Theodor Shulman

The Challenge of Stability

Niklas Luhmann's Early Political Sociology and Constitutional Adjudication in the United States and Germany

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Chapter 1: Introduction

This book has two objectives. The first is to introduce non-German-speaking scholars of law, sociology, or political theory to a famous work of German political sociology: Niklas Luhmann's *Legitimation durch Verfahren*, which I suggest translating as 'Legitimation through Proceedings'.[1] Published in 1969 and disputed by contemporaries such as Jürgen Habermas, Luhmann's book seeks to redefine the concept of political legitimacy and expose some of the latent mechanisms through which the political system makes people comply with the law.

Like most of Luhmann's work that predates his more well-known theory of autopoiesis, *Legitimation durch Verfahren* has not been translated into English.[2] At the same time, it remains as relevant today as ever. While Luhmann's redefinition of political legitimacy is ultimately unpersuasive, his explanation for why people comply with the law remains instructive. Moreover, the political sociology of which *Legitimation durch Verfahren* is a part can undergird novel approaches to longstanding problems of legal philosophy and political science. Therefore, the second objective of the present book is to improve our understanding of two such problems with the help, in part, of Luhmann's early political sociology. Both concern constitutional adjudication.

The first problem, which is normative, consists of reconciling judicial review of legislation with our autonomy as individuals. After concluding that certain tensions between judicial review and our political autonomy are impossible to avoid, at least in the United States and Germany, I argue that Luhmann's political sociology helps us reconcile judicial review with our *legal* autonomy. Thus, his theory of personality development in a functionally differentiated society teaches us that constitutional courts can

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

2 Luhmann's book *A Sociological Theory of Law*, which *has* been translated into English, briefly summarizes some of the core claims in *Legitimation durch Verfahren*. See Niklas Luhmann, *A Sociological Theory of Law* (Elizabeth King-Utz and Martin Albrow tr, 2014) 257 (eBook). Furthermore, *Legitimation durch Verfahren* has been translated into Bosnian-Croatian-Serbian, French, Greek, Japanese, and Portuguese.

safeguard our legal autonomy if they do their best to ensure that everyone will acquiesce in their rulings.

The second problem, which is more analytical, lies, first, in determining at what point judicial appointments politicize constitutional adjudication in America and Germany and, second, in gauging politicization's effect on constitutional courts. Some of the questions left unanswered by the concept of politicization are to what extent the confirmation stage contributes to judicial politicization and what it means for a court to be captured by party politics. Moreover, we do not know whether politicization will truly be as detrimental to constitutional adjudication as we fear. Relying in part on Luhmann's early systems theory, I suggest that only partisan confirmation votes help politicize constitutional adjudication; that a group of parties acting together can capture a court just as well as a single party; and that politicization's disadvantages depend on the extent to which a court is politicized.

I. The Radicality and Currency of Legitimation durch Verfahren

There is no shortage of English-language biographies of Niklas Luhmann. Nor do we lack summaries or analyses of his work.[3] Yet there is less focus in the English-speaking world on *Legitimation durch Verfahren*. Perhaps that is because the book predates Luhmann's turn to autopoiesis. After this turn, Luhmann conceived of social systems—the touchstone of his theory of society—as self-referential and closed, not open,[4] and as composed of

3 See, e.g., Eva M Knodt, 'Foreword', in Niklas Luhmann, *Social Systems* (John Bednarz, Jr, tr with Dirk Baecker, Stanford University Press, Stanford, 1995) ix–xxxvi; Alex Viskovatoff, 'Foundations of Niklas Luhmann's Theory of Social Systems', 29 Phil Soc Sci 481 (1999); Chris Thornhill, *Political Theory in Modern Germany: An Introduction* (Polity Press, Cambridge, 2000) 174–207; William Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (Stanford University Press, Stanford, 2000); Christian Borch, *Niklas Luhmann* (Routledge, London, 2011); Martin Albrow, 'Editor's introduction', in Niklas Luhmann, *A Sociological Theory of Law* (n 2) 10–35; Magnus Ramage and Karen Shipp, *Systems Thinkers* (2nd edn, Springer, Milton Keynes, 2020) 213–7; Jiří Šubrt, *The Systemic Approach in Sociology and Niklas Luhmann: Expectations, Discussions, Doubts* (Emerald Publishing, Bingley, 2020) 43–102.

4 Niklas Luhmann, *Social Systems* (n 3) 63.

communication, not action.[5] For him, the books he published prior to the autopoietic turn represented something of a 'pilot run'.[6]

Nevertheless, he did not think of *Legitimation durch Verfahren* as obsolete. In his later works on political and legal sociology, he stood by its findings, presenting them as part of his theoretical counteroffer to Jürgen Habermas' conception of legitimate law in *Between Facts and Norms*[7] and updating its terminology to better reflect his new conceptual approach.[8] For that reason, we can consider it a testament to the intellectual potential of Luhmann's early theoretical work. This potential will only become more apparent in the future as early and previously unpublished studies successively become available to the public.[9]

Legitimation durch Verfahren centers on government proceedings that terminate in or contribute to a binding decision, such as judicial proceedings, political elections, and the legislative process. It describes why and how such proceedings create the expectation that the decision's addressees will acquiesce in it. It does not primarily concern itself with the role of procedure,[10] nor does it explicate the decision-makers' thought process.[11] Instead, it concentrates on the series of events that, while being *regulated* by procedure, require the participants' input to come to life and terminate in a binding decision.

For that reason, it is inaccurate to translate 'Legitimation durch Verfahren' as 'legitimation through procedure'.[12] Procedure is relevant to legitima-

5 *Id*., 192.

6 See Niklas Luhmann, *Archimedes und wir: Interviews* (Dirk Baecker and Georg Stanitzek eds, Merve Verlag, Berlin, 1987) 142 (my translation) ('Null-Serie der Theorie-Produktion').

7 Niklas Luhmann, '*Quod Omnes Tangit*: Remarks on Jürgen Habermas's Legal Theory', 17 Cardozo L Rev 883, 892 (1995).

8 See Niklas Luhmann, 'Selbstlegitimation des Staates', 15 Archiv für Rechts- und Sozialphilosophie 65, 81–2 (1981), and *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main, 1995) 208–9.

9 Past examples include Niklas Luhmann, *Politische Soziologie* (André Kieserling ed, Suhrkamp, Berlin, 2010), *Systemtheorie der Gesellschaft* (Johannes Schmidt and André Kieserling eds, Suhrkamp, Berlin, 2017), and *Die Grenzen der Verwaltung* (Johannes Schmidt and Christoph Gesigora eds, Suhrkamp, Berlin, 2021).

10 See Niklas Luhmann, *Legitimation durch Verfahren* (n 1) 36–7, 42.

11 *Id*., 3.

12 As do Elizabeth King-Utz and Martin Albrow in Niklas Luhmann, *A Sociological Theory of Law* (n 2) 257, and Thomas McCarthy in Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (Thomas McCarthy tr, Polity Press, Cambridge, 1997) 265.

tion because it helps constitute the proceeding as a social system. But it does not as such help legitimate the decision.[13] That part falls to the proceeding precisely because it—not procedure—represents a social system.[14]

German-speaking readers should be made aware of this distinction as well. The term 'Verfahren' is ambiguous in German, as it can mean 'procedure', 'proceeding', and 'proceedings'. I suspect, therefore, that most readers of *Legitimation durch Verfahren* think of 'legitimation through procedure', too, when they read the book's title.[15]

Most social scientists both before and after *Legitimation durch Verfahren* have maintained that people's belief in law's justifiability is one important reason why they comply with it.[16] Luhmann's book is noteworthy because it sets out to explain why neither an appeal to people's reason nor the threat of coercion accounts for their obedience. People's attitudes and beliefs cannot matter, it argues, because they a functionally differentiated society is too diverse for the political system to base its stability on consensus, be it real or presumed.[17] That is why Luhmann makes another remarkable decision, namely, to label the political system 'legitimate' once people comply with its decisions regardless of their personal stance toward them.[18] Again, this stands in stark contrast to the theory of his contemporaries. Only one

13 Niklas Luhmann, *Legitimation durch Verfahren* (n 1) 42. For the sake of convenience, I will refer to Luhmann's theory as one of 'procedural legitimation' in Chapter 2.

14 See Niklas Luhmann, *A Sociological Theory of Law* (n 2) 257, and Chapter 2, subsection III.A.1.

15 See also André Kieserling, 'Legitimation durch Verfahren (1969)', in Oliver Jahraus and others (eds), *Luhmann-Handbuch: Leben – Werk – Wirkung* (JB Metzler, Stuttgart, 2012) 145, 149 (pointing out that many scholars continue to conflate *Legitimation durch Verfahren*'s proceedings with procedure or the decision-makers' thought process).

16 See Max Weber, *Economy and Society: An Outline of Interpretive Society*, vol 1 (Guenther Roth and Claus Wittich eds, Ephraim Fischoff and others tr, University of California Press, Berkeley, 1978) 37, and 'Politics as a Vocation', in *The Vocation Lectures* (David Owen and Tracy B Strong eds, Rodney Livingstone tr, Hackett Publishing Company, Indianapolis, 2004 [1919]) 32, 34, and Tom R Tyler, *Why People Obey the Law* (Princeton University Press, Princeton, 2006) 46 (treating the perceived obligation to obey the law as indicative of a legitimacy belief and finding that this obligation motivates many people to comply with the law).

17 See Niklas Luhmann, *Legitimation durch Verfahren* (n 1) 167–8, 251–2.

18 *Id.*, 32–3.

year before *Legitimation durch Verfahren* was published, Jürgen Habermas argued that the government's authority must be justifiable to be legitimate.[19]

Luhmann's 'radicality'[20] prevented his book from being widely received, with most scholars preferring to use its arguments as a foil for their own approach.[21] While they tried to reconcile liberal democracy with the demands of the student protestors of 1968, Luhmann evinced ironic disdain for the uprisings[22] and doubled down on the very proceedings that the protestors rejected as manipulative and authoritarian.[23]

Today, by contrast, the response to *Legitimation durch Verfahren* ought to be, and is, more measured. Thus, I argue in Chapter 2 that Luhmann's critics are right to reject removing the idea of justifiability from the concept of political legitimacy. But I also point out that his explanation for why people comply with the law is valuable because it *complements* theories that foreground people's legitimacy beliefs. After all, we already know that people do not comply with the law solely for the 'right' reasons. For instance, their fear of being punished if they break the law likewise accounts for their compliance.[24] Consequently, we should not reject out of hand the possibility that the compliance-inducing mechanisms Luhmann makes out can explain people's obedience at least in part.

Therefore, *Legitimation durch Verfahren* is not only radical but also current.[25] This gives us two reasons finally to commence the reception that the book failed to prompt in the first half-century of its existence.[26] In part,

19 See Jürgen Habermas, 'Technology and Science as "Ideology"', in *Toward a Rational Society: Student Protest, Science, and Politics* (Jeremy J Shapiro tr, Beacon Press, Boston, 1970) 81, 102.

20 Justus Heck, Adrian Itschert and Luca Tratschin, 'Legitimation durch Verfahren: Zum Entstehungskontext und zur Aktualität eines Nicht-Klassikers', 22 Soziale Systeme 1, 11, 12 (2017).

21 *Id*., 10, 4.

22 See, e.g., Niklas Luhmann, *Legitimation durch Verfahren* (n 1) 191 n 29, and Chapter 2, subsection III.B.2.

23 See Justus Heck, Adrian Itschert and Luca Tratschin, 'Legitimation durch Verfahren' (n 20) 3–4.

24 Adam D Fine and Benjamin van Rooij, 'Legal socialization: Understanding the obligation to obey the law', 7 J Soc Issues 367, 384 (2021).

