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Political Constitutionalism and Forms of Judicial Review: A Dual Approach to Counter-Majoritarian Difficulty

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Abstract

The Article examines the counter-majoritarian difficulty through the lens of political constitutionalism. To this end, it develops a dual framework for understanding the counter-majoritarian difficulty, distinguishing between internal and external dimensions. Based on this distinction, the Article proposes an institutional development of political constitutionalism—combining strong and weak judicial review—as a cogent response to these challenges.

The internal counter-majoritarian difficulty stems from distortions in majoritarian processes that undermine their representative legitimacy. The external counter-majoritarian difficulty, conversely, embodies the belief that courts, rather than legislatures, should be the pivotal institution in realizing citizens' expectations regarding justice and rights.

Given this distinction, the analysis demonstrates that political constitutionalism can address both internal and external counter-majoritarian difficulties without compromising its foundational commitment to equal participation through a combined application of strong and weak judicial review. Strong judicial review aligns with political constitutionalism's core principles by safeguarding against electoral distortions that pose internal counter-majoritarian issues. Weak judicial review enables courts to play a crucial role in realizing constitutional rights, as advocated by external counter-majoritarian critique, while leaving the final word on such matters to the legislature.

Keywords: Political constitutionalism; constitutional democracy; separation of powers; strong and weak judicial review; majoritarianism

A. Introduction

The malaise affecting constitutional democracies evokes an extensive network of interconnected problems—social, institutional, cultural, and even technological in nature. Within this complex framework, two trends can be isolated that contribute to defining the deconsolidation of the democratic and constitutional order that emerged in the West after World War II. The first phenomenon moves from bottom to top and describes the growing “fatigue” of citizenship in being an active participant in public decision-making. This fatigue manifests in various forms:

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from abstention to the hollowing-out of political parties, from political ignorance to a growing sense of distrust in politics' ability to address the serious problems of our time.¹ This first movement primarily captures the weakness of democratic regimes, forced to reckon with the demobilization of citizenship, increasingly disinclined to dedicate—to quote Oscar Wilde—their evenings to political matters.² The second movement, conversely, originates from the top and describes the emergence of authoritarian figures in the democratic and constitutional landscape.³ These figures, leveraging citizens' resignation and the weakness of mainstream political forces, demand greater power to combat uncontrolled immigration, the wounds of globalization, and threats to citizens' security.⁴ Under this pretext, demagogic rulers ultimately interpret the deconsolidation of constitutional democracies in an authoritarian manner.

There is arguably no philosophical conception more severe than political constitutionalism in denouncing the gravity of this scenario. From the perspective of political constitutionalism, it is not only fundamental to nurture and rely on citizen participation, not only essential to limit the power of elected officials, but—perhaps most importantly—the first goal, participation, accomplishes the second, limitation of power. This Article explores potential institutional developments in political constitutionalism as a response to the need for limiting rulers' power through citizen participation and examines arrangements that promote participation as a key channel for societal change. To this end, the investigation connects political constitutionalism to the counter-majoritarian difficulty. This concept captures the tension between the legislative power, elected and legitimized by popular participation, and the counter-majoritarian power of the judiciary to nullify laws deemed in conflict with the judges' interpretation of the constitution.

This analysis focuses on the relationship between judicial and legislative power, examining judges' constitutional interpretation of laws and its significance in democratic processes governed by majority rule. This perspective on the counter-majoritarian difficulty deliberately omits two aspects: First, the role of courts in regulating the scope of laws through statutory interpretation, and second, the tension between executive and judicial power arising from courts' constitutional review. In statutory interpretation, courts interpret legislation to apply it to specific cases before them. While statutory interpretation can generate tensions between legislative and judicial power,⁵ this difficulty falls outside the scope of this Article, as it raises distinct issues primarily stemming from the ambiguity of legislative statutes. Regarding executive power, while not directly examined, it remains tangential to the argument. By focusing on the friction between judiciary and legislature, this analysis addresses the broader dialectic between the majoritarian power of politics and the counter-majoritarian power of the courts. Moreover, in parliamentary systems, attention to the legislature inherently encompasses attention to the executive.

Both political constitutionalism's search for new participatory forms of law-making and the pursuit of equilibrium between legislatures and courts within the framework of the counter-majoritarian difficulty may find resolution in a dual approach. Such a dual approach leads, first and foremost, to distinguishing between two forms of counter-majoritarian difficulty, respectively

¹See generally CHRISTOPHER ACHEN & LARRY BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* (2016); PETER MAIR, *RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY* (1st ed. 2013); ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE* (2d ed. 2016); PIERRE ROSANVALLON, *COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST* (2008) (discussing the salience of these problems to the future of democracy).

²See Michael Walzer, *A Day in the Life of a Socialist Citizen: Two Cheers for Participatory Democracy*, *DISSENT*, May–June 1968, at 243, 243–47 <https://www.dissentmagazine.org/article/a-day-in-the-life-of-a-socialist-citizen/> (explaining that Wilde employed this phrase to critique socialism's excessive demands for civic participation); see generally KEVIN J. ELLIOTT, *DEMOCRACY FOR BUSY PEOPLE* (2023) (providing an extensive analysis of requisite citizen engagement and its appropriate parameters).

³See generally STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); ANDRÁS SAJÓ, *RULING BY CHEATING: GOVERNANCE IN ILLIBERAL DEMOCRACY* (2021).

⁴See generally LARRY M. BARTELS, *DEMOCRACY ERODES FROM THE TOP* (2023).

⁵Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 231–39 (2013) (outlining an analysis of counter-majoritarian difficulty raised by statutory interpretation).

internal and external to the majoritarian electoral process. In the first case, the difficulty stems from internal distortions of the majoritarian process, such as electoral barriers and gerrymandering, which compromise its capacity to represent the majority will. In the second case, the counter-majoritarian difficulty manifests itself externally, as the belief that the courts, and not legislatures, must be at the forefront in ensuring citizens' expectations linked to justice and rights. This distinction enables the development of a second duality in the institutional form, through which political constitutionalism can generate law through participation while simultaneously ensuring the limitation of power and non-arbitrary rule.⁶ This dual institutional development entails strong judicial review to address internal counter-majoritarian difficulties and weak judicial review to resolve external counter-majoritarian concerns. From the perspective of political constitutionalism, this dual approach reaffirms both the centrality of participation and the principle that participation generates shared solutions to societal problems—or, alternatively, that participation enables the correction of previous inadequate decisions regarding these problems.

Following this introduction, the Article is divided into four sections. Section D distinguishes between internal and external counter-majoritarian difficulty. Section C outlines the key elements of political constitutionalism, focusing on the centrality of disagreement, political equality, and the majority principle. Furthermore, the section highlights constitutionalism's reflexive tension toward new forms and possibilities consistent with its normative core, which can be synthesized in the paradigm of "participation of equals." Section D examines the relationship between political constitutionalism and internal counter-majoritarian difficulties, arguing that in addressing electoral barriers and gerrymandering, strong judicial review is both desirable and consistent with the ideal of decision-making as participation of equals. Finally, Section E reconnects political constitutionalism and external counter-majoritarian difficulty, arguing that, in this second case, courts can be granted political agency that allows them to play a crucial role in the realization of constitutional rights, while maintaining a weaker position than the final word, which belongs to the legislature.

B. Internal and External Counter-Majoritarian Difficulty

This section outlines a distinction of the counter-majoritarian difficulty, distinguishing an internal and an external side of the problem. In the first case, the difficulty derives from internal distortions to the majority process, such as electoral barriers and gerrymandering, which compromise its capacity to represent the majority will. In the second case, the counter-majoritarian difficulty manifests itself externally, as the belief that the courts, and not legislatures, should be the pivotal institution in realizing citizens' expectations regarding justice and rights.

1. Internal Counter-Majoritarian Difficulty

The counter-majoritarian difficulty first identifies a problem *internal* to the majoritarian process. In short, this process would be incapable of reflecting the truly majority position of the citizens due to distortions that affect the electoral procedure. In this way, the majority principle that regulates elections would end up being tampered with and, consequently, the voting process would only represent the perspective of an artificial majority or, paradoxically, of a minority.

