# POLARIZED COUNTERMAJORITARIANISM

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*This Article identifies a radical transformation in constitutional law methodology: the central project of constitutional analysis has changed from offering value-neutral theories of interpretation to observing and critiquing conservative forces that undermine popular self-rule. This is most apparent in scholarly reactions to the Roberts Court's refusal to strike down legislation that promulgates voter suppression, partisan gerrymandering, and abortion restrictions. Scholars treat these decisions to leave legislation standing as a direct assault on democracy, a distinction previously reserved for decisions that struck down legislation (such as Lochner v. New York). This new paradigm indicates a radical realignment in academic evaluation of judicial review, with a focus on substance rather than procedure.*

*This Article illuminates this shift by observing scholars' novel invocation of the 'countermajoritarian difficulty.' Widely recognized as the obsession of law professors for the past century, the countermajoritarian difficulty traditionally queries, why do non-accountable judges have authority to interdict decisions by elected representatives? The threat of far-right extremism has inspired constitutional law scholars to use countermajoritarianism to denote <u>any</u> political influence – the conservative-dominated judiciary, Republican legislatures, or polarized right-wing voters – that is perceived as exacerbating democratic backsliding. This changing use of countermajoritarianism portends a wider shift in constitutional theory. The classical approach to the countermajoritarian difficulty aspires to use general principles of constitutional analysis to reconcile independent judicial review with popular self-determination. This approach provides abstract explanations of constitutional interpretation and avoids openly committing to ideological or policy positions. Conversely, the new trend defines any threat to legitimate democratic self-governance as countermajoritarian. PCM constitutional theory thus takes as its starting point a set of substantive moral commitments.*

*Polarized countermajoritarianism has a dramatic effect on doctrinal analysis. Traditionally, scholars invoke countermajoritarianism when courts strike down legislation. The new trend identifies it where courts allow legislation to stand but such inaction fails to protect democratic process against attacks from the far right. This Article posits that this radical shift in doctrinal analysis is a response to the loss of civic unity and democratic consensus in American politics. Polarized countermajoritarianism highlights the fragile condition of contemporary democracy but*

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*relinquishes the analytic clarity of classical countermajoritarianism--a tradeoff scholars and jurists must incorporate into future analysis.*

## INTRODUCTION

It is widely accepted, that for the past decade, American democracy has faced existential crisis.[1] Constitutional law scholars have led the way in sounding the alarm. Some scholars have observed the rise of increasingly divisive behavior and rhetoric among a Donald Trump-led far right that assaults the basic norms of political and civic unity.[2] Others have observed the increasing willingness, particularly by Republicans,[3] to exploit legislative and constitutional structures to distort fair democratic process.[4] Legal academics in particular have noted that the Roberts Court is complicit and perhaps even

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1 *See generally* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) (examining the fragility of democracies); DAVID RUNCIMAN, HOW DEMOCRACY ENDS (2018) (exploring the end of democracies around the world); YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY (2018) (discussing how democracy is at risk and what would be required to save it); STEPHEN M. FELDMAN, THE NEW ROBERTS COURT, DONALD TRUMP, AND OUR FAILING CONSTITUTION (2017) (reviewing the evolution of the constitutional order and the degradation of democracy).

2 *See generally* Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1 (2020) (examining the recent degradation of American Democracy); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L. J. 177, 196 (2018) ("President Trump utters falsehoods regularly, including statements whose falsity is immediately demonstrable."); Michael Kang and Jacob Eisler, *Rethinking the Government Speech Doctrine, Post-Trump*, 2022 U. ILL. L. REV. 1943 (2022) ("[A]ddressing government speech that distorts democratic process.").

3 Joseph Fishkin and David E. Pozen, *Asymmetric Constitutional Hardball,* 118 COLUM. L. REV. 915 (2018) ("Republican officeholders have been more likely than their Democratic counterparts to push the constitutional envelope, straining unwritten norms of governance or disrupting established constitutional understandings"); Robinson Woodward-Burns, *Counter-Majoritarian Constitutional Hardball,* 81 MD. L. REV. 380 (2021) (exploring how Republicans use "constitutional hardball" to "bend lawmaking rules to win a legislative majority without winning an electoral majority").

4 *See, e.g.*, Klarman, *supra* note 2, 45–66 (highlighting the Republican Party's most "comprehensive assault on democratic governance since Jim Crow"); Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323–25 (2021) (explaining how "hard-wired features of our Constitution—in particular, the Senate and the Electoral College—are assisting a shrinking white, conservative, exurban numerical minority to exert substantial control over the national government and its policies"); Nicholas O. Stephanopoulos, *The New Pro-Majoritarian Powers*, 109 CALIF. L. REV. 2357 (2021) (recognizing that "American democracy [is] under siege"); Franita Tolson, *Countering the Real Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2381–82 (2021) (exploring "the erosion of democratic norms in the United States").

supportive of these efforts.[5] Finally, some have focused on how this manipulation of structure interacts with changing American demographics. Such manipulation threatens to impair majority rule and to perpetuate the disenfranchisement of long-oppressed minority groups in America.[6] The unifying concern of these accounts is that conservative forces are willing to use illegitimate means to seize and hold power, even if it irreparably harms civic self-rule and perpetuates systemic injustice.

It is well known that these concerns dominate the substance of constitutional law. What has been neglected is the way that this shift is transforming the methodology of constitutional law scholarship. Until the recent crisis of democratic backsliding, academics primarily advanced value-neutral accounts of the judicial role in the constitutional order. The dominant question in this classical view is the principled relationship between the judiciary and the elected branches. This framing aspires to agnosticism regarding partisan allegiances and questions of specific policy.[7] The accelerating trend of the past decade has directed constitutional analysis towards a more urgent question: how does a given institution or influence contribute to substantive democratic backsliding, and what can be done to stop it? This shift in the *methodology* of constitutional law is potentially much more tectonic than any shift in content because it will change not only what topics are of interest to scholars and jurists and what they say about them, but the background framework that determines the *purpose* of constitutional analysis. This trend is decentralized and emergent in the scholarship rather

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[5] Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L. & POL'Y REV. 131 (2019) (arguing that the Roberts Court has "substantially contribut[ed]" to the erosion of America's democratic institutions); Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn,* 109 GEO. L.J. ONLINE 50-1 (2020) (explaining how the Roberts Court has "give[n] political actors freer rein to enact laws and policies in their self-interest"); Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111-13 (2019) (showcasing the difference between Judge Roberts's 2005 confirmation hearing and "his deeds as Chief Justice" as it pertains to the directives outlined in Carolene Products to safeguard democracy); Michael Kang, *The Post-Trump Rightward Lurch in Election Law*, 74 STAN. L. REV. ONLINE 55 (2022) (examining cases that illustrate "the dramatic rightward lurch" of the Supreme Court).

[6] Steven Levitsky, *The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Turn Against It*, 110 CALIF. L. REV. 1991 (2022) (arguing that "major parties . . . [are] no longer committed to playing by the democratic rules ... trapping us into minority rule"); Karlan, *supra* note 5, at 2325 (explaining how a "numerical minority . . . [is] exert[ing] substantial control over the national government and its policies"). For the claim that *Dobbs* shows such an oppressive movement against women, *see* Section III.B.3.

[7] This traditional distinction between principle as the subject of legal analysis and policy as the domain of gritty politics is captured by RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90 (1977).

than the result of a coherent program. But that makes its ubiquitousness even more striking.

To illuminate this trend, this Article focuses on the fulcrum of American constitutional analysis. The 'countermajoritarian difficulty' has been the "obsession"[8] of modern constitutional law scholarship since Alexander Bickel posed it in *The Least Dangerous Branch*.[9] In its traditional pre-crisis formulation, the difficulty queries: why do non-accountable judges have the authority to override the political decisions of a free democratic electorate? The countermajoritarian difficulty observes that in a democracy, legitimate political authority must be attributable to the free will of constituent members of the democracy. In modern democracies, this typically means assigning political power to representatives who are selected as agents by voters. But judicial review is characterized by elite decision-making that *defies* such popular accountability: protection of individual rights against majority will[10] and advancement of neutral (that is to say, non-accountable) rule of law.[11] Traditionally, the puzzle of countermajoritarianism queries how popular self-rule can be reconciled with countermajoritarian judicial review, and thus how democratic self-determination can coexist with rule of law and rights protection.

Countermajoritarianism, as defined by Bickel, has been widely acknowledged as *the* central challenge of American legal thought.[12] Leading

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[8] Describing countermajoritarian as an 'obsession' is commonplace. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five,* 112 YALE L. J. 153–55 (2002) ("obsession of constitutional theory"); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287–90 (2004) ("obsession of modern constitutional scholarship"); Mark A. Graber, *Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 MD. L. REV. 1, 1 n.1 (2006) (noting legal scholars obsession with the countermajoritarian difficulty).

[9] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2nd. ed. 1962) (coining the term countermajoritarianism).

[10] *See* DWORKIN, *supra* note 8, at xi ("Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals . . . .").

[11] TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 12 (2018) (exploring the definition of the rule of law and how it is disconnected from "substantive concepts like rights or morality . . . [or] equality or justice").

[12] *See e.g.*, Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 14 (2012) (declaring *The Least Dangerous Branch* to be "the book with which all subsequent discussions of judicial review engage"); Christopher Sundby and Suzanna Sherry, *Term Limits and Turmoil:* Roe v. Wade's *Whiplash*, 98 TEX. L. REV. 121, 125–26 (2019) ("[T]he countermajoritarian difficulty [is] *the* central problem in constitutional law . . . the legal equivalent of proving Fermat's Last Theorem.") (emphasis added).

scholars have long interrogated the definition and contours of the difficulty.[13] The countermajoritarian difficulty's influence has also shaped constitutional scholarship generally. The dominant modern accounts of constitutional interpretation – originalism, living constitutionalism, and representative reinforcement theory – are to demonstrate how judicial review can serve popular autonomy.[14] This is precisely the challenge posed by the countermajoritarian difficulty. Thus, the countermajoritarian difficulty is not merely an academic puzzle regarding the nature of judicial review. Rather, it is the point of entry to all constitutional and legal theories.

Until the last decade, accounts of and responses to the countermajoritarian difficulty have possessed certain features. This Article's first novel contribution is to synthesize and clarify these features. Addressing the countermajoritarian difficulty under 'classical countermajoritarianism' (hereinafter, CCM) seeks to reconcile the priority of popular autonomy with the benefits of the rule of law rights protection. Most importantly, CCM aspires to *value-neutral* accounts of both democracy and judicial review. That is, while CCM scholars describe procedures or methods for reconciling democracy and judicial review, they seek to avoid imposing specific policy outcomes or first-order moral norms that should inform such reconciliation.[15] The foundational expression of this neutrality is that CCM does not interrogate what terms representative democracy must satisfy to be more accountable than judicial review. It simply *presumes as definitional* that the elected branches express popular autonomy more than non-accountable judges. This normative agnosticism means that the solutions do not seek to dictate the arrangement of electoral process, nor demand that judicial review advance a specific ideology. Furthermore, these accounts see countermajoritarianism as a fruitful tension. The goal of constitutional analysis is to redeem the coexistence of popular autonomy and judicial review, and to do so by offering an account of sound judging that avoids imposing specific values or policy outcomes.[16]

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[13] The authoritative account is Barry Friedman's five article series, beginning with *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998). For a further recounting of the literature, see Tolson, *supra* note 4, at 2381–82 n.1.

[14] *See* Section II.B.

[15] *See infra* Section II. A and II. B (describing the generic quality of classical countermajoratarianism and responses to it).

[16] This characteristic of CCM can be understood as serving to achieve reconciliation on the basis of general *principle* rather than granular *policy*. *See* Dworkin, *supra* note 8, at 92.

The past decade's response to the democratic crisis has seen a radical shift in the understanding and deployment of the countermajoritarian difficulty, and a parallel shift in American constitutional thinking generally. Countermajoritarianism is no longer defined as the tension that results from the intersection of judicial review with popular democratic autonomy. Rather, it is defined as the presence or advancement by *any* institution of substantive political values that obstruct legitimate expression of popular will. This new approach to countermajoritarianism––which this article calls 'polarized countermajoritarianism' (hereinafter, PCM)––is defined by three features. First, it applies the term 'countermajoritarian' to *any* institution or social factor (legislatures, political wedge block dynamics, and so forth) that is identified as undermining popular self-rule––including but not limited to the judiciary. Second, PCM is *value-judgment specific*. It entails a set of substantive moral commitments that it uses to define legitimate democracy,[17] and identifies countermajoritarianism whenever a political or social influence contravenes these commitments. Thirdly, PCM uses the term countermajoritarianism *pejoratively*, rather than to identify a fruitful tension in liberal constitutional democracy.

PCM identifies countermajoritarianism as pathological deviation from sustainable, normatively acceptable liberal democracy. PCM can thereby signal a tectonic change in the *function of judicial constitutionalism itself*. Under CCM thinking, the countermajoritarian difficulty illuminates the challenge of vindicating judicial review in light of the prevalent democratic virtue of popular autonomy. Countermajoritarianism is a challenge, but it is not a pathology or an evil. Rather, it serves to frame the affirmative project of innovating universally valid theories of constitutional interpretation. PCM conversely assesses judicial review––and any other institutional feature––by how effectively it champions a specific vision of democracy. This is motivated by the anxiety that America is suffering democratic backsliding due to far-right forces. Countermajoritarianism is invoked to condemn the practices and institutions that contribute to this backsliding and thus threaten popular autonomy. For doctrinal analysis, this manifests most uniquely in PCM scholars' condemnation of the judiciary as countermajoritarian when it allows

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[17] As described in Section III.A.2, the main commitments are: 1) democracy must satisfy certain procedural standards, and thus avoid certain practices (such as partisan gerrymandering); 2) prioritization of correction of inequity endured by traditionally oppressed groups such as women and racial minorities; and 3) the idea that democracy involves a general principle of substantive fair play.

legislation to *stand,* and such inaction contributes to democratic decline.[18] Yet describing judicial *passivity* as countermajoritarian is the inverse of the CCM use of the term.[19] This dramatic change is detailed in Section III.B.

PCM shows how the crisis of American democracy is transforming constitutional thought. The normative neutrality that characterizes CCM is premised on an implicit polity-wide consensus regarding the values of liberal democracy. As scholars perceive that consensus as disintegrating, they are abandoning the agnosticism of CCM. Instead, they evaluate institutions and social structures by whether they sustain the necessary preconditions for liberal democratic constitutionalism. This Article is the first to trace the relationship between the widespread anxieties regarding the democratic backsliding (which most scholars would readily acknowledge) and the discipline-wide reframing of constitutional analysis (which this Article is the first to identify).

This Article contextualizes and describes the shift from CCM to PCM in four sections. Section I lays out the underlying premises of the countermajoritarian difficulty. The aim of the difficulty, and the subsequent traditional challenge for constitutional legal thought, is to reconcile i) popular autonomy as a democratic decision-making mechanism and ii) independent judicial review that advances the rule of law and rights protection.

Section II shows how, until the emergence of the recent democratic crisis, CCM has grappled with this problem by seeking value-neutral theories that explain how majoritarianism and independent judicial review can coexist. This has shaped analysis of countermajoritarianism as a concept, and has also exerted significant background influence on constitutional law generally. Major explanations of constitutional interpretation (such as originalism and living constitutionalism), responsive to this attribute of CCM, aspire to value-neutral procedural answers.

Section III turns to PCM, describing the radical change in constitutional law scholarship. PCM has three defining features: i) redefinition of countermajoritarianism as a trait that can manifest in any institution or social feature, not just the judiciary; ii) delineation of countermajoritarianism by the presence of substantive values that advance a far-right agenda; iii)

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[18] See discussion *infra* Section III.B.

[19] The contrast is exemplified by the fact that Bickel's appreciation of 'the passive virtues' by the judiciary to strategically avoid conflict with popular self-rule. *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); BICKEL, *supra* note 10, 111 *et seq.* Under PCM, a judicial decision to decline to intervene can be just as countermajoritarian.

countermajoritarianism as a pejorative that denotes pathologies that courts, political institutions, and voters should seek to fix. Section III.B articulates how the new definition has manifested in the scholarly treatment of the case law. Under CCM, countermajoritarianism was only invoked where the judiciary struck down democratically authorized legislation (most notoriously in *Lochner v. New York*). However, PCM deploys the term against any judicial decision that fails to serve the substantive norms of legitimate democracy, including when a court *declines* to strike down legislation that is identified as serving the far-right anti-democratic agenda. This phenomenon manifests in scholarly reactions to Roberts Court decisions that let stand legislation affecting voter suppression (*Crawford v. Marion County*), partisan gerrymandering (*Rucho v. Common Cause*), and criminalization of abortion (*Dobbs v. Jackson Women's Health Organization*). In each of these cases, judicial inaction has been lambasted as countermajoritarian.

Section IV links the emergence of PCM to broader political and legal trends. It explains how PCM is a response to the crisis of democratic backsliding and systemic threats to democracy. It then synthesizes the deeper change in constitutional law. Instead of seeking theoretical explanations for how courts should undertake interpretation, PCM offers a theory of legal analysis guided by desperate consequentialist efforts to preserve liberal democratic constitutionalism. Finally, PCM is linked to broader social trends, specifically the loss of democratic consensus and the increase in affective polarization.

