A COUNTER-MAJORITARIAN CRITIQUE OF ORIGINALISM

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The paper aims to demonstrate that the interpretive theory of originalism is based on a majoritarian conception of democracy which is antithetical to the basic counter-majoritarian premise of the US Constitution. The criticism focuses on the counter-majoritarian argument proposed in favour of originalism, according to which the main counter-majoritarian feature of the Constitution relates to the semantic stability of its content, which is then methodologically implemented in constitutional interpretation through the concept of fixed meaning. It is argued that this proposition is in fact purely procedural since it equates the idea of limiting political majorities in relation to the rights of minorities with the requirement of a supermajority in the constitutional amendment process – hindering the implementation of substantive constitutional values such as equality and fundamental rights protection. A counter-majoritarian argument against originalism based on the institutional role of courts is developed in order to show that originalism marginalizes judicial input in the development of constitutional doctrine. It follows that originalism effectively removes the counter-majoritarian power from the framework of checks and balances, giving wide latitude to democratic branches of government, and opening the door to tyranny of the majority.

Keywords: originalism, constitutional interpretation, counter-majoritarian difficulty, constitutional democracy, judicial review

1. INTRODUCTION

In 2022, the Supreme Court of the United States of America (Supreme Court) issued its ruling in *Dobbs v. Jackson Women's Health Organization*.[1] This decision explicitly overruled the well-known precedent *Roe v. Wade*[2] and thus removed the protection of a woman's right to terminate a pregnancy from the remit of the federal Constitution. In practice, this meant that the issue of access to abortion was left to regulatory choices of each state after nearly 50 years of federal protection. Although this jurisprudential shift greatly disrupted the tectonics of women's rights across the United States (US), it hardly came as a surprise. The 2020 confirmation of Amy Coney Barrett to the Supreme Court

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[1] *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022), slip opinion, available at https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf accessed 13 March 2023.

[2] *Roe v. Wade* 410 U.S. 113 (1973).

cemented the 6-3 (super)majority in favour of the justices nominated by Republican presidents.[3] In one way or another, these "conservative" justices all foster originalism,[4] an interpretive theory which holds that constitutional interpretation ought to determine the original meaning of constitutional provisions, i.e. the meaning ascribed to the provision when it was adopted. From the perspective of originalism, the right of a woman to undergo an abortion cannot be embedded in the due process clause of the 14th amendment to the Constitution, as this guarantee of liberty was not understood to include protection of abortion at the time it was ratified.[5] The regressive recourse to "history and tradition"[6] in determining the original meaning of constitutional provisions is the main methodological trademark of originalism. Therefore, the overruling of *Roe v. Wade* can be characterized as "the triumph of originalism"[7] and, considering the current composition of the Supreme Court, originalism is the new normal in constitutional interpretation.

In the majority opinion in *Dobbs*, Justice Alito set forth that "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives".[8] This dictum illustrates a fundamental misconception of originalism – its preference for majoritarian decision-making which disregards the proper role of the judicial function in constitutional democracy.[9] Originalists claim that certain contemporary issues, such as the use of contraceptives,[10] same-sex marriage,[11] or gender equality[12] are not part of the original meaning of the Constitution, and consequently do not qualify for judicial protection. Even if those issues touch upon the most sensitive and private aspects of the

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[3] Justices Thomas, Roberts, Alito, Gorsuch, Kavanaugh and Barrett have all been nominated by a Republican president. See Supreme Court of the United States: https://www.supremecourt.gov/about/biographies.aspx accessed 10 March 2023.

[4] Justices Thomas, Gorsuch, Kavanaugh and Barrett are self-proclaimed originalists. Justice Alito describes himself as a "practical originalist". Chief Justice Roberts has often joined opinions that relied on originalist methodology. See Wurman, I., "What Is Originalism? Did It Underpin the Supreme Court's Ruling on Abortion and Guns? Debunking the Myths" https://theconversation.com/what-is-originalism-did-it-underpin-the-supreme-courts-ruling-on-abortion-and-guns-debunking-the-myths-186440 accessed 13 March 2023.

[5] *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022).

[6] See Siegel, R., *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism— and Some Pathways for Resistance*, vol. 101, no. 5, Texas Law Review, 2023, pp. 1127 – 1204.

[7] Alicea, J. J., "An Originalist Victory" https://www.city-journal.org/dobbs-abortion-ruling-is-a-triumph-for-originalists accessed 4 March 2023.

[8] *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022), Opinion of the Court, p 7.

[9] Although Justice Alito's statement could be regarded as a classic argument of respect for federalism, I see it primarily as an issue of relocating the decision on abortion to the appropriate decision-making forum in a qualitative sense rather than in the sense of the vertical division of powers – the right to decide on abortion should be granted to democratic (hence "legitimate") institutions as opposed to undemocratic fora (the courts). This is also evident in the concurring opinion of Justice Kavanaugh in which he states that the abortion problem "will be re-solved by the people and their representatives in the democratic process in the States or Congress", thus accepting that a federal authority (Congress) is a potential decision-maker regarding the issue of abortion. *Dobbs v. Jackson Women's Health Organization* (Kavanaugh, J., concurring), p. 10.

[10] *Dobbs v. Jackson Women's Health Organization* (Thomas, J., concurring), p. 3.

[11] Ibid.

[12] See Robson, R., "Justice Scalia's Legacy on Gender Equality: No Need to Remember the Ladies" https://ohrh.law.ox.ac.uk/justice-scalias-legacy-on-gender-equality-no-need-to-remember-the-ladies/ accessed 13 March 2023.

lives of individuals, and as such should be classified as issues of fundamental rights, originalism posits that those phenomena are to be resolved in the democratic process.

This paper demonstrates that the theory of originalism is inherently majoritarian and thereby antithetical to the basic premise of the US Constitution – the protection of minorities from unrestrained majority rule. In other words, originalism accepts that majority rule is the main feature of the US legal system, and as such is "normatively superior to other values", including equality.[13] Chemerinsky termed this idea as the "majoritarian paradigm",[14] while Dworkin called it the "majoritarian premise".[15]

The criticism focuses on the flawed counter-majoritarian justification for originalism developed by Justice Scalia which claims that judicial interpretations of the Constitution that diverge from its original meaning allow judges to infuse majoritarian preferences into constitutional doctrine.[16] Consequently, the concept of fixed meaning guarantees that the content of a constitutional provision will be stable and insulated from capricious majority rule, at the same time accepting that its alterations can be achieved only by constitutional amendment.[17] It will be argued that this argument is purely procedural because it equates the counter-majoritarian character of the Constitution with the requirement of a supermajority in amending the Constitution. As a corollary, originalists marginalize the substantive counter-majoritarian features of the Constitution, such as guarantees of equality and fundamental rights protection, which are safeguarded in the institutional architecture based on checks and balances that necessitates the counter-majoritarian role of the judiciary. The meaning of constitutional provisions is not fixed upon their adoption but is rather defined in institutional practice by all three branches of government. To that extent, constitutional interpretation necessarily requires judges to rebalance power in society and protect the legitimate interests of the minor party without being bound by a fixed original meaning. As will be elaborated, originalism marginalizes the role of courts as the main guardians of substantive counter-majoritarian values by insisting on the concept of fixed meaning.

The argument is divided into two parts. It is argued in the second section that originalism is a theory of constitutional interpretation that is inherently majoritarian. In the third section, a counter-majoritarian argument based on the institutional role of the judiciary in constitutional democracy is developed as an argument against originalism. Concluding remarks follow.

[13] Chemerinsky, E., *Foreword: The Vanishing Constitution*, Harvard Law Review, vol. 103, no. 1, 1989, p. 75.
[14] Ibid.
[15] Dworkin, R., *Freedom's Law: The Moral Reading of the American Constitution*, Oxford University Press, New York, 1996, pp. 15 – 16.
[16] Scalia, A., *A Matter of Interpretation: Federal Courts and the Law: An Essay*, Princeton University Press, Princeton, 1997, p. 47.
[17] Ibid.

2. ORIGINALISM AS A MAJORITARIAN THEORY OF CONSTITUTIONAL INTERPRETATION

Originalism posits that constitutional provisions have acquired fixed meaning upon their adoption which in turn limits constitutional doctrine.[18] In interpreting the Constitution, judges should strive to identify that fixed meaning by determining the original public meaning of the wording of the provision at the time of its adoption.[19] Modern-day policy considerations in light of societal development generally cannot be used in interpretation as a gateway to rewrite the original public meaning of constitutional provisions.[20] The question is why not? The answer is found in the theoretical justification for originalism and (how convenient) in the context of its original emergence. The answer to the question "why should judges apply originalism" also reveals its underlying majoritarian paradigm.

The aim of this section is to demonstrate that originalism is based on a majoritarian conception of democracy. The argument is divided into three subsections. The first considers the reactionary genesis of originalism. The second links the majoritarian matrix of originalism to the theoretical framework of counter-majoritarian difficulty. The third subsection provides a critique of the concept of the fixed meaning of constitutional provisions as a counter-majoritarian guarantee.