25 Justus Heck, Adrian Itschert and Luca Tratschin, 'Legitimation durch Verfahren' (n 20) 11.

26 See also André Kieserling, 'Legitimation durch Verfahren (1969)' (n 15) 149 (hoping for a new generation of critical readers who respond more appropriately to the book).

this process has already begun.[27] In Chapters 3 and 4, I try to extend it to an institution that Luhmann almost completely ignores in *Legitimation durch Verfahren*: constitutional adjudication.[28] To do so, I harness two aspects of his work that feature both in *Legitimation durch Verfahren* and in his larger political sociology: the theory of what makes people comply with the law in a functionally differentiated society and his more general theory of social systems and systemic differentiation.

II. Luhmann's Early Political Sociology and Constitutional Adjudication

A. Applying Luhmann's Sociology to a Normative Problem: Chapter 3

In Chapter 3, I apply Luhmann's theory of legitimate law in a functionally differentiated society to the judicial review of legislation. Because I reject his attempt to redefine the concept of political legitimacy, I do not argue that constitutional review is normatively legitimate if it meets Luhmann's legitimacy criteria. In other words, we still ought to focus on whether judicial review is worthy of our respect when we ask whether it is normatively legitimate; contrary to what Luhmann suggests, we should not content ourselves with people's acquiescence in it. However, his legitimacy theory does teach us something about an idea that lies behind the concept of legitimate authority: our autonomy.[29]

After discussing the various cases for judicial review that exist today, I conclude that none of them covers all of the constitutional court's rulings, at least not in the United States or Germany. The decisions that are not covered thus interfere with our political autonomy, i.e., our right to be the authors of the law that binds us[30]. To remedy this problem, many scholars argue that the courts should exercise some form of moderation. I suggest focusing on a different dimension of people's autonomy.

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27 See the contributions in 22 Soziale Systeme (2017), which is dedicated to *Legitimation durch Verfahren*.

28 He mentions it only once, in a footnote toward the end of the book. Niklas Luhmann, *Legitimation durch Verfahren* (n 1) 245 n 3.

29 Cf Rainer Forst, 'The Justification of Basic Rights: A Discourse-Theoretical Approach', 45 Netherlands J Legal Phil 7, 10–1 (2016) (arguing that autonomy is the ground for the basic rights that, in his view, help justify the normative order to the individual).

30 See, e.g., Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Jeffrey Flynn tr, Columbia University Press, New York, 2012) 135–6.

Thus, a chief ingredient of our *legal* autonomy is the right not to have to agree with the law we obey.[31] According to Luhmann's theory of personality development in a functionally differentiated society, this autonomy diminishes if the law is not legitimate in a Luhmannian sense—that is, if we cannot expect everyone to comply with it. The less likely it is for people to acquiesce to constitutional courts' decisions, the less legally autonomous we are, in other words. Consequently, constitutional courts can strengthen at least one dimension of our autonomy if they make their decisions as authoritative as possible.[32] I conclude Chapter 3 by discussing how constitutional courts can make their decisions more authoritative according to Luhmann.

B. Using Systems Theory to Remedy an Analytical Problem: Chapter 4

One of the reasons the political system can harness its proceedings to make people comply with the law is that it is internally differentiated into subsystems of party politics and of bureaucratic decision-making. According to Luhmann, this differentiation renders its decision-making both flexible and responsive, thereby making people trust its overall functioning. In Chapter 4, I apply the model of internal differentiation to the question of when judicial appointments politicize constitutional adjudication.

First, however, I describe the concept of politicization by judicial appointment in general, as there are few such accounts to date. I then discuss some of the questions that the concept leaves unanswered.

For example, it is unclear to what extent the parliamentary confirmation of judicial nominees contributes to politicization. If we apply the concept of politicization by judicial appointment strictly, it does so whenever the confirmed nominee's constitutional positions implement the nominating institution's party-political preferences. It does not matter what the parliamentarians intended with their vote. This conflicts with common parlance, whereby only partisan—not unanimous—votes constitute politicizing confirmation behavior.

Furthermore, politicization's effect on constitutional adjudication remains uncertain. Current empirical research is more ambiguous than polit-

31 See, e.g., *id*., 134–5.

32 I use the term 'authoritative' as a synonym for 'likely to be obeyed'. For this use, see, e.g., Richard H Fallon, Jr, 'Legitimacy and the Constitution', 118 Harv L Rev 1787, 1828 (2005).

icization scholars suggest. Lastly, the concept of politicization by judicial appointment may be too inflexible to accommodate the German judicial selection system. It suggests that the Federal Constitutional Court is not politicized even though the latter's composition is subject to complete party-political control and the parties that have concluded an informal agreement on how to fill new vacancies have excluded certain, ideologically more distant parties from nominating candidates of their own.

Luhmann's early systems theory helps us address these issues. Thus, the model of the political system's internal differentiation both accommodates and contextualizes the phenomenon of party politics. This helps us distinguish between politicizing and non-politicizing confirmation behavior because it highlights that parliamentarians can choose, by virtue of their position within the political system, whether to act as party politicians or as government decision-makers. More, Luhmann's argument that a functionally differentiated society gives rise to a multitude of attitudes and beliefs suggests that a constitutional court can diminish politicization's negative impact if it does its best to present itself as at least somewhat ideologically flexible.

III. How to Characterize this Book

In closing, a few words are in order on this book's method (A), its place in the research landscape (B), and its structure (C).

A. Methodology

This book brings (some of) Luhmann's observations to bear more or less directly on problems of constitutional adjudication. Accordingly, it treats *Legitimation durch Verfahren* as a current theory that is waiting to be received, not as a classic that merits reinterpretation. It is not interpretive in a methodological sense.[33] Instead, its method is best described as directly associated with Luhmann's own approach.

33 A more interpretive approach would consist of reading the book in the light of current problems to draw lessons from it for these problems. See Armin von Bogdandy, 'Das Öffentliche im Völkerrecht im Lichte von Schmitts „Begriff des Politischen": Zugleich ein Beitrag zur Theoriebildung im Öffentlichen Recht', 77

Luhmann's method was one of systems-theoretical functional analysis. Classical functional analysis investigated the contributions of specific recurrent activities to 'the maintenance of the structural continuity' in social life.[34] Luhmann, however, made functional analysis more comparative. His functionalism foregrounds the variety of *different* activities that are equally capable of addressing a specific problem (and are hence called functional equivalents).[35] Systems theory complements this analysis because social systems help specify which possibilities of action can be considered functional equivalents. Thus, only possibilities that allow the social system to react to changes in its environment, i.e., that are compatible with different problems it has to manage, are eligible as functional equivalents.[36]

Even though this book focuses on both the Supreme Court and the German *Bundesverfassungsgericht*, I do not conceive of it as an example of comparative legal scholarship. To be sure, I feature the two courts because I hope to understand each better. What undergirds this attempt is not a comparison between the two, however, but Luhmann's sociology;[37] my primary aim in including both courts is to exemplify how Luhmann's sociology can be applied to two distinct forms[38] of constitutional adjudication.[39] Of course, this does not mean that this book is spared the challenge typical of

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg J Int'l L) 877, 879 (2017) and the references cited therein.

34 Alfred R Radcliffe-Brown, 'On the Concept of Function in Social Science', 37 Am Anthropologist 394, 396 (1935).

35 See Niklas Luhmann, 'Funktionale Methode und Systemtheorie', in *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme* (6th edn, Westdeutscher Verlag, Opladen, 1991) 31, 35–6.

36 *Id*., 38, 43–4, 47–8.

37 On the comparative goal of understanding either one's own or another system better, Vicki C Jackson, 'Methodological Challenges in Comparative Constitutional Law', 28 Penn State Int'l L Rev 319, 319–20 (2010). On yet another goal—that of establishing best practices—see *id*., 321.

38 In very general terms, the German Federal Constitutional Court exemplifies centralized, specialized constitutional review, whereas the Supreme Court represents decentralized, diffuse judicial review. See Armin von Bogdandy, Christoph Grabenwarter and Peter M Huber, 'Constitutional Adjudication in the European Legal Space', in Armin von Bogdandy, Christoph Grabenwarter and Peter M Huber (eds), *The Max Planck Handbooks in European Public Law*, vol 3 (OUP, Oxford, 2020) 1, 12.

39 Ralf Rogowski's systems-theoretical analysis of the Supreme Court and the *Bundesverfassungsgericht* has the same approach. See 'Constitutional courts as autopoietic organisations' (n 43) 124.

comparative studies—namely, achieving a 'deep' understanding of the legal order with which the author is less familiar.[40]

B. The Research Landscape

This is not the first book to bring systems analysis to bear on courts.[41] More, there is no lack of scholarship that focuses on both the United States Supreme Court and the German Federal Constitutional Court.[42] One article even analyzes the two courts from a systems-theoretical perspective.[43] However, it engages with Luhmann's scholarship after the latter's autopoietic turn and does not feature *Legitimation durch Verfahren*. Therefore, the present book is the first to interpret constitutional adjudication in the light of Luhmann's early political sociology. As I set out in Chapter 4, the theory of open, not closed, social systems may even be more instructive than its successor, at least when it comes to the problem of politicization by judicial appointment.[44]

C. Structure

To appeal to as many readers as possible—including those who are less interested in *Legitimation durch Verfahren* than in constitutional adjudication—the ensuing chapters are independent of each other and do not assume that the reader has read the rest of the book. Consequently, those

40 See Pierre Legrand, 'How to compare now', 16 Legal Stud 232, 234–8 (1996).

41 See Sheldon Goldman and Thomas P Jahnige, *The Federal Courts as a Political System* (Harper & Row, New York, 1971).

42 See, e.g., Marcel Kau, *United States Supreme Court und Bundesverfassungsgericht: Die Bedeutung des United States Supreme Court für die Errichtung und Fortentwicklung des Bundesverfassungsgerichts* (Springer, Berlin, 2007), Ralf Rogowski and Thomas Gawron (eds), *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court* (2nd edn, Berghahn, New York, 2016), and Nicole Schreier, *Demokratische Legitimation von Verfassungsrichtern: Eine rechtsvergleichende Analyse am Beispiel des Bundesverfassungsgerichts und des United States Supreme Court* (Nomos, Baden-Baden, 2016).

43 Ralf Rogowski, 'Constitutional courts as autopoietic organisations', in Michael Wrase and Christian Boulanger (eds), *Die Politik des Verfassungsrechts: Interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten* (Nomos, Baden-Baden, 2013) 123.

44 See Chapter 4, subsection IV.E.

who do read the entire book will have to tolerate a certain amount of repetition: To describe how *Legitimation durch Verfahren* can improve our understanding of constitutional adjudication, Chapters 3 and 4 will have to reiterate parts of the summary of Luhmann's theory I present in Chapter 2.

To minimize the repetition, I add details to these recapitulations that do not already feature in Chapter 2. For instance, I wait until Chapter 3 to describe how, according to Luhmann, the political system contributes to its stability by generating systemic trust and creating an expectation of outcome equality. Furthermore, I fill in some details regarding the political system's differentiation in Chapter 4, where they help us better understand judicial politicization.

Chapter 2: Niklas Luhmann's Theory of Procedural Legitimation

When discussing political legitimacy, we frequently distinguish between a moral and a sociological dimension.[45] The first asks what makes the government's authority proper. The second inquires whether and why the people subjected to the authority consider it proper.[46] However, neither of the two represents a stand-alone concept. Thus, a discussion of sociological legitimacy will find it difficult to describe people's beliefs about government without referring to the sources of legitimacy that feature in normative analyses.[47] And even a normative analysis requires external moral considerations—such as democracy or justice—to unfold the critical potential that can inhere in the concept of legitimacy.[48]

Therefore, it makes more sense to treat the different normative variants of political legitimacy as distinct *conceptions* of legitimacy and to locate its conceptual core in a more rudimentary notion.[49] For Rainer Forst, this core lies in the government's implicit claim that it can justify its existence. In his words, 'by legitimacy we mean in general the quality of a normative order that explains and justifies its general binding power for those subjected to it'.[50] In other words, a government that not only rules but claims a right to do so seeks to be legitimate.[51]

Niklas Luhmann conceptualized legitimacy differently. His concept does not involve the government implicitly claiming that it has a right to rule. For him, a government decision is legitimate if we can presume that people

45 Or, alternatively, between normative and descriptive legitimacy.

46 E.g., Richard H Fallon, Jr, *Law and Legitimacy in the Supreme Court* (Belknap, Cambridge MA, 2018) 21–4.

47 See Robert Nozick, *Anarchy, State, and Utopia* (Blackwell, Oxford, 1974) 134 (including note), and Allen Buchanan, 'Political Legitimacy and Democracy', 112 Ethics 689, 689 (2002).