Electoral distortions jeopardize the integrity of the majoritarian process by breaking two fundamental links in the "chain of democratic choice"⁷: universal enfranchisement, which is

⁶Richard Bellamy, *Political Constitutionalism*, in *THE CAMBRIDGE CONSTITUTIONAL HISTORY OF THE UNITED KINGDOM* 59, 60–61, 69–70 (Peter Cane & Harshan Kumarasingham eds., 2023); Richard Bellamy, *Political Constitutionalism and Populism*, 50 *J. L. & Soc'y* 1, 10–12 (2022).

⁷Andreas Schedler, *Elections Without Democracy: The Menu of Manipulation*, 13 *J. DEMOCRACY* 36, 39 (2003).

formal and effective, and the equal weight of voters.⁸ In this sense, the distortions here considered identify two different phenomena: Respectively, the exclusion of part of the electorate in violation of universal suffrage and gerrymandering as opposed to the equal weight of voters. The first distortion coincides with the creation of electoral barriers which prevent universal inclusion in elections, thus making them a prerogative disconnected from citizenship membership. Even if universal suffrage is not formally repealed, it is weakened by suppressive regulations such as restrictive voter-ID laws, documentary proof of citizenship requirements, poll closings, and voter purges. The second distortion instead refers to the manipulation of electoral districts by political forces to maximize the number of seats won in relation to the votes obtained. An example of this kind of abuse is the practice of gerrymandering, that is, the redrawing of electoral boundaries for partisan electoral purposes in such a way as to create artificial majorities in the legislative assembly. This practice is particularly problematic in majoritarian and mixed electoral systems, where a segment of legislative seats is allocated through first-past-the-post election. Pure proportional representation systems, by contrast, minimize the impact of gerrymandering. In all affected systems, however, the equal weight of votes is compromised as votes for opposition parties are intentionally nullified by their distribution in districts where the majority is predetermined.

In the United States, Tolson identifies these two distortions—electoral barriers and gerrymandering—as the “real” counter-majoritarian difficulty:

Legislation was not always a product of democratic majorities because the institutions enacting legislation could be structurally countermajoritarian. Because of the difficulty of overcoming these hurdles, it has been an uncomfortable truth that the electorate often has not been a true majority In recent years, states have engaged in aggressive efforts to construct an electorate that has likewise reflected the policy preferences of ‘some group of people in some there and then’ but not necessarily the majority of the voting age population The idea that we should be concerned about judicial review of legislation when state legislatures are working to disenfranchise the voters constituting the “majority” seems especially misguided.⁹

It would be erroneous, according to Tolson, to seek counter-majoritarian difficulties in the activity of the courts. Rather, it is the incumbent legislature that manipulates the vote to alter the formation of the future majority in legislative assemblies. By doing this, the legislature distorts democratic openness to new rulers and different choices, depriving majority principle of its aptness to make power contestable and decisions emendable. As an upshot, democracy no longer identifies majority governance as a “repeat play,” in which “[t]ime allows the losers of today the prospect of reorganizing and emerging as the winners of tomorrow.”¹⁰

In a broader framework of analysis, Karlan also identifies the “new” counter-majoritarian difficulty in the distorted election of legislators. Such a distortion would precisely describe the inability of the majoritarian process to reflect the majority of citizens in the assemblies, that is, the counter-majoritarian nature of the majoritarian process: “[P]olitical power is a major source of a new countermajoritarian difficulty Put squarely, our political system may be incapable of reflecting the new majority.”¹¹

Tolson and Karlan summarize in this thesis the vast evidence with which the vote is distorted in the USA both with barriers—through suppressive regulations such as restrictive voter-ID laws, documentary proof of citizenship requirements, poll closings, and voter purges—and with

⁸See ALBERTO SIMPSON, WHY GOVERNMENTS AND PARTIES MANIPULATE ELECTIONS 32–60 (2013) (offering a broader analysis of electoral distortions).

⁹Franita Tolson, *Countering the Real Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2381, 2383–84 (2021).

¹⁰SAMUEL ISSACHAROFF, DEMOCRACY UNMOORED 7 (2023).

¹¹Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2334 (2021).

gerrymandering.¹² Exactly as Huq and Ginsburg noted with the diffusion of authoritarianism in democratic societies, the same is true with the electoral distortion at stake: This process underway in the United States does not only depict “idiosyncratic local storms” but also “climatic conditions of our political future.”¹³ In fact, the erection of electoral barriers and the use of gerrymandering also occur in other advanced democracies and does not suggest an argument from contingency, limited to the American context.¹⁴ Rather, internal counter-majoritarian difficulty stands as a possible progression of democracy’s deconsolidation.¹⁵

II. External Counter-Majoritarian Difficulty

The counter-majoritarian difficulty identifies a problem external to the majoritarian process when it links the distrust in elective institutions¹⁶ to the belief that the solution is offered by the work of the courts. The counter-majoritarian difficulty becomes “external” because it describes the faith in the courts which, as counter-majoritarian institutions, are better equipped than elective institutions to ensure citizens expectations linked to justice and rights.¹⁷ This second face of the problem develops Bickel’s first formulation of the counter-majoritarian difficulty as courts’ opposition to the “will of representatives of the actual people of the here and now.”¹⁸ In Bickel’s analysis, the prerogative of the justices to declare unconstitutional a legislative act is external, as it captures a correction that comes from outside the democratic process. This external nature justifies “the charge can be made that judicial review is undemocratic”¹⁹ and “may, in a larger sense, have a tendency over time seriously to weaken the democratic process.”²⁰ Judicial interference with democratic politics represents, in this prong of the counter-majoritarian difficulty, not only an alternative course of action to majoritarian democracy but also the paramount political means to protect and realize rights violated or forgotten by the legislatures.

The growing trust in the work of the judiciary and, with it, the need to look outside the majoritarian process is well depicted by Waldron:

¹²See generally ERIK J. ENGSTROM, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* (2013) (explaining electoral exclusions and manipulations in the United States); MICHAEL J. KLARMAN, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 45–60 (2020).

¹³TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 2–3 (2018).

¹⁴See generally BERNARD GROFMAN & LISA HANDLEY (eds.), *REDISTRICTING IN COMPARATIVE PERSPECTIVE* (2008) (collecting analyses and comparisons of redistricting in different countries, among others, the United States, Canada, New Zealand, Mexico, and Japan); Aurelian Giugăl, Ron Johnston, Mihail Chiru, Ionut Ciobanu & Alexandru Gavriș, *Gerrymandering and Malapportionment, Romanian Style: The 2008 Electoral System*, 31 E. EUR. POLS. & SOC’YS 4, 683–86 (2017); Lisa Handley, *Electoral Systems and Redistricting*, in *THE OXFORD HANDBOOK OF ELECTORAL SYSTEMS* 513, 513–32 (Erik S. Herron, Robert J. Pekkanen & Matthew S. Shugart eds., 2018); Miklós Sebők, Attila Horváth & Ágnes M. Balázs, *Electoral Reforms, Entry Barriers and the Structure of Political Markets: A Comparative Analysis*, 58 EUR. J. POL. RSCH. 741, 741–47 (2019); Carolien Van Ham, *Electoral Integrity*, in *THE OXFORD HANDBOOK OF POLITICAL REPRESENTATION IN LIBERAL DEMOCRACIES* 113, 121–26 (Robert Rohrschneider & Jacques Thomassen eds., 2020).

¹⁵See generally Roberto Stefan Foa & Yascha Mounk, *The Danger of Deconsolidation: The Democratic Disconnect*, 27 J. DEMOCRACY 5 (2016); LEVITSKY & ZIBLATT, *supra* note 3; YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY* (2018); MICHAEL LIND, *THE NEW CLASS WAR* (2020); BARTELS, *supra* note 4 (showing how the growing and systemic conflict between political forces is weakening the citizens’ faith in the democratic order).

¹⁶See generally DANIEL A. BELL, *THE CHINA MODEL* (2015); JASON BRENNAN, *AGAINST DEMOCRACY* (2016); GARRET JONES, *10% LESS DEMOCRACY* (2020) (offering critiques of majoritarian democracy and its limitations in delivering effective governance).

¹⁷See Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 298–99 (1974) (connecting, strictly, rights and justice, where justice is understood justice as what is due to a person, both comparatively and not-comparatively or, in other terms, justice as what a person can claim as a right).

¹⁸ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 17 (1962).

¹⁹*Id.*

²⁰*Id.* at 21.