2.1. The Origin of Originalism

Originalism is a reactionary theory that emerged as a critical response to the "liberal" constitutional jurisprudence of the Warren Court developed from the 1950s to the late 1960s.[21] Robert Bork's 1971 article "Neutral Principles and Some First Amendment

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[18] The first central point of originalism is known as the fixation thesis, or the proposition that the meaning of constitutional provisions is fixed upon their adoption and cannot transcend their "semantic content" by interpretation. Solum, L. B., *What is Originalism? The Evolution of Contemporary Originalist Theory* in Huscroft, G., Miller, B. W. (eds), *The Challenge of Originalism*, Cambridge University Press, pp. 33 – 34. The second central point of originalism is the contribution thesis, or the idea that historical meaning of constitutional provisions should control (and thus serve as a limitation to) the legal meaning expressed through constitutional doctrine. Solum, L. B., *What is Originalism? The Evolution of Contemporary Originalist Theory* in Huscroft, G., Miller, B. W. (eds), *The Challenge of Originalism*, Cambridge University Press, p. 35; Whittington, K.E., *Originalism: A Critical Introduction*, Fordham Law Review, vol. 82., no. 2, 2013, p. 377.

[19] There are two main methodological approaches to originalism – the idea of identifying the framers' intent and the idea of discovering the original meaning of a constitutional provision as understood by the public at the time of its ratification. As Whittington notes, originalism "has now largely coalesced around original public meaning as the proper object of interpretive inquiry." Whittington, op. cit. (fn. 18), p. 380.

[20] See *New York State Rifle & Pistol Association, Inc. v. Bruen* 597 U.S. ___ (2022), Opinion of the Court, slip opinion, p. 8, available at https://www.supremecourt.gov/opinions/21pdf/20-843_7j80.pdf

[21] Chemerinsky, E., *Worse Than Nothing: The Dangerous Fallacy of Originalism*, Yale University Press, New Haven and London, 2022, p. 19. The era during which Justice Warren served as the Chief Justice of the Supreme Court (1953-1969) is recognized as the most "liberal" era of the Supreme Court of all time. Among other things, its rulings expanded the rights of criminal defendants (*Miranda v Arizona* 384 U.S. 436 (1966), *Mapp v. Ohio* 367 U.S. 643 (1961), *Gideon v. Wainwright* 372 U.S. 335 (1963)), endorsed racial equality (*Brown v. Board of Education of Topeka* 347 U.S. 483 (1954), *Loving v. Virginia* 388 U.S. 1 (1967)), paved the way for constitutional protection of reproductive rights (*Griswold v. Connecticut* 381 U.S. 479 (1965)), and affirmed separation of the church and state (*Engel v. Vitale* 370 U.S. 421 (1962)). The "liberal jurisprudence" continued throughout the first years of the Burger Court (1969 – 1986), including protection of the right to

Problems"[22] inaugurated the ideas that would become known as originalism roughly a decade later.[23] In this highly influential article, which was used as intellectual artillery against *Roe v. Wade* in 1973,[24] Bork attempted to lay down his main criticism of the Warren Court, focusing on the treatment of the 1st amendment in Supreme Court case law. Generally, Bork was concerned with the issue of the legitimacy of judicial authority in a model of governance which entails "popular consent to limited government by the Supreme Court".[25] As Bork argued, the "Madisonian model" of constitutional governance is essentially based on a majoritarian premise with a counter-majoritarian corrective.[26] The Constitution accommodates both the majoritarian and the counter-majoritarian elements in order to prevent two extremes – "the tyranny of the majority and the tyranny of the minority".[27] The former "occurs if legislation invades the areas properly left to individual freedom", while the latter "occurs if the majority is prevented from ruling where its power is legitimate".[28] Additionally, neither the majority nor the minority should be given the power to "define the freedom of the other" due to their conflicting interests.[29] The "dilemma" generated by a system which juxtaposes majority rule to individual freedom in search of accommodation is resolved by vesting the power to define "the respective spheres of majority and minority freedom" in the Supreme Court.[30]

Bork further argues that the resolution of the dilemma embodied in the Supreme Court, as envisaged by the "Madisonian model", is necessarily based on the popular acceptance of the Supreme Court's power to govern.[31] Specifically, the Supreme Court's power to govern is legitimate "only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority".[32]

Therefore, Bork asserts that justices (and judges generally) should have a valid theory of constitutional interpretation to constrain themselves from imposing their own value choices in adjudication. Moreover, Bork claimed that the then latest Supreme Court jurisprudence demonstrated it had no coherent theory of constitutional interpretation to enhance its legitimacy in defining spheres of majority and minority freedom. The notion

abortion (*Roe v. Wade* 410 U.S. 113 (1973)) and upholding affirmative action as constitutional (*Regents of the University of California v. Bakke* 438 U.S. 265 (1978)).

[22] Bork, R., *Neutral Principles and Some First Amendment Problems*, vol. 47, no. 1, Indiana Law Journal, 1971,

[23] Chemerinsky, op. cit. (fn. 21), p. 3. The approach was first known as interpretivism.

[24] Ibid, p. 4.

[25] Bork, op. cit. (fn. 22), p. 2.

[26] Ibid, p. 3.

[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] Ibid.

of courts overstepping their power and delivering rulings not on the basis of law but based on their personal convictions or ideologies is also known as judicial activism.[33] Bork's criticism of the Warren Court's "judicial activism" offered a solution to the judicial power grab in a principled exercise of constitutional interpretation that aims to extrapolate the framers' intent, which would later be known as the early version of originalism.[34]

As Bork wrote elsewhere, "[t]he Court headed by Chief Justice Earl Warren from 1953 to 1969 occupies a unique place in American law. It stands first and alone as a legislator of policy, whether the document it purported to apply was the Constitution or a statute. Other Courts had certainly made policy that was not theirs to make, but the Warren Court so far surpassed the others as to be different in kind".[35] The intellectual origin of originalism is an articulation of dissatisfaction with the underlying principles (or the alleged lack thereof) in the case law of the Warren Court which broadened individual liberties to the detriment of majority rule. Originalism is thus best understood as a theory of constitutional interpretation devised to limit "raw judicial power"[36] which lacked legitimacy to restrain policymaking by democratically elected officials. Hence, Bork yearned for a theory of constitutional interpretation that would make judicial review more democratic.[37]

After revisiting the origins of originalism and describing it as a theory that emerged from the criticism of (liberal) judicial activism, aiming to limit the discretion of the Supreme

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[33] Judicial activism is an ambivalent term. It is often described simply as an opprobrium, or a pejorative rhetorical tool used both by conservatives and liberals to express substantive disagreement with a certain decision. Smith, S. D., *Judicial Activism and Reason*, in Pereira Coutinho, L., La Torre, M., Smith, S.D. (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences*, Springer, 2015, p. 22. Chemerinsky generally accepts that judicial activism is a rhetorical device used to discredit a decision one does not agree with. However, Chemerinsky gives a more workable definition of judicial activism: "I often have the sense that 'judicial activism' is just a label for the decisions that people don't like. But we can define judicial activism and restraint in functional terms: a decision is activist if it strikes down laws and restrained if it upholds them; it is activist if it overrules precedent and restrained if it follows precedent; it is activist if it rules broadly and restrained if it rules narrowly". Chemerinsky, op. cit. (fn. 21), p. 19. It should also be noted that judicial activism in its practical sense is a value-neutral label since it has been associated both with "liberal" as well as "conservative" rulings of the Supreme Court. The infamous case *Lochner v. New York* 198 U.S. 45 (1905) in which the Supreme Court struck down a law setting minimum working hours for bakers has been described as "conservative" judicial activism. The Lochner era of the Supreme Court, encompassing *Lochner* and its progeny, is often labelled as right-wing judicial activism in which the Supreme Court consistently struck down laws that pursued economic measures of the New Deal on the basis that it violated freedom of contract protected by the due process clause. See Bernstein, D. E., *Lochner v. New York: A Centennial Retrospective*, Washington University Law Quarterly, vol. 83, no. 5, 2005, pp. 1469 – 1527. On the other hand, many decisions of the Warren Court have been labelled as "liberal" judicial activism. One of the most disputed decisions from the perspective of conservative legal commentators is *Griswold v. Connecticut* 381 U.S. 479 (1965), protecting the freedom of married couples to buy and use contraceptives on the basis of the implied right to privacy.

[34] The early version of originalism was concerned with identifying the framers' intent. See supra fn. 19 and Berger, R., *Government by Judiciary: The Transformation of the Fourteenth Amendment*, Liberty Fund, Indianapolis, 2nd edition, 1997, p. 410.

[35] Bork, R., *The Tempting of America: The Political Seduction of the Law*, Free Press, New York, 1990, p. 69.

[36] This phrase was used in the dissenting opinion by Justice White *in Doe v. Bolton* 410 U.S. 179 (1973), p. 222.

[37] Chemerinsky, op. cit. (fn. 21), pp. 30 – 31.

Court, the central two points of the argument will be addressed. First, originalism is the progeny of the idea known as counter-majoritarian difficulty. Second, the theoretical framework of counter-majoritarian difficulty is inherently majoritarian.

