1

The Counterpopular Dilemma

This chapter considers the fundamental challenge facing judicial review of election law, which I call the *counterpopular dilemma*. Election law serves the fundamental democratic principle of constituent *control over governance*, while judicial review seeks to ensure that all constituents enjoy fundamental rights that offer *protection from governance*. The tension between state-legitimating elections and state-limiting rights assumes a paradoxical form when rights protection shapes electoral procedure. As judicial constitutional review of electoral procedure becomes increasingly robust, constituent autonomy can only be realized on terms acceptable to an institution with authority that is not directly accountable to the people. This raises a basic dilemma for democratic legitimacy: Free self-rule is the defining characteristic of democracy, but if a non-accountable entity oversees the terms of democratic process, how can this requirement be satisfied?

1.1 THE UNIQUE QUALITIES OF ELECTORAL PROCESS AS A SUBJECT OF JUDICIAL REVIEW: THE COUNTERPOPULAR DILEMMA

How can popular will be identified as coming from a particular source without a preexisting theory of democratic legitimacy that intrudes upon popular self-determination? Elections are held precisely to convert constituent will into political action. The structural core of the law of electoral procedure cannot entail thwarting popular will, nor can counterpopular judicial review be justified by adverting to some higher norm.

1.1.1 *The Uniqueness of Election Law: Reflexively Shaping Democratic Autonomy*

If democracy is a valid mode of governance because it expresses constituents' free will, constituents must have control over state decision-making processes. Imposing the government's coercive power on constituents is morally acceptable only because it can be attributed to the collective will of the polity, and is legitimate only to

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the extent that it incorporates the will (i.e., the consent) of the individuals subject to its coercion. How members of a polity legitimize state action to which they might object as individuals is a great puzzle of democracy. Explanations frequently advance contractarian postulations of a higher order or lexically prior authorization of collective self-governance. This tradition is deep, and its legacy stretches from Thomas Hobbes to Jean-Jacques Rousseau to John Rawls; its technical features lie beyond the scope of this project.

The moral legitimacy of state action derives from the ability of the democratic process to translate constituent will into collective decisions. Personal freedom alone can ultimately vindicate state coercion. But state action necessarily intrudes upon personal freedom; thus state action must be legitimated by being traced back to personal freedom. Democratic process must therefore convert individual will into collective choices, and then into state action. Rawls's seminal description of liberal democracy identifies the root of this challenge as expressing "the power of free *and equal* citizens as a collective body."[1] For constituents of a democracy to rule themselves freely, their liberty to act – whether in a personal capacity or to control the state – must be balanced against and limited by other individuals' capacity to act freely.[2] Because such constraint serves the ultimate shared freedom of the members of a state (all of whom must accept the terms of political rule), it can, in principle, be made compatible with freedom as the highest value of democracy.

Elections are pivotal to realize and balance these two bedrock values of freedom and equality. They are the dominant mechanism by which constituents of an established democratic polity realize their capacity for political autonomy as equal members.[3] By converting individual preferences into unified governance, elections legitimate democracy as collective self-rule. They are also the mechanism via which government is responsive to popular preferences, and those who deploy coercive state power are held accountable. While a significant body of scholarship attacks the efficacy of electoral control[4] and offers alternative modes of

[1] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), p. 136 (emphasis added).

[2] According to the Rawlsian tradition, basic liberties extend until they intrude upon others' liberties. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), p. 266; Frank I. Michelman, "Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment" (2004) 72 *Fordham Law Review* 1407, 1410.

[3] As seminal a source as the Universal Declaration of Human Rights states: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections," Article 21, Section 3. As John Hart Ely notes in *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), pp. 5–6, "We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government."

[4] This tradition can be traced back to Joseph Schumpeter and, in a slightly less cynical mold, Anthony Downs, with a recent and particularly cutting incarnation being Christopher H. Achen and Larry M. Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (Princeton: Princeton University Press, 2017).

social organization,[5] these challenges are notable because they challenge the near-axiomatic orthodoxy that elections legitimate and manifest popular self-rule.

The significance of elections to democratic governance shifts attention to the rules and laws by which such self-rule is achieved. The law of elections is a unique domain of law because it acts as a gateway to most substantive policymaking: coercive state power is presumably deployed with constituents' consent. In this regard, the law of democratic process infiltrates all other areas of substantive governance. Lawmaking by accountable government actors will only have been undertaken because democratic process authorized them to do so. The law of democratic process not only speaks to its own substantive content, it also shapes all later substantive government action. An electoral law that appears to be marginal or trivial can have vastly magnified effects because of how it inflects the authorization of representatives, and what substantive lawmaking they undertake.

Furthermore, the law of elections is uniquely recursive. Pathological, autonomy-infringing rules potentially act as rachets that will yield future pathologies. The governmental authority to determine policy includes the power to set the conditions of later elections. Election law not only shapes the terms of all substantive policymaking undertaken by those authorized by an election; it also has the capacity to shape the terms of later elections.[6] Given how central elections are to the realization of democratic autonomy, power over election law is, in effect, the ability to determine the contours of democratic autonomy.

The example of a voter ID law (requiring formal photographic identification in order to vote) illustrates the subtle yet tectonic force of election law.[7] Such laws impose a relatively trivial administrative requirement on individual voters and have less immediate impact on those affected than, for instance, a law that dictates whether a person receives state-provided health care or racially segregated education. But since voter ID laws can modulate which groups participate in elections (and have disproportionate effects on vulnerable groups such as the poor)[8] and the results of these elections determine substantive policy, such laws will indirectly

[5] The most prevalent such approaches are those associated with empowered deliberative democratic approaches that advocate for deliberative polling, mini-publics, and the like.

[6] In this respect, the governmental control of elections' significance may be analogized to the boundary problem, which describes how the capacity to determine who is a member of a democracy gives the state the capacity to define the substantial identity of a democracy. Frederick G. Whelan, "Prologue: Democratic Theory and the Boundary Problem" (1983) 25 *Liberal Democracy* 13. Many thanks to Eric Beerbohm for this observation.

[7] See Spencer Overton, "Voter Identification" (2007) 105 *Michigan Law Review* 631; Benjamin Highton, "Voter Identification Laws and Turnout in the United States" (2017) 20 *Annual Review of Political Science* 149 (executing a study broadly in line with Overton's suggestion). For the older version of such suppression, see Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (New York: New York University Press, 2003), pp. 21–31 (discussing *Lassiter* and similar cases).