People have become convinced that there is something disreputable about a system in which an elected legislature, dominated by political parties and making its decisions on the basis of majority-rule, has the final word on matters of right and principle. It seems that such a forum is thought unworthy of the gravest and most serious issues of human rights that a modern society confronts. The thought seems to be that the courts, with their wigs and ceremonies, their leather-bound volumes, and their relative insulation from party politics, are a more appropriate place for resolving matters of this character.²¹

The courts would be and, more importantly, should be the pivotal institution in realizing the complex of expectations linked to justice and rights established by the western constitutional tradition through the efficiency and soundness of their operations.²² Trusting their counter-majoritarian power, a leading political role must be assigned to the courts in democratic societies. This approach is legitimized by the belief—captured by Waldron—that on matters of rights the electoral majority does not constitute an appropriate decision-making principle.

This thesis is defended in the philosophical panorama by both conservative authors and liberal theorists. An example of the first case is given by Vermeule, who proposes a natural-law scheme in which judges realize the common good inscribed in the law through “their own natural intuitions” to device the *epikeia*, or “the equity of the statute.”²³ In this perspective, Vermeule maintains that political good cannot be derived from majoritarian voting procedure as “there exists an objective common good that transcends human will.”²⁴ Accordingly, “the common good need not justify itself before the bar of democracy, but the reverse.”²⁵

A case of liberal reading can instead be found in Dworkin. Dworkin interprets the power of judges to protect values which are not only a precondition for shaping the democratic order but, more importantly, constitute a higher substantive standard with which democracy must comply:

We have in mind substantive judicial review: the power of judges not simply to ensure that citizens have the information they need to properly assess their own convictions, preferences, and policies, or to protect citizens from an incumbent government anxious unfairly to perpetuate its mandate, but actually to strike down legislation whose majoritarian pedigree is undeniable.²⁶

In Dworkin’s view, the judiciary maintains a substantive relation with democracy, making democracy’s decisions consistent with its inspiring ideal of dignity as right to equal respect and ethical independence.²⁷ In this sense, the superior ability of the courts to reason on the moral principles enshrined in the constitution justifies, according to Dworkin, their leading political role to get democracy-serving interpretations of the law.

[T]here is nothing necessarily anti-democratic about allowing the country to be fundamentally governed, in part, by judges interpreting the basic laws But then, runs the line of Dworkin’s thought, you have to admit the practical possibility that an independent judiciary will tend to get closer to the truth than would the great body of the people or their elected tribunes in the legislatures.²⁸

²¹JEREMY WALDRON, THE DIGNITY OF LEGISLATION 4–5 (1999).

²²Mark Bovens & Thomas Schillemans, *Non-Majoritarian Institution and Representation*, in THE OXFORD HANDBOOK OF POLITICAL REPRESENTATION IN LIBERAL DEMOCRACIES 510, 511, 517 (Robert Rohrschneider & Jacques Thomassen eds., 2020).

²³ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 77–78 (2022).

²⁴*Id.* at 70.

²⁵*Id.* at 48.

²⁶RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 396 (2011).

²⁷*Id.* at 191–218, 255–70. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 139–47 (2006).

²⁸FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 19 (1999).

The tension between the judicial and legislative powers is therefore resolved, in this reading, to the benefit of the courts, which become political agents for realizing the values and interests of citizenship, thus assuming a representative role. On this point, Eisgruber argues that democratic decisions intersect interests and morality. For this reason, not only interests must be represented through elections, but also the ability and often even the inclination of people to put moral duty before interests. This second aspect of human agency is represented by the counter-majoritarian decisions of the courts.²⁹

Even more decisively, Ferrara argues that the mandate of the courts is to represent the interests of all citizens, including those of future generations, while that of the legislature is limited to the representation of the electorate.³⁰ In this sense, the external facet of the counter-majoritarian difficulty overturns Bickel's original perspective, characterizing the legislature, rather than the judiciary, as responsible for a difficulty in ensuring citizens their rights and interests.

C. The Core and the Development of Political Constitutionalism

The previous section proposed an analysis of the counter-majoritarian difficulty by distinguishing two aspects of the problem. On the one hand, the internal counter-majoritarian difficulty describes distortions in electoral procedures introduced by the legislature—particularly electoral barriers and gerrymandering. On the other hand, an external counter-majoritarian difficulty emerges, namely, the growing faith in the judiciary as a fundamental political actor in ensuring rights and justice to the citizenship. This section introduces the theoretical perspective of political constitutionalism, from which we will try to analyze the dual counter-majoritarian difficulty and advance an interpretation on its possible conciliation with the democratic process. Moreover, the analysis shows how political constitutionalism and counter-majoritarian difficulties clarify each other, shedding light on the participatory development of the former and participatory solution of the latter.

I. The Essentials of Political Constitutionalism

The counter-majoritarian difficulty arises from the tension between the political authority of the elected majority and the power of the courts to strike down its decisions. The complex of theories that can be grouped in the paradigm of “political constitutionalism” takes a highly critical point of view on this faculty of the judicial power, defending the need for the courts not to undermine the centrality of elective institutions. This centrality reflects the founding elements of political constitutionalism: i) political equality among citizens; ii) the presence of a profound and reasonable disagreement on the meaning and realization of constitutional rights, iii) participation regulated by the majority principle as the tool to temporarily resolve this disagreement.

Among the exponents of political constitutionalism, we find Griffith, Waldron, Tushnet, Kramer, Bellamy, and Ewing. Political constitutionalism develops the idea that the decision-making engine of democracy is contained in the majority principle as normative regulation of citizens' political will. By emphasizing this aspect, this conception of constitutionalism adopts as a yardstick of its reflection the expression of people's will through participation and majority rule. The concept of majority rule, as employed throughout this analysis, refers to the normative ideal that governs decision-making among equals.³¹ From this perspective, political constitutionalism relies on a minimalist understanding of democracy, as Dunn articulates in his historical

²⁹CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 48–59 (2001).

³⁰ALESSANDRO FERRARA, SOVEREIGNTY ACROSS GENERATIONS 7, 201–10 (2023).

³¹See *infra*, specifically Section D.I (arguing that this ideal applies to both the citizens' selection of legislators and legislators' production of laws, though through different mechanisms which, throughout this analysis, will be encompassed in the reference to majority rule).

reconstruction of the democratic ideal: “[D]emocracy is itself a direct pressure on the will: a demand to accept, abide by, and in the end even submit to, the choices of most of your fellow citizens.”³² By resorting to the majority, democracy realizes the constant need to decide on public problems, avoiding deadlocks while waiting for a broad consensus or unanimity. It also includes the live possibility of revising rules when the reasons underpinning them are no longer agreed,³³ democratic rule being the collective self-government of equals.³⁴

The centrality of egalitarian participation supported by political constitutionalists is based on deep disagreement as a fundamental feature of political space. Griffith, for instance, defines disagreement and conflict between members of the same society as inevitable. Disagreement and conflict are characteristic traits of the human condition because they derive from the dual nature—individual and social—which pushes us to develop interests linked to our individual identity and to contrast our *desiderata* with those of others.³⁵ With a different background, Waldron instead conceptualizes disagreement as a key aspect of the “circumstances of politics” that leave every decision made within the reach of dissent and future corrections.³⁶ Bellamy takes up Waldron’s reflection by insisting on the uncertainties in the interpretation of fundamental rights which rise to reasonable disagreements on their meaning and political implications.³⁷

With this strong emphasis on disagreement, political constitutionalists affirm the centrality of citizens’ egalitarian participation regulated by the majority principle. Disagreement and the need to produce decisions on public problems legitimize the primary political role of citizens, who choose their representatives and determine the political line that they will follow through an egalitarian process, in which each point of view is equally considered and weighed. This account of constitutionalism is political due to the attention to the procedure that generates decisions on issues marked by disagreement. In this sense, constitutionalism’s concern to limit power³⁸ is interpreted by this political paradigm as the need to orient the entire system of rights and powers towards the citizenship as equal decision-makers. This aspect does not contrast, but rather realizes the need to control power, which must be responsive to the participation of citizens.³⁹

With these premises, Waldron qualifies the political participation of citizens as the “right of rights” in the democratic context,⁴⁰ defending the use of the majority principle as the criterion to determine the decisions to be made: “[T]he method of majority-decision attempts to give each individual’s view the greatest weight possible in this process compatible with an equal weight for the views of each of the others.”⁴¹ Like Waldron, Bellamy also highlights the realization of political equality through a participatory system that guarantees equality of input to participants.⁴² Kramer

³²JOHN DUNN, *SETTING THE PEOPLE FREE: THE STORY OF DEMOCRACY* 2 (2d ed. 2019).