2.2. Justifying Originalism: Judicial Review Through the Lens of Counter-Majoritarian Difficulty

The term counter-majoritarian difficulty was coined by Bickel in his 1962 book "The Least Dangerous Branch" where it was stated that "judicial review is a deviant institution in American democracy".[38] The prerogative of judicial review gives courts the power to strike down laws enacted by the legislature on the basis of their incompatibility with the Constitution.[39] According to Bickel, "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it".[40] In a nutshell, the argument framed as counter-majoritarian difficulty purports that "[j]udicial review conflicts with democracy because it permits unelected judges to invalidate actions taken by representative branches of government".[41]

The tension between democracy and judicial review became "the central obsession of modern constitutional scholarship" ever since the idea of counter-majoritarian difficulty entered academic discourse.[42] The debate mostly consists of either defending the counter-majoritarian role of judicial review or arguing against it on the basis of "democratic deficit".[43] However, understanding judicial review through the lens of counter-

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[38] Bickel, A. M., *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, New Haven and London, 2nd edition, 1986, p. 18.

[39] It should be noted that the power of judicial review is not part of the text of the Constitution. On the contrary, it was established by the Supreme Court in the renowned 1803 case *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803). Chief Justice John Marshall described the logic behind judicial review in the following words: "So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply". *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), p. 178.

[40] Bickel, op. cit. (fn. 38), pp. 16 – 17.

[41] Hutchinson, D. L., *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, Minnesota Journal of Law and Inequality, vol. 23, no. 1, 2005, p. 1.

[42] Friedman, B., *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, vol. 73, no. 2, New York University Law Review (1998), p 334.

[43] Zoffer, J. P., Grewal, D. S., *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary,* California Law Review Online, vol. 11, 2020, p. 459.The most productive defence of judicial review was put forth by John Hart Ely in his theory of representation reinforcement. Zoffer, J. P., Grewal, D. S., *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary,* California Law Review Online, vol. 11, 2020, p. 459. The theory of "representation reinforcement" claims that "[w]here the mechanisms of democracy themselves have failed, courts can find a warrant in the Constitution for intervening". Dorf, M. C., *The Majoritarian Difficulty and Theories of Constitutional Decision-Making*, University of Pennsylvania Journal of Constitutional Law, vol. 13, no. 2, 2010, p. 288. Specifically, Ely asserts that the Supreme Court should correct "process failures" of the democratic representatives which curtail political freedoms because then the Supreme Court "does not

majoritarian difficulty – as a deviant institution of the US legal system – is possible only if one has a purely majoritarian vision of democracy. In other words, the view that judicial review is a deviant institution of the US constitutional model rests on the "majoritarian paradigm" which is based on "the belief that democracy is the essence of the American constitutional order".[44] As Chemerinsky explains, "Bickel defined democracy as majority-rule – decisionmaking by electorally accountable officials".[45] Moreover, "the majoritarian paradigm" is the source of the idea that judicial review, or "judicial value imposition – is in tension with American democracy".[46] Therefore, theories of judicial review which accept the analytical framework of counter-majoritarian difficulty view judicial review as antagonistic to democracy defined as majority rule. Instead of understanding majority rule and judicial review as cooperative models of implementing constitutional ideals, counter-majoritarian difficulty distils majoritarian decision-making as the ultimate constitutional value "normatively superior to other values".[47] At the same time, counter-majoritarian guarantees which stem from equally important constitutional values, such as equality, are conceptualized as aberrations that halt majority rule. Dworkin argues that the "majoritarian conception of democracy" generates the idea that "judicial review compromises democracy" and hence "the central question of constitutional theory must be whether and when that compromise is justified".[48] When one understands judicial review as a threat to democracy, the majoritarian paradigm emerges as the underlying premise of constitutional law. Judicial review is no longer a vital component of constitutional democracy that can be a pushback force when the majority oversteps its area of authority. Instead, judicial review in its misunderstood form is the object of theories of interpretation which aim to reduce it to a constitutional exception and synchronize it with majority rule. The majoritarian paradigm does not rule out exceptions to democracy defined as majoritarian decision-making.[49] However, the majoritarian paradigm embraces that it is "always unfair when a political majority is not allowed to have its way".[50] In that context, judicial review is understood as an incongruity in a majoritarian system.

Originalism is a theory of constitutional interpretation rooted in the framework of counter-majoritarian difficulty.[51] Bork attempted to respond to Bickel's argument of counter-majoritarian difficulty and to "reconcil[e] judicial review with electoral democracy" by claiming "that originalist judicial review is democratic because the people consented to adopt the Constitution, and originalism just follows what was agreed to by

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invade the democratic process; instead, it 'reinforces' the representation of disenfranchised and vulnerable classes". Hutchinson, op. cit. (fn. 41), p. 11.

[44] Chemerinsky, op. cit. (fn. 13), p. 74.

[45] Ibid, p. 71.

[46] Ibid, p. 73.

[47] Ibid, p. 75.

[48] Dworkin, op. cit. (fn. 15), p. 18.

[49] Ibid, p. 16.

[50] Ibid, pp. 16 – 17.

[51] See also Freeman, S., *Original Meaning, Democratic Interpretation, and the Constitution*, Philosophy & Public Affairs, vol. 21, no.1, Winter, 1992, pp. 3 – 42.

ratification".[52] The need for reconciling judicial review with electoral democracy reveals "the originalist premise that American democracy should be defined as majority rule or that this concept of democracy must be reconciled with judicial review".[53] The link between the framework of counter-majoritarian difficulty and originalism is also evident in the basic justification of originalism which says that originalism is a theory that can "constrain the courts and limit the circumstances under which judges could invalidate the actions of the popular branches".[54] As a theory which aims to constrain judges from judicial activism, originalism is essentially a "majoritarian critique[] of judicial activism".[55] Originalists hence purport to have found the answer to the question of how to exercise judicial review that is as compatible as possible with democracy defined as majority rule. This question is rooted in Bickel's basic argument that "judicial review may, in a larger sense, have a tendency over time seriously to weaken the democratic process".[56] If judicial review is a deviant institution because it is a "counter-majoritarian check on the legislature and the executive",[57] then originalism is a majoritarian check on judicial review. Originalism accepts the criticism of judicial review from the perspective of counter-majoritarian difficulty and internalizes the mission of making judicial review more democratic, at the same time redefining the constitutional mandate of the judiciary.

The argument advanced in this subsection can be summarized as follows. Originalism came to be as a reactionary theory of constitutional interpretation born from criticism of the "activist" jurisprudence of the Supreme Court in a certain historical context. Originalists accept the proposal that judicial review is a deviant institution in so far as it contravenes democratic decision-making. In order to make judicial review more democratic, originalists claim that applying originalism limits judicial discretion, which in turn makes the substance of judicial decisions closer to the societal consensus accepted upon the ratification of the Constitution.[58] By advancing "the myth of judicial restraint",[59] originalism embodies the modern incarnation of formalism.[60] Originalists claim that their theory is desirable since it can "yield determinate results".[61] Chemerinsky reminds us that "[f]ormalism is impossible in constitutional law", notwithstanding its alluring promise of determinacy.[62] The non-originalist position does not advocate for an unbridled judiciary that has no theory of consistent constitutional interpretation. On the contrary, non-

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[52] Chemerinsky, op. cit. (fn. 21), pp. 77 – 78.
[53] Ibid, p. 78.
[54] Sherry, S., *Why We Need More Judicial Activism*, Vanderbilt Public Law Research Paper No. 13-3, 2013, p. 5, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213372 accessed 13 March 2023.
[55] Ibid, p. 4.
[56] Bickel, op. cit. (fn. 38), p. 21.
[57] Ibid.
[58] Chemerinsky, op. cit. (fn. 21), p. 78.
[59] Ibid, p. 19.
[60] Ibid, p. 167.
[61] Ibid.
[62] Ibid. Chemerinsky explains how throughout the 20th century legal realism "demolished formalism" by demonstrating how adjudication is "inherently discretionary" because "all legal rules are value choices". Chemerinsky, op. cit. (fn. 21), pp. 167 – 168. For further discussion on formalism, see Schauer, F., *Formalism*, The Yale Law Journal, vol. 97, no. 4, 1988, pp. 509 – 548.

originalists explain that originalism advances a false promise of judicial restraint due to its scepticism of the legitimacy of judicial power to strike down democratically enacted laws.[63]

After establishing that originalism is rooted in the idea of counter-majoritarian difficulty, which embraces the majoritarian paradigm, the next subsection will address the counter-majoritarian argument offered in favour of originalism. That argument is paradoxically also rooted in majoritarianism.

