

Chapter 3: Judicial Review, Normative Legitimacy, and Legal Autonomy

This chapter analyzes to what extent the rights-based judicial review of legislation in the United States and Germany is compatible with our autonomy as individuals. It begins with judicial review's³¹⁴ impact on our political autonomy, that is, our capacity to govern ourselves as equals. Thus, it inquires whether judicial review is normatively legitimate—or proper, respect-worthy—in the United States and Germany.³¹⁵ I will argue that there are three distinct justifications for judicial review in Germany and one that applies to the United States.³¹⁶ But it will also reveal that not all of the courts' rulings reflect these justifications. Those that do not throw into relief the problem Alexander Bickel termed the 'countermajoritarian difficulty':³¹⁷ unelected decision-makers substituting their constitutional judgment for that of elected decision-makers.³¹⁸

Constitutional rulings that do not reflect judicial review's justifications are not illegitimate as a result.³¹⁹ It would hence go too far to consider

314 I will use the terms 'judicial review of legislation', 'judicial review', and 'constitutional review' interchangeably. In all cases, I am referring to the review of legislation. See n 361 and accompanying text.

315 On political autonomy and its relationship with the concept of legitimacy, Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Jeffrey Flynn tr, Columbia University Press, New York, 2012) 135–6. For the definition of normative legitimacy as proper or respect-worthy government, see John Rawls, *Political Liberalism* (Columbia University Press, New York, 1996) 137, and Frank I Michelman, 'Ida's Way: Constructing the Respect-Worthy Governmental System', 72 *Fordham L Rev* 345–6 (2003).

316 I will use the terms 'justification', 'legitimacy', and 'legitimation' interchangeably. But see A John Simmons, 'Justification and Legitimacy', 109 *Ethics* 739, 752 (1999) (distinguishing between the justification of the state as such and the legitimacy of a specific state vis-à-vis its citizens).

317 See n 343 and accompanying text.

318 By 'unelected', I mean that they are not selected through popular elections.

319 Some scholars argue that legitimacy is the property of government as a whole, not of its institutions or individual decisions. See, e.g., Allen Buchanan, 'Political Legitimacy and Democracy', 112 *Ethics* 689, 689–90 (2002). Nevertheless, individual decisions can still either contribute to or detract from the government's legitimacy. Therefore, it is more efficient to label them either legitimate or illegitimate in their

them an ‘insult’ to our political autonomy.³²⁰ By not contributing to judicial review’s legitimacy, they at least interfere with, or diminish, our political autonomy, however. To minimize this dilemma and maximize our political autonomy, many scholars suggest some form of judicial moderation.³²¹ By contrast, I will describe how the Supreme Court and the Federal Constitutional Court can maximize a different dimension of our autonomy: our legal autonomy.

We are legally autonomous when and because the law demands behavioral, not attitudinal, compliance—or, put differently, obedience, not endorsement.³²² Niklas Luhmann’s early political sociology teaches us that our legal autonomy diminishes if we cannot presume that (almost) everyone will comply with the law. Applied to judicial review, this means that we are only autonomous under the law established by the Supreme Court and the Federal Constitutional Court if there is no doubt that people will acquiesce in it.

Therefore, I will conclude this chapter by analyzing to what extent judicial review in the United States and Germany meets the conditions that, according to Luhmann, establish a presumption of universal behavioral compliance. Chief among these conditions is that the courts offer each of us an equal chance of obtaining a satisfactory legal outcome. They can do so by maximizing the flexibility, or openness, of constitutional reasoning. In other words, the very phenomenon that aggravates the countermajoritarian difficulty helps strengthen our legal autonomy.

At first blush, Luhmann’s sociology does not lend itself to the normative analysis of constitutional review. Luhmann rejected imbuing the concept of political legitimacy with moral considerations.³²³ By shifting our attention from the narrower concept of legitimacy to the broader idea of individual autonomy, I aim to show, however, how relevant his theory can be to our understanding of judicial review. Consequently, one of my two objectives in

own right. See also Wojciech Sadurski, *Equality and Legitimacy* (OUP, Oxford, 2008) 6–7.

320 But see Jeremy Waldron, ‘A Right-Based Critique of Constitutional Rights’, 13 Oxford J Legal Stud 18, 39 (1993).

321 See notes 603–604 and accompanying text.

322 See notes 606–607 and accompanying text. On attitudinal and behavioral compliance, David Easton, ‘A Re-Assessment of the Concept of Political Support’, 5 Brit J Pol Sci 435, 454 (1975).

323 See Niklas Luhmann, *Legitimation durch Verfahren* (10th edn, Suhrkamp, Frankfurt am Main, 2017) 1–2.

this chapter is to highlight how Luhmann's sociology complements political liberalism in the endeavor to reconcile individuals with the social order that surrounds them.³²⁴

To be sure, there is no lack of scholarship on the countermajoritarian difficulty. 'Hardly a year goes by', remarked Bruce Ackerman in the early eighties, 'without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or, even more darkly, that the countermajoritarian difficulty is insoluble.'³²⁵ His words have lost none of their currency. In 2013, for instance, Or Bassok and Yoav Dotan declared to have 'solved' the countermajoritarian difficulty in the United States. They argue that the American public's enduring support for judicial review is reason enough to consider the latter a product of our consent and hence majoritarian after all.³²⁶ Eight years later, Nikolas Bowie stated before the Presidential Commission on the Supreme Court of the United States³²⁷ that 'the justification for judicial review is not persuasive as a matter of practice or theory'. Accordingly, he advocated '[e]liminating the power of courts to decline to enforce federal law'.³²⁸ To quote Dieter Grimm, '[t]he traditional suspicion of constitutional jurisdiction has recently come to a radical head' in academia.³²⁹

But contrary to what Ackerman suggests, the recurrent attempts at reconciling judicial review and democracy are not merely evidence of a scholarly obsession. Instead, I believe they highlight how precarious and in

324 See also Christoph Möllers, *Freiheitsgrade: Elemente einer liberalen politischen Mechanik* (Suhkamp, Berlin, 2020) para 50 (arguing that sociological theories of how society creates the individual are not only not incommensurate with but also a complement to political liberalism). On justification of the social world as liberalism's core objective, Jeremy Waldron, 'Theoretical Foundations of Liberalism', 37 *Phil Q* 127, 135 (1987).

325 Bruce A Ackerman, 'The Storrs Lectures: Discovering the Constitution', 93 *Yale LJ* 1013, 1016 (1984).

326 Or Bassok and Yoav Dotan, 'Solving the countermajoritarian difficulty?', 11 *Int'l J Const L* 13, 17–26 (2013).

327 Exec Order no 14023, 86 *Fed Reg* 19569.

328 Nikolas Bowie, 'The Contemporary Debate over Supreme Court Reform: Origins and Perspectives', Written Statement to the Presidential Commission on the Supreme Court of the United States, 30 June 2021, pp 1, 24, available at <https://perma.cc/7HK9-CDQC>.

329 Dieter Grimm, 'Neue Radikalkritik an der Verfassungsgerichtsbarkeit', 59 *Der Staat* 321, 322 (2020) (my translation).

need of explanation judicial review's normative legitimacy remains. That is reason enough to critique the arguments currently advanced to support it. Accordingly, the second of my two objectives in this chapter is to update and refine some of the classical cases for judicial review of legislation. We will see that explanations which were persuasive years ago may no longer be as convincing today.

For instance, the German people's decision in 1949 to institute judicial review may no longer carry the same justificatory weight, given that much of the legislation the Constitutional Court may strike down pursuant to this decision has much more recent and straightforward democratic credentials. I will argue that we ought instead to read the Basic Law's provision for judicial review as a mere normative presumption. According to this presumption, the legislature will fail to protect either our constitutional or our moral rights in the absence of external scrutiny. This means that judicial review is justified because it helps safeguard our future political autonomy, not because it issues from a past exercise of self-government.

This change is far from insignificant. If judicial review is legitimate because it issues from an act of self-government, all of the constitutional court's decisions fully reflect our political autonomy.³³⁰ But if judicial review is justified because we fear being worse off without it, our political autonomy benefits more from having the legislature articulate our rights for as long as the parliamentarians are sufficiently solicitous of them.

Throughout this chapter, I will frequently refer not to the Supreme Court or the Federal Constitutional Court but to constitutional courts in general. I do so out of convenience, but also because some (or many) of my observations may apply to constitutional courts around the world. Of course, institutional analysis runs the risk of being either too abstract or plain wrong if it is insufficiently sensitive to the specific facts of the institution.³³¹ For instance, the question of whether a court can interpret the constitution either just as well or better than the legislature depends on the system

330 Provided they are not *ultra vires*, that is.

331 See, e.g., Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP, Oxford, 2013) 139–41.

used to appoint its members as well as on the length of their term.³³² Nevertheless, my observations may offer food for thought to those who conclude that their constitutional court resembles the Supreme Court or the German Constitutional Court closely enough.

Furthermore, I limit my discussion to rights-based review because it has occasioned the most controversy, including in recent years.³³³ I make no claim about the review of statutes for compliance with the rules of constitutional structure.³³⁴ Conversely, I will only consider cases for judicial review that explain *all* instances of rights-based scrutiny. This excludes John Hart Ely's theory of representation reinforcement, which tends to confine judicial review to select constitutional issues.³³⁵ However, I make an exception for the argument that judicial review is legitimate if it helps emancipate marginalized communities, for I cannot say which, or how many, rights must be protected for this to occur.³³⁶

For reasons of conceptual clarity, I will judge each justification of judicial review on its own merits. This means I will not rebut my objections to individual justificatory rationales with arguments from alternative rationales. For example, I will posit that constitutional courts are generally less democratically legitimate than elected legislatures³³⁷ even though feminist scholars have emphasized that parliamentary majoritarianism has primarily

332 See Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd edn, Springer, Dordrecht, 2014) 162.

333 For a case against judicial review of legislation, see, e.g., Ryan D Doerfler and Samuel Moyn, 'Democratizing the Supreme Court', 109 Cal L Rev 1703, 1734–6 (2021), and Nikolas Bowie, 'The Contemporary Debate over Supreme Court Reform: Origins and Perspectives' (n 328). For a case for judicial review, see Susanne Baer, 'Who cares? A defence of judicial review', 8 J Brit Acad 75 (2020), and Dieter Grimm, 'Neue Radikalkritik an der Verfassungsgerichtsbarkeit' (n 329).

334 But see Adrienne Stone, 'Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review', 28 Ox J Legal Stud 1 (2008) (suggesting that the arguments against rights-based review apply to structural review as well). For a tentative case for structural judicial review, see Christoph Möllers, *The Three Branches* (n 331) 128–30.

335 See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge MA, 1981) 105 (emphasizing 'free speech, publication, and political association'). See also Christopher Eisgruber, *Constitutional Self-Government* (Harvard University Press, Cambridge MA, 2001) 46–7 (arguing that Ely's approach is either too narrow or requires willful misinterpretation).

336 See notes 566–569 and accompanying text.

337 See notes 395–397 and accompanying text.

benefited men, not women³³⁸. This, I hope, highlights both the historical development and the incremental sophistication of arguments in favor of judicial review.

Finally, I will not consider the impact of the European Union on the function and justification of judicial review in Germany.³³⁹ Thus, the place of Germany within Europe's burgeoning democratic society is too complex for a single book chapter. Moreover, the German Constitutional Court reviews only statutes enacted by German legislatures, not laws that originate in Brussels and Strasbourg.³⁴⁰ The question of whether its review is legitimate thus turns on a comparison between the Court and the German legislatures, not between the Court and the European Parliament (whose head start in terms of democratic legitimacy is much less clear).³⁴¹

The chapter will proceed as follows. The first three sections center on judicial review's normative legitimacy, that is, its impact on our political autonomy. Section I explains why judicial review of legislation requires justification in the first place and sets out the two criteria most political theorists use to gauge whether a political regime is normatively legitimate.³⁴² Section II centers on the first criterion. Accordingly, it asks whether rights-based judicial review is legitimate because it originates in our political equality as self-governing citizens. It is here we come to the first justification I consider persuasive: I will argue that judicial review is legitimate because of an irrebuttable presumption enacted by political equals.

Section III focuses on the second criterion. It inquires whether judicial review is justified because the constitutional court ensures that government is minimally just. This is where the second and the third successful case for judicial review come in. Such review is legitimate, I will suggest, if the

338 See n 556.

339 But see, e.g., Reinhard Müller, 'Ohne Karlsruhe geht es nicht', *Frankfurter Allgemeine Zeitung*, 6 September 2021, p 1 (arguing that the Court's current purpose is to prevent the European Union from encroaching on the sovereignty of the German people).

340 Art 93 para 1 nos 2 and 4a, Art 100 para 1 of the Basic Law.

341 It does not matter in this regard whether the Court reviews a statute against the Basic Law's fundamental rights or European Charter rights. For the novel review against European Charter rights, see BVerfGE 152, 152 paras 63–73 – *Right to Forget I* (2019), and BVerfGE 152, 216 paras 50–5 – *Right to Forget II* (2019).

342 In the following, I will use terms like 'government' or 'political regime' interchangeably.

constitution establishes an irrebuttable presumption that the legislature will eventually fail to protect our basic human rights if there is no court to check it. Furthermore, it is justified if we can expect the court to implement marginalized communities' idea of just government at least every so often.

Finally, section IV draws from Niklas Luhmann's early political sociology to suggest how constitutional courts can safeguard at least one dimension of our autonomy as individuals—our legal autonomy.

I. The Countermajoritarian Difficulty and the Two Criteria of Political Legitimacy

This section specifies the so-called countermajoritarian difficulty (A) and describes the most commonly proposed sources of political legitimacy (B).

A. The Countermajoritarian Difficulty

The 'reason the charge can be made that judicial review is undemocratic', Alexander Bickel wrote in 1962, is that 'when the Supreme Court declares unconstitutional a legislative act [...], it thwarts the will of representatives of the actual people of the here and now'.³⁴³ For John Hart Ely, the 'central problem' of judicial review was that 'a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd otherwise like'.³⁴⁴

These claims are inaccurate, for they conflate a critique of judicial review with one of constitutional precommitment.³⁴⁵ In no political system that includes constitutional 'disabling provisions'³⁴⁶ can the people's elected representatives govern as they wish. They are duty bound not to enact a law

343 Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, Indianapolis, 1962) 16–7.

344 John Hart Ely, *Democracy and Distrust* (n 335) 4–5.

345 For further examples of such claims, see Jesse H Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (The University of Chicago Press, Chicago, 1980) 6, Ronald Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge MA, 1985) 33, and Michael J Klarman, 'The Puzzling Resistance to Political Process Theory', 77 Va L Rev 747, 768 (1991).

346 Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court', 28 Alta L Rev 324, 326 (1990).

that violates any of the disabling provisions.³⁴⁷ In other words, the crux of judicial review is not that the court frustrates the legislators' political will but that it supplants their interpretation of the constitution's restraints with its own.³⁴⁸

This clarification does not yet explain why judicial review of legislation requires justification. Legitimacy attaches to public *authority*,³⁴⁹ and legal interpretation does not in itself constitute an exercise of public authority; it does not as such alter our normative profile as individuals under the government's jurisdiction.³⁵⁰

Firstly, however, the justices alter our normative profile under statutory law every time they invalidate a statute deemed violative of a constitutional right. By virtue of either law³⁵¹ or precedent³⁵², we are no longer (effectively, in the case of the US) subject to the statute after the court's intervention.

In Germany, for instance, the public prosecution office may now reopen the case against an acquitted defendant if new evidence suggests that a court would very likely convict the defendant of murder or a similarly egregious crime.³⁵³ If the Federal Constitutional Court strikes down this

347 See Lawrence G Sager, 'The Incorrigible Constitution', 65 NYU L Rev 893, 900 (1990).

348 See, e.g., Luís R Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies', 67 Am J Comp L 109, 125 (2019), and Nikolas Bowie, 'The Contemporary Debate over Supreme Court Reform: Origins and Perspectives' (n 328) p 1. For a more detailed explication, see Frank I Michelman, 'Justice as Fairness, Legitimacy, and the Question of Judicial Review', 72 Fordham L Rev 1407–8 (2003).

349 See, e.g., Christoph Möllers, *The Three Branches* (n 331) 51. I will not address the question of whether legitimacy pertains to the government's authority or merely to its use of coercive force, as this problem is irrelevant to our inquiry. For greater detail, see Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (OUP, Oxford, 2008) 240.

350 On authority as the power to change someone else's normative profile, Matthias Brinkmann, 'Coordination Cannot Establish Political Authority', 31 Ratio Juris 49, 52–4 (2018). See also Thomas Christiano, *The Constitution of Equality* (n 349) 240–1 (arguing that authority can be understood as a right to rule that includes 'a liberty on the part of the authority to make decisions as it sees fit'). In the following, I will disregard one exercise of authority that is independent of the court's constitutional interpretation: the disposition of the case that—in 'concrete' or 'incidental' instances of review—gave rise to judicial review in the first place.

351 For Germany, see sec 31 para 2 of the Act on the Federal Constitutional Court.

352 For the United States, see Richard H Fallon, Jr, 'As-Applied and Facial Challenges and Third-Party Standing', 113 Harv L Rev 1321, 1339–40 (2000) and the references cited therein.

353 Sec 362 no 5 of the Code of Criminal Procedure.

amendment,³⁵⁴ it exercises authority because it alters the body of law currently in force.

Secondly, the justices' interpretation of our fundamental rights alters our normative profile under *constitutional* law because it engenders legal effects that exceed the individual lawsuit and arise regardless of whether the court invalidates or upholds the statute in question. Thus, the Federal Constitutional Court's articulation of a constitutional right³⁵⁵ is likely binding on all parts of government, provided it does not represent *dictum*.³⁵⁶ In the United States, the Supreme Court has claimed similar authority for itself.³⁵⁷ This means that the rights of all of us change whenever the constitutional court specifies them in an individual lawsuit. For instance, if the Federal Constitutional Court invalidates the exception to the double-jeopardy rule, it determines that our constitutional rights³⁵⁸ encompass a right against double jeopardy, including in the case of murder. If it upholds the law, it specifies our liberties as not including such a right.

Because of this *erga omnes* effect, we cannot ground judicial review's legitimacy in the individual complainant's request for self-determination. To revisit the abovementioned example, constitutional review is not justified if and because the Constitutional Court protects the complainant's right to walk free by enforcing their personal liberty not to be subjected to

354 A constitutional complaint against a court judgment that is based on this amendment is already pending before the Court (2 BvR 900/22). See Hasso Suliak, 'Umstrittene StPO-Vorschrift wird in Karlsruhe geprüft', *Legal Tribune Online*, 24 May 2022, available at <https://perma.cc/47RD-6NK9>.

355 By rights 'articulation' or 'specification', I mean the decision whether the constitution protects the concrete course of action or area of life affected by the statute under review.

356 Sec 31 para 1 of the Act on the Federal Constitutional Court. It is contested to what extent the Court's rulings bind other parts of government. See Herbert Bethge, '§ 31', in Bruno Schmidt-Bleibtreu, Franz Klein and Herbert Bethge, *Bundesverfassungsgerichtsgesetz: Kommentar* (loose-leaf, 61st delivery, CH Beck, Munich, 2021) para 106 (arguing for extensive judicial supremacy) and Andreas Voßkuhle, 'Art. 94', in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds), *Grundgesetz: Kommentar*, vol 3 (7th edn, CH Beck, Munich, 2018) paras 32–3 (rejecting extensive judicial supremacy). But see Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court', in Matthias Jestaedt and others, *The German Federal Constitutional Court: The Court Without Limits* (Jeff Seitzer tr, OUP, Oxford, 2020) 131, 181 (calling the debate academic and concluding that '[t]here is no doubt that the political process in the Bundestag takes decisions of the Court very seriously').

357 See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

358 To wit, art 103 para 3 of the Basic Law.

double jeopardy.³⁵⁹ Nor can judicial review be legitimate because it grants the litigants—but no one else—a right to be heard.³⁶⁰ Instead, we require a justification that acknowledges and encompasses the *erga omnes* effect.

Of course, a constitutional court frequently articulates our constitutional rights outside of judicial review of legislation as well. That is why some scholars analyze the legitimacy of constitutional jurisdiction as such, not merely of judicial review of legislation.³⁶¹ The reason I do not is that the court's authority is much more circumscribed without judicial review of legislation: Absent constitutional review, the justices cannot enforce their rights specification against legislation that chooses to articulate the same right differently. I will continue to focus on judicial review of legislation, therefore, because it brings the court's normative predicament to a head: unelected justices specifying our constitutional rights.