³³NADIA URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE* 18 (2014); BASTIAAN RIJPKEMA, *MILITANT DEMOCRACY: THE LIMITS OF DEMOCRATIC TOLERANCE* 134 (2018).

³⁴Carlo Invernizzi-Accetti, *Does Democratic Theory Need Epistemic Standards?*, 4 *DEMOCRATIC THEORY* 9, 9–10 (2017) (emphasizing that majority rule as collective self-government of equals contrasts a unanimity or broad-consensus decision process).

“[U]nanimity effectively means that, in principle, even a single individual can prevent a collective decision from being taken. If not taking a decision is seen as a decision in itself, this implies that, under a regime of unanimity, collective decisions can be in force that have not been consented to by more individuals than those who have. Majority rule, however, guarantees that the totality of decisions actually being taken (i.e., both decisions and nondecisions) have been consented to by more individuals than those who have not.”

³⁵John A.G. Griffith, *The Political Constitution*, 42 *MOD. L. REV.* 1, 12 (1979).

³⁶JEREMY WALDRON, *LAW AND DISAGREEMENT* 116–17 (1999).

³⁷RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* 20–26 (2007).

³⁸CHARLES H. MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 22 (1947).

³⁹Keith D. Ewing, *The Resilience of the Political Constitution*, 14 *GERMAN L. J.* 2111, 2116 (2013).

⁴⁰See Jeremy Waldron, *Participation: The Right of Rights*, 98 *PROCS. ARISTOTELIAN SOC’Y* 307, 330, 337 (1998).

⁴¹JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 148 (1999).

⁴²See Richard Bellamy, *Political Constitutionalism and the Human Right Act*, 9 *INT’L J. CONST. L.* 86, 91–92 (2011).

applies this perspective to the interpretation of constitutional law, including within the political power of popular participation and its elected officials the possibility of giving concrete form to the broad semantic spectrum of rights enshrined in constitutional documents.⁴³

The theoretical approach of political constitutionalism leads these authors to reject the supremacy of the judicial power in matters of constitutional interpretation and to refuse courts' prerogative to invalidate laws for violating the terms of the constitution.⁴⁴ Political constitutionalism consequently has a very clear position in denouncing the counter-majoritarian difficulty understood in Bickel's terms and in the "external" form considered above. The supremacy of the judiciary in the interpretation of constitutional rights collides with the centrality of political equality which is realized by the participation of citizens in public decisions regulated by the principle of majority. The authority of judges would thus tower over that of citizens and their representatives, violating the principle of political equality between all the citizens.

II. Political Constitutionalism as Participation of Equals

Political constitutionalism defines a normative paradigm focused on the egalitarian participation of citizenship, aiming to characterize the relationship between democracy and the judiciary, and consequently, offering insight into how to address the counter-majoritarian difficulty. The analysis above emphasized that political constitutionalism highlights the problematic nature of counter-majoritarian difficulty and opposes the judicial supremacy of courts. In the continuation of this analysis, attention will be given to two aspects of this conception regarding the role of political equality and the search for new participatory spaces for generating law. Moreover, the analysis will defend the possibility of deriving the core of political constitutionalism from the realization of law through the participation of equals. It is through this theoretical-normative core that the analysis will guide us in outlining a solution to the two forms of counter-majoritarian difficulty, while also tracing a potential path for the development of political constitutionalism itself.

At the outset of this section, we highlighted how political constitutionalism characterizes political equality as a benchmark that should guide the disputes between citizens in facing disagreement. Political equality justifies the rule of the majority—in other words, the rule of the majority is the translation of political equality into a decision-making rule. Using Waldron's terminology, equality defines a procedure in which participants' input reasons are weighted equally.⁴⁵ Still, there is a second aspect. Political equality is not only the substance to the majoritarian principle; it also constitutes a limit on the majority itself. Majority rule combines equality and agency⁴⁶—or more precisely, it embodies the principle that all decision-makers act as equal agents in the political sphere, maintaining this status whether they prevail or are defeated. For instance, it would be inconsistent with the framework of political constitutionalism to disenfranchise a minority based on a majority vote. Such a decision would violate political equality as both a foundation and a prerequisite for deciding through the majority, thus exceeding the normative scope of the majoritarian principle. Waldron himself emphasizes this point, referring to equality as a prerequisite for applying the tenets of political constitutionalism.⁴⁷ Suppressing political equality while invoking the majority creates a paradox similar to the effort of Baron

⁴³See Larry Kramer, *Popular Constitutionalism*, circa 2004, 92 CALIF. L. REV. 959, 959 (2004).

⁴⁴See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6–32 (1999); LARRY KRAMER, *THE PEOPLE THEMSELVES* 249–53 (2004); BELLAMY, *supra* note 37, at 15–51; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1348 (2006) [hereinafter *The Core of the Case*].

⁴⁵Waldron, *The Core of the Case*, *supra* note 44, at 1372.

⁴⁶RICHARD TUCK, *THE SLEEPING SOVEREIGN* 261 (2015).

⁴⁷Waldron, *The Core of the Case*, *supra* note 44, at 1346.

Munchausen, who saves himself from drowning by pulling up on his own hair. The rule of the majority, in short, is parasitic upon equality and cannot decide upon it.⁴⁸ From the perspective of political constitutionalism, the political equality of citizens as decision-makers is the core that democracy must never lose and the main rationale of its legitimacy.⁴⁹

Besides political constitutionalism's valorization of equality, a second element arises that concerns the value of participation. This point can be explored by examining the development of political constitutionalism. Goldoni and McCorkindale argue that political constitutionalism has developed in three waves. The first defined the features of the political constitution; the second defended the legislature from the growth of judicial power; while the third and most recent inaugurated a reflexive phase on the nature of the political around which this form of constitutionalism gravitates.⁵⁰ As Goldoni and McCorkindale explain, "[T]he third wave appears to be much less concerned by the rise of judicial power and juristocracy and instead is more focused on analyzing the circumstances which make possible the emergence, the development and the preservation of a political constitution."⁵¹

This reflexive wave, the authors continue, leads political constitutionalism to reflect on the nature of the political, on its capacity to create power.⁵² This reflection involves, using Loughlin's terminology, investigating the ways in which the political can "generate common understandings, practices, and norms, and strengthening the authority of its worldview through the medium of right and law."⁵³ This reflexive tension takes on a particular form within the boundaries of the democratic state. Within this perimeter, the task is to clarify the conditions that enable the egalitarian participation of citizens to produce laws and rights, to find "the place where reflexivity can best be realized,"⁵⁴ and to "multiply chances of political participation, and for the expression of opinions."⁵⁵ Political constitutionalism, from this perspective, is defined by its structural focus on the channels through which political power can generate law in participative manners. In the democratic state, this tension becomes a focus on the solutions and structures through which the egalitarian and reflective participation of citizens can contribute to the generation of rights and rules in society.

In sum, the baseline for this potential development of political constitutionalism consists of two essential elements: the preservation of equal agency among all participants and the ongoing creation of participatory spaces for law generation. These elements establish participation of equals as the theoretical-normative core through which political constitutionalism addresses both counter-majoritarian difficulties and the reflexive search for new arrangements to generate law through participation. Simply put, the conceptual core of political constitutionalism also identifies the regulative ideal for hypothesizing the most appropriate institutional form that such a conception should assume.⁵⁶ By focusing on equal participation as political constitutionalism's foundation, we can institutionally address the dual nature of the counter-majoritarian difficulty: implementing strong judicial protection of political equality for the internal prong while favoring weak judicial review and legislative override for the external one. Furthermore, the distinction

⁴⁸Simone Chambers, *Democracy and Constitutional Reform: Deliberative Versus Populist Constitutionalism*, 45 PHIL. & SOC. CRITICISM 1116, 1124 (2019).

⁴⁹See generally Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41 POL. THEORY 441 (2013) (providing strong support for political equality of citizens as decisions-makers as the main rationale for democracy).