The Conclusion assesses the influence of PCM on future legal thinking and considers the consequences of its break with CCM. By placing the substantive commitments of liberal democracy at the center of constitutional analysis, PCM makes its main goal the defense of those values from existential threat. PCM thus potentially clarifies the highest goals of constitutional and legal thought, particularly during times of crisis. As political polarization and the aggressive advancement of a conservative agenda continue, constitutional law will continue to reflect the new paradigm of PCM––a trend perhaps most salient in the unique political ramifications scholars have identified in *Dobbs v. Jackson Women's Health Organization.* But this clarity entails relinquishing the central insights of CCM. Countermajoritarianism may no longer be available as a mechanism to reconcile popular autonomy and judicial review. The value-neutral openness of CCM may be sacrificed to address the crisis of liberal democratic constitutionalism.

## I. FIRST PRINCIPLES: POPULAR AUTONOMY, RULE OF LAW, AND DEMOCRATIC CONSTITUTIONALISM

The countermajoritarian difficulty posits certain background conditions: legitimate democratic governance that can be traced to popular consent; such consent that is practically realized rather than hypothetical or assumed; and some procedures and rights protected by constitutional enforcement. These commitments form the core of liberal democratic constitutionalism and form the shared basis against which the radical shift from CCM to PCM occurs.

### A. THE MORAL FOUNDATIONS OF LIBERAL DEMOCRACY: CONSENT AND MAJORITARIANISM

Democracy possesses unique moral validity because it is the sole mode of governance in which the constituency rules itself. Thus, the polity is truly autonomous and can satisfy the demands of moral responsibility. The value of autonomy is vindicated by the principle that only the application of free will can be a valid basis for moral judgment—the guiding principle of modern moral and political philosophy.[20] A political system in which effective policies are imposed upon a ruled people, a benevolent dictatorship, may be a well-run technocracy, but it is not moral governance. In such a technocracy, the people are heteronomously subject to a domineering will and sacrifice the power over their own decisions that allows them to realize their moral dignity.[21]

This summary of democracy legitimacy reveals that the invocation of the 'countermajoritarian difficulty' usually conflates several steps in defining the

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[20] This is perhaps the most heavily studied idea in contemporary political philosophy. Its most prominent exponent is Immanuel Kant, who explains why only autonomous action attributed to a non-determined will can be called morally free. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 394 (Mary Gregor trans., 4th ed. 1998). John Rawls is likely the most prevalent contemporary exponent. JOHN RAWLS, THEORY OF JUSTICE: REVISED EDITION (2nd ed. 1999); JOHN RAWLS, POLITICAL LIBERALISM (1993); *see also* James E. Fleming, *Securing Deliberative Democracy*, 72 FORDHAM L. REV. 1435, 1437 (2004) (describing how "the free exercise of [citizens'] capacity for a conception of the good" underlies democracy); RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 90 (2007) ("[W]e value democracy as giving effect to the status of individuals as autonomous rights-bearers.").

[21] BICKEL, note 10 *supra* at 20, observes "*morally supportable* . . . government is possible only on the basis of consent" of the governed.

challenge posed by judicial review.[22] Democratic governance is usually justified by expressing the will of the people. The first-order problem is not that judges are *countermajoritarian*, but that their intervention in politics lacks the standard relationship to popular autonomy that vindicates democratic governance.

This reveals two other assumptions that explain why judicial review can be critiqued as 'countermajoritarian.' One is that judges do not have the same relationship to the autonomy of the electorate as other branches of governance. The difference is essentially one of causal directness. Accountable power can be causally traced back to the will of the people. In large-scale democracies, this typically means power is held by representatives (or officials they appoint) that the franchise can retain or expel at regular intervals through elections. These governmental officials are effectively agents of the rank-and-file principal citizens. Conversely, judges must be ready to advance rule of law impartially, regardless of popular opinion.[23] More practically, the selection and retention of judges often ensures that they do not face public accountability (a feature most explicit with regards to lifetime Article III appointments).[24] While the degree to which judges are nonetheless responsive to public opinion is thoroughly debated,[25] it seems difficult to deny that their relationship to popular will is much less causally direct than that of the elected branches.[26]

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[22] *See generally* JACOB EISLER, THE LAW OF FREEDOM: THE SUPREME COURT AND DEMOCRACY (2023) (preferring the term 'counterpopular' to 'countermajoritarian' because the former phrase better captures the real difficulty with judicial review).

[23] *See* Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 154 (Jeremy Waldron ed., 1984) ("Utilitarianism claims that people are treated as equals when the preferences of each . . . are balanced in the same scales, with no distinctions for persons or merit.").

[24] Consider Justice Sandra Day O'Connor's campaign to end the election of state court judges. *See* Sandra Day O'Connor & Ins. Advancement Am. Legal Sys., *The O'Connor Judicial Selection Plan*, (2014) https://iaals.du.edu/sites/default/files/documents/publications/oconnor_plan.pdf [https://perma.cc/D3Z9-D7QJ].

[25] *See* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 60 (2001) (assessing whether judges are accountable to the public). Klarman counters that even if judges are rarely *entirely* deviant from popular will, they are often "*somewhat* countermajoritarian," Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 493 (1997).

[26] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980), 206 n.9 ("[T]he appropriate perspective here is a comparative one, and there can be no doubt that the judicial branch, at least at the federal level, is significantly less democratic than the legislative and executive."). Klarman endorses this view in Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 777 (1991).

The second threshold question is why it is the will of the *majority* of constituents that is the gold standard for identifying the legitimate expression of popular will. The special status that Bickel's formulation grants the majority has been challenged from a variety of perspectives.[27] It is possible to offer a rigorous working justification of majoritarianism by further interrogating the bedrock values of democracy. To serve as a conduit for the autonomy of the many persons who come together to achieve *collective* self-rule, democracy must find a means of reaching decisive policy outcomes where there are many competing claims by individual autonomous persons. To balance these competing claims, democracy must also serve the value of equality. To deviate from this value of the equal political authority of each constituent is to identify some persons as having an intrinsically superior claim to political authority.[28]

Because democratic processes must respect equality in political power as a facet of political autonomy, majoritarianism must become the central mechanism for resolving political disagreements.[29] As Richard Tuck states it, majoritarianism is "the only principle that offers both equality and agency."[30] The alternative--rule by some group that is *less* than a majority --would contravene the principle of constituent autonomy that guides democracy in the first place. Thus, majoritarianism must be the primary, if not the only, value in democratic process. Any other decision mechanism must, logically, privilege less than a majority, and allow a smaller group to dominate a larger one.[31]

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[27] *See* Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74–75 (1989) (describing the role of non-majoritarian institutional design in the Constitution); Somin, *supra* note 9, at 1291 (arguing that voters are often ignorant of actual issues).

[28] This account is largely a reinterpretation of how equality can be derived from autonomy articulated by Philip Pettit, whose own formulation is that "the intensity of freedom as non-domination which a person enjoys in a society is a function of other people's power as well as their own." PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 113 (1997).

[29] This does not mean that the majority dominates with regards to *every* preference. For example, Coalition-forming and wedge block bargaining through intermediaries such as party politics means that some interest groups may 'trade' their positions on many policies to achieve an unpopular view in one. *See* V.O. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS 12 (4th ed. 1958).

[30] RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 261 (2016).

[31] There are alternatives, but they take radically different starting propositions. There may be arguments, for example, for community-based group authority allocation (as Michael Walzer describes in SPHERES OF JUSTICE (1983)). But all else equal, the superiority of majority over minority rule is incontrovertible. *Cf.* ELY, *supra* note 26 (observing the default normative claim to legitimate authority by the elected branches).

In short, the concern that judges are a countermajoritarian political force can be traced back to the bedrock value of political autonomy. Judicial review does not track the consent of the governed; and it allows a small elite to shape governance. The countermajoritarian difficulty posed by judicial review is a challenge to the primacy of popular autonomy itself.

### B. THE VIRTUES OF JUDGING: RULE OF LAW AND INDIVIDUAL RIGHTS

The features of judging that make it countermajoritarian are, by the lights of legitimate judicial lawmaking, virtues. Reaching decisions regardless of political influence––that is to say, regardless of the will of the franchise––is the defining characteristic of rule of law neutrality.[32] Protecting minorities and even single individuals from majority will or government decisions is the defining feature of rights protection. Rights protection and rule of law are the vindicating aspects of sound judicial review.

These two features have been the subject of extensive interrogation in legal scholarship, but it is widely accepted that impartial judging[33] and rights protection[34] are necessary for functional liberal democracy. This explains why the classical account of the countermajoritarian difficulty presents as a *difficulty* that must be reconciled rather than just a *pathology* that must be eliminated.

The virtue that unifies rule of law and rights protection is doing justice. Accountable politics is defined not by its outcome but rather by its procedure: it must flow from the constituent autonomy that legitimizes democracy. It is the input-determination of governance by popular will that makes it legitimate,

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[32] It is this commitment to *process neutrality*, rather than giving power to a sub-majoritarian group, that distinguishes the countermajoritarian quality of courts from other "antimajoritarian . . . checks and balances" like the Electoral College and the Senate, and that explains the distinctive normative appeal of courts. *See* James Thuo Gathii, *Beyond Samuel Moyn's Countermajoritarian Difficulty as a Model of Global Judicial Review*, 52 VAND. J. TRANSNAT'L L. 1237, 1243 (2019).

[33] *See generally* H.L.A. HART, CONCEPT OF LAW (1994) (stating that law is about rule-based decision-making of relevant classes, not about discretion in individual cases); LON L. FULLER, THE MORALITY OF LAW (1969) (observing the moral prerequisites of legitimate legality); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980); Cass R. Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1 (1992); Paul Gowder, The Rule of Law and Equality, 32 L. & PHIL. 565 (2013).

[34] *See* Daryl J. Levinson, *Rights and Votes*, 121 YALE L. J. 1286 (2012) (exploring the "interrelationships between rights and votes . . . as tools for protecting minorities . . . from the tyranny of majorities"); GINSBURG AND HUQ, *supra* note 11.

rather than any particular result.[35] Conversely, judicial decisions are based on non-contingent reasoned principle. Their aim is not to implement the will of constituent members of the polity, but rather to advance abstract, reflexively self-justifying norms.[36] By defending these norms, courts advance moral values with a different claim to legitimacy than consent of the people. The great question of jurisprudence is what these norms are and how to justify them, but all liberal democracies possess a judicial institution with such a uniquely apolitical role in the constitutional structure.

The character of judicial review can be synthesized into two features. Firstly, courts apply the law in a neutral manner that occurs without domination by external interests or accountability to some superior political institution. What moral norms such neutral rule of law entails has been heavily debated.[37] But it is incontrovertible that courts must be *consistent* in their application of the law. This confers, if nothing else, a type of stability in governance. In a polity whose procedures and substantive aims are broadly just, judicially enforced rule of law prevents implementation of the law from being distorted by interest groups or hijacked by intermediaries. In a polity that has rule of law but is broadly unjust (if such a polity is possible), no matter how unjust the aims of the legislation, the consistency of legality affords another type of justice. It provides some minimal procedural reliability by which citizens in such a regime can seek to protect their interests and seek change.

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[35] In Justice Scalia's formulation, "Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc . . . ." Vieth v. Jubelirer, 541 U.S. 267, 278 (2004). This view seems to have evolved from a more demanding view of law made by legislatures. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) ("Statutes that are seen as establishing rules of inadequate clarity or precision are criticized . . . as undemocratic . . . because they leave too much to be decided by persons other than the people's representatives."). Interestingly, Scalia's earlier view echoes the idea that democracy must conform to certain standards to be normatively valid, and thus that liberalism requires a deeper woven structure.

[36] For a theoretical account, see DWORKIN, *supra* note 8, at 92. See also the second half of Scalia's formulation from Vieth, 541 U.S. at 278: "[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions." EISGRUBER, *supra* note 24, at 59 offers a more cynical but substantively parallel account: "Nothing damages a judicial reputation like the suggestion that a judge has followed personal interest or political ambition rather than made an honest, principled judgment about right and wrong."

[37] The debate is between positivism—which suggests that legality demands only legal procedure, even if laws are immoral – and moral theories of law, which suggest that rule of law must attain moral ends. *Compare* HART, *supra* note 32 (arguing law has no intrinsic moral content), *with* FULLER, *supra* note 32 (arguing that legality entails a unique type of internal standing).

The non-accountable nature of judging is linked to its second defining feature, that of rights protection. As with rule of law, the appropriate content and interpretation of rights are fiercely debated.[38] But the *fundamental* nature of rights, and why the judiciary is the appropriate entity for advancing them, is largely accepted as a premise of liberal democracy. There are principled reasons to ensure every individual a certain zone of liberty and protection against state overreach, regardless of popular or majority will. Ronald Dworkin captures the two interlocked universal features of rights.[39] They are based on principles that create zones of individual freedom, regardless of collective will or utility;[40] and they 'trump' typically collective-interest arguments that favor majority will or group benefit.[41] In doing so, rights i) serve the same value of autonomy as popular self-rule, but grounding it at the individual rather than collective level;[42] and ii) preserve essential conditions, such as the guarantee of freedom of political speech and of private association, that make popular self-rule possible. Given that legal defense of individual rights against majority will typically requires a counter-majoritarian decision-making, courts are the logical institution to defend them.

The features of neutral rule of law decision-making, rights defense, and political non-accountability of the judiciary are interwoven. Judges have the institutional capacity and obligation to reason objectively to protect rights and universally apply the law regardless of policy interests or the political consequences. If elected institutions acted in this way, they would risk political backlash, and might be seen as deviating from their agential obligation to obey majoritarian principals. But judicial service to prospectively countermajoritarian justice is one of the Court's central institution virtues.

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[38] This debate has extraordinary breadth. Some have challenged whether the judiciary is the best defender of rights. *Compare* JEREMY WALDRON, LAW AND DISAGREEMENT (1999) with Theunis Roux, *In Defence of Empirical Entanglement: The Methodological Flaw in Waldron's Case against Judicial Review*, *in* CAMBRIDGE HANDBOOK OF DELIBERATIVE CONSTITUTIONALISM (Ron Levy, Hoi Kong, Graeme Orr, & Jeff King eds., 2018). Other debates focus on specific rights, such as the right to equal protection on the grounds of race; if there is a right to abortion; and how the right to free practice of religion intersects with, for example, the Establishment Clause.

[39] Justice Black offers a seminal defense in the Pentagon Papers case, New York Times v. United States, 403 US 713, 716 (1971) (Black, J., concurring) (emphasizing that the history and language of the First Amendment supports the freedom of the press to publish without censorship).

[40] DWORKIN, *supra* note 8, 90–91.

[41] DWORKIN, supra note 8, 90-91., 154–59 (discussing the relationship between individual rights and collective utility).

[42] This has led some, such as Eisgruber, to argue that it is rights rather than collective self-rule that is most essential for democracy.

### C. BALANCING POPULAR AUTONOMY AND RULE OF LAW

It might seem that popular self-rule and judicial review are opposed. Popular self-rule empowers the electorate to do what it wishes––including, if unconstrained, to neglect or mistreat vulnerable groups. Judicial review, conversely, allows an elite group to advance a particular vision of morality. Each of these priorities in governance has its champions.[43]

A recent strand of scholarship has emphasized that the two features work in concert to sustain liberal constitutional democracy. Tom Ginsburg and Aziz Huq argue that democracy demands more than "a simple requirement of competitive elections" and instead identify the triad of i) competitive elections, ii) rights, and iii) rule of law.[44] As rights and rule of law are typically identified with the judiciary, Ginsburg and Huq can be described as seeking to synthesize the countermajoritarian difficulty into a positive account of functional democracy. Rights and rule of law are necessary *preconditions* if the elections are to be morally meaningful and practically sustainable expressions of popular will. Samuel Issacharoff characterizes the relationship between majoritarian elections and these preconditions as beneficial constraints of popular will: "successful liberal democracies . . . must enable majority rule while also institutionally limiting it."[45] For Issacharoff, threats such as entrenchment and majoritarian oppression necessitate mechanisms like judicial review to make democracies longitudinally stable.[46]

Ginsburg, Huq and Issacharoff invert the standard tension posed by the countermajoritarian difficulty. Institutions such as the judiciary do not threaten democratic autonomy, but rather they sustain it. The difficulty is that this reframing does not resolve the question of how the priority of popular autonomy and the necessity of judicial review are to be balanced. Rather, they offer descriptive accounts of why judicial review beneficially tempers the

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[43] *See, e.g.*, WALDRON, *supra* note 37, at 303 ("[E]verything is up for grabs in a democracy"); *cf.* EISGRUBER, *supra* note 24, at 83 ("We need a practical conception of democracy that emphasizes processes and institutions without privileging majoritarianism.").

[44] GINSBURG AND HUQ, *supra* note 12, at 9.

[45] SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 2 (2015).

[46] *Id.* at 4 (exploring whether to "trust the future leadership of the country to the outcome of an election"); *id.* at 12 (explaining that constitutional courts "provide a critical process limitation" on this "exercise of democratic power").

practice of democratic self-rule.[47] But observing that the realization of democracy is more complex than raw conversion of citizen preferences into state action––that successful democracy requires a "latticework of practices, institutions and attitudes"[48] or that the "domain of our lived experience" of democracy is "contaminated" rather than ideal[49]–– does not answer the question of why the judiciary is the specific institution with the moral authority to dictate terms of the political process.