[8] Bertrall L. Ross II and Douglas M. Spencer, "Voter Suppression: Campaign Mobilization and the Effective Disenfranchisement of the Poor" (2019) 114 *Northwestern University Law Review* 633.

determine these substantive policies. Moreover, representatives elected with unjust voter ID laws in place will not only have the opportunity to pass substantive policy that does not accurately reflect the legitimate will of the constituency; they can also reshape future electoral processes (e.g., by further modifying ballot access or redrawing district lines). This can create a vicious (or, in the case of legitimate and just election law, virtuous) spiral. A just voter ID policy (as part of just electoral process generally) is therefore a necessary precondition for ensuring such substantive policies are just (insofar as legitimately reflecting the franchise's will is a requirement of justice) and protecting democracy in the future.

Those who have done the most to shape election law have recognized its significance. Chief Justice Earl Warren celebrated *Baker v. Carr* as the finest achievement of his time leading the Court, preferring it even to the explicitly anti-discriminatory landmark of *Brown v. Board of Education*. Underlying Warren's reasoning was the identification of a virtuous spiral that would follow from ensuring that every person in a polity has equal power in voting by eliminating malapportionment in districting. It seems difficult to deny that *Brown* had greater first-order policy effects: it transformed the daily lives of millions in perpetuity. *Baker* merely demanded a set of seemingly quotidian administrative changes in how voters are allocated to districts. Yet Warren speculated that this shift in voter allocation might have made citizen control over policy more just and accountable and might have yielded a political solution to school segregation that would have made *Brown* unnecessary.[9] He recognized the transformative potential of election law not only to shift substantive policy but also to alter the very terms of democracy. Where the baseline terms of electoral process are made to conform to the conditions of democratic legitimacy, sound policy will follow. And in the wake of such sound policy and legitimate electoral process, further legitimate electoral process will follow.

1.2 JUDICIAL REVIEW OF DEMOCRATIC PROCESS: CONTRASTING THE PRIMACY OF AUTONOMY WITH THE VALUE OF PRACTICAL EFFICACY

Legal scholars recognize the significance of authority over electoral process, and the power of courts to shape democracy. This has manifested in two contrasting ways in the scholarship. One scholarly approach emphasizes the practical ramifications of sound electoral procedure. Focused on the possibility that the functioning of democratic practice can substantively go awry due to either deep-rooted social factors or manipulation by elites, these scholars have queried how the judiciary can ensure the structural integrity of electoral process. As the field has matured, this instrumentalism has become increasingly hard-edged.

[9] Luis Fuentes-Rohwer and Charles Guy-Uriel, "Reynolds Reconsidered" (2015) 67 *Alabama Law Review* 485.

Yet the judiciary's capacity to robustly intervene in electoral process is distinguished by lying *outside* democratic accountability. Because judges (or at least federal judges) need not worry about their own electoral fates, they are safely insulated from political pressure and can advance what they identify as sound or legitimate democratic process without fear of reprisal. Yet this very insulation of judges from democratic accountability has inspired another body of scholarship. Democracy is defined by constituent autonomy. Given the recursive character of electoral process, this constituent autonomy is nowhere more crucial than in having the power to shape elections. If a constituency has the terms of its own self-rule dictated to it, this suggests that autonomy is not the driving feature of democracy. This observation has led some critics to suggest judicial review is itself undemocratic.

These two approaches diverge in the normative priority they afford to democratic process and, correspondingly, the appropriate means of curating it. Election law scholars have expressed little normative concern that the Court might reshape popular autonomy, so long as the Court proposes sound democratic procedures. Critics of judicial review are first and foremost concerned that the meaning of democratic autonomy will be imposed from outside accountable political process and lose its moral primacy. The contrast between these two approaches highlights the fundamental dilemma facing the judiciary's role in shaping election law.

1.2.1 *American Election Law Scholarship: From Rights toward a Substantive Democratic Theory*

The emergence of the field of election law has been marked by three features: (1) recognition of the pathologies that can afflict democratic structures from social and political circumstances, and courts' ability to address them; (2) the need to move beyond a rights-based understanding to achieve this; and (3) the proposal that the next logical step is for the judiciary to adopt substantive understandings of democratic process.

This pattern frequently recurs in the field's founding scholarship. Samuel Issacharoff and Richard Pildes argue that a major threat to the integrity of democratic process is the capacity of representatives and elites to entrench themselves through self-aggrandizing processes.[10] They maintain that courts are uniquely positioned outside the political process to break up such entrenchment, but to do so effectively, courts must move beyond an individual rights-based understanding to a substantive conception of democracy as forged in competition. Pildes has written further about the worldwide transformation of democracy effected by the judiciary and of the potential of such interventions to address the pathologies of mature

[10] Samuel Issacharoff and Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50 *Stanford Law Review* 643.

democracy, such as "disaffection, distrust, and disillusionment."[11] Yet he argues that rigidly traditional rights enforcement, instead of more systemic consideration of sound democratic practice, can impair rather than encourage innovation and adaptation in democratic design.[12] Issacharoff and Pamela Karlan have argued that the rights-based approach to campaign finance advanced by *Buckley v. Valeo* has had perverse impacts on the dynamics of political fundraising. Identifying equality through neutralization of money in politics as an unrealistic option, they advocate for institutionally sensitive disclosure-based reforms, rather than a rigidly rights-bound approach.[13] Heather Gerken takes a more theoretical approach. She has examined a diverse array of topics and argued that the Supreme Court's election law jurisprudence lacks sufficiently clear normative vision or commitments, even though its rights-based enforcement has had clear structural effects. She has urged the Court to develop "mid-level intermediary theories" to achieve moral and structural coherence.[14]

The most recent development in the field has been even more unabashedly instrumental: empirical and quantitative outcomes have become a touchstone of legal analysis.[15] Nicholas Stephanopoulos advocated for – and led the litigation to apply – a quantitative measure he calls the efficiency gap to assess the egregiousness of partisan gerrymanders.[16] He also has offered a system-wide analysis that concludes the aim of election law is to correct "misalignment between the preferences of voters and the preferences of their elected representatives."[17] Stephanopoulos's focus on achieving particular outcomes and offering a mid-level theory to support them exemplifies the dominant trends in election law scholarship.

Prevalent scholarly approaches have accurately exposed the odd fit in the framing of judicial review of elections through rights (though, as this book's thesis shows, the

[11] Richard H. Pildes, "The Supreme Court, 2003 Term: The Constitutionalization of Democratic Politics" (2004) 118 *Harvard Law Review* 25, 37.

[12] Pildes, "Constitutionalization of Democratic Politics," 97 gives a specific example regarding the interpretation of Section 5 (*Georgia v. Ashcroft*) of the VRA discussed in Chapter 7.

[13] Samuel Issacharoff and Pamela S. Karlan, "The Hydraulics of Campaign Finance Reform" (1999) 77 *Texas Law Review* 1705, 1711, 1734.