2.3. The Fixed Meaning of Constitutional Provisions as a Counter-Majoritarian Guarantee

Originalism strives to make judicial review more democratic in order to mitigate counter-majoritarian difficulty. However, originalism nominally accepts the counter-majoritarian premise of the Constitution. Originalists justify the interpretive search for original meaning with a counter-majoritarian argument that was very clearly formulated by Justice Scalia, writing in his academic capacity:

"If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all."[64]

Several conclusions can be drawn from this argument. First, the alternative to originalism is constitutional evolution by interpretation. Justice Scalia adamantly rejects that approach because evolutive[65] constitutional interpretation would be guided by the sentiments of the majority. As a corollary of accepting constitutional evolution by interpretation, elected officials would fill judicial seats with candidates whose vision of society corresponds to the views of the majority that elected those officials. Second, allowing the courts to interpret the Constitution in light of current understandings of fundamental rights boosted by social progress marks the ultimate devaluation of the Bill of Rights. This is so because the Bill of Rights is an undemocratic guarantee of individual freedom which serves as an exception to majority rule and is insulated from majoritarian interference by the supermajority.[66] It follows that the counter-majoritarian quality of the

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[63] See Chemerinsky op. cit. (fn. 21), p. 185.

[64] Scalia, op. cit. (fn. 16), p. 47.

[65] The term "evolutive interpretation" is borrowed from the case law of the European Court of Human Rights. It denotes a dynamic approach to interpretation of the ECHR which takes into account new developments and policy changes. See Schabas, W. A., *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford, 2015, pp. 47 – 48.

[66] Amending the US Constitution is regulated by Article V of the Constitution. The process consists of two stages – the proposal and ratification. In the proposal stage, either both Houses of Congress must pass the proposal by a two-thirds majority, or Congress should call a constitutional convention on the request of two-thirds of the States. In the ratification stage, three-fourths of State legislatures, or three-fourths of State

Bill of Rights ends once courts abandon the original meaning because the content of constitutional provisions would inevitably be adjusted through interpretation to suit the will of the current majority. Eventually, constitutional evolution by interpretation would make the Bill of Rights legally worthless as it would no longer have immutable meaning. Instead, its meaning would be prone to evolution via judicial interpretations in a manner that follows dominant societal views. Under this framework, the concept of fixed meaning emerges as a methodological tool which can allegedly secure minority rights against majoritarian infringements by ensuring that the content of constitutional provisions remain stable. In other words, fixed meaning should limit judges from responding with approval to majoritarian sentiments, which in turn preserves the immutability and insulation of constitutional content.[67]

Justice Scalia reiterates a weighty argument – the Constitution cannot be interpreted in a manner which corresponds to a purely majoritarian vision of society.[68] However, the originalist counter-majoritarian argument allows exactly for that since it conceptualizes the stability of the content of constitutional provisions as a constitutional value which protects the minority from majoritarian infringements. The meaning of a constitutional provision is fixed at the time of its adoption – it absorbs dominant social views of that point in history. Any interpretive adjustment of that meaning to suit the spirit of the Constitution and to rebalance power in contemporary society is not legitimate. This is a formalistic argument[69] which reduces the counter-majoritarian nature of the Constitution to a procedural trait[70] and disregards a whole range of substantive values expressed through general constitutional principles. The procedural requirement of the supermajority in amending the Constitution does not disqualify judicial protection of groups that have historically not been considered as oppressed and constitutionally protected. This is because fundamental rights protection should not depend on the will of a supermajority to amend the Constitution.[71] Evolutive judicial protection of fundamental rights is a substantive constitutional value that does not disparage the function of the amendment process but rather complements it.[72] In the end, preserving the semantic stability of constitutional content through fixed meaning will not protect the minority – it is the judiciary with its institutional capacity to define the content in specific disputes that will protect the minority.

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ratifying conventions must ratify the proposal. See National Archives - The Constitution of the United States: A Transcription https://www.archives.gov/founding-docs/constitution-transcript accessed 13 March 2023.

[67] Somewhat contradictorily, Justice Scalia is concerned that judges might act as an extension of the electoral majority, while at the same time arguing for a more democratic approach to constitutional interpretation.

[68] It should be noted that constitutional evolution by interpretation does not lead to majoritarian interpretations of the Constitution that endanger its counter-majoritarian quality. See Chemerinsky, E., *Interpreting the Constitution*, Praeger, New York, 1987, pp. 113 – 115.

[69] Justice Scalia defends formalism with an oversimplistic statement of how "[t]he rule of law is about form". Scalia, op. cit. (fn. 16), p. 25.

[70] The Constitution can be amended only by a supermajority.

[71] Chemerinsky, op. cit. (fn. 21), 113.

[72] See ibid, p. 112.

The basic idea that the fixed meaning of constitutional provisions should coordinate instances in which the interests of the majority clash with the rights of the minority is deeply flawed. Under originalism, judicial review is reduced to a portal to a certain point in time that can transfer the mindset of past generations which lived when the Constitution or constitutional amendments were enacted to current controversies. The historical understanding expressed in fixed meaning should answer the question of whether protecting a distinct minority is worthy of curbing majority rule. Originalism has this basic deficiency since it purports to resolve the counter-majoritarian difficulty. As explained above, originalism emerged as an alternative to the liberal jurisprudence of the Warren Court. The main target of its criticism was case law developing implied rights in the Constitution which protected the rights of individuals that were not secured in the democratic process. This line of case law which originalists renounce as a constitutional abomination illustrates the majoritarian conception of judicial review that is bound by the concept of fixed meaning.

The landmark 1965 Supreme Court ruling in *Griswold v. Connecticut*[73] struck down a Connecticut law which criminalized the purchase and use of contraceptives for married persons. The Supreme Court found that the prohibition contained in the law infringed the right to privacy implicitly protected by the Constitution. As Justice O. Douglas wrote in the famous majority opinion, "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance".[74] Furthermore, numerous rights contained in the Bill of Rights "create zones of privacy".[75] Justice O. Douglas identified various reflections of the right to privacy in, inter alia, the 3rd amendment's prohibition of the quartering of soldiers in any house in times of peace without the consent of the owner, or in the 4th amendment's guarantee against unreasonable searches and seizures.[76] This implied independent right to privacy served as a legal basis to protect married couples from criminal liability for buying and using contraceptives. The implied right to privacy was later used as a legal basis for other cases, including *Eisenstadt v. Baird*[77] and *Roe v. Wade*. The jurisprudence of penumbra enabled the Supreme Court to interpret the Constitution functionally, by subsuming social phenomena under general[78] constitutional guarantees of individual liberty, and respecting the spirit of the Constitution. The "penumbral reasoning" as "reasoning-by-interpolation" is a tool used for identifying the constitutional rights that are not part of the simple textual premise of the Constitution.[79] Rather, penumbral rights penetrate

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[73] *Griswold v. Connecticut* 381 U.S. 479 (1965).
[74] *Griswold v. Connecticut* 381 U.S. 479 (1965), Opinion of the Court, p. 484.
[75] Ibid.
[76] Ibid.
[77] *Eisenstadt v. Baird* 405 U.S. 438 (1972). The ruling extended the right to use contraceptives to unmarried persons.
[78] On the principled nature of constitutional norms, see Dworkin, R., *The Model of Rules*, The University of Chicago Law Review, vol. 35, no. 1 (Autumn, 1967), pp. 14 - 46; Dworkin, R., *Hard Cases*, Harvard Law Review, vol. 88, no. 6, 1975, pp. 1057 – 1109.
[79] Reynolds, G. H., *Penumbral Reasoning on the Right*, University of Pennsylvania Law Review, vol. 140, no. 4, 1992, p. 1334.

through the wording of multiple constitutional provisions. The constitutional edifice consists both of written guarantees of an open-textured[80] nature as well as its derivations that give them concrete expression. Thus, a penumbral reading of the Constitution deploys constitutional provisions as functional avenues of protection instead of limited textual guarantees which have historically been taken from the hands of the majority.

Originalists reject this sort of interpolation in constitutional interpretation. Bork described reliance on the implied right to privacy in *Griswold v. Connecticut* as the "creation of a new device for judicial power to remake the Constitution".[81] Moreover, Bork considered the penumbral reasoning which identified the right to privacy in the penumbra of the Constitution as "the construction of a constitutional time bomb".[82] Originalists find that reading the guarantees of individual liberties in the Constitution as a set of broad principles which are not historically condensed is too dangerous as it leads to unrestrained judicial power. Bork's analysis of *Griswold v. Connecticut* reveals a constrained vision of the judiciary which asks for a formalistic rather than a functionalist reading of constitutional rights: "Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights".[83] Bork stated that Justice O. Douglas performed "the miracle of transubstantiation" as he failed to demonstrate "how a series of specified rights combined to create a new and unspecified right" is capable of encompassing the right of married couples to purchase and use contraceptives.[84] The criticism also included a slippery slope argument to attack the invocation of the right to privacy of such general extent, claiming that it could lead to the construction of a "general constitutional right to be free of legal coercion".[85] The sum of Bork's criticism of penumbral reasoning is contained in the following conclusion: "Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure".[86] It follows that adherence to original meaning in those instances urges the courts not to protect the minority, but to leave the issue to the democratic process – the majority.[87] This idea could also be expressed as constitutional "absence" or "silence".[88] If the Constitution is silent on a single issue, meaning that it does not regulate it explicitly, as in the case of abortion or contraception,