An authoritative account of how the electoral process and judicial review fit together would impose explicit preconditions upon democratic design and operation. A descriptive account that claims such wisdom thus encounters a higher-level version of the countermajoritarian difficulty: it imposes a set of values down upon a free electorate. In Waldron's conception, such an account would make some institutional arrangements no longer 'up for grabs' and indicate that there is a higher morality than the morality of popular will.[50] This observation does not entail that Waldron's critique—including his own descriptive claim that popular will is the best defense of democracy's tenability––is necessarily correct.[51] Rather, this observation indicates that the claim that popular will and judicial review both serve liberal democratic values does not solve the countermajoritarian difficulty. It only recasts it as a higher-order problem of offering a full account of constitutional democracy.

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47 Another issue raised by this inversion of the countermajoritarian difficulty is that once the project becomes a description of the social and institutional practices that sustain democratic society, the potential array of factors becomes dizzying and extra-legal. One could point to, for example, the cultural underpinnings of democracy in a set of shared moral values and rooted social assumptions. JOHN RAWLS, LAW OF PEOPLES 23 (1999) identifies institutional factors as only one of three features that are necessary for liberal society, the others being a shared sense of morality and a set of "common sympathies" (a phrase Rawls borrows from John Stuart Mill). More plainly, as ERNEST GELLNER, CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS 186 (1994) states, the existence of democracy depends upon "institutional and cultural" factors. Yet if one remains in "[l]aw's domain," Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 360 (2014), the countermajoritarian paradox remains at the fore. The confrontation between mechanisms that express and restrain popular will manifest the tension between political and judicial lawmaking. Subsuming such explanations, systematic anthropological theories may lose the sense of being *inside* a democratic society—which is to say, a free actor. *See* HART, *supra* note 32, at 89-91 (discussing the internal versus external understanding of a legal system).

48 GINSBURG & HUQ, *supra* note 12, at 14.

49 Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1, 5 (2019).

50 WALDRON, *supra* note 37, at 303.

51 Issacharoff, drawing upon Theunis Roux, argues that Waldron's argument has the precondition of an over-idealized conception of good democratic functioning. *Id.* at 4, 10.

This recasting serves one especially valuable function in making sense of the countermajoritarian difficulty: it demonstrates the unified moral question that solutions to countermajoritarianism must face. The question is what institutional arrangement will do the most to advance democratic values, and what those democratic values are. Recognizing countermajoritarianism as a valid problem requires a baseline commitment to popular autonomy as the central value of democracy. The subsequent question becomes how other institutional features that do not seem to be procedurally responsive to such popular autonomy can be justified, even if they appear to serve some practical function in sustaining governance.

## II: CLASSICAL COUNTERMAJORITARIANISM, PROCEDURAL NEUTRALITY, AND UNIVERSALIST ASPIRATIONS

Since Bickel introduced the concept, American constitutional law has lived in the shadow of the countermajoritarian difficulty. Before anxieties about the tenability of the constitutional democratic order, scholars pursued value-neutral procedural accounts of how popular will and judicial review could coexist. CCM declines to assert substantive norms or specific policy outcomes that should inform either side of the countermajoritarian difficulty: how popular will must be expressed and the character of legitimate judging. PCM is salient because it rejects this value-neutrality of CCM.

### A. THE GENERIC PROBLEM OF JUDICIAL REVIEW

Bickel and Barry Friedman--the two leading scholars of countermajoritarianism--observe that the moral validity of countermajoritarian judging was debated from the turn of the 19th century, with an initial culmination in *Marbury v. Madison*. Bickel begins *The Least Dangerous Branch* with the observation that *Marbury* establishes that "a federal court has the power to strike down a duly enacted federal statute."[52] Friedman traces the struggle between judicial authority and democratic outcomes even further back by contextualizing *Marbury* as a battle between Jeffersonians and Federalists regarding the tenability of the Federalist-appointed 'midnight judges' who were an attempt to preserve Federalist power in the face of political defeat.[53]

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[52] BICKEL, *supra* note 9, at 12.

[53] Friedman 'Part One,' *supra* note 13, at 357.

Yet countermajoritarianism only became an 'obsession'[54] of contemporary academia with Bickel's coining of the term in *The Least Dangerous Branch*.[55] It is this 'modern' expression of the countermajoritarian difficulty upon which this article focuses. The modern expression is marked by framing the difficulty as *explicit* conflict between two self-contained elements of governance, popular autonomy[56] and judicial authority. While similar ideas may have manifested in previous accounts of judicial review (for example, Thayerite minimalism), they were framed internally as theories of appropriate judging rather than the confrontation between two competing forces against the background plane of legitimate governance. This change may be historically contextual. Friedman argues that the Warren Court's progressivism put academics in the novel position of defending judicial authority.[57] Previously (as in the *Lochner* era), courts were conservative-leaning institutions that academics wished to constrain.

For the purposes of this article, the relevant feature of typical post-Bickel countermajoritarian analysis––what this article calls classical countermajoritarianism/CCM––is that the multifarious answers to the difficulty sought solutions that are character and hesitant to assert first-order normative or policy claims. That is, they did not indicate the granular policies and attributes that are necessary for a legitimate democratic process. The result is facial moral agnosticism in CCM. These characteristics are notably present in *The Least Dangerous Branch* itself. As he prepares to conclude the work, Bickel evokes the two pillars of constitutional democracy he seeks to reconcile: "morality of government by consent [popular self-determination] and to moral self-government [adherence to rule of law]."[58] These two

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[54] The use of the word 'obsession' to describe scholarly engagement with the countermajoritarian difficulty is, itself, now almost an obsession. *See supra* note 9; *see also* Karlan, *supra* note 13, at 14 (declaring *The Least Dangerous Branch* to be "the book with which all subsequent discussions of judicial review engage").

[55] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH, 16 (2nd. ed. 1962).

[56] As Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without* Fundamentalism, 107 HARV. L. REV. 30, 61–62 (1993) notes, democracy only became a central part of jurisprudential reasoning in the 1940s; Ely's representation reinforcement theory is a local maximum, and evolved into the anti-lockup theory of contemporary election law. *See* EISLER, *supra* note 21, at 74–75.

[57] Friedman, *supra* note 8, at 159–61.

[58] BICKEL, *supra* note 9, at 199. That Bickel has a conception of rule of law that is morally laden is apparent, as he observes that rule of law cannot mean "full and unrelenting dominion of the Court's principles" because it would extinguish any space for democratic self-determination itself. *Id.* at 200

principles are nigh-incontrovertible and broadly accepted as prerequisites to functional liberal constitutional democracy.[59]

A broadly underappreciated feature of *The Least Dangerous Branch* is how little (despite, as noted in Section II.C, his own partisan inclinations) Bickel specifies the normative content of either pillar. His description of popular self-determination advances only the barest deontological foundations: "coherent, stable––and *morally supportable*––government is possible only on the basis of consent" of the governed through accountable institutions.[60] Throughout the rest of the text, Bickel does little to further elaborate on the specifics necessary for legitimate democracy. Perhaps the strongest indirect indication of this is Bickel's agnostic understanding of democracy and his remarkably inaccurate[61] prediction that the judiciary would largely abstain from dictating the particulars of democratic design. But, given that the domain of the judiciary is a moral principle, this prediction of avoiding the political thicket follows from Bickel's value-neutrality regarding democratic arrangements. If there were principled bases for determining the prerequisites of democratic self-rule, Bickel himself would be expected to elaborate on them. This would create a new layer of complexity in the idea of countermajoritarianism, for democratic self-rule would only be contravened when these norms were violated, which is how PCM, but not CCM, identifies it.

Bickel's analysis of legitimate judging is more extensive than his analysis of democracy, yet retains the same agnosticism regarding moral substance. Bickel's primary assertion is that judging, in contrast to the 'expediency' that marks politics, is a domain of principle.[62] However, his declarations regarding the principled nature of judicial analysis are devoid of any specific normative content. Bickel indicates that the judiciary's role as the champion of principle is foundational, and cannot be overdetermined by any other property (such as understandings of history).[63] This suggests a commitment to an ideal rule of law that suggests the judiciary should act as a disinterested advocate for

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[59] *See, e.g.*, GINSBURG AND HUQ, *supra* note 11; Issacharoff, *supra* note 49; EISLER, *supra* note 22.

[60] BICKEL, *supra* note 9, at 20.

[61] *Id.* at 196–97. As the decades since have shown, the post-*Baker* era has been marked by increasingly extensive judicial involvement in the design of democratic structures. The seminal statement on this as a general matter may be Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004).

[62] BICKEL, *supra* note 9, at 68–72.

[63] *Id.* at 108.

universal *moral* reason that does not serve the end of raw power[64] (as do some realist understandings of democracy).[65] But Bickel does not describe the substantive content of these principles. Rather, he describes the procedural characteristics that judging must possess.[66] As such, Bickel adopts a conception of rule of law that emphasizes procedural neutrality and principled adherence to rationality in the judging process,[67] but does not entail the morality of specific positions or outcomes.

Bickel, of course, initiated rather than resolved the analysis of countermajoritarianism. It is perhaps unsurprising that Bickel's posing of the question did not offer the definitive resolution.[68] Pursuit of that definitive resolution has set the agenda for the analysis of judicial review. Until the emergence of PCM in the past decade, those who recognized the moral onus[69] of countermajoritarianism retained Bickel's agnostic description of the problem.

A handful of examples demonstrate the prevalence of this agnosticism towards democratic procedure and the aspiration towards procedural neutrality in vindicating judicial review. The best starting place may be Bickel's most well-known heir, John Hart Ely. Ely likewise leans heavily on normative agnosticism in his framing of the countermajoritarian difficulty. Ely opens *Democracy and Distrust* with the "obvious" proposition that "rule in accord with the consent of a majority of those governed is the core of the American governmental system."[70] Ely immediately notes that this majority rule cannot be "untrammeled" – i.e., that a majority cannot unreservedly abuse or oppress minority groups – but these limitations are "side constraints."[71] Majority rule is the unequivocal core of democracy, and the challenge is elaborating on the

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64 *See id.* at 200.

65 This is most apparent in the Schumpeterian understandings of politics as a matter predominantly of struggles over power. *See, e.g.*, IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY (2003); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 67–71 (2006).

66 BICKEL, *supra* note 9, at 86 may have the clearest expression of this in Bickel's admiration for Hugo Black's proceduralism. Justice Black legitimates his analysis by looking to the text of the Constitution. Such an appeal to objective procedural is a core example of the appeal to objective method that characterizes typical answers to CCM. *See* Section II.B.1 on originalism below.

67 Bickel is explicit about his adherence to reasoned, principled decision-making. *Id.* at 205. This characteristic of rule of law is commonly recognized by scholars, *supra* note 32.

68 ELY, *supra* note 26, at 71–72 analyzes Bickel's later attempts to make sense of the question.

69 As noted below, some have brushed countermajoritarianism to the side as a problem altogether. *See infra* note 80.

70 ELY, *supra* note 26, at 7.

71 *Id.* at 8.

side constraints. After his initial homage to majority rule, Ely does very little to explicitly state what conditions it must satisfy, or why it is valid.

The rest of *Democracy and Distrust* wrestles with how judicial review should operate in light of the countermajoritarian difficulty. Ely's answer that constitutional judging should affect representation reinforcement is likely the single most influential answer to the difficulty.[72] Ely's promulgation of representation reinforcement – discussed in more detail in Section II.C below – was critiqued from the moment of its unveiling for sneaking in normative commitments while wrapped in the veil of procedural neutrality.[73] To demonstrate how Ely reflects the value-neutrality of CCM, the critical feature is that Ely *aspires* to normative non-commitment. He begins his argument for representation reinforcement by first rejecting "value imposition" as a mode of judging.[74] Representation reinforcement is, in Ely's mind, a meritorious solution because it can guide judicial review without requiring specific normative substance; value agnosticism is thus the defining virtue of his account of judicial review.[75] If anything, Ely is far *more* explicit than Bickel in revealing the degree to which normative agnosticism is prized under CCM.

Turning to an account that focuses on unpacking countermajoritarianism in more detail provides an even more informed demonstration of the value agnosticism of CCM. In his capstone analysis of the countermajoritarian difficulty, Friedman writes "countermajoritarian criticism will emerge when: (1) there is general acceptance of judicial supremacy; (2) there is a sense that constitutional meaning is relatively indeterminate, so that judges have broad discretion; (3) notions of popular democracy are prevalent; and (4) courts are rendering decisions that actually are contrary to the preference of a portion of the public large enough to deem itself the majority."[76] 1) and 2) speak to the nature of judicial review, and 3) and 4) to the nature of democratic self-governance. Friedman calls normative appeal of democracy "intuitive."[77] While he notes that what comprises rule by the people can be interrogated

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[72] It has persisted despite long-running criticism. *See* Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769 (2023).

[73] Karlan, *supra* note 12, at 15; for contemporaneous examples see *infra* note 113.

[74] ELY, *supra* note 26, at 73. More poignantly, Ely describes the dying Bickel's concession that value imposition is inevitable as a move of "desperation." *Id.* at 72.

[75] Ely's perception of this as a virtue is apparent when he describes his theory as "appropriately concern[ing] itself only with questions of participation, and not with the substantive merits of the political choice." *Id.* at 181.

[76] Friedman, *supra* note 8, at 168.

[77] *Id.* at 172.

(and may be constructed),[78] he does so only in passing, and only explores in any depth if countermajoritarianism queries sub-national or national majorities.[79] Friedman's concept of democracy, like Bickel's and Ely's, posits the legitimacy of majoritarian rule. Friedman's corresponding interrogation of the nature of judicial review likewise identifies the existence of the relevant features for the presence of the countermajoritarian difficulty, but leaves them normatively undetermined or generic. The relevant features are the *recognition* of judicial supremacy and of a Constitution open to interpretation – not that the decisions that follow from these features have particular effects.

The extensiveness of this interrogation of the countermajoritarian difficulty as a conceptual touchstone by Bickel, Ely, and Friedman is exceptional. Most scholars tersely posit it as a waypoint to further analysis. The result has been that, while countermajoritarianism is a part of the shared corpus of legal concepts, scholars do not deploy it in a way that is meant to entail normatively informed values regarding democracy.

One facet of this manifests in the claims to universalism in *solutions* to the countermajoritarian difficulty. The posited quality of universalism is the subject of Section II.B below. However, even accounts that are skeptical of the accuracy of the countermajoritarian difficulty tend to take the universalism of the problem and the absence of specific normative commitments as starting premises.

This is apparent from those who are skeptical of the countermajoritarian difficulty either from the integrity of popular self-rule, or from the legitimacy of judicial review. Perhaps the most prevalent critic of the legitimacy of judicial review, Jeremy Waldron, attempts to eliminate the countermajoritarian difficulty by arguing that judicial review does not achieve its purported normative and social goals.[80] Waldron pitches both aspects of this analysis, by his own concession, at a high level of abstraction.[81] One aspect of this is that Waldron has opened himself up to the critique that he is relying on an idealized vision of democratic operation as a premise for his analysis.[82]

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78 *Id.* at 173.

79 He ultimately concludes: "It is thus possible to conclude that for the most part an act was 'countermajoritarian' if it trumped national majority will." *Id.* at 176.

80 This account is extensively developed in Waldron, *supra* note 38, albeit with little discussion of Bickel. Waldron is more explicit about his relationship to Bickel in Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1349 (2006).

81 *Id.* at 1352 (his own writing has been "more abstract than most").

82 *See* Issacharoff, *supra* note 49, at 8; Roux, *supra* note 38.

Regardless of its validity, this claim that Waldron is sneaking in (rather than openly advocating for) substantive features of legitimate democracy demonstrates that Waldron aspires to a universal account of democracy, rather than advocating for specified preconditions. Meanwhile, his very critique of robust judicial review is that judicial review imposes, in a manner that is not accountable to the franchise, substantive values. Legitimate judicial review should be confined to minimalist adjudication.

Some have been skeptical of the countermajoritarian difficulty because of asserted deficiencies of majoritarianism itself. The CCM version of this skepticism does not attempt to 'cure' majoritarianism by declaring it must adhere to new substantive norms – it accepts the typical Bickelian definition and then shows the flaws of majoritarianism generally. Three examples illustrate this feature. vA philosophical critique is that democratic legitimacy does not ultimately draw from majoritarianism at all. This view is exemplified by Christopher Eisgruber's claim that majoritarianism, is, at most, *instrumental* for realizing legitimate democratic values: "elections help to implement democracy because they achieve democratic goals, not because elections are themselves the goal of democracy."[83] Eisgruber and his allies would reject majoritarianism, or even popular will, as the bedrock of democracy. Moving the terrain from philosophy to constitutional interpretation, Erwin Chemerinsky has argued that the Constitution itself does not advance majoritarian procedures of self-rule, and thus that the countermajoritarian judging does not in fact pose the difficulty often identified.[84] Finally, Ilya Somin articulates the idea that voter ignorance undermines the cogency of the countermajoritarian difficulty by weakening the case for majoritarianism at all. Unlike PCM theorists, Eisgruber, Chemerinsky, and Somin do not attempt to solve countermajoritarianism by asserting the conditions of democracy that would make majoritarianism

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[83] Eisgruber, *supra* note 23, at 83. For a direct attack on Bickel on these terms, *see* Rebecca Brown, *"How Constitutional Theory Found its Soul: The Contributions of Ronald Dworkin," in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN (Scott Hershovitz ed., 2008), 46. Eisgruber's claim is strong medicine, diminishing the deontological foundations of democracy, and threatening to impose moral views upon the polity (perhaps selected by Eisgruber himself). For a challenge to Eisgruber's solution, see Eisler, *supra* note 22, at 71–73.