[14] Heather K. Gerken, "The Costs and Causes of Minimalism in Voting Cases: *Baker v. Carr* and Its Progeny" (2002) 80 *North Carolina Law Review* 1411, 1417. For the parallel argument in the racial vote dilution context, see Heather K. Gerken, "Understanding the Right to an Undiluted Vote" (2001) 114 *Harvard Law Review* 1663, 1717, and in the partisan gerrymandering context, Heather K. Gerken, "Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum" (2004) 153 *University of Pennsylvania Law Review* 503, 507.

[15] For a general critique of this trend, see Jacob Eisler, "Partisan Gerrymandering and the Illusion of Unfairness" (2018) 67 *Catholic University Law Review* 229; Jacob Eisler, "Partisan Gerrymandering and the Constitutionalization of Statistics" (2019) 68 *Emory Law Journal* 979.

[16] Nicholas O. Stephanopoulos and Eric M. McGhee, "Partisan Gerrymandering and the Efficiency Gap" (2015) 82 *University of Chicago Law Review* 831.

[17] Nicholas O. Stephanopoulos, "Elections and Alignment" (2014) 114 *Columbia Law Review* 283, 286; Nicholas O. Stephanopoulos "Aligning Campaign Finance Law" (2015) 101 *Virginia Law Review* 1425, 1499.

odd fit is only a matter of *framing* – the Supreme Court's election law jurisprudence is driven by a normative debate). Popular elections and rights protection (the typical judicial point of entry) serve different goals. Elections consolidate and express popular will, making a government capable of legitimately acting on behalf of the polity. Rights protect individuals from such state action, shielding isolated persons from the coercive apparatus backed by centralized power. Justice Black's concurrence in the Pentagon Papers case illustrates this general principle: rights operate to protect the liberties of individuals against the central government.[18]

In American constitutional scholarship, the judiciary has long been considered to be affiliated with both rights protection and the advancement of equality (including in its general form as rule of law neutrality). The concern regarding majority tyranny has animated not only constitutional thinking about explicitly state-constraining (and minority-protecting) enumerated rights but also the structural logic of federalism and the separation of powers.[19] This applies even to general theories of constitutional governance, demonstrated by Daniel Ortiz's claim that in order to "get anywhere interesting," even Ely's theory of representation–reinforcement (discussed below) must be based on minoritarian protection.[20] Yet having entered the political thicket, the judiciary has been compelled to grapple not only with how the rights of vulnerable individuals should be protected but also with how the franchise should self-govern generally. Conceptualizing how the dominant will within a polity can legitimately exert its power as a general matter is orthogonal to the traditional role of majority-constraining rights protection, which may explain why the Court has struggled to translate some typical doctrines of constitutional law into the election law context.[21] Phrased in terms of the basic values of democracy, judges must not only ask how rights can be applied to protect the vulnerable members of a polity, as scholarship in this area tends to return to the more comfortable question of minoritarian protection.[22] They must also ask how successful individuals and coalitions can legitimately realize their freedom.

That the judiciary must engage with both rights and structures expresses a mid-level tension; its highest incarnation is the complex coexistence of freedom and equality as the foundations of democracy. Electoral procedure is legitimate if it effectively translates the will of the franchise into corresponding political outcomes, thus advancing the cause of collective freedom. This requires assessing not only how electoral rules affect *individuals* as they engage in politics, but also whether

[18] *New York Times v. US*, 403 US 713, 716 (1971).

[19] David Landau, Hannah J. Wiseman, and Samuel R. Wiseman, "Federalism for the Worst Case" (2020) 105 *Iowa Law Review* 1187.

[20] Daniel R. Ortiz, "Pursuing a Perfect Politics: The Allure and Failure of Process Theory" (1991) 77 *Virginia Law Review* 721, 728–9.

[21] See Franita Tolson, "Election Law 'Federalism' and the Limits of the Antidiscrimination Framework" (2018) 59 *William & Mary Law Review* 2211.

[22] Daryl J. Levinson, "Rights and Votes" (2012) 121 *Yale Law Journal* 1286.

such rules succeed as *systems* that convert collective political will into governance. According to Richard Tuck, if a polity is seeking to undertake collective self-rule but is large and diverse enough that consensus among its members is unrealistic, majoritarianism is "the only principle that offers both equality and agency."[23] A minority group would have to assert a morally legitimate authority to dominate others based only on a claim to intrinsic superiority. Thus, groups that wish to autonomously rule themselves need both equality and freedom, as each member of the group must be identified as equal in the relevant way if their political ability to contribute to group decision-making is to be realized. Equality is not a competitor or limiter of autonomous self-rule, but a prerequisite to its legitimate realization.[24] From this high-level perspective, the courts must ask a unitary query about elections. What constitutional principles (whether framed directly as necessary for freedom or as equality-serving rights that are facultative of freedom) would do the most to generate the conditions under which persons can rule themselves? Thus the thrust of election law scholarship – a turn toward institutions, structures, and the values that should undergird them – is analytically valid.

The challenge of campaign finance jurisprudence illustrates this point. The conservative justifications for an anti-regulatory posture are presented as protecting individuals from government oppression (i.e., equality to speak freely), with the fear that regulating speech will lead to tyranny.[25] The core of the progressive riposte is that this view disregards the vast and disproportionate *economic* power of many who influence campaign speech.[26] Progressives justify equalizing regulation by arguing the wealthy have superior social power and that unconstrained use of this wealth threatens the liberty of the poorer members of society (and the polity as a whole).[27] Both wings seek to frame regulating speech as defending the vulnerable (the classic understanding of rights protection). Yet the underlying issue highlighted in the case law and judicial opinions touches on the universal question of the necessary social conditions for collective political self-determination in a society rife with economic inequality. The core question of campaign finance is how the polity as a whole should regulate money in the context of campaign speech to facilitate legitimate self-rule, rather than the state's capacity to harm a threatened subgroup.

[23] Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016), p. 261.

[24] Phillip Pettit describes the unity of these two values, as described in Chapter 3.

[25] *McConnell v. Federal Election Commission*, 540 US 93, 283 (2003) (the logical endpoint of the progressive view of campaign finance is "outright regulation of the press").

[26] Sabeel Rahman, *Democracy against Domination* (Oxford: Oxford University Press, 2017); Joseph Fishkin and William E. Forbath, "The Anti-Oligarchy Constitution" (2014) 94 *Boston University Law Review* 671; Timothy K. Kuhner, *Capitalism v. Democracy: Money in Politics and the Free Market Constitution* (Stanford: Stanford University Press, 2014).

[27] *McCutcheon v. Federal Election Commission*, 572 US 185, 241 (2014).

1.2.2 Democratic Self-Determination and Skepticism of Judicial Review

The major takeaway from election law scholarship is that judges must undertake a new – and, for the judiciary, novel – type of query: what structural arrangements advance legitimate democracy? This proposition gives courts the power to dictate the meaning of freedom to the constituent polity. On the surface, this suggests that autonomy is not a preeminent value of democracy, but rather should be beholden to some other structural value – such as competitiveness or preference alignment. Even if the electorate has the opportunity to express its preferences, the broader context in which it may do so is externally dictated by an institution basing its authority on a claim to elite moral knowledge. Curiously, election law scholarship has neglected to explore why courts are well positioned to dictate the terms of this autonomy.