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[80] Indeterminacy of open-textured law generates the need for interpretation. See Chemerinsky, op. cit. (fn. 21), pp. 181 – 184.
[81] Bork, op. cit. (fn. 35), p. 99.
[82] Ibid, p. 95.
[83] Bork, op. cit. (fn. 22), p. 8.
[84] Ibid, pp. 8 – 9.
[85] Ibid, p. 9.
[86] Ibid.
[87] Ibid, p. 10.
[88] Langford, C. L., *Scalia v. Scalia: Opportunistic Textualism in Constitutional Interpretation*, The University of Alabama Press, Tuscaloosa, 2017, p. 101.

that issue is by virtue of historical constitutional choice left to the political process. Hence, no interpolation by interpretation could substitute the democratic principle of majority rule in making such value choices. However, when courts decide to leave an issue to the democratic process, a value choice is made – majority interests triumph over minority interests.[89] On the other hand, it is clear that the Constitution contains broad principles of a general nature, and it is not an exhaustive list of individual rights that can be perceived by wording only.[90] Originalists claim that the Constitution does not protect those rights which are not part of the original meaning of the Constitution. Formalistic logic takes those rights out of the judicial arena and leaves them to platforms of majority rule. Instead of protecting the current minority, originalists at the same time protect the historical majority's understanding of constitutional guarantees, and the current majority.[91] The idea that the historical majority's understanding of social relations should remain authoritative is untenable since the ignorance and prejudice of historical majorities often go hand in hand with the interest of the current majority, and to the detriment of the current minority. Notwithstanding this reality, once the courts abandon original meaning, the originalist constitution departs from the legitimate understanding of exceptions to democracy as understood by its ratifiers. In other words, it stops being a truly legitimate counter-majoritarian document, and becomes a tool for "legislating policy from the bench"[92] that constructs new exceptions to democracy without legitimacy. Understood in originalist terms, the Bill of Rights becomes "another expression of [majoritarianism]".[93]

Justice Scalia once stated that courts should not "invent new minorities that get special protections".[94] Originalists claim that protecting only those minorities that historical majorities thought to be deserving of protection is a constitutional value that should be preserved because nobody agreed to protect other minorities.[95] The majoritarian paradigm is evident – judges are bound by the original meaning in order not to expound the limits to majority rule set by the historical majority. The concepts of "minority" as well as "majority" are understood in a fixed historical sense, instead of in a general sense.

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[89] Courts deferring to the legislature could be described as judicial passivism, which is only the flip side of judicial activism. See Goldner Lang, I., *Towards 'Judicial Passivism' in EU Migration and Asylum Law?* in Ćapeta, T., Goldner Lang, I., Perišin, T.*, The Changing European Union: A Critical View on the Role of Law and Courts*, Hart Publishing, Oxford, 2022, pp. 175 – 192. Available at SSRN: https://ssrn.com/abstract=3597017 accessed 10 March 2023.

[90] As an example, it should be noted that originalists do not question judicial protection of the implied right to travel from one state to another. See *Dobbs v. Jackson Women's Health Organization* (Kavanaugh, J., concurring), p. 10.

[91] See Chemerinsky, op. cit. (fn. 21), p. 78.

[92] Bork, op. cit. (fn. 35), p. 16.

[93] Singh, R., "Justice Scalia's Philosophy Wasn't Just Immoral, It was Contradictory" https://www.prospectmagazine.co.uk/world/justice-scalia-philosophy-wasnt-just-immoral-it-was-contradictory-us-supreme-court accessed 13 March 2023.

[94] Politico, "Antonin Scalia: Don't Invent Minorities" https://www.politico.com/story/2013/08/antonin-scalia-dont-invent-minorities-095692 accessed 13 March 2023.

[95] To draw a parallel, Yoshino wrote about "pluralism anxiety" in constitutional law, referring to judicial reluctance to protect new kinds of different people, both in the context of immigration, which opens the door to people of different ethnic, cultural or religious backgrounds, as well as in the context of the emerging visibility of traditionally oppressed groups. See Yoshino, K., *The New Equal Protection*, Harvard Law Review, vol. 124, no. 3, 2011, pp. 747 – 803.

Taking as authoritative the views of a "largely agrarian society where slaves existed in many states"[96] regarding the dynamic development of fundamental rights issues leaves numerous vulnerable minorities without constitutional protection.

Under this conceptual background, fixed meaning is revealed not merely as "a meaning" (i.e. the specific content of a provision) but as an interpretive concept which stems from a purely procedural understanding of the counter-majoritarian premise, and which serves to project dominant social attitudes, including prejudice, into constitutional provisions. It solidifies (historical) majoritarian judgments as constitutional truths which can be challenged only in the prescribed amendment procedure. Consequently, the protection of minority rights is supposed to depend on a concept that is epistemically convoluted[97] and that aims to democratise judicial review.

After arguing that the concept of fixed meaning is inherently majoritarian, in the next section it will be argued that the counter-majoritarian essence of the Constitution comes to fruition in the institutional arrangement of checks and balances. It will be explained how originalism fails to grasp that the supermajority did not limit legislative majorities through the fixed (substantive) content of constitutional provisions. Legislative majorities were rather limited by the institutional framework in which these open-textured guarantees will be defined in a manner that will optimally achieve the balance of power in society.[98] This institutional architecture assigns to the judiciary the paramount role in defining the content of constitutional provisions in a manner which protects the minority from majoritarian infringements in general, not just in a historical sense.

3. THE ROLE OF JUDICIAL REVIEW IN CONSTITUTIONAL DEMOCRACY: A COUNTER-MAJORITARIAN ARGUMENT AGAINST ORIGINALISM

In this section, a counter-majoritarian argument against originalism is developed. The first subsection lays down the conceptual differences between democracy defined as majority rule, and constitutional democracy. The second subsection argues that courts are counter-majoritarian institutions that ought to interpret the Constitution to restrain the democratic branches of government once the majority invades the protected area of minority freedom, without being bound by fixed original meaning.

3.1. Embracing Constitutional Democracy – Rejecting the Majoritarian Paradigm

The majoritarian paradigm – democracy defined as majority rule – in which judicial review is a counter-majoritarian deviation is not the underlying value of a society

[96] Chemerinsky, op. cit. (fn. 21), p. 93.
[97] Ibid, p. 44 et seq.
[98] See Madison, J., *The Federalist no. 51* (first published in 1878) in Madison, J., Hamilton, A., Jay, J., *The Federalist Papers*, Penguin Books, London, 1987, pp. 318 – 322.

governed by a constitution.[99] A constitution inherently poses limitations on majoritarian decision-making through counter-majoritarian features. Therefore, majority rule subordinated to counter-majoritarian mechanisms constitutes a constitutional or liberal democracy.

Dworkin juxtaposes "the majoritarian conception of democracy" to the "constitutional conception of democracy".[100] The majoritarian conception of democracy accepts the majoritarian premise, while the constitutional conception of democracy rejects it.[101] Dworkin defines the majoritarian premise as a position according to which democracy should mean "that collective decisions always or normally be those that a majority or plurality of citizens would favor if fully informed and rational".[102] On the other hand, the constitutional conception of democracy supposes "that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect".[103] The constitutional conception of democracy holds the "equal status of citizens" as the utmost value, consequently accepting that both majoritarian institutions as well as correctives of majority rule have an equally important status.[104] When majoritarian institutions fail to respect "democratic conditions" which secure "equal status for all citizens" – other non-majoritarian institutions should reinforce those conditions without objection "in the name of democracy".[105] While striking down laws as unconstitutional is perceived as a "moral regret" from the majoritarian perspective, the constitutional conception of democracy accepts it as an avenue of securing equal status for all citizens.[106]

In his 1997 article "The Rise of Illiberal Democracy", Zakaria distinguishes between democracy and constitutional liberalism.[107] Democracy is "about the procedures for selecting government", namely "competitive, multiparty elections" based on majority rule.[108] On the other hand, constitutional liberalism relates to "government's goals" which entail protecting the "individual's autonomy and dignity against [the] coercion" of "state, church, or society".[109] Constitutional liberalism is a notion which consists of philosophical ideas of equality and individual liberty ("liberalism"), as well as the tradition of the rule of law ("constitutional").[110] Zakaria argues that "constitutional liberalism has led to democracy, but democracy does not seem to bring constitutional liberalism".[111] For

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[99] Chemerinsky, op. cit. (fn. 13), p. 64.
[100] Dworkin, op. cit. (fn. 15), p. 17.
[101] Ibid, p. 20.
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Ibid, pp. 17 - 18.
[107] Zakaria, F., *The Rise of Illiberal Democracy,* Foreign Affairs, vol. 76, no. 6, 1997, pp. 22 – 43.
[108] Ibid, p. 25.
[109] Ibid, pp. 25 – 26.
[110] Ibid, p. 26.
[111] Ibid, p. 28.

example, the Austro-Hungarian Empire was a "liberal autocracy".[112] Today, liberal autocracies do not exist since embracing liberalism has ultimately generated democracy.[113] On the other hand, the phenomenon of "illiberal democracies" demonstrates how majoritarianism does not necessarily lead to respect for individual rights.[114] Democracy centres on "accumulation and use" of power.[115] Constitutional liberalism revolves around "limitation of power".[116] Zakaria further describes the American legal system as "based on an avowedly pessimistic conception of human nature", characterized by its undemocratic features, most prominently visible in the Supreme Court which consists of "nine unelected men and women with life tenure".[117] Democracy itself is not a system which generates liberal values, such as respect for individual rights. Constitutional liberalism is a concept which limits governmental authority by respecting individual liberty, and democracy is a set of procedural mechanisms which constitutes the government according to majoritarian preferences.