[84] Chemerinsky, *supra* note 27, at 74–75.

legitimate. Rather they take majoritarianism as a procedurally defined, normatively agnostic concept and seek to expose its limitations.[85]

## B. TOWARDS VALUE-NEUTRAL CONSTITUTIONAL INTERPRETATION

The defining features of CCM have not merely been presented internally within the debate over the contours and status of countermajoritarianism as an idea. Bickel's account of the normative challenge posed by judicial review has become the dominant frame for accounts of constitutionalism.[86] Offering a complete overview of the response would demand a comprehensive recounting of American constitutional theory itself;[87] it is enough to succinctly observe that the main approaches aspire to legitimate judicial review through the procedural universalism that is characteristic of CCM.

### *1. Originalism*

Originalism is the bluntest attempt to resolve countermajoritarianism. The underlying principle is that the meaning of a constitutional provision at the time of the passage should dictate its application in legal interpretation. In the words of its most famous advocate, originalism dictates that the text of the Constitution "has a fixed meaning."[88] Ultimately this fixed meaning has validity because it was agreed to by the polity through an explicit and demanding process of direct popular consent that makes it higher law, and it continues to operates as a contract-like agreement that sets the basic terms of constitutional democracy.[89] This fixed meaning is discoverable as a matter of descriptive

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85 Somin, *supra* note 8, at 1290 and Chemerinsky, *supra* note 27, at 70 take Bickel as an explicit starting point. Eisgruber reiterates the conception of majoritarianism upon which Bickel relies, at 50, though he recognizes Bickel's deep influence in passing, *supra* note 25, at 225 n.50.

86 Karlan, *supra* note 12, at 14 notes that Bickel's account is "the book with which all subsequent discussions of judicial review engage;" *see also* Graber, *supra* note 8, at 1. Somin, *supra* note 8, at 1290 n.6 recounts the vastness of the scholarly response.

87 For one such effort, *see* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate* 113 N.W. L. REV. 1243 (2019).

88 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 847, 854 (1988).

89 Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 G.W. L. REV. 1127, 1132 (1997) ("All power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it.").

analysis.[90] There are disputes over this project,[91] but these disputes occur (at least compared to living originalism) within a relatively narrow band.

This sketch captures why originalism, as an answer to countermajoritarianism, mirrors the defining characteristics of CCM. An advocate for originalism claims that the judicial review side-steps the countermajoritarian difficulty because judges are only enforcing the higher-priority commitments of a polity (adopted through the especially onerous commitments of constitutional framing and amendment) against later, lower-priority decisions (actions taken by the legislature within this constitutional frame). Judges are only acting as guardians of the popularly authorized precommitments, and doing so by identifying the objectively determinable legal implications of those precommitments. Originalism offers a solution to countermajoritarianism marked by purported universalism of method (understanding of objectively described history) and neutrality of result (enforcing the commands of that history). The purest understandings of originalism spare judges the need to make normative judgments,[92] because they do nothing more than parse the historically informed meaning of intelligible text. CCM is solved by the fact that the higher-priority commitments require no normative overruling of popular will by judges, only judicial enforcement of what the popular will itself has asserted.

### *2. Living Constitutionalism*

Originalism has been widely critiqued as normatively suspect[93] and analytically insufficient,[94] yet many scholars wish to retain the centrality of the Constitution in American democracy and law. The result has been the efflorescence of theories that can be placed under the broad umbrella of living constitutionalism.[95] The types of living constitutionalism that seek to maintain

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90 Keith E. Whittington, *Originalism: A Critical Introduction* 82 FORDHAM L. REV. 375, 377 (2013); William Baude, *Is Originalism Our Law?* 115 COLUM. L. REV. 2345, 2357 (2015).

91 *See* Solum, *supra* note 87, at 1251.

92 Criticism of originalism often argues that this purportedly objective process sneaks in judges' normative values. *See* David A. Strauss, *Does the Constitution Mean What It Says?* 129 HARV. L. REV. 1, 17 (2015); Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text* 64 DUKE LAW JOURNAL 1213, 1217 (2015).

93 Jacob T. Levy, *Not So Novus an Ordo: Constitutions without Social Contracts,* 37 POL. THEORY 191, 192 (2009).

94 *See supra* note 88.

95 As Solum, *supra* note 87, at 1259 observes, living constitutionalism is not as tightly defined as originalism, with significant debate over what the phrase connotes.

the primacy of popular self-rule[96] continue to reflect value-neutrality. Because of the diversity of living constitutionalism, an exhaustive account is beyond the scope of this piece. A few representative examples will suffice to demonstrate that living constitutionalism answers the countermajoritarianism difficulty on the terms of CCM.

Perhaps the most familiar forms of living constitutionalism seek to show how the Constitution can remain authoritative even as judges update their interpretations of it. David Strauss, for example, advocates for 'common law constitutionalism,' an interpretive approach that incorporates both the meaning of text and the aggregated legacy of past interpretation to reach conclusions at any given moment.[97] In a parallel vein, Jack Balkin argues for 'living originalism,' which recognizes the Constitution may decisively resolve a small number of problems, but that judges must deduce general principles and extract answers from them for a far greater number. In Balkin's view this is a practice of construction (rather than textual interpretation).[98] These approaches modulate originalism's focus on fealty to the pure meaning of the text – but they do so by modifying the *processes* of making sense of the Constitution to validate judicial review. As such, they share originalism's focus on explaining why judicial review is valid as a matter of its value-neutral, process-driven answer to CCM. In granting greater flexibility to judges they may face the criticism that they create greater opportunity for judges to introduce their own normative judgments. However, the bite of this criticism (if successful) demonstrates conformity to CCM's avoidance of justification of judicial review by outcomes or normative commitments.

Rather than turning to interpretation, another trend has been to locate the legitimacy of constitutional command in its relationship to the rank-and-file electorate. This view is most strongly associated with Bruce Ackerman and Larry Kramer. In Kramer's words, the Constitution is not only a matter of judicial authority, but "an act of popular will: the people's charter, made by the people."[99] As Ackerman observes, this higher law of the Constitution is defined by popular political engagement, rather than only by abstract

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[96] Some hardline forms of living constitutionalism reject popular self-rule in favor of substantive normative commitments as the defining feature of legitimate democracy. *See supra* note 79.

[97] DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

[98] JACK M. BALKIN, LIVING ORIGINALISM (2014).

[99] LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004).

reasoning by legal elites.[100] By this understanding, the impact of the Constitution upon popular governance is no longer "presumptively antidemocratic",[101] because the content of the Constitution is an expression of democratic will. This attempt to ameliorate countermajoritarianism does so on the terms of CCM – indeed, perhaps more resonantly with CCM than most solutions. It resolves countermajoritarianism by showing how even the 'input' of constitutional enforcement is reflective of popular self-determination. But it does not dictate the substantive norms that such popular determination – either as a means of redeeming judicial review, or as an independent foundational value of democracy – must adhere to. Rather, it offers them as a type of process that can redeem the two poles of democratic constitutionalism.

These versions of living constitutionalism are representative of the approach as a whole in that they answer the countermajoritarian difficulty by innovations in *process*. They avoid specific normative commitments, or substantive claims about the requirements of justice. In doing so, they seek to avoid validating judicial review, or governance, because it conforms to or advances particular values or policies. The universalism of CCM remains in the background of such theories.

### *3. Representation Reinforcement and Anti-Entrenchment Theory*

A third justification for judicial review looks to the power realities of constitutional democracy. The argument is that courts, insulated from the self-interested struggles of accountable politics, can intervene to prevent pathological entrenchment by current power holders and dominant cliques. This view has its first, most prominent advocate in John Hart Ely and his theory of representation reinforcement.[102] A sympathetic approach was advanced by the scholars who later founded the field of election law.[103] In Ely's words, judicial review should "unblock[] stoppages in the democratic process."[104] For the second generation of structuralist scholars, courts should

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100 BRUCE ACKERMAN, WE THE PEOPLE: VOLUME 1: FOUNDATIONS 7 (1993).

101 *Id.* at 10 (confronting the countermajoritarian difficulty as such).

102 ELY, *supra* note 26, 206 n.9.

103 The seminal account may be Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process* 50 STAN. L. REV. 643 (1998). For the relationship between contemporary election law and Ely's theory, *see* Luke P. McLoughlin, *The Elysian Foundations of Election Law,* 82 TEMPLE L. REV. 89 (2009).

104 ELY, s*upra* note 26, at 117.

strike down laws that current power-holders adopted to reduce electoral competition.[105] Both these approaches justify judicial review as a realist necessity to sustain democracy over time, lest the majority of the moment and their agents craft entrench themselves. Courts, reflecting a neutral and insulated body, are well-positioned to intervene against such abuses.

The feature of such structural justifications for judicial review is that they are typically seen as vehicles of neutral procedural intervention, rather than as a vehicle for substantive values. Ely is most explicit about this, grounding representation reinforcement theory in the claim that "the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values."[106] Similarly, Samuel Issacharoff and Richard Pildes characterize their focus on competition as "process-based",[107] and treat competition as a background feature of sound elections rather than a particularized substantive norm. Seeking to ground power-based correction of representative self-aggrandizement as a neutral background condition has become a prevalent feature of theories of law and elections.[108] Such structural justifications for judicial review neatly conform to the process-oriented normative neutrality of CCM. The countermajoritarian potential of judicial review is alleviated because it defends normatively neutral democratic process.

### C. A REALIST CONCESSION: CCM AS AN IDEOLOGICAL SHROUD

The analysis and rhetoric of CCM demonstrate commitment to value-neutral, process-informed constitutionalism. Yet many have suggested that the CCM analysis inevitably has the ulterior motive of advancing the political values of those defending them. Mark Tushnet captures the effect of this: "A broad generalization, inaccurate only at the margins, is that nearly every constitutional theorist urges minimal judicial review and vigorous democratic dialogue on issues on which the theorist believes her preferred position is

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105 Issacharoff & Pildes, *supra* note 103, at 646; for an application to a specific legal problem, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform* 77 TEX. L. REV. 1705, 1734 (1999).

106 ELY, *supra* note 26, at 92.

107 Issacharoff & Pildes, *supra* note 103, at 646.

108 *See, e.g.*, Stephanopoulos, *supra* note 47, at 286; Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law* 101 VA. L. REV. 1425, 1499 (2015).

likely to prevail in the democratic dialogue and more-than-minimal review on issues on which the theorist believes her preferred position is unlikely to prevail there."[109] This understanding – which has affinities with both critical legal studies[110] and attitudinal model of judicial decision-making[111] – would undermine the purported objectives of CCM legal scholarship. It furthermore suggests that, when the pretextual optics of CCM are peeled back, CCM has always had the goal of achieving substantive political aims, just like PCM.

The claim of serving an ulterior goal has been directed against Bickel himself. Barry Friedman suggests that "Bickel simply was arguing for, and trying to justify, a set of jurisprudential outcomes he favored personally, within the limits of an intellectual structure handed down to him by his teachers" – the liberal values of the Warren Court.[112] Or as Richard Posner puts it more plainly, "Bickel had a political program [of] mild liberalism."[113] In this view Bickel's entire project was meant to vindicate the moments where the Warren Court advanced the progressivism that Bickel found appealing, such as striking down racial discrimination or affording greater constitutional protections in criminal and penal law. In Friedman's view, Bickel's challenge was redeeming robust yet morally legitimate judicial review in light of a scholarly tradition that was typically skeptical of Courts because of their conservativism (such as during the *Lochner* era).[114] *The Least Dangerous Branch* had as its aim preparing a framework for how this could be done through neutral and abstract principles of interpretation.

Similar claims of ulterior motive have been levied against constitutional scholarship more generally. At the moment perhaps the most notorious is the claim that originalism is a committed project by the conservative political

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109 Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 245–46 n.4 (1995).

110 Critical legal studies see law-making as a value-laden social construction rather than an impartial process of interpretation. *See* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); Amna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821, 826 (2021).

111 The attitudinal model argues that judges are driven by their political inclinations. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

112 Friedman, *supra* note 8, at 159, 162.

113 Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 531 (2012).

114 Friedman, *supra* note 8, at 219.

machine.[115] Yet it can and has been levied against almost any theory of judging whose application yields somewhat coherent ideological outcomes.[116] Even Ely's attempt to openly advance a procedurally based, normatively agnostic theory of representation reinforcement was quickly savaged as doing nothing more than serving as a vehicle for introducing ideology – or, at a minimum, requiring such values to function.[117]

If this is true, then PCM is not a break with CCM, but rather just the exposure of what has long been the driving inspiration behind constitutional scholarship, and presumably law-making as well. Scholars and judges come up with pretextual analyses of facially neutral theories they find preferable, for ideological or partisan reasons. The invocation of value-neutral principles supporting universal theories of interpretation is merely a shroud, or perhaps part of an elaborate dance by which legal scholars attempt to establish their intellectual validity and analytic preferability. If this is true, it would show that the substance of most legal scholarship is at best argued with a highly oblique tenor and motivation, and at worst is meaningless propaganda advanced in bad faith.

This Article takes no view on this point, because the core observation of the CCM-PCM shift is of tectonic significance for legal scholarship regardless. The only question is if the change from CCM to PCM is a fundamental change in the actual substance of constitutional theory (which it is if CCM is taken in good faith), or simply a radical exposure of the true, policy-driven stakes of constitutional debate (which suggests CCM scholarship has typically obfuscated regarding its real goals). The latter is as radical a change to the presentation of constitutional law as the former is to the substance of constitutional law. But demonstrating that the CCM-PCM shift is only one of optics would require a further layer of analysis – perhaps of much greater

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[115] For a recent example of this charge, *see* Reva Siegel's discussion of *Dobbs* in Section III.B.3 below. For critical discussions of this claim, *see* Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198 (2017).

[116] *See, e.g.*, Posner, *supra* note 113 (walking through interpretive theories and showing their underlying motivations). Posner rejects such a coherent schema, preferring somewhat amorphous pragmatism. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003). For an application of this problem in a historical context, see Samuel Moyn, *On Human Rights and Majority Politics*, 52 VAND. J. TRANSNAT'L. L. 1135, 1139–40 (2019).

[117] For an example, *see* Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J., 1063, 1063-64 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory* 89 YALE L.J. 1037 (1980); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 728 (1991).

complexity – of the way in which CCM and PCM advanced their ideological schemas. That is a rich vein for future work.

## III: POLARIZED COUNTERMAJORITARIANISM, DEMOCRATIC BACKSLIDING, AND MORAL ASSESSMENT OF THE JUDICIARY

In the past decade scholars have dramatically reconceptualized countermajoritarianism. Scholars now apply it to identify substantive democratic deficiencies, whether caused by the judiciary or any other institution. This terminological shift illuminates a broader change in the assessment democratic constitutionalism. Whereas CCM advanced procedurally neutral and normatively agnostic accounts of constitutional democracy, PCM defines legitimate democracy by its commitment to substantively informed norms and policies. This drift from the universalist aspirations of CCM suggests a new spirit in the project of constitutional law. The defining features of this shift are the invocation of countermajoritarianism against *any* institution seen to erode legitimate democracy; adoption of substantive moral commitments and correspondingly detailed accounts of legitimate democracy; and the implication that countermajoritarianism is a pejorative feature when these commitments are not met. Recent scholarly evaluations of case law show the most dramatic doctrinal implication: PCM scholars deem decisions countermajoritarian when they *decline* to strike down legislation if judicial inaction is seen as failing to defend democracy. This is apparent in reactions to Roberts Court opinions permitting legislation on voter ID (*Crawford v. Marion County*), partisan gerrymanders (*Rucho v. Common Cause*) and abortion restrictions (*Dobbs v. Jackson Women's Health Organization*) to stand.

### A. FROM PROCEDURAL NEUTRALITY OF COURTS TO UNIVERSAL DEMOCRATIC DEFICIENCY

PCM is marked by three features: i) application of the term 'countermajoritarian' to *any* institution or social feature that obstructs popular autonomy; ii) adopting a morally detailed conception of legitimate democratic self-rule, and identifying countermajoritarianism when institutions deviate from it; iii) use of the term 'countermajoritarian' to pejoratively condemn features for impairing democracy. Countermajoritarianism is no longer a value-neutral feature of judicial review that may, in fact, be normatively tenable or even desirable. Rather it is *any* deviation from a specified legitimate conception of democracy, and worthy of unequivocal condemnation.