B. The Two Criteria of Political Legitimacy

The question to ask, then, is when it is proper for a constitutional court to replace parliament's rights specification with its own—that is, on which sources of legitimacy it can rely. Because no government is legitimate that does not reflect our political autonomy,³⁶² it would make sense to postulate that a political regime is legitimate to the extent it either originates in our self-government as equals or creates the conditions we require to govern ourselves this way. But not every account of political legitimacy expressly refers to the idea of autonomy.³⁶³ For that reason, I will employ a slightly more general paradigm to describe the grounds of legitimacy discussed today. Thus, most political philosophers appear to agree that there are two

359 See Christoph Möllers, *The Three Branches* (n 331) 139. Generally on individual—as opposed to collective—acts of self-determination as a source of political legitimacy, *id.*, 68–9.

360 But see Alon Harel and Adam Shinar, 'The real case for judicial review', in Erin F Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar Publishing, Cheltenham, 2018) 13, 17–20.

361 See, e.g., Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 356) 147–8 (highlighting the 'fundamental legitimacy problem of constitutional adjudication').

362 See n 315.

363 See, e.g., Fabienne Peter, 'The Grounds of Political Legitimacy', 6 *J Am Phil Ass'n* 372 (2020).

general criteria for determining whether a political regime is normatively legitimate (1–2).³⁶⁴

1. The Political-Equality Criterion

The first criterion is whether we treat all citizens as autonomous political equals when we make collective decisions.³⁶⁵ There are different ways to conceptualize political equality. Here, I focus on two. According to John Rawls, citizens treat each other as equals when they offer each other terms of cooperation that everyone should reasonably accept, ‘as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position’.³⁶⁶ A constitutional court occupies pride of place in this conception. Since it provides reasons for its decisions anyway, it can treat the citizens as political equals by relying exclusively on public reason.³⁶⁷

Other political thinkers focus on citizens’ participation in the decision-making process. They say that we treat each other as political equals when all of us have an equal vote in electing our legislative representatives and when the legislature adopts its laws by a simple majority. This gives ‘each person the greatest say possible compatible with an equal say for each of the others’.³⁶⁸ On this account, the *legislature* is central to political legitimacy. According to Thomas Christiano, it is even indispensable: By pooling our equal political rights in a legislature, we define the body politic within which our political actions can take effect (and be reviewed for legitimacy). For Christiano, there is no natural union of citizens that can serve as a legal community instead.³⁶⁹

364 While a bifurcation of this sort is common, some conceive of it differently. See, e.g., Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, MIT Press, Cambridge MA, 1996) 99–104 (distinguishing between popular sovereignty, which lends expression to our public autonomy, and human rights, which lend expression to our private autonomy).

365 See, e.g., Rainer Forst, *Normativity and Power: Analyzing Social Orders of Justification* (Ciaran Cronin tr, OUP, Oxford, 2017) 134, and Duncan Ivison, ‘Pluralising political legitimacy’, 20 *Postcolonial Studies* 118, 124 (2017).

366 John Rawls, ‘The Idea of Public Reason Revisited’, 64 *U Chi L Rev* 765, 770 (1997).

367 John Rawls, *Political Liberalism* (n 315) 235–7.

368 Jeremy Waldron, ‘The Core of the Case Against Judicial Review’, 115 *Yale LJ* 1346, 1388–9 (2006).

369 Thomas Christiano, *The Constitution of Equality* (n 349) 245–8.

The political-equality criterion suggests that today's philosophers have chosen to do something which the concept of political legitimacy arguably does not require: have it rely on considerations of justice.³⁷⁰ By concluding that government is only legitimate once those who are subject to its laws can also be considered its authors, today's philosophers are demanding 'fundamental justice in the sense of a basic structure of justification'.³⁷¹

However, fundamental justice is not the same as full, or perfect, justice.³⁷² For instance, houselessness contravenes the demands of egalitarian justice.³⁷³ But if tolerating it made government illegitimate, no regime on Earth would be justified, and we are loath to come to that conclusion.³⁷⁴

2. The Minimal-Justice Criterion

Nevertheless, a decidedly *unjust* regime is illegitimate.³⁷⁵ Government is not justified, in other words, if we allow some of us to die from hunger, if we call for their extermination, or if we take away their children at the border.³⁷⁶ One might call this criterion one of 'minimal justice'.³⁷⁷

370 See Rainer Forst, 'Justifying Justification: Reply to My Critics', in Rainer Forst (ed), *Justice, Democracy and the Right to Justification: Rainer Forst in Dialogue* (Bloomsbury Academic, London, 2014) 169, 213, and *Normativity and Power* (n 365) 138. See also Randy E Barnett, 'Constitutional Legitimacy', 103 *Colum L Rev* 111, 114 (2003) (suggesting that the concept of legitimacy lies somewhere in between the two poles of legal validity and justice).

371 Rainer Forst, *Normativity and Power* (n 365) 138 (emphasis omitted).

372 *Ibid.* See also John Rawls, 'Reply to Habermas', 92 *J Phil* 132, 175–6 (1995). For the prerequisites of, say, egalitarian justice, see, e.g., Elizabeth Anderson, 'What Is the Point of Equality?', 109 *Ethics* 287, 317–8 (1999).

373 See Elizabeth Anderson, 'What Is the Point of Equality?' (n 372) 313, 317–8.

374 See Richard H Fallon, Jr, *Law and Legitimacy in the Supreme Court* (Belknap Press, Cambridge MA, 2018) 28 (reminding us that we commonly think of some states as 'legitimate' even though they are evidently not perfectly just).

375 See, e.g., Jürgen Habermas, *Between Facts and Norms* (n 364) 106 (on the illegitimacy of clearly immoral regimes).

376 See, e.g., Cass R Sunstein, *The Partial Constitution* (Harvard University Press, Cambridge MA, 1993) 138; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge MA, 1996) 23; and Fabienne Peter, 'The Grounds of Political Legitimacy' (n 363) 385.

377 See Richard H Fallon, Jr, *Law and Legitimacy in the Supreme Court* (n 374) 29 (demanding that government be 'reasonably just').

In many cases, the minimal-justice criterion is indistinguishable from that of political equality.³⁷⁸ On Rawls's public-reason approach, for instance, we do not offer each other fair terms of cooperation if we enslave them. However, it makes sense to distinguish between the two criteria because the minimal-justice criterion requires specific substantive outcomes and does not content itself with the procedural focus that characterizes some conceptions of political equality.³⁷⁹ Some philosophers even argue that the procedural requirements of the political-equality criterion are irrelevant if the demands of justice are clear.³⁸⁰

Again, there are distinct conceptions of the minimal-justice criterion. One of them—which we might call liberal³⁸¹—states that government must strive to protect our basic human (or 'moral') rights, such as freedom from religious discrimination.³⁸² Freedom of speech is one of the most important rights.³⁸³ It also exemplifies the close connection between the two criteria of political legitimacy. After all, political equality is unthinkable without the

378 If the political-equality criterion is interpreted as requiring legislative majoritarianism, the two criteria of political legitimacy arguably part ways when it comes to foreigners, who cannot vote for parliament.

379 Rawls's concept of public reason may well be substantive, not procedural, but that debate is beyond the scope of this chapter. For an overview of the different positions, see Fabienne Peter, 'Political Legitimacy', in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2017 ed) para 3.3, available at <https://plato.stanford.edu/entries/legitimacy/#PubReaDemApp> (last accessed 17 November 2021).

380 See Fabienne Peter, 'The Grounds of Political Legitimacy' (n 363) 385–7. For a nuanced debate, see also Allen Buchanan, 'Political Legitimacy and Democracy' (n 319) 712–13.

381 See Frank I Michelman, 'The bind of tolerance and a call to feminist thought: A reply to Gila Stopler', 19 *Int'l J Con L* 408 (2021) (stating that 'dedication to the pursuit of an equal basic right of everyone to freedoms of conscience, thought, association, and expression' is 'virtually definitional [...] for liberalisms of all stripes and varieties').

382 See, e.g., Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review', 9 *Law & Phil* 327, 350 (1991); Allen Buchanan, 'Political Legitimacy and Democracy' (n 319) 703–7; and Randy E Barnett, 'Constitutional Legitimacy' (n 370) 141–2. But see Christoph Möllers, *The Three Branches* (n 331) 58 (arguing that human rights have replaced pre-modern attempts to ground government's legitimacy in the objectives it pursues).

383 See, e.g., Ronald Dworkin, *Freedom's Law* (n 376) 25.

right to express one's opinion freely.³⁸⁴ To quote Rainer Forst, some rights enable political equality, whereas others flow from it.³⁸⁵

Secondly, postcolonial/feminist/queer conceptions of the minimal-justice criterion demand that government not only refrains from violating our rights but also furthers them.³⁸⁶ They argue that the procedural approach to political equality fails to acknowledge structures of domination outside government—to wit, in society itself—and does not, for that reason, grant all citizens an equal say in collective decision-making processes.³⁸⁷ In their view, legislative majoritarianism has traditionally served the powerful.³⁸⁸ To be truly equal, the subordinated citizens must be free from social structures of domination, and government must effect this emancipation if it wishes to be justified,³⁸⁹ at least in the eyes of the subordinated.³⁹⁰ What privileged groups might consider a question of perfect justice is a matter of basic political legitimacy for marginalized communities.

384 See, e.g., Richard H Fallon, Jr, 'The Core of an Uneasy Case *For* Judicial Review', 121 Harv L Rev 1693, 1724 (2008).

385 Rainer Forst, 'The Justification of Basic Rights: A Discourse-Theoretical Approach', 45 Netherlands J Legal Phil 7, 22–3 (2016).

386 Cf Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge MA, 1989) 162–5 (describing government as male because it considers society free if the state does not interfere with it, despite women being unfree). It bears emphasizing that advocates of the first conception of the minimal-justice criterion do not necessarily disagree with this position. See Allen Buchanan, 'Political Legitimacy and Democracy' (n 319) 705 (stating that we only protect human rights if we prevent violations others are willing to commit).

387 Cf Carole Pateman, *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford University Press, Stanford, 1989) 83 (on liberalism's failure to distinguish between free commitment and agreement induced by subordination).

388 See Catharine A MacKinnon, 'Freedom from Unreal Loyalties: On Fidelity in Constitutional Interpretation', 65 Fordham L Rev 1773, 1774 (1997).

389 See *id.*, 1779.

390 Calls to 'pluralize political legitimacy' suggest that an absence of emancipatory policies renders government illegitimate not in its entirety but solely with regard to the marginalized communities. See, e.g., Richard H Fallon, Jr, *Law and Legitimacy in the Supreme Court* (n 374) 29–31; Nikita Dhawan and others, 'Normative Legitimacy and Normative Dilemmas: Postcolonial Interventions', in Nikita Dhawan and others (eds), *Negotiating Normativity: Postcolonial Appropriations, Contestations, and Transformations* (Springer, Cham, 2016) 1, 7–8; and Duncan Ivison, 'Pluralising political legitimacy' (n 365) 127–8. See also Jeremy Waldron, 'Theoretical Foundations of Liberalism' (n 324) 135 (emphasizing that liberals seek to justify the social order to everyone individually and that the social order is illegitimate with regard to those to whom no justification can be given).

All arguments in favor of constitutional review's legitimacy can be subsumed under one (or both) of the two criteria of political legitimacy. Thus, the claim that judicial review of legislation is justified because the constitution authorizes it or because it enforces rights that are themselves the product of democratic choice reflects the political-equality criterion: Judicial review issues from or embodies our collective self-determination, the claim suggests. By contrast, the claim that constitutional review is legitimate only if the constitutional court protects our moral rights better than the legislature implicates the minimal-justice criterion. In the following, I will base my discussion of these claims on this differentiation. We begin with the political-equality criterion of normative legitimacy.

II. Judicial Review of Legislation and the Political-Equality Criterion

Judicial review of legislation may originate in our political equality as autonomous individuals for the following reasons: because we elect those who staff the bench (A); because we made the democratic decision to institute judicial review (B); because a majority supports it (C); or because we—or our forebears—voted for the rights that judicial review is charged with enforcing (D).

A. The 'Chain of Legitimation'

In both the United States and Germany, the legislature gets to confirm nominees for vacant seats on the constitutional court.³⁹¹ This raises the question of whether its democratic legitimacy rubs off on judicial review. After all, parliament is central to the justification of government since (almost) all adult citizens get to elect its members based on universal and equal suffrage, thereby implementing the political-equality condition of legitimacy.³⁹² The argument would go like this: We do not elect the constitutional court, but we elect the people who do;³⁹³ there exists, in

391 U.S. Const. Art II, § 2, cl 2 and Art 94 para 1 cl 2 of the Basic Law. Admittedly, half of the German constitutional justices are confirmed by the Federal Council, which represents the governments of the *Länder* and is not elected directly. However, I will treat it as part of the legislature for our purposes.

392 See n 369.

393 See Susanne Baer, 'Who cares? A defence of judicial review' (n 333) 90.

other words, a ‘chain of legitimation’ between us citizens and the members of the Supreme Court or Federal Constitutional Court.³⁹⁴

This argument demonstrates that judicial review is not categorically illegitimate. However, we do not determine in the abstract whether an institution is legitimate. Instead, we compare it to its (viable) alternatives.³⁹⁵ In the case at hand, the alternative consists of the legislature articulating our rights in lieu of the court. And compared to the legislature, the court is less legitimate.³⁹⁶

Of course, the law of elections to the legislature may be flawed, making parliament less legitimate than it could be. But that does not redound to the court’s benefit because any defect in the legislature’s composition will necessarily affect the court sooner or later.³⁹⁷ That is what I will be referring to whenever I write, in the following, that the legislature is ‘more democratic’ than a constitutional court.

Yet the chain of legitimation can still serve a purpose: It can complement the other possible sources of judicial review’s legitimacy. Imagine concluding that judicial review is justified because it serves to emancipate marginalized communities. If we hold that government requires some form of procedural-democratic justification as well,³⁹⁸ the chain concept can supply such legitimation.

B. Constitutional Provisions for Judicial Review

The second potential argument for the legitimacy of judicial review lies in the constitution itself. It states that whenever a constitution explicitly provides for judicial review, the constitutional court may invalidate a decision

394 Ernst-Wolfgang Böckenförde, *Verfassungsfragen der Richterwahl: Dargestellt anhand der Gesetzentwürfe zur Einführung der Richterwahl in Nordrhein-Westfalen* (2nd edn, Duncker & Humblot, Berlin, 1998) 73–4.

395 Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (n 368) 1389.

396 Which Böckenförde acknowledges, incidentally. *Verfassungsfragen der Richterwahl* (n 394) 74.

397 See Wojciech Sadurski, *Rights Before Courts* (n 332) 61 (arguing that deficiencies in parliaments’ democratic credentials do not justify resorting to an even less legitimate institution, such as a constitutional court).

398 See n 380 and accompanying text.

the people have taken as political equals because its power to do so itself emanates from such a decision.³⁹⁹

Now, the US Constitution does not explicitly authorize constitutional review,⁴⁰⁰ and it is far from clear that the founders intended for it.⁴⁰¹ For that reason, it is best not to ground the Supreme Court's judicial review in the people's putative authorization. By contrast, Germany's Basic Law clearly provides for judicial review of legislation,⁴⁰² which is why this subsection focuses on the Federal Constitutional Court.

Some scholars reject the argument from constitutional legality outright. They contend that we would also have to accept army rule or other, similarly autocratic elements if we deem judicial review of legislation legitimate simply because the constitution allows it.⁴⁰³ They also emphasize that political legitimacy is a philosophical concept and hence dissociated from the current state of legislation, including constitutional legislation.⁴⁰⁴

I do not share these objections. It would smack of hubris to treat concepts of political philosophy as if they originated in natural law and to tell the people that a constitutional provision they chose themselves is of no consequence.⁴⁰⁵ Nevertheless, I am skeptical of grounding the Federal Constitutional Court's review power in the Basic Law. That is because the latter's democratic pedigree is comparatively weak. In 1949, it was ratified by the parliaments of the *Länder*, not by the people.⁴⁰⁶ And when Germany

399 Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (n 382) 353–4, and Richard H Fallon, Jr, 'The Core of an Uneasy Case For Judicial Review' (n 384) 1727.

400 E.g., Laurence H Tribe, *American Constitutional Law* (2nd edn, Foundation Press, Mineola, 1988) 25.

401 See, e.g., Joyce L Malcolm, 'Whatever the Judges Say It Is? The Founders and Judicial Review', 26 *JL & Pol'y* 1, 22–36 (2010).

402 See Art 93 para 1 nos 2, 2a, 4a, 4b, para 2 and Art 100 para 1 of the Basic Law.

403 E.g., Michael J Klarman, 'What's So Great About Constitutionalism?', 93 *Nw U L Rev* 145, 187 (1998).

404 See, e.g., Michael J Perry, *The Constitution in the Courts: Law or Politics?* (OUP, New York, 1994) 16.

405 Christoph Möllers, *The Three Branches* (n 331) 138, and 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 356) 165.

406 E.g., Hans Meyer, 'Grundgesetzliche Demokratie und Wahlrecht für Nichtdeutsche', 71 *JuristenZeitung* 121, 122 (2016), and Christian Hillgruber, 'Art.144', in Volker Epping and Christian Hillgruber (eds), *Beck'scher Online Kommentar Grundgesetz* (49th edn, CH Beck, Munich, 2021) paras 1–3.

was reunited in 1990, the people of the new *Länder*—that is, the former GDR—did not get to vote on the Basic Law either.⁴⁰⁷

I am not trying to impugn the legitimacy of the Basic Law. Instead, my point is again comparative. The question here is not whether the German Constitution was enacted democratically.⁴⁰⁸ It was, but so were (most of) the laws that the Court has the power to invalidate.⁴⁰⁹ More, many of these laws have issued from legislatures elected recently in universal and nationwide elections. Therefore, the more apposite question is whether the democratic nature of the Basic Law's enactment remains sufficiently strong to justify replacing the judgment of elected decision-makers and invalidating laws whose democratic pedigree is frequently more evident than its own.⁴¹⁰ I do not think so.

It is common to respond to this sentiment that the people can always amend the constitution to repeal judicial review and that their refusal to do so signals democratic approval.⁴¹¹ But constitutional amendments require a supermajority.⁴¹² Accordingly, citizens who wish to maintain judicial review have more voting power than those who favor abolishing the practice, and this impinges on citizens' political equality.⁴¹³

The question, then, is how to honor the German people's democratic decision to institute judicial review even though we do not attribute it sufficient justificatory weight in its own right. We will see below that my approach is to let this decision inform our discussion of *other* cases for judicial review: If the Basic Law's provision for judicial review cannot in

407 See Horst Dreier, 'Art. 146', in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol 3 (3rd edn, Mohr Siebeck, Tübingen, 2018) paras 45–6.

408 This is the mistake Christopher Scheid makes in refuting this objection. See 'Demokratieimmanente Legitimation der Verfassungsgerichtsbarkeit', 59 *Der Staat* 227, 255–6 (2020).

409 The Federal Constitutional Court will also review laws enacted before the Basic Law entered into force. BVerfGE 103, 111, 124 – *Scrutiny of Elections in Hesse* (2001). But as time passes, fewer and fewer such laws will still be on the books, thereby further diminishing the Basic Law's democratic advantage.

410 See Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 356) 153–4 (arguing, however, that judicial review's democratic mandate in the Basic Law is still sufficiently fresh).

411 See *id.*, 154, and Christopher Scheid, 'Demokratieimmanente Legitimation der Verfassungsgerichtsbarkeit' (n 408) 256.

412 Art 79 para 2 of the Basic Law (requiring a two-thirds majority in both legislative chambers).

413 See Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 356) 154.

itself legitimate the Federal Constitutional Court's power, it may help other justificatory strategies succeed.⁴¹⁴

C. Public Support for Judicial Review

Or Bassok and Yoav Dotan have argued that judicial review in the United States is justified because opinion polls show that the public accepts it.⁴¹⁵ Let us assume, for the sake of argument, that the quality of the polling is sufficiently good to approximate an actual vote. Bassok and Dotan might then claim that opinion polling is merely a more convenient and efficient way of having the people decide, over and over again, whether to maintain judicial review of legislation. In this case, moreover, a simple majority suffices to legitimate judicial review. This avoids the problem that a hypothetical constitutional amendment to abolish judicial review would require a supermajority, thereby violating the political-equality criterion of legitimacy.

Compared to a proper referendum, opinion polling violates citizens' political equality in a different way, however. The technicalities of the vote count are not the only thing that distinguishes an official, formalized vote from opinion polling. Thus, a referendum usually follows upon a public debate that helps foreground the pros and cons of the issue under discussion. The debate need not be particularly sophisticated; I am not trying to paint a rosy picture of political campaigning. In addition, other factors, such as the popularity of the current administration or government, may affect the plebiscite's outcome more than the substantive question does.⁴¹⁶ Nevertheless, data suggests that voters are more motivated to focus on the

414 See also Richard H Fallon, Jr, 'The Core of an Uneasy Case *For* Judicial Review' (n 384) 1727 (noting that the 'democratic adoption' of judicial review 'may count for something').