48 See Rainer Forst, *Normativity and Power: Analyzing Social Orders of Justification* (Ciaran Cronin tr, OUP, Oxford, 2017) 132. See also Chapter 3, section I.B.

49 *Id.,* 133.

50 *Ibid.*

51 See Joseph Raz, 'Authority and Justification', in Joseph Raz (ed), *Authority* (New York University Press, New York, 1990) 115, 117 (choosing, however, to label such authority 'de facto authority' and to reserve the qualifier 'legitimate' only to those authorities whose right to rule is, in fact, justified).

will acquiesce in it.[52] 'The concept of legitimacy denotes that the unquestioning acceptance of the political system's binding decisions is ensured independently of concrete personal structures of motivation', he writes.[53]

Therefore, it is inaccurate to qualify Luhmann's theory as one of sociological (as opposed to normative) legitimacy.[54] Conceptually speaking, it is not a theory of legitimacy at all. In terms of political philosophy, it is best understood as a theory of stability[55] or, in Hobbesian terms, of normative order[56]—that is, as an explanation for why we can expect people to comply with a political regime's decisions.[57] From the perspective of social psychology, Luhmann's analysis is one of compliance.[58]

Nevertheless, we still have good reason to associate *Legitimation durch Verfahren* with legitimacy theory. By designating his theory one of legitimacy, not stability, Luhmann makes an implicit conceptual claim about

52 Niklas Luhmann, *Legitimation durch Verfahren* (10th edn, Suhrkamp, Frankfurt am Main, 2017) 28, 32. 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' (n 47) 689–90. 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 own right. See also Wojciech Sadurski, *Equality and Legitimacy* (OUP, Oxford, 2008) 6–7.

53 Niklas Luhmann, *Politische Soziologie* (André Kieserling ed, Suhrkamp, Berlin, 2010) 96 (my translation). See also *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (5th edn, Duncker & Humblot, Berlin, 2009) 144–5.

54 But see Chris Thornhill, 'Niklas Luhmann: A Sociological Transformation of Political Legitimacy?', 7 Scandinavian J Soc Theory 33, 38 (2006).

55 See also Niklas Luhmann, 'Soziologie des politischen Systems', in *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme* (6th edn, Westdeutscher Verlag, Opladen, 1991) 154, 159 (arguing that we ought to reconceptualize modern political philosophy's fundamental question as one not of lawfulness but of stability) and *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main, 1995) 332 n 73 (stressing that *Legitimation durch Verfahren* merely sought to explain how proceedings can help manage societal conflict, not get the participants to agree with the law's implicit claim to validity).

56 On the concept of normative order, Talcott Parsons, *The Structure of Social Action: A Study in Social Theory with Special Reference to a Group of Recent European Writers* (Free Press, Glencoe, 1949) 91–3.

57 Cf John Rawls, *Political Liberalism* (Columbia University Press, New York, 1996) 141 (discussing how to achieve stability in a just society). For an analysis of Rawls's conception of stability, see Brian Barry, 'John Rawls and the Search for Stability', 105 Ethics 874, 880–3 (1995).

58 See Tom R Tyler, *Why People Obey the Law* (Princeton University Press, Princeton, 2006) 3.

legitimacy theory. He argues that we ought to eradicate, from the concept of legitimate authority, the one thing which distinguishes it from the concept of stability: the notion of justifiability. In the terms of Jürgen Habermas's *Between Facts and Norms*,[59] in which facticity implies stability and validity suggests justifiability,[60] Luhmann thus emphasizes the problem of facticity and disregards that of validity.

At the same time, *Legitimation durch Verfahren* is also noteworthy empirically. Thus, Luhmann's explanation for why people comply with the law parts ways with Max Weber's seminal account of obedience. According to the latter, people acquiesce in being ruled because they believe their government is legitimate (e.g., because its enactments are legal).[61] Weber's analysis of people's belief in legality has attracted a lot of criticism.[62] Nevertheless, most social scientists continue to use it as a point of departure.[63] Thus, David Easton, with whose work we will briefly contrast Luhmann's argument,[64] observes that no political system can be stable in the long term unless the public considers the government legitimate.[65]

59 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, MIT Press, Cambridge MA, 1996).

60 Cf Kenneth Baynes, 'Democracy and the *Rechtsstaat*: Habermas's *Faktizität und Geltung*', in Stephen K White (ed), *The Cambridge Companion to Habermas* (CUP, Cambridge, 1995) 201, 206 (associating facticity with stability and validity with justification). See also Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main, 1993) 99–100 (arguing for a non-normative conception of validity).

61 See Max Weber, *Economy and Society: An Outline of Interpretive Society*, vol 1 (Guenther Roth and Claus Wittich eds, Ephraim Fischoff and others tr, University of California Press, Berkeley, 1978) 37, and 'Politics as a Vocation', in *The Vocation Lectures* (David Owen and Tracy B Strong eds, Rodney Livingstone tr, Hackett Publishing Company, Indianapolis, 2004 [1919]) 32, 34.

62 See, e.g., Peter M Blau, 'Critical Remarks on Weber's Theory of Authority', 57 Am Pol Sci Rev 305, 311–2 (1963) (pointing out that Weber did not explain how to determine such belief), and Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (Thomas McCarthy tr, Polity Press, Cambridge, 1997) 264–7 (emphasizing that Weber's argument is circular because it fails to explain how a belief in legality can legitimize authority if the legitimacy of that legality is itself unresolved).

63 See Morris Zelditch, Jr, 'Theories of Legitimacy', in John T Jost and Brenda Major (eds), *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations* (CUP, Cambridge, 2001) (deeming Weber '[s]eminal to all modern thought about legitimacy').

64 See notes 175–177 and accompanying text.

65 David Easton, *A Systems Analysis of Political Life* (Chicago University Press, Chicago, 1965) 278–81.

As the quote above demonstrates, Luhmann believed that government can be stable *without* people having to believe its decisions are justified. He writes that '[l]egitimacy is not based on voluntary recognition, on a conviction for which one personally bears responsibility. On the contrary, it is based on a social climate that institutionalizes the recognition of binding decisions as a matter of course and regards it not as the consequence of a personal decision but as the consequence of the official decision's validity'.[66]

I believe Luhmann had two reasons for conceptualizing legitimate authority as not involving justifiability. In what follows, section I—which will double as a more general introduction to Luhmann's sociology—will detail one of them. Thus, the idea of justifiability presupposes that an individual stands apart from the social order whose legitimacy is in question; from this remove, they can subject the social order to critical scrutiny.[67] On Luhmann's theory, by contrast, we require the social order to orient ourselves in the world; we rely on social systems for meaning and rationality.

Section II will set out the second reason for Luhmann's skepticism of implied justifiability—namely, that he rejected the prevailing theoretical attempts to validate the claim of justifiability. For instance, he thought society's functional differentiation incommensurate with the sort of consensus potential that theories of rational acceptability, such as Habermas's, require to legitimate the government. On the contrary, functional differentiation requires a political system whose decisions create an expectation of universal compliance regardless of people's stance toward them.

Section III will summarize arguably the most important part of Luhmann's explanation for why the political regime is stable. Part of the reason for its stability, he argued, is that governmental proceedings (the 'Verfahren' in *Legitimation durch Verfahren*) help absorb and neutralize the protest of people who are dissatisfied with the proceedings' outcome and hope to rally others' support against it. Lastly, section IV will present others' and my critique of *Legitimation durch Verfahren*.

66 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 34 (my translation).

67 See, e.g., Jeremy Waldron, 'Theoretical Foundations of Liberalism', 37 Phil Q 127, 135–6 (1987) (suggesting that political liberalism is characterized by the attempt to justify the social order to the individual).

I. Complexity and Meaning, Or Luhmann's Theory of Social Systems

Luhmann presented his theory of social systems as a reaction to a perceived shortcoming of Enlightenment philosophy. What the latter failed to explain, he argued, is how a human being can process the complex information that is supposed to guide our actions.[68]

A. Man's Experience of the World

Complexity constitutes a major problem of human existence in Luhmann's theory. It challenges individuals by presenting them with many more possibilities of experience than they can grasp and process.[69] Moreover, these possibilities are contingent: Every experience the individual expects could, in fact, turn out differently.[70]

Therefore, Luhmann considers man—or, for that matter, any organism or matter[71]—fundamentally overburdened.[72] To survive, the organism must thus unburden itself and decrease the complexity of its world.[73] In this premise, we can observe the influence of conservative currents in German philosophical anthropology, of which Arnold Gehlen, a twentieth-century philosopher, sociologist, and anthropologist, is perhaps the most significant exponent.[74] Seeking to distinguish man from animal without resorting to the concept of the mind (*Geist*), Gehlen argued that man is organically deficient because he lacks the specific milieu to which animals' organs have adapted. Contrary to animals, man is open to a 'world', which overburdens

68 Niklas Luhmann, 'Soziologische Aufklärung', in *Soziologische Aufklärung 1* (n 55) 66, 72–3.

69 Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme', in *Soziologische Aufklärung 1* (n 55) 113, 115; *A Sociological Theory of Law* (Elizabeth King-Utz and Martin Albrow tr, 2014) 78 (eBook).

70 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie', in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung?* (Suhrkamp, Frankfurt am Main, 1971) 25, 32.

71 Niklas Luhmann, *Vertrauen: Ein Mechanismus der Reduktion sozialer Komplexität* (5th edn, UVK Verlagsgesellschaft, Konstanz, 2014) 5.

72 Niklas Luhmann, 'Normen in soziologischer Perspektive', 20 Soziale Welt 28, 30–1 (1969).

73 Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 69) 115.

74 For evidence of Luhmann's reliance on Gehlen, see *id*., 115 n 9. See also Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan, Houndmills, 2003) 167.

him with stimuli.[75] Accordingly, 'the human being must unburden himself, that is, he must independently transform the deficient conditions of his existence into opportunities of his own life'.[76]

What separates humans from other organisms, writes Luhmann, is that they unburden themselves through the meaning (*Sinn*) that imbues their actions. (We shall see shortly how that occurs.) Meaning has the advantage of diminishing complexity without eliminating the other possibilities of experience and action from the individual's consciousness. It maintains these possibilities as potentialities by relocating them to the *horizon* of the individual's consciousness, where they stand ready for immediate experience, should that become necessary.[77] This increases the number of events the individual may be able to experience:[78] although overburdened by the world, man remains open to it. In the words of Luhmann,

> [t]he phenomenon of meaning appears as a surplus of references to other possibilities of experience and action. Something stands in the focal point, at the center of intention, and all else is indicated marginally as the horizon of an 'and so forth' of experience and action. In this form, everything that is intended holds open to itself the world as a whole, thus guaranteeing the actuality of the world in the form of accessibility.[79]

Luhmann contends that the uniquely human capacity to negate something exemplifies this flexibility.[80] Negation (*Verneinung*) features in Sigmund Freud's theory of psychoanalysis, which describes it as a mechanism to take note of thoughts we simultaneously repress. In Freud's view, negation allows us to perpetuate the repression but to keep the thought itself at hand. If a person dream of their mother, for example, but does not wish to acknowledge that, they can accept and learn to live with her occurrence

75 Arnold Gehlen, *Der Mensch: Seine Natur und seine Stellung in der Welt* (first published 1940, re-worked and re-published 1950, Vittorio Klostermann, Frankfurt am Main, 2016) 34.

