Countering the Real Countermajoritarian Difficulty

Franita Tolson*

INTRODUCTION

Writing about the countermajoritarian difficulty is a rite of passage for constitutional law scholars. Indeed, the sheer number of articles that have discussed the countermajoritarian difficulty have corroborated that this phenomenon was, and continues to be, a "central preoccupation" and a "central obsession" of constitutional law scholarship.[1] Coined by Professor Alexander

DOI: https://doi.org/10.15779/Z38251FM0J

* Vice Dean for Faculty and Academic Affairs and Professor of Law, USC Gould School of Law.

1. The literature is too voluminous to summarize here. One of the most famous treatments of the countermajoritarian difficulty is Barry Friedman's magisterial five-part series. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–35 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter *The Birth of an Academic Obsession*]. But a number of others have also weighed in on this debate. *See, e.g.*, Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1436–41 (2017); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 298–99 (2002); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 15 (2001); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 495–96 (1994); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 71 (1989). In 2006, the countermajoritarian difficulty was one of the themes of a symposium

Bickel to refer to democratically unaccountable judges invalidating legislation enacted by democratically elected bodies, the countermajoritarian difficulty has not been easily solvable even as a new generation of scholars has grappled with its implications.[2] For five decades, scholars have extrapolated the idea that judicial review would undermine the majoritarian outputs of the elected branches to many different areas of law,[3] but their assumption that the problem lies predominantly with the courts is misguided. In fact, the countermajoritarian difficulty remains a "difficulty" because of the incessant focus on the "judicial invalidation" part of the definition, when more attention needs to be paid to the "democratically elected bodies" part of the equation,[4] particularly in light of recent events signaling the erosion of democratic norms in the United States.[5]

Seeking to correct this oversight, Professor Pamela Karlan provocatively argued that the literature on the countermajoritarian effects of judicial review has failed to fully account for the countermajoritarian aspects of our Constitution, namely the Senate and the Electoral College, both of which frustrate the process of achieving a true majoritarian democracy.[6] These structural elements have interacted with demographic changes in which geographically concentrated

---

from the Maryland/Georgetown Constitutional Law Schmooze. *See* Mark A. Graber, *Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 MD. L. REV. 1 (2006). So many more articles are relevant here—too many to list—almost all of which feel universally compelled to note that the countermajoritarian difficulty was a "central obsession."

2. Friedman, *The Birth of an Academic Obsession*, *supra* note 1, at 155 ("Fed up with the activism of the Rehnquist Court, academics are coming to see the central obsession of constitutional theory in an entirely new light. Before, the central obsession was the inconsistency between judicial review and democracy. Now, it is the inconsistency between judicial review and democracy.").

3. *See, e.g.*, Samuel Moyn, *On Human Rights and Majority Politics: Felix Frankfurter's Democratic Theory*, 52 VAND. J. TRANSNAT'L L. 1135 (2019) (exploring the countermajoritarian difficulty in the context of human rights); John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator, and the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257 (exploring the countermajoritarian difficulty in the context of the filibustering of judicial appointments in the Senate).

4. While scholars have explored the representativeness of our democratic institutions in the context of the countermajoritarian difficulty, there has been no reassessment of this question in the context of recent efforts to suppress the vote and, importantly, after the Supreme Court's 2013 decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), which invalidated a portion of the Voting Rights Act of 1965. *See, e.g.*, Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1 (2001) (using adjudication to highlight the problem of democratic legitimacy that plagues majoritarian politics); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997) (arguing that judicial review is justified when legislatures act to entrench their own power); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991) (challenging assumptions in the literature that judicial review can correct for defects in the political process). For an interesting take on how voter ignorance contributes to the countermajoritarian nature of our democratic institutions, see Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004).

5. Dan Barry, Mike McIntire & Matthew Rosenberg, *'Our President Wants Us Here': The Mob That Stormed the Capitol*, N.Y. TIMES (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/us/capitol-rioters.html [https://perma.cc/CT99-YPM4].

6. *See generally* Pamela Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323 (2021).

majorities have less power than their rural counterparts, producing another period of minority retrenchment that has been enabled by the Supreme Court. In illustrating that the countermajoritarian difficulty is not necessarily judicial, but structural, Professor Karlan questioned both Bickel's arguments about the countermajoritarian nature of judicial review and John Hart Ely's equally famous claim defending judicial review. Ely argued, contra Bickel, that judicial review was necessary to reinforce the Constitution's predestined and inevitable move towards more inclusive democratic self-government.[7]

As Professor Karlan showed, however, democratic self-government has not been a given and sometimes judicial intervention has been necessary for the survival of the democratic experiment. 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. Indeed, the reapportionment decisions posed no difficulty for the courts precisely because of the failures of institutional design.[8] The allocation of seats based on decades-old census data meant that the state legislatures were structurally countermajoritarian and so too were their legislative outputs. To use Professor Karlan's words: the manner in which these districts were constructed reflected "something about some group of people in some there and then" but not those living in the present.[9]

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. These attempts to manipulate electoral outcomes have disempowered voters in ways similar to the rampant malapportionment that defined the early twentieth century and, in the process, have undermined any claim that our system is majoritarian. Despite record turnout in the 2020 presidential election, everyone who should have been able to vote could not vote because of suppressive regulations, such as restrictive voter-ID laws, documentary proof of citizenship requirements, poll closings, and voter purges.[10] There were numerous judicial decisions sanctioning refusals by state legislatures to make voting easier amidst the COVID-19 global pandemic. The idea that we should be concerned about judicial review of legislation when state legislatures

7. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 6 (1980).

8. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 237 (1962) (holding complaint alleging denial of equal protection presented justiciable constitutional cause of action under the Fourteenth Amendment); Reynolds v. Sims, 377 U.S. 533 (1964) (same).

9. Karlan, *supra* note 6, at 2345.

10. NAACP LEGAL DEF. & EDUC. FUND, DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST *SHELBY COUNTY, ALABAMA V. HOLDER* 7–79 (2021), https://tminstituteldf.org/wp-content/uploads/2017/08/LDF_01192021_DemocracyDiminished-4b_06.24.21v2.pdf [https://perma.cc/BHS2-GZLH]; *Voting Laws Roundup: January 2021*, BRENNAN CTR. FOR JUST. (Jan. 26, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-january-2021[https://perma.cc/VS22-XAFH**].**

are working to disenfranchise the voters constituting the "majority" seems especially misguided.[11] In effect, the countermajoritarian difficulty has become an excuse employed by courts to choose *when* to intervene in political disputes rather than operating as a principled constraint on judicial action.

This short essay builds on Professor Karlan's argument that the problem of countermajoritarianism has not been unique to the courts, but does so by taking a slightly more extreme position. In my view, the courts rarely face any countermajoritarian difficulties precisely because American democracy has always been an ongoing project that has never been perfected and has been subject to setbacks resulting in lost progress towards a majoritarian ideal.[12] The idea that judicial involvement should be tempered by concerns that courts are acting counter to democratic majorities has been, and remains, illusory. American democracy would be better served by recognizing that a court's decision to invoke the countermajoritarian difficulty is itself a substantive decision on the merits of any political dispute.[13] This would explain why the degree of judicial intervention might change depending upon the political cycle or the nature of the dispute.[14] Indeed, using the countermajoritarian difficulty as an excuse to avoid the political thicket, but only in selective instances, has given potentially partisan judicial decisions a veneer of legitimacy.