415 Or Bassok and Yoav Dotan, 'Solving the countermajoritarian difficulty?' (n 326) 17–26. See also Johannes Masing, '§ 15: Das Bundesverfassungsgericht', in Matthias Herdegen and others (eds), *Handbuch des Verfassungsrechts: Darstellung in transnationaler Perspektive* (CH Beck, Munich, 2021) para 149 (arguing that the German Constitutional Court's support among members of the public suggests it has succeeded in enforcing constitutional law, which he considers the source of the Court's legitimacy).

416 See Mark Franklin, Michael Marsh and Lauren McLaren, 'Uncorking the Bottle: Popular Opposition to European Unification in the Wake of Maastricht', 32 J Common Mkt Stud 455, 467–8 (1994) (describing how three referenda on the Maastricht Treaty tracked popular support for the country's government).

issue at hand and bring their underlying political attitudes to bear on it when the campaign is sufficiently intense.⁴¹⁷ And while it is beyond the scope of this chapter to discuss how much deliberation is required before we can qualify a vote as democratic, I consider unobjectionable the claim that a more informed decision makes the voters' choice freer.⁴¹⁸

To this Bassok and Dotan might respond that questions about the legitimacy of judicial review of legislation frequently feature in the American political debate. For instance, there were calls to strip the Supreme Court of its review power prior to the 2020 presidential election.⁴¹⁹ More, then-candidate Joe Biden announced he would create a commission to study possible reforms of the Court were he to be elected president.⁴²⁰ Yet I do not consider such discussions equivalent to the debate that precedes a formalized, single-issue vote. Absent the urgency of an upcoming vote dedicated to the question under debate, the voters may choose not to reflect on the question, believing that their opinion is neither here nor there anyway.

D. Does the Court Implement Our Self-Government by Articulating Our Rights?

The fourth reason why it may be proper for the Supreme Court and the Federal Constitutional Court to replace the legislature's rights specifications may lie in the rights the courts grant us. Thus, one could argue that the court is merely giving voice to our self-government because we (or our

417 See Sara B Hobolt, 'When Europe Matters: The Impact of Political Information on Voting Behaviour in EU Referendums', 15 J Elections, Pub Opinion & Parties 85, 89, 99–105 (2005) (comparing the effect of campaign intensity on EU referendums in Denmark, Ireland, and Norway).

418 See Dennis F Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* (The University of Chicago Press, Chicago, 2002) 10 (on the importance of information on candidates during elections).

419 See, e.g., Sean Illing, 'The case for stripping the Supreme Court of its power', *Vox*, 12 October 2018, available at <https://www.vox.com/2018/10/12/17950896/supreme-court-amy-coney-barrett-mark-tushnet> (last accessed 22 November 2021) (interviewing Professor Mark Tushnet).

420 Sam Gringlas, 'Asked About Court Packing, Biden Says He Will Convene Commission To Study Reforms', *npr.org*, 22 October 2020, available at <https://perma.cc/BP8G-MY56>.

forebears) voted for our constitutional rights as political equals.⁴²¹ Judicial review is democratic, on this view, because it speaks in the name of the people—albeit the constitution-making one.⁴²²

The most significant challenge to this argument is that constitutional law is too indeterminate for us to postulate that concrete constitutional rulings emanate from the *pouvoir constituant* and not from the justices' discretionary preference for one constitutional outcome over another.⁴²³ For that reason, most scholars who nevertheless defend judicial review of legislation on grounds of self-government do not argue that it is justified because the outcomes of constitutional adjudication closely track the framers' or people's intentions or expectations. They point to the justices' reasoning process instead (1–4).

1. Enforcing Constitutional Law

According to perhaps the classical case for the legitimacy of judicial review, we require the latter to make sure that our constitutional rights restrain the legislature.⁴²⁴ In supplanting the legislature's specification of our rights, the

421 Of course, marginalized communities had no say in adopting the US Constitution's bill of rights. I revisit this problem below. See below, section III.B.

422 See, e.g., Alexander Hamilton, 'Federalist No. 78', in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Michael A Genovese ed, Palgrave Macmillan, New York, 2009 [1787/1788]) 235, 237, and Bruce A Ackerman, 'The Storrs Lecture: Discovering the Constitution' (n 325) 1049–51.

423 See, e.g., Michael J Klarman, 'Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments', 44 *Stan L Rev* 759, 795–6 (1992), and Frank I Michelman, 'Brennan and Democracy', 86 *Cal L Rev* 399, 409–10, 413–5 (1998). See also Dieter Grimm, 'Neue Radikalkritik an der Verfassungsgerichtsbarkeit' (n 329) 340–3 (acknowledging that the democratic predicament of judicial review will only go away if we abolish the practice). On the difficulty of interpreting vague constitutional provisions, see, e.g., Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap, Cambridge MA, 1996) 35.

424 See Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit', in *Wer soll Hüter der Verfassung sein? Abhandlungen zur Theorie der Verfassungsgerichtsbarkeit in der pluralistischen, parlamentarischen Demokratie* (Robert C van Ooyen ed, 2nd edn [reprint], Mohr Siebeck, Tübingen, 2019 [1929]) 1, 23–4 [30, 53–4]; Michael J Perry, *The Constitution in the Courts* (n 404) 19–20; Dieter Grimm, 'Neue Radikalkritik an der Verfassungsgerichtsbarkeit' (n 329) 345–6; and Johannes Masing, '§ 15: Das Bundesverfassungsgericht' (n 415) para 147. On constitutional restraints as disabling provisions, see above, n 346.

constitutional court protects our decision, as political equals, to enact these rights as true ‘disabling provisions’.⁴²⁵

For starters, we need to clarify what it means for constitutional rights to restrain the legislature. In the case of negative rights, constitutional liberties restrain parliament when the legislators refrain from enacting a bill that infringes a liberty or promptly repeal a statute which is already on the books.⁴²⁶ In the case of protective duties, constitutional rights restrain parliament when the latter amends legislation that fails to meet the duties’ requirements.⁴²⁷

This definition presumes that the constitutional bill of rights is not merely aspirational. We can only use the enforcement argument to justify judicial review if constitutional rights are what Laurence Tribe calls ‘regulatory’, that is, independent, in principle, of the legislators’ volition.⁴²⁸ This distinction is not identical to that between ‘political’ (or ‘populist’, ‘popular’) and ‘legal’ constitutionalism. Not all political constitutionalists believe that the legislators (or the people) should treat our rights as synonymous with their political preferences. Some merely reject judicial supremacy.⁴²⁹ In Tribe’s words, they acknowledge the dance and simply deny that the constitutional court should be the dancer.⁴³⁰

In any event, the provision for constitutional review in the German Basic Law suggests that its fundamental rights are not merely aspirational. Furthermore, hardly anyone believes the US Constitution’s bill of rights does not mean to restrain Congress: America’s political constitutionalists simply argue that the Supreme Court should not have the last say.⁴³¹

425 Of course, one can conclude that the constitution would cease to restrain the legislature in the absence of external review but reject entrusting such review to a constitutional court. See Carl Schmitt, ‘Der Hüter der Verfassung’, 55 *Archiv des öffentlichen Rechts* 161, 176ff (1929).

426 See *Marbury v. Madison*, 5 U.S. 137, 176–7 (1803).

427 See, e.g., Josef Isensee, ‘Das Grundrecht als Abwehrrecht und als staatliche Schutzpflicht’, in Josef Isensee and Paul Kirchhof, *Handbuch des Staatsrechts*, vol 9 (3rd edn, CF Müller, Heidelberg, 2011) 413, 516–7 (detailing the legislature’s duties under the protective dimension of German fundamental rights).

428 See Laurence H Tribe, *American Constitutional Law* (n 400) 26–7.

429 E.g., Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, Princeton, 1999) 14.

430 See Laurence H Tribe, *American Constitutional Law* (n 400) 27.

431 See n 429 and Larry D Kramer, ‘Foreword: We the Court’, 115 *Harv L Rev* 5, 8 (2001).

The next question is when the legislature can be said to violate a constitutional restraint. Because the wording of fundamental rights is frequently vague, many constitutional cases are hard, not easy.⁴³² This yields the following problem. On the one hand, a constitutional court will frequently articulate our constitutional rights more thoughtfully than the legislature (a). On the other hand, the legislature will frequently stay within the bounds of reasonable legal judgment nonetheless (b). As a result, the classical case for judicial review only prevails if the people had the right, in establishing constitutional restraints, to subject future majorities not only to restraints as such but to *thoughtfully interpreted ones* (c) or if it is sufficiently likely that the legislators will frequently exceed the bounds of reasonable legal judgment were judicial review to disappear (d).

a) How the Legislature and the Court Implement Our Constitutional Rights

To show why a constitutional court will frequently articulate our rights differently than parliament, I will briefly describe how the two institutions typically go about interpreting said rights. There are two structural differences between a court and a legislature when it comes to legal interpretation, but I consider only the second determinative.

The first difference is that rights-based judicial review generally⁴³³ originates in an individual request to remedy a concrete rights violation. Accordingly, the justices will interpret the liberty in question through the filter of that violation.⁴³⁴ By contrast, the legislators do not use this filter. In cases of rights collisions, for instance, they instead produce a general ‘rule on the distribution of freedoms’.⁴³⁵ At first blush, there is thus no point in comparing the court’s and the legislature’s interpretive approach: Perhaps the two are simply incommensurate.

432 E.g., Martin Loughlin, ‘The Constitutional Imagination’, 78 *Mod L Rev* 1, 15–6 (2015).

433 The Federal Constitutional Court’s abstract judicial review pursuant to Art 93 para 1 no 2 of the Basic Law constitutes an exception to this rule. Thus, the justices will review a statute for fundamental-rights compliance even though the applicants need not vindicate a subjective right to initiate the proceeding. See BVerfGE 37, 363, 397 – *The Federal Council* (1974).

434 Christoph Möllers, *The Three Branches* (n 331) 140.

435 *Ibid.*

In practice, however, the *erga omnes* effect of constitutional courts' rights interpretations⁴³⁶ levels the difference between the court's and the legislature's perspective: By virtue of judicial supremacy, what was conceived as a response to an individual request is now likewise a general rule. As such, we ought to compare it to legislative rights interpretations after all.

The second, and more significant, difference between a constitutional court and a legislature is that the former is confined to constitutional law, whereas the latter is merely restrained by it.⁴³⁷ There are different ways to put this. In Luhmannian terms, legislation is not 'programmed' by constitutional law: The constitution mostly tells the legislature what not to do, not what to do instead.⁴³⁸ Conversely, constitutional adjudication is programmed, for the constitution provides the court with a rule of decision.⁴³⁹ In Razian terms, the legislature must deliberate the constitutional point of view, just like the constitutional court, but it may also entertain the political point of view.⁴⁴⁰

Consequently, constitutional rights are seldom a reason for action for the legislature. Instead, they enter the equation at a later point.⁴⁴¹ The opposite is true for judicial decisions, which we can always trace to law (provided they are not *ultra vires*), regardless of how creative we make out the justices' decision-making process to be.⁴⁴²

Therefore, we do not expect the legislators to prioritize the discussion of constitutional restraints over that of policy. Of course, we expect them to abide by constitutional law.⁴⁴³ We also demand that they *consider* it

436 See notes 356–358/359 and accompanying text.

437 E.g., Dieter Grimm, 'What Exactly Is Political About Constitutional Adjudication?', in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (CUP, Cambridge, 2019) 307, 310–1, and Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' (n 424) 25–6 [55–6].

438 On the concept of programming, Niklas Luhmann, *Organization and Decision* (Dirk Baecker ed, Rhodes Barret tr, CUP, Cambridge, 2018) 210.

439 See Richard A Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford University Press, Stanford, 1961) 6.

440 See Joseph Raz, *Practical Reason and Norms* (OUP, Oxford, 1999) 143–4.

441 Dieter Grimm, 'What Exactly Is Political About Constitutional Adjudication?' (n 437) 310.

442 See Ronald Dworkin, *Law's Empire* (Belknap, Cambridge MA, 1986) 6, and Michel Rosenfeld, *Just Interpretations: Law between Ethics and Politics* (University of California Press, Berkeley, 1998) 78 (distinguishing 'justice according to law' and 'political justice').

443 E.g., Richard H Fallon, Jr, 'Constitutional Constraints', 97 Cal L Rev 975, 1025 (2009).

proactively, at least when they know that the constitutional court will not review their action.⁴⁴⁴ Yet, in many cases, the legislature will arguably treat constitutional rights in one of the following three ways (i), contrary to a constitutional court (ii).

i. The Legislature

In the first scenario, one or more of the implicated constitutional rights does not come up in the legislative decision-making process, creating what Rosalind Dixon has termed a ‘blind spot’.⁴⁴⁵ When the legislature debates instituting rent control, for instance, the majority may argue that rent control is necessary to protect everyone’s right to dignified and affordable housing;⁴⁴⁶ but perhaps no one will bring up the rights whose enjoyment may suffer as a result of rent control, such as the liberty of contract or the right to property. Conversely, it is also conceivable that the bill’s opponents argue in terms of property rights while the legislative majority forgets to raise the question of whether there is a right to dignified and affordable housing.⁴⁴⁷

In the second scenario, the majority asks for constitutional counsel before bringing the bill to the floor, and the parliamentarians exchange legal arguments on the floor. But the majority fails to take the opposition’s arguments seriously because it has determined, after a summary review of constitutional law, that there is no *evident* reason to refrain from rent control. Perhaps it values a policy win more than thorough constitutional argument. In this case, one might say that the majority lacks the incentive to take the constitution seriously.⁴⁴⁸

444 See Mark Tushnet, ‘The Constitution Outside the Courts: A Preliminary Inquiry’, 26 Val U L Rev 437, 453–4 (1992).

445 Rosalind Dixon, ‘Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited’, 5 Int’l J Const L 391, 402 (2007).

446 On the right to housing under German constitutional law, BVerfGE 125, 175 para 135 – *Hartz IV* (2010).

447 See Bill of the Berlin Senate no S-2365/2019, p 2, available at <https://perma.cc/X42U-HYY6> (arguing in terms of public welfare but omitting any mention of a potential constitutional right to housing).

448 On legislators’ incentives, Mark Tushnet, *Taking the Constitution Away from the Courts* (n 429) 65–6.

In the third scenario, finally, the policy and the rights issue are virtually indistinguishable. In the debate on whether murder defendants should be protected from double jeopardy, for instance, the question of whether the constitutional prohibition against double jeopardy extends to all crimes all the time will be front and center. I will assume that the parliamentary majority will not treat constitutional law as an afterthought in this case but will make an effort to think about its restraints in more or less independent legal terms. Thus, when the *Bundestag* considered relaxing the prohibition against double jeopardy, its committee on law and consumer protection conducted a hearing with professors of criminal law, NGO experts, and defense attorneys to ascertain whether the bill was constitutional.⁴⁴⁹ Nevertheless, the government coalition's committee members may have assumed their parliamentary groups would defer to their verdict. Accordingly, they may have seen little reason to reconsider their initial impression of the legal facts and anticipate potential objections.

ii. The Court

With this in mind, we can now analyze how these scenarios would play out before the Supreme Court and the Federal Constitutional Court. For starters, blind spots will be less frequent because the litigants have to invoke a constitutional right to trigger rights-based review.⁴⁵⁰ Once a landlord challenges rent-control legislation before the court, for example, the liberty of contract and the right to property will no longer play second fiddle to public-welfare considerations.

Of course, it is possible that the government will not base its defense of the law on a right to dignified and affordable housing, preferring instead to argue in terms of public welfare. In other words, not all blind spots will disappear in court. From a substantive perspective, this need not weaken the protection of the right to housing, however. In Germany, welfare considerations can justify limitations on constitutional rights—such as the

449 See the minutes of the committee's meeting of 21 June 2021, available at <https://perma.cc/A3CB-LFKS>.

450 For the United States, see, e.g., *Baker v. Carr*, 369 U.S. 186, 204–8 (1962). For Germany, see Art 93 para 1 no 4a of the Basic Law.

liberty of contract—just as well as countervailing individual rights.⁴⁵¹ In the United States, government interests are, in fact, more likely to justify such limitations.⁴⁵² As a result, the right to housing can profit from the court's intervention even if no one invokes it in so many words.

It is more difficult to surmise how a constitutional court would go about the second and the third scenario—i.e., those that implicate the thoroughness and thoughtfulness of constitutional argument. On the one hand, constitutional justices do not have to worry about reelection, which lessens the significance of 'policy' wins and allows them to focus on legal reasoning. On the other hand, the boundary between constitutional argument, politics, and morality is more porous in the United States. Consequently, American constitutional law will be quicker to reflect the ideological fault lines that exist outside the courtroom.⁴⁵³ Nevertheless, I believe it is fair to say that both the Supreme Court and the Federal Constitutional Court will be more thorough and thoughtful than Congress or the *Bundestag* in considering our constitutional rights. We should give courts the benefit of the doubt and assume that their members experience constitutional law not as putty in their hands but as real internal constraints.⁴⁵⁴ In addition, the justices at least of the Federal Constitutional Court make a conscious and persistent effort, during their deliberations, to get everyone on board with the outcome.⁴⁵⁵ To do so, the justices in the presumptive majority must take their colleagues' objections seriously. They cannot lean back in the certainty

451 For examples, see Horst Dreier, 'Vorbemerkungen vor Artikel 1', in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol 1 (3rd edn, CH Beck, Munich, 2013) para 140.

452 E.g., Jamal Greene, 'Foreword: Rights as Trumps?', 132 Harv L Rev 28, 70–2 (2018). Generally on the role of governmental interests in the Supreme Court's 'strict scrutiny' test, Richard H Fallon, Jr, *The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny* (CUP, Cambridge, 2019) 54–9.

453 See, e.g., Alexander Somek, 'Zwei Welten der Rechtslehre und die Philosophie des Rechts', 71 JuristenZeitung 481, 481–2 (2016).

454 David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press, Princeton, 2010) 21.

455 Marlene Grunert and Reinhard Müller, 'Was kann Karlsruhe? 70 Jahre Bundesverfassungsgericht – Dieter Grimm und Andreas Voßkuhle über Fehler, Leistungen, Corona und Europa', *Frankfurter Allgemeine Zeitung*, 23 September 2021, p 8, and Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts* (Verlag für Sozialwissenschaften, Wiesbaden, 2010) 181–5.

that their opinion will prevail just because they have the numbers to push it through.⁴⁵⁶

b) The Bounds of Reasonable Legal Judgment

Therefore, the Supreme Court and the Federal Constitutional Court will frequently articulate our constitutional rights the way the legislature would if it focused solely on the question of rights. Nevertheless, legislation will still frequently be within the bounds of reasonable legal judgment. By this I mean that there will often be at least one acceptable legal argument to support the legislators' implicit interpretation of constitutional restraints.⁴⁵⁷

Tracing the bounds of reasonable legal judgment is very difficult, of course, and I venture here no theory of legal interpretation. Instead, I will simply take it for granted that there are many cases in constitutional law—both in the United States (i) and in Germany (ii)—in which diametrically opposed interpretations fall within the realm of reasonable legal judgment. In many instances, then, constitutional rights can be said to restrain legislation even though the parliamentarians did not deliberate their significance as well as the court would have.

i. The United States

In the United States, there are many different acceptable constitutional arguments and no hierarchy that helps adjudicate between divergent interpretive outcomes.⁴⁵⁸ Even theories that aim to curtail judicial discretion by prioritizing one of the several modes of constitutional argument accept that their preferred mode can generate conflicting interpretations.⁴⁵⁹ 'Almost a quarter century as a federal appellate judge has convinced me that it is

456 On the internal deliberations of the Supreme Court, see, e.g., John Ferejohn and Pasquale Pasquino, 'Constitutional Adjudication: Lessons from Europe', 82 *Tex L Rev* 1671, 1696–7 (2004) and the references cited therein.