This critique has driven the major scholarly challenge to the legitimacy of judicial review. Doubts regarding courts' capacity to uphold democratic process have a long legacy in American constitutional thinking. In his description of the countermajoritarian difficulty, Alexander Bickel notes a fundamental challenge to the innovative, highly structural type of judicial review that has characterized modern election law. He observes that of the plausible alternatives, elections are the most democratic means of dictating government action. Courts are unaccountable to the people, which raises a threshold challenge to any judicial negation of action undertaken by the people's elected representatives.[28] Bickel identifies elections as the primary engine of democratic self-governance, which gives them a particular claim to legitimacy that judicial review lacks. He does not, broadly speaking, ascribe special standing to judicial review of the law of electoral procedure. He notes how the Court's entry into the political thicket raises questions regarding who determines democratic norms, though he wrongly predicted that, following *Baker v. Carr,* the Supreme Court would be cautious and reserved in its engagement with electoral procedure.[29]

Distinguishing my approach from Bickel's, I favor the term *counterpopular* since a given decision reached via democratic procedures may not necessarily be majoritarian. The US constitutional arrangement accommodates both legislative (in the Senate) and executive (through the Electoral College) deviation from per-voter majoritarianism. These practices remain *popular* mechanisms for representation, reflecting the will of the people (albeit filtered through the constitutional commitment to federalism). By contrast, rule-of-law neutrality prohibits judges from basing their opinions on political will and accountability.

The inheritors of Bickel's skepticism have highlighted the morally problematic nature of the judiciary displacing political autonomy. Some of these critiques have

[28] The general form of this proposition is contained in Alexander M. Bickel, *The Least Dangerous Branch* (Connecticut: Yale University Press, 1986), p. 19.

[29] *Ibid.*, pp. 192, 196.

noted the increasing importance of judicial intervention and judicially defined rights across liberal democratic regimes, often in ways that displace popular democratic decision-making or claim normative priority.[30] This book focuses less on these observational accounts and more on the normative problem posed by judicial review. I examine two leading critics of judicial review in democratic regimes, Jeremy Waldron and Richard Bellamy. Their accounts advance two fundamental challenges to judicial review:[31] it is both morally wrongful (because it displaces democratic constituent autonomy) and practically ineffective (at least at achieving the ends that are offered to justify the unique and non-accountable role of a strong judiciary).[32] Waldron describes these as "process related" and "outcome related," respectively, while Bellamy calls an even more fundamental understanding of this problem "input" and "output" considerations.[33] The former argument is normative in character, as it identifies the failure of judicial review to conform to the legitimating principle of democratic self-rule: constituent self-determination. The latter is functional in character, as it argues that the judiciary is ineffective (or at least not uniquely effective) at sustaining democratic viability by, for example, checking the excesses of representatives and powerful cliques or protecting the rights of vulnerable groups. The election law scholarship has at least meaningfully engaged with, if not decisively answered, these descriptive arguments.

The normative argument, however, has been oddly neglected. When judges (functionally) make policy, the people do not determine the substance of their own governance and do not steer the coercive power of the state. Thus constituent members of the polity are coerced by an authority whose will cannot be clearly attributed back to those constituents. Jeremy Waldron is the best-known critic of the legitimacy of judicial review of democratic structure on these terms.[34] He argues that since the foundation of democracy is autonomous self-determination, any claim that this autonomy is conditioned on external curation undermines this foundation. This theme runs throughout Waldron's argument, but is most purely captured in his description of participation in democracy as "the right of rights"[35] and his

[30] Leading examples of this trend include Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge: Harvard University Press, 2018) and Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of New Constitutionalism* (Cambridge: Harvard University Press, 2009).

[31] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2009), p. 27, cites Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *Yale Law Journal* 1346, 1372–75 to draw both parallels and differentiations for the two main features this account notes.

[32] Waldron notes that this criticism is directed against "strong judicial review," that is, review in which a judiciary can override decisions of democratically accountable representatives, rather than ordinary conflict resolution and interpretative actions required to resolve any legal dispute. Waldron, "The Core of the Case against Judicial Review," 1354.

[33] Bellamy, "Political Constitutionalism," p. 27.

[34] Bellamy is Waldron's most sympathetic ally, although Bellamy is focused on rights constitutionalism rather than the role of the courts specifically. *Ibid.*, Chapter 3.

[35] Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1993), Chapter 11.

argument that democratic autonomy must allow citizens to freely assert the meaning of democracy and autonomy themselves.[36] Bellamy advances a parallel claim in his critique that using legal constitutionalism to "depoliticize" conflict over the substance of rights is a type of domination.[37] It is perhaps telling that accounts that confront Waldron directly tend to undermine the non-representative character of judicial review or attack it as a matter of practical impact.[38]

Electoral process poses this problem with particular incisiveness. The purpose of elections is to convert constituent will into political action and thereby validate state power by attributing it back to constituents. Even if there are moral limits to what popular political action may authorize (classically framed as preventing the tyranny of the majority, but the procedures for allocating constituent political power, and the problem of limiting political decision-making, need not be so narrow),[39] the normative facet of this problem is uniquely sharp in the context of democratic procedure. Elections are morally valid because they express political will and are the practical engine via which the principle of democratic autonomy is realized. Their characteristic, redeeming feature is that they instantiate the free moral capacity of the constituent members of the polity. To fully realize this attribute, their realization must therefore be determined by this same constituent autonomy – and likewise be politically determined. If the terms of elections are subject to some higher authority, this implies that individual moral freedom must be conditioned and thus that it is not the highest value. It is therefore much harder to offer a normative justification for externally imposing terms of elections upon the polity compared to, say, imposing a rights-based rule that even popular will cannot authorize torture.

If substantive judicial curation of the conditions of electoral process is defended on instrumental grounds as necessary to maintain democratic durability, it deepens rather than resolves the dilemma. What is the legitimate source of the value that justifies non-accountable curation? Since it does not come from the electorate itself (in which case it would be an expression of autonomy), it must suggest that even free persons in a democracy are beholden to some authoritative moral values. The moral untenability of imposing terms of self-governance on a liberal system with self-determination as a guiding principle is epitomized by Isaiah Berlin's rejection of positive freedom. Berlin declines to adopt an ideal of freedom that mandates particular

[36] Waldron, "Law and Disagreement," Chapter 13 (especially at p. 296).

[37] Bellamy, "Political Constitutionalism," p. 147.