As Part I shows, states have had substantial authority to define who the majority is, and the needle has moved between substantial disenfranchisement and expansive enfranchisement. The Constitution, as interpreted by a current majority of the Supreme Court, has facilitated the states' ability to undermine majority rule, and political elites seeking partisan gain have taken advantage of

11. Of course, there will always be citizens who are denied the opportunity to meaningfully participate in our democracy—those who are under eighteen or those who are currently incarcerated provide the most obvious examples. But when states take affirmative steps to actively suppress the votes of those otherwise legally entitled to vote, this raises democratic concerns of a different sort. This suppression silences dissenters and supporters alike who are seeking to express their positions through their vote, inhibiting public discussion of the issues. *Cf.* Peters, *supra* note 4, at 2 (emphasizing the procedural importance of free and equal public discussion for democratic legitimacy because "some percentage of the citizenry—often a very large percentage—always will be denied the ability to play a meaningful role in deciding on policy, merely by the happenstance of being outvoted").

12. This essay goes further than Michael Klarman's seminal article on the countermajoritarian difficulty, which assumed that judicial review is countermajoritarian unless the court is acting to prevent minority entrenchment. *See* Klarman, *supra* note 4. Because majoritarianism is an ideal that America has worked towards (often falling short), *see infra* Part II, judicial review may be justified even if the legislature is not acting to entrench itself in the way that Klarman described (by ignoring constituent preferences or illegitimately seeking to hold on to power). Klarman, *supra* note 4, at 498–99. Instead, my point is that our political institutions, politics, and the U.S. Constitution have a number of countermajoritarian elements that make it impossible to frame the difficulty as a problem specific to judicial review in any principled way; instead, the countermajoritarian difficulty has become an excuse that courts latch onto to avoid hot-button political issues without any consistency. *See infra* Part III.

13. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236 (2018) (arguing that the Supreme Court's decision in *Rucho v. Common Cause*, 138 S. Ct. 2679 (2018) (mem.), which held that partisan gerrymandering presented a nonjusticiable political question, was nonetheless a substantive decision on the merits).

14. *See generally* Friedman sources cited *supra* note 1.

the fact that the hardwired features of our constitution can be exploited by demographics and partisan sorting. Bickel's myopic focus on the courts led him to miss the countermajoritarianism elsewhere in our political system.[15]

John Hart Ely sought to refute Bickel's concerns, arguing that our steady and sure march towards universal suffrage needed to be reinforced by robust judicial review.[16] However, Professor Karlan persuasively showed that democracy has been neither a foregone conclusion nor would it be historically accurate to portray democracy as a march that has always proceeded in the right direction.[17] And in some cases, the judiciary might be the last bulwark of American democracy, a fact particularly salient in light of the dozens of cases filed to overturn the legitimate results of the 2020 election.[18] History has long provided lessons that caution against this narrative of majoritarianism as a reality rather than an ideal.

Part II of this essay discusses one such incident—Dorr's Rebellion—to show how the political branches have often abdicated their responsibilities to protect both republican and democratic ideals in service of some other cause. In the case of Dorr's Rebellion, that cause was slavery. The Supreme Court nonetheless failed to police the political branches in a dispute that presented an actual countermajoritarian difficulty. Disenfranchised Rhode Islanders challenged political elites to create a more representative electorate; however, they were defeated in these efforts despite the gap between Rhode Island's political system and the ideal of republican government that existed at the time.

One would be hard pressed to refer to a minoritarian state legislature's outputs as the product of democratic majorities. The reality is, and always has been, that legislation represents the will of some of the people, some of the time. For this reason, judicial review is imperative, because the constituency who makes up "we the people" (or those whose preferences that legislation purports to represent) can shrink or expand depending on the prevailing politics. Yet the Supreme Court in *Luther v. Borden* declined to intervene in the Rhode Island dispute, deeming it a nonjusticiable political decision.[19] *Luther* has always loomed large, forcing the Court to look for new and creative ways to address political lockups to avoid its holding, as was true in *Baker v. Carr* and the other reapportionment cases of the 1960s.[20]

---

15. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

16. ELY, *supra* note 7.

17. Karlan, *supra* note 6, at 2324.

18. *See* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. (forthcoming) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720065 [https://perma.cc/43RK-853E] ("The Trump campaign and Republican supporters filed suits in at least Arizona, Georgia, Michigan, Nevada, and Pennsylvania, as well as directly to the U.S. Supreme Court, and all of those suits failed.").

19. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

20. *See* cases cited *supra* note 8.

Indeed, as Part III shows, the difference between the reapportionment cases and the more recent partisan gerrymandering decision in *Rucho v. Common Cause* is that, in the reapportionment cases, the Court rejected the path set by *Luther v. Borden* and recognized that the political institutions representing the people had indeed become countermajoritarian. In contrast, the *Rucho* majority adhered to *Luther*, which has, for over a century and a half, embraced a rule of justiciability that has served as a vehicle to give legal effect to a countermajoritarian difficulty that has infrequently existed inside the courts but has been fairly plentiful outside of them.[21] In reality, the judiciary is best equipped to determine the scope of its involvement in the political thicket, a fact that even Alexander Bickel recognized over fifty years ago, as opposed to relying on the countermajoritarian difficulty as a reason, in and of itself, to justify staying its hand.[22]

I.
IDENTIFYING THE REAL COUNTERMAJORITARIAN DIFFICULTY

The recent attacks on voting rights stand as the most obvious indicator that our democracy is failing. The Supreme Court's refusal to aggressively intervene is yet another sign that, not only is the march towards a more inclusive democracy not linear, achieving the aspiration of majoritarian democracy is also not certain.[23] In 2020, state legislatures passed a number of laws making it more difficult to vote, or, alternatively, refused to ease voting restrictions despite the COVID-19 pandemic.[24] To name a few (and only a few) representative examples: in Michigan, the state legislature passed a law, upheld by the Sixth Circuit, banning free transportation for those seeking a ride to the polls.[25] In Indiana, those over sixty-five could vote by mail without an excuse, while those under sixty-five needed an excuse to cast a ballot by mail.[26] In Florida, the state legislature passed a law requiring those with felony convictions to pay all fines and fees associated with their conviction prior to being able to cast a ballot.[27] In Georgia, voters in and around Atlanta had trouble with voting machines and long lines, in some cases waiting five or six hours to vote in both the primary and general elections. Long lines were the foreseeable consequence of actions by Georgia's state legislature and secretary of state making voting more difficult in

21. *See, e.g.*, Sam Wang & Ari Goldbloom-Helzner, *Why the Filibuster Suits the GOP Just Fine*, ATLANTIC (Apr. 30, 2021), https://www.theatlantic.com/ideas/archive/2021/04/zone-legislative-death/618754/ [https://perma.cc/7B2Q-RWFS].

22. *See* sources cited *supra* note 15.

23. *See, e.g.*, Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (holding that a federal court could not order state officials to accept absentee ballots postmarked after Election Day despite the COVID-19 global pandemic).

24. *See, e.g.*, Libertarian Party of Pa. v. Governor of Pa., 813 F. App'x 834 (3d Cir. 2020) (rejecting a challenge to Pennsylvania's signature requirement).

25. Priorities USA v. Nessel, 978 F.3d 976 (6th Cir. 2020).

26. *See* Tully v. Okeson, 977 F.3d 608 (7th Cir. 2020).

27. Jones v. Governor of Fla., 975 F.3d 1016 (11th Cir. 2020).

the years leading up to the election.[28] In Texas, the governor limited each county to one drop box for absentee ballots, including reliably Democratic Harris County (home to Houston), which is larger than Rhode Island in both landmass and population.[29]

Just like *Shelby County v. Holder* and *Rucho v. Common Cause,* the COVID-19 voting rights litigation, some of which worked its way up to the Supreme Court, places the onus on individual voters to overcome the needless barriers that states erect to make it difficult to cast a ballot.[30] Both *Shelby County,* which invalidated a provision of the Voting Rights Act of 1965 on federalism grounds, and *Rucho,* which found partisan gerrymandering claims to be nonjusticiable, have made it difficult to police antidemocratic efforts by the states to minimize the voting power of racial and political minorities.[31] These cases have been highly deferential to state authorities, deference that a cynic might refer to as avoiding the countermajoritarian difficulty (despite the states' penchants for misbehaving).