457 See Richard H Fallon, Jr, *Law and Legitimacy in the Supreme Court* (n 374) 39–40.

458 See, e.g., Philip Bobbitt, *Constitutional Interpretation* (Blackwell, Oxford, 1991) 169–70.

459 See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 803–4 (Scalia, J, concurring) (accepting that originalism may require 'nuanced judgments about which evidence to consult and how to interpret it').

rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly', writes Richard Posner.⁴⁶⁰

The contingency of constitutional interpretation becomes even more apparent once we acknowledge that most theories play out within the narrow confines of the Supreme Court's current constitutional doctrine. This doctrine—whereby a few rights trigger strict scrutiny and the others may be limited for any rational reason—is not self-evident but the product of historical evolution.⁴⁶¹ By the same token, it is not clear that 'strict scrutiny' in fact works to allow as few rights limitations as possible. It may also represent a weighted balancing test not entirely unlike the German Constitutional Court's proportionality analysis.⁴⁶²

ii. Germany

Interpreters of the German Constitution can likewise prioritize the mode of constitutional argument (such as purposive or structural interpretation) they like best.⁴⁶³ More, the prevalence of proportionality review—and the balancing it entails—introduces a significant subjective element into constitutional reasoning.⁴⁶⁴

In the double-jeopardy case, for instance, lawyers will disagree, using different modes of constitutional argument, whether the protection against double jeopardy in Article 103 para 3 of the Basic Law is susceptible in prin-

460 Richard A Posner, 'Foreword: A Political Court', 119 Harv L Rev 32, 40 (2005). See also 52: '[A] Supreme Court Justice—however outlandish-seeming his position in a particular case—can, without lifting a pen or touching the computer keyboard, but merely by whistling for his law clerks, assure himself that he can defend whatever position he adopts with sufficient skill and force to keep the critics at bay.' See also Brian Leiter, 'Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature', 66 Hastings L J 1601, 1604–5 (2015).

461 See Jamal Greene, 'Foreword: Rights as Trumps?' (n 452) 96–108, and Richard H Fallon, Jr, *The Nature of Constitutional Rights* (n 452) 13–39.

462 Richard H Fallon, Jr, *The Nature of Constitutional Rights* (n 452) 40–6.

463 See, e.g., Fritz Ossenbühl, '§ 15: Grundsätze der Grundrechtsinterpretation', in Detlef Merten and others (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol 1 (CF Müller, Heidelberg, 2004) 595, 600.

464 E.g., Bernhard Schlink, 'Proportionality', in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, Oxford, 2012) 718, 724–5, and Matthias Herdegen, 'Verfassungsinterpretation als methodische Disziplin', 59 JuristenZeitung 873, 877 (2004).

ciple to limitations by conflicting constitutional values. Some will argue that it is, whereas others will claim that the constitutional framers anticipated and resolved such conflicts, choosing to prioritize the prohibition against double jeopardy over considerations of substantive justice.⁴⁶⁵ And if they agree that limitations are permissible in principle, they can still disagree about which considerations of substantive justice outweigh the protection against double jeopardy.

As a result, the *Bundestag* can claim to have stayed within the bounds of reasonable legal judgment even if the Federal Constitutional Court invalidates its decision. The same applies to Congress in comparable cases. This means that the legislature can claim to have respected—or protected, enforced—our constitutional rights regardless of how well it thought about them.⁴⁶⁶

The argument that constitutional rights would not restrain legislation in the absence of judicial review moves too quickly, in other words. We do not lose our rights if judicial review disappears. What we do lose, however, are rights as only the court would interpret them. For that reason, we should now reconsider what it means for rights to restrain the legislature. Accordingly, constitutional review is legitimate even though the legislature remains within the bounds of reasonable legal judgment if rights can only be said to restrain parliament once they are interpreted the way someone who thinks about nothing but them would interpret them.

c) How Far Does the Right to Bind Future Majorities Go?

The question, therefore, is whether the people had the right to bind future generations to restraints implemented the way someone who is confined to the constitutional point of view would interpret them. So as not to

465 See, on the one hand, Klaus Letzgus, ‘Wiederaufnahme zuungunsten des Angeklagten bei neuen Tatsachen und Beweisen’, 40 *Neue Zeitschrift für Strafrecht* 717, 719 (2020) (suggesting that conflicting constitutional values may serve to weaken the prohibition against double jeopardy) and, on the other hand, Helmuth Schulze-Fielitz, ‘Art. 103 Abs. 3’, in Horst Dreier (ed), *Grundgesetz: Kommentar*, vol 3 (n 407) para 35 (suggesting that they may not).

466 Joseph Raz overlooks the phenomenon of reasonable legal judgment when he argues that judicial review may be legitimate because ‘the legislature will not even try to establish what rights people have’. See Joseph Raz, ‘Disagreement in Politics’, 43 *Am J Juris* 25, 46 (1998).

load the dice against judicial review, I will assume that parliament will not start thinking more carefully about our rights once there is no longer a constitutional court to check it.⁴⁶⁷

i. The Argument from Democratic Choice

The first and most straightforward argument in favor of affirming the above question is that the people ought to have the democratic right, as political equals, to subject their and future legislatures to restraints that must be interpreted the way someone who thinks about nothing but them would interpret them. This is in effect the same argument that supported the people's right explicitly to provide for judicial review in the constitution.

However, the same caveats that applied to express constitutional provisions for judicial review apply here, too.⁴⁶⁸ If we are going to ground judicial review's legitimacy in our ancestors' decision to subject us not only to constitutional restraints but to very specific restraints—namely, judicially interpreted ones—the democratic pedigree of that decision must be strong. More, its significance will wane over time as our ancestors recede further and further into the past. To my mind, this precludes grounding the Federal Constitutional Court's power of judicial review in the constitutional framers' intention to subject future majorities to thoughtfully interpreted constitutional restraints.

ii. The Argument from Constitutional Precommitment

The second argument in favor of affirming the question is that the legitimacy of constitutional rights ought to rub off on that of judicial review. Thus, we might claim that the justification for having a bill of rights in the first place encompasses the right to consider the judicial interpretation of its liberties its only correct implementation. On this view, it no longer matters whether the people wanted thoughtfully interpreted restraints when they enacted the constitution; what matters is why bills of rights are legitimate *in general*, and whether these reasons necessarily extend to judicial review.

467 But see Mark Tushnet, *Taking the Constitution Away from the Courts* (n 429) 62.

468 See notes 406–410 and accompanying text.

The reason we consider fundamental rights—or ‘constitutional precommitments’—justified is that they may enable future generations to govern themselves freely.⁴⁶⁹ Constitutional law and politics are said to justify each other. Constitutional law legitimates politics because it demands that the latter abides by principles of political equality, and politics justifies constitutional law because it makes sure we get to establish its commands as autonomous political equals.⁴⁷⁰ It follows that the people may subject future majorities to thoughtfully interpreted constitutional restraints if staying within the bounds of reasonable legal judgment does not suffice to protect those majorities’ political equality.

The problem with this proposition is that the criterion of political equality—like the concept of legitimacy it brings to life—is moral, not legal.⁴⁷¹ So, then, is the question of whether staying within the bounds of reasonable legal judgment guarantees that we retain our political equality: Only moral standards can determine at what point a moral right is sufficiently protected. Accordingly, it is possible that the legislators’ implementation of our fundamental rights does not suffice to honor the purpose of constitutional precommitment; but in that case, judicial review is justified, not because it protects our constitutional rights but because it enforces the moral rights that, taken together, enable us to be political equals.⁴⁷²

In other words, the question becomes whether the court is more likely than parliament to protect our basic human rights. This is a distinct question, one that is independent of a people’s right to subject future majorities to constitutional restraints. Since we will come to this question later—to wit, in the context of the minimal-justice criterion for political legitimacy⁴⁷³—I suggest ending this discussion for now and focusing on a different way in which the ‘classical’ case for judicial review may prevail.

469 Stephen Holmes, ‘Precommitment and the paradox of democracy’, in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (CUP, Cambridge, 1988) 195, 226; John Rawls, *Political Liberalism* (n 315) 232.

470 See Christoph Möllers, ‘Legality, Legitimacy, and Legitimation of the Federal Constitutional Court’ (n 356) 143. See also Niklas Luhmann, ‘Operational Closure and Structural Coupling: The Differentiation of the Legal System’, 13 *Cardozo L Rev* 1419, 1436–7 (1991) (using the systems theory of *autopoiesis* to explain how the constitution provides for the structural coupling of the legal and the political system).

471 See Rainer Forst, ‘The Justification of Basic Rights’ (n 385) 20.

472 Cf Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (n 368) 1385 n 110 (arguing that we should not value legalism ‘as an end in itself’).

473 See subsection III.A.

d) Who Gets to Predict Legislative Behavior?

Nevertheless, we have not yet finished discussing the argument whereby judicial review is justified because it enforces constitutional law. The observations in the previous subsection were premised on the presumption that the legislators will largely remain within the bounds of reasonable legal judgment once judicial review ceases to exist. But with the threat of external review out of the way, the parliamentarians may start prioritizing policy over our rights to such an extent that fewer and fewer laws can reasonably claim to respect our liberties. After all, we do not know whether the legislators are somewhat mindful of our rights because they are naturally so inclined, because the court educates them on the importance of constitutional liberties, or because they know that the justices will invalidate unconstitutional statutes.⁴⁷⁴

Of course, it is possible that little to nothing will change. After decades (or centuries) in which the Supreme Court or the Federal Constitutional Court have served as our constitutional educators,⁴⁷⁵ both the electorate's and the legislators' solicitude for rights as restraints might not wane for a long time. In addition, we might argue that judicial review may itself stray beyond the bounds of reasonable legal judgment every so often.⁴⁷⁶ Finally, we might doubt whether judicial review—or law in general⁴⁷⁷—is of any use when government is bent on degrading our fundamental rights systematically and pervasively.⁴⁷⁸

474 On the Supreme Court's educational function, Ronald Dworkin, *A Matter of Principle* (n 345) 70–1. On the Federal Constitutional Court's educational function, Uwe Volkmann, 'Bausteine zu einer demokratischen Theorie der Verfassungsgerichtsbarkeit', in Michael Bäuerle, Philipp Dann and Astrid Wallrabenstein, *Demokratie-Perspektiven: Festschrift für Brun-Otto Bryde zum 70. Geburtstag* (Mohr Siebeck, Tübingen, 2013) 119, 135–6. On the Court's role in establishing external constraints on legislation, Richard H Fallon, Jr, 'Constitutional Constraints' (n 443) 997–8, 1029–30.

475 See n 474.

476 *Bush v. Gore*, 531 U.S. 98 (2000), is frequently cited as an example. See Richard H Fallon, Jr, *Law and Legitimacy in the Supreme Court* (n 374) 2 and the references cited therein.

477 See John Rawls, *Political Liberalism* (n 315) 233, and Christoph Möllers, *Freiheitsgrade* (n 324) para 246.

478 For examples of constitutional courts faced with democratic backsliding, see Piotr Tuleja, 'The Polish Constitutional Tribunal', in Armin von Bogdandy, Christoph Grabenwarter and Peter M Huber (eds), *The Max Planck Handbooks in European Public Law*, vol 3 (OUP, Oxford, 2020) 619, 658–73, and László Sólyom, 'The Constitutional Court of Hungary', in *id.*, 357, 440–1.

The question is what conclusion to draw from this uncertainty. I suggest the following: In countries whose constitutions explicitly provide for judicial review, respect for the people's democratic choice compels us to presume that the legislators would start exceeding the bounds of reasonable legal judgment so often that judicial review is warranted.

This is where constitutional authorizations of judicial review come into play. I argued above that the Basic Law's provision for review does not in itself suffice to justify constitutional review but that it can complement a different case for judicial review.⁴⁷⁹ It does so if we read it as a normative presumption that the legislature will violate our constitutional rights if left unchecked. This justifies judicial review because it leads us to agree with the claim that constitutional rights would fail to restrain the legislature if judicial review did not exist.

In other words, it is irrelevant, normatively speaking, how legislation would evolve in the absence of judicial review. If we wish to take seriously the people's democratic decision to institute such a review,⁴⁸⁰ we must grant them the right, especially in post-totalitarian situations, to doubt their legislators' everlasting commitment to rights.⁴⁸¹ After all, this doubt inheres in the very idea of constitutional restraints: Behind every disabling provision lies the fear that the restrained might act otherwise if left unchecked.⁴⁸² Nor ought we dismiss the people's hope that an institution confined to the law can and will do something to prevent the degradation of our liberties.⁴⁸³

Accordingly, judicial review of legislation is justified in Germany, whose constitution contains an explicit provision in this regard, because we must presume that the Federal Constitutional Court ensures at least one reasonable interpretation of our constitutional rights prevails over legislation. In other words, the Court does not give voice to our autonomy as self-governing political equals when it implements the bill of rights; instead, it prevents the legislature from curtailing our autonomy.

479 See above, section II.B.

480 See n 405 and accompanying text.

481 See Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 356) 145 (suggesting that the experience of totalitarianism validates the constitutional framers' decision to mandate a legal, not political, construction of our constitutional rights).

482 Kenneth Burke, *A Grammar of Motives* (University of California Press, Berkeley, 1969) 357.

483 Michael J Perry, *The Constitution in the Courts* (n 404) 20.

This case for judicial review comes at a cost. By presuming that we would be worse off without a constitutional court, we argue that the hypothetical detriment to our political autonomy if judicial review were to disappear weighs more heavily than the detriment to our autonomy as political equals *today*, when the legislature may still act within the bounds of reasonable legal judgment. We thus conclude that unelected decision-makers have the right to diminish our political equality on a day-to-day basis in the name of preventing a different—and merely potential—violation of our political equality. In doing so, we acknowledge that judicial review grates at our autonomy despite being justified.

That is why it makes sense to investigate other cases for judicial review: Perhaps one of them shows that judicial review never diminishes our political equality after all. Moreover, we still require a justification for judicial review in the United States, whose constitution does not clearly authorize such review. We commence with John Rawls's case for judicial review before moving on to Pierre Rosanvallon's and Anuscheh Farahat's.

2. Public Reason

Like the classical case for the legitimacy of judicial review, John Rawls' case suggests that judicial review is legitimate because it protects our constitutional rights (and thus 'the higher authority of the people') against the current legislative majority. But it differs from the classical case in its focus on public reason.⁴⁸⁴

Rawls writes that modern-day society is characterized by a 'pluralism of comprehensive philosophical and moral doctrines'.⁴⁸⁵ In these circumstances, the constitutional court represents the people as long as it avails itself of public reason.⁴⁸⁶ It does so when it bases its decision on a 'family of reasonable political conceptions of justice'.⁴⁸⁷ According to Rawls's later

484 John Rawls, *Political Liberalism* (n 315) 233–4.

485 *Id.*, xviii–xix.

486 *Id.*, 233–4.

487 *Id.*, liii. For a recent application of Rawls' approach to constitutional adjudication, see Ute Sacksofsky, 'Wenn Rechtfertigungen brüchig werden: Verfassungsgerichte in der Diskriminierungsbekämpfung am Beispiel der Geschlechterordnung vor dem Bundesverfassungsgericht', in Rainer Forst and Klaus Günther (eds), *Normative Ordnungen* (Suhrkamp, Berlin, 2021) 604 (discussing whether the Federal Constitutional Court's case law on gender and sexuality conforms to Rawls' idea of public reason).

work,⁴⁸⁸ a conception of justice belongs to this family if it reasons in terms that potential objectors ought nevertheless to accept ‘as free and equal citizens’.⁴⁸⁹ This means that the conception of justice must protect certain basic rights, refrain from subordinating them to a conception of the good, and ensure that everyone can make effective use of their freedoms.⁴⁹⁰

There are manifold objections to Rawls’s idea of public reason.⁴⁹¹ I will focus on one of them. As Rawls himself admitted, there will frequently be a ‘standoff’ between conflicting reasonable political conceptions.⁴⁹² Consider the duty of social-media platforms under German law to delete manifestly unlawful posts upon the request of a user within twenty-four hours.⁴⁹³ Were the German Constitutional Court to invalidate this statute, it could base its decision on the public reason that we should encourage, rather than deter, expressions of opinion. But it could also justify the decision *not* to strike down the law, for it could argue that we must protect the dignity of all as robustly as possible if we wish for civil society and democracy to function well.⁴⁹⁴ The question, then, is why the Court should get to adjudicate the standoff between these conflicting political conceptions, given that it is less democratically legitimate than the legislature.

One way to respond to this question is to note that it suffices, on Rawls’s theory, for the constitutional court’s decision to rest on one of several conceivable public reasons. Even when the contrary outcome would be equally reasonable, the court’s ruling is sufficiently legitimate if it is itself reasonable, for no reasonable individual could object to it.⁴⁹⁵

488 For detailed analysis of the subtle changes in Rawls’s concept of political liberalism, see Frank I. Michelman, ‘The Question of Constitutional Fidelity: Rawls on the Reason of Constitutional Courts’, in Silje A. Langvatn, Mattias Kumm and Wojciech Sadurski (eds), *Public Reason and Courts* (CUP, Cambridge, 2020) 90.

489 John Rawls, ‘The Idea of Public Reason Revisited’ (n 366) 770–1.

490 *Id.*, 774.

491 For an overview, see Jonathan Quong, *Liberalism without Perfection* (OUP, Oxford, 2010) 259–60 and the references cited therein.

492 See John Rawls, *Political Liberalism* (n 315) liv–lvi. For a critique, see John A. Reidy, ‘Rawls’s Wide View of Public Reason: Not Wide Enough’, 6 *Res Publica* 49, 64–7 (2000).

493 Sec 3 paras 1, 2 no 2 *Netzwerkdurchsetzungsgesetz*.

494 In many cases, a conflict of public reasons will overlap with rights collisions. But the former may occur more often since public reason does not always implicate a fundamental right.

495 Wilfrid Waluchow, ‘On the Neutrality of Charter Reasoning’, in Jordi Ferrer Beltrán, José Juan Moreso and Diego M. Papayannis (eds), *Neutrality and Theory of Law* (Springer, Dordrecht, 2013) 203, 221.

But I believe that reasonable individuals could very well object to the court's decision. That is because Rawls expects each of the political conceptions that together make up public reason to order the values it holds dear.⁴⁹⁶ Consequently, at least one conception will likely prioritize free speech over dignity and privacy rights, whereas a different one will do the opposite. As a result, we should not expect the first conception to accept as reasonable the proposition that we should protect privacy rights as robustly as possible—and vice versa.

Rawls, for his part, seems to argue that judicial review is legitimate in these circumstances if the justices break the deadlock by resorting to precedent and accepted modes of constitutional argument.⁴⁹⁷ But in this case, the question again arises why the justices' legal judgment should prevail over the legislators', whose constitutional interpretation may very well lie within the bounds of reasonable legal judgment as well. Rawls seems to trust the justices' judgment more because they are better versed in constitutional law.⁴⁹⁸ But as we saw above, that does not justify judicial review as long as the legislature stays within the bounds of reasonable legal judgment and we consider constitutional restraints legal, not moral, in nature.⁴⁹⁹

3. The Need for Unanimity

Pierre Rosanvallon's theory of judicial review has proven influential of late, particularly in Germany.⁵⁰⁰ Like Rawls, Rosanvallon grounds judicial review's legitimacy in the people's decision, as political equals, to establish constitutional restraints. Like Rawls, he considers the constitutional court representative of the people—namely, of the 'peuple-principe', not the 'peuple-suffrage' represented in parliament.⁵⁰¹ But unlike Rawls, who argues

496 John Rawls, 'The Idea of Public Reason Revisited' (n 366) 777.

497 See John Rawls, *Political Liberalism* (n 315) liv–lv and 235–236.

498 See *id.*, 236.

499 See above, section II.D.1.c.

500 See Uwe Volkmann, 'Bausteine zu einer demokratischen Theorie der Verfassungsgerichtsbarkeit' (n 474) 134–6; Christopher Scheid, 'Demokratieimmanente Legitimation der Verfassungsgerichtsbarkeit' (n 408) 262–6; and Anuscheh Farahat, *Transnationale Solidaritätskonflikte: Eine vergleichende Analyse verfassungsgerichtlicher Konfliktbearbeitung in der Eurokrise* (Mohr Siebeck, Tübingen, 2021) 73–6.

501 For criticism of the idea that sovereignty resides in two distinct peoples, see Michel Troper, 'The logic of justification of judicial review', 1 Int'l J Con L 99, 120 (2003) (arguing that the constitution can only attribute sovereignty to the people, not divide it among different peoples).

that the court speaks for the people when it bases its decision on one of the several reasonable conceptions of justice that together account for societal pluralism,⁵⁰² Rosanvallon believes the court represents the people when it reminds them of the fundamental values agreed on *unanimously*.