76 *Id.*, 35. ('[Der Mensch muß sich] entlasten, d.h. die Mängelbedingungen seiner Existenz eigentätig in Chancen seiner Lebensfristung umarbeiten' [my translation; emphasis omitted]).

77 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie' (n 70) 33–4.

78 Niklas Luhmann, 'Normen in soziologischer Perspektive' (n 72) 30.

79 Niklas Luhmann, *Social Systems* (John Bednarz, Jr, tr with Dirk Baecker, Stanford University Press, Stanford, 1995) 115. While *Social Systems* stems from Luhmann's later period of work, the definition of meaning did not change. See, e.g., 'Sinn als Grundbegriff der Soziologie' (n 70) 34.

80 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie' (n 70) 35–7.

by denying it was her.[81] This mechanism demonstrates our flexibility of experience, Luhmann claims, because we can always negate the negation, thereby accessing an experience that was previously pushed to the horizon of our experience.

The horizon of experience originated not in Luhmann's sociology but in the work of Edmund Husserl, the founder of phenomenological philosophy.[82] In his theory of intentional consciousness, Husserl argues that every instance of actual perception of an object—of a cube, for instance—implies a multitude of potential experiences. Each experience features its own 'horizon' that refers the perceiving individual from the facets of the thing they have perceived to those facets they have not yet perceived but can anticipate. Thus, by perceiving the sides of the cube that lie within one's view, one can anticipate the sides one does not see. This predetermination of potentialities within one's horizon lends meaning to individual consciousness.[83]

For Luhmann, this insight underscores the significance of meaning, as opposed to subjectivity, for man's place in the world. Humans are conscious creatures because their consciousness directs the way in which they experience the world, not because it allows us to reflect on ourselves and become one with the world.[84] Luhmann argues that the theory of subjectivity erroneously places individuals on an equal footing with their world and thus neglects the disparate levels of complexity between the environment as we imagine it and the environment itself.[85]

B. Intersubjectivity

Having thus established the centrality of meaning, we can ask who or what creates it. Traditional sociology understood meaning as the individual's

81 Sigmund Freud, 'Die Verneinung', in *Gesammelte Werke*, vol 14 (Anna Freud and others eds, Fischer, Frankfurt am Main, 1955) 11–2.

82 For a detailed explanation of how Husserl's phenomenology influenced Luhmann's (late, advanced) systems theory, see Sven-Eric Knudsen, *Luhmann und Husserl: Systemtheorie im Verhältnis zur Phänomenologie* (Königshausen & Neumann, Würzburg, 2006).

83 Edmund Husserl, *Pariser Vorträge und Cartesianische Meditationen* (Nijhoff, The Hague, 1950) 81–3.

84 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie' (n 70) 37–8.

85 Niklas Luhmann, *Vertrauen* (n 71) 32.

subjective achievement.[86] Luhmann, however, argues that this conception became obsolete once Edmund Husserl had spelled out the problem of intersubjectivity.[87] Husserl had written that we experience the world as an object that is accessible to everyone's consciousness alike, as intersubjective, but that we also experience other individuals—*alter egos*—as having their own experiences of the world, their own 'world phenomenon'.[88] The question to be resolved, therefore, is how anything can be objective if other subjects can perceive the same thing differently. Reformulated in Luhmann's terms, the question is how social complexity can be decreased.[89]

Husserl attempted to solve this conundrum and square intersubjectivity with subjectivity by incorporating intersubjectivity into the individual's own consciousness.[90] Yet that convinced no one,[91] including Luhmann.[92] Luhmann gathered from Husserl's failure that all meaning is constituted intersubjectively[93] and that society, not subjectivity, is the answer to intersubjectivity.[94] 'The otherness of the other becomes the finding that renders sociality not just necessary or beneficial but enables it in the first place.'[95]

86 Max Weber, *Economy and Society* (n 61) 4.

87 See, e.g., Niklas Luhmann, *Politische Soziologie* (n 53) 29.

88 Edmund Husserl, *Pariser Vorträge und Cartesianische Meditationen* (n 83) 123.

89 See Niklas Luhmann, *Vertrauen* (n 71) 5–6, and 'Soziologische Aufklärung' (n 68) 73–4.

90 Edmund Husserl, *Pariser Vorträge und Cartesianische Meditationen* (n 83) 123 ff.

91 See, e.g., Alfred Schütz, 'Das Problem der transzendentalen Intersubjektivität bei Husserl', 5 Philosophische Rundschau 81 (1957).

92 See, e.g., Niklas Luhmann, *Vertrauen* (n 71) 6 n 13, 'Sinn als Grundbegriff der Soziologie' (n 70) 51–2 n 25, and *Social Systems* (n 79) xli ('There can be no intersubjectivity on the basis of the subject').

93 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie' (n 70) 51–2.

94 Luhmann once remarked that 'cogito ergo *sumus*' is how Descartes should have formulated the link between consciousness and subjectivity. Wolfgang Hagen, 'Es gibt keine Biographie', Interview with Niklas Luhmann, *Radio Bremen*, 2 October 1997, available at https://perma.cc/U6MA-GUM9. See also Niklas Luhmann, 'Die Tücke des Subjekts und die Frage nach den Menschen', in *Soziologische Aufklärung 6: Die Soziologie und der Mensch* (4th edn, Springer VS, Wiesbaden 2018) 151, 154, and André Kieserling, Interview on the occasion of the posthumous publication, in 2017, of Luhmann's *Systemtheorie der Gesellschaft*, *Suhrkamp*, available at https://perma.cc/62FT-TA38.

95 Niklas Luhmann, 'Arbeitsteilung und Moral: Durkheims Theorie', Preface to Émile Durkheim, *Über soziale Arbeitsteilung* (Ludwig Schmidts tr, Suhrkamp, Frankfurt am Main, 1992 [1930]) 19, 22. The quote refers to Adam Smith's theory of moral sentiments, in which Smith argued that sympathy consists not in feeling other individuals' feelings within oneself but in 'chang[ing] persons and characters'. Adam Smith, *The*

Like many sociologists of his day,[96] Luhmann drew from George Herbert Mead's social psychology to explain how meaning is constituted intersubjectively. Mead contended that social control precedes subjectivity because an individual grows to be self-conscious and self-critical once they learn to take the attitude, or 'rôle', of an *alter ego*. Since this allows the individual to direct their conduct in accordance with their social group, the process of rôle-taking lies at the basis of interpersonal cooperation.[97] On Luhmann's reading of Mead, interpersonal cooperation requires us to learn to expect the expectations others have of our own behavior.[98] Therefore, Luhmann considers meaning the result of an intersubjective expectation regarding individual actions. As we will now see, intersubjective expectations arise in social systems.

C. Social Systems

A social system does not consist of individual actors and their biological organisms. It consists of actions that it groups together through the common

Theory of Moral Sentiments (D D Raphael and A L Macfie eds, Clarendon Press, Oxford 1976 [1759]) 317.

96 See, e.g., Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Doubleday, Garden City, 1966) 69 n 37.

97 George H Mead, *Mind, Self & Society* (The University of Chicago Press, Chicago, 2015 [1934]) 254–5.

98 Niklas Luhmann, '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, 177 n 2. One can trace this reading to Talcott Parsons' concept of the 'complementarity of expectations'. See Talcott Parsons and others, 'Some Fundamental Categories of the Theory of Action: A General Statement', in Talcott Parsons and Edward A Shils (eds), *Toward a General Theory of Action* (Harvard University Press, Cambridge MA, 1962) 3, 14–5.

meaning it ascribes to them.[99] It does so by generalizing behavioral expectations,[100] which constitute what Luhmann called the system's structure.[101]

Generalization occurs when an expectation is rendered impervious to contradictions or fluctuations. Luhmann writes that these contradictions can result from changes over time, situational changes, or disagreement about the validity of the expectation. Accordingly, we can observe generalizations in the temporal, substantive, and social dimensions. Thus, behavioral expectations are generalized temporally once they learn to resist and survive the disappointment of deviant behavior; as of this moment, they become normative. Substantive generalization occurs once an expectation is sufficiently abstracted from a particular person or situation and attaches to a role that can be performed or a program that can be implemented regardless of other changes. Finally, expectations are generalized in the social dimension once it becomes irrelevant whether everybody concurs in them; as a result, they become institutionalized.[102]

Once behavioral expectations are generalized, the plurality of different experiences that are imaginable from an intersubjective perspective is synthesized into meaning.[103] Consequently, meaning can guide the action of individuals by decreasing complexity and alleviating the problem of contingency within the system, compared to the system's environment.[104] It is erroneous, therefore, to conceive of a system as an entity comprised of

99 Niklas Luhmann, 'Funktionale Methode und Systemtheorie', in *Soziologische Aufklärung 1* (n 55) 31, 42, *Politische Soziologie* (n 53) 21, and 'Moderne Systemtheorien als Form gesamtgesellschaftlicher Analyse', in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie* (n 70) 7, 11–2.

100 Over the years, Luhmann shifted the emphasis from 'behavioral expectations' to 'expectations of expectations'. Compare Niklas Luhmann, *Funktionen und Folgen formaler Organisation* (Duncker & Humblot, Berlin, 1964) 53–9, and *A Sociological Theory of Law* (n 69) 80. For simplicity's sake, I will stick with the former.

101 Niklas Luhmann, 'Funktionale Methode und Systemtheorie' (n 99) 42; *Legitimation durch Verfahren* (n 52) 42.

102 Cf Niklas Luhmann, *Funktionen und Folgen formaler Organisation* (n 100) 55–9; *A Sociological Theory of Law* (n 69) 102–114.

103 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 116.

104 The function of social systems throws into relief their similarity with Arnold Gehlen's concept of (social) 'institutions', such as religion or the law, which help man unburden himself by overcoming his 'subjective feeling of powerlessness'. See also Helmut Schelsky, 'Systemfunktionaler, anthropologischer und personfunktionaler Ansatz der Rechtssoziologie', in Rüdiger Lautmann, Werner Maihofer and Helmut Schelsky (eds), *Die Funktion des Rechts in der modernen Gesellschaft* (n 98) 61, and Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie? Eine Auseinandersetzung mit Niklas Luhmann', in Jürgen Habermas and Niklas Luhmann,

distinct parts. Instead, anything that creates an inside/outside distinction can be considered a system.[105]

Crucially, the decrease in complexity does not diminish our potential for action. On the contrary, it augments this potential because it replaces our overload with concrete possibilities of experience and action. In Luhmann's words, social systems do not make the world smaller and thus easier to process. Instead, their selection processes create the world in the first place.[106] Therefore, social systems both decrease and increase complexity at the same time.[107] Thus, we can learn from Thomas Hobbes that submitting to sovereign power makes civilizational gains more likely: By allowing a few people to make decisions for us (that is, by decreasing complexity), we increase the complexity we can process, for we no longer have to fear death and destruction.[108]

From a functional point of view, social systems thus solve a problem when they decrease the complexity of their environment.[109] Because solving a problem appears better than its alternative, the question arises whether systems theory favors the existence of a specific social system over change —i.e., whether it is inherently conservative.[110] This charge was indeed leveled at Talcott Parsons, who was Luhmann's erstwhile mentor at Harvard University[111] and whose theory of action systems strives to explain how a system can prevent disintegrating.[112] Critics accused Parsons of overplaying

Theorie der Gesellschaft oder Sozialtechnologie (n 70) 142, 157. On institutions, Arnold Gehlen, *Der Mensch: Seine Natur und seine Stellung in der Welt* (n 75) 456.

105 Niklas Luhmann, *Funktionen und Folgen formaler Organisation* (n 100) 24; 'Soziologie als Theorie sozialer Systeme' (n 69) 115.

106 Niklas Luhmann, 'Systemtheoretische Argumentationen: Eine Entgegnung auf Habermas', in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie* (n 70) 291, 307–8.

