Introduction

The Supreme Court has transformed American democracy in the last century. It has mandated numerical equality in the process of allocating voters to districts, heralding the "reapportionment revolution." It has strictly curtailed campaign finance regulation, allowing private wealth to dominate political discourse. It has influenced the processes by which increasingly polarized parties select their candidates. It has defined the constitutional bounds within which legislatures may seek racial justice. When constituents engage in self-governance, they now do so in the shadow of a judiciary that – by institutional design and the moral requirements of the rule of law – can act with impunity, insulated from political pressure.

The federal judiciary's influence over the democratic process has created a fundamental difficulty. Democracy has unique moral legitimacy as a mode of governance because it directly allocates power over governance to its constituent members. Yet to realize legitimate self-rule, constituents must not only be able to express their will through democratic procedures (typically elections); they must also have the authority to construct and validate these procedures. When politically neutral (i.e. non-accountable) courts make decisions that impact democratic procedure, this directly challenges the foundation of democracy as autonomous constituent self-rule.

The central question – *how can non-accountable judicial authority over democratic process be legitimate?* – has been strangely neglected in academic research. The last major analysis is John Hart Ely's influential but controversial *Democracy and Distrust*, now almost half a century old.[1] Subsequent scholarly debates over constitutional interpretation have generally overlooked the unique challenges posed by this transformation of democratic process. While the rapid growth of election law studies echoes the Court's impact on democratic process, research in this field has predominantly deployed a structural lens, interrogating what electoral features and practical designs the Court should advance as a matter of policy. Mostly recently, election law scholars have described the judiciary as another player in

[1] Both Ely and his critics are discussed extensively in Chapter 2.

the game of power politics, asserting that election law is now overdetermined by partisan conflict on the bench.[2]

This book addresses this gap in the research in two parts. First, in Chapters 1 to 3, it presents a theoretically rigorous, philosophically informed account of the challenge posed by judicial oversight of democratic process. This challenge, which I call the *counterpopular dilemma*, is based on the confrontation between the competing normative implications of judicial oversight of electoral process. The first implication is that democracy is a uniquely legitimate mode of governance because it allocates power over governance to the constituent members of the polity. Constituent autonomy requires both (1) the authority to establish the procedures that realize that autonomy and (2) participating in those procedures. Allocating this authority to a non-accountable judiciary limits constituent autonomy and subordinates the moral role of constituent freedom to some other value. This undermines the constituency's autonomy – and with it, democracy's moral value.

However, the value of impartial and institutionally insulated review of electoral process evokes the second normative implication of judicial oversight of democracy. Without judicial review, representatives and elites can manipulate the integrity of democratic procedures for their own political gain. Leading scholars in election law have observed that political actors tend to adopt self-serving democratic procedures to entrench themselves and their allies. This practice taints the imprimatur of democratic autonomy in subsequent elections. These scholars have argued that the judiciary is uniquely positioned outside typical political struggles, and thus especially well-suited to guarantee fair elections.

No prior account of judicial review can reconcile these competing values. I argue in this book that this dilemma is intractable, but that its intractability can be crafted into a virtue. The best judicial approach is to focus on the highest value of democracy, constituent freedom, and to recognize the two conflicting mandates that the judiciary faces in serving it: recognizing the importance of constituent authority over terms of self-rule, and preventing the self-interested manipulation of processes that advance such self-rule. The tension that emerges from these two conflicting mandates cannot be eliminated. Therefore, *judicial review of election law is most legitimate when it engages in continual and unsettled struggle and debate over the principles of constituent self-rule*.

The second part of the book (Chapters 4–7) demonstrates that the Supreme Court election law doctrine is such *a philosophical struggle between egalitarian and libertarian conceptions of constituent self-rule*. Each chapter offers a coherent, theoretically rich analysis of the doctrine to illuminate this debate over constituent liberty. Chapter 4 outlines the debate surrounding the notion of one person, one vote, which consisted

[2] See, e.g., Nicholas O. Stephanopoulos, "The Anti-Carolene Court" (2019) 2019 *Supreme Court Review* 111, 177–180; Richard L. Hasen, "The Supreme Court's Pro-Partisanship Turn" (2020) 109 *Georgetown Law Journal* 50. As discussed in the Conclusion, while some trends in modern election law support this claim, a comprehensive analysis of the doctrine reveals that a far more nuanced philosophical conflict.