*1. Countermajoritarianism in any Deviant Institution or Influence*

The most visible novelty of PCM is the broadened use of the term 'countermajoritarian', such that it denotes *any* constitutional, political, or social influence that impairs legitimate democratic self-rule.[118] These influences range from conservative state legislatures that are willing to use mechanisms such as partisan gerrymandering and voter suppression to empower their constituency to a Republican Party completely ruthless in its commitment to partisan victory to far-right voters who are increasingly polarized and intractable.

A handful of leading accounts have been especially explicit in applying countermajoritarianism to a wide swath of institutions and social practices. The most reflective declaration comes from Pamela Karlan's 2021 Jorde Lecture, in which she identifies a new countermajoritarian difficulty that derives from "changes in demography . . . interacting with constitutional law—both structural features of how political power is allocated and recent Supreme Court decisions."[119] She recounts various features of contemporary American governance that contribute to this countermajoritarianism, from the non-majoritarian federated nature of the Senate and the Electoral College and the changing racial demographics of America (including, for example, a tendency of Americans to sort themselves into socioeconomically homogenous communities)[120] to recent Supreme Court decisions (such as those that she describes as condoning voter suppression)[121] that exacerbate these features. These deficits intersect and reinforce one another to undermine the authority of the electorate itself over its own governance.

As Karlan acknowledges, this is a radical redefinition of countermajoritarianism. It is no longer a feature particular to judicial review, but manifests as democratic deficits throughout American society. Karlan frames her new conception as an attack on a cabined definition, speculating that "Bickel [was] wrong . . . in supposing the countermajoritarian difficulty was tied to the judiciary."[122] Thus, her revised vision of countermajoritarianism *explicitly* rejects the institution-specific conception that has inspired much of American constitutional law.

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[118] A longer-established claim that resonates with this aspect of PCM that the judiciary is not, in fact, countermajoritarian. *See supra* note 23.

[119] Karlan, *supra* note 4, at 2324.

[120] *Id.* at 2328.

[121] *Id.* at 2347.

[122] *Id.* at 2324.

Many scholars have echoed, or even redoubled, this redefinition.[123] In response to her Jorde lecture, Nicholas Stephanopoulos adopts Karlan's redefinition,[124] describing the non-majoritarian presidential outcomes (Bush in 2000 and Trump in 2016) as "countermajoritarian outcomes[s]" and identifying countermajoritarian politics as a "real peril" to American democracy.[125] Likewise, Franita Tolson commits even more unabashedly to an extra-constitutional conception, offering the intersection between non-majoritarian aspects of the constitutional architecture and social features such as racial and political polarization to show "that the countermajoritarian difficulty has more often manifested in the political struggles outside of the courts."[126] Other writing have likewise adapted the term to indicate broad structural threats to American democracy. Steven Levitsky describes "counter-majoritarian institutions" as those that "dilute the power of electoral majorities"[127] – a wide-ranging structural conception that abandons its unique application to the judiciary.[128] Robinson Woodward-Burns innovates the concept of "counter-majoritarian constitutional hardball" to describe a practice that is the function of "legislative power."[129] In many respects, her conception – which Mark Graber describes as potentially derailing efforts to legitimize constitutional reform through political channels[130] – exemplifies the transformation of the institutional locus of countermajoritarianism under PCM. Woodward-Burns describes such interdiction of majority will as a form of illicit *political* maneuvering by a sub-majority elite empowered by structural pathologies. In this respect, countermajoritarianism is transformed into

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123 William Baude, *The Real Enemies of Democracy,* 109 CAL. L. REV. 2407, 2419 (2021)—the interlocutor to Karlan's Jorde lecture who does not embrace her assessment—prefers the term "undemocratic" to describe exploitation of structural inefficiencies in the Constitution. This suggests that advocates of PCM tend to integrate a broadened conception of countermajoritarianism with their substantive political concerns.

124 Stephanopoulos, *supra* note 4, at 2358 includes one insight that foreshadows Section III.B below—he notes the decisions of the Roberts Court that allow partisan gerrymandering and voter ID laws to stand "isn't a record of countermajoritarian intervention. It's a pattern of failing to intervene in defense of majoritarianism."

125 *Id.* at 2358, 2361.

126 Tolson, *supra* note 4, at 2392.

127 Levitsky, *supra* note 6, 1997.

128 Levitsky does note that the rights and minority-protecting aspects of countermajoritarianism are morally essential, but his definition of countermajoritarinism makes them incidental rather than intrinsic. *Id.* at 1998.

129 Woodward-Burns, *supra* note 3, at 381.

130 Mark A. Graber, *Essentially Contested Constitutional Revolutions,* 81 MD. L. REV. 205, 208, 215 (2021).

something much more like the familiar concern regarding electoral entrenchment.[131] In a similar vein, Miriam Seifter's uses the term countermajoritarian to characterize state legislatures (and introduces an elaborate account of majoritarianism to do so).[132] Seifter exemplifies the *institutional* generalization of countermajoritarianism distilled by Karlan: countermajoritarianism, once a generic quality that by definition applies to courts because of their non-accountability, is now a term used to condemn any institution that fails to accord with substantive democratic values. Michael Smith similarly adopts a purely *political* definition of countermajoritarianism as having political power despite reflecting the views of a minority.[133]

This reconceptualization of countermajoritarianism has vast consequences. It undermines the motivating anxiety of American constitutional law, which interrogates the judiciary as *uniquely* countermajoritarian. The scholarly starting point for constitutional analysis – that accountable governmental actors are, if imperfectly accountable, certainly *more* accountable than the judiciary (and unlike the judiciary, *intended* to be accountable)[134] – loses its bearings if countermajoritarianism can manifest in any institution or condition. Furthermore, this redefinition means countermajoritarianism no longer indicates the *virtues* of judicial review. It is countermajoritarian insulation from political pressure that allows the judiciary to protect minority rights from majoritarian overreach or ensure neutral legal process for *every* party to a suit. Because countermajoritarianism is now just a general flaw of the political process,[135] it can no longer frame vindication of judicial review or analysis of constitutional interpretation.

### *2. The Substantive Moral Commitments of PCM*

PCM also entails a commitment to substantive values of democratic morality and the policies that enable them. Influences are countermajoritarian when they cause deviation from these values. These values are invoked to condemn the far-right assault on legitimate democracy. Thus countermajoritarianism now indicates specific deviations from legitimate

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131 *See* Issacharoff & Pilde, *supra* note 103.

132 Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1756–59 (2021).

133 Michael L. Smith, *Countermajoritarian Criminal Law*, 43 PACE L. REV. 53, 66 (2022).

134 *See supra* note 24.

135 Scholars advancing the PCM view primarily use the term to condemn the Roberts Court for decisions that do not recognize democratic deficits. *See* Section III.B below.

democratic practice, and the faction in America – Republican conservativism – is responsible for such deviations, rather than for the abstract institutional tension between the representatives and the judiciary.

This feature is especially clear when considering PCM critiques of the Supreme Court for exacerbating the far-right democratic backsliding. As Lynn Adelman summarizes, "the Court's hard right majority is actively participating in undermining American democracy."[136] Pamela Karlan first reviews changes in demography, institutional elements (such as the Electoral College), and political machinations by the hard-right, and then observes how in light of these factors the Robert's Court has "exacerbated the countermajoritarian drift in our politics."[137] She contrasts the Roberts Court with the Warren Court's constitutional decisions – attacking malapportionment in particular – that benefit political accountability. As Karlan herself notes, her charge of countermajoritarianism against the Roberts Court is "distinct from the one that preoccupied Alexander Bickel."[138] Karlan thus recognizes that unlike Bickel's use of the term to identify value-neutral, proceduralist tension between judicial power and popular autonomy, she is deploying it to identify substantive failures of the democratic process. This contains the seed of the polarized aspect of PCM – to levy these charges, it must commit to political values. Karlan's contrast between the Warren Court and the Roberts Court is that the Warren Court used its constitutional authority to advance one vision of democracy that more closely aligns with a progressive, egalitarian conception of democracy. Conversely, the Roberts Court has exacerbated hard-right *democratic* countermajoritarianism, either by declining to act to prevent it (partisan gerrymandering and voter ID) or striking down legislation that works against it (*Shelby County*). Ultimately this charge of countermajoritarianism depends upon committing to a vision of how democracy should operate, and indicting the Court – either by action or inaction – for failing to make decisions in accordance with it.

Karlan's complaint is exemplary of a prevalent accusation levied against the Roberts Court. Michael Klarman offers one of the most extended and systematic accounts. After an exhaustive recounting of the "Republican Party's assault on voting rights and President Trump's war on the institutions and

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[136] Adelman, *supra* note 5, at 131.

[137] Karlan, *supra* note 4, at 2344.

[138] *Id.* at 2345. It is worth noting that Bickel, *supra* note 9, at 196–97 predicted incorrectly that *Baker v. Carr* would be of limited importance, and that the Court would likely avoid extensive political intervention.

norms of democracy",[139] Klarman argues that "Republican Justices seem insensitive, or even hostile, to [a conception of judicial review that fosters democracy] – at a time when threats to democracy emanate from the Republican Party."[140] Klarman asserts that while constitutional decision-making is inevitably political,[141] the current highly polarized environment and Republican hostility to legitimate democracy, combined with the fealty of sitting Republican-appointed justices to the Republican political machine means that the majority of the bench will not act to prevent the erosion of American democracy.[142] He adduces, for example, cases such as *Shelby County* and *Rucho* as exemplary of the Republican refusal to take decisions that would enhance democracy.[143] In doing so, Klarman advances a sharpened form of PCM,[144] indicting the contemporary Supreme Court for undermining *specific* democratic practices because of their *particularized* partisan allegiance.

The idea that the Roberts Court is acting as a Republican agent is now prevalent in constitutional law scholarship. Some, as do Karlan and Klarman, see it as part of a coherent Republican scheme to undermine of democratic norms.[145] Others have focused on the standalone observations: the Court is aggrandizing power to itself to advance a hard-right agenda,[146] or has shown an alarming trend of reaching outcomes that aid Republicans in getting elected.[147]

The unique quality to these accusations from a constitutional perspective is that the prevalent mode of classifying them is as a failure of *legitimate substantive political value*, rather than a *generic failure to advance rule of law neutrality*. According to norms of judicial review, courts should act on the basis of principle, not political affinity. If Courts act to advance *any* narrow conception of democracy – whether right-wing or left-wing – it comprises a deviation from this neutrality. Yet critiques of the Roberts Court take the tenor

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139 Klarman, *supra* note 2, at 11.

140 *Id.* at 178–79.

141 *Id.* at 224.

142 *Id.* at 231.

143 See Klarman, *supra* note 2, at 178-194, discussing *inter alia* Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 179 (2013); and Rucho v. Common Cause, 588 U.S. ___ (2019).

144 Notably, Klarman has long relied upon Bickel's mainstream definition. Klarman, *supra* note 23, at 492; Klarman *supra* note 2, at 178.

145 Stephanopoulos, *supra* note 4; Tolson, *supra* note 4; Adelman, *supra* note 5.

146 Mark A. Lemley, *The Imperial Supreme Court,* 136 HARV. L. REV. F. 97 (2022); Josh Chafetz, *The New Judicial Power Grab,* 67 ST. LOUIS U. L.J. 635 (2023).

147 Stephanopoulos, *supra* note 5; Hasen, *supra* note 5. *Moore v. Harper* and *Allen v. Milligan* may dampen this narrative slightly.

of having selected the wrong side in a political dispute. It is this quality that explains the uniquely *polarized* nature of PCM.

The substantive values at the heart of PCM express a robust conception of progressive liberal democracy. Broadly speaking, they are an evolution of Rawlsian[148] and Dworkinian[149] theories of democracy forged in civic equality. PCM more specifically emphasizes the importance of intersectional features such as race and gender to this equality. Thus the commitments of PCM can be synthesized as i) the need for a fair democratic procedure that prevents the already powerful from further aggrandizing their privilege (condemning, for example, partisan gerrymandering); ii) the principle that politics must prioritize just treatment of long-disadvantaged groups such as women and minorities; this involves adopting policies that improve substantive equity for these groups, or, at a minimum, avoid worsening their disadvantaged position;[150] iii) a general idea of granular 'fair play' institutional and political conduct, and condemning the use of aggressive rhetoric or manipulation of political process to achieve partisan ends.[151]

PCM is distinguished from CCM by its explicit commitment not to *these* particular values, but to *any such explicit substantive norms in the framing of the problem*. In the CCM tradition, scholars have condemned or vindicated judicial review because it is anti-democratic as a matter of abstract principle, rather than pointing to the moral commitments or policies of a specific decision. CCM scholars adopt this tack even if their approbation or condemnation of judicial review seems to be motivated by the scholars' own ideologies, as discussed in Section II.C. PCM is a novel trend because the scholars explicitly condemn the Roberts Court for its failures to adhere to or defend the substantive norms that PCM prizes. PCM need not have adopted this approach; it would have been possible to indict the Roberts Court under CCM countermajoritarianism for illegitimately displacing popular will and failing to advance the rule of law. This would frame the Roberts Court's failings as deviation from principled lawmaking *generally*, and thus have the

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148 These values are seminally expressed by Rawls, *supra* note 20.

149 RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2002). For a philosophical account of the progressive view in election law and its relationship to Dworkin and Rawls, *see* Eisler, *supra* note 22, at 14–20, 292–99.

150 For how PCM manifests in constitutional interpretation, *see* Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427 (2017), and for a critique of the Roberts Court on this ground, *see* Stephanopoulos, *supra* note 5.

151 For the early expression, *see* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004), and for the post-backsliding evolution, *see* Fishkin & Pozen, *supra* note 3.

same content as traditional critiques of judicial activism – the judicial imposition of policy rather than principle contravenes more direct (even if still imperfect) expressions of popular autonomy. In making the center of contemporary countermajoritarianism the partisan substance of such deviation, PCM radically changes the concept by abandoning value neutrality with regard to the democratic process.

That PCM grounds itself first and foremost in the claim that the Roberts Court serves the *wrong* norms and thus declines to take the traditional route and claims that the wrongfulness of the Court is its judicial activism *generally*. Courts should, as a matter of popular autonomy, not advance coherent normative agendas as a first-order matter in resolving conflicts. That the attack levied against the Roberts Court is that it advances the *wrong* politicized norms, rather than it advances politicized norms of any persuasion, reveals the centrality of a moral conception of politics and subsequently a particularized conception of democracy to PCM.

Despite this conceptual disjunction, there is a logical parallelism that explains why countermajoritarianism is being used to denote a wider array of institutions *and* to identify an urgent moral challenge to legitimate democracy. It relates back to the nature of countermajoritarianism as a *constitutional* failing. PCM scholars do not merely describe the contemporary crisis of American democracy as a quotidian factional struggle in which a smaller faction temporarily obtained the upper hand due to a fluke electoral outcome.[152] Rather the concern is that they have obtained power through the manipulation of constitutional structures, and that now power in the American system is enduringly dominated by actors who are resistant to genuine popular rule attained by legitimate democratic practices. The durability of this deviation mirrors the problem of CCM courts. The idea of countermajoritarianism does not merely signal the temporary victory of a

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[152] Klarman, *supra* note 25, at 516, offers a representative example: 26 years ago, he critiqued partisan gerrymandering—a legislative practice—as "indefensibly antimajoritarian"—while limiting the term 'countermajoritarian difficulty' to the judiciary. This also manifests when scholars address democratic erosion without indicting the judiciary as a main contributor. *See, e.g.*, Levitsky & Ziblatt, *supra* note 1, at 56, 118–19 (declining to use the term 'countermajoritarian' to describe democratic decay, and characterizing the Supreme Court as a passive actor in it; and observing the importance of continued formal judicial neutrality); *see also* Runciman, *supra* note 1 (declining to use the term countermajoritarian); *cf.* Mounk, *supra* note 1, at 96 (offering an overall political narrative of democratic collapse compatible with PCM, but adopting a core CCM understanding of Courts in describing how "[f]or all of their shortcomings, countermajoritarian institutions like constitutional courts do have a proud record of protecting individual rights").

minority, but a hardened and persistent resistance to the basic norm of popular autonomy. When this quality of countermajoritarianism was limited to the judiciary, it was less threatening (in Bickel's titular words, 'the least dangerous branch' for its lack of an openly coercive toolkit). As a coordinated trend expressed by a wide number of institutional actors and advanced by a major political party, such non-accountability poses a serious threat to the survival of democracy.

### *3. Countermajoritarianism as Pathology and the Transformation of Constitutional Law*

The two foundational features of PCM – its application of countermajoritarianism to any institution that contravenes legitimate popular self-rule, and its invocation of democratic practices to inform countermajoritarianism– give it a second-order feature that radically changes constitutional analysis. Under PCM, countermajoritarianism is fundamentally a *pejorative* term directed against a substantive moral failing. It consists of the unjustified deviation of political practice from equal empowerment of each citizen such that collective popular will no longer determines self-governance.[153] As such, under PCM, countermajoritarianism is the loss of the moral quality that vindicates democracy. Scholars identify countermajoritarianism in order to condemn it, and to encourage judges, activists, and citizens to purge it regardless of how it manifests.