The Court has also made it difficult for district courts to impose remedies that make it easier for voters to cast ballots, as with the 2020 *Republican National Committee v. Democratic National Committee* decision.[32] In this case, the Court invalidated a district court order extending the ballot receipt deadline by five days for the 2020 Wisconsin primary in response to the COVID-19 pandemic.[33] Applying the *Purcell* principle, which cautioned against last minute changes to the rules of an election, the Supreme Court held that the state had very few obligations to make voting easier, despite the pandemic.[34] The Court further reasoned that, because of the timing, the federal district court was ill-positioned to provide relief to distressed voters who could not meet the deadline.[35] The majority argued that the last-minute change by the district court violated the norm that ballots should be postmarked or received by election day to be

28. Stephen Fowler, *Why Do Nonwhite Georgia Voters Have to Wait in Line for Hours? Too Few Polling Places*, NPR (Oct. 17, 2020), https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl [https://perma.cc/AA9D-PX4J]; *see also* NAACP, *supra* note 10.

29. Jolie McCullough, *Texas Counties Will Be Allowed Only One Drop-off Location for Mail-in Ballots, State Supreme Court Rules*, TEX. TRIB. (Oct. 27, 2020), https://www.texastribune.org/2020/10/27/texas-voting-elections-mail-in-drop-off/ [https://perma.cc/E2CN-PJPR].

30. Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

31. Karlan, *supra* note 6, at 2351–52.

32. 140 S. Ct. 1205 (2020).

33. *Id.*

34. *Id.* at 1207.

35. *Id.* (rejecting the dissent's argument that the deadline should be extended because of "voters who have not yet received their absentee ballots" on the grounds that "even in an ordinary election, voters who request an absentee ballot at the deadline for requesting ballots . . . will usually receive their ballots on the day before or day of the election," but ignoring that an election in a middle of a global pandemic is hardly "ordinary").

counted, but the majority ignored the very practical realities imposed by the COVID-19 pandemic.[36] Namely, many Wisconsin voters requested absentee ballots but never received them because of the unprecedented volume of requests.[37] The voters who had done what they were supposed to do—timely request their absentee ballots in accordance with state law—were penalized because the Court was insufficiently protective of the right to vote and overly protective of state control (and, more outrageously, *partisan* state control) of elections.

The Court's opinion in *Republican National Committee v. Democratic National Committee*, as well as other recent decisions,[38] are representative of its current posture regarding voting rights more generally—where the right to vote is premised almost entirely on deservedness and privilege rather than its status as a fundamental right. These decisions also assume that, despite any state-imposed barriers, those who want to vote will find a way to vote. Implicit in this assumption is the belief that our elections and institutions will continue to survive, even if we exclude those whom these institutions are supposed to serve and defer to partisan state legislatures and state authorities.[39]

Indeed, one of the most consequential arguments to come out of the 2020 election cycle is the independent state legislature doctrine. This doctrine stands for the proposition that state legislatures are free to set the rules of presidential elections without constraints imposed by state constitutions and state courts.[40] Pursuant to this doctrine, state legislatures are not otherwise bound by state constitutional limitations when they are performing federal functions. Article II of the Constitution empowers the legislature (rather than any other organ of state

36. *Id.*

37. *Id.*

38. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (finding that two Arizona voting laws—one that prohibited ballot collection by anyone other than election officials and close family members, and another that required ballots cast anywhere other than an assigned precinct be discarded—did not violate Section 2 of the Voting Rights Act despite conclusive evidence that both restrictions disproportionately disenfranchised voters of color relative to White voters).

39. *See* Douglas, *supra* note 18, at 2 ("Ultimately, the protection of the right to vote turned into an undue deference standard, one that places a thumb on the scale of states, especially as an election draws near. Thus, the problem is not only that courts applied the *Purcell* Principle and refused to invalidate state election rules too close to the election to preserve the status quo; they also too readily deferred to states and thereby devalued the constitutional right to vote.").

40. The doctrine applies to both presidential elections and regulations governing the times, places, and manner of congressional elections. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 8 (2020) (arguing that, because of the independent state legislature doctrine, "state constitutions may validly restrict states' power to politically gerrymander state and local legislative districts, [but] they cannot limit a legislature's power to regulate most aspects of federal elections—including the legislature's authority to draw congressional district boundaries"). The independent state legislature doctrine might be an important exception to the ability of state constitutions to constrain antidemocratic behavior by state legislatures. *See* Jessica Blumen-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021) (arguing that state constitutions could constrain antidemocratic behavior by state legislatures).

government) to decide the manner of appointing electors. Additionally, the Elections Clause gives state legislatures the authority to set the times, places, and manner of federal elections.[41] In the disputed 2000 presidential election, three Supreme Court justices endorsed the doctrine as grounds to overturn the Florida Supreme Court's interpretation of state law as an infringement of the state legislature's authority to set the rules of the presidential election.[42] Similar arguments emerged in Pennsylvania and other battleground states as state courts read their state constitutions expansively to protect the rights of voters to cast a ballot.[43]

When the Pennsylvania Supreme Court extended the deadline for receipt of absentee ballots,[44] members of the legislature argued that the court unconstitutionally interfered with its authority under Article I, Section 4 to set the times, places, and manner of federal elections.[45] If the Supreme Court had accepted this argument, which four justices were willing to do, it would have conflicted with a five-year-old Supreme Court precedent, *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[46] There, the Court held that the word "legislature" encompassed any process for lawmaking established by the state rather than just the formal institutional legislature. Had the Supreme Court sided with Pennsylvania Republicans, the institutional legislature would have virtually unlimited authority over certain aspects of presidential and congressional elections, taking precedence over the state constitution. Based on this rationale, even if the state constitution created the state legislature and, additionally, set parameters for the administration of state and federal elections, the document could not in any way interfere with or usurp the power that the U.S. Constitution reserved to the state legislature over federal elections.

41. The Elections Clause, in its entirety, provides: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1.

42. *See* Bush v. Gore, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring); *see also id.* at 104 (per curiam) (noting that "the state legislature's power to select the manner for appointing electors is plenary" and this authority "can neither be taken away nor abdicated").

43. *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 643 (2020) (mem.) (denying certiorari despite briefs that raised the issue of the independent state legislature doctrine); *see also* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring) ("The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules. Art. I, § 4, cl. 1. And the Constitution provides a second layer of protection too. If state rules need revision, Congress is free to alter them.").

44. Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 1–2 (2020).

45. Petition for Writ of Certiorari at 8–9, Scarnati v. Pa. Democratic Party, No. 20-574 (U.S. Oct. 27, 2020), 2020 WL 6393780 (raising the independent state legislature issue); *see also* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 366–67 (Pa. 2020) (discussing petition's as-applied challenge to the Election Code's deadline for receiving ballots).

46. 576 U.S. 787 (2015).

The Supreme Court declined to resolve the independent state legislature doctrine controversy, putting off for another day an issue that could potentially disempower voters by making election day advisory rather than definitive.[47] There are, nonetheless, two core insights that emerged from the 2020 election cycle that illustrate that the pre-2013 voting rights regime—defined by a mix of advocacy, legal scholarship, and policy making—had not put forth tools sufficient to protect the right to vote in light of current challenges. The hard truth is that the constitutional and statutory provisions that bear on voting rights—from the Reconstruction Amendments to the Voting Rights Act of 1965—are not up to the job. These provisions (at least what is left of them)[48] are designed to be defensive, rather than offensive, tactics. In other words, a state's failure to make voting easier does not necessarily trigger a plausible constitutional or statutory claim in the same way as a state's decision to make voting harder. This inequity in our legal regime bore fruit for states seeking to depress turnout by maintaining the status quo at a time in which change was necessary for full participation.