[38] Cristina Lafont, *Democracy without Shortcuts* (Oxford: Oxford University Press, 2019), Chapter 8; Theunis Roux, "In Defense of Empirical Entanglement: The Methodological Flaw in Waldron's Case against Judicial Review," in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018).

[39] More recent versions of this article emphasize democratic theory based on values other than the self-determination of the polity. See, for example, Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001) (discussed extensively in Chapter 1), and Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton: Princeton University Press, 2007).

conduct (even appealingly framed as obedience to "rational self-direction") because it "leads to despotism, albeit by the best or the wisest."[40]

Empowering judges to dictate the terms of individuals' own political freedom would introduce such a claim of elite moral knowledge into procedures of democratic governance. The solution cannot be to simply adopt a "thin" conception of liberalism, akin to Berlin's idea of negative freedom, and instruct the Court to advance this interpretation, as opposed to the "thicker" concept of liberalism that has been prominent in the more didactic scholarship. This is because judicial interpretation and advancement of a specific idea of freedom, even a negative one, is still contrary to ultimate terms of self-rule residing with the constituency.[41] This is not mere judicial activism,[42] but a direct contravention of the foundations of democracy in constituent freedom. In short, substantive judicial review of the terms or circumstances of elections implies that some feature of democracy other than the autonomy of the electorate is the defining moral value of democracy.

The positive edge of the argument of Waldron and his kin is that standard channels of politics (such as elections) should – and do – perform the function of rights protection typically assigned to courts and can do so without sacrificing constituent autonomy.[43] Forms of democratic process can perform the same substantive function of judicial review and be led by the very people they affect. This answers Bickel's countermajoritarian difficulty by returning power to the constituency. Democratic participation can substitute for magisterial judicial authority. John Hart Ely's scholarship, discussed extensively in Chapter 2, is largely a reply to Bickel's countermajoritarian difficulty, yet it is typically seen as a general (albeit highly influential) constitutional argument rather than a specific work on election law. Surprisingly, his attempt to justify judicial review has not become a thematic touchstone in the field.[44]

1.2.3 *Implicit Tolerance of Instrumental Judicial Intervention in the Election Law Scholarship*

These critiques of judicial intervention into democracy have been strangely absent from American election law scholarship. Judicial review is often portrayed as

[40] Isaiah Berlin, *Two Concepts of Liberty in Liberty*, ed. Henry Hardy (Oxford: Oxford University Press, 2002), p. 200.

[41] I owe this point to extremely thoughtful discussions with Samuli Seppänen.

[42] This is a familiar concept, from Bickel's concept of the countermajoritarian difficulty to Ran Hirschl's concern articulated in "Towards Juristocracy" to Jeremy Waldron's broader skepticism of judicial review.

[43] Waldron, "Law and Disagreement," pp. 244, 305; Waldron, "The Core of the Case against Judicial Review," 1378; Bellamy, "Political Constitutionalism," p. 152.

[44] Intriguingly, there has been a resurgent interest in Ely's approach in a comparative context, though this approach does not center the tension of counterpopularism. See, for example, Stephen Gardbaum, "Comparative Political Process Theory" (2020) 18 *International Journal of Constitutional Law* 1429.

beneficial for, if not essential to, the viability of democracy, even if the seminal virtue of democracy is popular self-rule. Chapter 2 discusses a stronger, normative form of this objection – advanced by constitutional law scholars such as Eisgruber and arguably Dworkin – which identifies constitutional rights protection as the defining value rather than a facultative feature of democracy. The generalized, weaker form of this approach is an institutional understanding that considers courts and values such as the rule of law to be practical necessities. Critics of judicial review challenge the weaker practical case descriptively through the outcome-/output-based argument that judicial review is *not* uniquely effective at achieving justice or at least is not worth the cost to democratic legitimacy.[45]

This descriptive critique of judicial review – that its benefits do not justify the normative onus – would seem to cut especially hard in the context of election law, for the reason described above. Since elections are the typically decisive instantiations of democratic autonomy, the side of the scale in favor of popular self-rule would seem heavily weighted. Yet strangely, the focus of election law scholarship has been almost exclusively instrumental in nature, focused on how judges can bring about the "best" democratic practice. Contemporary scholarship has neglected the paradoxically autonomy-infringing effects of judicial intervention in the sphere of elections.

Prior studies in this area have instead treated judicial intervention as a policymaking problem. The prevalent question is always which legal interventions would yield a good electoral design. Scholars, in other words, have concentrated almost exclusively on one side of the counterpopular dilemma, courts' capacity to benefit democratic process through their institutional position. The difficulties posed by the judiciary's political insulation and non-accountability have been neglected. If anything, prior studies have noted non-accountability in passing as an institutional virtue that enables judicial oversight of democratic process.[46] This is particularly salient in one leading account, Issacharoff and Pildes's "Politics as Markets: Partisan Lockups of the Democratic Process."[47] Issacharoff and Pildes assert that the Supreme Court has failed to articulate "any underlying vision of democratic politics that is normatively robust or realistically sophisticated about actual political practices."[48] They advocate for competition-generating, entrenchment-policing judicial intervention, modeled on judicial intervention in corporate governance that seeks to protect shareholders from executive mismanagement. Their argument is unabashedly institutionalist and structuralist, treating

[45] See Jeremy Waldron, "The Rule of Law and the Role of Courts" (2021) 10 *Global Constitutionalism* 91, 94.

[46] See Issacharoff and Pildes, "Politics as Markets."

[47] Heather Gerken describes this work as "the finest article written in the field." Heather K. Gerken, "Playing Cards in a Hurricane: Party Reform in an Age of Polarization" (2017) 54 *Houston Law Review* 911, 912.

[48] Issacharoff and Pildes, "Politics as Markets," 646.

the Court's defining feature as its capacity to deploy power insulated from political reprisal or accountability.[49]

The normatively extraordinary feature of Issacharoff and Pildes's account is implicit. If adopted, their approach would transform the Court into a non-accountable yet broadly empowered regulator of democratic process. Insofar as the Court's authority derives from a normative or constitutional remit, the article circumvents such difficulties by seeking "to read into the Constitution an indispensable commitment to the preservation of an appropriately competitive political order."[50] This argument parallels that of Dworkin and Eisgruber, who are willing to subordinate constituent autonomy to other values. Indeed, in the first sentence, Issacharoff and Pildes dismiss the "autonom[y]" of democratic self-governance. They barely acknowledge that the unique features of the Court that should limit or discipline such an ambitious judicial role in shaping politics. The seemingly sympathetic work of Ely is brushed aside as excessively concerned with, inter alia, individual rights.[51] However, Ely's work is defined by trying to justify judicial review as a normative matter. Insofar as Issacharoff and Pildes's account includes a moral justification, it is reverse engineered from justifying judicial involvement to achieve a particular vision of democracy. The rights-based approach that Issacharoff and Pildes reject in favor of this structuralist turn, for all its analytic inadequacies (including its inability to explain dramatic interventions such as one person, one vote), has a readier explanation for the Court's authority to intervene in elections: it is merely fulfilling its constitutional mandate.