Chemerinsky differentiates the substantive definition of democracy from its purely procedural counterpart.[118] The procedural, and hence incomplete, definition of democracy is equated with majority rule – the idea that "all decisions should be subject to control by electorally accountable officials".[119] According to Chemerinsky, this simplistic, procedural definition of democracy is "descriptively inaccurate and normatively not desirable".[120] The Constitution is "an antimajoritarian document reflecting a distrust of government conducted entirely by majority rule".[121] Moreover, an authoritative constitution which lays down the structure of government and protects fundamental rights "achieves desirable goals" – "it prevents dictatorship, lessens the likelihood of tyranny, maximizes protection of minorities", protects fundamental rights, and also serves as a "powerful unifying symbol of society".[122] Therefore, the substantive definition of democracy includes values which a constitution stands for. In answering the question why US society should be governed by a constitution, Chemerinsky uses several theories of social contract, including the theory of political liberalism crafted by John Rawls.[123] In a nutshell, Rawls conceptualizes the process of selecting the governing principles of our society by relying on concepts of "original position" and "veil of ignorance".[124] The original position is a hypothetical state in which individuals debate upon which principles to

[112] Ibid, p. 29.
[113] Ibid p. 28.
[114] Ibid. Zakaria gives numerous examples of "illiberal democracies" in Latin America, Africa, and parts of Asia, where democracy has been preserved but constitutional liberalism has been abandoned.
[115] Ibid, p. 30.
[116] Ibid.
[117] Ibid, p. 39.
[118] Chemerinsky, op. cit. (fn. 68), p. 2.
[119] Ibid.
[120] Ibid, Preface, p. ix.
[121] Ibid, p. 2.
[122] Ibid, p. 27.
[123] Ibid, pp. 33 – 35. Chemerinsky also considers criticism of Rawls's theory, concluding that "Rawls's theory justifies the existence of a constitution only if basic principles of liberal ideology are accepted". Chemerinsky, op. cit. (fn. 68), p. 35.
[124] Rawls, J., *Political Liberalism: Expanded Edition*, Columbia University Press, New York, 2005, p. 22 – 27.

govern themselves.[125] The debate is characterized by the veil of ignorance – nobody is aware of their personal factors, such as race, sex, or wealth, that would determine their place in society.[126] Once the individuals do not know whether they would be part of the powerful majority, or would be the weaker party, the position for bargain is fair.[127] Rawls argues that individuals behind the veil of ignorance would decide to be governed by a liberal constitution based on the principle of limited power and equality.[128] Constitutional governance which combines majoritarian and counter-majoritarian mechanisms is therefore based on the underlying substantive value of equality which places the individual as part of a collective of individuals in the centre.

The US Constitution does not place majority rule as the highest principle upon which society is organized. It rather establishes a system in which majoritarian "precepts about the good life" do not become "universally binding".[129] Under constitutional democracy, "counter-majoritarian guarantees ultimately protect individual agents active in all spheres of social life and their pursuance of whatever they may consider a good life".[130]

Madison highlighted the difference between a "pure democracy" and a "republic".[131] In defending the premise of the US Constitution, Madison developed the notion of "faction".[132] A faction consists of a number of citizens who are united by "common passions or interests", "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community".[133] Citizens forming the faction can belong either to a minority or a majority.[134] Madison argues that causes of faction cannot be removed since removing them would mean either "destroying the liberty" or "giving to every citizen the same opinions, the same passions, and the same interests".[135] Instead of removing the cause of faction, the objective is to control its effects.[136] When a faction consists of a minority, the principle of democracy defeats it.[137] However, when a faction consists of a majority, a "pure democracy" can find no cure for it.[138] Madison further claims that "a republic" can "secure the private rights and public goods" from the danger of faction, at the same time preserving "the spirit and the form of popular government".[139] The main force to withhold the effects of faction is found in the federal composition of the republic

[125] Ibid.
[126] Ibid, p 23.
[127] Ibid, pp. 22 – 27.
[128] Ibid.; Chemerinsky, op. cit. (fn. 68), pp. 33 – 35.
[129] Rodin, S., *Liberal Constitutionalism, Rule of Law and Revolution by Other Means*, Il Diritto dell' Unione Europea, no. 2, 2021, p. 230.
[130] Ibid, p. 224.
[131] Madison, J., *The Federalist no. 10* (first published in 1878), in Madison, J., Hamilton, A., Jay, J., *The Federalist Papers*, Penguin Books, London, 1987, p. 126.
[132] Ibid, pp. 122 – 128.
[133] Ibid, p. 123.
[134] Ibid.
[135] Ibid.
[136] Ibid, p. 125.
[137] Ibid.
[138] Ibid, p. 126.
[139] Ibid, pp. 125 – 126.

– the "influence of factious leaders may kindle a flame within their particular States but will be unable to spread general conflagration through the other States".[140] The larger size of the republic would generate a plurality of interests as well as institutional avenues to accommodate those interests. The structure of government should be designed to sustain the effects of a majority faction that threatens the rights of the minority and the public good. The US system of governance provides "three cures" to control a majority faction: "federalism, separation of powers and judicial review".[141] Judicial review is a vital part of constitutional democracy envisaged to protect the minority from a majority faction. When democracy is not understood in "purely procedural" terms as majority rule with unfortunate counter-majoritarian deviations from that rule, but as a system of government based on substantive values of equality, mutual respect, and protection of individual rights, judicial review does not have to be adjusted to suit the majoritarian paradigm.[142] Constitutional democracy does not mechanically combine majority rule with counter-majoritarian exceptions – it presupposes a set of underlying values that express the need for upholding the equality and dignity of all individuals in a society. Those basic values are then safeguarded through constitutional mechanisms which encompass both majoritarian decision-making and counter-majoritarian avenues.[143]

After establishing the difference between majoritarian democracy and constitutional democracy, it is necessary to assess the counter-majoritarian nature of courts as institutions. The constitutional mandate ascribed to the judiciary diverges from the originalist vision of judicial review. The courts are not supposed to safeguard the stability of content of constitutional provisions without enforcing general counter-majoritarian values. The substantive counter-majoritarian value dictates the judiciary to protect the minority against a majority faction.

3.2. Courts as Counter-Majoritarian Institutions: Protecting the Minor Party

All government officials and institutions engage in constitutional interpretation.[144] The question is who gets the last word?[145]

The legislative branch interprets the Constitution while exercising its authority to legislate, which entails elaborating broad constitutional provisions into statutes, and its other prerogatives. The executive interprets the Constitution when it enforces the law. Both powers are based on democratic legitimacy derived from the electorate. Courts, on the other hand, are not democratically accountable to the people.

[140] Ibid, p. 128.
[141] Rodin, op. cit. (fn. 129), p. 219.
[142] Chemerinsky, op. cit. (fn. 68), pp. 6 – 7.
[143] Chemerinsky, op. cit. (fn. 13), pp. 75 – 76.
[144] Chemerinsky, op. cit. (fn. 68), p. 81.
[145] Ibid.

Chemerinsky argues that the judiciary should be the authoritative interpreter of the Constitution for several reasons, including the following.[146] The Constitution is a counter-majoritarian document which should be interpreted in a counter-majoritarian manner.[147] The judiciary is best equipped to provide protection from majoritarian pressures due to its insulation from politics.[148] Judicial interpretation takes into account the "long-term interests" of society in contrast to the "immediate interests" pursued by the current majority.[149] Furthermore, the judiciary deploys a decision-making method preferable for defining the content of constitutional provisions.[150] Judges are required to base their decisions on arguments and legal reasoning, and to explain their reasons for reaching a particular decision.[151]

It follows that separation of powers combined with checks and balances[152] generates an interpretive triangle in which all three branches of government take part.[153] The legislative and the executive branch engage in constitutional interpretation with the aim to achieve the interests of their electorate. The system of checks and balances constitutes the judiciary as the undemocratic, and also the authoritative interpreter of the Constitution.[154]

The counter-majoritarian argument against originalism from the position of constitutional democracy asserts that courts should define the content of constitutional provisions by engaging in constitutional interpretation. The content of constitutional provisions was never meant to acquire a fixed meaning in order to be antidemocratic. In other words, the counter-majoritarian character of the Constitution is not equated with the pure procedural requirement of a supermajority in amending the Constitution. Counter-majoritarian features of the Constitution substantively relate to achieving the equality of all citizens, especially of those in the minority who cannot benefit from the democratic process. This counter-majoritarian premise is implemented in the institutional design which enables all three branches of government to define the meaning of constitutional provisions. The judiciary is the authoritative interpreter tasked with limiting the democratic branches of power when their actions infringe upon minority rights. To flesh out the argument, two points will be addressed.

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[146] Ibid.

[147] Ibid, p. 35.

[148] Ibid, p. 86.

[149] Ibid, p. 89.

[150] Ibid.

[151] Ibid.