The Court's deference to state legislatures during the global pandemic laid bare the core flaw of both the countermajoritarian difficulty and the proposed solutions. The 2020 election season directly challenged the assumption that the elected branches are a lesser threat to democracy than the courts. Not only are the state legislatures the bigger threat, the level of polarization in our politics continues to stand as a barrier to the inclusive electorate that the Constitution and its democratizing amendments envision.

Part of the issue is that the political parties have changed. Today's parties are not the same parties once deemed to have outlived their usefulness in a famous report by the American Political Science Association in 1950.[49] Nor are they the same parties willing to engage in bipartisan cooperation to enact the far-reaching civil rights legislation of the 1960s. Partisan identity no longer loosely correlates with a number of overlapping characteristics that generally signal where one might fall on the ideological spectrum. The partisan divide has become stark, rigid, and sharply defined, particularly on issues of race.[50]

---

47. *See* Barton Gellman, *The Election That Could Break America*, ATLANTIC (Sept. 23, 2020), https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424/ [https://perma.cc/CUP7-GPCE].

48. *See* Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

49. Am. Pol. Sci. Ass'n, *Toward a More Responsible Two Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. (SUPPLEMENT), at v (1950) ("Historical and other factors have caused the American two-party system to operate as two loose associations of state and local organizations, with very little national machinery and very little national cohesion. As a result, either major party, when in power, is ill-equipped to organize its members in the legislative and the executive branches into a government held together and guided by the party program."). Ironically, the APSA report advocated for the clearly defined, ideologically rigid parties that we see today. *Id.*

50. Karlan, *supra* note 6, at 2332 ("The stark alignment of the urban-rural and Democraticepublican divides means that urban and rural voters now each view a win for the other party 'as an existential threat to their sense of national identity and way of life.'").

The divide on ideological issues also has geographic salience, with "red" and "blue" states (and also urban versus rural areas) having clearly defined world views that do not lend themselves to ideological or cultural diversity.[51] The Republican Party rules sparsely populated rural and suburban enclaves whereas the Democratic Party is the party of people of color and urban dwellers.[52] The manner in which people have sorted themselves has resulted in a geographic countermajoritarian difficulty, to use Professor Karlan's phrasing, because "[w]e now have a 'highly polarized partisan geography' resulting in a 'growing disjuncture between where Americans and where hard-wired aspects of American political power are located.'"[53]

These demographic changes, complicated by partisan politics, have been compounded by the manner in which the hard-wired, countermajoritarian features of the Constitution operate. The Electoral College was intended to be countermajoritarian.[54] By allowing designated electors, rather than the people, to vote directly for President and Vice President, the Electoral College structurally favors the Republican Party because of geographic sorting that concentrates Democrats in far fewer counties than Republicans.[55] The Republicans have failed to garner the popular vote in seven of the last eight presidential elections yet have nonetheless won the presidency three times in that period.[56]

Furthermore, the Electoral College exacerbates the racial divide. Prior to the ratification of the Thirteenth Amendment, its structure gave slaveowners a "bonus" with both the presidency and in Congress by including their nonvoting slaves in the political calculus. Despite the abolition of slavery, this effect has yet to fade, even into the present day. The Electoral College still gives disproportionate power to southern states that vote Republican but nonetheless have large Black populations that favor Democratic candidates.[57]

The Senate has likewise contributed to these countermajoritarian struggles, giving each state two Senators regardless of population. As a result, Wyoming has just as much representation in the Senate as California, even though the latter

51. *Id.* at 2329–30 (noting that "[t]he number of 'landslide' counties—counties where either the Democratic or the Republican candidate for president wins by more than 20 percentage points (that is, by more than 60–40)—has increased dramatically").

52. *Id.* at 2329, 2331–34.

53. *Id.* at 2334.

54. *Id.*

55. *Id.* at 2340.

56. Jonathan Bernstein, *Why Can't Republicans Win the Popular Vote*?, BLOOMBERG (Nov. 5, 2020), https://www.bloomberg.com/opinion/articles/2020-11-05/why-can-t-republicans-win-the-popular-vote [https://perma.cc/R7JX-M8VC].

57. Karlan, *supra* note 6, at 2343 ("Even today, the presidential election system undermines the voting strength of Black citizens. Nearly half the nation's Black citizens live in the eleven states of the former confederacy. And they vote overwhelmingly for the Democratic presidential candidate. But in this century, of all those states, only Georgia, North Carolina, and Virginia have ever cast their electoral votes for a Democrat.").

has fifteen times as many residents.[58] But there is an even larger concern than the population disparity underlying the structure of the Senate. Because of our current levels of polarization as well as demographic changes, the Republican Party can control the Senate even if it lacks anything resembling nationwide public support. As Professor Karlan observed, this "countermajoritarian skew" has had significant implications for policy and governance, lessening the incentive for Senate Republicans to adopt policies that appeal to median voters and giving the Party "a built-in advantage in competition for control of a central organ of the federal government—an organ that, among other things, is responsible for deciding whether to confirm or reject judicial nominees."[59] The fact that a political party lacking majority support is able to confirm judicial nominees that are also far to the right of the median voter filters this countermajoritarian bias into the judicial branch.

It is this interaction between the countermajoritarian elements of our Constitution (the Electoral College and the Senate), the demographic changes, and partisan polarization that has empowered the sparsely populated, rural red states at the expense of the more densely populated, urban blue states. Attempts to suppress voter turnout and disenfranchise otherwise lawful voters in some populous and politically divided states have further undermined the argument that legislation represents the democratic will of the people. History has shown, time and time again, that the countermajoritarian difficulty has more often manifested in the political struggles outside of the courts.[60] And courts, hiding behind the countermajoritarian difficulty, have sanctioned the behavior of political elites in ways that undermine our democracy.

II.
DORR'S REBELLION AS A PARADIGM OF COUNTERMAJORITARIANISM

Our democracy, and what we envision it to be, sometimes needs judicial assistance. The constitutional text and our historical practice set broad parameters for what constitutes republican government, particularly if we want democratic norms to govern our republic.[61] That democracy can languish on life support without judicial intervention is a lesson that America has had to learn time and time again.[62]

58. Dale R. Durran, *Whose Votes Count the Least in the Electoral College?*, CONVERSATION (Mar. 13, 2017), https://theconversation.com/whose-votes-count-the-least-in-the-electoral-college-74280 [https://perma.cc/8HEJ-22DD].

59. Karlan, *supra* note 6, at 2339.

60. *See, e.g.*, *infra* Part II (discussing Dorr's Rebellion).

61. *See generally* FRANITA TOLSON, IN CONGRESS WE TRUST?: ENFORCING VOTING RIGHTS FROM THE FOUNDING TO THE JIM CROW ERA (forthcoming 2022) (arguing that the requirements of republican government have evolved since the founding era to encompass majoritarianism and democratic norms).