of a disagreement and then consensus regarding the principle that liberal democracy demands minimal procedural equality for constituents. Chapter 5 describes how campaign finance regulation has interrogated whether state intervention or the unequal deployment of private wealth constitutes a greater threat to individuals' ability to reason freely about politics. Chapter 6 explores how parties' constitutional status has queried whether parties, as extra-constitutional organizations including both elites and rank-and-file members, enhance or threaten constituents' capacity to achieve self-rule. Chapter 7 investigates whether the constitutional command for racial equity requires the state and the courts to advance only minimal procedural equality that disregards past racial injustices, or whether racial equity demands enhancing the representative power of groups that have suffered discrimination.

These debates highlight a singular battle over the meaning of self-rule on the bench. This struggle is between (1) an "egalitarian" understanding of liberal self-governance that prioritizes establishing a shared baseline for all constituents and (2) a "libertarian" understanding that prioritizes protecting individuals' pre-political identities from state overreach. This struggle between egalitarianism and libertarianism calls into question whether election law should aim to ensure that all constituents have a shared baseline of political influence, or whether it should protect individuals' pre-electoral endowments from being nullified in electoral competition. While this struggle crystallizes along progressive–conservative lines, it also demonstrates that a shared commitment to constituent self-rule is the foundational value of American democracy. It thereby suggests a way forward for dialogue instead of conflict even in the face of judicial polarization. Yet, as the Conclusion describes, the doctrine's long-running emphasis on freedom is threatened by a loss of a philosophical focus on freedom from both pure tribal partisanship (a risk exemplified by *Bush v. Gore*) and from an increasing reliance on summary disposition of election law questions.

That philosophical struggle offers a coherent account of election law confirms the centrality of constituent autonomy to judicial decision-making. It also offers evidence that the framing of debate over constituent autonomy best ameliorates the counterpopular dilemma. Thus, this book synthesizes the philosophical problem of judicial review of rules of democratic self-governance with a descriptive account of election law. It represents a transformative starting point for understanding election law and offers a new understanding of how the mandate of judicial constitutionalism can inform the role of courts.

STARTING PRINCIPLES: POPULAR AUTONOMY, THE COUNTERPOPULAR DILEMMA, AND RECONCILIATION THROUGH PHILOSOPHICAL DISPUTE

Democracy is a uniquely legitimate regime type – likely the *only* legitimate regime type – because it operates through self-rule by the polity's constituent members. The rulers and the ruled are the same. Such self-determination enables a normatively

acceptable and politically accountable system because it satisfies the requirement that moral evaluation be attributable to free will. While this book focuses on philosophical accounts of democracy as legitimated by freedom, more popular and applied accounts also accept this as a premise.[3] Without this freedom, just conduct and the idea of the good are imposed upon individuals, crowding out the space for moral value. The relationship between morality and freedom is the root of Immanuel Kant's statement that free will is, morally, the "jewel that shines with its own light."[4] Free will is the self-justifying (or reflexive) foundation of morality. The most influential contemporary manifestation in political theory is John Rawls's lexical ordering of liberty as the highest priority.[5] This ideal is now interwoven throughout political and legal thinking on democracy.[6]

The claims that (1) free self-determination of the constituency is the essential prerequisite for democratic legitimacy, and (2) that such freedom gives democracy its unique moral standing, are polestars of the liberal democratic tradition. This root commitment to freedom stands as a starting point of consensus even where subsequent debates lead to foundational disagreements regarding liberal democracy. This is strikingly demonstrated by Barbara Fried, who quotes a statement that mirrors Rawls's lexical prioritization of liberty – and then reveals that the quote is not from Rawls or an egalitarian working in the Rawlsian tradition, but from libertarian stalwart Loren Lomasky.[7] It is this point of consensus regarding the priority of liberty that is the foundation for this book's treatment of the doctrine as a debate over the meaning of this liberalism. Even those who are not wholly committed to the premise that freedom is the foundation of legitimate democracy but are interested

3 See, e.g., Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992), p. 45.

4 Immanuel Kant, *Groundwork for the Metaphysics of Morals*, Mary Gregor (trans.), ed. 4 (Cambridge: Cambridge University Press, 1998), p. 394. Chapter 3 sketches the relevant Kantian understanding of freedom, and touches upon the extensively researched relationship between morality, free will, and political justice.

