woke capitalism," an ill-defined term meaning business interests that advance or indulge progressive ideas.[95] After leading the Federalist Society's successful efforts to shift the federal courts, Leonard Leo is now devoting his skills and several billion dollars to shifting public opinion, including by challenging "woke capitalism"—a "battle" he has said is "a very high priority for me."[96]

Following the Supreme Court's decision *in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, which held race-based affirmative action in college admissions unconstitutional,[97] a significant frontline of that battle has been in fighting diversity, equity, and inclusion (DEI) programs in both the private sector and higher education.[98] That has encompassed threats from Republican attorneys general to Fortune 100 companies, warning them to immediately terminate any DEI programs, and from federal lawmakers to national law firms, warning them that if they "continue[] to advise clients regarding DEI programs or operate one of your own, both you and those clients should take care to preserve relevant documents in anticipation

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[95] Shanor & Light, *supra* note 91; *Woke*, MERRIAM-WEBSTER DICTIONARY, https://perma.cc/6N5C-6G7M (defining woke not only as "aware of and actively attentive to important social facts and issues (especially issues of racial and social justice)," but also "reflecting the attitudes of woke people" and "disapproving: politically liberal (as in matters of racial and social justice) especially in a way that is considered unreasonable or extreme."). The communications director for Florida Governor Ronald DeSantis—who announced in his inaugural address that "Florida is where woke goes to die!" Press Release, Fla. Off. of the Governor, Governor DeSantis Delivers Inaugural Address, Sets Priorities for Second Term (Jan. 3, 2023), https://perma.cc/N5PH-7KHX—has similarly explained that "woke" is "a slang term for . . . progressive activism." Philip Bump, *What Does 'Woke' Mean? Whatever Ron DeSantis Wants*, WASH. POST (Dec. 5, 2022), https://perma.cc/CJA7-F6B6.

[96] Kenneth P. Vogel, *Leonard Leo Pushed the Courts Right. Now He's Aiming at American Society*, N.Y. TIMES (Oct. 12, 2022), https://perma.cc/UAL4-X4YY; *see also*, Jonathan Swan & Alayna Treene, *Leonard Leo to Shape New Conservative Network*, AXIOS (Jan. 7, 2020), https://www.axios.com/2020/01/07/leonard-leo-crc-advisors-federalist-society.

[97] 600 U.S. 181 (2023).

[98] Shanor & Light *supra* note 91. The ousters of the presidents of both Harvard and the University of Pennsylvania over their responses to antisemitism on campus following the terrorist attack on Israel on October 7, 2023 are arguably entangled in this fight. *See generally* Nicholas Confessore, *As Fury Erupts Over Campus Antisemitism, Conservatives Seize the Moment*, N.Y. TIMES (Dec. 10, 2023), https://perma.cc/6NBT-97KF; Nicholas Confessore, *'America is Under Attack': Inside the Anti-D.E.I. Crusade*, N.Y. TIMES (Jan. 20, 2024), https://perma.cc/UMZ6-H84S.

of investigations and litigation."[99] Bills targeting DEI programs in education have been introduced in over thirty states.[100]

The Tenth Circuit, while rejecting a claim that being required by an employer to attend a single DEI training created a hostile work environment under Title VII, recently called such programs "troubling on many levels" and appeared to invite further challenges to them, over the protest of one panel member.[101] The majority expressed that "[t]he rhetoric of these programs sets the stage for actionable misconduct by organizations that employ them" and that "[i]f not already at the destination, this type of race-based rhetoric is well on the way to arriving at objectively and subjectively harassing messaging."[102] It also noted that while one DEI training was insufficient to state a claim, "[p]erhaps an ongoing, continuing commitment from Mr. Young's supervisors to mandatory [DEI] trainings with content similar to the one here may evolve into a plausible hostile workplace claim."[103]

The rise of polarized identitarianism has fomented laws targeting corporate America far more broadly than DEI. This includes a multi-state campaign against ESG investing;[104] state laws seeking to rein in alleged censoring of conservatives by social media platforms;[105] and the high-profile war waged by Governor DeSantis against Disney for its criticism of Florida's so-called "Don't Say Gay" law, to name but a few.[106]

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99 Letter from Attorneys General of Thirteen States to Fortune 100 CEOs (July 13, 2023) (on file with the Wall Street Journal), https://perma.cc/EM57-BCLT; Press Release, Tom Cotton, Sen. for Ark., Cotton Warns Top Law Firms About Race-Based Hiring Practices (July 17, 2023), https://perma.cc/E9ZW-5ZVN. Ed Blum, the lead litigator fighting affirmative action programs, has similarly taken that fight to the private sector. Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done.*, N.Y. TIMES (July 8, 2023), https://perma.cc/A9Y6-PBAA; Nate Raymond, *Activist Behind US Affirmative Cases Major Law Firms*, REUTERS (Aug. 22, 2023), https://www.reuters.com/legal/activist-behind-us-affirmative-action-cases-sues-major-law-firms-2023-08-22/.