107 *Id.*, 309.

108 *Ibid.*

109 See Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 69) 115.

110 Cf Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (Harper & Brothers, New York, 1944) 1056 (pointing out that things which have functions appear to have value).

111 See, e.g., Niklas Luhmann, *Funktionen und Folgen formaler Organisation* (n 100) 24 n 2.

112 See, e.g., Talcott Parsons, *The Social System* (The Free Press, Glencoe, 1951) 26–36 (spelling out social systems' 'functional prerequisites').

the significance of stability and failing to see that conflict and change have historically determined the course of world history.[113]

Luhmann, however, could circumvent this accusation because he linked systems to the creation of meaning and described the latter as the conjugation of actual and potential experiences. The potential experiences point *outside* the system; consequently, Luhmann could argue that systems address the world and the complexity that inheres in it, not their own preservation.[114] For that reason, a system which fails to fulfill this function adequately can be replaced with a better one.[115]

By increasing our capacity to manage complexity, social systems—not the use of reason—enlighten us, Luhmann argues.[116] Opposing Kant, he writes that 'only systems can serve as means of enlightenment, not the public that engages in free discussions.'[117] The process of differentiation, which we will look at now, allows social systems to manage even greater complexity and thus to enlighten us further.

D. Systemic Differentiation

Differentiation occurs when a system establishes a subsystem, that is, when it replicates the inside/outside distinction *within itself*.[118] It can do so by creating more specific roles, thereby giving rise to new expectations that are generalized in the substantive dimension.[119] For instance, each judicial proceeding is a subsystem of the political system because its participants—such as the judge, the parties, and witnesses—perform roles that are detached from the role performers' other, extra-systemic roles. Thus, we expect

113 See, e.g., Ralf Dahrendorf, *Gesellschaft und Freiheit* (Piper & Co, Munich, 1961) 78–84. For a general defense of functional analysis against accusations of conservatism, see Robert K Merton, *Social Theory and Social Structure* (enlarged edn, Free Press, New York, 1968) 91–2.

114 E.g., Niklas Luhmann, *Systemtheorie der Gesellschaft* (Johannes Schmidt and André Kieserling eds, Suhrkamp, Berlin, 2017) 45.

115 See, e.g., Niklas Luhmann, 'Funktionale Methode und Systemtheorie' (n 99) 35.

116 Niklas Luhmann, 'Soziologische Aufklärung' (n 68) 76–7.

117 *Id.*, 77 (my translation). Luhmann is referring to Kant's essay 'An answer to the question: What is enlightenment?', in which the philosopher argued that enlightenment requires the public use of one's reason and provided the example of the learned scholar who addresses the reading public.

118 Niklas Luhmann, 'Differentiation of society', 2 Can J Soc 29, 30, 31 (1977).

119 See Niklas Luhmann, 'Soziologie des politischen Systems' (n 55) 155.

judges to adjudicate a case impartially and to withstand party-political or religious considerations that influence positions they hold outside the courtroom; and we try not to gauge witnesses' credibility by their societal status.[120]

Given their higher degree of specificity, subsystems are more selective still than the system within which they originated.[121] For example, judicial proceedings are more selective than the political system precisely because roles performed outside the proceeding are, in theory, irrelevant. The increase in selectivity allows the original system to funnel potentially destabilizing environmental input into subsystems that absorb and neutralize the input. It need not curtail all input for fear of destructive influences that may threaten its survival.[122] Thus, judicial proceedings allow the political system to increase the range of demands it can accommodate, for the courts stand ready to absorb and neutralize the protest that may arise when it chooses not to satisfy a specific demand.[123]

Incidentally, the political system is an example of functional differentiation, one of three forms of differentiation at the societal level.[124] The first form, segmentation, occurs when society creates equal subsystems (such as tribes), each of which is likewise differentiated into equal subsystems (such as families).[125] In a stratified society, secondly, the subsystems are unequal, which means that each subsystem characterizes the systems in its environments as either equal, higher, or lower in rank than itself.[126] When differentiation is functional, finally, dedicated subsystems fulfill the various functions that require fulfillment at the societal level—such as 'want satisfaction' (which occurs in the economic subsystem of society) or 'interpreting the incomprehensible' (which occurs in the religious subsystem).[127]

120 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 59–65.
121 Niklas Luhmann, 'Differentiation of society' (n 118) 31.
122 See Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 69) 123.
123 See below, subsection III.A.
124 Other social systems include organizations (at the intermediate level) and face-to-face encounters. See Niklas Luhmann, 'Interaktion, Organisation, Gesellschaft: Anwendungen der Systemtheorie', in *Soziologische Aufklärung 2: Aufsätze zur Theorie der Gesellschaft* (4th edn, Springer Fachmedien, Wiesbaden, 1991) 8. Organizations are social systems to which individuals only gain access if they fulfill specific criteria. *Id.*, 12.
125 Niklas Luhmann, 'Gesellschaft', in *Soziologische Aufklärung 1* (n 55) 137, 148.
126 Niklas Luhmann, 'Differentiation of society' (n 118) 33–4.
127 *Id.*, 35.

By differentiating subsystems, society enters a process of evolution: Any change in one of the subsystems alters the environment for all other subsystems, whose reaction to this change constitutes yet another change, thereby potentially setting in motion a chain reaction of more and more changes. Through differentiation, society thus becomes dynamic.[128] Crucially, functional differentiation allows society as well as society's subsystems to manage a greater degree of complexity than in the case of segmentary differentiation.[129] As we will see in the following section, Luhmann believes that it also invalidates the prevailing attempts at legitimating the government.

II. The Impossibility of Justification in a Differentiated Society

Luhmann never comprehensively discussed all the sources of government legitimacy that political theorists have put forward over the past decades. But he did engage with Jürgen Habermas's discourse-theoretical—or procedural[130]—conception of legitimate law. One possible reason for his selective approach is that Habermas was arguably Luhmann's most important intellectual sparring partner. In fact, Habermas debated Luhmann in a joint publication just two years after *Legitimation durch Verfahren* was published;[131] it was here that he laid the groundwork for his theory of communicative action.[132]

The other reason is that Luhmann's theory of procedural legitimation itself relies on individuals' (direct or indirect) participation in government

128 Niklas Luhmann, 'Gesellschaft' (n 125) 150–1.

129 *Id.*, 151. See also *Grundrechte als Institution* (n 53) 17–19.

130 See James Bohman and William Rehg, 'Jürgen Habermas', in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2017 edn), available at https://plato.stanford.edu/archives/fall2017/entries/habermas/ (last accessed 4 March 2022). See also Jürgen Habermas, 'Legitimationsprobleme im modernen Staat', in Peter Graf Kielmansegg (ed), *Legitimationsprobleme politischer Systeme* (Westdeutscher Verlag, Opladen, 1976) 39, 43–44 (noting that the sources of legitimacy necessarily become procedural once neither nature nor religion helps justify government).

131 Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie* (n 70).

132 See Jürgen Habermas, 'Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz', in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie* (n 70) 101, and Elmar Koenen, 'Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung? (1971)', in Oliver Jahraus and others (eds), *Luhmann-Handbuch: Leben – Werk – Wirkung* (JB Metzler, Stuttgart, 2012) 150, 152.

proceedings to explain when and why government is stable. By critiquing the extant procedural approaches to political legitimacy, Luhmann could thus underscore how significant his conceptual transformation of participatory rights was. He believed that participating in the government's proceedings does not turn government into self-government. Instead, it ensures the regime's survival by helping to neutralize individuals who might protest the government's decisions.[133]

A. Habermas's Discourse-Theoretical Conception of Legitimate Law

Like Luhmann, Habermas believes that only (shared) meaning can constitute an intersubjective world. But unlike Luhmann, he argues that meaning originates in communicative action, not a social system.[134] Crucially, communicative action is only successful if its subjects can accept the validity claims (*Geltungsansprüche*) that are implicit in each utterance. One such validity claim pertains to the rule that the speaker purports to follow.[135] Habermas argues that we must impute this claim to the speaker unless we wish to treat the speaker as a manipulable object. As a result, we must assume that the speaker only acts according to rules they deem justifiable.[136] This means that when the government asks people to comply with its law, it necessarily implies that the law is justifiable.[137]

In his later publication *Between Facts and Norms*, Habermas specifies when the law is indeed justified. He writes that legal norms are valid if all possibly affected persons can participate in a 'legally structured deliberative praxis in which the discourse principle is applied'.[138] According to the discourse principle, a norm is valid if all those possibly affected could agree to it as participants in a discourse that seeks to 'reach an understanding over problematic validity claims' under conditions of free communication in

133 See generally Niklas Luhmann, 'Normen in soziologischer Perspektive' (n 72) 41–2.
134 See Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 194–5.
135 See Jürgen Habermas, 'Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz' (n 132) 115–6.
136 *Id.*, 118–9.
137 See Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 244.
138 Jürgen Habermas, *Between Facts and Norms* (n 59) 127.

the public space.[139] Once the requisite political rights establish democratic procedures that allow for the discourse principle to materialize, law that accords with these procedures enjoys a presumption of legitimacy.[140]

This presumption itself involves a presumption. After all, we establish democratic procedures to set the discourse principle in motion. But the discourse principle merely demands that the participants in the discourse *could* agree to the norm in question. In other words, we presume that democratic procedures allow us to presume that everyone could agree to the law which issues from the procedures. Habermas's theory of legitimate law thus seeks what James Bohman and William Rehg call a 'warranted presumption of reasonableness'[141] and what Habermas himself terms a 'presumption of rational acceptability'[142].

B. Luhmann's Counterargument from Functional Differentiation

1. The Impossibility of Consensus in a Differentiated Society

The first objection that Luhmann voiced against Habermas's conception of legitimate law concerns the theory of communicative action itself. In the two scholars' joint publication, he writes that we do not always impute validity claims to each other's utterances in order to constitute an intersubjective world. We also love or enter into conflict with each other and perceive, evade, or imitate others, none of which implies justification.[143] As long as there is sufficient 'operative consensus', one 'can live together very well on the basis of the mutual conviction that the other's justifications are wrong—including and especially when each knows the other's opinion about his opinion and [my] knowledge of the [other's] opinion about my opining is equally well known and has stabilized as mutual.'[144] Justifications do not help build an intersubjective world; they presuppose it.[145]

In today's functionally differentiated society, mutual disagreements are bound to be ever more likely, Luhmann adds. Functional differentiation

139 *Id.*, 107–8. On communicative freedom, *id.*, 119.
140 *Id.*, 127.
141 James Bohman and William Rehg, 'Jürgen Habermas' (n 130).
142 Jürgen Habermas, *Between Facts and Norms* (n 59) 151.
143 Niklas Luhmann, 'Systemtheoretische Argumentationen' (n 106) 320.
144 *Id.*, 320–1 (my translation).
145 *Id.*, 321.

requires individuals to have distinct personalities because complete homogeneity would deprive society of the requisite divergence in attitudes and motivations.[146] Consequently, the rational acceptability to which Habermas attributes justificatory potential is incommensurate with the state of our society.[147] We cannot hope for emancipation by having the master and knave of old enter into a discourse of equals over the legitimacy of the government's authority: Because of functional differentiation, the master's reason is overburdened, and the knave's new-found specialization (in a functional subsystem of society) precludes him from gaining reason in the first place.[148]

2. The Necessity of Decisionism in a Differentiated Society

Luhmann's second objection to Habermas's theory can be found in his review of *Between Facts and Norms*. According to the latter, the law is legitimate if it is enacted in accordance with democratic procedures that allow for the discourse principle to materialize.[149] Luhmann doubts that governmental proceedings lend themselves to the discourse principle. He argues that they do not necessarily seek to reach an understanding over validity claims because their primary aim is to render a decision. Therefore, Habermas's presumption of legitimacy ultimately amounts to a fiction.[150]

Contrary to Habermas's, Luhmann's conception of governmental proceedings thus emphasizes decisionism, not deliberation. Again, the phenomenon of functional differentiation explains why this is so and why Luhmann's sociology becomes incompatible, for that reason, with prevailing attempts at justifying the government's authority. Luhmann described the impact of functional differentiation on the government in both his political sociology (a) and his sociology of law (b).