5 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999).

6 For example, according to James Fleming, "Securing Deliberative Democracy" (2004), 72 *Fordham Law Review* 1435, 1437, the "*free* exercise of [citizens'] capacity for a conception of the good" undergirds democracy (emphasis added). Richard Bellamy asserts that "we value democracy as giving effect to the status of individuals as autonomous rights-bearers." Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2009), p. 90. There are challenges to these views from a variety of perspectives. Some challenge the foundational relationship between morality and freedom. P. F. Strawson, "Freedom and Resentment" (1962) 48 *Proceedings of the British Academy* 1. More relevant to the book's legal argument, the relationship between democracy and constituent freedom has also faced a challenge from descriptive political scientists who query whether democratic governance is, as an empirical matter, a response to reasoned will. Christopher Achen and Lawrence Bartels, *Democracy for Realists* (Oxford: Princeton University Press, 2017); Martin Gilens and Benjamin I. Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens" (2014) 12 *Perspectives on Politics* 564.

7 Barbara H. Fried, "The Unwritten Theory of Justice," in Jon Mandle and David A. Reidy (eds.), *A Companion to Rawls* (Chichester: Wiley-Blackwell, 2014), p. 436.

in (and committed to) American democracy should be moved by the observation that sustained dispute over liberal freedom offers the most compelling and unified understanding of the Supreme Court doctrine.

However, political self-determination requires that the procedures that actualize it are legitimate and effective. The judiciary plays an essential role in ensuring this, particularly by advancing fair and equal implementation of process. The judiciary has an institutional obligation to protect constitutional rights, and the moral authority to advance the equal position of persons as mandated by impartial rule of law. But if the judiciary curates democratic process in fulfilling this role, it comes at the cost of constituent authority over self-governance. The anti-democratic potential of judicial review is familiar, but the problem for democratic procedure is unique.

Liberal democratic self-rule therefore faces an intrinsic tension: it must simultaneously realize and discipline the freedom of the constituency. According to Samuel Issacharoff, "successful liberal democracies…must enable majority rule while also institutionally limiting it."[8] This Janus-faced quality reflects the intrinsic tension in collective freedom: state governance must be beholden to the will of its constituent members, yet for their will to be free, even in a popularly governed state individuals must enjoy some protection from state overreach so that they may continue to make free choices (including in their contributions to collective governance).[9] Therefore, the practice of liberal democratic rule does not involve the unadulterated conversion of free will into state action. Instead, it relies on institutions and embedded practices that aggregate, channel, and modulate such will.

THE COUNTERPOPULAR DILEMMA: CRITIQUES OF JUDICIAL REVIEW AND COURTS AS GUARDIANS OF PROCESS

Some institutions and practices that contribute to democratic self-rule can be readily attributed to popular will. Some structures are established by mechanisms that are directly democratically accountable (e.g. statutes that set terms of electoral

[8] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015), p. 2.

[9] Tom Ginsberg and Aziz Huq capture this weighing of the collective freedom of self-governance and the individual freedom of rights in their account of the three features of successful liberal democracies. Tom Ginsberg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2019), pp. 8–14. In addition to holding sound majoritarian elections, such democracies must vigorously protect rights essential to individual political freedom (such as speech and political association) and respect the rule of law. Although I do not take a technical perspective on it, there is a fierce debate over whether the rule of law and rights protection can be considered singular and entwined – i.e. whether neutral rule-of-law adjudication *entails* certain rights protection. This debate pitches HLA Hart and his student Joseph Raz against Lon Fuller. Since neutral rule of law is necessary for the effective realization of both majority rule and the protection of individual rights, I posit that liberal democracies that realize the moral freedom of their constituents adhere to a "thicker" conception of the rule of law. However, seeking to inform how the judiciary should address intervention in democratic process by reverting to principles of legality faces the evergreen difficulty of imposing

administration), or that can be allocated at least in principle to the constituency itself, such as the widely held value of democracy within civil society. Yet the rule of law's centrality to democracy points to an institution that cannot be as neatly reconciled with the primacy of constituent self-rule – the judiciary. By advancing rule of law and protecting rights, the judiciary plays a central role in safeguarding the equal freedom of individuals whose collective will empowers democratic governance.[10] It is thus a pivotal institution for successful democracies.