Paralleling the turn away from rights-based understandings, subsequent election law scholarship typically followed the tradition of enquiring *what should democracy look like?* and advocating judicial intervention to achieve it. This has neglected the question *why are the courts the appropriate mechanism to do so?* This implicit instrumental justification for judicial review has been reflected in multiple ways. Following from Gerken's critique of rights-based approaches to elections as inadequacy is her claim that the Court *must* advance a structural theory of legitimate democratic process to answer the legal questions posed by topics such as the racial protections afforded by the equal protection clause, one person, one vote, and the permissibility of partisan gerrymandering. Yet Gerken notes that advancing such a structural theory, as opposed to relying on the more traditional rights-based approach, imposes a clear normative vision of democracy.[52] Insofar as she concedes that the Court has been hesitant to explicitly impose such visions, she describes it as an institutional blind spot and tends to suggest that even if the Court tries to avoid imposing such theories, in resolving cases it will inevitably do so. The underlying normative

[49] *Ibid.*, 648.
[50] *Ibid.*, 716.
[51] *Ibid.*, 710.
[52] Gerken, "The Costs and Causes of Minimalism," 1463; Gerken, "Lost in the Political Thicket," 521.

tension elicited by the counterpopular dilemma tends not to play a significant role in Gerken's analysis. The goal, even philosophically, is to advance the right democratic theory through the available institutional channels, despite the fundamental features of those institutions that might prove to be normatively problematic (that is, the non-accountable nature of the judiciary). Stephanopoulos's descriptions of what he thinks democracy should look like largely overlook the Court's unique normative remit. In his influential advocacy to adopt the efficiency gap to address partisan gerrymandering, other than analogizing the proposed quantitative standard to the one person, one vote rule in terms of its descriptive efficacy, he does little to explain why the judiciary is the appropriate institution to advance districting standards. Likewise, his field-encompassing argument that judicial adoption of the alignment interest would "launch a doctrinal revolution"[53] does not consider the unique normative weight the Court must bear to advance a "particular vision of democracy."[54]

1.3 SHARPENING THE MORAL ONUS OF THE COUNTERPOPULAR DILEMMA

Critics of judicial review would unequivocally reject the conclusion that courts should develop a robust freestanding theory of democracy to guide structural interventions in democracy. Asserting that courts should undertake baldly structural intervention is an even more direct affront to popular autonomy, because (unlike rights protection) it cannot be vindicated by the risk of majority tyranny. Advocates for such intervention can only revert to the claim that the constituency itself lacks the competence to generate structures with soundness and integrity. Because they find this premise untenable, skeptics of judicial review would reject the legitimacy of courts policing democratic structures. They would instead prefer governance by whatever structures emerged from accountable political processes.[55]

Despite being an affront to the principle of autonomy championed by judicial review skeptics, positing the institutional incompetence (or at least the tendency toward pathology) of democratic process is present in much of the election law scholarship. Issacharoff and Pildes explicitly declare that the Supreme Court should address what they identify as the recursive failures of democracy (i.e., entrenchment); Pildes identifies the intersection of constitutionalization of democracy and structural challenges to democratic self-rule as the defining quality of the election law as a field.[56] Critics of Waldron have invoked Issacharoff's description of the role

[53] Stephanopoulos, "Aligning Campaign Finance Law," 1454.

[54] *Ibid.*, 1449.

[55] Waldron, "Law and Disagreement," p. 303 openly grasps (grabs?) the nettle that this would make all substance in democratic process "up for grabs"; Bellamy notes "ordinary legislation within the legislature has to be the sphere of constitutional politics" if ultimate constitutional authority is to rest with the people, "Political Constitutionalism," p. 139.

[56] Pildes, "The Constitutionalization of Democratic Politics," 39.

of the judiciary in preserving democracy in times of crisis to counter Waldron's anti-judicial review stance.[57] These views are unspoken but implied in recent scholarship that advocates for theoretical or technocratic judicial intervention. Underlying these approaches is the proposition that the Court's neutrality – essential to sound rule of law – also gives it a uniquely disinterested position from which to curate democratic process.

This belief seems to refer back to the second aspect of the criticism of judicial review. Bellamy describes how political process is "overwhelmingly stronger than courts with regard to 'input' criteria, with courts doing better on 'outputs'."[58] This output question is empirical: is judicial review ineffective or superfluous for ensuring the integrity of democratic process? One form of anti-judicial review attack is essentially a repackaging of the prominent critique of political process theory that it has insufficient content to guide judicial review. Any assertion that the judiciary can more effectively advance legitimate democratic process requires an authoritative consensus on what democratic process *is*; if popular mechanisms are ineffective, this consensus cannot come from the constituency itself.[59] I discuss below how this can be developed into a problematic paradox for judicial review, but the more practical critique of judicial review is not process-based. This practical claim is that "[r]eal change only comes with legislation, and judicial review may hinder as much it promotes that process."[60] Bellamy points to *Brown v. Board* and *Roe v. Wade* to exemplify how judicial intervention often fails to achieve the social benefits that champions of judicial review claim.

The difficulty is that making such a descriptive, substance-based assessment of which measures advance legitimate democratic procedure introduces a further seemingly insoluble question. With no obvious descriptive baseline regarding legitimate terms of democratic process, such a query necessarily becomes circular. The legitimacy of a democratic procedure can ultimately only be assessed against what the constituents themselves would authorize – which in turn requires a reliable way to evaluate the content of popular will. This poses a problem for both advocates of structural judicial intervention and for critics of judicial review. The former cannot offer a truly foundational explanation of the efficacy of judicial review without referring to an authoritative norm. The latter cannot decisively assert that judicial review is ineffective at promoting democracy without citing an authoritative vision of their own of what democracy should be (which is, of course, the very trap they accuse advocates for robust judicial review of falling into).

It is worth noting that judicial intervention in election law has achieved some great victories in interdicting democratic pathologies. This gives the prevalent

[57] Roux, "In Defence of Empirical Entanglement," 210 (citing Issacharoff's *Fragile Democracies*).
[58] Bellamy, "Political Constitutionalism," p. 27.
[59] This is developed from Waldron, "Law and Disagreement," p. 243.
[60] Bellamy, "Political Constitutionalism," p. 44.

structural approach to election law ammunition to use against critics of judicial review. The most successful interventions appear to be the early moves against racist electoral procedure (the White Primary cases and the striking down of illicit districting in *Gomillion*) and one person, one vote. These interventions assailed entrenched cliques whose electoral power was enhanced unjustly; yet they cannot be explained wholly in rights-based terms. The White Primary cases prohibited even a wholly private organization from effecting exclusionary electoral policies.[61] The attacks on malapportionment in one person, one vote, which has an uncertain constitutional footing, increased popular control over electoral outcomes by breaking up practices of rural entrenchment (see Chapter 4). As the election law scholarship has noted, these cases are noteworthy precisely because they do not easily fit into a rights-based framework.[62] Furthermore, insofar as they involve breaking up cliques, they vindicate the underlying feature of judicial review – political neutrality based on lying outside the political process – that defines the courts' role in the rule of law and justifies counterpopular judicial review.