146 Niklas Luhmann, *Grundrechte als Institution* (n 53) 48.
147 Niklas Luhmann, 'Systemtheoretische Argumentationen' (n 106) 327.
148 *Id.*, 327–8.
149 See n 140 and accompanying text.
150 Niklas Luhmann, '*Quod Omnes Tangit*: Remarks on Jürgen Habermas's Legal Theory', 17 Cardozo L Rev 883, 890–3 (1995).

a) Luhmann's Political Sociology

The more differentiated society is, the more possibilities of experience and action there are, Luhmann writes, and the greater the need for coordination becomes. At the same time, the attempt at coordination may turn out to be mistaken.[151] To manage this complexity, society requires binding decisions, for only a focus on binding decisions helps us achieve both stability and flexibility.[152] This is where society's political subsystem comes in: According to Luhmann, its function is to adjudicate, by means of binding decisions, those conflicts that society's other functional systems cannot manage on their own.[153] It is hence both a consequence of and a requirement for society's functional differentiation.[154]

Luhmann defines a binding decision as one that succeeds in becoming a premise for people's behavior—i.e., as an authoritative decision.[155] In other words, he suggests that the point of legitimate authority is to comply with it, not question its justification. On his view, the political system does not ask us to confirm that its authority is justified because its very existence renders this question moot. Accordingly, Luhmann argues that the political system *legitimates itself* when it provides us with binding decisions.[156]

In consequence, democracy does not help us realize collective self-government as autonomous political equals. Luhmann argues that political elections and legislative majoritarianism are valuable insofar as they help the political system manage the complexity of a functionally differentiated environment by both decreasing and preserving it.[157] (In Chapter 3, we

151 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 202–3.

152 See Niklas Luhmann, 'Soziologie des politischen Systems' (n 55) 159.

153 Niklas Luhmann, *Politische Soziologie* (n 53) 36–41. See also Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (n 74) 70–1 (speaking of the political system's 'residual' function).

154 See Niklas Luhmann, 'Soziologie des politischen Systems' (n 55) 159.

155 *Ibid*. By 'authoritative', I mean likely to be obeyed. For this use of the term, see, e.g., Richard H Fallon, Jr, 'Legitimacy and the Constitution', 118 Harv L Rev 1787, 1828 (2005).

156 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 30, and 'Soziologie des politischen Systems' (n 55) 167. For a version of this argument that harnesses Luhmann's later theory of self-referential—as opposed to open—social systems, see Niklas Luhmann, 'Selbstlegitimation des Staates', 15 Archiv für Rechts- und Sozialphilosophie 65 (1981).

157 See Niklas Luhmann, 'Komplexität und Demokratie', in *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung* (4th edn, Springer, Wiesbaden, 1994) 35, 37–40.

will see how they do so, using the legislative process as an example.[158]) By the same token, fundamental rights do not help legitimate government by helping us 'co-determine the structure of [our] society'.[159] For Luhmann, the function of fundamental rights is to help maintain functional differentiation by preventing the political system from colonizing other functional subsystems.[160]

b) Luhmann's Sociology of Law

In his work on legal sociology, Luhmann translated these observations into the terms of legal theory. To satisfy a functionally differentiated society's need for flexibility, society's law—which issues from the political system's binding decisions—must be positive, that is, susceptible to change.[161] The law must not restrict the world to which society can have access. Any law that society requires must be capable of being enacted.[162]

Now, the idea of change is not foreign to the theory of normative legitimacy either. On the contrary, political philosophers argue that the law is justified if and because our self-determination gives us the right to change it.[163] Therefore, positive law's innate alterability is an *asset* when we conceptualize legitimacy as involving a claim to justifiability (as do most scholars): We are autonomous, the argument runs, because we can rectify past mistakes. But once we collapse legitimacy and stability into one concept (as does Luhmann), the possibility of change appears more

158 Chapter 3, subsection IV.C.2.a.

159 Rainer Forst, 'The Justification of Basic Rights: A Discourse-Theoretical Approach', 45 Netherlands J Legal Phil 7, 7–8 (2016).

160 Niklas Luhmann, *Grundrechte als Institution* (n 53) 33–7.

161 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 215, and 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft' (n 98) 183–4. The focus on adaptability differentiates the concept of positivity from that of positiv*ism*, which lays a greater emphasis on the question of who or what is a source of law. See, e.g., Jeremy Waldron, *Law and Disagreement* (OUP, Oxford, 1999) 44. That is not to say that legal theorists undervalue the significance of adaptability. They use it, among other things, to distinguish law from morality. See HLA Hart, *The Concept of Law* (Clarendon Press, Oxford, 1972) 171.

162 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 145.

163 See, e.g., Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP, Oxford, 2013) 79.

threatening: How can we make sure that people will acquiesce not only in today's law but also in tomorrow's?[164]

For that reason, Luhmann's theory of legitimate law does not answer the question of which requirements must be met for the law to be justified. Instead, it seeks to explain how we can demand that everyone comply with the law but simultaneously expect that law to change—that is, why we normatively expect compliance but cognitively expect change.[165]

III. Niklas Luhmann's Theory of Why People Comply with the Law

Luhmann makes out four factors which warrant the presumption that those affected by a government decision will acquiesce in it. The first is that the political system succeeds in absorbing and thus neutralizing the protest of those who are unlikely to adapt to the decision because they were invested in obtaining the opposite outcome.[166] The second is that it makes people trust the political system. To do so, it must make them feel reasonably secure despite the law's perennial variability and give them the confidence that they will be able to lead a dignified life regardless of what happens.[167] The third factor, finally, obtains when the political system offers everyone an equal chance of achieving a satisfactory political outcome.[168]

According to Luhmann, government proceedings play a crucial role in implementing all three factors: They absorb protest by individualizing and isolating participants who are disappointed in the proceedings' outcome,[169]

164 See Niklas Luhmann, 'Normen in soziologischer Perspektive' (n 72) 47. In Luhmann's terms, the question should be formulated as follows: At what point can we assume 'that third parties expect normatively that the directly affected persons cognitively prepare themselves for what the decision-makers communicate as normative expectations'? Niklas Luhmann, *A Sociological Theory of Law* (n 69) 256.

165 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 255. On the distinction between cognitive and normative expectations, Niklas Luhmann, 'Normen in soziologischer Perspektive' (n 72) 36, and Johan Galtung, 'Expectations and Interaction Processes', 2 Inquiry 213 (1959).

166 Niklas Luhmann, 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft' (n 98) 188–9, and *A Sociological Theory of Law* (n 69) 258.

167 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 192–9, and *Vertrauen* (n 71) 69–72.

168 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 30, 198 ('Gleichheit der Chance, befriedigende Entscheidungen zu erhalten').

169 Niklas Luhmann, 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft' (n 98) 189.

generate the decisions that make people trust the political system, and bring the idea of outcome equality to life.[170]

The fourth factor is coercion, for we can expect almost everyone to bow to the threat (or use) of force and acquiesce in a government decision despite initially refusing to do so.[171] However, a government that relies exclusively on force cannot prevent people from eventually creating a united front against the state's regime of terror. Nipping protest in the bud by absorbing it as early as possible remains imperative, Luhmann writes.[172]

By contrast, a belief in the justifiability of government decisions does not feature in his account of political stability. He argues that we overburden people if we expect them to form an opinion on the justifiability of every government decision. Doing so 'fails to recognize the high complexity, variability and contradictoriness of the issues and decision-making premises that have to be dealt with in the political-administrative system of modern societies.'[173]

In what follows, I will not address the question of how, according to Luhmann, the political system can generate systemic trust and achieve outcome equality; Chapter 3 will do so briefly. Instead, I will concentrate on government proceedings' role in absorbing protest. We will look at three types of proceedings: judicial proceedings (A), political elections, and the legislative process (B). The first type—judicial proceedings—will receive the most attention, as it takes up the most space in *Legitimation durch Verfahren*.[174]

A. Judicial Proceedings and the Entanglement of Self

Luhmann was not the first to discuss judicial proceedings' capacity to absorb protest. Four years before *Legitimation durch Verfahren* was published, David Easton's systems-based analysis of government argued that the process of adjudication constitutes one of several 'depoliticizing responses' with which the political system diminishes the stress caused by societal

170 *Ibid.* and *Legitimation durch Verfahren* (n 52) 199–200.
171 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 256–7.
172 *Ibid.*
173 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 32.
174 *Id.*, 57–135.

cleavages.[175] For Easton, two characteristics account for the depoliticizing effect. Firstly, judicial procedure excludes everyone who cannot prove a 'very special interest' in the conflict. The controversy is hence artificially confined to the litigants.[176] Secondly, 'adoption of judicial processes implies the antecedent acceptance of the idea that an established rule does or must exist for the settlement of the issue, that it has some degree of commonly recognized equity and justice about it, that it has the sanction of the community behind it, and that it ought to be obeyed.'[177]

But it is one thing to acknowledge that there is a respect-worthy decision rule and quite another to accept the judge's application of that rule. Missing from Easton's account is a specific explanation for why the judge's application of the decision rule is not bound to rile the losing party and cause it to carry the conflict outside the courtroom. (We will touch upon Easton's more general answer to this question further below.[178]) This is where Luhmann's theory comes in. It agrees with Easton's two points[179] but explains in greater detail why the losing party's reaction to the judge's verdict is unlikely to further societal cleavages.

Central to Luhmann's argument is the idea of individualization and isolation.[180] To understand it, we should take a closer look at the concepts of role reciprocity and of presentation of self (1) and consider the significance of courtroom publicity (2) and conditional programming (3). Lastly, we will discuss a specific form of depoliticization: contact systems within the judicial proceeding (4).

1. Role Reciprocity and the Presentation of Self

The concept of role reciprocity owes a lot to George Herbert Mead's analysis of 'rôle-taking'. As we saw above, Mead claimed that individuals learn to be self-conscious and self-critical when they learn to take the attitude, or

175 David Easton, *A Systems Analysis of Political Life* (n 65) 264. Easton defines cleavages as 'differences in attitudes, opinions and ways of life or as conflict among groups'. *Id.*, 235–6.

176 *Id.*, 264. See also Alexis de Tocqueville, *Democracy in America* (Arthur Goldhammer tr, Library of America, New York, 2004 [1835]) 115 (arguing that litigation's narrow procedural focus dilutes the court judgment's political impact).

177 David Easton, *A Systems Analysis of Political Life* (n 65) 264–5.

178 See n 294 and accompanying text.

179 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 114–5, 122.

180 See, e.g., *id.*, 120.

'rôle', of an *alter ego*.[181] Following the lead of other scholars,[182] Luhmann applied this theory to *societally preformed roles*. He writes that every such role implies what Ralph Turner called an 'imputed other-role'[183]—i.e., a complementary role without which one's own role would make no sense.[184] For instance, we cannot comprehend the role of 'judge' without simultaneously acknowledging the role of the parties who bring their controversy before the court.

Every time a person performs a role, they thus imply a complementary role; their performance demands that the individual they address behave according to the complementary role's expectations.[185] Once we treat another person as a judge, we must thus abide by the role expectations for litigants.

One such expectation is that the litigants remain consistent in their factual and legal argument.[186] Now, any presentation of self gives rise to consistency requirements,[187] and we necessarily present our self when we perform a role in the face of others.[188] But Luhmann argues that the consistency requirement is more pronounced still in a courtroom. Without it, the judge would find it much harder to reach a decision, thereby failing to implement the court's manifest function of adjudicating a controversy.[189]

The consistency requirement serves to individualize the conflict because it narrows the parties' argumentative options as the case progresses.[190] In systems-theoretical terms, the litigants' past statements and arguments become history. Because it decreases complexity, this history turns the concrete proceeding into a social system unto itself, one in which things

181 See n 97 and accompanying text.

182 See Ralph H Turner, 'Role-Taking: Process Versus Conformity', in Arnold M Rose (ed), *Human Behavior and Social Processes: An Interactionist Approach* (Houghton Mifflin, Boston, 1962) 20, 23.