Traditionally, Rosanvallon argues, unanimity was thought to emanate from universal suffrage. The term ‘majority’ only made its first appearance in Great Britain and France in the eighteenth and nineteenth centuries, respectively.⁵⁰³ But in the current age of party politics and clientelism, we can no longer consider the legislature the center of legitimate lawmaking. The people represented in parliament are but an aggregation of different minorities, each undervalued, underserved, or otherwise disappointed in its own way. As a result, the parliamentary majority can no longer claim to represent the general will.⁵⁰⁴ Majority rule is a mere decision technique, then, not a source of legitimacy.⁵⁰⁵ Modern democratic societies still require common values to survive, which means they need institutions dedicated to consensus, not partisanship.⁵⁰⁶

On this view, it falls to the constitutional court to implement the general will vis-à-vis parliament. While the latter focuses on short-term progress, the former prioritizes the abiding national togetherness encapsulated in the constitution’s rules. Therefore, it is inaccurate to say that judicial review frustrates the people’s democratic will. In actuality, it reminds the parliamentary majority that its democratic legitimacy grows weaker the more time passes. For that reason, judicial review protects the liberty of future majorities from constraints imposed today for the sake of short-term advantage.⁵⁰⁷

However, I believe Rosanvallon is barking up the wrong tree when he tethers political legitimacy to unanimity. He does so out of a concern for social cohesion.⁵⁰⁸ But the problem of cohesion implicates not legitimacy but what John Rawls termed stability⁵⁰⁹—that is, the question of how to

502 See n 486.

503 Pierre Rosanvallon, *La légitimité démocratique: Impartialité, réflexivité, proximité* (Éditions du Seuil, Paris, 2008) 33–57.

504 *Id.*, 116–8.

505 *Id.*, 28.

506 *Id.*, 27–8.

507 *Id.*, 28, 222–7.

508 See *id.*, 27.

509 See John Rawls, *Political Liberalism* (n 315) 141. On stability, Brian Barry, ‘John Rawls and the Search for Stability’, 105 *Ethics* 874, 880 (1995).

ensure that everyone remains willing to abide by the law. By contrast, the concept of legitimacy describes our belief that everyone *ought* to accept the law as authoritative.⁵¹⁰

The second problem is that Rosanvallon's approach forces us to locate consensus *somewhere*, lest we must consider all current political regimes illegitimate. And once we do so, we can no longer explain how an institution we consider consensus-based should adjudicate disagreement. Thus, absent from Rosanvallon's account is a suggestion for how the constitutional court should apply, in a concrete case, the fundamental values that hold the nation together. The example he offers of a fundamental value—the rejection of capital punishment⁵¹¹—is uninformative, for the prohibition of the death penalty will likely occasion little interpretive disagreement once it has been entrenched in the constitutional text in so many words. Thus, a constitutional decision that protects us from the government's attempt to reinstitute capital punishment even though the constitution prohibits it is undoubtedly justified. But what about the right to free speech, privacy, or religion? Rosanvallon does not acknowledge that our disagreement about the correct articulation of these rights is not limited to eccentric applications thereof but frequently pertains to their core meaning.⁵¹²

Accordingly, the risk which inheres in judicial review is not only that the justices abuse their power, as Rosanvallon would suggest.⁵¹³ Instead, it lies in the possibility that they substitute one plausible rights articulation for another⁵¹⁴ despite having less democratic legitimacy than the legislature.

4. Re-Politicizing Our Constitutional Values

a) Forming the General Will

Anuscheh Farahat has recently put forward a defense of judicial review that builds on Rosanvallon's theory of dualist democracy but does not skirt the problem of disagreement. In fact, it places it front and center. Like Ro-

510 See also Leif Wenar, 'John Rawls', in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2021 Edition), available at <https://plato.stanford.edu/archives/sum2021/entries/rawls/> (last accessed 30 September 2021).

511 Pierre Rosanvallon, *La légitimité démocratique* (n 503) 225.

512 See Wojciech Sadurski, *Equality and Legitimacy* (n 319) 35–6.

513 Pierre Rosanvallon, *La légitimité démocratique* (n 503) 259–64.

514 See Uwe Volkmann, 'Bausteine zu einer demokratischen Theorie der Verfassungsgerichtsbarkeit' (n 474) 127.

sanvallon, Farahat believes that the constitutional court contributes to the government's legitimacy because it implements the values entrenched in the constitution. But unlike him, she considers the process more important than the outcome.

Farahat argues that judicial review allows societal groups with little or no parliamentary leverage to reopen the legislative debate outside the legislature. In court, the debate is framed in constitutional terms. That is why judicial review can be said to constitutionalize the majority's will. Yet it also *re-politicizes* constitutional rules once all the participants in the debate accept that each rule contains within it and is open to varied and conflicting interpretations. Here, then, is a forum where groups can, for a moment, challenge the powers that be and foreground the possibilities hidden behind the entrenched interpretations of our constitutional rights.⁵¹⁵

On this view, judicial review does not simply implement a pre-existing general will. Instead, it contributes to a more nuanced and diverse *formation* of the general will and hence to a better form of self-government.⁵¹⁶ Whether the group ultimately prevails in court is beside the point. All that matters is that the justices acknowledge the different possible conceptions of the constitutional value in question and that the losing side knows neither this nor any other interpretation of a constitutional rule is immutable.⁵¹⁷

b) Holding Out the Promise of Change

Jack Balkin has made a similar argument for the United States.⁵¹⁸ He contends that our assent to the constitution as political equals does not in itself render government legitimate. At some point, we must also be able to expect moral progress in the areas in which we find fault. He writes that 'faith in progress affects how we view deviations from what we regard as fair, just, and democratic. It allows us to interpret these deviations as mistakes or temporary failings inconsistent with the true nature of the system, rather

515 Anuscheh Farahat, *Transnationale Solidaritätskonflikte* (n 500) 74–5. See also Aileen Kavanagh, 'Participation and Judicial Review', 22 Law & Phil 451, 483 (2003).

516 Anuscheh Farahat, *Transnationale Solidaritätskonflikte* (n 500) 74–5.

517 *Id.*, 72–3.

518 Jack M Balkin, 'Respect-Worthy: Frank Michelman and the Legitimate Constitution', 39 Tulsa L Rev 495 (2004).

than as more or less permanent features that are characteristic of the system or central to it.⁵¹⁹

Because we disagree both about the current faults and the required remedy, government must attend to divergent expectations of what our constitution should become. Consequently, different groups must each be able to expect that persistent efforts to move the country closer to their constitutional aspirations will have some demonstrable effect. Balkin submits that judicial review is one of two feedback mechanisms that can transform people's efforts into institutional change. From this, he writes, it derives its legitimacy.⁵²⁰

c) Why the Constitutional Court?

Farahat and Balkin's argument foregrounds an empowering, cheerful conception of collective self-government. It implies that it is up to each of us to determine how legitimate our political regime is. Instead of relying on parliament to specify our constitutional rights, we should present our own constitutional narrative whenever we can. Yet, there are many ways in which we can get to work and many fora in which we can present our narrative. Why should constitutional adjudication be one of them if the people who get to choose between competing constitutional narratives are unelected?

Farahat's answer is that constitutional adjudication complements legislation because it represents a different part of the people. She argues that judicial review allows underserved groups to question dominant power structures and to raise their voice in a forum where someone will have to listen.⁵²¹ However, judicial review thus fails to represent all people who do not participate in the lawsuit. In other words, Farahat advocates overrepresentation in one forum to remedy underrepresentation in another. The problem with this approach is that the two instances of representation do not combine to form a harmonious whole. Instead, only one collective decision can exist at a time: the legislature's or the court's.

Farahat likely believes that the litigants' overrepresentation in court is a price worth paying because some societal groups—such as marginalized

519 *Id.*, 496.

520 *Id.*, 503–9.

521 Anuscheh Farahat, *Transnationale Solidaritätskonflikte* (n 500) 74–5.

communities—have no chance of gaining equal representation in parliament. We will see below that her focus on underserved groups is shared by postcolonial/feminist/queer scholars, who believe that judicial review is legitimate if and because it helps emancipate marginalized communities. The difference I see between the two approaches is that Farahat focuses more on the groups' voice than on the actual victory they hope to achieve in court. And while I cannot speak for marginalized communities, it seems to me that most scholars who identify with them demand rights, not voice. Of course, it may be impossible to obtain the former without having the latter. Empirically, however, it is far from clear that litigation helps vulnerable groups stir up public opinion in their favor.⁵²² In fact, the government's reaction to a court ruling may do more in that regard than the justices' decision-making process.⁵²³

Consequently, I consider Farahat's defense of judicial review insufficiently persuasive because it accepts the countermajoritarian difficulty without offering sufficient benefits in return. Her theory demands too little in the way of concrete rights to make up for the justices' comparative lack of democratic legitimacy.

III. Judicial Review of Legislation and the Minimal-Justice Criterion

We now turn to two cases for judicial review that ground its legitimacy not in a decision of the people but in the outcomes of constitutional adjudication. The first suggests that the court contributes to the legitimacy of government, and by extension its own, because the rights it specifies may help government remain minimally just (A).⁵²⁴ The second, which originates in postcolonial/feminist/queer theories of judicial review, differs from the first one in that it adds specific rights to the liberties the court must enforce for judicial review to be justified (B).

522 See n 583 and accompanying text.

523 See Michael J Klarman, 'How *Brown* Changed Race Relations: The Backlash Thesis', 81 J Am Hist 81 (1994) (arguing that white Southern backlash against *Brown* did more than the ruling itself to make a majority of Americans support more civil-rights legislation).

524 And, in doing so, help guarantee our political equality. See notes 378, 384–385 and accompanying text.

A. Protecting Our Basic Human Rights

According to the first conception of the minimal-justice criterion, government must protect all basic human rights to be legitimate.⁵²⁵ Perhaps, then, judicial review of legislation is justified because the constitutional court makes up for its comparative lack of democratic legitimacy by being more likely than the legislature, all things considered, to protect these rights.⁵²⁶

The chief reason adduced to explain the constitutional court's superiority in protecting our basic human rights is that the justices are confined to constitutional law, including constitutional rights, and may not entertain the political point of view.⁵²⁷ However, a focus on constitutional rights does not automatically entail better human-rights protection. Since political legitimacy and constitutional legality are distinct from one another,⁵²⁸ our basic human rights—whatever they may be—do not necessarily coincide with our entrenched constitutional rights. And it is not clear, especially in America, that the court's rights jurisprudence ultimately protects a sufficient number of basic human rights for us to consider constitutional adjudication structurally superior to legislation (1).

Nevertheless, parliament may become so inattentive of our constitutional rights in the absence of judicial review that legislation will gradually fall below a minimal-justice threshold. The question, then, is how seriously to take this possibility. In a country in which the constitution explicitly provides for judicial review, we should again honor the people's democratic decision by taking it as proof that legislation will indeed fall below this threshold. On this view, judicial review is justified because its constitutional authorization compels us to presume that the court can and will act as a bulwark against a gradual slide toward injustice (2).

1. Distinguishing Between Constitutional and Human Rights

Because of its constitutional doctrine, at least the Supreme Court both under- and overenforces our basic human rights when it articulates our constitutional liberties. This means it likely ends up protecting too few

525 See n 382 and accompanying text.

526 See Aileen Kavanagh, 'Participation and Judicial Review' (n 515) 459, 485.

527 Cf *id.*, 477–8 (suggesting that legislation may fail to protect our rights 'because the legislature did not have the protection of a particular right in the forefront of its concerns, when enacting a particular piece of legislation').

528 See n 404.

basic human rights for the democratic loss caused at other times to be outweighed.

a) Underenforcing Our Basic Human Rights

Judicial review may be underenforcing our human rights because the constitutional rights enforced by the Supreme Court and, to a lesser extent, the German Constitutional Court do not cover all the rights that plausibly belong on a list of basic human rights. For instance, there may well be a basic human right to assisted dying, education, or abortion. Yet, neither is currently protected as such in the United States.⁵²⁹ More important, the justices adduced no moral reasons to justify their decision not to consider these interests fundamental rights.⁵³⁰ Instead, they were loath, among other things, to ‘reverse centuries of legal doctrine and practice’⁵³¹ and to go beyond the rights ‘explicitly or implicitly guaranteed by the Constitution’.⁵³²

This should not come as a surprise. By confining a court to constitutional law, we skew the protection of our rights in favor of liberties that are particularly easy to extract from the text.⁵³³ The court’s members may well prioritize principle over policy, but the principle they prioritize is not necessarily a purely moral one.⁵³⁴

In Germany, furthermore, the Constitutional Court shied away as recently as 2002 from declaring same-sex marriage a constitutional right.⁵³⁵ True, German constitutional law covers a general right to liberty.⁵³⁶ But it does not follow that every right we might consider a ‘human right’ is constitu-

529 *Washington v. Glucksberg*, 521 U.S.702 (1997); *San Antonion Indep. Sch. Dist. v. Rodriguez*, 411 U.S.1 (1973); and *Dobbs v. Jackson Women’s Health Org.*, 2022 U.S. LEXIS 3057.

530 On ‘moral principle’ as the reasoning for moral controversy, Christopher Eisgruber, *Constitutional Self-Government* (n 335) 55–6.

531 *Washington v. Glucksberg* (n 529) 723.

532 *San Antonion Indep. Sch. Dist. v. Rodriguez* (n 529) 33.

533 See Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (n 368) 1381. That is what Christopher Eisgruber’s defense of judicial review, which considers the Court the better moral decision-maker because the justices lack personal political ambition, fails to see. See Christopher Eisgruber, *Constitutional Self-Government* (n 335) 52–9.

534 For a comparison of judicial and moral reasoning, see Jeremy Waldron, ‘Judges as moral reasoners’, 7 *Int’l J Con L* 2, 9–15 (2009).

535 See BVerfGE 105, 313, 351–2 – *Act on Registered Life Partnerships* (2002).

536 E.g., BVerfGE 80, 137, 152–3 – *Horseback Riding in the Forest* (1989).

tionally protected, as opposed to merely covered,⁵³⁷ for any proportional law may limit the exercise of the general right to liberty.⁵³⁸

b) Overenforcing Our Basic Human Rights

Conversely, the constitutional courts may be overenforcing our human rights, from the standpoint of legitimacy analysis, because they potentially grant us more liberty from democratic legislation than the human-rights baseline requires. If a right enforced by the court does not feature among the basic human rights, the court's decision does not help legitimate government. To the contrary, it weakens it: Where there is reasonable disagreement about a particular rights specification, the political equality of all citizens in adjudicating this disagreement is more important than that the court enforces the right.⁵³⁹

For example, if the German Constitutional Court strikes down the law that weakens the double-jeopardy protection against murder charges,⁵⁴⁰ its ruling furthers murder defendants' constitutional privacy rights or dignity. But if we assume, *arguendo*, that this form of double-jeopardy protection does not constitute a basic human right, the Court's ruling detracts from government's legitimacy because it replaces a democratically enacted law.

For that reason, Richard Fallon errs when he suggests that judicial review helps make the government more legitimate because it minimizes the total number of rights violations.⁵⁴¹ Only those rights (specifications) which we may not curtail even through democratic means outweigh the threat that judicial rights specifications pose to our autonomy as political equals.⁵⁴²

537 On the coverage/protection distinction, Frederick Schauer, 'The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience', 117 Harv L Rev 1765, 1769–70 (2004).

538 E.g., BVerfGE 80, 137, 153 (n 536).

539 Cf Jürgen Habermas, 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism', 92 J Phil 109, 128 (1995) (arguing that we ought not to impose too many principles as external constraints on the current self-determination of autonomous citizens).

540 See n 353 and accompanying text.

541 Richard H Fallon, Jr, 'The Core of an Uneasy Case *For* Judicial Review' (n 384) 1705–12, 1718.

542 See Thomas Christiano, *The Constitution of Equality* (n 349) 279–80.

c) Zero-Sum Rights Controversies

Finally, current constitutional doctrine in the United States admits of very few rights conflicts (or ‘zero-sum controversies’).⁵⁴³ The Supreme Court is thus structurally inclined to underenforce basic human rights that conflict with the constitutional right invoked in court; at the same time, it is bound to overenforce the latter. In consequence, the statute invalidated by the constitutional court may well have protected human rights better than the court’s decision to void the law. For example, a statute that prohibits private businesses from discriminating against gay customers may be better for our rights—namely, our dignity—than a court decision which, in striking down the law, allows business owners to prioritize their religious beliefs.⁵⁴⁴

2. Judicial Review as Insurance Against Future Violations

To sum up, the court’s focus on constitutionally entrenched rights does not necessarily give the justices an edge over the legislators when it comes to enforcing our basic human rights. But perhaps its focus makes sure the legislature does not abandon all concern for our constitutional rights; and perhaps legislation would gradually fall below a human-rights baseline if parliament did abandon all concern. In that case, judicial review would not be more likely than legislation to protect our human rights, yet we would require it to ensure that parliament does not start violating these rights.

As mentioned above, it is impossible to predict what parliament would do in the absence of judicial review.⁵⁴⁵ Again, however, we can read a normative presumption into an explicit constitutional provision for judicial review. According to this presumption, the legislature will eventually start violating our basic human rights if there is no external review.

Of course, a provision for judicial review authorizes the constitutional court to review legislation for compliance with our constitutional liberties,

543 See Jamal Greene, ‘Foreword: Rights as Trumps?’ (n 452) 71–2. See also Mark Tushnet, ‘How Different Are Waldron’s and Fallon’s Core Cases For and Against Judicial Review?’, 30 *Ox J Legal Stud* 49, 54–60 (2010) (detailing in which instances American constitutional doctrine could, if it wanted to, acknowledge zero-sum controversies).

544 See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and Leslie Kendrick and Micah Schwartzman, ‘The Etiquette of Animus’, 132 *Harv L Rev* 133, 157–62 (2018).

545 See notes 475–478 and accompanying text.

not our moral rights. However, our constitutional and our moral rights are sufficiently closely related for us to extend the presumption of constitutional-rights violations to the latter.⁵⁴⁶ In fact, they must be related, or else we could not consider constitutional restraints legitimate for protecting an essentially moral right—our political equality.⁵⁴⁷

A constitutional provision for judicial review thus compels us to presume that the constitutional court is the only thing standing in the way of the legislature gradually eroding our basic human rights.⁵⁴⁸ To be sure, the constitutional court could not prevent a sudden authoritarian turn. As mentioned above, we cannot expect a court—or the law—to withstand a government that sets out to infringe our rights.⁵⁴⁹ Instead, we ought to presume that the court's educational capacity or its function as an external constraint on legislative decision-making⁵⁵⁰ imbues the parliamentarians with the sort of constitutional fidelity that makes egregious rights violations less likely in the first place.

Now, I argued in the previous sub-section that the court does not protect our moral rights just because it specifies our constitutional ones. Does that contradict the presumption that the legislature would fail to respect our basic human rights were it not for constitutional review? I do not think so. Judicial review can make parliament protect a basic human right even though the court itself does not always do so. Imagine the justices letting the right to free speech prevail over a conflicting right they fail to acknowledge. On my view, they do not protect our basic human rights in this case. However, their emphasis on the freedom of expression may still prompt the legislature to think twice about restricting speech in a case that does *not* involve a rights conflict.

It follows that the judicial review exercised by the Federal Constitutional Court is legitimate because its constitutional authorization makes us presume that the justices help prevent government from falling below the minimal-justice threshold. Again, however, we pay a price for accepting judicial review on these grounds: To prevent a hypothetical violation of our basic human rights, we allow unelected decision-makers to articulate

546 On the relationship between constitutional and moral rights, Robert Alexy, 'Constitutional Rights and Proportionality', 22 *Revus: J Const Theory & Phil Law* 51, 61 (2014).

547 See n 470 and accompanying text.

548 See n 481.

549 See notes 477–478 and accompanying text.

550 See n 474.

our constitutional rights even when the legislature is mindful of our basic human rights. In other words, we suffer a loss to our autonomy today in order to retain it in the long run.

By contrast, we cannot ground the legitimacy of the *Supreme Court's* review power in its protection of our basic human rights.⁵⁵¹ But we have yet to discuss one final case for constitutional review: Perhaps the Supreme Court helps emancipate marginalized communities.