⁵⁰Marco Goldoni & Chris McCorkindale, *Three Waves of Political Constitutionalism*, 30 KING'S L.J. 74, 74–75 (2019).

⁵¹*Id.* at 82–83.

⁵²*Id.* at 84.

⁵³MARTIN LOUGHLIN, *POLITICAL JURISPRUDENCE* 77 (2017).

⁵⁴Goldoni & McCorkindale, *supra* note 50, at 86.

⁵⁵Goldoni & McCorkindale, *supra* note 50, at 90.

⁵⁶ROBERTO GARGARELLA, *THE LAW AS A CONVERSATION AMONG EQUALS* 69–71 (2022) (discussing the link between the normative core of a theory and its institutional shape).

between these two types of counter-majoritarian difficulties supports a hybrid institutional arrangement that accommodates political constitutionalism's reflexive pursuit of new forms and possibilities.

D. Political Constitutionalism and Internal Counter-Majoritarian Difficulty

The previous sections have articulated an analysis of the counter-majoritarian difficulty, distinguishing between its internal and external dimensions. Furthermore, the analysis has considered political constitutionalism as theoretical paradigm to deal with this dual counter-majoritarian difficulty. Such a paradigm was presented in its essential elements: the primacy of political equality, the persistence of disagreement, the centrality of participation, the rejection of judicial supremacy. Moreover, a theoretical-normative core has been identified in political constitutionalism's emphasis on the "participation of equals." This section argues that political constitutionalism orients toward a judicial solution to the internal counter-majoritarian difficulty by positioning the preservation of political equality among citizens outside the majoritarian dispute, establishing it as a precondition for participatory political decision-making. When the aim is maintaining equality as the basis for participatory production of law, granting the courts a strong power of review legislation to preserve electoral integrity is fully consistent with the philosophy of political constitutionalism.

I. The Judicial Protection of Political Equality

The first form of counter-majoritarian difficulty emerges from inability of the electoral process to be truly majoritarian due to electoral distortions, such as electoral barriers and gerrymandering. These distortions conflict with the principles of political constitutionalism because they both undermine its normative core—participation of equals. Electoral barriers violate the principle of "participation of equals" by denying voting rights to specific groups of citizens, directly discriminating against them through exclusion from the political process. In contrast, gerrymandering preserves voting rights but undermines equal influence through strategic redistricting.

These distortions arise from the legislature's actions. Legislators try to escape majority control by manipulating the universality of suffrage and the equal weight of votes. Consequently, a critical contradiction emerges: The institution elected through an egalitarian, majoritarian, and participatory process actively works to undermine the process that legitimizes its rule.⁵⁷ The fight against these electoral distortions—barriers and gerrymandering—cannot, therefore, depend on the very institution that created them. This point is not simply grounded in prudential reasons; rather, it is normatively implied by political constitutionalism's commitment to political decision-making as the participation of equals. In a nutshell, the preservation of political equality transcends the decision-making domain of the majority as the latter depends on the former and not the opposite.

Consider a scenario in which a parliamentary majority, Group A, votes for a tax law that a minority, Group B, opposes. This case reveals that the majority is not equivalent to Group A as a subject, but rather represents a threshold that Group A reaches and Group B does not. Attaining this threshold grants Group A the authority to make decisions affecting both groups and their respective constituents. Throughout this participatory process, the fundamental equality binding all parties—members of both groups and their constituents—remains intact. In subsequent elections, the majority may include new members who previously aligned with Group B's positions.

⁵⁷Jacob Rowbottom, *Political Purposes, Anti-Entrenchment and Judicial Protection of the Democratic Process*, 42 OXFORD J. LEGAL STUD. 383, 394–98 (2022).

Now, let us envision a scenario where majority A intervenes not on taxes, but on the rules of access to participation—for instance, regulating suffrage or gerrymandering—aiming to crystallize itself and its respective constituents as the majority and B as the minority. In this second case, the bond of equality among all parties would dissolve, and A’s authority would stem not from equality but from the strength of its position. In Waldron’s terms, the majority would become what it cannot be: *iudex in sua causa*, that is, “the use of the majoritarian method of decision-making implies that a particular faction in society was simply invited to ratify its own position.”⁵⁸ This dynamic does not occur in the first case, where the majority represents a threshold that equal participants must reach to make temporary decisions, such as tax policies. Yet it does occur in the second case, when the majority, as a constituted entity, uses its position of power to undermine fundamental political equality and maintain its decision-making authority by controlling the formal conditions that regulate the achievement of majority as a normative threshold.

Although not typically adopted by political constitutionalists, a judicial approach to procedural rules governing the formation of legislative majorities is fully consistent with this legal framework’s aim to safeguard the participation of equals and thus warrants consideration. Under this interpretation, political constitutionalism might move toward a judicial solution to the internal counter-majoritarian difficulty by entrusting the judiciary with safeguarding the participation of equals as the fundamental substrate of democratic institutional organization. Courts can resolve the internal counter-majoritarian difficulty by shielding the electoral process from manipulation and, in doing so, safeguarding the core principles of participation, equality, and majority rule—in essence, preserving the fundamental concept of the “participation of equals.”

The protection of political equality within the political process can be ensured by a non-majoritarian institution capable of invalidating the manipulations that elected representatives might implement to favor their own re-election. Judicial intervention thus preserves the full political potential of the “participation of equals,” whereby citizens maintain control over the actions and mandate of legislators and, more broadly, direct the trajectory of social change through their electoral choices. This point is developed in Ely’s theory and can inform political constitutionalism’s use of judicial review. Ely is in sync with political constitutionalists in emphasizing the centrality of elected representatives for resolving political disagreements and, on this basis, advocates a “participation-oriented, representation-reinforcing”⁵⁹ approach to democracy. In this framework, Ely argues that the courts need to clear the channels of political change, thus using their power of review when incumbent officials suppress voices or votes.⁶⁰

The aim of Ely’s work is the defense of a constitutional anti-trust conception of adjudication, correcting distortions of the political market to avoid the formation of political monopolies able to impede change and marginalize minorities.⁶¹ In this view, Ely’s argument outlines a “fair majoritarianism,”⁶² justifying judicial intervention against the manipulation of equal citizens’ participation regulated by majority rule. A fair electoral process, Ely claims, is the only place for the “selection and accommodation of substantive values.”⁶³ In fact, Ely admits the possibility of an interventionist court not to affirm values, “but rather by a desire to ensure that the political process—which is where such values are properly identified, weighted, and accommodated—was open to those of all view-points on something approaching an equal basis.”⁶⁴ The necessity of

⁵⁸Jeremy Waldron, *Legislatures Judging in Their Own Cause*, 3 LEGISPRUDENCE 125, 128 (2009).

⁵⁹JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980).

⁶⁰*Id.* at 103.

⁶¹*Id.* at 102; NIELS PETERSEN, *PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA* 13–37 (2017).

⁶²Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 741 (2004) (emphasis in original).

⁶³ELY, *supra* note 59, at 87.

⁶⁴*Id.* at 47 (emphasis in original).

recognizing judicial supremacy occurs, as we will examine more thoroughly later in this section, solely in procedural matters. In this Ely's argument, one discerns the profound resonance with the mission of political constitutionalism. Granting the courts supremacy in safeguarding the political process secures the principle of majority rule in a participatory process aimed at managing disagreement among equals.

Gardbaum revisited the Elyean approach, advocating for the key role of the courts in defending the integrity of the democratic process and, with it, its responsiveness to people's participation. Gardbaum broadens Ely's advocating judicial intervention to supervise the electoral procedure⁶⁵ and, more broadly, "all the processes by and through which public power is allocated, exercised, and held to account."⁶⁶ Following Ely, Gardbaum argues that "certain types of acts and outcomes are impermissible because they threaten to displace, corrupt, or undermine the democratic political process, and here stronger forms of review may be necessary."⁶⁷ In this view, constitutions empower courts to protect democracy from procedural malfunction and distortions. The courts' review power fights back the attempts of elected representatives to manipulate the majority principle on which they depend in their favor. One might argue that the Elyean approach could justify stronger protection of the electoral process by courts, advocating judicial intervention to promote "participation of equals" in other procedural domains, such as campaign finance. This Article does not consider this possible extension and maintains a minimalist approach to better comply with political constitutionalism's principle that political decision making should not be limited by unelected authorities, a point we will address subsequently.⁶⁸

This judicial solution, as political constitutionalism demands, embodies a robust protection of people's egalitarian commitment to govern themselves through participation or, in a nutshell, the protection of "participation of equals." Moreover, the courts' function in protecting the electoral process's integrity responds to political constitutionalism's reflexive search for new forms and possibilities. Indeed, judicial review enables the generation of law by valorizing and protecting the participation of equals.