Yet countermajoritarian difficulty has not been the 'obsession' of constitutional law scholarship because it is a gross and irredeemable deviation from democratic legitimacy. Under CCM, countermajoritarianism is the fulcrum of constitutional law because it synthesizes together the challenge and virtue of judicial power. It is posed as a 'difficult[y]' or a 'paradox'[154] because the question is a *reconciliation* of a countermajoritarian institution with legitimate democratic authority. Since Bickel's formulation, scholarship has largely sought to offer value-neutral accounts of how judicial authority is legitimated (at least hypothetically) by the same popular authority that legitimizes democracy as a totality.[155] The characteristic feature of responses

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[153] The significance of equality and freedom to this condemnation—*equal* citizens act so that the collective *freely* determines governance—echoes the essential moral features of democracy Rawls articulates in *Political Liberalism,* discussed in Section I.A.

[154] Bickel, *supra* note 9, at 247–48.

[155] *See* Section II.B.

to the 'obsession' has been showing why countermajoritarianism should be *retained* as a feature of the democratic order. Were countermajoritarianism no more than a pathological deviation from democratic legitimacy, it would do little to inspire these elaborate efforts to reconcile it. Rather the response would be that of PCM scholars towards the hard-right undermining of popular self-rule: alarm, condemnation, and reform efforts meant to alleviate or eliminate it.[156]

This is especially apparent in the relationship between countermajoritarianism and the rule of law. Under CCM, the non-accountability of the judiciary that gives it a countermajoritarian cast is the same feature that allows it to champion neutrality and objectivity in the application of law. It is this feature that has led scholars to identify the importance of politically insulated judicial review to the survival of democracy. The CCM attempt to 'solve' the countermajoritarian difficulty reflect the tension in retaining democratic primacy while also retaining the political insulation of the Court. Conversely, the PCM critiques of the Roberts Court attack the Court's relationship to democratic authority as deviating from the rule of law principles by failing to prevent (or, at worst, exacerbating) the trends of far-right politics. Because PCM defines countermajoritarianism by substantive moral affinity, it cannot advert to neutrality in judicial review as the basis for critiquing the Roberts Court. Such critiques would be of the familiar CCM character, identifying the way in which the policies of the Roberts Court deviate from principled neutrality in decision-making, *regardless* of the partisan direction of the deviation.

PCM thus portends a transformation in the project of constitutional law. Constitutional law has traditionally sought value-neutral explanations for the role of judicial review. Conversely PCM identifies a sufficiently dire threat to the democratic system that its defining project is elimination of substantive features of a political system. The optical marker of this is the re-characterization of countermajoritarianism as irreconcilably pathology. The deeper methodological consequence of such an approach is that it does not lend itself to value-neutral, procedurally abstract interrogation of the judicial

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[156] Prior to the emergence of PCM, general critics of judicial review (such as Waldron and Moyn) fell outside, in one sense, the constitutional law mainstream, because their interest is minimization rather than reconciliation of judicial review. For these scholars, the defining feature of judicial review is its illegitimate contravention of democratic autonomy. Insofar as they are not part of the core PCM movement, it is because their objections 1) are confined to the judiciary and 2) identify judicial authority as morally problematic regardless of the values it advances.

role. Rather, it pursues the more urgent aim of preventing catastrophic failure of democratic process by both judicial and non-judicial institutions. Such constitutional law analysis will have the features of a reform project, instrumental in character and assessing the judiciary and modes of constitutional interpretation by if they serve the PCM conception of democracy.[157] This 'instrumentalization' of the constitutional law abandons the pursuit of a universally tenable account of judicial review in favor of preserving a particular conception of democracy.[158]

### B. PCM DOCTRINAL ANALYSIS: INACTION AS COUNTERMAJORITARIAN

PCM's ramifications for doctrinal analysis are already apparent in the treatment of the Roberts Court's most controversial decisions. This Section examines three manifestations of this trend:[159] voter identification law (*Crawford v. Marion County*); partisan gerrymandering (*Rucho v. Common Cause*); and abortion rights (*Dobbs v. Jackson Women's Health Organization*). These cases have all been invoked to support the charge that the Roberts Court that it at a minimum passive – and perhaps even collaborative – in the face of a partisan conservative attack on American democracy.

These reflect decisions by the Court to *decline* to constrain legislative action. Claiming them to be countermajoritarianism inverts its typical direction: the charge is usually levied against decisions by the judiciary to

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157 One expression of this is the emergence of new proposals for reforming the bench. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L. J. F. 821 (2021).

158 Consider parallels with the early critiques of Ely's representation reinforcement theory, *see* Tribe, *supra* note 117.

159 For analytic simplicity, these are instances where the Court has directly *declined* to strike down legislation. The situation becomes more complicated when the Court balances competing claims to institutional power. Such a situation is, for example, the case in *Shelby County*, which functionally nullified the preclearance requirement of the Voting Rights Act. *Shelby County* has been lambasted for undermining the VRA's benefit to racial justice in voting, and typically classified by PCM scholars as contributing to the democratic backsliding. Yet its relationship to CCM countermajoritarianism is more complex, as it balances the power of the federal government against the power of states, pitching legislatures against one another. Similarly, some (*see, e.g.*, Lemley, *supra* note 146) have classified *West Virginia v. EPA* as judicial overreach, and its limitation of progressive policy would make it a ready example of PCM countermajoritarianism. But as a technical matter, it balances power between state and legislature.

*prevent* action by the elected branches. [160] The classic example from the 20th century[161] of CCM anxiety, and the great bugbear of advocates of judicial legitimacy is *Lochner v. New York*.[162] The case struck down legislation that regulated the working hours of bakers, holding such legislation to violate freedom of contract. *Lochner* came to stand for the proposition that governmental regulation of the economy contravenes due process. This decision lacked clear constitutional grounding, and was profoundly debilitating for the governmental interventions of the New Deal. *Lochner* is now so representative of judicial overreach, that when courts "substitut[e] their own view of desirable social policy for that of elected officials" they "Lochnerize."[163]

Given the legacy of the Warren Court, *Lochner* is a perfect pendant to the problem of countermajoritarianism under CCM. The *Lochner* Court and the Warren Court shared one critical feature: both were willing to strike down legislation that they saw as morally unjust in the name of individual rights and rule of law. Yet the Warren Court, through decisions from *Brown v. Board of Education* to *Baker v. Carr* to *Gomillion v. Lightfoot*, struck down legislation that is now universally condemned as illegitimate. The liberal anxiety was that if *Lochner* must be condemned, so must Warren Court

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[160] The judiciary can also err by declining to protect the vulnerable, as it did in *Plessy v. Ferguson*, *Giles v. Harris*, *Buck v. Bell,* and *Korematsu v. United States*. These cases are all frequently classified as 'anti-canon' cases, along with *Lochner* and *Dred Scott*. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011). Yet these cases of *failure* of the Court to adequately enforce individual rights—which might be best understood as a failure of its majority-constraining, individual-protection rule of law remit—receive little focus in core CCM accounts, from Bickel to Ely to Friedman. Conversely, *Dred Scott* and (especially) *Lochner* have been axial to their narratives.

[161] The other major decision offered as a gross error in striking down legislation, *Dred Scott*, has been less prevalent in contemporary concerns regarding CCM, even though it remains reviled as an outcome. Yet CCM scholars still address it, given its countermajoritarianism ramifications, in some detail. *See* Bickel, *supra* note 9, 259–61 (addressing the countermajoritarian ramifications of *Dred Scott* as a political decision); Friedman, *supra* note 13, at 413–31 (parsing the degree to which *Dred Scott* activated countermajoritarian anxieties); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court,* 91 GEO. L. J. 1, 20–22 (2002) (discussing if *Dred Scott* explained the Supreme Court's weak post-Civil War posture).

[162] 198 U.S. 45 (1905). Like countermajoritarianism, *Lochner* has generated a subdiscipline of constitutional scholarship. *Compare* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987) (arguing that the traditional view Lochner is condemned for 'judicial activism' should be supplanted by the recognition it was condemned for advancing a view of the distribution of wealth) *with* David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003) (challenging Sunstein's view as historically underinformed). *See* Barry Freidman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner,* 76 N.Y.U. L. REV. 1383 (2001) (framing the development of the pre-Warren countermajoritarian difficulty through the lens of Lochner).

[163] Friedman, *supra* note 161, at 1385.

progressivism. The goal of CCM has largely been, in Ely's words, "to find a way of approving *Brown* while disapproving *Lochner*."[164] Or alternately stated, in David Bernstein's words, the goal is now to address the criticism "frequently [directed] at the Warren and Burger Courts [of] *Lochneristic* judicial activism."[165] The result is that CCM accounts of interpretation pursue facially value-neutral explanations of how and when robust judicial intervention is valid (and why it applied to the Warren era but not the *Lochner* era).

PCM breaks with this tradition by critiquing case law that cannot be understood under the post-*Lochner* interpretive framework. The Roberts Court has been assailed by PCM scholars, as much for decisions that allow legislation to *stand*. That is, the Roberts Court has been assailed for *rolling back* the extent of, in the words of traditional critique of Lochnerism, 'judicial activism' – even if that judicial activism served the causes of justice and democratic legitimacy. The reason, as the totality of PCM scholarship makes clear, is that these decisions have failed to preserve legitimate democratic structures and individual rights in the face of a concerted far-right assault. Reducing the extent of judicial power is assailed as an assault on democracy further that PCM is guided by preserving a specific vision of legitimate democracy.

### *1. Voter Suppression: Crawford v. Marion County*

Three instances where the Supreme Court has declined to strike down legislation and subsequently been savaged by PCM scholars vividly illustrate this change. One of the earliest such cases is 2008's *Crawford v. Marion County Election Board,* in which a (mostly) conservative bench[166] left standing an Indiana statute requiring voter ID against a facial challenge that the statute burdened the right to vote in violation of the Fourteenth Amendment. Six justices found no violation, with a 'moderate' conservative opinion concluding that, under the balancing test of *Anderson v. Celebrezze*,[167] the prospective

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164 ELY, *supra* note 26, at 65. Ely quotes Bickel, *supra* note 9, at 237–38 to support this claim.

165 Bernstein, *supra* note 157, at 6. Given that the development of CCM seems best explained by the need to condemn *Lochner* while approving of Warren Court's 'judicial activism', Bernstein's claim that Warren Court supporters simply "brushed off such criticism" seems untenable; rather, the liberals sought to shroud their defense of the Warren Court in the procedural neutrality of CCM.

166 Stevens joined the plurality opinion along with Roberts and Kennedy. As Klarman, *supra* note 2, at 187 notes, Stevens later reversed his position (though this would not have changed the outcome of the 6-3 case).

167 460 U.S. 780 (1983).

burden on "a small number of voters" was outweighed by "the State's broad interests in protecting election integrity."[168] A more 'extreme' conservative opinion concluded that because the restriction was "nonsevere" and "nondiscriminatory" it should face the more deferential standard of *Burdick v. Takushi*,[169] and survive without consideration of the burden.[170] The three dissenting justices expressed concerns that there was an absence of any proof of voting fraud, and that moreover the burden of the provision would be more likely to fall upon the poor and racial minorities.[171] The debate was not about the constitutional question elicited, but about the severity of the burden and how it should be weighed against the purported anti-fraud and pro-integrity interests of the measure.

*Crawford* precisely *declined* to strike down an act taken by representative agents,[172] thus avoiding the typical threshold criterion of countermajoritarianism. Despite this, scholars have made it a central target of PCM criticism, holding the Court responsible as either complicit or responsible (Adelman calls it an "assault[]" on "the voting rights of the poor and minorities")[173] for the suppression of voting rights. This critique is twofold: i) Indiana had failed to show incidents of voter fraud, there was little reason to treat the law as justified; and ii) there were clear pretextual reasons for Republicans to want to pass such measures, because the demographics that would be more likely to have their voting suppressed tend to vote Democrat.[174] By PCM lights *Crawford* is a core example of the judicial contribution to the Republican distortion of fair democracy.

Classifying *Crawford* as countermajoritarian requires rejecting the CCM understanding of countermajoritarianism as well as committing to the features of PCM. Speaking abstractly, the Court did nothing to *advance* vote suppression; it simply declined to intervene to prevent it. As such, the Court

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168 553 U.S. 181, 200 (2008).

169 504 U.S. 428 (1992).

170 Crawford v. Marion Cnty. Elec. Bd., 553 U.S. 181, 204 (2008) (Scalia, J., concurring).

171 553 U.S. at 238-39 (Breyer, J., dissenting); 238–39 ("[A]n Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles.").

172 *Id.* at 204. Striking down a voter ID measure could be justified by CCM representation reinforcement theory—the measure had disproportionate impact upon vulnerable voters.

173 Adelman, *supra* note 5, at 145.

174 *See* Karlan, *supra* note 4, at 2348; Klarman, *supra* note 2, at 184–46. Stephanopoulos, *supra* note 5, at 170 observes that *Crawford* could be explained by "[j]udicial restraint" but then contrasts it with *Shelby County* and *Citizens United*. He characterizes (with echoes of Tang, *supra* note 150) *Crawford* and *Rucho* as "reverse *Carolene*", and ultimately suggests, though does not firmly commit to, a "legal realist" commitment of the Roberts Court to the Republican Party, *id.* at 178.

merely allowed the process of the delineation of democracy to play out through the political process (a conclusion that scholars such as Waldron would approve of). Indeed, in his plurality opinion Stevens takes pains to observe that states adopt a variety of ballot integrity protection mechanisms along a spectrum of impact on ease of voter access.[175] In doing so he defers to the polity the authority to set its own terms of democratic self-determination. PCM scholars argue that his claim to doing so is in fact simply allowing one pathological conception of democracy – that preferred by the far right – to advance its agenda and entrench its power. This merely reveals the normative specificity and broadened conception of institutional responsibility that is required to condemn *Crawford* as a countermajoritarian decision.

An alternative reading of *Crawford* would be that it is not countermajoritarian, but simply morally repugnant – more akin to other failures to protect rights such as *Giles v. Harris*[176] (declining to strike down grossly racist ballot access restrictions) or *Buck v. Bell*[177] (declining to prohibit sterilization on purported grounds of mental disability). These decisions are unequivocally moments of judicial failure in refusing to control an oppressive state – but they are errors of the moral reasoning that informs rule of law, perhaps precisely described as judicial cowardice, rather than examples of classical countermajoritarianism. As such they have not become linchpins of legal analysis such as *Lochner* or *Baker v. Carr*,[178] because they do nothing to push at the boundaries between elected and judicial authority.[179] Furthermore, as ingenuous (for Stevens) or partisan (for the conservative justices) as *Crawford*'s reasoning may be, it does not have the character of *Giles* or *Buck* of permitting explicit and avowed state oppression of vulnerable groups (even if that is its effect).

The opprobrium directed towards *Crawford* has a tenor different than that of moral disdain towards an institution that is declining to protect the vulnerable. It instead reflects an anxiety that the Court is actively contributing to the decay of the broader structures of American politics – *even though the*

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175 553 U.S. at 197.

176 189 U.S. 475 (1903).

177 274 U.S. 200 (1927).

178 369 U.S. 186 (1962).

179 *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon* (2000) 17 CONST. COMMEN. 295, 297 (2000) (characterizing *Giles* as "airbrushed out of the constitutional canon"); *see also* Greene, *supra* note 160, at 462 (speculating that *Buck* is primarily castigated for its shocking content rather than its legal reasoning).

*pathology of the voter ID measure itself reflects the existing dynamics of those politics*. *Crawford*'s legal effect as allowing legislation to stand and the anxieties surrounding democracy competence make the reaction to it exemplary of the PCM focus on a specified normative conception of democracy. Karlan sees in *Crawford* a failure to control right-wing partisan impulses that she holds to have motivated the legislation.[180] Even more pointedly, Klarman declares "Justice Stevens also invoked the state's interest in protecting public confidence in the integrity of the voting system: whether or not voter impersonation fraud actually existed, people might believe that it did. However, that rationale simply rewarded the Republican Party for a decade's worth of lies perpetuating the myth of voter impersonation fraud."[181] Adelman openly calls the anti-fraud justification a "sham" that serves as a cloak for the Republican scheme to suppress votes.[182]

These critiques suggest the Court should intervene to protect democracy from pathologies whose deeper roots must be attributed to voters' own frailty as political agents. Partisanship in the organization of political process is ferociously complex because parties are precisely the intermediaries by which citizens as well as elites organize to achieve political control.[183] This organizational capacity can be abused, but it is also essential for democratic organization, and it ultimately reflects extra-political impulses traceable, in meaningful part, to rank-and-file voters' preferences that are realized through forming allegiances and striking bargains. This can include legislation that shapes political processes, and merely because a given piece of electoral legislation reflects partisan influence cannot be the basis for its illegality.[184] Such partisan-driven legislation can be illegal if it uses partisanship in illegal ways,[185] but the marker of illegality is the realization of the partisanship.

The driving feature of the characterization of *Crawford* as countermajoritarian is that it relies on pretext to advance the agenda of one party. This has two underlying moves that reveal the depth of PCM's

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[180] Karlan, *supra* note 4, at 2347–48.

[181] Klarman, *supra* note 2, at 185.

[182] Adelman, *supra* note 5, at 145.

[183] For a complete account of this proposition, *see* Jacob Eisler, *supra* note 22, Ch. 5.