The judiciary has taken on an increasingly central role in shaping American electoral process. Over the past 60 years, there has been an efflorescence of federal case law that directly impacts elections. The result – which Richard Pildes calls "the constitutionalization of democratic politics"[11] – has been a restructuring of multiple aspects of electoral practice. The Supreme Court has set in motion the reapportionment revolution of one person, one vote, innovated anti-corruption law to regulate campaign finance, and revolutionized the constitutional mandate of racial equality in voting. These interventions have structurally transformed how Americans rule themselves. Furthermore, the Court's intervention into election law has uniquely wide-ranging implications for fair governance. Decisions that identify and delineate substantive individual rights can transform specific relationships between persons and the state (e.g. *Roe v. Wade* or *Gideon v. Wainwright*). Yet in exerting constitutional authority over the conditions of collective self-rule, the Court has impacted the content and legitimacy of all other lawmaking.[12]

The judiciary's centrality to successful democracy poses a dilemma for the primacy of self-determination. A defining feature of sound judicial decision-making is judges' neutrality and independence – i.e. political non-accountability.[13] If a democracy is morally vindicated by the self-determination of its constituent members, how can the democratic processes that realize constituents' autonomy be subject to an institution that is politically non-accountable? Meaningful freedom requires that an outside entity does not overdetermine constituent power over politics (here, the

substantive values upon a free electorate, and thus constricting freedom in a context that is meant to enable it; this parallels the difficulties facing general accounts of constitutional review.

[10] This role is seminally articulated in Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010). There is debate over how extensively rule of law advances substantive justice. See, e.g., Joseph Raz, "The Rule of Law and Its Virtue" in *The Authority of Law: Essays on Law and Morality* (ed. 2) (Oxford: Oxford University Press, 2009).

[11] Richard H. Pildes, "The Constitutionalization of Democratic Politics" (2004) 118 *Harvard Law Review* 29, at 42.

[12] Scholars have typically been critical of the rights-based understanding of judicial oversight of electoral practice. For a seminal example, see Pamela S. Karlan and Daryl J. Levinson, "Why Voting is Different" (1996) 84 *California Law Review* 1201.

[13] The nature of this independence is widely debated, but its presence as a quality of sound judging is incontrovertible. See, e.g., Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); Irving R. Kaufman, "The Essence of Judicial Independence" (1980) 80 *Columbia Law Review* 671; Cass R. Sunstein, "Neutrality in Constitutional Law" (1992) 92 *Columbia Law Review* 1; Paul Gowder, "The Rule of Law and Equality" (2013) 32 *Law and Philosophy* 565.

processes by which constituents make political choices).[14] Just as a person who votes under physical threat would not be said to act freely, a polity that has processes of decision-making exogenously imposed upon it cannot be considered wholly free.

The role of judicial review in shaping elections therefore poses what I call the *counterpopular dilemma*: the integrity of self-rule requires sound (i.e. neutral) judicial advancement of equal constituent right in the democratic process; yet such intervention (at least when it assumes the structurally transformative forms of modern American election law) contravenes the principle that authority over processes of self-rule must come from the constituents rather than an external, non-accountable source. While some have argued that action initiated by the judiciary is not necessarily less democratic than activities undertaken by accountable institutions (such as legislatures), Alexander Bickel's classical formulation still resonates: "nothing can finally deprecate the central function that is assigned … to the electoral process; nor can it be denied that the policymaking power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."[15]

Judicial restructuring of electoral process poses this problem in two linked ways. First, the purpose of elections is to convert constituent will into governance and thereby attribute state power to constituents. While in many contexts judicial intervention can be vindicated as preventing majoritarian mistreatment of vulnerable individuals or marginal groups, this is insufficient to justify judicial intervention in elections. *Democracy has moral power because it realizes the collective will; interdicting that will cannot be a guiding principle of democratic procedure*. Second, as a structural corollary to this normative problem, where the judiciary redefines democratic process, it redefines the baseline of the collective will. Any subsequent expression of popular will – including future electoral rules – following judicial reworking of electoral process reflects this judicially curated version of popular will. Since this