II. Strong Judicial Review Within Political Constitutionalism

Following Ely's framework of political-process theory, the intervention of courts in defense of the electoral process is justified as being entirely consistent with political constitutionalism and the safeguarding of its core principle: the participation of equals. In the United States, for example, the Warren Court performed such a role through several rulings defending the egalitarian and participatory principle of *one person, one vote*.⁶⁹ This historical reference permits a key clarification regarding the type of judicial review required by courts to defend the electoral process. Judicial review in the United States is just one instance of judicial supremacy, in which Supreme Court justices can definitively invalidate legislation through judicial interpretations that are final and binding on the parties.⁷⁰

Nonetheless, this approach, which tolerates judicial supremacy only in electoral matters, contradicts political constitutionalism's rejection of judicial supremacy as one of its essential features. Bellamy emphasizes this problem by focusing specifically on Ely's theory and rejects the

⁶⁵Stephen Gardbaum, *Comparative Political Process Theory*, 18 INT'L J. CONST. L. 1429, 1431 (2020).

⁶⁶*Id.*

⁶⁷*Id.* at 1432.

⁶⁸See *infra*, Section F.

⁶⁹See generally *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁷⁰Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–55 (1998); Stephen Gardbaum, *What is Judicial Supremacy?*, in *COMPARATIVE CONSTITUTIONAL THEORY* 21, 24 (Gary Jacobsohn & Miguel Schor eds., 2018).

compatibility of judicial supremacy with the principles of political constitutionalism, even when limiting judicial review to cases of electoral manipulation.

A number of theorists . . . have argued that a role remains for courts to police democratic procedures. The claim here is that although we should allow the democratic process to decide such issues as abortion, capital punishment and privacy, we need judicial review to oversee that the process by which these decisions are made is fair.⁷¹

This represents, for Bellamy, a form of political constitutionalism which “needs reinforcing by a limited form of legal constitutionalism.”⁷² Nevertheless, the author concludes that this legalistic form of political constitutionalism would ultimately cede to courts decisions on fundamental substantive issues that, instead, must be decided through the participation of equals.

The problem for Ely and those who follow him, and one Dworkin has not hesitated to jump on, is that you cannot judge whether the process is fair without a view of what counts as a fair outcome, and one cannot judge a fair outcome without referring to some account of fundamental values. Put succinctly, the only coherent way to adjudicate on the justice of democratic ‘inputs’ is to have some notion of what counts as a just “result.”⁷³

Bellamy completes his rejection of judicial supremacy in electoral matters by discussing two examples that demonstrate his thesis: the U.S. Supreme Court decision in *Gomillion v. Lightfoot* on electoral exclusions and the use of racial gerrymandering in the United States as a form of minority empowerment through the creation of majority-minority districts.⁷⁴ In both cases, Bellamy argues, we would be confronting discriminations on which, however, citizens and not tribunals should pronounce.

The position outlined here diverges from Bellamy’s stance on electoral matters, asserting the necessity of judicial oversight when an elected majority manipulates the participation of equals. This implies, as Bellamy correctly emphasizes, a departure from political constitutionalism’s reluctance to employ judicial supremacy. Still, this change can be justified by presenting the use of strong judicial review in electoral matters as a potential institutional development of constitutionalism, one capable of safeguarding participation of equals as a political requirement that cannot be manipulated by the majority in power. The difference between this judicial approach and Bellamy’s can be illuminated through an examination of the two cases discussed by the author.

The first case, *Gomillion v. Lightfoot*, concerns an Alabama legislation which created in the city of Tuskegee a 28-sided boundary that excluded nearly all black voters from the redefined city, depriving them of the right to vote in local election. As recognized by Justice Frankfurter in his ruling,⁷⁵ this legislation was designed to strip voting rights from a segment of the population. At its core, this represents a clear violation by Alabama’s legislators of the “participation of equals” principle established by political constitutionalism to manage political disagreement. The Supreme Court’s intervention prevents the weaponization of the majority principle, which in Alabama was employed as a fig leaf to conceal one group’s dominance over another through the manipulation of procedural rules. This is precisely the essence of the internal counter-majoritarian

⁷¹BELLAMY, *supra* note 37, at 107.

⁷²*Id.* at 109.

⁷³*Id.* at 110.

⁷⁴*Id.* at 113–14.

⁷⁵*Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (Frankfurter, J.).

difficulty, whose resolution, therefore, cannot be left in the hands of elected majorities and must be resolved through judicial intervention.⁷⁶

The second example posed by Bellamy to contest judicial supremacy in electoral matters concerns the broader practice of racial gerrymandering in the United States to advantage disadvantaged minorities. This intervention on inputs, that is, on how votes are collected, would be appreciable, Bellamy laments, only because the output is approved, namely the protection accorded to a minority.⁷⁷ For this reason, the author concludes, if this evaluation were formulated by a court, an unelected institution would be deciding on an eminently political matter, rather than citizens.⁷⁸

This objection to the courts' role raises two problems. First, if we were to translate Bellamy's position into a judicial decision concerning gerrymandering, we would arrive at the U.S. Supreme Court's landmark ruling in *Rucho v. Common Cause*. In *Rucho*, the Court argued that while gerrymandering may be "incompatible with democratic principles," the federal courts cannot review such allegations, as they present nonjusticiable political questions.⁷⁹ This type of outcome, however, precisely recreates the problems previously highlighted: it empowers a temporary legislative majority to rule over the source of its authority. In this way, fertile ground is created for the internal counter-majoritarian difficulty, allowing gerrymandered elections to produce counter-majoritarian outcomes, delivering a legislative majority to a minority of voters and thus violating political equality. Together with equality, gerrymandering also undermines the centrality of participation, making citizens' electoral mobilization efforts ultimately ineffective.⁸⁰

Second, Bellamy's argument conflates the problem of decision-making authority with the merits of the decision itself. It is undisputed that any decision, whether made by judges or legislators, may assume values conflicting with the ideal of "participation of equals." What is relevant for the dual argument advanced in this Article, however, is differentiating between domains where the ultimate decision-making authority—and thus the possibility of error or abuse—should rest with the judiciary or the legislature. In the case of elections and the internal counter-majoritarian difficulty, legislators elected through majority rule cannot have the final say on the rules assigning the authority to legislate. It is up to the courts to establish criteria for determining, for example, whether a particular redistricting plan is legitimate.⁸¹ The risk of judicial error or abuse of authority is a more acceptable cost than allowing legislators, who are accountable to the majority principle, to manipulate that principle to evade accountability entirely without external oversight. In the former case, indeed, we would be observing an authority that, while potentially making mistakes, remains institutionally separate from the mechanism being judged.

E. Political Constitutionalism and External Counter-Majoritarian Difficulty

The previous section defended a judicial solution to the internal counter-majoritarian difficulty, arguing that courts must scrutinize electoral barriers and gerrymandering through strong judicial review. This solution would enable the protection of the core of political constitutionalism, namely, the participation of equals. The present section focuses instead on the external counter-

⁷⁶Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 NW. U. L. REV. 1099, 1104 (2023).

⁷⁷BELLAMY, *supra* note 37, at 114.

⁷⁸*Id.* at 113 (explaining "[r]elated issues emerge in debates about districting. Here too one can give different rationales for drawing the lines of constituencies in particular ways, depending on what you are trying to achieve.").

⁷⁹*Rucho v. Common Cause*, 588 U.S. 684, 718 (2019).

⁸⁰Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 124 (2019).

⁸¹See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 849–53 (2015) (noting that a possible standard could be the efficiency gap, which measures the wasted votes of each party in the electoral district).

majoritarian difficulty, that is, on conferring courts' a strong and representative political agency to secure citizens' expectations linked to justice and rights.