[184] For an argument of how this applies specifically to partisan gerrymandering, *see* Peter Schuck, *The Thickest Thicket,* 87 COLUM. L. REV. 1325, 1350 (1987); *cf. Davis v. Bandemer,* 478 U.S. 109, 152–56 (1986) (O'Connor, J., concurring) (observing that major political parties are dominant actors in a democracy and do not require the types of protections afforded vulnerable minority groups).

[185] *See* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*,116 MICH. L. REV. 351 (2017).

substantive commitments. Firstly, its presumption that voters are incapable of policing pretextual conduct by representatives requires an assumption of voter fragility or incompetence to control such legislation themselves – a move that Klarman makes explicit in suggesting that voters have been systematically deceived by Republican claims.[186] Secondly, the basis for imputing this incompetence is that the type of electoral procedure advances the agenda of the right wing.

The criticism of *Crawford* for declining to strike down legislation is thus premised upon i) its partisan effects and ii) the presumption that voters neither legitimately authorized it nor have the capacity use political channels to remove it. Such a claim of judicial failure due to the vulnerability of the electorate requires a far more extensive set of substantive assumptions than a value-neutral procedural claim of countermajoritarianism that can be brought when the judiciary *does* strike down a piece of legislation. The extensiveness of these assumptions exemplifies the core commitment to particularized norms of democracy as the hallmark of political legitimacy that is the central characteristic of PCM.

A final useful contrast can be drawn between *Crawford* and the decision to find malapportionment illegal in *Baker v. Carr*. *Baker* is widely seen as an attack on entrenchment by a non-democratic minority of legislators who could exploit their control over the process to illegitimately retain power.[187] Insofar as rural groups had used non-equipopulous districting to retain power, they contradicted the majoritarian basis of democracy. *Baker* and the one-person, one-vote rule that it heralded are widely perceived[188] as legitimate and morally appropriate judicial intervention against legislation and a crown jewel of the Warren Court. Insofar as it interdicted legislation (admittedly passed by imperfectly accountable representatives) through judicial authority with no clear constitutional authority,[189] *Baker* is a seminal example of classical countermajoritarianism. The countermajoritarian quality of the judicial action is present *regardless* of the moral integrity of *Baker*. Furthermore, this countermajoritarianism serves to prompt *reconciliation* of judicial review with

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[186] *See* Klarman, *supra* note 2, at 50 (regarding voter impersonation fraud).

[187] Eisler, *supra* note 22, at 132.

[188] *See generally* Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002); *see also* Eisler, *supra* note 22, at 119.

[189] RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 51 (2003).

popular autonomy, rather than to condemn it. Had the Court decided to strike down the legislation at issue in *Crawford*, similar types of arguments could have been used to vindicate the decision as were used to vindicate *Baker* (particularly representation-reinforcement arguments). Had the Court so decided, *Crawford* might have been deemed countermajoritarian, but it would have been an instance of countermajoritarianism that illustrates how judicial authority can *benefit* democratic legitimacy.

Conversely, condemning *Crawford* specifically as countermajoritarian even though it was an instance of inaction radically expands the meaning of the term. By allowing pathological legislation to stand, *Crawford* can be easily condemned as a judicial error, sloppily reasoned, or an expression of partiality (and thus a failure of rule of law). But it is only countermajoritarian if the term condemns all actors who contribute to the bad democratic arrangement, whether by action or inaction.

### *2. Partisan Gerrymandering: Rucho v. Common Cause*

Ten years after *Crawford*, *Rucho v. Common Cause*[190] concluded that another controversial type of electoral legislation, partisan gerrymandering, was not subject to judicial oversight. The 5-4 decision split along partisan lines on the bench and found partisan gerrymanders to be non-justiciable in federal courts due to a lack of determinable standards. It thus concluded four highly contentious decades on the bench that began with *Davis v. Bandemer*, which held that partisan gerrymanders were illegal but failed to offer lower courts clear guidance. Two decades later, the 4-1-4 split of *Vieth v. Jubelirer*[191] further illustrated the fierce contestation over whether and when partisan gerrymanders should be illegal. In *Vieth*, four conservative justices rejected judicial oversight of gerrymanders, the four progressive justices offered three different dissents with three different tests, and the swing vote, Justice Kennedy, stated that while no satisfactory test had been developed, one might be in the future. This resulted in an efflorescence of scholarly innovation, as scholars proposed various novel tests for identifying illegal gerrymanders.[192]

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[190] 139 S. Ct. 2484 (2019).

[191] 541 U.S. 267 (2004).

[192] *See* Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L. J. 979 (2019) (reviewing the innovation that occurred in the run-up to the final round of partisan gerrymandering litigation).

*Rucho* dashed these hopes by arguing that the Court could identify no such test through appropriate judicial reasoning.

Scholars have reacted furiously to *Rucho* with claims that it exemplifies the countermajoritarian tendencies of the Roberts Court.[193] These attacks not only question the analytic conclusion that no appropriate standard can be developed for partisan gerrymandering but they suggest that it is the fact that such gerrymanders tend to favor Republicans that explains the conservative justices' refusal to intervene. Indeed, there has been long-running debate over the basic principle of whether partisanship in districting should be monitored by the judiciary at all, as well as suggestions that partisan gerrymandering might even be a legitimate political practice.[194] Combined with the diversity of proposed solutions, this suggests that the intense reaction provoked by *Rucho* is not because it abstractly declines to condemn a mode of electoral arrangement, but because it is perceived as contributing to a specified political order advanced by the far right. Condemnation of *Rucho*, in effect, is functionally condemnation of the broader political context.

The strangest aspect of casting *Rucho* as countermajoritarian is that *Rucho* precisely *declines* to strike down legislative decision-making. Given the controversy surrounding the practice, by Bickel's lights, it could illustrate the realization of the passive virtues as the Court declines to impose a view of democratic fairness upon the electorate.[195] There are further features of partisan conflict that make it a strange context in which to condemn judicial non-intervention as countermajoritarian. Partisan gerrymandering allocates power among the dominant organizational force in democratic process – parties themselves – so there is an easy argument for why judicial oversight is gratuitous (an argument O'Connor made as early as *Bandemer*). Moreover, voters have the choice to change party affiliation, potentially shifting the balance among parties as well as the internal wedge block groups that comprise party coalitions.[196] Because of this, unlike in cases such as racial oppression of

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193 Klarman, *supra* note 2, at 192–94; Seifter, *supra* note 128 at 1761–62; Lemley, *supra* note 146, at 110–11; Hasen, *supra* note 5, at 60; Stephanopoulos, *supra* note 5, at 113.

194 *See* 274 U.S. 200 (1927). For a summary of this view and the alternative, *see* Eisler, *supra* note 20, 240–41. Even Karlan, *supra* note 4, at 2349 concedes the contestability of the practice (quoting Louis Michael Seidman, *Rucho Is Right – But for the Wrong Reasons*, 23 U. PA. J. CONST. L. 865, 866, 876–77 (2021)).

195 *See* Bickel, *supra* note 9, at 192, 196–97.

196 For a description of how this limits the harm of partisan gerrymandering, as well as its own limits, *see* Jacob Eisler, *Partisan Gerrymandering and the Illusion of Unfairness*, 67 CATH. U. L. REV. 229, 231 (2018).

minorities (whether direct as in *Giles* or pretextual as in *Crawford*), it is harder to justify judicial oversight of partisan gerrymandering through traditional representation-reinforcement theories.[197] Partisanship is precisely how dominant forces in politics express their will.

The point is not, of course, that partisan gerrymandering is a morally or constitutionally permissible type of state action, and there are many arguments for classifying it as illegal based on plausible constitutional interpretation.[198] Rather, the point is that by CCM lights it makes little sense to classify judicial decisions to decline to strike down partisan gerrymandering as countermajoritarian. *Rucho* is an expression of judicial passivity that may be critiqued for bad reasoning or partisan overdetermination but not for contravening the will of accountable branches – gerrymanders precisely *emerge* from the will of the accountable (if perhaps corrupted) branches. A value-neutral conception of countermajoritarianism would concede that at a minimum the dominant parties engaging in partisan gerrymandering are at least more directly accountable to popular will than neutral judges. A decision to strike them down must come from a place of claims of superior technical knowledge or non-accountable moral authority (such as rule of law or the role of the judiciary in preserving democracy). These are the types of claims that can be supported by the unique rule of law remit of judges, but not be a claim to greater accountability by the courts.

Describing a judicial decision to decline striking down partisan gerrymanders as countermajoritarian demands normative commitment to highly specified ideals of democratic process. PCM thought has precisely shown such a willingness, first in identifying legitimate democracy as one that does not use partisan gerrymandering to design districts,[199] but even more characteristically, as condemning the Court for exacerbating the Republican stranglehold over politics. In doing so the classification of partisan gerrymanders as countermajoritarian reveals the preference for particularized

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[197] Admittedly, the anti-entrenchment evolution of representation reinforcement advanced by Issacharoff, Pildes, and Karlan can make a stronger argument that partisan gerrymanders are a form of entrenchment that prevents competition. *See* Samuel Issacharoff and Pamela S. Karlan, *Where to Draw the Line: Judicial Review of Political Gerrymanders* 153 U. PA. L. REV. 541 (2004).

[198] For constitutional arguments, *see, e.g.*, Kang, *supra* note 185; Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655 (arguing that voters have a due process right to be protected from partisan gerrymandering).

[199] *See* Stephanopoulos, *supra* note 5, at 124–26 for this type of universal substantive claim regarding legitimate democratic design (identifying several empirical harms of partisan gerrymandering

conception of just democracy that differentiates PCM from the normative agnosticism of CCM. Of course, the actual *presence* of partisan gerrymanders must be first assigned to the legislators who are willing to pass them – the Court is not designing such districts – but the complicity of the judiciary in this effect is a seminal example of the broadened institutional presence of countermajoritarianism that is the other central facet of PCM.

### *3. Abortion Rights: Dobbs v. Jackson Women's Health Organization*

*Crawford* and *Rucho* speak to the explicit arrangement of electoral process. Insofar as the driving anxiety of PCM is the conservative erosion of legitimate democratic process, these failures to champion fair electoral processes are obvious instances of it, and of the Roberts Court's complicity. A more recent case that is not expressly about political process shows the integrated coherence of the PCM condemnation of judicial refusal to strike down problematic legislation. *Dobbs v. Jackson Women's Health Organization*[200] undid the abortion protections the Court established 50 years ago in *Roe v. Wade*[201] by concluding there is no constitutional right to abortion. The decision has been widely savaged for neglecting a constitutional legacy, deploying its ostensible mode of originalist reasoning selectively, and dramatically undermining access to health care in America.[202]

Even as the first wave of *Dobbs* scholarship emerges, it is apparent that *Dobbs* is taken as highly resonant with the core concerns of PCM: scholars have identified it as a pretextually justified partisan conservative attack on the foundations of American democracy. This functionally classifies it as a core example of polarized countermajoritarianism, even though the analyses do not explicitly operate within the emerging core of PCM. Reva Siegel, for example, has characterized the reasoning of *Dobbs* as 'anti-democratic living constitutionalism.' Her reasoning is highly resonant with the more explicit political arguments of PCM scholars. Substantively, she identifies the restriction of abortion rights as an attack on the "equal participation of members of historically marginalized groups" and thereby as exacerbating

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200 142 S. Ct. 2228 (2022).

201 410 U.S. 113 (1973).

202 The scholars discussed below; particularly Goodwin, Bridges, and Siegel, make these points with clarity. For a technical analysis of reliance on established rights, *see* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023) (arguing that *Dobbs* marked a jurisprudential shift away from recognizing people's reliance on prior Supreme Court precedent).

"democratic deficits."[203] Secondly, she identifies this decision by the judiciary to abandon abortion rights as a result of efforts by "networks that connect conservative movement-identified originalists across the domains of academics, judging, and politics."[204] She attributes the substance and influence of the originalist analysis that conservative justices used to overturn *Roe* to conservative politics.[205] In short, she characterizes *Dobbs*'s deeper effect – beyond its impact on rights – as distorting politics in a manner that benefits Republicans, and as a result of a multi-pronged conservative effort. Siegel's view synthesizes initial reactions to *Dobbs*, which has been characterized as the culmination of a long-planned Republican strategy,[206] as a Roberts Court scheme to entrench existing oppressive hierarchies,[207] and as a direct affront to accountable governance.[208] In the words of Rachel Rebouché and Mary Ziegler, the failure to defend abortion rights is intimately linked to the "eros[ion of] democratic norms."[209] Between the ardent vision of a just politics as including a substantive right to abortion and the causal attribution of *Dobbs* to a wide array of Republican institutions, *Dobbs* reflects the defining features of PCM analysis of individual rights.

Regardless of the malign conservative forces that led to *Roe*'s overturning and the degree to which the bench was guided to this conclusion by a conservative campaign, treating *Dobbs* as a countermajoritarian decision faces the same basic difficulty as *Crawford* and *Rucho*: it consisted of the Court declining to act, rather than interdicting the legislature. The necessary lever of abortion restriction now lies with unconstrained, and, by progressive lights, often malign and unaccountable Republican representatives. Much of the anxiety about *Dobbs*, of course, is a function of legal intersectionality – the same Court that has stripped abortion rights has declined to protect voting

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[203] Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism – and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1129 (2023); *see also id.* at 1153 ("[T]he right *Roe* recognized was democracy-promoting.").

[204] *Id.* at 1144.

[205] *Id.* at 1129–30.

[206] David S. Cohen et al., *Rethinking Strategy after* Dobbs, 75 STAN. L. REV. ONLINE 1, 11 (2022); Michele Goodwin, *Distorting the Reconstruction: A Reflection on* Dobbs, 34 YALE J. L. & FEMINISM 30, 34 (2023); Darren Lenard Hutchinson, *Thinly Rooted:* Dobbs, *Tradition, and Reproductive Justice* 65 ARIZ L. R. 385, 387 (2023).

[207] Khiara M. Bridges, *Foreward: Race in the Roberts Court*, 136 HARV. L. REV. 23, 25, 34 (2022).

[208] *Id.* at 51; Rachel Rebouché & Mary Ziegler, *Fracture: Abortion Law and Politics After Dobbs,* 76 SMU L. REV. 27, 37 (2023) ("*Dobbs* . . . seeks to shrink the community qualified to participate in constitutional politics.").

[209] Rachel Rebouché & Mary Ziegler, *supra* note 208, at 75.

rights (*Crawford*, *Rucho*) or actively undermined them (*Shelby County v. Holder*).[210] Thus the claim that the people can now make their own decisions regarding abortion (precisely the normative thrust of Alito's majority decision) has been undermined by the Court's other decisions.

The fact that scholars have applied a parallel analytic frame to *Dobbs* as to the 'political' decisions reveals the normative robustness of PCM. As Ely (who has faced extensive criticism over his disdain for *Roe* as inappropriate judicial policy-making)[211] observes, even imperfect legislatures are more accountable than judges, and in the presence of even the bare minimum of accountability there is more space for popular contestation over political decisions before them.[212] For a decision such as abortion rights to be treated as if it were countermajoritarian requires one of two propositions: either i) that judges are more accountable than the elected branches themselves; or ii) that the moral authority of judges is more important than the will of legislators. Either of these propositions can be supported by sound reasoning, but it is ii) that would be the traditional basis for justifying judicial authority: the bench is merely performing its institutional role in upholding personal rights and protecting rule of law. That the tendency of critics of *Dobbs* has been to justify judicial right-creation under i) suggests the urgency regarding *broader* democratic collapse that motivates PCM. This urgency regarding broader collapse is the subject of the next section.

## IV. CONTEXTUALIZING POLARIZED COUNTERMAJORITARIANISM

PCM has sent and will continue to send shockwaves through scholarship and lawmaking, and it is still in its relative infancy. This section identifies three significant ramifications of or for PCM constitutionalism. It first identifies the relationship between the broader crisis of liberal democratic constitutionalism and the emergence of PCM. It then demonstrates how the substantive moral urgency expressed by PCM has broader ramifications for legal analysis. Finally, it observes perhaps the greatest crisis elicited by PCM: the existence of a substantial and seemingly intractable far-right constituency in America,

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[210] 570 U.S. 529 (2013) (holding that using the coverage formula in Section 4(b) of the Voting Rights Act to determine jurisdictions subject to preclearance requirements is unconstitutional).

[211] *See, e.g.*, Siegel, *supra* note 194, at 1152.

[212] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

even if not a majority, raises serious concerns regarding the survival of democratic constitutionalism.