[14] Jeremy Waldron calls this general capacity, "on which large numbers of right-bearers act together to control and govern their common affairs" "the right of rights." Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), pp. 232–3. He notes on p. 283 that the principle of democratic self-determination demands that when "a common decision is needed, every man and woman in the society has the right to participate on equal terms in the resolution of that disagreement," thus showing the continued expression of equality as a facet of freedom. This book focuses on the unique demands of democratic process as such a type of common decision. Waldron's analysis captures the political–philosophical basis of the problem of non-accountable authoritative determination, which Chapter 2 of this book invokes through Isaiah Berlin's description of a "temple of Sarastro" where a concept of freedom is imposed upon others. *Two Concepts of Liberty* in Henry Hardy (ed.), *Liberty* (Oxford: Oxford University Press, 2002). In the most metaphysical sense, this generates a deep debate regarding the nature of free will, particularly the question of compatibilism. See R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge: Harvard University Press, 1994).

[15] Alexander M. Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1986), p. 19. Some prominent responses to Bickel have sought to minimize the tension posed by of rule of law rights enforcement by denigrating the significant of elections generally. In Chapter 2 I revisit this issue in my discussion of Dworkin and Eisgruber.

externally determined version influences any later expressions of popular autonomy, this recursively disrupts the foundation of democracy as legitimated by (and expressing) such autonomy.

As discussed in Chapter 1, the counterpopular dilemma operates at the intersection of two contemporary bodies of scholarship. This book is one of the first scholarly accounts to bring these bodies of literature into meaningful dialogue. On the one hand, scholars skeptical of judicial review – led by Jeremy Waldron, Samuel Moyn, Ran Hirschl, and Richard Bellamy – have argued that assertive judicial review of legislation intrudes upon constituent freedom and fails to generate superior outcomes in governance. On the other hand, American election law scholars – led by Samuel Issacharoff, Richard Pildes, and Pamela Karlan – identify judicial review, and specifically its non-accountable nature, as essential to prevent self-serving legislative manipulation of democratic process. These scholars observe that legislators often exploit electoral legislation to consolidate power, with the result that democratic process no longer accurately expresses popular will. This approach posits that courts should robustly intervene to benefit the moral integrity and representative efficacy of democracy.

The counterpopular dilemma emerges from the cogency of each position: judicial review of electoral process simultaneously contravenes and sustains constituent autonomy. It contravenes this autonomy by empowering an institution defined by the characteristic (according to its advocates as well as its critics) of lacking political accountability. This implies that popular autonomy is only legitimate if it is subordinated to conditions imposed by an external entity thereby undermining the primacy of popular self-determination. Yet without such non-accountable oversight, the integrity of democratic process is vulnerable to manipulation by political elites. Judges' non-accountability insulates them from such manipulation, and thereby sustains constituent autonomy.

BETWEEN CONSTITUENT SELF-RULE AND DEMOCRATIC INTEGRITY

The lack of engagement between election law scholarship and criticism of judicial review exposes a gap in the literature. Since the normative difficulty of non-accountable authority is heightened in the context of electoral process, the casual willingness of election law scholars to treat robust, substantive judicial intervention as acceptable is especially puzzling. Prior election law research has presumed that robust judicial intervention is valid, rather than adequately investigating who has moral authority to guarantee constituent autonomy.

There are three immediate and decisive answers to this dilemma. The first is that some existing account vindicates judicial intervention in democratic process. However, as Chapter 2 shows, none of the three leading candidates – interpretivism–deliberativism; originalism–contractarianism; and structuralist instrumentalism – offers a satisfactory explanation. All three accounts contravene democratic autonomy

by suggesting that judges have the moral knowledge or political authority to impose conditions of self-rule, and can define democracy in a manner lexically prior to constituent freedom. Examining these accounts highlights the unique onus of justifying authority over democratic process. Even if these scholarly explanations can vindicate robust judicial review of "typical" substantive policymaking, such explanations are insufficient to justify courts' oversight of constituent self-rule. This is because democratic process is the functional incarnation of the foundational value of democracy, autonomy of the constituents who make up the polity. Non-accountable authority over such autonomy cannot be vindicated by referencing some other value or feature of the constitutional order, because this suggests there is a higher priority than autonomy. Such an account would contravene popular autonomy as the legitimizing principle of democracy. The normativity of such a claim collapses in on itself.