In this reading, courts, not elected institutions, must realize constitutional rights and resolve disagreements about the scope of such rights. In addressing this second version of counter-majoritarian difficulty, the section argues that, following political constitutionalism, judicial review must assume a dual form: strong in protecting the electoral process from manipulation but weak in other domains. From the perspective of political constitutionalism, it is legitimate to grant courts political agency in rights protection, but not to assign them the final word in realizing these rights. The external counter-majoritarian difficulty must therefore be resolved in favor of elected institutions through a dialogue between these and the courts, which retain the faculty to exercise a weak form of judicial review.

1. Legislatures and Courts in Dialogue on Rights

The external counter-majoritarian difficulty can be approached by considering an aspect of Ely's political-process theory. Ely does not insist only on a "participation-oriented, representation-reinforcing" approach. Alongside this aspect, his theory focuses on the necessary protection of minorities from the majority tyranny.⁸² We have seen how this critical issue is addressed by Ely through a procedural approach, characterizing judicial review as a means to facilitate minority representation, to protect their participation in the political process and, consequently, to include minorities in societal change.⁸³ Framed in these terms, the point does not seem problematic from the perspective of political constitutionalism. The procedural protection of minorities involves, as discussed in the preceding section, ensuring their inclusion in decision-making processes and preventing electoral exclusion or abuse, thereby enabling these groups to advocate for their interests.

Yet, the point does not seem so plain. Minority protection might require something more than simple inclusion in the majoritarian process. Ely himself seems to acknowledge, in some passages, a greater protection beyond inclusion in the majoritarian contest, focusing on the judicial defense of minority interests, even when these groups have not been deprived of the possibility of political participation.⁸⁴ From this perspective, courts would not merely stand as guardians of the majoritarian process but, more broadly, would embody political actors capable of ensuring for minorities—and not only them—what the majoritarian process is unable to deliver.

Lafont develops these intuitions concerning the protection of minorities, extending beyond the protection of "participation of equals" the political function of judicial review. The counter-majoritarian power of courts would not solely concern the inclusion of minorities in the majoritarian process.⁸⁵ Rather, on matters of rights, the possibility of resorting to a different institutional mechanism, not regulated by the majority principle, should be guaranteed. Judicial review responds, according to Lafont, precisely to this necessity. The counter-majoritarian power of the judiciary would perform the function, particularly for minorities, of a "conversation initiator."⁸⁶ As Lafont explains, "[j]udicial review offers a key institutional mechanism by which minorities can be empowered to force an otherwise inattentive, misinformed, ignorant, or indifferent majority to listen to their cause and join the political debate on the merits of the issues at hand."⁸⁷

⁸²ELY, *supra* note 59, at 81–82.

⁸³*Id.* at 103.

⁸⁴*Id.* at 77, 86.

⁸⁵CRISTINA LAFONT, DEMOCRACY WITHOUT SHORTCUTS 53–59 (2020).

⁸⁶*Id.* at 228.

⁸⁷*Id.* at 240.

According to Lafont, the counter-majoritarian power of the judiciary enables a dialogue between minorities and courts on fundamental rights, leading to decisions grounded in reasons rather than majority support. Through this dialogue, courts guarantee minorities substantive protections beyond mere inclusion in the political process, providing remedies that deliberative and electoral mechanisms have not yet delivered.⁸⁸ In this interpretation, the political agency of judges would be crucial in supplementing the limitations of majoritarian procedures.

Lafont appears to move beyond the “fair majoritarianism” of “political-process theory,” embracing a judicial role in hearing and disseminating minorities’ reasoning regarding constitutional rights. Although Lafont extensively develops this position, she does not address the question of how prerogatives should be allocated between judges and legislators within their dialogue about rights. Specifically, she does not examine whether weak-form or strong-form judicial review is preferable.⁸⁹ This represents a crucial point in framing how the dialogue between courts and legislatures protects minorities.

The metaphor of dialogue used to characterize judicial review and, more broadly, the dialectic between legislative and judicial powers has been criticized in constitutional theory for failing to clearly delineate the roles of the parties involved in this dialectic.⁹⁰ Indeed, the reference to dialogue overlooks the authoritative dimension necessarily implicated in the implementation and protection of rights. Even while advocating for collaboration between these two branches of government, the dialogue must inevitably reach a conclusion and provide responses to parties who disagree on rights interpretation.⁹¹ For this reason, it becomes crucial to define the prerogatives possessed by the parties engaged in this dialogue.

This point brings us back to the external counter-majoritarian difficulty. The courts would be and, more importantly, should be the pivotal institution in realizing the citizens’ expectations linked to justice, equality, and rights established by the western constitutional tradition. Trusting their counter-majoritarian power, a leading political role must be assigned to the courts in democratic societies. Courts serve as fundamental agents in realizing the values and interests of citizenship, even assuming a representative role in domains where electoral representatives are susceptible to majoritarian bias. The conclusion would differ, nonetheless, in a system of weak judicial review. The absence of judicial supremacy would, in fact, reconfigure the role of the judiciary and, with it, the critical issues arising from the external counter-majoritarian difficulty.

II. Weak Judicial Review Within Political Constitutionalism

The choice of the type of judicial review is crucial for reflecting on the external counter-majoritarian difficulty. If judicial review allows citizens to initiate a dialogue, in the case of strong judicial review and judicial supremacy, the courts have the final word on the issue at hand, binding the parties in accordance with the courts’ interpretation of the problem. In contrast, in constitutional systems characterized by weak judicial review, courts do not enjoy formal legal finality, as legislatures have the power to override their decisions.⁹² In this second case, the dialogue initiated through recourse to the courts would be more polyphonic, empowering the courts to guide the decision-making process but allowing the legislature to have the final say.⁹³

⁸⁸LAFONT, *supra* note 85, at 232–33.

⁸⁹*Id.* at 234.

⁹⁰Aileen Kavanagh, *The Lure and the Limits of Dialogue*, 66 U. TORO. L. J. 83, 84–85 (2016).

⁹¹DIMITRIOS KYRITSIS, WHERE OUR PROTECTION LIES: SEPARATION OF POWERS AND CONSTITUTIONAL REVIEW 107–20 (2017).

⁹²Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2781–86 (2003); Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT’L J. CONST. L. 167, 167–75 (2010).

⁹³See ALLAN C. HUTCHINSON, DEMOCRACY AND CONSTITUTIONS 89–174 (2021) (outlining and discussing possible solutions to “democratize” judicial power).

The distinction between these two forms of judicial review is crucial for providing a comprehensive analysis of the counter-majoritarian difficulty, especially from the perspective of political constitutionalism. We began by distinguishing two different cases of counter-majoritarian difficulty, internal and external,⁹⁴ then advancing a solution consistent with political constitutionalism centered on strong judicial review in the internal case.⁹⁵ In that context, the goal was to guarantee political equality and, with it, the legitimacy of the principle of majority rule as a regulative criterion for democratic participation. Once judicial protection of equal participation is granted, the perspective of political constitutionalism suggests a different balance between the courts and the interpretation of other rights. In the case of the external counter-majoritarian difficulty, in other words, the aim is no longer to realize or defend equal participation but rather to conform to it.

Facing the external counter-majoritarian difficulty, political constitutionalism resorts to participation of equals as the regulative criterion for disagreements over constitutional rights. The courts would only indirectly ensure representation by supervising the political process with a strong judicial review and leaving elected representatives with the task of representing the citizenry, both in their moral positions and in their concerns about the future.⁹⁶ Nevertheless, this process would still involve the courts, granting them a primary, though not final, role in the realization of contested rights. Indeed, despite the opposition to the expansion of judicial power,⁹⁷ political constitutionalism does not exclude a role for the courts but, on the contrary, shapes that role according to the centrality of equal citizen participation. Courts are therefore rendered weaker than would be advocated by legal constitutionalism⁹⁸ and are not invested with a directly representative function.