183 *Ibid.*

184 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 85. Strictly speaking, Mead's 'rôle' describes a psychological attitude, not a sociological set of expectations. See Walter Coutu, 'Role-Playing vs. Role-Taking: An Appeal for Clarification', 16 Am Soc Rev 180–1 (1951). By interpreting sociological roles in the light of Mead's psychology, both Turner and Luhmann thus endeavored to blend both concepts.

185 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 85.

186 *Id.*, 91–2.

187 Erving Goffman, 'On Face-Work', reprinted in *Interaction Ritual: Essays on Face-to-Face Behavior* (Doubleday, New York City, 1967) 5, 9–10.

188 *Id.*, 5.

189 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 92.

190 *Id.*, 94–5.

that were possible at the outset are no longer so.[191] Luhmann likens the adjudicative process to a funnel:[192] Initially, the parties submit to the proceeding because they hope to win;[193] but once they do so, they themselves contribute to the de-politicization of their controversy. On this view, the inherent 'chanciness' of adjudication[194] is vital to the stability of the political system, for it serves to lure the conflicting parties into the courtroom.[195]

> In the course of the proceeding, the participants are thus persuaded to specify their positions with regard to the outcome that is still open in the instant case, so that their concern cannot ultimately appear to be that of any given third party. It takes on the profile of an opinion or interest, as opposed to the expectations of the public—and, in any case, no longer of truth or of a morality that is naturally taken to be common to all. After the performance of their self-presentation in the proceeding, the participants discover they have become individuals who have articulated their opinions and interests, who have voluntarily established their positions as their own, and, therefore, hardly stand a chance of mobilizing an effective formation of expectation and action by third parties for their own case.[196]

Luhmann does not expect the losing party to agree with the judge's verdict. Because courts implement a predetermined program (regardless of how indeterminate it is), they cannot demonstrate the sort of flexibility and patience needed to keep at least one party from being disappointed when the judgment is handed down.[197] Therefore, it is more important to render society impervious to the loser's continuing dissent.[198] All is well if the losing party works off its disappointment through silent bitterness or ornery complaint.[199] But if it asks others for assistance and tries to undo the proceeding's success in individualizing the conflict, the following two

191 *Id.*, 44.
192 *Id.*, 115.
193 *Id.*, 116.
194 Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, Princeton, 1949) 50.
195 Therefore, one of judicial impartiality's latent functions is to maintain the chanciness of adjudication. Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 134.
196 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 257.
197 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 112–4.
198 *Id.*, 120.
199 *Id.*, 111–2.

factors compound the individualizing effect of legal argument and isolate the loser, thus neutralizing any dissent they choose to voice.[200]

Firstly, participating in a judicial proceeding prompts the litigants to perform 'unpaid ceremonial labor', that is, to include the court's decorum and solemnity as well as its decision rule in their presentation of self. In doing so, they affirm—as Easton noted—the court and the law it applies, which makes it more difficult to attack either after the judge has handed down their decision.[201] Secondly, the character of judicial proceedings as institutionalized mechanisms of conflict resolution[202] forbids a party from denying its opponent the elementary right to contest the claim and make its own case.[203] Accordingly, the loser will have a hard time arguing that the victor had no credible case whatsoever.

Sensing this isolation will likely help the loser come to terms with his loss, Luhmann writes.[204] And if he refuses to do so, society will start treating him as an 'eccentric, a troublemaker, someone whose favorite topic one knows and whom one seeks to avoid. He must choose his audience very carefully and very narrowly; he cannot talk to everybody about his lawsuit.'[205]

2. Courtroom Publicity

However, other people will only isolate persistent dissenters if we can assume that they will treat the judgment as authoritative. Luhmann contends we can make this assumption if the absence of outspoken dissent suggests that people believe two things: first, that the judges are making an honest, sincere, and diligent effort at getting to the truth; and second, that everyone can, if need be, avail themselves of the courts to obtain a legal victory.[206] Simply put, *two of the other three factors* that together warrant a presumption of universal acquiescence must be present for protest to be absorbed

200 *Id.*, 117.
201 *Id.*, 114.
202 See also Johan Galtung, 'Institutionalized Conflict Resolution: A theoretical paradigm', 2 J Peace Res 348, 349 (1965).
203 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 105.
204 *Id.*, 117–8.
205 *Id.*, 118.
206 *Id.*, 123.

efficiently: People must have trust in the overall functioning of the judiciary, and they must believe in outcome equality in the courtroom.[207]

According to Luhmann, the absence of dissent is indicative of systemic trust and the belief in outcome equality if and because people can observe judicial proceedings whenever they so desire.[208]

> All the non-involved must be able to follow the course of the proceeding. What matters in this context is accessibility, not so much the actual act of going [to court] and watching. [...] The possibility [of doing so] strengthens people's trust or at least prevents the emergence of the kind of distrust that attaches to all attempts at concealment. The function of the procedural principle of publicity lies in the creation of symbols, in the configuration of the proceeding as a drama that symbolizes right and just decision-making, and the continuous presence of a more or less large part of the population is not necessary for that. The general and indeterminate knowledge that these proceedings take place continuously and that everyone can, if need be, learn about them suffices.[209]

Therefore, the role of the public is not to place a check on the courts. Luhmann argues that such a role would be unfeasible because an open court necessarily prompts the adjudicators to conduct their actual decision-making process away from the public eye.[210] Instead, what happens is a broad and diffuse exchange of sorts: the public helps the court render a binding decision, and the courts present themselves as capable of doing so. This interpretation of judicial symbolism distinguishes Luhmann from earlier functional sociologists such as Durkheim. Where the latter argued that the symbolism of law inspires societal solidarity, Luhmann claimed that judicial proceedings' symbolism wards off challenges to this solidarity.[211]

Because there is no need for the public to be physically present, the mass media play an important role in depicting this symbolism. One might wonder how the tidbits the press relays to its audience suffice to adequately portray judicial proceedings. However, courtroom publicity need not enable a rational analysis of a given case's outcome; trust does not require informed

207 See above, notes 167–168 and accompanying text.
208 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 123.
209 *Id.*, 123–4.
210 *Id.*, 124.
211 See Émile Durkheim, *De la division du travail social* (5th edn, Librairie Félix Alcan, Paris, 1926) 73–8, and Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 121.

judgment. What matters, Luhmann argues, is that the public can observe the law in action, and the mass media facilitates such observation.[212]

3. Conditional Programming

Finally, Luhmann contends that a court can only depoliticize a subject matter if it can minimize the influence it is seen to have over the decision. If it succeeds in doing so, it can deflect criticism and, if necessary, redirect the parties' attention to the decision rules that forced its hand.[213] For this to occur, the norms that govern the case must provide *conditional programs*.

By program, Luhmann means the conditions a decision must fulfill to be considered correct. In other words, a program provides the blueprint for a multitude of individual decisions.[214] We can trace the concept back to the American economist Herbert A. Simon, whose theory of decision-making used computer programs—i.e., instructions or role prescriptions for a machine—to analyze a decision's premises.[215] Luhmann reframed the concept in systems-theoretical terms, observing that programs protect the autonomy of decision-making systems vis-à-vis their environment because they instruct the system to act only pursuant to specific, selected information.[216] On this view, judicial proceedings are programmed processes of decision-making, contrary to legislative proceedings.[217]

However, a court decision is not immune to criticism simply because it is premised on a (supposedly) external program. This brings us to the distinction between purposive and conditional programs, which Luhmann took from the Scandinavian sociology of law.[218] Purposive programs instruct the decision-maker to accomplish a specific output. They do not predetermine the means to do so. If the means the decision-maker chooses prove deleterious, those affected will hold them personally responsible and blame their

212 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 125–6.
213 *Id.*, 130.
214 Niklas Luhmann, *Politische Soziologie* (n 53) 208, and *Organization and Decision* (Dirk Baecker ed, Rhodes Barrett tr, CUP, Cambridge, 2018) 210.
215 See, e.g., Herbert A Simon, 'Theories of Decision-Making in Economics and Behavioral Science', 49 Am Econ Rev 253, 273–5 (1959).
216 See Niklas Luhmann, *Politische Soziologie* (n 53) 211.
217 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 139.
218 See Niklas Luhmann, *A Sociological Theory of Law* (n 69) 230–1 n 53 and the references cited therein.

judgment.[219] By contrast, conditional programs correlate a decision with a specific input: '*if* specific conditions are fulfilled (if previously defined constituent facts are given), *then* a certain decision has to be made'.[220] Because they bear no responsibility for the relevant input or the decision that follows from the input, the decision-maker can deflect criticism directed against their person, the proceeding, their (non-legal) expertise, and the decision's ramifications.[221]

The law is regularly programmed conditionally, Luhmann writes. Contrary to what the idea of 'programming' may suggest,[222] this does not mean that the law's interpretation is a foregone conclusion.[223] Nevertheless, conditional legal programs make the uncertainty of human experience more bearable because they correlate other individuals' uncertain but possible behavior with identifiable sanctions.[224] More, they unburden the judge from having to make transparent and reviewable value judgments.

According to Luhmann, the principle of judicial impartiality adds to conditional programs' depoliticizing potential because it differentiates the judge's adjudicative role from their other social positions. As a result, they need not account for any of their decision's negative effects on their other roles' areas of concern and can claim to act solely within the confines of the law.[225] In fact, a judge who is expected to accomplish certain social goals could hardly act impartially and would certainly not *seem* to act impartially.[226] Luhmann writes that appearing too 'active' endangers the judge's presentation of their impartiality.[227]

219 *Legitimation durch Verfahren* (n 52) 130–1.
220 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 228.
221 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 131–2.
222 See Ronald Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge MA, 1985) 33 (suggesting that programs are somehow apolitical).
223 For Luhmann's analysis of legal interpretation, see Niklas Luhmann, *Politische Soziologie* (n 53) 216–20.
224 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 229.
225 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 134.
226 *Id.*, 185.
227 *Id.*, 134. See also Torstein Eckhoff, 'Impartiality, Separation of Powers, and Judicial Independence', 9 Scandinavian Stud in Law 11, 41 (1965) (arguing that it is 'sometimes impossible for the active and helpful conflict-solver to avoid the unjustified suspicion of being partial').

4. Contact Systems

The arguments discussed in the foregoing paragraphs were not premised on the disputants and other participants knowing each other. Yet the participants will often be well-acquainted: The judges might know the attorneys, and the litigants' out-of-court relationship may regularly give rise to legal disputes. For Luhmann, these networks serve to depoliticize and neutralize a controversy because they help differentiate, within the judicial proceeding, a specific subsystem whose normative structure suggests that getting along is more important than winning at all costs.

Luhmann labels this system a 'contact system'. He defines it as a web whose participants depend on each other because they know that they will eventually require each other's help.[228] This web becomes a social system unto itself—thereby increasing the complexity it can process—because the participants' familiarity creates more far-reaching perspectives of meaning. For example, the perspectives become more generalized in the temporal dimension because the actors within the system have to countenance not only the current proceeding but future events; they become more generalized in the substantive dimension because more and more different subject matters will likely arise over time; and they become generalized socially because each actor knows beforehand whether the other participants in the system will prefer conflict or cooperation.[229]

Contact systems decrease this complexity, Luhmann continues, by taking a long view of things and rationally choosing not to maximize the potential gains from the individual encounters that take place within the system. In planning their strategy for a particular court case, the participants will take into account that the other party may prove more powerful in the next lawsuit. For that reason, they will prioritize their long-term relationship over the outcome of the instant case.[230] This means they will not disrupt the political system by inveighing against the court and the decision-maker's animus or bias but will instead attribute the current loss to the 'circumstances' or the disadvantageous state of the law.[231] In other words, they will voluntarily refrain from voicing the kind of dissent that undermines an assumption of universal compliance; they will anticipate their argumentative entanglement.