The second possibility would be that the virtues of judicial intervention in electoral process reveal a strict limit to popular authority over democratic self-rule. Yet this runs contrary to the principle that democracy is legitimized by constituent self-determination (the premise of this book). It, would suggest a "hard" juristocratic limit to Waldron's wry claim that "everything is up for grabs in a democracy."[16] While some defenders of robust constitutional review accept the proposition that democratic autonomy has such limitations,[17] it contradicts the bedrock principle that democratic procedure is morally redeemed by self-determination of the people.

This might suggest the third possibility, that judicial review skeptics have identified a profound reason to condemn judicial intervention in electoral process. Yet skepticism of judicial review of election law faces two complexities of its own. The first is that the doctrinal legacy of judicial intervention has been, by any reasonable assessment, thoroughly mixed (discussed further in Chapters 4–7, which examine the substantive law). Some judicial interventions into democratic process seem, by both popular acclaim and according to any reasonable account of legitimate democratic process, desirable. The interdiction of legislative malapportionment by *Baker v. Carr* and the prohibition of gross racial discrimination in *Gomillion v. Lightfoot* and the White Primaries cases would likely be the most widely accepted examples. Some non-interventions, particularly those related to failures to prevent racial discrimination – *Giles v. Harris* and *Lassiter v. Northampton* – illustrate the Court's unequivocal failure to make democratic process available to all. Other interventions have mixed (*Buckley v. Valeo*) or fiercely disputed (*Shelby County v. Holder*) reputations, as do some non-interventions (*Rucho v. Common Cause*). Still, others lack a clear basis in sound judicial reasoning (*Bush v. Gore*). Thus, it is difficult to

[16] Waldron, "Law and Disagreement," p. 303.

[17] See Theunis Roux, "In Defence 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), pp. 210–211 (invoking Issacharoff's empirical observations about the value of constitutional courts in challenging Waldron's implicit radical view of political constitutionalism).

conclude that judicial intervention in electoral process leads to juristocracy and non-intervention to more autonomous democracy. Rather, and in line with the instrumental focus of election law scholarship, the impact of judicial intervention depends on its substance and legacy. The second is that understanding (and seeking to limit) judicial review by understanding politics purely as a matter of power faces a problem of moral justification. If the judicial review critique is fully accepted and the judiciary excluded from shaping democracy, it leaves the structures of political process wholly subject to political outcomes themselves (a condition critics might well accept as a desirable). However, this means that democracy is wholly determined by power itself – which, when unconstrained, can impair the legitimacy of a democracy, from malapportionment to racial oppression.[18] Such an account neglects to explain how the characteristic moral legitimacy of democracy can be sustained over time.

Thus, the counterpopular dilemma is profoundly sharpened by simultaneously recognizing (1) that the moral premise of democracy, autonomy of the constituent members of the society, should be realized as directly as possible; and (2) that the abuse of power can undermine the legitimacy of democratic process, creating at a plausible argument for expansive judicial review, and clearly vindicating some specific instances of it. Many attempts to vindicate judicial review based on democratic autonomy only do so by ultimately claiming autonomy-displacing moral authority or eroding the rule of law neutrality that makes judicial review an effective check on power.[19] In this book, I explore whether there is an account that retains the legitimizing primacy of democratic autonomy *and* the normative virtues (neutrality, rule of law) and practical inevitably of judicial review.

RECONCILING THE COUNTERPOPULAR DILEMMA: PHILOSOPHICAL DISPUTE OVER FREEDOM

This dilemma seems insoluble. Democratic procedure must be self-determined to be morally valid, yet aspects of it must be exogenously determined to preserve democratic integrity. Any solution to this conflict must balance or sustain, rather than

[18] The instrumental scholarship is of course directed toward such power-based understandings of elections, and part of its own rich tradition traceable to Schumpeter. Samuel Issacharoff and Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50 *Stanford Law Review* 643, 649–650 (discussing Anthony Downs and public choice theory).

[19] Eisgruber advances a variation of this by arguing that federal courts are to some degree accountable and thus democratically legitimate. Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001) p. 60. Lafont maintains that citizen participation in litigation makes judicial review valid. Christine Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford: Oxford University Press, 2020) p. 225. Yet even if describing constituents (who have political attributes such as power and self-interest) as involved in litigation makes judicial review more procedurally democratic, introducing this democratic procedure based on citizen participation erodes the 'strong' neutrality that makes judicial review an effective check on the deployment of democratic power over process.