Political constitutionalism's possible compatibility with weak judicial review emerges in its scholars' work. Waldron clarifies that the arguments composing his core case against judicial review do not concern its weak variant.⁹⁹ Bellamy also considers a system of weak judicial review "whereby courts defer to the legislative 'scope' determined by Parliament and are restricted in their independent determinations to the judicial 'sphere' of the fair conduct of the case at hand."¹⁰⁰

Tushnet articulates two points: first noting that weak judicial review "provides an institutional structure for constitutional judicial review in the courts that preserves a large domain for political constitutionalism."¹⁰¹ Second, Tushnet considers the possibility of a hybrid solution, employing strong review in the case of political and civil rights and weak review in the case of economic and social rights: "Is it possible to confine strong-form review to these relatively narrow domains? I do not think that we have enough experience with weak-form review to know the answer."¹⁰²

This possible dual approach to judicial review is in some ways anticipated by the reflections of other scholars, not adherents of political constitutionalism, who emphasize the necessity of super-strong judicial protection of the electoral process to safeguard the democratic nature of

⁹⁴See *supra* Section B.

⁹⁵See *supra* Section D.

⁹⁶See *supra* Section D (providing relevant arguments from Eisgruber and Ferrara).

⁹⁷Goldoni & McCorkindale, *supra* note 50, at 78–82; MARTIN LOUGHLIN, *AGAINST CONSTITUTIONALISM* 16–22, 124–35 (2022).

⁹⁸See generally ANDRÁS SAJÓ & RENÁTA UITZ, *THE CONSTITUTION OF FREEDOM: AN INTRODUCTION TO LEGAL CONSTITUTIONALISM* (2017) (arguing this conception emphasizes the need for institutional stability and order and, to this end, relies upon robust judicial review by the courts).

⁹⁹Waldron, *supra* note 44, at 1354.

¹⁰⁰BELLAMY, *supra* note 42, at 89.

¹⁰¹Mark Tushnet, *The Relation Between Political Constitutionalism and Weak-Form Judicial Review*, 14 GERMAN L. J. 2249, 2254 (2013).

¹⁰²*Id.* at 2262.

institutions and the laws they produce.¹⁰³ The dual thesis—hypothesized by Tushnet and defended in this Article—develops this insight within political constitutionalism’s framework by theorizing an institutional solution that enables the judiciary to safeguard legislative majority formation without embracing strong review across all areas of rights protection. This type of hybrid response is the best solution for resolving the two counter-majoritarian difficulties by following the theoretical approach of political constitutionalism. Notably, such a dual judicial review responds to political constitutionalism’s tension toward new solutions capable of generating law through the participation of equals.

Under this reading, the protection of rights, particularly those of minorities, would be guaranteed by weak-form judicial review in all matters not pertaining to participatory procedure, whose distortions courts would correct through strong intervention.¹⁰⁴ Weak judicial review would initiate a “dialogue” or “interplay” between judiciary and legislature,¹⁰⁵ permitting legislative intervention only after courts have charted the interpretative course on constitutional rights. Through this hybrid conception, constitutional rights would receive dual protection: Strong court intervention for procedural abuse and weak intervention across other domains. In this latter case, only legislative override can supersede judicial decisions. This dual solution would resolve the counter-majoritarian difficulty in favor of elective legislatures while avoiding parliamentary “supreme and absolute power”¹⁰⁶—a power strongly limited in procedural matters yet weakly curtailed in all other areas.

The dual scheme would allow the legislature to adopt different override possibilities: formal legislative override, constitutional amendment, and jurisdiction stripping.¹⁰⁷ While identifying the appropriate form of weak judicial review goes beyond the objectives of this Article, two aspects must be maintained. First, the type of weak or weakened review in question necessarily involves the legislature’s ability to intervene, *ex post*, on a judicial decision.¹⁰⁸ Second, the weakness of review depends on a power possessed by the legislature rather than on the judiciary’s approach—in other words, judicial restraint, *stare decisis*, constitutional avoidance.¹⁰⁹

The interaction between the judiciary and the legislature in a system of weak judicial review would allow judges both to improve and to contain the political power of the elected. Concerning the improvement of lawmaking, courts intervention would allow the legislature to discover possible solutions for protecting rights that have been neglected by previous legislation or to recognize necessary interventions on specific issues in future legislations.¹¹⁰ Concerning the containment of power, political intervention on non-procedural matters would still face an obstacle in the weak review of the courts in at least two senses. First, the counter-majoritarian veto of the judiciary, although defeatable, would have significant communicative power and the capability “to put indirect pressure on legislatures to respond to demands for greater rights-based recognition for certain groups.”¹¹¹ The judiciary could slow down the

¹⁰³See generally SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606 (2015).

¹⁰⁴See *supra* Section D.

¹⁰⁵Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391, 393 (2007); Stephen Gardbaum, *What’s So Weak About “Weak-Form Review”? A Reply to Aileen Kavanagh*, 13 INT’L J. CONST. L. 1040, 1040–42 (2015).

¹⁰⁶JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT* 126 (1999).

¹⁰⁷Rosalind Dixon, *The Forms, Functions, and Varieties of Weak(ened) Judicial Review*, 17 INT’L J. CONST. L. 904, 907–11 (2019).

¹⁰⁸*Id.* at 914–17.

¹⁰⁹JEFFREY GOLDSWORTHY, *PARLIAMENTARY SOVEREIGNTY* 202–224 (2010).

¹¹⁰See Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38, CARDOZO L. REV. 2193, 2203–20 (2017) (referencing “blind spots” and “burdens of inertia” applicable in this context).

¹¹¹Dixon, *The Forms, Functions, and Varieties of Weak(ened) Judicial Review*, *supra* note 108, at 926.

decisions of legislators by acting as a reservoir, keeping alive in the memory of the public debate the interests and values that have not been considered by the majority in parliament.¹¹² Moreover, the weak review would push for a response and democratic mobilization, rather than for a confrontation between legislative and judicial power triggered by strong judicial review. As Dixon explains, this strategic approach recognizes potential risks:

If [the courts] confront certain threats to democracy too directly, in some cases this may be self-defeating: would-be authoritarians may simply respond by counterattacking the court, and at a time when the court itself lacks the necessary sociopolitical support to withstand the attack. Weakening the court's approach—by delaying the effects of aspects of its decisions—may therefore be an important step toward promoting the effectiveness of its role in democratic hedging.¹¹³

This type of response would, more than any judicial decision, embody the spirit of political constitutionalism and the participation of equals as the beating heart of democracy and rights' realization.

F. Conclusion

The dual approach developed in this Article has examined political constitutionalism's elements and potential in addressing both internal and external counter-majoritarian difficulties. Based on this distinction, the Article has shaped a strategy employing courts and strong judicial review for the internal prong, while favoring dialogue between courts and legislature within weak judicial review for the external prong. Through this framework, the alternation between strong and weak judicial review charts a participatory path for political constitutionalism, ensuring both equal participation's protection and elected, accountable institutions' ultimate authority in realizing constitutional rights.

The definition of a dual approach, combining strong and weak judicial review, further articulates the relationship between legislative and judicial power, introducing issues that warrant additional consideration. Nevertheless, proposing such a framework as a possible development of political constitutionalism has the merit of directly addressing the necessity of outlining a clear strategy regarding the dialogue between different state powers.

While the dual approach represents a possible institutional development within the paradigm of political constitutionalism, we must consider the extent to which this development might, in turn, lead to further modifications. This consideration applies primarily to the perimeter of the procedural domain—that is, the internal counter-majoritarian difficulty—over which strong judicial review presides. The threshold identified in this Article takes a minimalist approach, limiting constitutional courts' oversight to electoral regulation, specifically the removal of electoral barriers and the correction of gerrymandering through standards set by courts. More robust and substantive visions of democracy might extend the same treatment to, for example, campaign finance laws that undermine the ideal of equal participation.

On this last problem, one point merits attention. As shown in this Article,¹¹⁴ political constitutionalism rests on the belief that democratic politics, as the participation of equals, has the right to decide, to err, and to correct itself. From this perspective, the framework of constitutionalism necessarily leads to minimalist limitations on the political. Prohibiting more than the minimum would conflict with this *political* right, which is not merely the "right of rights"

¹¹²See Stefan Rummens, *Staging Deliberation: The Role of Representative Institutions in the Deliberative Democratic Process*, 20 J. POL. PHIL. 23, 34 (2012) (describing in these terms the counter-majoritarian function of oppositional associations).

¹¹³Dixon, *supra* note 107, at 929.

¹¹⁴See *supra* Section C.

but the right that generates other rights. The only intolerable error, over which no majority can claim authority, is jeopardizing the preservation of these three fundamental liberties among the citizenry: to decide, to err, and to correct—perhaps with considerable effort—what has been decided.

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