62. *Id.*

The passage of time has led many of us to forget that there are various historical episodes in which political elites undermined democracy to preserve their power. These assaults on democracy went mostly unrebutted because Congress's ability to respond was dependent upon its partisan composition, which, by definition, limited its effectiveness. In addition, the Supreme Court was sometimes complicit in these democratic failures, refusing to police the very institutions responsible for these harms. The events surrounding Dorr's Rebellion are a particularly compelling example of this judicial failure because the 1849 decision stemming from that dispute—*Luther v. Borden*—remains a precedent that has haunted the Court's entry into the political thicket over the last six decades.[63]

The events leading to the rebellion are remarkably similar to those that marked other uprisings in American history—where an elected government, resistant to changing demographics and changing attitudes, sought to cement its political dominance by manipulating the rules and structures that governed its democratic institutions.[64] Rhode Island, in particular, experienced population growth stemming from the industrialization that defined the Northeast after 1820.[65] Between 1790 and 1860, four-fifths of the state's population was condensed into the northern counties, populated with immigrants and factory workers, while the southern and western counties remained mostly agricultural.[66] Virtually every other state adopted a new constitution during the revolutionary (1775–1783) and confederation (1781–1789) periods to reflect the young country's changing demographics and political culture. However, Rhode Island's 1663 charter functioned as its governing document in the mid-nineteenth century, making its political structure nonresponsive to both population shifts and to the national tide that had led many other states to move closer to universal White male suffrage in the 1820s and 1830s. Suffrage was limited to "freemen," as defined by the General Assembly, leaving many of the property-less factory workers disenfranchised.[67] The state legislature was also severely malapportioned, with the northern counties electing less than one-third of their

63. *See* Baker v. Carr, 369 U.S. 186 (1962) (finding malapportionment claims justiciable under the Equal Protection Clause because of *Luther v. Borden*'s holding that Guarantee Clause claims were nonjusticiable); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (declining to revisit *Luther* in the context of partisan gerrymandering).

64. *See, e.g.*, TOLSON, *supra* note 61 (discussing the Revolutionary War and Shay's Rebellion as manifestations of the people's natural right to alter or abolish their ties with a nonresponsive government).

65. William M. Wiecek, *"A Peculiar Conservatism" and the Dorr Rebellion: Constitutional Clash in Jacksonian America*, 22 AM. J. LEGAL HIST. 237, 241 (1978).

66. Robert E. Shalhope, *The Radicalism of Thomas Dorr*, 2 REV. AM. HIST. 383 (1974); Wiecek, *supra* note 65, at 238–39.

67. William G. Goddard, An Address to the People of Rhode Island 42 (May 3, 1843), available at https://digitalcommons.salve.edu/newport_books/6/ [https://perma.cc/CK46-SCYX] (noting that under the charters of 1644 and 1663, "[n]either of these Charters regulated the right of suffrage, or the admission of persons into the body politic. They left all power over this matter to be exercised by the representatives of the people").

representatives despite their substantial population.[68] Seth Luther would distinguish himself as a spokesperson for these workers,[69] but the movement would ultimately be taken over by upper-middle class elites committed to a complete restructuring of Rhode Island's political system.

The Dorr of "Dorr's Rebellion" refers to Thomas Wilson Dorr, a wealthy elite who, prior to the rebellion, advocated for a new constitutional convention in 1834 to enfranchise taxpayers and those in the military rather than just property owners.[70] The General Assembly could amend the charter by statute to expand the electorate, but wealthy rural landowners who benefitted from a limited suffrage and a malapportioned legislature rejected even the most moderate proposals.[71] This precursor to Dorr's Rebellion, the so-called "Constitutionalist Movement," petered out in 1835, having accomplished none of the goals that its organizers hoped for.[72]

The movement was reborn in 1840 with the birth of the Rhode Island Suffrage Association, a more radical organization led by Dorr that relied on the natural right to alter or abolish government to push for universal White male suffrage.[73] The right to alter or abolish government was the "right of revolution" that the colonists invoked against the British during the Revolutionary War, and it provided a vehicle, outside of suffrage, for the people writ large to express their sovereign authority.[74] Invoking this right, the Suffrage Association argued that the disenfranchised could call a convention to elect delegates in response to a resistant and nonresponsive General Assembly. The convention was tasked with

---

68. Wiecek, supra note 65, at 241 ("[Rhode Island] retained a substantial freehold qualification, as well as a special provision allowing the eldest sons of freeholders to vote, an even less defensible exception to a bad rule. The apportionment of the lower house was rigid: each town, no matter what its population, sent two representatives, except that Providence, Portsmouth, and Warwick sent four and Newport six.").

69. Not to be confused with Martin Luther of *Luther v. Borden* fame.

70. *See* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 88 (1972).

71. *Id.*

72. *Id.*

73. *Id.* at 88–89 ("The Constitutionalists had sought only taxpayer-militia suffrage and had contented themselves with petitioning the General Assembly, but the Suffrage Association insisted that a majority of the male adults in a state had the right to change or abolish their government if it was oppressive. The reformers now advocated for a type of majoritarian democracy, at least for the original ratification of a new state constitution.").

74. *Compare* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."), *with* PA. CONST. of 1776, art. V ("[T]he community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal."), *and* VA. CONST. of 1776, art. I, § 3 ("[A] majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal."). *See generally* THE FEDERALIST NO. 40 (James Madison) (invoking the "transcendent and precious right of the people to 'abolish or alter their governments'" as a justification for the new constitution).

drafting a more representative constitution than the 1663 charter, which was to be submitted to the people for approval.[75] Should the people ratify this new constitution, referred to as the "People's Constitution," then this document would become the governing charter for a new government that would replace the General Assembly.

The General Assembly did not go quietly, calling its own constitutional convention known as the "Freeholders Convention," which drafted a constitution that retained the same freehold requirements but addressed some of the malapportionment issues that had persisted under the 1663 charter. The People's Constitution, submitted to a broader swath of the population because its suffrage restrictions were based on sex, race, and citizenship but not property, was ratified 14,000 to 52 and the Freeholders Constitution, submitted only to voters enfranchised under the original charter, failed 8,689 to 8,013.[76] After the failure of their constitution, the General Assembly attacked the legitimacy of the People's Constitution, rejecting the argument that republicanism required majority rule and dismissing the anarchy associated with exercising the alter or abolish power.[77]

In a famous pamphlet, William Giles Goddard, a professor at Brown University, attacked the Suffrage Association's reliance on the right of revolution to justify universal suffrage. In his view, suffrage was not an essential element of republican government because it was a political right, not a natural one. He defined the "People" of Rhode Island as those who spoke through the enfranchised gentry and their elected representatives, rather than those who sought to exercise the alter or abolish right.[78]

By denying that there was a "We the People of Rhode Island" and recognizing only "We the Voters of Rhode Island," Goddard sought to delegitimize efforts by the Suffrage Association to paint the General Assembly as a band of aristocrats.[79] He instead positioned the Assembly as the rightful representatives of the state whom the Suffrage Association had no right—constitutional or natural—to remove through the People's Constitution. As Goddard observed,

> [I]t was reserved for sage politicians in 1841, to discover that Rhode-Island had not a republican form of government, but was an aristocracy

75. WIECEK, *supra* note 70, at 90.

76. *Id.* at 91.

77. Goddard, *supra* note 67, at 45–46.

78. *Id.* at 42–43 ("More than a hundred years ago, the people of this State, by their representatives in the General Assembly, provided that none but freeholders should be entitled to the right of suffrage, or should be admitted members of the body politic . . . . Those who admit the sovereignty of the people are bound to admit the right of the people of this State so to make and constitute this portion of their fundamental law . . . . were, in a constitutional sense, the people of Rhode-Island; that no other persons had a right to change the law, in this respect, or to exercise those constitutional powers which belong to the people.").

79. *See id.* at 44–45.

> so oppressive as to justify a Revolution! A Revolution by whom? Had those who by the fundamental laws of the State had no right to the exercise of political power, a right to destroy the body politic, that they might erect another upon its ruin? Whence did they derive this right? Not certainly from the law. The social compact makes no provision for such a right, and cannot recognize such a right. The law denies to all those who are not legal people, the right to exercise any political power in the State. It must, therefore, a fortiori, deny their right to revolutionize the body politic.[80]

Ignoring that the source of disagreement was the unduly narrow electorate, Goddard denied the existence of the right of revolution which, in his words, was "preposterous to claim for the majority in a free State," and contended that, "[w]hatever grievances they may chance to suffer, can be redressed at the ballot-box . . ."[81] According to Goddard, once the people settled on a form of government, the people were bound to change that government only by the terms laid out in its governing documents.