[152] A system in which power is distributed among the three branches of government in an overlapping manner in order to prevent accumulation of power that could lead to tyranny. See Madison, op. cit. (fn. 98), pp. 318 – 322.

[153] See Bader Ginsburg, R., *Speaking in a Judicial Voice*, New York University Law Review, vol. 67, no. 6, 1992, p. 1198.

[154] In *Marbury v. Madison*, Chief Justice John Marshall proclaimed the following: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each". See *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803), p. 177.

First, the judiciary is counter-majoritarian in its institutional capacity. Hamilton described the judicial branch as "the least dangerous to the political rights of the Constitution" since it cannot exercise its authority on its own.[155] The legislature "commands the purse" and "prescribes the rules" of conduct, while the executive "holds the sword of the community".[156] The judiciary has "neither force nor will but merely judgment".[157] The execution of its decisions depends on the executive branch of government. The judiciary is institutionally devised in such a way as to be independent of political majorities. Courts are not democratic institutions, which means that the people cannot influence them directly in the same way as they can replace officials in democratic institutions through elections. Considering that courts are not democratic, but instead counter-majoritarian institutions, their institutional setup as "the weakest power" means that "the general liberty of the people can never be endangered from that quarter".[158] In separating the judiciary from the other two powers, constitutional design enables judicial review to emerge as the guarantee of the supremacy of the Constitution. Hamilton defends declaring acts contrary to the Constitution as void by invoking hierarchy, comparing the relationship between the statutes and the Constitution to the one between a servant and its master.[159] When a particular statute – a subordinate authority – contravenes the Constitution – the superior authority – judges should adhere to the latter.[160] The Constitution expresses the will of all the people, while statutes express the will of a current legislative majority.[161] The power of judicial review makes the courts an "intermediate body between the people and the legislature" that can "keep the latter within the limits assigned to their authority".[162] In other words, the judiciary is institutionally counter-majoritarian since its legitimacy does not depend on the results of elections, as its main task is to limit the democratic branches of power.

Second, the main substantive counter-majoritarian value enshrined in the Constitution relates to the power of the judiciary as an institution to control the effects of a majority faction by defining the content of constitutional provisions. The supermajority limited legislative majorities and itself primarily by establishing an institutional framework to define the content of the Constitution, not by petrifying power structures that existed in a certain historical context. It is true that the Constitution is composed of a set of principles which have been elevated by the supermajority from majoritarian decision-making. That procedural trait is closely intertwined with the importance of judicial review – the Constitution lays down the rules of the game which the players cannot change out of convenience. Once the democratic branches break the rules, the counter-majoritarian power corrects the breach and restores the rules. However, the judiciary cannot limit the

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155 Hamilton, A., *The Federalist no. 78* (first published in 1878) in Madison, J., Hamilton, A., Jay, J., *The Federalist Papers*, Penguin Books, 1987, p. 437.
156 Ibid.
157 Ibid.
158 Ibid.
159 Ibid, p. 438.
160 Ibid, p. 439.
161 Ibid.
162 Ibid, pp. 438-439.

democratic branches of government effectively if its counter-majoritarian tool is supposed to be synchronized with majoritarian decision-making. As explained above, originalism requires the courts to uphold the will of historical majorities to the detriment of current minorities. If the Constitution is textually "silent"[163] on certain issues, the judiciary should not protect the minority but rather falsely proclaim its neutrality in the name of democracy. That neutrality is false since the minority will inevitably lose in the democratic process.[164] Institutionally, courts should protect the minority.

Protecting the minority as a constitutional value is important because it amounts to protecting the weaker party.[165] Protection of a weaker party is omnipresent in legal regulation – it is visible in consumer protection, competition law, rules on shifting the burden of proof, etc.[166] The constitutional mandate of courts reflects the underlying idea that the counter-majoritarian essence of a constitution substantively relates to protecting the minority as a weaker party in society.[167] It should also be noted that a minority is not a purely statistical category.[168] On the contrary, the sociological definition of a "minority group" entails individuals who are discriminated against on the basis of their common identity.[169] Therefore, although women are not statistically in the minority, the systemic discrimination they suffer collectively on the basis of their identity makes them holders of a "minority group status".[170] The US Constitution is not value neutral in respect of power balance between the stronger and the weaker party, especially regarding the possible misuse of that power against the weaker party.[171] It seeks to prevent the side-effects of "prejudice against discrete and insular minorities".[172] The "tyranny of the majority"[173] is inevitable in the absence of counter-majoritarian institutions.[174] This means that the minority cannot follow its own vision of a "good life"[175] when the majority is unrestrained by the need to respect the fundamental rights of every individual. For these reasons, courts are supposed to be "bulwarks of a limited Constitution against

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163 Langford, op. cit. (fn. 88), p. 101.

164 Desmond Tutu said the following about false neutrality: "If you are neutral in situations of injustice, you have chosen the side of the oppressor. If an elephant has its foot on the tail of a mouse and you say that you are neutral, the mouse will not appreciate your neutrality". Available at Oxford Reference: https://www.oxfordreference.com/display/10.1093/acref/9780191843730.001.0001/q-oro-ed5-00016497;jsessionid=28B8F7C1C4D628647261B657205CCA86 accessed 10 March 2023.

165 Rodin, op. cit. (fn. 129), p. 215.

166 Ibid, p. 216. Rodin further explains that legislation which protects the stronger party has no significant effect since the stronger party is part of the majority that could achieve its goals without protection by legislation (pp. 215 – 216).

167 Ibid, p. 215.

168 Hacker, H. M., *Women as a Minority Group*, Social Forces, vol. 30, no. 1, 1951, p. 60.

169 Ibid.

170 Ibid.

171 See Rodin, op. cit. (fn. 129), pp. 215 – 216.

172 *United States v. Carolene Products Co*. 304 U.S. 144 (1938), Opinion of the Court, p. 153. The famous footnote 4 in the majority opinion written by Justice Stone states that the Supreme Court should use a strict standard of review when a law is, inter alia, motivated by prejudice against "discrete and insular minorities".

173 The notion was first used in De Tocqueville, A., *Democracy in America* (first published in two volumes in 1835 and 1840), Mansfield, H. C., Winthrop, D. (eds), The University of Chicago Press, Chicago, 2000.

174 Hamilton, op. cit. (fn. 155), p. 440.

175 Rodin, op. cit. (fn. 129), p. 224.

legislative encroachments".[176] Moreover, courts should "guard the Constitution and the rights of individuals from the effects of those ill humors" that have a tendency to oppress "the minor party in the community".[177] Disqualifying the power of courts to define the meaning of constitutional provisions (and insisting to simply proclaim it) leaves the weaker party without protection.

Hamilton declared that "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today".[178] This account also illustrates the flexibility of constitutional arrangements content wise.[179] The content of constitutional provisions is susceptible to interpretation which inherently makes it manipulable.[180] The landmark Supreme Court decision in *Brown v. Board of Education*[181] which *de iure* ended racial segregation in schools illustrates this point. Several originalists have tried to reconcile *Brown* with originalist methodology.[182] However, many scholars have demonstrated that the original understanding of the 14th amendment did not prohibit racial segregation.[183] In fact, the same Congress that passed the 14th amendment also voted for school segregation.[184] The 1896 decision *Plessy v. Ferguson*[185] which upheld racial segregation is today considered as one of the worst Supreme Court decisions of all time. In contrast, *Brown* is celebrated as one of the most important Supreme Court decisions which paved the way for racial equality before the law. The original understanding of the 14th amendment clearly did not prohibit racial segregation in schools. Some originalists have accepted that *Brown* is not based on the original meaning of the 14th amendment.[186] According to the originalist formula, the Supreme Court should not have protected the racial minority from inhumane segregation because that would have amounted to an illegitimate exercise of judicial authority that would curb majority rule. In spite of that, *Brown* is an example of a decision based on the counter-majoritarian capacity of the Supreme Court as an institution. Resorting to fixed meaning in that case would not have resulted in upholding the substance of the Constitution, which relates to protecting the minority from a racist majority faction. The Supreme Court in *Brown* defined the content of the 14th amendment contrary to the interpretations of legislative and executive power which were in accordance with its original understanding. The phrase "separate but equal" inaugurated by *Plessy v. Ferguson* is not a principle of equality but of contempt. The Supreme Court thus fulfilled its constitutional mandate by serving

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[176] Hamilton, op. cit. (fn. 155), p. 440.
[177] Ibid, p. 440.
[178] Ibid, p. 441.
[179] See Chemerinsky, op. cit. (fn. 21), pp. 181 – 184.
[180] Compare e.g. Strauss, D. A., *The Living Constitution*, Oxford University Press, New York, 2010, pp. 2 – 3.
[181] *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954).
[182] E.g. Wurman, I., *A Debt Against the Living: An Introduction to Originalism*, Cambridge University Press, New York, 2017, p. 108. See McConnell, M. W., *The Originalist Case for Brown v. Board of Education*, Harvard Journal of Law and Public Policy, vol. 19, no. 2, 1995, pp. 457 – 464.
[183] McConnell, op. cit. (fn. 182), p. 457.
[184] Chemerinsky, op. cit. (fn. 21), pp. 98 – 99.
[185] *Plessy v. Ferguson* 163 U.S. 537 (1896). The decision held that racial segregation (in transportation) was constitutional as long as facilities for both races were equal in quality.
[186] McConnell, op. cit. (fn. 182), p. 457.

as a limit to majority rule which contradicted the Constitution. The equal protection clause of the US Constitution which states that no State shall "deny to any person within its jurisdiction the equal protection of the laws"[187] could have been interpreted using originalist methodology that would have allowed racial segregation. The Supreme Court instead decided to protect the minority.