### A. THE POLITICS OF PCM: DEMOCRATIC BACKSLIDING AND SYSTEMIC THREATS

It is not much of a mystery which the event may have sparked PCM: the election of Donald Trump as President put a political novice with far-right demagogic tendencies and a seemingly unconstrained ego into the most powerful political office on earth.[213] Klarman offers the most extended account of this, lambasting Trump for his "attack on the basic norms and institutions of democracy at the national level."[214] Conceived either within American politics or at a scale that looks beyond the US, the threat to democracy appears more foundational than the election of a single leader who had little cognizance of, let alone respect for, liberal constitutional norms. Rather, as summarized by scholars such as David Runciman, Steven Levitsky, Daniel Ziblatt, and Yascha Mounk[215] the threat to US democracy reflects broader patterns of erosion of liberal democracy thanks to far-right populist leaders with autocratic tendencies, a resurgence of populist sentiment among many voters, and a weakening of social and political institutions (like civil society and professionalized administrative actors) that might ameliorate such political trends. This pattern has been especially salient in nations such as Hungary, Turkey, and Poland.[216]

Legal scholarship has focused on the role that hijacking or undermining of legal institutions has played in this democratic decline. There are two major facets to this trend. The first is a concern that erosion of rule of law is a central

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[213] While many might identify the first judicial decision that truly provoked PCM anxieties as *Shelby County v. Holder*, there have been members of the Court that have long questioned the validity of the Section 5 preclearance mechanism of the Voting Rights Act. *See* Eisler, *supra* note 20, at 274–77 (describing the challenges to preclearance from *Katzenbach* through *City of Rome*, *Lopez*, and *NAMUDNO* that anticipated *Shelby County*).

[214] Klarman, *supra* note 2, at 7. Klarman's view is widely held. *See, e.g.*, Fishkin & Pozen, *supra* note 3, at 929 (describing in passing Trump's "norm-shattering approach" to the presidency); *cf. id.* at 976 (observing the "raft of apocalyptic rhetoric among liberal elites[]" that Trump's election brought about).

[215] *See* note 147, *supra*.

[216] Jacob Eisler et al., *The pendulum swings back: New authoritarian threats to liberal democratic constitutionalism*, 11 CAMBRIDGE U. 1 (2022).

contributor to democratic backsliding.[217] Rule of law and its implementation – individual rights protection, shielding of vulnerable groups, and guarantees of procedural neutrality – are central to the operation of liberal constitutional democracy as described in Section II. The key trends of backsliding – autocratic centralization of power by charismatic leaders, and untrammeled expression of populist will – aspire to consolidate power, and attack or undermine institutions that limit them. A procedurally neutral, rights-protecting judiciary is often a target when liberal democracy is under attack. Such an institution limits the autocratic power and ethnonationalist tendencies characteristic of democratic backsliding. Moreover, aspects of the "sound" rule of law – such as the formalities of constitutionalism – may themselves be subverted or distorted to serve the ends of those responsible for democratic backsliding.[218] "[A]utocrats who hijack constitutions seek to benefit from the superficial appearance of both democracy and legality within their states. They use their democratic mandates to launch legal reforms that remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state."[219]

The undermining and subversion of the democratic infrastructure and of the judiciary do much to explain the shift from CCM to PCM. The premise of the countermajoritarian *difficulty* is the idea that elected representatives are accountable, and thus serve the deontological norm of popular autonomy that vindicates democracy. But if, thanks to structural decay, the democratic process entrenches proto-autocrats and legislatures primarily use the power to entrench themselves, the normatively significant feature of representation is

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[217] This account synthesizes Tom Ginsburg et al., *The Coming Demise of LiberalConstitutionalism?* 85 U. CHI. L. REV. 239 (2018); Paul Gowder, *The Dangers to the American Rule of Law Will Outlast the Next Election,* 2020 CARDOZO L. REV. DE NOVO 126 (2020); and Tom Ginsburg, *Democratic Backsliding and the Rule of Law,* 44 OH. N. L. REV. 351 (2018). For a discussion of how rule of law is especially critical to elections, *see* Lisa Marshall Manheim, *Election Law and Election Subversion,* 132 YALE L. J. F. 312 (2022). For an argument that evidence shows such authoritarianism is more present among Republicans—thus affirming the polarized commitments of PCM, *see* Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, 117 AM. POL. SCI. REV. 967 (2023).

[218] David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

[219] Kim L. Schepple, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 547 (2018). Another aspect of this partisan anxiety is captured by Fishkin & Pozen, note 3 *supra* – conservatives are better at leveraging constitutional structures.

much less compelling. Issacharoff encapsulates this idea in a recent riposte to Waldron's skepticism of judicial review. Issacharoff observes that Waldron's critique of robust judicial review loses much of its bite where democracies suffer "institutional weakness or design defects."[220] Such failures are precisely what democratic backsliding identifies in once-stable liberal democracies.

One solution might be to turn back to the judiciary to bolster democratic process, hoping that rule of law and liberal rights protection could blunt the politics of populist backsliding.[221] But because of the failure to protect democracy and liberalism that PCM has identified on the Supreme Court, turning to the judiciary offers no respite.[222] Indeed, PCM is differentiated from simple claims for well-reasoned judicial activism because PCM identifies a Republican-dominated and Republican-aggrandizing bench that will certainly not defend and may well exacerbate democratic backsliding. The PCM critiques of the Supreme Court reflect precisely the anxieties that scholars of democratic backsliding identify among the judiciary – the use of legal reasoning and constitutional rhetoric to advance practices ultimately corrosive to liberal constitutional democracy.

With neither institution in the standard CCM formula retaining its integrity, the normative forthrightness of PCM becomes apparent. It is a response to a crisis in which key institutions of CCM have lost their characteristic virtues – popular, autonomy-serving accountability for elected branches and rule of law neutrality for the judiciary. During such a dire crisis, retaining the value-neutrality of CCM would be, at best, naïve and ingenuous and, at worst, self-sabotaging by concealing the symptoms of democratic decline.

### B. LEGAL ANALYSIS DURING CRISIS: FROM UNIVERSALIST NEUTRALITY TO SURVIVALIST CONSEQUENTIALISM

Shifting from the realm of political reality to the domain of legal analysis highlights PCM's disjunctive break with typical legal reasoning. When judges

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220 Issacharoff, *supra* note 51, at 26; *see also* Roux, *supra* note 38 (arguing that Waldron's criticism of judicial review is grounded upon assumptions that do not always hold true for established democracies).

221 This is Issacharoff's, *supra* note 51, at 56, defense of judicial review in nascent democracies: "constitutional courts could ill afford to be passive night watchmen over democracies in formation."

222 This 'turn' to the judiciary and rights-protection marks the previous generation's skeptics of the countermajoritarian difficulty, such as Waldron. *See* Friedman, *supra* note 76.

and lawyers soundly engage with what Stephanopoulos calls "law's domain,"[223] they deploy certain modalities of analysis. These modalities give legal analysis its distinctive moral and procedural qualities. As Dworkin says, such legal analysis turns to questions of legitimate "principles", rather than the questions of good "policy" that are the subject of political competition and debate.[224] This focus on principle allows judges to ensure that judicial analysis defends individual rights instead of just pursuing optimal collective polity. Lon Fuller famously articulates the procedural features of legal analysis (such as generality and explicit promulgation) that generate the moral virtues of rule of law.[225] These virtues of law explain why CCM addresses a *difficulty* rather than merely a *pathology*.[226]

PCM relinquishes this objectivity, preferring to identify the judiciary's possible virtue as the advancement of policy outcomes that support substantively legitimate democracy. One justification for this is that, as recounted above, scholars perceive the current bench as failing to serve rule of law neutrality and instead serving a conservative agenda. Another, perhaps more general, one is that the urgency of democratic backsliding makes the theoretical features of rule of law less important than their outcomes. This general concern with democratic decay explains the widened definitional use of countermajoritarianism. Regardless of the reasons, PCM shifts the virtue of the judiciary from value-neutral, procedurally defined objectivity to the advancement of political outcomes that directly prevent democratic backsliding. This contrast is captured by Fuller's suggestion that rule of law morality is not the pursuit of "any 'brooding omnipresence in the skies[]'"[227] (i.e., substantive morality) but rather a set of procedural characteristics that mark lawmaking as a practice. In focusing on the granular substance of democratic policy, PCM shifts the focus from procedural characteristics to something much closer to such explicitly normative content.

The result is PCM radically transforms what good legal analysis looks like – at least during the current period of crisis. The traditional features of rule of law are displaced, or at least subordinated, to a set of political outcomes. The real significance of the shift in the term "countermajoritarian" is that it portends this radical shift in the legitimate judicial role. Other legal

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223 Stephanopoulos, *supra* note 45, at 360.

224 DWORKIN, *supra* note 7, at 92–94.

225 Fuller, *supra* note 33, at 46–94.

226 *See supra* Sections I.B and I.C.

227 Fuller, *supra* note 214, at 96.

movements have for decades made sympathetic claims[228] – but what is remarkable about PCM is that it uses the traditional core framework of constitutional analysis to alter the entire discipline. This shift can be seen within the career of individual scholars. Klarman – whose 2020 Harvard Law Review forward exemplifies the substance of PCM – worked within a highly orthodox CCM paradigm in the 1990s.[229] Comparing Karlan's post-Elysian work of a decade earlier likewise reveals a commitment to the basic framework of CCM,[230] compared to her explicit advancement of the PCM paradigm in her piece *The New Countermajoritarianism*.

As a result, the features typically celebrated in judging, and the typical value-neutral efforts to reconcile the countermajoritarian difficulty through theories of interpretation, no longer fit. The PCM paradigm demands that the assessment of judging undertake something more like normatively particularized deployment of critical legal realism: the critical question is whether judges are advancing the right agenda in their pretextual use of the legalistic shroud.[231] The question remains if, as with many attempts to suggest that legitimate judging serves not rule of law neutrality but some other ulterior influence, such an account "obliterate[s] the foundations of much current and past legal scholarship[]"[232] and long-running understandings of the role of the judiciary in a liberal constitutional democracy.

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228 *See* Akbar et al., *supra* note 110 (summarizing critical legal studies and its successors and arguing that legal analysis must pursue explicit substantive policy change).

229 Klarman, *supra* note 106, at 492: CM is "the question of whether the democratic principle of majority rule can be reconciled with the practice of remotely accountable judges invalidating legislation enacted by electorally accountable representatives."

230 Karlan, *supra* note 12, at 14.

231 Duncan Kennedy, *Form and Substance in Private Law* Adjudication, 89 HARV. L. REV. 1685, 1775 (1976); see *generally* Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L. J. 461, 462 (1984) (offering a brief critical synthesis and extended bibliography of founding documents regarding critical legal studies, and observing that while critical legal studies has certain themes that challenge conventional legal thinking by identifying good legal reasoning by the achievement of just outcomes, critical legal studies does not have a single orthodox approach).

232 *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 N.W. U. L. REV. 251, 253 (1997).

### C. THE FUTURE OF A RIVEN POLITY

A well-established background factor of the crisis to which PCM responds is increasing polarization in America.[233] The most palpable manifestation of this is in the lack of shared policy and ideological principles between political parties, and their refusal to pursue policy or even dialogue that reflects bipartisan consensus. There is an even broader aspect to this – such polarization has penetrated the polity itself, fracturing the franchise by party identity. Moreover, such party affiliation is now often *determinative* of political identity and preferences, inverting the typical relationship of party responding to and coordinating to accommodate preferences.[234] Such "affective polarization" threatens to make partisan cleavages the substantive core of American democracy.[235]

The depth and durability of such polarization among the electorate has a double-edged effect on PCM's approach to law. On the one hand, affective polarization justifies the urgency and focus on substantive political realities. PCM seeks to preserve the basis of the liberal constitutional order, and the threat to the liberal constitutional order is especially severe if a significant portion of the electorate is willing to assail it. PCM offers strong medicine to save democracy in a time of crisis.

Once that threat to liberalism takes the form of *the values of a significant percentage of the population itself,* PCM highlights, and perhaps even exacerbates, such polarization. PCM condemns certain substantive political views as anti-democratic, but given that the Republicans remain one of the major parties (and given the peculiar sustained popularity of Trumpism despite its incompatibility with standard American liberal values), this condemnation must touch a large chunk of the electorate. One possibility is that the Republicans have managed to brainwash or confuse a vast chunk of the electorate that makes up their base, but such a view of voter incompetence is paternalistic and broadly incompatible with liberal democracy. It is hard to

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[233] *See, e.g.*, Richard H. Pildes, *Why the Center Does not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011); Karlan, *supra* note 3, at 2328 (describing the great divide between Democratic and Republican ideology in American today that create an iron triangle of polarization).

[234] *See, e.g.*, GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 17–18 (2005); JOHN H. ALDRICH, WHY PARTIES? A SECOND LOOK 35 (2011).

[235] Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States* 22 AN. REV. POL. SCI. 129 (2019).

say which alternative is worse: that a significant chunk of the American electorate has been led to adopt false thinking, or that a vast chunk of the American electorate has adopted values and political principles that are an affront to democracy.[236] Neither of these implications of PCM creates space for constructive dialogue among a riven polity.[237] One identifies a significant part of the polity as incompetent; the other as malign. Regardless, it means that a significant part of the polity holds values that are irreconcilable with democratic self-rule, undermining a social premise of democracy: a degree of mutual consensus and respect regarding the operation of democracy, even as liberal democracy prizes freedom of viewpoint and ideological diversity.[238]

CCM, conversely, has a greater potential to integrate, or at least create space for dialogue with, those opposed to the values of PCM. CCM's value-neutrality, political agnosticism, and capacity to prospectively incorporate a wide variety of accounts regarding legitimate constitutionalism and viable legal outcomes makes it less prone to declare the views of political actors – whether elites such as judges or rank-and-file citizens – simply incompatible with the project of legitimate lawmaking. This agnosticism also means that CCM loses the hard-edged focus on the threats to democratic process – or at least that more analytic steps are required when using CCM as a starting point.

The riven nature of the American polity thus exposes the dilemma of PCM versus CCM. PCM highlights the immediate ideological and institutional threats to democratic process. But given that its value-commitments condemn one of the major American parties, its account must give some explanation – only sketched here – of why voters hold such noxious views, and how to accommodate (or exclude) them from the design of the political order. CCM has, at least as a starting point, more capacity to bring the incorporate, interrogate, and perhaps through dialogue change the views

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[236] A microcosm of this problem is encapsulated by Klarman, *supra* note 2, at 185. Klarman suggests that the Republican Party has convinced voters that voter impersonation fraud is a real threat instead of voter suppression. If voters can be so 'fooled' by their representatives, it undermines a basic premise of democracy. Yet the alternative—that voters know that voter ID is a means of voter suppression but are willing to exclude fellow citizens from the franchise—makes a significant chunk of the franchise malevolent.

[237] It is noteworthy that a few decades ago this was seen as a central goal of democratic process, particularly by deliberative democratic theorists. *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004); JOHN GASTIL & PETER LEVINE (EDS.), THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY (2005).

[238] For a general discussion of this thorny topic, *see* JENNIE C. IKUTA, CONTESTING CONFORMITY: DEMOCRACY AND THE PARADOX OF POLITICAL BELONGING (2020).

of these voters, because CCM makes no normative presumption as part of its initial apparatus. But the result is that CCM does not bring with it the same facial urgency to addressing the crisis of democracy.

## CONCLUSION

This Article has identified a dramatic change in constitutional law scholarship: scholars no longer seek to assess judicial intervention through abstract and universalist theories of constitutional interpretation, but rather through the explicit first-order moral values that courts advance. PCM's explicit reliance on ideology is a radical break with the long-established scholarly aspiration of constitutional theory that is process-informed and value-neutral. This demonstrates a broader scholarly shift towards policy-oriented instrumentalism in response to the democratic crisis in America. Continued polarization among the electorate, Trump's likely status as the Republican nominee in the 2024 presidential election,[239] and additional polarized Roberts Court decisions that challenge longstanding progressive values[240] strongly suggest that PCM's displacement of CCM will only accelerate.

This Article has primarily sought to delineate the contours and central features of polarized countermajoritarianism, and to contrast it with the classical treatment of countermajoritarianism that has shaped constitutional analysis. As such, this Article sets forth fruitful lines of future research. Through early identification of an emergent trend, this Article forecasts the PCM patterns that will continue to manifest in constitutional thinking. Initial reactions to *Dobbs*, for example, show how scholars treat a seemingly non-electoral right as a conservative assault on democratic procedure.[241] As the struggle between conservative institutions and progressive thinkers continues, such constitutional analysis will become increasingly prevalent.

It is also essential that scholars recognize the trade-offs of PCM. Even as PCM highlights the stakes of the contemporary crisis of liberal democracy, it threatens to relinquish the virtues and nuances of CCM and the debates it has

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[239] *See, e.g.*, Shane Goldmacher, *Trump Crushing DeSantis and G.O.P. Rivals, Times/Siena Poll Finds*, N.Y. TIMES, 31 July 2023, available at https://www.nytimes.com/2023/07/31/us/politics/2024-poll-nyt-siena-trump-republicans.html [https://perma.cc/Y92V-KZA8].

[240] *See, e.g.*, 600 U.S. 181 (2023) (holding race-based affirmative action a violation of equal protection); 600 U.S. 570 (2023) (finding the First Amendment prohibits an equal accommodation provision that requires non-discrimination by commercial service providers on the grounds of sexual orientation) are this term's exemplars).

[241] *See supra* Section III.B.3.

engendered. By expanding the scope of countermajoritarianism beyond the judiciary, PCM blurs the boundaries of the concept, sacrificing the analytic clarity of Bickel's original idea. By identifying countermajoritarianism as pathology, PCM loses the capacity of the traditional value of CCM as a tool for reconciling competing but complementary contributions of political and judicial normative legitimacy to interwoven liberal constitutional democracy. Even as the predictive value of PCM can be used to frame future constitutional law scholarship, the ramifications of the break with the classical treatment of countermajoritarian deserve further analysis.