Other supporters of the General Assembly took a less aggressive stance than Goddard with respect to the right to alter or abolish government. Congressman Elisha Potter, for example, disavowed any intent to diminish the right of revolution, arguing, "we do not wish to be understood as denying what may be called the right of revolution, or the right of any portion of the people who are oppressed to redress their grievances by force, after having tried all peaceable means without effect."[82] Yet, like Professor Goddard, he agreed that a majority of the population could never exercise this power: "[b]ut this is a right which belongs not to majorities only, but to any number of citizens, however small, who are oppressed, where the oppression is sufficient to justify it, and there is no mode of redressing it but by a revolution."[83] Since the majority adopted the means by which government could be amended in the 1663 charter, a majority could not then seek to change government through revolutionary means since they had the numbers to change it through formal amendment.[84] Emphasizing the importance of amendment through formal mechanisms (and ignoring the nineteenth-century version of voter suppression), Potter drew on the U.S. Constitution to illustrate the risk of interpreting the alter or abolish right expansively: "if the majority of the people of Rhode Island have a right to change their own government in this manner, they have an equal right to throw off the government of the Union; for they both stand upon the same foundation, a

80. *Id.* at 44.

81. *Id.*

82. ELISHA R. POTTER, CONSIDERATIONS ON THE QUESTIONS OF THE ADOPTION OF A CONSTITUTION, AND EXTENSION OF SUFFRAGE IN RHODE ISLAND 22 (1842).

83. *Id.*

84. *See id.* at 23–24.

compact made by our forefathers . . . . never legally adopted, and is not legally binding, for a majority of the whole people never assented to it . . . ."[85]

The fear that invoking the alter or abolish power could lead to unfettered chaos and a reversion back to the state of nature was a powerful rhetorical device. Goddard and Potter's pamphlets raised questions about how one should go about identifying the relevant political community who can exercise the sovereign power of the state and, importantly, whether the sovereignty exercised by this community can be limited to a written constitution.[86] For Dorr and his followers, "[t]he establishment of any mode of convenience, for amending a Constitution through the action of the Legislature, cannot impair the general unalienated & inalienable right of the People at large to make alterations in their organic laws in any other mode, which they may deem expedient."[87] In contrast, the propertied elites rejected any exercise of political power that centered on pure majoritarianism that could manifest outside of a written document, which they viewed as an aspect of democracies, not constitutional republics.

As the political dispute escalated after the rejection of the Freeholder's Constitution, it became apparent that these were two very different communities vying for power—state level microcosms of "We the People," or the disenfranchised who still retained their right to alter or abolish government, and "We the Voters," comprising of the electors enfranchised by state law. The General Assembly sought to perpetuate the privileged subset that had traditionally defined "We the Voters," but "We the People" sought to force discussions of meaningful political power and representation beyond this community and, notably, beyond the scope of the traditional right to vote. While the Suffrage Association's explicit goals would center on White male suffrage, women played a large part in both the organization and the resulting rebellion, signifying that the alter or abolish right was important in providing access to public discourse for women and others deemed unqualified to vote. Among these early suffragettes was Catherine Williams, a confidante to Thomas Dorr, who held numerous events to raise money for Dorrites who were fired from their jobs for joining the rebellion.[88] Frances H. Whipple, a well-known poet, writer, and editor of *The Wampanoag, and Operatives Journal*, wrote articles supporting Dorr and the suffrage movement. Two other women—Ann Parlin and Abby Lord—were directly involved in the rebellion, forming benevolent associations that provided funds for Dorrite families.[89]

The dispute between the existing government and the government created by the People's Constitution ignited a series of confrontations throughout 1841–

85. *Id.*
86. *See* WIECEK, *supra* note 70, at 92.
87. *Id.* at 95 (discussing Letter from Thomas Dorr to Nathan Clifford (Jan. 24, 1848)).
88. FRANK L. GRZYB & RUSSELL J. DESIMONE, REMARKABLE WOMEN OF RHODE ISLAND 21–22 (2014).
89. *Id.* at 22–23.

1842.[90] The Suffrage Association held elections under their new constitution in April 1842, despite a state law enacted by the General Assembly that prohibited the formation of a new government (the so called "Algerine" law).[91] During this period, Rhode Island had two governors: Dorr, who was elected in the 1842 elections, and Samuel King, who was the choice of the landed gentry.[92]

The involvement of President John Tyler in the Rhode Island dispute provided occasion to define the scope of the federal guarantee that each state should have a republican government.[93] After the elections in April 1842, Governor King wrote to President Tyler, invoking the Guarantee Clause and requesting federal intervention to quiet the threat that Dorr posed to his government.[94] Relying heavily on the Guarantee Clause's reference to "domestic violence," President Tyler rejected Governor King's request to intervene, arguing that "there must be an actual insurrection, manifested by lawless assemblages of the people, or otherwise, to whom a proclamation may be addressed, and who may be required to betake themselves to their respective abodes."[95]

Tyler's framing of the Clause as permitting federal intervention upon "actual insurrection, manifested by lawless assemblages of the people" created inevitable conflict with at least some exercises of the alter or abolish authority.[96] While the people could exercise this power peacefully—for example, by calling a constitutional convention outside of the legislature as Dorr and others had in 1841—it mostly manifested in not so peaceful ways, such as the colonists' revolution against the British. While Tyler's position was inconsistent with violent exercises of the right, he did not think that Governor King and the General Assembly could ignore the Suffragists' demands, illustrating that peaceful exercises of the right still retained some validity.[97] Since the Suffragists were demanding political rights, a reasoned response by those in power should obviate the need for violence and force political disagreement through the aegis of the state rather than around it.

---

90. WIECEK, *supra* note 70, at 88–90.

91. *Id.*

92. *Id.*

93. The Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4.

94. WIECEK, *supra* note 70, at 101 ("King's specific request was moderate enough: he wanted a proclamation from Tyler (contents unspecified) and one United States Army officer. King seemed to have felt that a mere gesture of support by the President would be enough to persuade the Dorrites to disband.").

95. 2 LYON GARDINER TYLER, THE LETTERS AND TIMES OF THE TYLERS 194–96 (Richmond, Whittet & Shepperson 1885).

96. *Id.*

97. WIECEK, *supra* note 70, at 106.

Nonetheless, Tyler's interpretation of the Clause largely inured to the benefit of the established government rather than the people seeking better political representation. He indicated that federal intervention in cases of violent uprising would come at the behest of the recognized state government, rather than the faction seeking to overthrow it; yet, he viewed his duty as one of a neutral party in that "the President is not free to choose the group that he will aid on the basis of his own notions of republicanism."[98] The idea that there is some abstract definition of republicanism that should dictate the President's actions here is a nonstarter; after all, if sovereignty lies in the people, the people of Rhode Island had selected the People's Constitution by a wide margin. And even if republicanism is consistent with the idea of a more limited suffrage, such as those who voted on the Freeholder's Constitution, that document was rejected when put to a vote in late 1841. In some ways, Tyler's background as a southerner partially explained his view that the Clause necessitated federal intervention in very limited circumstances. Southerners were wary at any interpretation of the Constitution that might permit the federal government to interfere with the institution of slavery. But he also recognized the power of the alter or abolish right, and sought to preserve its core by implying that the federal government would respond only in the event of violence.