100 Chronicle Staff, *DEI Legislation Tracker*, CHRON. OF HIGHER EDUC. (Feb. 9, 2024), https://perma.cc/SLS2-2FFS; Jessica Bryant & Chloe Appleby, *These States' Anti-DEI Legislation May Impact Higher Education*, BEST COLLEGES (Apr. 3, 2024), https://perma.cc/BHL2-35NZ.

101 Young v. Colo. Dep't of Corrections, 94 F.4th 1242, 1245 (2024); *id*. at 1257 (Matheson, J., concurring) ("I do not think the court otherwise needs to comment on the EDI training or the potential for future legal challenges to it or other EDI programs . . . .").

102 *Id*. at 1245, 1251.

103 *Id*. at 1251 n.2.

104 *See* Shanor & Light, *supra* note 91.

105 Moody v. NetChoice, LLC, No. 22-277 (2024); NetChoice, LLC v. Paxton, No. 22-555 (2024).

106 Benjamin Wallace-Wells, *The Political Strategy of Ron DeSantis's "Don't Say Gay" Bill*, NEW YORKER (June 28, 2022), https://www.newyorker.com/news/the-political-scene/the-political-strategyof-ron-desantiss-dont-say-gay-bill; Andrew Krietz, *Disney*

The heretofore close relationship between the Republican Party and the business community is falling apart. In the words of DEI-critic Senator Tom Cotton: "To the extent the Republican Party ever was more closely aligned with big business, those days are long since past."[107] Or, more bluntly: "You're seeing a divorce between the GOP and Wall Street . . . It's a Trumpian shift from big business to a populist focus."[108]

Growing polarization and identitarianism heralds even more balkanized markets—where "we" shop, invest, work, and watch the content of some businesses, while "they" live in an entirely different economic world with corresponding ideas, politicians, and values. Practically, growing polarization is likely to mean more conflict between the business community, particularly those seeking to appeal to customers or investors across partisan lines, and politicians of both parties.

On a deeper register, these developments also signal the decline of libertarianism as the central animating philosophy of the conservative legal movement and neoliberalism as its core policy commitment.[109] In service of that transformation, attacks on woke capitalism share a radically different concept of "the political." Instead of resting on assumptions of market neutrality, these ideas are framed around identitarian antipathy. "Political" is a loaded denunciation that means being a part of, believing in, or favoring out-group members or out-group ideas. When Disney sued Governor DeSantis alleging that he had "weaponize[d] government power against Disney in retaliation for expressing a political viewpoint unpopular with certain State officials," DeSantis shot back that the suit was "political."[110] This polarized concept of "political" centers not on the earlier public/private or state/market divides, but on the imagined communities of "us" versus "them."[111]

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*Releases Statement as DeSantis Prepares to Sign Bill Limiting Teachings About Sexual Orientation, Gende*r, WTSP (Mar. 22, 2022), https://perma.cc/4JS3-5Y34; Todd C. Frankel & Lori Rozsa, *DeSantis Might Have Met His Match in Disney's Iger as Both Sides Dig In*, WASH. POST (May 15, 2023), https://perma.cc/FVB7-H2KK; Amended Complaint at 73–78, Disney v. DeSantis, No. 23-cv-163 (N.D. Fla. May 8, 2023).

107 Kenneth P. Vogel, *Leonard Leo Pushed the Courts Right. Now He's Aiming at American Society*, N.Y. TIMES (Oct. 12, 2022), https://perma.cc/NE9C-VPRW.

108 Lydia Moynihan, *The Great Divorce: GOP to Launch Investigations into Big Business*, N.Y. POST (Dec. 11, 2022), https://perma.cc/RKL7-RUBL.

109 Shanor & Light, *supra* note 91.

110 Ryan Bort, *DeSantis Calls Disney Lawsuit 'Political'*, ROLLING STONE (Apr. 27, 2023), https://perma.cc/D73G-TY9P.

111 *Cf.* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983).

Over the last forty years, the conservative coalition, prominently including the business community, has been largely successful in embedding a libertarian version of the "political" in constitutional law. How effective will the ascendent GOP coalition be in transforming the idea to reflect the notion that certain identities and ideas are legitimate—while others are not? Against the backdrop of growing partisan antipathy and threats to constitutional democracy,[112] the prospect of aggressively identarian constitutionalism may alarm critics of the Constitution's libertarian turn and business leaders alike. It is less clear what role the business community will have in shaping the future boundaries of the political in both law and American culture—and what, if anything, it can do about the political's identitarian turn.

[112] Marisa Iati, *Trump Says Some Undocumented Immigrants Are 'People'*, WASH. POST (Mar. 16, 2024), https://perma.cc/24WB-M7EC; Marianne LeVine, *Trump Calls Political Enemies 'Vermin,' Echoing Dictators Hitler, Mussolini*, WASH. POST (Nov. 13, 2023), https://perma.cc/3TUX-4NJF.