The counter-majoritarian role of judicial review understood in a substantive, institutional manner makes a case against originalism. The judiciary cannot act as a counter-majoritarian institution if its power to shape constitutional doctrine is bound by the historical meaning of constitutional provisions. The majority and the minority are not static categories.[188] The aim of a constitution is not to fit a whole historical era into a document. Its purpose is rather to elevate certain values that can be institutionally operationalized to accommodate conflicting interests in society – procedurally it allows the majority to make value-choices while ensuring respect for minority rights. To some extent, this argument is similar to Ely's claim that the US Constitution is less concerned with elaborating the exact content of substantive provisions because it primarily established a system of governance based on separation of powers, and in order to guarantee a fair decision-making process.[189] Therefore, the exact content of constitutional provisions in institutional practice will depend on the current state of affairs in society. Courts as counter-majoritarian institutions in the system of government are supposed to give substance to constitutional provisions with respect to protecting the minority by balancing competing constitutional rights.[190] Balancing the interests of the majority with the rights of the minority is a weighty institutional endeavour. Originalists claim that the Constitution has already done the balancing through its content that has acquired fixed meaning – and this premise is inherently majoritarian because it asks whose rights the majority wished to protect. In fact, the open-textured nature of constitutional principles leaves the exercise of balancing to institutions. In constitutional adjudication, courts, as counter-majoritarian institutions, have to balance constitutional rights without being bound by majoritarian preferences and traditions that originalism infuses into constitutional doctrine. Those traditions are just one variable that should be taken into account while balancing competing constitutional values – not its necessary outcome.[191]

Constitutional democracy normatively rejects the position articulated by Justice Scalia, according to which judges should not write into the Constitution any new minorities that

[187] 14th Amendment to the US Constitution. See National Archives – The Constitution of the United States: A Transcription https://www.archives.gov/founding-docs/constitution-transcript accessed 13 March 2023.
[188] Chemerinsky mentions "past majorities" in Chemerinsky, op. cit. (fn. 21), p. 78.
[189] Ely, J. H., *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge and London, 14th edition, 2002, pp. 88 – 101. However, Ely argued that judicial review is democratic when it reinforces representation of oppressed minorities, hence attempting to reconcile judicial review with majoritarianism. See supra fn. 43; Chemerinsky, op. cit. (fn. 13), p. 72. For this reason, Ely wrongfully disregarded substantive values that are foundational to the notion of political process and to the institutional framework established to balance it. See Chemerinsky (fn. 13), p. 72.
[190] Chemerinsky, op. cit. (fn. 21), pp. 71 – 74.
[191] See ibid, pp. 177 – 178.

deserve special protection. The minority does not have to be qualitatively defined in the Constitution due to the shifting nature of power dynamics.[192] In fact, the equal protection clause of the US Constitution operationalizes the principle of equality towards all – with no enumeration of specific protected characteristics pertaining to individuals.[193] The minority is simply the weaker, outnumbered party vulnerable to majority faction. The legitimate interests of the minority will not be infringed by a majority faction as long as courts act as counter-majoritarian institutions willing to shape, upgrade, or ameliorate the content of constitutional provisions to ensure the pervasiveness of its underlying values. The absence of explicit constitutional language which protects or forbids certain conduct does not disqualify the judicial protection of the minority in the concerned dispute. As explained above, the Supreme Court in *Brown* shaped the equal protection clause of the 14th amendment to protect the racial minority despite the absence of clear language (or historical practice) prohibiting racial segregation.

The counter-majoritarian nature of the Constitution has its substantive dimension – it provides for protecting the minority – and it is safeguarded through institutional design based on checks and balances. Judicial review is a "veto point"[194] which necessarily limits the democratic branches of government in policymaking through counter-majoritarian interpretations. To that extent, "[j]udicial review ensures that the judiciary has the same opportunity as the other two branches to prevent the government from acting unconstitutionally".[195] Eliminating the interpretive input of the judiciary in the development of constitutional doctrine means that counter-majoritarian power is effectively removed from the framework of checks and balances. The two remaining democratic branches of government are then free to violate zones of minority freedom. Marginalization of the judiciary as a counter-majoritarian institution leads to tyranny of the majority.

4. CONCLUSION

This paper has critically reassessed originalism as a theory of constitutional interpretation in US constitutional law. The starting premise was that originalism is based on a majoritarian conception of democracy. In an endeavour to synchronize judicial review with majoritarian decision-making, originalism posits that the object of

[192] It is interesting to note that some constitutions have open-ended clauses in relation to protected characteristics, such as Article 15 (1) of the Canadian Charter of Rights and Freedoms (Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.), available at https://laws-lois.justice.gc.ca/eng/const/page-12.html accessed 10 March 2023, or Article 14 of the Constitution of the Republic of Croatia (published in the Official Gazette nos. 56/90, 135/97, 8/98, 113/2000, 124/2000, 28/2001, 41/2001, 76/2010 and 5/2014). Furthermore, Article 14 of the ECHR (The European Convention on Human Rights 1950, 87 UNTS 103; ETS 5) contains an open-ended non-discrimination clause, available at https://www.echr.coe.int/documents/convention_eng.pdf accessed 10 March 2023.

[193] Chemerinsky, op. cit. (fn. 21), p. 104; Dworkin, R., *Comment* in Scalia, op. cit. (fn. 16), p. 126.

[194] See Watkins, D., and Lemieux, S. E., *Compared to What? Judicial Review and Other Veto Points in Contemporary Democratic Theory*, Perspectives on Politics, vol. 13, no. 2, 2015, pp. 312 – 326.

[195] Sherry, op. cit. (fn. 54), p. 2.

constitutional interpretation is to identify the authoritative original meaning of constitutional provisions. This interpretive methodology is justified by a counter-majoritarian argument that is purely procedural – originalism protects the content of constitutional provisions from evolution by judicial interpretation, thus allegedly safeguarding the essence of constraints upon democracy enacted by the supermajority. The consequence of employing this methodology is that many issues which require the balancing of competing constitutional values are left to the democratic process, leaving the rights of the minority to the mercy of majority rule.

The paper then developed a counter-majoritarian argument against originalism that is consistent with the basic normative elements of constitutional democracy. The separation of powers under the US Constitution provides for a complex framework of checks and balances in which all three branches of government are supposed to define the content of constitutional provisions. The judiciary is the counter-majoritarian branch in its institutional capacity and as such is supposed to protect the minority as the weaker party in society with counter-majoritarian interpretations that limit majority rule. Effective judicial protection of the minority is the substantive value which distinguishes constitutional democracy from its purely procedural counterpart – the majoritarian vision of democracy. Limiting the judicial input of a counter-majoritarian nature in the development of constitutional doctrine inevitably gives broader latitude to democratic institutions, leading to tyranny of the majority. Consequently, the fixed meaning of constitutional provisions is not a force that can (or was supposed to) coordinate the delicate dynamic between the majority and the minority. Instead, that force is found in the institutional design which enables all three branches of government to shape the meaning of law, with the judiciary acting as the counter-majoritarian institution. The reign of originalism does not accept the substantive premise of the Constitution. Living under a constitution means living in a liberal democracy, and no theory of constitutional interpretation should aspire to change its DNA.

PROTUVEĆINSKA KRITIKA ORIGINALIZMA

U radu se nastoji pokazati kako se interpretativna teorija originalizam temelji na majoritarnoj koncepciji demokracije koja je antitetična temeljnoj protuvećinskoj postavci Ustava SAD-a. Fokus kritike je na protuvećinskom argumentu ponuđenom u korist originalizma, prema kojemu se temeljno protuvećinsko svojstvo Ustava odnosi na semantičku stabilnost njegova sadržaja, a koje se metodološki implementira u ustavno tumačenje kroz koncept fiksnog značenja. Tvrdi se kako je ova pozicija zapravo isključivo proceduralna zato što izjednačuje ograničavanje političkih većina naspram prava manjina sa zahtjevom kvalificirane većine u postupku ustavne revizije – onemogućavajući implementaciju materijalnih ustavnih vrijednosti kao što su jednakost i zaštita temeljnih prava. Razvija se protuvećinski argument protiv originalizma utemeljen na institucionalnoj ulozi sudova da bi se pokazalo kako originalizam marginalizira sudski doprinos razvoju ustavne doktrine. Slijedi kako originalizam u stvarnosti uklanja protuvećinsku vlast iz okvira provjera i ravnoteža, ostavljajući široku diskreciju demokratskim granama vlasti i otvarajući vrata tiraniji većine.

Ključne riječi: originalizam, tumačenje ustava, protuvećinska poteškoća, ustavna demokracija, sudbeni nadzor

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