The situation in Rhode Island came to a head in June of 1842, with a violent uprising in which Dorr's troops were ultimately defeated and Dorr was forced to flee the state.[99] In the end, Dorr's Rebellion presented the paradigmatic example of an unresponsive state government that had impermissibly narrowed the community of "We the Voters" to maintain power. Yet the federal government refused to intercede on behalf of Dorr and his supporters even after they went through formal, nonviolent legal processes to displace the incumbent legislature for fear of further upsetting the delicate compromises that then prevailed with respect to issues of slavery.[100] The rebellion ended with a whimper, but ultimately, it gave rise to facts that set the precedent for the judicial regulation of politics that would reign for over one hundred years.[101]

III.
WHAT COUNTERMAJORITARIAN DIFFICULTY?: *RUCHO V. COMMON CAUSE* AS THE LEGACY OF DORR'S REBELLION

In 1842, Luther Borden and several of his comrades—all of whom were infantry officers working for the General Assembly—broke into Martin Luther's

98. *Id.* at 105; *see also* TYLER, *supra* note 95, at 195 ("[T]he executive could not look into real or supposed defects of the existing government, in order to ascertain whether some other plan of government proposed for adoption was better suited to the wants and more in accordance with the wishes of any portion of her citizens.").

99. WIECEK, *supra* note 70, at 97–98.

100. *Id.* at 100.

101. Compare with Governor George Wallace's request for federal intervention during the Selma March of 1965.

Rhode Island home at the height of the Dorr Rebellion. Whether their actions were illegal, however, really depended upon whom you asked. Luther argued that Borden's action constituted trespass.[102] Borden claimed that, as a militiaman, he was authorized to arrest Luther; his actions, sanctioned by the state legislature, could not constitute trespass.[103] In reality, whether Borden and the other infantry officers working for the General Assembly committed trespass or were insulated from sanction as officials acting under color of law, turned on whether Thomas Dorr was the rightful governor of Rhode Island, or if that title belonged to Samuel King.[104]

The difficulty of answering this question was inextricably tied to then-prevailing debates over the slavery issue. As the prior section shows, President Tyler refused to take a position on the question of which faction should govern, promising troops in the event of bloodshed but little else in the way of identifying the legitimate government. Indeed, King's request had put Tyler in a bind. While most southerners supported the General Assembly, federal intervention in a state-level dispute that had yet to erupt into violence at the time of King's letter could have contravened the two-decade effort by southern states to protect slavery by limiting federal power under the Clause.[105] If the federal government could decide the lawful government of Rhode Island, then it could make a similar determination should a conflict arise between pro-slavery and anti-slavery factions within a state. Hence, the political branches were reluctant to get involved.

Seven years after the break-in, the Supreme Court decided *Luther v. Borden*, declining to resolve whether the defendants committed trespass when they entered the home of Martin Luther.[106] The Court held that the issue was nonjusticiable since the dispute turned on the question of which faction was the lawful government of Rhode Island, a determination resolvable by the political branches and not the courts.[107] But the Court reached this conclusion through some dubious reasoning and by creative use of the facts. For example, President Tyler promised federal troops in the event of violence but declined to deem the government of Samuel King to be the lawful one. His promise centered on restoring civil order—not on bestowing official recognition on either of the

102. Luther v. Borden, 48 U.S. (7 How.) 1, 1 (1849).

103. *Id.* at 35.

104. *Id.*

105. WIECEK, *supra* note 70, at 102–03; *see also* Michael A. Conron, *Law, Politics, and Chief Justice Taney: A Reconsideration of the* Luther v. Borden *Decision*, 11 AM. J. LEGAL HIST. 377, 381 (1967) ("To allow the federal government the option of deciding which of two rival factions—slave or free, for example—was more republican, would grant to the central authority a power over the admission of new states (and thus over the extension of slavery) that the South had consistently rejected.").

106. *Luther*, 48 U.S. at 1.

107. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1911 (2015) (noting that *Luther* applied a variation of the political question doctrine in which "political questions were *factual* determinations made by the political branches that courts treated as conclusive in the course of resolving cases").

entities vying for power in Rhode Island. Nonetheless, *Luther* treated Tyler's promise of aid as an endorsement of the King government.[108]

The Court essentially left to the elected branches an authority that they had steadfastly refused to exercise because it was in the Court's interest to do so. Indeed, this judicial abstention makes little sense considering the stasis of the political branches when they were faced with this very issue seven years earlier unless the judiciary also favored the status quo, even a dysfunctional one.

Two years prior to *Luther*, Taney had authored another consequential opinion—*Dred Scott v. Sanford*—in which the forbearance and modesty that marked *Luther* was notably missing. In *Dred Scott*, the Court held that the enslaved Scott's travel to a free jurisdiction with his owner did not change his status from a slave to a free person.[109] The Court also held that Scott could never be a citizen of the United States, regardless of whether he was a slave or free; accordingly, he lacked standing to invoke the Court's diversity jurisdiction to challenge his continued enslavement. Rather than dismissing the case at that point, the Court went on to invalidate the Missouri Compromise, which prohibited slavery north of the 36°30' parallel, because Congress lacked authority to prohibit slavery in the territories. Thus, Dred Scott's multi-state journey through slave states and free territories governed by the Compromise had little relevance as a practical matter. By reaching an issue not central to the resolution of the case—the constitutionality of the Missouri Compromise—Taney embroiled the Court in a political dispute over the constitutionality of slavery, rather than have the Court stay its hand just as it would two years later.[110]

Luther marked the rebirth of the very doctrine that could have dictated judicial action in the highly charged political disputes over slavery, but unlike in *Luther* the Court *wanted* to intervene in *Dred Scott*. To continue to honor *Luther* in the name of judicial modesty is to ignore that judicial abstention is, by definition, a decision on the merits. In *Luther*, the Court seemingly avoided the difficult question of which entity was the lawful governing body of Rhode Island, but in essence, its abstention in the face of the political branches' refusal to act left in place a ruling minority and a countermajoritarian status quo. Thus, the political question doctrine has become the vehicle through which the countermajoritarian difficulty lives. And it remains true, just as it was 150 years

108. *See* WIECEK, s*upra* note 70, at 105. *But see* Grove, *supra* note 107, at 1929 ("By declaring itself bound by Congress's determination as to the republican nature of a state government, the Court in *Luther* ensured that it would have to reject any such Guarantee Clause challenge to slavery").

109. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

110. *See* William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820–1860*, 65 J. AM. HIST. 34, 59 (1978) ("If ever a court needed a sense that issues coming before it presented questions that could not be resolved by judges, it was in the slavery cases of the 1840s and 1850s. Yet Taney and most of his associates, invited by Congress and impelled by their own strongly-held convictions, embraced these issues with a foolhardy bravado, discovered that they had become sorcerer's apprentices, and thereby contributed to the destabilization of the constitutional system that hastened the Civil War.").

ago, that invoking the doctrine in the face of inertia by the political branches is an explicit endorsement of the status quo.

Luther v. Borden and the more recent case of *Rucho v. Common Cause* share a common storyline (judicial abstention) and a common enemy (ineffective political actors). In *Rucho,* the Supreme Court held that partisan gerrymandering presented a nonjusticiable political question because of the lack of judicially manageable standards to resolve these claims.[111] The Court based this holding on the presumption that some partisanship in redistricting was legitimate, making it difficult for the Court to determine when gerrymandering was unconstitutional. In addition, structural provisions in the Constitution empowered Congress to regulate gerrymandering, if it so chose. Like the *Luther* Court, the *Rucho* Court explicitly punted to a Congress that had proven to lack political will on this issue and, in the process, endorsed a clearly dysfunctional and unworkable status quo.

But, more important, the Court's decision effectively put the locus of authority in institutions that were themselves countermajoritarian, both in their structure and in how power was exercised within their domains. In the Court's view, it was appropriate to let Congress, with its malapportioned Senate and heavily gerrymandered House, resolve fundamental issues of democracy and democratic legitimacy. Not only was the Court dismissive of the range of plausible approaches to address this problem judicially, but the Court did not meaningfully consider whether there were principles grounded in the constitutional text and judicial precedent that also precluded this abdication of duty.