B. Emancipating Marginalized Communities

'Blacks are not faithful to the Constitution because the Constitution deserves their allegiance, for it deserves their cynicism', wrote Dorothy Roberts in 1997. 'Blacks' fidelity to the Constitution is not a duty, it is a demand—a demand to be counted as full members of the political community.⁵⁵² And for Catharine MacKinnon, the US Constitution 'has quite a lot to answer for when it comes to women. [...] Our fidelity to the Constitution is bound up with its fidelity to us.'⁵⁵³

These observations reflect what Susanne Baer has called the 'post-colonial, post-authoritarian agreement', namely, that dignity, liberty, and equality must prevail for all, not the few.⁵⁵⁴ Theorists of political legitimacy have responded to this agreement by recognizing that government may be less legitimate with regard to marginalized communities than with regard to others.⁵⁵⁵ Thus, government may be illegitimate with regard to women and sexual minorities if it does not afford them sexual liberty.⁵⁵⁶ Therefore, many postcolonial/feminist/queer scholars suggest that judicial review of

551 See notes 400–401 and accompanying text.

552 Dorothy E Roberts, 'The Meaning of Blacks' Fidelity to the Constitution', 65 *Fordham L Rev* 1761, 1762 (1997).

553 Catharine A MacKinnon, "Freedom from Unreal Loyalties": On Fidelity in Constitutional Interpretation' (n 388) 1779.

554 Susanne Baer, 'Who cares? A defence of judicial review' (n 333) 76.

555 See n 390.

556 See Tracy E Higgins, 'Democracy and Feminism', 110 *Harv L Rev* 1657, 1681 (1997), and Ruthann Robson, 'Judicial Review and Sexual Freedom', 30 *U Haw L Rev* 1, 45 (2007). See also Catharine A MacKinnon, "Freedom from Unreal Loyalties" (n 388) 1779 (arguing that the US Constitution would be more legitimate with regard to women if it contained the Equal Rights Amendment).

legislation is legitimate if it grants marginalized communities the rights without which they may regard the political regime as illegitimate.⁵⁵⁷

1. Preliminary Observations

This claim raises many issues that I can touch upon only briefly. Thus, we might ask whether the concept of partial illegitimacy makes sense (a); how to define marginalized communities (b); and who gets to determine the rights without which government is partially illegitimate (c).

a) Partial vs. Complete Illegitimacy

Firstly, we might doubt whether the concept of partial illegitimacy is preferable to the conclusion that government is unjustified *tout court* if it continues to subordinate underprivileged groups. After all, government fails to treat all of us—not merely the subordinated—as political equals whenever some individuals are less equal than others.

To this one might object that no government on Earth would be legitimate if the existence of marginalized communities rendered government unjustified. But I do not consider this objection particularly forceful, for we might be quicker to emancipate the underprivileged once we realize that we all live under an unjustified regime.

Therefore, the better argument in favor of only partial illegitimacy is that privileged communities should not get to conclude that the very regime which enhanced their privilege (at the cost of oppressing the vulnerable) is not worthy of their respect either. That is why Richard Fallon is correct, in my opinion, to argue that antebellum America was legitimate with regard to whites even though the practice of slavery made it profoundly immoral.⁵⁵⁸

b) Defining Marginalized Communities

The next question is when to characterize a group of individuals as a marginalized community. Susanne Baer counts ‘children and women, non-

557 See Tracy E Higgins, ‘Democracy and Feminism’ (n 556) 1698–9, and Ruthann Robson, ‘Judicial Review and Sexual Freedom’ (n 556) 46.

558 Richard H Fallon, Jr, *Law and Legitimacy in the Supreme Court* (n 374) 30.

patriarchal men and social and cultural minorities, poor people and other excluded people' among judicial review's beneficiaries.⁵⁵⁹ More generally, one may say that all groups which suffer durable inequalities because of the position they occupy within a paired category—such as sex (male/female), gender (straight/queer), or race (black/white)—constitute marginalized communities.⁵⁶⁰

It is important not to confuse marginalized communities and numerical minorities, i.e., groups that fail to obtain what they demand because they are outvoted by the legislative majority.⁵⁶¹ Women are not a numerical minority, but that does not preclude us from considering them marginalized. Their political power arguably does not match their numbers: Asking them to rely solely on the legislature fails to see that women's demands may reflect the system of which the legislature is a part, not the needs they might articulate if they cast off the yoke of their oppression.⁵⁶²

c) Determining the Essential Rights

This brings us to the most delicate question, that of who gets to determine the rights without which marginalized communities may regard government as illegitimate. To begin with, *every* member of a normative community has the right to participate in establishing its liberties. Excluding some

559 Susanne Baer, 'Who Cares? A defence of judicial review' (n 333) 76.

560 See Charles Tilly, *Durable Inequality* (University of California Press, Berkeley, 1998) 1–6, and Elizabeth Anderson, *The Imperative of Integration* (Princeton University Press, Princeton, 2010) 7. Perhaps populations from countries of the Global South count as marginalized communities as well. See BVerfG, Order of 24 March 2021, 1 BvR 2656/18 paras 174–9, available at <https://perma.cc/BA3L-JQ63>, and Matthias Goldmann, 'Judges for Future: The Climate Action Judgment as a Postcolonial Turn in Constitutional Law?', *Verfassungsblog*, 30 April 2021, available at <https://perma.cc/Z93Y-GJA7> (discussing the constitutional rights of the Bangladeshi and Nepalese people, who may suffer the effects of climate change caused in part by Germany, vis-à-vis that state).

561 On the distinction between systematic disadvantage and losing, Mark Tushnet, *Taking the Constitution Away from the Courts* (n 429) 159–60.

562 See Tracy E Higgins, 'Democracy and Feminism' (n 556) 1695–7. Generally on the interplay between social construction and liberty, Nancy Hirschmann, 'Toward a Feminist Theory of Freedom', 24 *Pol Theory* 46, 51–7 (1996). On gaps in political knowledge between privileged and underprivileged groups, Ilya Somin, 'Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory', 89 *Iowa L Rev* 1287, 1354–64 (2004).

members from this discussion violates their status as justificatory equals.⁵⁶³ Including them may lead to a set of rights that marginalized communities deem insufficient, however.⁵⁶⁴ To make matters even more difficult, marginalized communities may frequently disagree among themselves about the rights they require to be free. For instance, it is unclear whether women who disagree with feminist theorists about abortion are unwittingly subject to patriarchal pressure (and hence mistaken) or merely exercise their freedom to think for themselves.⁵⁶⁵

Seeing as I am not a member of a marginalized community, I should tread lightly in addressing these problems.⁵⁶⁶ I might find it difficult, in judging underprivileged groups' claims, not to replicate the oppression from which they seek to emancipate themselves.⁵⁶⁷ For that reason, I defer in this chapter to the judgment of postcolonial/feminist/queer scholars as to the liberties their groups require. I leave open the question of whether the concept of standpoint epistemology or of positionality better justifies this deference.⁵⁶⁸ For our purposes, it may not need to be clear which rights truly emancipate underprivileged groups anyway. All we need to know is that there likely are such rights, for we can then focus on the question of whether judicial review provides an adequate forum for finding out what they are.⁵⁶⁹

563 Rainer Forst, 'The Justification of Basic Rights' (n 385) 14, 16.

564 Cf Mary Becker, 'Conservative Free Speech and the Uneasy Case for Judicial Review', 64 U Colo L Rev 975, 985 (1993) (pointing to the intractable conflict between women's and men's interests).

565 Tracy E Higgins aptly labels this problem feminism's own 'countermajoritarian dilemma'. 'Democracy and Feminism' (n 556) 1685–9. See also Olúfemi O Táíwò, 'Being-in-the-Room Privilege: Elite Capture and Epistemic Deference', 108 The Philosopher (2020), available at <https://perma.cc/74FG-9D5L> (describing how elite capture can render standpoint epistemology less valuable).

566 See Ruthann Robson, 'Judicial Review and Sexual Freedom' (n 556) 18.

567 Cf Darren L Hutchinson, 'The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics', 23 Law & Ineq 1, 46–9, 50–5 (2005) (criticizing *Lawrence v. Texas*, which held that the prohibition of same-sex sodomy violates the right to privacy, as heteronormative because it emphasizes the similarity between homosexual and married heterosexual couples).

568 See the discussion in Katharine T Bartlett, 'Feminist Legal Methods', 103 Harv L Rev 829, 867–87 (1990).

569 Cf Olúfemi O Táíwò, 'Being-in-the-Room Privilege' (n 565) (emphasizing that building appropriate institutions is more important than symbolism).

2. Devising a Test for a Court's Emancipatory Impetus

The next question, then, is how to ascertain whether judicial review provides an adequate forum for recognizing and enforcing emancipatory rights. One possibility is to ask whether the constitutional court is more likely than the legislature to protect these rights. This would risk dooming the postcolonial/feminist/queer case for judicial review. After all, we saw above that constitutional courts are not necessarily more likely than parliament to protect our basic human rights.

More specifically, constitutional adjudication, as it currently stands, is not structurally geared toward progressive social change.⁵⁷⁰ Thus, both the American and the German constitutional justices are bound to be no more solicitous of underprivileged communities than the legislature because they are appointed by the latter.⁵⁷¹ In other words, judicial review is countermajoritarian in a structural sense, but not necessarily in a political one. It is countermajoritarian in a structural sense because it can, by dint of constitutional law, veto the legislature's enactments, thereby creating a counterweight to the latter.⁵⁷² Yet, it need not be more progressive than parliament. In fact, it will be more conservative if most of its members were appointed by a previous, more conservative government.⁵⁷³ More, the elite background of most constitutional justices makes it more difficult for them to imagine the plight of marginalized communities.⁵⁷⁴

However, the 'more likely' test is premised on the constitutional court's comparative lack of democratic legitimacy. Crucially, this deficiency may well be less significant when it comes to marginalized communities.⁵⁷⁵ That is why we ought to use a less demanding test. According to the 'futility'

570 For an overview of the American debate about courts' role in producing social change, see Tomiko Brown-Nagin, 'Elites, Social Movements, and the Law: The Case of Affirmative Action', 105 *Colum L Rev* 1436, 1497–1501 (2005).

571 See Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker', 6 *J Pub L* 279, 284–5 (1957).

572 E.g., Peter M Huber, 'Constitutional Courts and Politics in the European Legal Space' [p 123018 of the proofs] (forthcoming).

573 Jack M Balkin and Sanford Levinson, 'Understanding the Constitutional Revolution', 87 *Va L Rev* 1045, 1064–6 (2001).

574 Deseriee A Kennedy, 'Judicial Review and Diversity', 71 *Tenn L Rev* 287, 299 (2004). See also Sherrilyn A Ifill, 'Racial Diversity on the Bench: Beyond Role Models and Public Confidence', 57 *Wash & Lee L Rev* 405, 409–10 (2000) (emphasizing the importance of racial diversity for the quality of judicial decision-making).

575 See n 557.

test, for instance, we should accept judicial review of legislation as long as relying on the constitutional court to help emancipate marginalized communities does not prove futile.⁵⁷⁶

3. Does Judicial Review Pass the Futility Test?

a) How Expansive Can We Expect the Courts' Rulings to Be?

The first step in bringing the futility test to life is to establish what kind of rights victories we may reasonably expect of the constitutional court. If we demand of the justices that they bring about women's political equality by dismantling the patriarchy, we are bound to be disappointed, and judicial review will appear less justified. After all, constitutional justices are fearful for what they consider their sociological legitimacy,⁵⁷⁷ which means they will be unlikely to hand down too many decisions that conflict with public opinion.⁵⁷⁸ More, the requirement that constitutional courts give reasons for their decisions makes difficult the sudden change of mind that may be necessary for social change.⁵⁷⁹ A court cannot alter its jurisprudence too quickly, lest it forfeit its self-presentation as a rule-bound decision-maker.⁵⁸⁰ Finally, both the Supreme Court and the Federal Constitutional Court (predominantly) enforce the negative dimension of constitutional rights,

576 See Mary Becker, 'Conservative Free Speech and the Uneasy Case for Judicial Review' (n 564) 998–1002.

577 See Or Bassok, 'The Schmitelsen Court: The Question of Legitimacy', 21 German LJ 131, 143–7 (2020), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992) (emphasizing that the Supreme Court's power lies in the support the people extend toward it).

578 See Or Bassok, 'The Supreme Court's New Source of Legitimacy', 16 U Pa J Const L 153, 188–96 (2013). See also Michael A Zilis, 'Minority Groups and Judicial Legitimacy: Group Affect and the Incentives for Judicial Responsiveness', 71 Pol Res Q 270 (2018) (adducing empirical proof that people who dislike certain marginalized communities exhibit lower degrees of diffuse support for the Supreme Court after it hands down decisions perceived as beneficial to those communities).

579 See Mary Becker, 'Conservative Free Speech and the Uneasy Case for Judicial Review' (n 564) 998 and, more generally, Frederick Schauer, 'Giving Reasons', 47 Stan L Rev 633, 642–53 (1995).

580 Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 356) 148–9.

and this dimension tends to improve the lot of the privileged, not of those who demand state action.⁵⁸¹

We likewise risk disappointment if we expect the way in which the court establishes emancipatory rights to galvanize public support for further political action. Thus, Tomiko Brown-Nagin has argued that relying on the law may be detrimental to a social movement⁵⁸² because a focus on the sort of technical constitutional questions that appeal to the justices diminishes the movement's opportunity to further inspire its supporters.⁵⁸³

By contrast, the more technical our equality expectations become, the likelier it is that marginalized communities will score the occasional victory in court. Few of the landmark Supreme Court decisions that granted these groups previously unprotected rights reasoned in uplifting, emancipatory terms. Yet rights they did grant.

b) Focusing on the Concrete Change in the Law

For instance, the Supreme Court decision that (formally) ended segregation in public schools⁵⁸⁴ arguably did so primarily for utilitarian reasons: The justices implied that giving Blacks more rights would make America more powerful, especially in its competition with other major players on the world stage.⁵⁸⁵ But regardless of the reason, segregation became unlawful after *Brown*.

Secondly, *Lawrence v. Texas*, which invalidated a Texas statute criminalizing same-sex sodomy, bespeaks a heterosexist attitude. In tying gay sex to a

581 See Catharine A MacKinnon, *Toward a Feminist Theory of the State* (n 386) 162–5; Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (The University of Chicago Press, Chicago, 1991) 10–12, and Mary Becker, 'Conservative Free Speech and the Uneasy Case for Judicial Review' (n 564) 999–1000.

582 For Tomiko Brown-Nagin, a social movement is a 'sustained, interactive campaign that makes sustained, collective claims for relief or *redistribution* in response to social marginalization, dislocation, change, or crisis.' Tomiko Brown-Nagin, 'Elites, Social Movements, and the Law' (n 570) 1503 (emphasis in the original).

583 *Id.*, 1511–7.

584 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

585 See Derrick Bell, 'Bell, J., dissenting', in Jack M Balkin (ed), *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (New York University Press, New York, 2001) 185, 193–6, and Tomiko Brown-Nagin, 'Elites, Social Movements, and the Law' (n 570) 1480–2.

marriage-like ‘personal bond’ and emphasizing gays’ right to privacy within their own home, the Court appears keen to marginalize homosexuality: Gay sex is primarily tolerable, the justices seem to be saying, when we need not be reminded that it exists and when married heterosexual couples could, in theory, relate to it.⁵⁸⁶ Be that as it may, the Texas statute prohibiting ‘deviate sexual intercourse’ was no longer an issue after *Lawrence*.

Finally, ‘[t]he woman and her life are almost absent from the discussion of abortion in *Roe v. Wade*, which becomes instead the story of the fetus and the doctor.’⁵⁸⁷ More, Catharine MacKinnon has pointed out that the isolated liberalization of abortion under circumstances of male domination ultimately serves men more than women because it removes a potential obstacle to sex.⁵⁸⁸ Ultimately, however, the ruling arguably left American women with stronger abortion rights than women in most other countries.⁵⁸⁹ In other words, marginalized communities can reasonably expect judicial review to protect some of the rights that, *taken together*, may *gradually* strengthen their political equality and render government more legitimate.

In fact, the characteristics of constitutional adjudication—such as its reliance on public approval and its focus on constitutionally entrenched rights—will sometimes work in an underprivileged group’s favor. If the public is more progressive than its elected representatives on a particular matter and there is a straightforward, traditional way of expressing constitutional support for the public’s concern, constitutional adjudication may well further the cause of a marginalized community. Perhaps the best example is the Supreme Court’s decision in favor of same-sex marriage: Firstly, a majority of the public supported gay marriage prior to *Obergefell*.⁵⁹⁰ Secondly, granting same-sex couples the right to marry did not require a major doctrinal innovation. All the Supreme Court had to do was extend a liberty it had previously recognized—as ‘one of the vital personal rights essential to the

586 See, e.g., Darren L Hutchinson, ‘The Majoritarian Difficulty’ (n 567) 46–9, 50–5.

587 Mary Becker, Cynthia Grant Bowman and Morrison Torrey, *Feminist Jurisprudence: Taking Women Seriously* (2nd edn, West Group, St Paul, 2001) 531 (emphasis added).

588 See, e.g., Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge MA, 1987) 99.

589 See Claire Cain Miller and Margot Sanger-Katz, ‘On Abortion Law, the U.S. Is Unusual. Without Roe, It Would Be, Too’, *The New York Times*, 22 January 2022, available at <https://perma.cc/U45R-BLP9>.

590 Justin McCarthy, ‘Record-High 60 % of Americans Support Same-Sex Marriage’, *Gallup*, 19 May 2015, available at <https://perma.cc/L7Y9-HX2Q>.

orderly pursuit of happiness by free men⁵⁹¹—to same-sex couples. It did not have to abandon, say, the state-action doctrine, which feminist legal scholars consider a roadblock to the better constitutional protection of women.⁵⁹²

Nevertheless, it should be stressed that Susanne Baer's depiction of constitutional courts as the defender of the downtrodden is overstated. Examples from her own court—the Federal Constitutional Court—show as much. Thus, its two abortion decisions⁵⁹³ have attracted criticism for their restrictive attitude toward a woman's right to abortion.⁵⁹⁴ Furthermore, its support for Muslim women's religious freedom has been lukewarm at best.

For instance, it has not granted Muslim women the right always to wear a headscarf when they represent the state.⁵⁹⁵ Instead, the justices pitted women's right to cover their hair against non-believers' right not to be confronted with the symbols of a particular faith in situations not of their choosing.⁵⁹⁶ In doing so, they refused to acknowledge that the allegedly neutral statutory bans on civil servants' religious symbols materialized right after the Court ruled that a mere administrative decision would not be sufficient to ban headscarves.⁵⁹⁷ In other words, the justices ignored the bans' anti-Muslim animus, choosing instead to perpetuate it. From a postcolonial perspective, the Court's headscarf jurisprudence has thus othered Muslim women: In continuation of European orientalist traditions of oppression, it implies that their headscarf is somehow alien and threatening.⁵⁹⁸

591 *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

592 See, e.g., Tracy E Higgins, 'Democracy and Feminism' (n 556) 1671–6.

593 BVerfGE 39, 1 – *Abortion I* (1975), and BVerfGE 88, 203 – *Abortion II* (1993).

594 See, e.g., Ute Sacksofsky, 'Das Frauenbild des Bundesverfassungsgerichts', 14 *Querelles: Jahrbuch für Frauen- und Geschlechterforschung* 191, 208–10 (2009) and the references cited therein.

595 See BVerfGE 153, 1 – *Headscarf III* (2020).

596 *Id.*, paras 94–5.

597 See BVerfGE 108, 282, 310–3 – *Headscarf I* (2003), and Udo di Fabio, 'Art. 4 GG', in Günter Dürig and others (eds), *Grundgesetz: Kommentar* (loose-leaf, 94th delivery, CH Beck, Munich, 2021) para 145. See also Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 356) 159.

598 Cengiz Barskanmaz, 'Das Kopftuch als das Andere. Eine notwendige postkoloniale Kritik des deutschen Rechtsdiskurses', in Sabine Berghahn and Petra Rostock (eds), *Der Stoff, aus dem Konflikte sind: Debatten um das Kopftuch in Deutschland, Österreich und der Schweiz* (transcript, Bielefeld, 2009) 361 (referring to the first headscarf decisions).

4. Conclusion

To conclude, we can ground judicial review's legitimacy in its capacity to grant marginalized communities (some of) the rights without which they may consider government unjustified. Yet, this justification stands or falls on the justices' performance over time. The less they appear solicitous of vulnerable communities, the weaker their legitimacy.

It does not follow that the court acts illegitimately whenever a case does not implicate marginalized communities' rights. It would if we could ask the justices to refrain from adjudicating such controversies and they refused this request. But the request would not be feasible. Were the justices to limit themselves to cases that implicate marginalized communities' rights, their restraint would be tantamount to admitting that the court ought solely to protect the vulnerable. And if the Supreme Court is right about the close relationship between public opinion and its sociological legitimacy,⁵⁹⁹ it is unlikely that a constitutional court could survive a countermajoritarian thrust of this nature for long. For that reason, all the court's decisions⁶⁰⁰ benefit from the justification that originates in the occasional protection of marginalized communities. However, not all of them contribute to this justification themselves.

As we saw above, the same applies to the previous two defenses of judicial review I ultimately considered successful.⁶⁰¹ In other words, I see no case for judicial review in which *each* constitutional decision contributes *equally* to the court's justification. Instead, every case turns on a rationale that does not extend to all of the court's rulings. This challenge brings us to the final part of this chapter.