These interventions have incontrovertible normative appeal. Yet the appeal of these rules (what Waldron or Bellamy might call outputs) does not explain why the Court has the institutional authority to legitimately impose electoral rules in the first place. Beyond highlighting the struggle between election law scholarship and skepticism of judicial review, this tension elicits the deeper normative onus associated with judicial review of election law.

The counterpopular dilemma emerges from this intersection of (1) the foundational problem of authority over freedom and (2) the practical realities of democratic process. Election law scholars have focused on the latter. The inevitable concentration of power in the hands of representatives and elites creates opportunities for them to redesign electoral rules for their own benefit. Regardless of who (independent judges or accountable politicians) has "deep" moral authority to dictate the terms of autonomy, the practical reality is that the electoral processes that legitimately serve constituent autonomy are under constant threat. This problem is exacerbated by the fact that "pathologized" election law can be a self-reinforcing rachet: subsequent elections may legitimize increasingly abusive electoral rules. Election law scholars favor judicial power because federal judges are well positioned to interdict representatives who engage in such abuses because they are not representatives themselves. They are, by constitutional design, insulated from the pressures and processes of direct political accountability. They can therefore intervene as morally and structurally appropriate when representatives who *are* subject to such political pressures seek to enact self-aggrandizing election law.

[61] See the discussion of *Terry v. Adams* 345 US 461 (1953) in Chapter 6.

[62] Issacharoff and Pildes, "Politics as Markets," 653 (discussing the White Primary cases); Gerken, "The Costs and Causes of Minimalism" (discussing one person, one vote).

Yet this justification for judicial review glides over the foundational countervailing argument: if electoral procedure does have the unique capacity to dictate the terms of constituent autonomy, it is especially crucial that it be under (or close to) the constituents' control. Mid-level structural innovation by an outside, unaccountable actor is especially problematic in the domain of election law because it compromises the moral principle that vindicates democracy in the first place. Proposing that a rule is valid in a democracy even though it does not derive from constituent self-determination suggests that democracy ought to be guided by some external authority. This in turn implies that some external principle can dominate self-determination in democratic organization – a normative commitment that, regardless of how it is packaged, eventually requires moral authoritarianism. Given that electoral rules are the dominant means by which popular freedom is realized and democracy is legitimized, it is especially (and recursively) important that these rules are attributable to constituent will. Even if this creates circularity in trying to identify and shape electoral rules because constituent will cannot be identified without some initial valid mechanism, Bickel's core critique that elections and representatives are closer to the people than the judiciary remains compelling. Conversely arguing that courts are the direct agents of that will is implausible. The closer courts are to being accountable, the more they lose the practical benefit of neutrality and detachment from political pressure that election law scholars consider to be a virtue.

The problem elicited by judicial review of election law resonates with and extrapolates from Waldron's general critique. Elections are valuable *because* they serve as a conduit for the popular will. A counterpopular approach to judicial rights enforcement can be justified in the context of substantive policymaking by observing that the popular will can abuse the fundamental integrity or functionality in those domains and that advancing their basic values may require restraining outputs of the political process. When a court protects free speech rights from illicit restriction or prohibits a law that illicitly uses racial classifications, it does so because First Amendment and equal protection rights, respectively, prevent the majority (acting through representatives) from oppressing minorities. While the higher authorization that justifies such countermajoritarianism needs to be attributed to a deeper shared commitment (discussed further in Chapter 2), if the right is identified as having freestanding status in the broader constitutional order, judicial intervention against popular decisions can be vindicated. Thwarting the expression of popular will is not a defect in such types of rights enforcement; it is an essential feature – an idea that can be traced back to James Madison.[63]

Such a standard defense of judicial review, however, cannot legitimize judicial oversight of electoral process. Since elections are meant to convert constituents' autonomous choices into governance, the law of electoral procedure cannot seek

[63] Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (New Orleans: Quid Pro Quo Books, 2013), Chapter 2.

to thwart constituent will, because this would assert a principle of higher priority than autonomy. If electoral procedure is legitimized by a principle other than the realization of constituent autonomy, it contradicts its own normative foundations, and there is no way of advancing it in a coherent manner. This difficulty is the core of the counterpopular dilemma. Despite the practical benefits of judicial review of electoral process and its potential to interdict the pathologies of democracy, it can only be authorized through a principle higher than constituent autonomy, which contradicts democracy's foundational, legitimizing principle.

The ramifications of such interventions are reinforced by the recursive implications of allocating authority over electoral process to a source other than the constituents. Such rules embed externally imposed values in subsequent electoral rules that reflect such non-autonomously imposed decision-making procedures. Thus externally imposing electoral rules can influence the polity's processes indefinitely. Even if these democratic processes are authorized by later electoral decisions, they were not truly legitimate expressions of constituent will when they were introduced.

Ironically, this "stickiness" of electoral pathologies, when effected by representatives and elites, is what motivates election law scholars to look to the courts to intervene. Representatives' adoption of self-entrenching electoral procedures is the most classic example. The judiciary is a prospectively appealing mechanism for addressing "stickiness" that comes from within the accountable democratic process because judges are outside this process, but this calls into question the judiciary's authority to legitimately shape the terms of freedom. The potential benefits of having the judiciary structurally address electoral problems can only be realized by contravening the legitimizing principle of democracy.

1.4 THE DURABILITY OF THE COUNTERPOPULAR DILEMMA

It is worth addressing some preemptive challenges (perhaps better termed "easy solutions") to this problem. Some easy solutions question the centrality of elections to autonomy and instead emphasize features of the liberal constitutional order that fit more comfortably with robust judicial review, such as rights and the rule of law. Dworkin and Eisgruber have gone so far as to openly denigrate elections as the characteristic property of democracy, preferring a substantive rights-favoring conception. Eisgruber maintains that "we must first put aside the idea that free elections are constitutive of democracy."[64] Rebecca Brown epitomizes how this substantively rights-favoring view of democracy undermines Bickel's countermajoritarian difficulty: she asserts that Bickel reduces democracy "to its most elemental populist foundations" of majoritarian will and thereby ignores the "collection of interacting mechanisms"

[64] Eisgruber, "Constitutional Self-Government," pp. 50, 83. See also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1997), p. 17.

that protect it.[65] This position is a hard-edged extrapolation of the account of democracy articulated by Ginsberg and Huq (in which electoral self-rule is only one feature, along with rights protection and the rule of law). This more extreme critique suggests that Bickel's argument relies upon a problematically minimalist conception of democracy.