In particular, the district court had ruled in favor of the *Rucho* plaintiffs on their Elections Clause claim, finding that the North Carolina gerrymander exceeded the scope of the state's authority to legislate the "Times, Places, and Manner" of congressional elections because the Clause "did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts."[112] On appeal, the Supreme Court treated the Elections Clause, not as a judicially enforceable remedy for political inequality, but instead, as an express delegation to Congress to police gerrymandering. The Clause empowered Congress, not the courts, to "make or alter" state regulations, including those that governed redistricting.[113] Invoking *Luther*, the Court argued that the Elections Clause claim was really an argument that the government was non-republican in form, in violation of the Guarantee Clause of Article IV, which the Court had long held to be nonjusticiable.[114]

In fact, precedent indicated that the Supreme Court should not have abstained in *Rucho.* Cases that came long after *Luther v. Borden* have arguably

111. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

112. *Id.* at 2506.

113. *Id.* at 2495.

114. *See* Grove, *supra* 107, at 1928 (arguing that *Luther* did not stand for the proposition that Guarantee Clause claims are nonjusticiable).

pointed in the other direction, recognizing that the failure of the political branches to carry out their obligations to the polity necessitated judicial intervention.

Starting with *Baker v. Carr* in 1962, the reapportionment cases explicitly rejected the idea that "political cases" involving legislative reapportionment necessarily equated to "political questions" that courts could not resolve. *Baker* overruled *Colegrove v. Green*, which had sought to keep the Court out of the "political thicket."[115] *Baker* rejected the argument that the political nature of malapportionment disputes meant that such claims were nonjusticiable.[116]

In making this distinction between "political questions" and "political cases," however, *Baker* sought to evade *Luther* and its progeny. *Rucho* exploited *Baker*'s distinction between political questions and political cases by insinuating that reapportionment and gerrymandering were sufficiently different to put the former in the category of "political case" and the latter in the category of "political question." But as *Luther* exemplified, the Guarantee Clause's conception of republicanism makes it impossible to disaggregate questions about the scope of the individual right to vote from structural questions about how political power is aggregated when thinking through issues of majority rule. This was doubly true in *Rucho*, because reapportionment and gerrymandering both raise constitutional questions about the method of aggregation. In other words, putting *Baker* and *Rucho* side by side, it is conceptually incoherent to say that it is countermajoritarian for the Court to weigh in on some aspects of the aggregation question (gerrymandering) but not others (reapportionment) when both fall in the category of "political cases" based on the Court's precedents.[117]

One would be hard pressed to read Professor Bickel as endorsing this incoherence in his famous articulation of the countermajoritarian difficulty. Bickel never read the cases in which the Court has refused to enter the political thicket—most famously *Colegrove v. Green*[118]—to stand for the proposition that the Supreme Court would never intervene in political disputes, regardless if we called them questions or cases.[119] While *Colegrove* held that malapportionment claims presented nonjusticiable political questions, Bickel pointed to the Fifteenth Amendment as an example of judicial intervention in the political thicket—albeit spotty intervention—for the better part of fifty years by the time

115. Baker v. Carr, 369 U.S. 186, 217 (1962).

116. *Id.* ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.").

117. Karlan, *supra* note 6, at 2351 ("As for its own precedent, the [*Rucho*] Court's account of the one-person, one-vote cases that made quantitative vote dilution claims justiciable[117] is striking for the way it focused entirely on the Warren Court's individualist rhetoric. It avoided any recognition of the decisions' majoritarian underpinnings.").

118. 328 U.S. 549 (1946).

119. Alexander M. Bickel, *The Durability of* Colegrove v. Green, 72 YALE L.J. 39 (1962).

Colegrove had been decided.[120] He rejected the idea that the Fourteenth Amendment did not similarly invite judicial administrability along the same lines and denied that these issues were ones that should lie with Congress, rather than the courts, to enforce their terms. According to Bickel, just as the Court had interpreted the Commerce Clause to be judicially reviewable, despite the fact that its text began with "Congress shall have Power," so too should the Election Clause's delegation to Congress "to make or alter" state regulations have been judicially reviewable.[121] Also, as Professor Bickel so aptly observed, "a judicial system that swallowed *Brown v. Board of Education* and *Cooper v. Aaron* would hardly strain at *Colegrove v. Green* or *Baker v. Carr*."[122]

Writing after *Baker v. Carr* but before *Reynolds v. Sims*, Bickel saw *Baker* as at odds with *Colegrove*, but he nonetheless recognized that the Court was not obligated to stand by in the face of a refusal by the political branches to address the problem of malapportionment, an outcome that *Colegrove* did not demand even if *Luther* might. As Bickel observed, "[n]ow to say that the apportionment problem cannot, just at present, be resolved by judges is not to argue that it ought to be allowed to go unresolved. If the Court must defer to political judgment, it is entitled to ask for a political judgment to defer to."[123]

Luther stretched the facts to find a political judgment to defer to, and *Rucho* didn't bother, ignoring that the political branches had declined, so far, to exercise their judgment because of rank partisanship. As Professor Karlan aptly noted, "the political mechanism the Framers included in the Constitution for dealing with unfair allocation of congressional seats—a grant of power to Congress to override a state's choice of the manner used to elect members of Congress—does not work in a world of political parties."[124]

Ultimately, there is no judicial escape from the political thicket. The reapportionment decisions shared the same problem of judicial manageability as the segregation decisions, which is the exact same problem that the Court faced

120. *Id.* at 39–40 ("*Baker v. Carr* has made clear what the decision in *Colegrove v. Green* was not and should never have been thought to be. *Colgrove* did not hold that the Court may never interfere with the election process, or that there are no judicially enforceable constitutional principles that apply to elections. For the Court has interfered consistently for some fifty years to enforce the [F]ifteenth [A]mendment's guarantee that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.' Nor—though a passage in Mr. Justice Frankfurter's opinion does tend in this direction—can *Colegrove* rest on the proposition that the Constitution, properly interpreted, confides to Congress exclusive authority to regulate congressional elections. For plainly the [F]ifteenth [A]mendment cuts across any such exclusive authority, and as a matter of textual interpretation, there is no readily apparent reason why the [F]ourteenth [A]mendment's guarantee of the equal protection of the laws should not similarly cut across and similarly authorize judicial intervention.").

121. *Id.* at 39–40.

122. *Id.* at 40. *Cooper v. Aaron*, 358 U.S. 1 (1958), reaffirmed the core holding of *Brown v. Board of Education*, stating that the state of Arkansas could not delay school integration and had to admit Black children.

123. Bickel, *supra* note 119, at 44.

124. Karlan, *supra* note 6, at 2350.

with partisan gerrymandering. Instead of a general rule of nonjusticiability, the Court must decide for itself the scope of its involvement in these political disputes. This is the principle that must prevail in these controversies rather than allowing the countermajoritarian difficulty to be opportunistically used by courts to facilitate partisan outcomes.

CONCLUSION

The political institutions enshrined in the Constitution of 1787 have changed into entities that few Founding Fathers would recognize, representing an ever-shrinking share of "We the People." American democracy has failed in the past, and the Supreme Court has had a starring role in many, if not all, of these tragedies, both explicitly and by abdicating its duties of oversight. By treating the countermajoritarian difficulty as unique to the judicial branch, we facilitate these failures by giving the courts a ready-made excuse to avoid policing the political thicket, even in cases where judicial review may be the least of all evils. As Professor Karlan effectively showed, the countermajoritarian difficulty is hard-wired in our Constitution—through the Senate and the Electoral College—and demographic changes have rendered these institutions a greater danger than any risk posed by the judicial regulation of the political thicket. Corresponding attempts by state legislatures to shrink the electorate through the authority that the Constitution gives these entities to set the rules of state and federal elections only further illustrate that it is not the courts that present the real countermajoritarian difficulty. Until legislation is truly the product of democratic majorities, judicial intervention should be embraced rather than feared.