IV. Judicial Review and the Protection of Our Legal Autonomy

In the previous two sections, I argued that judicial review of legislation is legitimate in three cases. It is justified if the people authoritatively predict that the legislature will eventually fail to protect either our constitutional or our basic human rights if there is no external review. And it is legitimate if we may reasonably assume that the constitutional court will strive to help liberate marginalized communities. The first case applies more to

599 See notes 577–578 and accompanying text.

600 Except for those that are *ultra vires*.

601 See above, subsections II.D.1.d. and III.A.2.

Germany than to the United States, where it remains unclear whether the constitution authorizes judicial review. The second can apply to both. Yet, we should disabuse ourselves of the preconception that the Supreme Court or the Federal Constitutional Court are inherently staunch defenders of the vulnerable.

By contrast, we cannot ground judicial review's legitimacy in a decision we took as political equals, be it to explicitly permit such review⁶⁰² or to institute a bill of rights that the courts subsequently enforce. This distinction is significant because it highlights that not every one of the justices' decisions contributes to the justification of judicial review. They would if judicial review were legitimate simply because the people voted in its favor or because the justices articulate rights that we enacted democratically. In those cases, every ruling that is not *ultra vires* would implement—and thus safeguard—our autonomy as self-governing political equals. Instead, judicial review is legitimate, firstly, because of fears that may never become a reality and, secondly, because of a hope that likely will be disappointed just as often as not.

Consequently, many of the courts' decisions will grate at our political autonomy. Some will replace the legislature's interpretation of our rights even though parliament is sufficiently mindful of our liberties. In doing so, they grate at our autonomy because the justices are unelected, and the legislators are not. Others will fail to protect rights without which members of marginalized communities do not view themselves as self-governing individuals. In doing so, they grate at our autonomy because they serve to perpetuate the subordination of the marginalized.

In the remainder of this chapter, I will discuss how a constitutional court can go about its business if it wishes to minimize its incursion into our autonomy. Scholars typically suggest that the justices should exercise restraint—either by deferring, whenever possible, to the legislators' constitutional judgment⁶⁰³ or by keeping the substantive scope of their rights

602 Unless, that is, the democratic credentials of that decision are stronger than they were when Germany adopted the Basic Law. See notes 406–409 and accompanying text.

603 See James B Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law', 7 Harv L Rev 129, 135–8, 143–52 (1893/1894), and Robert Alexy, 'Constitutional Rights, Democracy, and Representation', 3 Ricerche giuridiche 197, 202–3, 205 (2014).

articulations to a minimum.⁶⁰⁴ But such restraint will only slow down, not eliminate, the incursion into our autonomy. True, it leaves open some space for democratic decision-making. But the constitutional court is likely to fill in this space as soon as the appropriate case comes before the justices.⁶⁰⁵

Imagine a ruling that carves out an exception for egregious crimes such as murder from the prohibition against double jeopardy but does not discuss whether a crime such as rape falls into the same category. This question will initially be subject to democratic adjudication, but not for long: Whatever parliament decides will eventually have to yield to the court's assessment.

A. The Notion of Legal Autonomy

For that reason, I do not think the courts can truly minimize their incursion into our autonomy as political equals. However, there are other dimensions to our autonomy as individuals. Chief among them is our legal autonomy. Contrary to the notion of political autonomy, the notion of legal autonomy does not demand that we be the authors of the laws to which we are subject. The freedom it grants us is to be subject to *nothing but* the law. As legally autonomous individuals, we are free, within the confines of the law, to pursue our personal conception of the good life. We are not bound by the conceptions of others.⁶⁰⁶ Moreover, we are free to profess our disagreement with or disinterest in the law. The law does not ask for our endorsement, for it only regulates our external behavior and leaves untouched our attitude toward it. All it demands, in other words, is behavioral—as opposed to attitudinal—compliance.⁶⁰⁷

604 See, e.g., Cass R Sunstein, 'Foreword: Leaving Things Undecided', 110 Harv L Rev 4, 19–20 (1996), and Anuscheh Farahat, *Transnationale Solidaritätskonflikte* (n 500) 85–6.

605 Cf *Dobbs v. Jackson Women's Health Org.* (n 529) 107 (declining not to overrule *Roe v. Wade* lock, stock, and barrel and reasoning that 'the concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide').

606 Rainer Forst, *The Right to Justification* (n 315) 133–5.

607 *Id.*, 134–5. See also Thomas Hobbes, *Leviathan* (Penguin, London, 1981 [1651]) 528, 591 [ch 42] (arguing that the act of obeying the law without inward approval renders that act the sovereign's, not the subject's), and Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr and ed, CUP, Cambridge, 1996 [1797]) 6:219 (stating that 'lawgiving' creates only 'external duties, since this lawgiving does not require

This means that we can retain some degree of autonomy even when we do not consider ourselves the authors of the law established by the Supreme Court or the Federal Constitutional Court. We may have had no hand in articulating the rights that are now 'ours'. But at least they represent nothing but the law, to be respected but not necessarily espoused.

Admittedly, a constitutional court's rights jurisprudence has no direct impact on our legal autonomy. A judgment articulating our constitutional rights does not expect that we comply with it, for it imposes no duties on private actors.⁶⁰⁸ In other words, constitutional decisions are not like a red traffic light that we either stop at or run, thus complying with or disobeying the law;⁶⁰⁹ they create rights that can be either exercised or not. Before *Roe v. Wade* was overruled,⁶¹⁰ for example, state legislatures in America could violate the right to abortion by prohibiting women from terminating a pregnancy; but a private actor could not violate another woman's right to obtain an abortion. And today, no one can violate the decision to overrule *Roe*, for even a woman who attempted to terminate her pregnancy illegally would solely be contravening the state law that prohibited abortions.

What private actors *can* do, however, is make it difficult for other people to exercise their constitutional rights. For instance, they can refuse service to gay customers,⁶¹¹ insult another person,⁶¹² try to intimidate abortion providers,⁶¹³ and prevent a group they dislike from holding a political rally.⁶¹⁴ For that reason, scholars in the United States admit that it can be difficult

that the idea of this duty, which is internal, itself be the determining ground of the agent's choice'). In the following, I will use the terms 'acquiescence' and 'compliance' interchangeably.

608 Cf Ralf Poscher, *Grundrechte als Abwehrrechte: Reflexive Regelung rechtlich geordneter Freiheit* (Mohr Siebeck, Tübingen, 2003) 276 (emphasizing that the Federal Constitutional Court's case law on fundamental right's horizontal effect does not impose a duty on private actors to comply with other people's rights).

609 A red traffic light appears to be the archetype of a law that expects our compliance. See the cover picture for Tom R Tyler, *Why People Obey the Law* (Princeton University Press, Princeton, 2006) (depicting cars stopping at a red light).

610 *Dobbs v. Jackson Women's Health Org.* (n 529).

611 See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (n 544).

612 See Federal Constitutional Court, 1 BvR 1073/20, ECLI:DE:BVerfG:2021:rk20211219.lbvrl07320.

613 See Federal Constitutional Court, 1 BvR 49/00, ECLI:DE:BVerfG:2006:rk20060524.lbvr004900.

614 See the hypothetical in James L Gibson, 'Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance', 23 *Law & Soc'y Rev* 469, 475–7 (1989).

to ascertain why people comply with the Supreme Court's rulings, but they do *not* reject the idea that people can comply with a constitutional court's decision at all.⁶¹⁵ Accordingly, I, too, will postulate that the law established by a constitutional court expects our obedience insofar as the rights it grants us are devalued if we attempt to obstruct their exercise. In other words, imagine the law telling us that we need not endorse the right to terminate a pregnancy but that we should not impede other people's access to abortion. In my opinion, this creates a sufficient connection between our constitutional rights and our legal autonomy.

The next question is whether the law established by the Supreme Court or the Federal Constitutional Court renders us legally autonomous just by entering into force as law or whether something else is required as well. This is where Niklas Luhmann's political sociology comes into play. It suggests that something else is required—namely, a presumption that everyone will acquiesce in the courts' rulings. Absent this presumption, we are less legally autonomous when we follow the law—in the sense described above—despite it not asking us for our endorsement. It follows that constitutional courts should specify our rights in a way that promotes a presumption of universal acquiescence if they wish to strengthen our legal autonomy.

In the following, I set forth Luhmann's argument (A). Then, I apply, to judicial review of legislation, his theory of how the political system generates a presumption of universal acquiescence (B). Finally, I briefly investigate whether this theory jibes with more recent ones (C).

B. The Notion of Legal Autonomy and Niklas Luhmann's Political Sociology

Luhmann does not speak of individual 'autonomy', legal or otherwise. Instead, his early political sociology argues that the law affects our freedom to choose the personality we present to others. However, the concepts of personality and autonomy are related to one another, for we become autonomous, from a sociological perspective, when we create a personality.⁶¹⁶

615 See, e.g., Tom R Tyler and Gregory Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights', 43 Duke LJ 703, 720–9 (1994).

616 Émile Durkheim, *De la division du travail social* (5th edn, Librairie Félix Alcan, Paris, 1926) 398–400.

Autonomy is not an innate characteristic, in other words, but something we attribute to each other.⁶¹⁷ Accordingly, legal autonomy is something we attribute to one another as well, not something that inheres in us just because we are subject to the law.

Luhmann argues that the more restrictive the law is, the less liberty we have to act in ways others can attribute to our free choice (and hence our personality). Therefore, the sociological function of the right to liberty is to enable us to act in ways others will attribute to our free choice, not an external imposition.⁶¹⁸ More important, the less we can expect others to acquiesce in the law, the more our own behavioral compliance will suggest to others that we support it.⁶¹⁹

To illustrate the second claim, Luhmann provides an instructive example involving the Berlin Wall and the German Democratic Republic. Before the Berlin Wall was erected, there was no expectation of universal compliance with the GDR's law, given that many of its people chose to flee the country. Consequently, people who *did* stay signaled to others that they approved of the country's political regime. Put differently, they were less legally autonomous. But once the Wall was built and there was no longer any choice but to stay in the country, doing so no longer affected how others perceived one's personality.⁶²⁰

Luhmann's sociology thus teaches us that we attribute less legal autonomy to each other when we cannot expect everyone to acquiesce in the law. Instead, we perceive each other as endorsing the law; no longer do we grant each other the liberty of disagreement that legal autonomy promises us.

It follows that the Supreme Court and the Federal Constitutional Court ought to specify our constitutional rights in a way that promotes a presumption of universal acquiescence if they wish to maximize our legal autonomy. Whether their jurisprudence is maximalist or minimalist is beside the point. By contrast, our autonomy diminishes if the courts' jurisprudence tends to trigger widespread and persistent objections, making judicial review a constant source of societal debate and controversy.

617 Joel Anderson, 'Autonomy and Vulnerability Entwined', in Catriona Mackenzie, Wendy Rogers, and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP, New York, 2013) 134, 151–2.

618 Niklas Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (5th edn, Duncker & Humblot, Berlin, 2009) 78.

619 See Niklas Luhmann, *Politische Soziologie* (André Kieserling ed, Suhrkamp, Berlin, 2010) 96–8.

620 *Id.*, 104–5.

Of course, a court will always strive to hand down decisions that give rise to a presumption of behavioral compliance. If it does not, it risks irrelevance or abolition, both of which would imperil judicial review's legitimate aims, such as safeguarding our future political autonomy from negligent legislators or furthering marginalized communities' autonomy. However, a Luhmannian analysis of judicial review reveals that our autonomy would suffer more comprehensively: The more pushback there is against judicial review, the less *legally* autonomous we are as well.

There has been a lot of research on how constitutional courts can ensure that other political actors will respect their decisions.⁶²¹ By contrast, we are less sure about what makes *people* acquiesce in the law established by constitutional courts.⁶²² Again, I suggest drawing inspiration from Luhmann.

C. Generating a Presumption of Universal Acquiescence

Luhmann argues that the political system must meet three requirements to make universal behavioral compliance likely. Firstly, it must absorb the sort of protest that, if widespread, would threaten its survival (1). Secondly, it must make members of the public trust it (2). Thirdly, it must give every member of the public an equal chance of obtaining satisfactory outcomes (3). In each instance, government proceedings—such as judicial or legislative proceedings and elections—play a significant role.⁶²³

In the following, I will apply each of these requirements to judicial review of legislation. We will see that the third—whereby the political system must maximize outcome equality—proves the most instructive.

1. Judicial Proceedings and the Absorption of Protest

Luhmann's theory of how judicial proceedings help absorb protest is what made his book *Legitimation durch Verfahren*, or 'Legitimation Through

621 See, e.g., Lee Epstein and Jack Knight, 'Efficacious judging on apex courts', in Erin F Delany and Rosalind Dixon (eds), *Comparative Judicial Review* (n 360) 272.

622 Tom R Tyler and Gregory Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority' (n 615) 727–9.

623 See Niklas Luhmann, *Legitimation durch Verfahren* (n 323) 30, 193, and 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft', in Rüdiger Lautmann, Werner Maihofer and Hartmut Schelsky (eds), *Die Funktion des Rechts in der modernen Gesellschaft* (Bertelsmann-Universitätsverlag, Bielefeld, 1970) 175, 188–9.

Proceedings', famous. In fact, its central argument, whereby such proceedings individualize and minimize the parties' controversy to such an extent that the litigants risk losing face if they complain to others about the court's verdict,⁶²⁴ has been used as an argument in favor of judicial minimalism.⁶²⁵

Yet, this argument offers us little help in reconciling judicial review with our legal autonomy. The reason the parties risk isolation, according to Luhmann, is that they participated in the proceeding as litigants.⁶²⁶ But the proceedings in which a constitutional court specifies our rights do not allow everyone to participate. Consequently, Luhmann's analysis of judicial proceedings cannot explain how constitutional review preempts protest against the court's decisions. His analysis of how legislation can foster systemic trust is more relevant.

2. Legislative Proceedings and the Generation of Systemic Trust

Generally speaking, people trust the political system when they accept in advance what the latter will decide for them—when they anticipate tomorrow's decisions as if they were today's.⁶²⁷ To generate such trust, the political system has to make the members of the public feel reasonably secure, writes Luhmann.⁶²⁸ It must appear likely to offer them a dignified life (*eine menschenwürdige Existenz*).⁶²⁹ Luhmann argues that legislative proceedings play a significant role in helping members of the public feel reasonably secure (a). The mechanisms he identifies may apply to judicial review of legislation as well (b).

624 E.g., 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft' (n 623) 189.

625 See Christoph Möllers, *The Three Branches* (n 331) 92–3.

626 See Niklas Luhmann, *Legitimation durch Verfahren* (n 323) 114–9.

627 *Id.*, 24, 19.

628 *Id.*, 199.

629 Niklas Luhmann, *Vertrauen: Ein Mechanismus der Reduktion sozialer Komplexität* (5th edn, UVK Verlagsgesellschaft, Konstanz, 2014) 72. I will treat this criterion as synonymous with the third requirement Luhmann stipulates for a presumption of universal acquiescence, namely, that the political system gives everyone an equal chance of obtaining satisfactory outcomes.

a) Sensitizing People to the Possibility of Change

The idea that process can contribute to systemic trust is not new.⁶³⁰ What distinguishes Luhmann's approach is its social-psychological lens. Legislative proceedings make us feel secure, he writes, because they sensitize us to the possibility of change and simultaneously allow us to witness and thus familiarize ourselves with the change that actually occurs. In other words, legislative proceedings help us realize that change is always possible but that we have nothing to fear from it. In systems-theoretical terms, they simultaneously preserve and decrease complexity.⁶³¹

For starters, legislative proceedings remind us that change is possible—i.e., that we live in a complex world—because they are subject to majoritarian decision-making: Since every vote counts, change is always possible.⁶³² This resembles the insight in democratic theory that majoritarianism maximizes our political equality because it grants each vote an equal impact on the decision-making process.⁶³³

Furthermore, legislative proceedings allow us to familiarize ourselves with change because we can observe the drama of politics from the outside. Once we become invested in the process and follow its ups and downs, we will find it more difficult to dismiss the system when the law is either passed or abandoned. Like it or not, Luhmann writes, we are now a part of it.⁶³⁴

b) An Alternative to Positivity Theory?

Applying these observations to judicial review of legislation proves instructive. To begin with, it makes us appreciate that the principle of majority decision-making, which obtains both for the Supreme Court and the Federal Constitutional Court⁶³⁵, can help constitutional adjudication contribute to our trust in the political system (and hence to our legal autonomy). Thus, knowing that a bare majority of one justice suffices for the court to change tack teaches us to be ready for such change.

630 See, e.g., John C Wahlke, 'Policy Demands and System Support: the Role of the Represented', 1 Brit J Pol Sci 271, 288 (1971).

631 See Niklas Luhmann, *Legitimation durch Verfahren* (n 323) 193–200.

632 *Id.*, 196–7.

633 See n 368.

634 See *id.*, 194–5.

635 Sec 15 para 4 cl 2 of the Act on the Federal Constitutional Court.

Now, we are already aware that a bare majority decision is a useful way to settle disagreement among the justices; we say that it prevents bad interpretations of the law from becoming entrenched.⁶³⁶ But Luhmann's sociology demonstrates that majoritarianism is beneficial regardless of the justices' past and future interpretations. Once the public understands that judicial reversals can be just as characteristic of constitutional adjudication as storied precedent,⁶³⁷ the justices can alter their jurisprudence without fearing an outcry.

Secondly, the media attention that accompanies important constitutional cases may help cushion the blow of disappointing court rulings. The better we get to know the individual justices' foibles or quirks,⁶³⁸ the background of the cases before the bench,⁶³⁹ the quality of the parties' oral argument,⁶⁴⁰ and the justices' questions,⁶⁴¹ the more we may come to understand constitutional adjudication as an integral—albeit at times regrettable—part of

636 See Jeremy Waldron, 'Five to Four: Why Do Bare Majorities Rule on Courts?', 123 Yale LJ 1692, 1712 (2014) (suggesting that the principle of majority decision offers 'an optimal combination of decisiveness and non-finality').

637 Within reason, of course. See notes 579 and 580 and accompanying text.

638 The *New Yorker*, for instance, frequently profiles members of the Supreme Court. See, e.g., Jeffrey Toobin, 'Swing Shift: How Anthony Kennedy's passion for foreign law could change the Supreme Court', *The New Yorker*, 12 September 2005, available at <https://perma.cc/6MSW-3G5W>, and Margaret Talbot, 'Amy Coney Barrett's Long Game', *The New Yorker*, 7 February 2022, available at <https://perma.cc/8F35-3RSW>. On changes in the media's portrayal of the Court's members, Richard Davis, 'Symbiosis: The US Supreme Court and the Journalists Who Cover It', in Richard Davis (ed), *Justices and Journalists: The Global Perspective* (CUP, Cambridge, 2018) 281, 289–90.

639 See, e.g., Adam Liptak, 'College Diversity Nears Its Last Stand', *The New York Times*, 15 October 2011, available at https://www.nytimes.com/2011/10/16/sunday-review/college-diversity-nears-its-last-stand.html?_r=1&pagewanted=all (last accessed 14 February 2022) (discussing the facts of *Fisher v. University of Texas*, 570 U.S. 297 (2013)), and Sebastian Jost, 'EZB steht ein zweites Mal vor dem Verfassungsgericht', *Die Welt*, 15 February 2016, available at <https://perma.cc/9GB8-YVWQ> (describing the conflict between the CJEU and the Federal Constitutional Court regarding the ECB's OMT program).

640 See, e.g., Adam Serwer, 'Obamacare's Supreme Court Disaster', *Mother Jones*, 27 March 2012, available at <https://perma.cc/7PYZ-8SGW> (criticizing the Solicitor General's performance during oral argument for the Supreme Court's first 'Obamacare' decision).

641 See, e.g., Ruth Marcus, 'Justice Sotomayor drops the S-bomb', *The Washington Post*, 3 December 2021, available at <https://perma.cc/YEA2-2K5W> (analyzing the liberal justices' questions during oral argument for *Dobbs v. Jackson Women's Health Org.* [n 529]).

public life, not unlike a somewhat bothersome but ultimately cherished friend. We may complain about the court, but we may also appreciate that it reflects society for better or worse.

This conception calls into question perhaps the dominant theory of how the Supreme Court's media portrayals make behavioral compliance with its law more likely. According to James Gibson and others' positivity theory, citizens who disagree with a Supreme Court decision are more likely to acquiesce in it if they are confronted with judicial symbols. These symbols notably include the '[temple-like] court building', the 'special dress for judges (robes), and honorific forms of address and deference ("your honor")', directed at a judge typically sitting on an elevated bench, surrounded by a panoply of buttressing symbols (a gavel, the blind-folded Lady Justice, balancing the scales of justice, etc.).⁶⁴² Such framing,⁶⁴³ Gibson and others argue, suggests to displeased citizens that the Court differs from political institutions in its focus on procedural fairness. This, in turn, makes citizens believe the ruling is legitimate, from which follows a 'presumption of acquiescence'.⁶⁴⁴

By contrast, a Luhmannian analysis suggests that a 'messier' frame, such as one of raw politics, may also make people trust a constitutional court, provided it captures the public's attention and allows each observer to find a specific object of interest that engrosses them. Some people may be fascinated by a swing justice's unpredictable behavior, while others may be more interested in the specifics of the case before the bench; lastly, some people may predominantly wonder about how the court's ruling will affect the political scene more generally. What matters is that they all start treating the court as an indispensable part of society's political fabric, not as an interference with the smooth workings of the political process.