What are the implications of this skepticism toward electoral primacy? Since elections require certain background conditions (some of which are directly related to electoral rules and others to establishing socio-political circumstances that are conducive to self-rule more broadly), it logically follows that elections are a necessary but not sufficient condition for liberal democracy. Yet if a polity's elections do not always realize constituent autonomy, is it truly a liberal democracy? This leads naturally enough to the thesis that elections – as a form of majority rule – may not, in fact, be a necessary trait of liberal democracy. Legal scholars typically identify an alternative foundation of democracy as defined by rights, rather than autonomy over governmental decision-making.

This line of reasoning entails an alarming leap – from the observation that electoral representation is an imperfect realization of self-rule (both because elections do not realize constituent will perfectly and because elections require other conditions to function) to the conclusion that political self-determination is not, in fact, the central feature of democracy. If this jump is considered compelling and decisive, then the premise of this book – that self-rule achieved through elections must be reconciled with judicial transformation of electoral procedure – may be of little interest (though the coherent descriptive account of election law may be of interest as a hermeneutic exercise). However, this jump entails far more; its logical conclusion is that democracy is not a system of autonomous constituent self-determination of governance. Rather, democracy is defined by a characteristic other than autonomy, presumably a set of social conditions such as equal application of the law and citizens' ability to exercise rights. Elections may have a key role to play in protecting these features, but if self-rule is not a first-order value, then giving judges the power of electoral design will not cause problems as long as doing so yields a social order that protects these conditions. The significance of de-prioritizing citizen autonomy should not be diminished. It does not merely attempt to address majority tyranny. Rather, it rejects self-rule as the legitimating quality of politics. It thus rejects the basic premise that the power of a person (or collective) over its own political fate is decisive. This in turn goes against this book's premise regarding the link between morality and freedom.

Thus, if constituents' political autonomy is accepted as the core value of democracy, the substantive weight of the counterpopular dilemma cannot be so easily

[65] Rebecca Brown, "How Constitutional Theory Found its Soul: The Contributions of Ronald Dworkin," in Scott Hershovitz (ed.), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford: Oxford University Press, 2008), p. 46.

brushed away. As Ely describes it (in a way Michael Klarman describes as "unanswerable"),[66] even if election-based representation is an imperfect expression of constituent autonomy – that is, it is procedurally imperfect – judicial intervention has a lexically weaker claim to articulate the will of the franchise because it does not even aspire to accountably express constituent autonomy.[67] Even if one recognizes the virtues of robust judicial review and the flaws and risks of representation, there is no question that elections are a *more* direct expression of constituent autonomy. Judicial intervention in electoral process can only be justified by asserting that there is some higher substantive value than constituent self-determination that can grant democratic legitimacy and that the right authorities can advance as settled moral fact (which is precisely what Eisgruber and Dworkin come to assert). Taken to its logical extreme, such a view could vindicate purely technocratic rule (rule by philosophers, one might quip). If the technocrats advanced the normatively "correct" views and operated within a properly arranged institutional framework, this would justify minimizing the role of constituent determination of the terms of self-rule altogether. While those who recognize rule of law and independent rights protection are unlikely to take such an extreme view, the problematic *principle* remains apparent. Empowering those who are *less* (rather than more) accountable to the franchise to set the terms of electoral procedure requires a substantive vision of good governance that necessarily undermines the primacy of autonomous constituent self-determination.

There is a further problem facing any ultimate force given to judicial review of election law that activates another aspect of its recursive character. If judges' substantive conclusions are fixedly authoritative, this confirms that the terms of democratic self-determination are closed to debate.[68] It is possible to make experiential observations about what types of electoral arrangements and circumstances are more or less desirable according to a posited set of criteria. But considering this to be decisive begs the question of who has the authority to posit the criteria. The character of legitimate democracy can only be defined by the constituents who rule (and are ruled by) it. The ongoing process of disputing its meaning is a reflexive aspect of democratic process, which is necessary to retain the legitimacy of self-rule, even as it destabilizes the fixity of its definition. When the judiciary dictates what democracy means from a position of non-accountable technocratic authority, this undermines this reflexive aspect of democratic self-determination.

Another argument that brushes away the counterpopular dilemma fails due to the unique characteristic of election law. Some have argued that judicial review

[66] Michael J. Klarman, "The Puzzling Resistance to Political Process Theory" (1991) 77 *Virginia Law Review* 747, 777.
[67] Ely, "Democracy and Distrust," p. 206 n.9.
[68] See Waldron, "Law and Disagreement," p. 303.

of legislative action is generally unproblematic because judges, who lack direct control over coercive levers of the state, will always be sensitive to voters' interests and preferences.[69] Lafont articulates a version of this argument by emphasizing the role of litigants in shaping legal outcomes.[70] According to this perspective, even if judges are not directly accountable, they will avoid taking action that is so at odds with popular preference that it deprives the judiciary of normative legitimacy due to fears of being institutionally circumvented or disempowered. Yet where judges transform the very terms by which popular will is collectively synthesized into representative state action, the soft restraints of public opinion offer far less comfort. This is because judges are not merely shaping policy that constituents may react to via expressions of political will; they are determining what that political will looks like in the first place. If judges favor (or take away) a particular group's power through the democratic process, that group, which now has control of the state (or not), will be able to act (or be hindered from acting) to reinforce and incentivize (or be prevented from disincentivizing) such non-accountable overdetermination of political power. The judiciary, since it is an initial gatekeeper, is insulated from retaliation by those who are excluded from power unless the situation becomes so dire that the entire constitutional order is threatened. In short, where the judiciary curates the universe of manifest constituent will that makes up the political process, that constituent will cannot be relied upon to police the judiciary. This problem is especially salient where the judiciary condones or accelerates a moment of majoritarian domination that may become entrenched, including long-condemned examples of racial oppression and still-contested instances of partisan gerrymandering.

The counterpopular dilemma cuts deep. Judicial review has the potential to prevent the pathological domination of the democratic process by those in power. But for such judicial review to be effective, it must be able to make some claim to moral knowledge of good democracy that does not undermine the very popular autonomy that elections are meant to vindicate. Addressing this problem requires not merely describing what judges should do when they police elections, but stipulating precisely how an anti-majoritarian structuring of electoral process can be vindicated and what its content should be, given that it acts against the most direct expression of popular will, accountable representation.

[69] Eisgruber, "Constitutional Self-Government," p. 3.
[70] Lafont, "Democracy without Shortcuts," Chapter 8.