642 James L Gibson, Milton Lodge and Benjamin Woodson, 'Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority', 48 *Law & Soc'y Rev* 837, 840 (2014). Incidentally, Luhmann's theory of how judicial proceedings help absorb protest acknowledges the importance of symbolism. See *Legitimation durch Verfahren* (n 323) 123–4 and Chapter 2, subsection III.A.2.

643 A frame denotes a set of dimensions people use to evaluate something. 'Framing' describes the process by which this set develops or changes. See Dennis Chong and James N Druckman, 'Framing Theory', 10 *Annu Rev Pol Sci* 103, 104–6 (2007).

644 James L Gibson, Milton Lodge and Benjamin Woodson, 'Losing, but Accepting' (n 642) 840–1. See also James L Gibson and Gregory L Caldeira, 'Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination', 53 *Am J Pol Sci* 139, 141–3 (2009).

I will not pursue this line of inquiry further, as it requires more careful empirical analysis than I can offer here. Thus, a recent study suggests that the public's support for the Supreme Court does not increase if it is exposed to sensationalist reporting about the justices and their cases.⁶⁴⁵ And there is comparatively little research on the German media's depiction of the Federal Constitutional Court.⁶⁴⁶ Instead, I suggest focusing on the third requirement Luhmann stipulates for a presumption of universal acquiescence: that the political system gives each member of the public an equal chance of obtaining satisfactory outcomes.

3. Maximizing Outcome Equality

In *Legitimation durch Verfahren*, Luhmann says little about how the political system can generate sufficient outcome equality.⁶⁴⁷ But he elaborates on the problem in his article on democratic theory entitled '*Komplexität und Demokratie*', or 'Complexity and Democracy'.⁶⁴⁸ Admittedly, this piece does not mention the problem of outcome equality either. Instead, it analyzes democracy's modern-day function. For Luhmann, however, that function is to preserve complexity in a society characterized by contingent—i.e., potentially divergent—perspectives and demands.⁶⁴⁹ The more complexity the political system can accommodate, the higher the number of possible outcomes it can generate.⁶⁵⁰ In other words, Luhmann's conception of democracy is indissociable from the idea of increased outcome equality.

645 Christopher D Johnston and Brandon L Bartels, 'Sensationalism and Sobriety: Differential Media Exposure and Attitudes Toward American Courts', 74 Pub Opinion Q 260, 272–3 (2010).

646 Christina Holtz-Bacha, 'Germany: The Federal Constitutional Court and the Media', in Richard Davis (ed), *Justices and Journalists* (n 638) 101, 112.

647 Whether this requirement is truly distinct from the concept of systemic trust is a different matter. Citizens may well assess the likelihood of obtaining satisfactory outcomes from past experiences with the political system, and such experiences may contribute to their trust in the system. See David Easton, 'A Re-Assessment of the Concept of Political Support' (n 322) 448.

648 '*Komplexität und Demokratie*', in *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung* (4th edn, Springer, Wiesbaden, 1994) 35.

649 *Id.*, 37–40.

650 Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme', in *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme* (6th edn, Westdeutscher Verlag, Opladen, 1991) 113, 115.

In ‘Complexity and Democracy’, Luhmann argues that the political system’s proceedings help determine how much complexity it can accommodate. In a democracy, elections increase the level of complexity because they regularly fail to resolve issues of substance, thus enabling politicians generally and legislators more specifically to decide these matters as they see fit.⁶⁵¹ Legislative proceedings preserve complexity, too, because most parliamentary means of hashing out a law (such as informal working groups or backdoor negotiations) must remain concealed lest they elicit accusations of being unlawful; as a result, the parliamentary process must remain amenable to legislative proposals of all colors.⁶⁵² Finally, one-party states can mimic the responsiveness of representative democracies if their governing ideology is sufficiently malleable, irrespective of the official party line, to accommodate change.⁶⁵³

All of these points can inform our analysis of judicial review’s potential in ensuring outcome equality (a–c). Again, the last one proves the most instructive.

a) The Judicial-Appointment Process

Firstly, the judicial-appointment process, like political elections, fails to resolve issues of substance because the principle of judicial independence allows the court’s new members to disappoint the legislators’ expectations and chart their own path.⁶⁵⁴ In other words, the very freedom that aggravates the countermajoritarian difficulty may strengthen our legal autonomy because it allows the court to remain open to a multitude of conflicting interpretations.

b) Disavowing Partisanship

Secondly, the discrepancy between a proceeding’s outward appearance and the mechanisms used behind the scenes to obtain political results also helps

651 Niklas Luhmann, ‘Komplexität und Demokratie’ (n 648) 39–40.

652 *Id.*, 41.

653 *Id.*, 42.

654 Unless the appointing politicians succeed in capturing the court for their partisan interests. See Chapter 5 on ‘politicization by judicial appointment’.

us understand the connection between constitutional adjudication and our legal autonomy. Thus, many conservative Supreme Court justices regularly emphasize that their work is objective, not partisan or representative.⁶⁵⁵ This commitment is significant because it precludes them from continually using their ideological kinship to diminish constitutional complexity and preclude outcomes that conflict with their political leanings. From time to time, they will have to rule in favor of their ideological adversaries lest they discredit their avowed independence from the political process.⁶⁵⁶ This increases outcome equality.

c) Safeguarding the Openness of Constitutional Reasoning

Finally, I suggest we apply Luhmann's brief insights on one-party states to constitutional adjudication. Of course, a constitutional court is no polit-buro. But a constitution resembles a political ideology in that it provides the justices with exclusive reasons for action.⁶⁵⁷ This means that judicial review is only open to different outcomes to the extent that its reasoning under constitutional law is open to different outcomes. The more outcomes fall within the bounds of reasonable legal judgment, the higher everyone's chance of obtaining satisfactory outcomes every so often, and the greater the expectation of universal acquiescence in the court's case law.

Theorists of judicial review frequently endeavor to *limit* the justices' discretion, fearing it might interfere too gravely with our political autonomy.⁶⁵⁸ By contrast, a Luhmannian analysis suggests such discretion is valuable, given that it maximizes outcome equality.

Admittedly, outcome equality will indeed conflict with our political autonomy. The greater an abortion opponent's chance of curtailing abortion rights, for instance, the less autonomous women are, and the more their

655 See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 999–1000 (1992) (Scalia, J. dissenting), and Chief Justice John Roberts' statement during his confirmation hearings that his job would be to 'call balls and strikes' (quoted, e.g., in Charles Fried, 'Balls and Strikes', 61 Emory LJ 641, 641 [2012]).

656 This is the aim observers frequently attribute to some of Chief Justice John Roberts' unexpected votes. See, e.g., Robin J Effron, 'Will the Judicial Get Political?', *Brooklyn Law Notes*, Fall 2019, available at <https://perma.cc/A6N7-A4Y5>.

657 See notes 441 and 442 and accompanying text.

658 See, e.g., John Hart Ely, *Democracy and Distrust* (n 335) 41, and Jürgen Habermas, *Between Facts and Norms* (n 364) 258–61.

political equality weakens. But that is not necessarily an argument against an increase in our legal autonomy. It would be if our conception of legal autonomy were all that stood in the way of the court protecting marginalized communities' rights more forcefully. Yet, that is not the case. As we saw above, constitutional courts are structurally disinclined to rule in favor of vulnerable groups because they fear that contravening public opinion too often will incite societal resistance against judicial review⁶⁵⁹—not because they wish to strengthen our legal autonomy. As long as it occasionally rules in favor of marginalized communities, judicial review can thus both live up to *realistic* legitimacy expectations and further our legal autonomy.

i. Examples

It follows that a constitutional court must be ready to respond to minorities' concerns about equal participation in higher education by upholding affirmative action *and*, by reading a right to bear arms into the constitution, give succor to conservatives' belief in gun rights. It must also be capable of doing the opposite—that is, of striking down affirmative action as a violation of the equal-protection clause and rejecting a personal constitutional right to bear firearms. Further examples include allowing (or prohibiting) calling soldiers murderers *and* obstructing (or facilitating) the transfer of sovereign powers to a supranational association. And so on.

A proponent of judicial minimalism might call on the court to tailor its ruling on affirmative action to the specifics of the university admissions program in question and to leave open the question of whether a different program would likewise pass (or fail) constitutional muster. But once we place outcome equality front and center, the breadth of an individual ruling is arguably less important than making sure that different decisions are similarly broad (or narrow). In other words, my reading of Luhmann grants the court the right to make as grand a statement as it wishes, provided it can make a similarly sweeping pronouncement on a different issue and in favor of a different ideological group.

Sometimes this will benefit marginalized communities. A Luhmannian reading of judicial review is more tolerant of a ruling that permits all pre-viability abortions than a minimalist approach whereby *Roe v. Wade* could,

659 See above, notes 577 and 578 and accompanying text.

and therefore should, have limited itself to protecting a right to abortion in the case of rape.⁶⁶⁰ All that matters for our approach is how comprehensive the court chooses to be in matters dear to other societal groups. If others can hope for a similarly broad ruling, decisions like *Roe v. Wade* can contribute to our legal autonomy despite their maximalism.

ii. Increasing Interpretive Flexibility

In closing, let us turn to the process involved in making a court's reasoning more malleable. The American differs from the German one. Thus, the Supreme Court must rely on the political process and its choice of new justices if it wishes to increase outcome equality. The Federal Constitutional Court, conversely, can concentrate on further developing doctrinal constructions that already feature in its case law.

Because there is no autonomous system of legal doctrine in the United States, extrinsic considerations determine how best to interpret the Constitution.⁶⁶¹ And since there are many viable perspectives for making this determination, there are many different theories of constitutional interpretation, many (or all) of which rely on distinct conceptual frames and ideological background assumptions.⁶⁶² Consequently, the choice of constitutional theory is personal.⁶⁶³ In addition, no theory is so narrow as to make the justices' personal 'values, backgrounds, and dispositions' irrelevant.⁶⁶⁴ In other words, the flexibility of the Supreme Court's constitutional reasoning depends on the diversity of the bench—which, in turn, depends on the political process for appointing new justices.

Therefore, the Supreme Court can maximize outcome equality if judicial appointments serve to increase its members' ideological diversity. Crucially, the lack of term or age limits for Supreme Court justices diminishes the appointment process's potential to do so. A party can entrench its political

660 For this criticism, see Cass R Sunstein, 'Foreword: Leaving Things Undecided' (n 604) 49–50.

661 See Alexander Somek, 'Zwei Welten der Rechtslehre' (n 453) 482–4.

662 See *id.*, 483–4, and Richard H Fallon, Jr, 'How to Choose a Constitutional Theory', 87 Cal L Rev 535, 549–62 (1999).

663 See Cass R Sunstein, 'Foreword: Leaving Things Undecided' (n 604) 13 (emphasizing that there is no 'official' Supreme Court choice of constitutional theory).

664 Richard H Fallon, Jr, 'How to Choose a Constitutional Theory' (n 662) 567.

positions through constitutional law if it gets to appoint many new justices and several of these remain on the Court for a long time.⁶⁶⁵

Accordingly, term limits can help the appointment process render constitutional reasoning more malleable, as they increase the likelihood that both parties get to select new justices at roughly the same pace. Because they tether the Court's composition more closely to political elections, it is frequently implied that they benefit our political autonomy.⁶⁶⁶ Luhmann teaches us that our gain in *legal* autonomy may be just as significant.

In Germany, scholars likewise advocate different theories of how to implement the Basic Law's constitutional rights.⁶⁶⁷ More important, the Federal Constitutional Court itself is committed to reading multiple dimensions into them.⁶⁶⁸ The more dimensions there are and the stronger (or more flexible) each dimension becomes, the more outcomes are possible under constitutional law. It follows that the Constitutional Court can maximize the openness of its constitutional reasoning by either fortifying or rendering more flexible each of the 'non-traditional' rights dimensions.

For instance, the socio-economic dimension of the right to human dignity⁶⁶⁹ currently allows the Court to review the state's welfare programs for manifest errors.⁶⁷⁰ By broadening its conception of such errors, the justices can both strengthen and diversify individuals' welfare entitlements. Secondly, the horizontal application of fundamental rights—such as equality—to third parties is currently limited to cases of 'structural disadvantage' or ones in which the third party wields considerable power over individuals' ability to 'participate in social life'.⁶⁷¹ The indeterminacy of these criteria

665 See Jack Balkin and Sanford Levinson, 'Understanding the Constitutional Revolution' (n 573) 1065–6.

666 See Michael W McConnell, Written Testimony Before the Presidential Commission on the Supreme Court of the United States, 30 June 2021, p 7, available at <https://perma.cc/KJT6-HAHM> (arguing that term limits would make the composition of the Court 'reflect the opinions of the people over time as expressed in their choice of presidents and senators, rather than the happenstance of health or accident or the strategic timing of the justices').

667 For a discussion thereof, see, e.g., Ralf Poscher, *Grundrechte als Abwehrrechte* (n 608) 72–105.

668 Regarding the 'objective' dimensions, see, e.g., Rainer Wahl, '§ 19: Die objektiv-rechtliche Dimension der Grundrechte im internationalen Vergleich', in Detlef Mer ten and others (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol 1 (CF Müller, Heidelberg, 2004) 745, 749–51.

669 BVerfGE 125, 175, 222 – *Hartz IV* (2010).

670 *Id.*, 226.

671 BVerfGE 148, 267 paras 38, 41 – *Stadium Ban* (2018).

enables the Court to modulate its intrusion into our economic and social life as it sees fit. As a result, it can provide both classically liberal and more egalitarian outcomes.⁶⁷² Finally, the protective—or ‘objective’—dimension of fundamental rights allows the Court to protect a right regardless of whether there has been an interference with it.⁶⁷³

D. Is Luhmann’s Theory of Systemic Trust Sufficiently Plausible?

Luhmann did not substantiate his theory of systemic trust empirically.⁶⁷⁴ By contrast, many rivaling explanations of what makes people accept or acquiesce in the law, including that enacted by constitutional courts, have featured robust empirical research. The question, then, is whether Luhmann’s theory remains sufficiently plausible, given what we know today, to inform our analysis of the interplay between judicial review and legal autonomy.

1. Compliance and Institutional Legitimacy

For starters, research has suggested that an important factor in explaining acquiescence in Supreme Court decisions is institutional legitimacy, that is, the public’s commitment to preserving the Court regardless of what it decides.⁶⁷⁵ Luhmann, conversely, does not consider institutional support decisive for public acquiescence in political decisions. In fact, his theory does not even acknowledge the possibility of institutional—as opposed to specific—support.⁶⁷⁶

672 See Michael Grünberger, ‘Warum der Stadionverbots-Beschluss weit mehr ist als nur Common Sense’, *Verfassungsblog*, 1 May 2018, available at <https://perma.cc/P85K-UGNZ>.

673 See, e.g., BVerfGE 125, 39, 78–9 – *Advent Sundays in Berlin* (2009), and Christoph Möllers, ‘Legality, Legitimacy, and Legitimation of the Federal Constitutional Court’ (n 356) 191–2.

674 Niklas Luhmann, *Legitimation durch Verfahren* (n 323) 191, 193.

675 See, e.g., James L. Gibson, Gregory A. Caldeira and Lester Kenyatta Spence, ‘Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment’, 58 *Pol Res Q* 187, 195 (2005). On institutional support, David Easton, ‘A Re-Assessment of the Concept of Political Support’ (n 322) 451–2.

676 See, e.g., Niklas Luhmann, *Legitimation durch Verfahren* (n 323) 34 (rejecting the idea that support for individual decisions ought to determine behavioral compliance).

Nevertheless, I do not think that the two approaches are incompatible. Luhmann's theory does not fall apart if we posit that individuals who trust the political system and believe in outcome equality effectively believe in the system's legitimacy, including in the legitimacy of judicial review. Thus, Luhmann himself argued that people can only be expected to comply with the law if they trust the political system to provide them with a dignified life; and this trust arguably approximates a belief in the system's legitimacy.⁶⁷⁷

2. The Causes of Institutional Legitimacy

Furthermore, other research is more compatible still with Luhmann's claims. It indicates that the public's belief in the Supreme Court's legitimacy depends on the ideological distance people perceive between themselves and the justices' rulings: The more we agree with the Court's perceived ideological position, the more we support its continued existence.⁶⁷⁸ Luhmann's insistence on outcome equality accommodates these findings because it helps maximize the number of people who will find at least some subjective ideological agreement with the constitutional court.

Admittedly, a rival theory rejects the significance of ideology for institutional legitimacy. It claims, first, that people are committed to judicial review because they think that the Supreme Court engages in principled, not strategic, decision-making and, second, that exposure to the judicial symbols mentioned above⁶⁷⁹ activates this commitment.⁶⁸⁰

However, we can read Luhmann's theory of outcome equality and the theory of principled decision-making as complementing each other, as two sides of the same coin. Thus, advocates of the latter theory admit that

677 See Peter Graf Kielmansegg, 'Legitimität als analytische Kategorie', 12 *Politische Vierteljahresschrift* 367, 391–4 (1971) (arguing that we cannot entertain expectations that are at least partly normative without a background conception of what a legitimate government looks like).

678 Brandon L Bartels and Christopher D Johnston, 'On the Ideological Foundations of Supreme Court Legitimacy in the American Public', 57 *Am J Pol Sci* 184, 190–4 (2013). See also Alex Badas, 'The Applied Legitimacy Index: A New Approach to Measuring Judicial Legitimacy', 100 *Soc Sci Q* 1848, 1855–6 (2019) (finding that perceived ideological distance makes people want to reform the Court, e.g., by instituting term limits).

679 See n 642 and accompanying text.

680 See James L Gibson, Milton Lodge and Benjamin Woodson, 'Losing, but Accepting' (n 642) 853, 855, 859–60 (2014).

outcome equality may contribute to acquiescence as well. Perhaps it ensures that decisions perceived by the public as ideological do not tarnish the Supreme Court's image as a principled decision-maker: As long as everyone scores the occasional victory in court, no one has reason to assume that the justices are ideologically disposed to working against them.⁶⁸¹ In other words, Luhmann's explanation for expectations of behavioral compliance is useful because it throws into relief what needs to happen for perceptions of principled decision-making to *remain intact*. Instead of negating the importance of such perceptions, it merely underscores that latent mechanisms which inhere in government bodies' set-up and proceedings are just as important as the manifest principles that officially guide their decision-making.⁶⁸²

V. Conclusion

Neither the authorization of judicial review in the German Basic Law nor the German or American bill of rights provides a sufficiently strong or direct mandate to turn every constitutional ruling into the product of our autonomy as self-governing political equals. Yet this does not mean that we ought to abandon judicial review of legislation. The countermajoritarian difficulty is a price worth paying if we wish to prevent much graver violations of our autonomy and to cease obstructing the emancipation of marginalized communities.

Be that as it may, a constitutional court intent on reconciling judicial review with our autonomy can always seek to strengthen its legal dimension. To do so, Niklas Luhmann teaches us, it should try to give people the impression that everyone can obtain a favorable constitutional outcome. Ideological diversity and interpretive discretion will help the court succeed in this endeavor. Of course, this shows that our legal and political autonomy will frequently be inversely related. On Luhmann's theory, the same phenomena that help strengthen our legal autonomy maximize the countermajoritarian difficulty and grate at our political autonomy.

681 See James L. Gibson and Michael J. Nelson, 'The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto', 10 *Annu Rev Law Soc Sci* 201, 209 (2014), and 'Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?', 14 *J Empirical Legal Stud* 592, 614 (2017).

682 See Niklas Luhmann, 'Soziologische Aufklärung', in *Soziologische Aufklärung* 1 (n 650) 66, 69–70.

For that reason, I do not consider the maximization of our legal autonomy inherently desirable. In terms of our overall autonomy, it is less desirable than judicial review recently instituted by constitutional referendum, as such review would strongly reflect our self-determination as autonomous political equals. And it is less desirable than a constitutional court that shakes off its fear of public opinion and sets out to maximize underprivileged groups' freedom. But where these circumstances do not obtain and justifying judicial review invariably involves a trade-off (such as between our future and our current political autonomy), it is helpful to know there are many angles to the relationship between judicial review and individual autonomy.