228 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 75.
229 *Id.*, 76.
230 *Id.*, 75–6.
231 *Id.*, 77.

However, this specific form of depoliticization ends once self-restraint becomes too burdensome, Luhmann writes. Intuiting when that point is reached is an integral part of being party to a contact system. The participants 'must be able to feel which impositions are still bearable for other participants and where the threshold lies beyond which concerned individuals lose control and thus their future within the system.'[232]

B. Political Elections and the Legislative Process

1. Elections

Political elections help absorb protest, Luhmann argues, because they provide a safety valve of sorts for disgruntled citizens.[233] The reason their protest votes do not destabilize the political system is that elections never serve to reduce complexity and make actual decisions. There are too many societal controversies for parties to distill into a comprehensible platform. Moreover, the scarcity of government offices means that parties tend to assimilate their platforms to one another anyway. As a result, no voter can expect their vote to reliably secure a certain policy outcome. Instead of resolving conflicts, elections funnel them into the political system and leave it to officeholders to decrease the complexity for which the conflicts stand.[234]

That is also why the right to vote does not help citizens participate in government. Luhmann argues that its function is to prevent making the public's support for the political system contingent on the latter satisfying each voter's demands.[235] Citizens know that they must voice their demands differently if they wish to obtain specific outcomes; they must turn to 'personal contacts and interventions, letters to the editor or other publications, petitions, interest groups, demonstrations, etc.'[236]

Many political philosophers consider equal participation rights crucial to the justification of government. Granting each citizen an equal vote in legislative elections and having the legislature adjudicate disagreement by

232 *Id.*, 78.
233 See, e.g., *id.*, 171.
234 See *id.*, 161–4.
235 See Niklas Luhmann, *Grundrechte als Institution* (n 53) 148, and *Politische Soziologie* (n 53) 413.
236 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 166.

majority decision accords everyone 'the greatest say possible compatible with an equal say for each of the others'.[237] For that reason, we can say there is no longer any difference between the ruled and the rulers.[238] But Luhmann disputes this link, which he deems too tenuous. Citizens have too little impact on legislative decision-making for us to consider participation tantamount to self-government.[239] In fact, they are not even *meant* to have any substantive impact, for the government they vote into office is sovereign in its decision-making.[240]

Luhmann adds that we risk widespread frustration if we pin our hopes on participation. Thus, every political decision in favor of a particular course of action simultaneously rejects conceivable alternatives, thereby disappointing all citizens who would have preferred one of the alternatives over the enacted decision. The more diligent the political process is, the more alternative policies become conceivable, and the more rejections are implied by the decision. In a well-functioning system, each decision thus tends to beget more disgruntled than satisfied participants.[241]

2. The Legislative Process

Finally, the legislative process preempts potentially dangerous protest because it forces people seeking to destabilize the political system to do so *from within*, in societally preformed roles that tend to moderate the role performers' political positions.[242] Central to this claim is the interrelation-

237 Jeremy Waldron, 'The Core of the Case Against Judicial Review', 115 Yale LJ 1346, 1388–9 (2006).

238 Christoph Möllers, *The Three Branches* (n 163) 71–2.

239 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 167, and 'Komplexität und Demokratie' (n 157) 39. On the concept of impact on legislative decision-making, see Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, Cambridge MA, 2002) 191. See also Joseph Raz, 'Disagreement in Politics', 43 Am J Juris 25, 45 (1998) (arguing that pleading one's case before an impartial yet unelected court is likely more effective in fulfilling one's autonomy than being one of the millions to elect one's lawmakers).

240 Niklas Luhmann, *Vertrauen* (n 71) 71.

241 Niklas Luhmann, 'Komplexität und Demokratie' (n 157) 39. For another theoretical objection to the justificatory potential of participation rights, see, e.g., Ronald Dworkin, *Sovereign Virtue* (n 239) 191 (highlighting that equal participation rights do too little to differentiate meaningful democracies from authoritarian states because citizens of the latter also wield political power equally, given that no one has any).

242 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 191.

ship between the complexity that the legislators are asked to decrease and the public's general apathy in matters political.

For starters, Luhmann emphasizes that legislation must decrease an extreme amount of complexity to enact law and to thus fulfill the political system's function. The election that determines the legislature's composition fails to decrease any complexity on its own, leaving the parliamentarians to do what the voters could not; in addition, legislation is not programmed.[243] Crucially, parliamentary debate alone will not suffice to reduce complexity and help legislators agree on a decision. Instead, the parliamentarians must resort to unofficial, partly concealed means of facilitating the law-making process, Luhmann writes.[244]

Thus, any deliberative assembly splinters into groups or factions that substitute allegiance and partisanship for truth and persuasiveness. This tendency facilitates decision-making, Luhmann argues, because it demarcates the boundaries between cooperation and competition—boundaries that are blurred in simple face-to-face encounters.[245] Furthermore, parliamentary assemblies naturally give rise to contact systems,[246] which decrease complexity because they allow individual parliamentarians to know what they need to say to elicit the reaction they desire.[247] Finally, Luhmann points to empirical studies of American legislation[248] to argue that lawmakers expect their colleagues to be consistent in the presentation of their opinions. Arguments once voiced thus bind the parliamentarians and diminish their room for maneuver.[249]

More concretely, Luhmann stresses that legislation is advanced not through the back-and-forth of deliberative assemblies but through tough negotiations and artful bargaining behind closed doors. Legislators can safeguard the effectiveness of their decision-making by relying on external expert opinion, strategizing to avoid parliamentary defeat, alternating the public exchange of opinion with untransparent deal-making, and resorting to small groups of influential lawmakers to hammer out the final details.[250]

243 See *id.*, 154.
244 *Id.*, 185.
245 *Id.*, 185–6.
246 On contact systems, see above, subsection III.A.4.
247 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 186–7.
248 E.g., James D Barber, *The Lawmakers: Recruitment and Adaptation to Legislative Life* (Yale University Press, New Haven, 1965) 159–60.
249 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 187–8.
250 *Id.*, 189–90.

The public will care little about concrete law-making processes, Luhmann adds. Life has too much to offer for us to expect people to closely follow the legislative process's ups and downs.[251] As a result, galvanizing the public and creating a movement for change requires substantial effort. Luhmann argues that only seasoned actors within the political system can muster this effort because they are versed in the art of creating new political controversies and elevating them in the public's consciousness. Consequently, the legislative process defangs potential protest by creating a high threshold for outsiders.[252] Parliamentary debate—i.e., the official face of law-making—contributes to this effect because it bars participants from entertaining policy-making reasons that they could not defend in public.[253]

IV. Critiquing Legitimation durch Verfahren

Over the years, legions of scholars have criticized Luhmann's arguments in *Legitimation durch Verfahren*.[254] In presenting and discussing some of their points, I will again distinguish between what I consider to be the book's two central claims: first, that the question of whether government decisions are justifiable is immaterial to the concept of political legitimacy (A); second, that we can expect people to comply with the government's decisions in part because government proceedings absorb the protest of those who may disagree with their outcome—and not because people believe in the government's legitimacy (B).

251 *Id.*, 191.

252 See *ibid.*

253 *Id.*, 190, and Niklas Luhmann, *A Sociological Theory of Law* (n 69) 258.

254 See, e.g., Hubert Rottleuthner, 'Zur Soziologie richterlichen Handelns (II)', 4 Kritische Justiz 60, 72–88 (1971); Johannes Weiß, 'Legitimationsbegriff und Legitimationsleistung der Systemtheorie Niklas Luhmanns', 18 Politische Vierteljahresschrift 74, 77–82 (1977); Claus Offe, 'Politische Legitimation durch Mehrheitsentscheidung?', in Bernd Guggenberger and Claus Offe (eds), *An den Grenzen der Mehrheitsdemokratie: Politik und Soziologie der Mehrheitsregel* (Westdeutscher Verlag, Opladen, 1984) 150, 176–8.

A. Justifiability and the Concept of Political Legitimacy

The first author whose critique I wish to present is Habermas, whose rival conception of legitimate law we briefly looked at above (1). The second and third are Stefan Lange and Chris Thornhill, who exemplify the more recent critical response to Luhmann's political sociology (2).[255] Finally, I will present my own thoughts (3).

1. Jürgen Habermas's Debate with Niklas Luhmann

As we saw above, Habermas argued that meaning originates in communicative action; that communicative action is only successful if its subjects can accept the validity claims implicit in each utterance; and that the government thus implies its law is justifiable when it asks people to comply with it.[256] To deny this, he adds, we would have to posit that communicative action no longer implies validity claims. And he, for one, sees no reason for doing so.[257] Instead, we should further democratize society, thus creating the conditions for the discourse that enables us to reach an understanding about contested validity claims.[258]

Habermas acknowledges that the political system would currently be incapable of justifying itself in a discourse.[259] What it does instead, he writes, is promote an ideology, that is, a merely *apparent* justification (which Habermas calls a 'legitimation').[260] Writing in the late 1960s, he argued that technocracy, whereby government action is 'designed to compensate for the dysfunctions of free exchange', represented capitalist democracies' new

255 It would be almost impossible to provide an exhaustive account of the more recent reception of Luhmann's theory. But it appears that little of that reception has focused on his theory of political legitimacy anyway. See Chris Thornhill, 'Niklas Luhmann: A Sociological Transformation of Political Legitimacy?' (n 54) 47.

256 See notes 134–137 and accompanying text.

257 See Jürgen Habermas, 'Legitimationsprobleme im modernen Staat' (n 130) 46.

258 Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 265–6. On the concept of discourse in this phase of Habermas's work, see, e.g., Jürgen Habermas, 'Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz' (n 132) 115, 117.

259 Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 266.

260 *Id.*, 244.

ideology.[261] It is 'oriented toward the elimination of dysfunctions and the avoidance of risks that threaten the system: not, in other words, toward the *realization of practical goals* but toward the *solution of technical problems*.'[262] This requires moving away from public discussions, thereby depoliticizing 'the mass of the population'.[263] Habermas adds that Luhmann's theory of legitimate law contributes to this depoliticization and thus complements the governing ideology of technocracy precisely because it leaves no room for the discussion of practical questions.[264]

2. Stefan Lange and Chris Thornhill's Nuanced Appraisal

In more recent years, Stefan Lange and Chris Thornhill have argued that Luhmann's decision to remove the notion of implied justifiability from the concept of political legitimacy leaves many questions unanswered. For instance, Lange takes issue with Luhmann's account of the public's role in making law legitimate. According to Luhmann, the more people disengage from politics, the better the political system can entangle and neutralize those who refuse to disengage. Lange objects that this premise conflicts with Luhmann's objective of preventing societal politicization. According to Luhmann, fundamental rights are crucial to this objective because they help prevent the political system colonize society's other functional subsystems.[265] For Lange, however, it is unlikely that people will vindicate their fundamental rights—thereby maintaining other functional systems' autonomy—if they are too disinterested in politics. To make use of their rights efficiently, people require the sort of normative convictions that Luhmann deems improbable in a functionally differentiated society.[266]

In addition, both Lange and Thornhill doubt that the political system requires no extra-systemic help to legitimate its decisions. On Luhmann's theory, the political system would fail in its function of adjudicating extra-systemic conflict if it had to rely on more than its own resources. Today,

261 Jürgen Habermas, 'Technology and Science as "Ideology"', in *Toward a Rational Society: Student Protest, Science, and Politics* (Jeremy J Shapiro tr, Beacon Press, Boston, 1970) 81, 102.
262 *Id.*, 103.
263 *Id.*, 103–4.
264 Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 266–7.
265 See n 160.
266 Stefan Lange, *Niklas Luhmanns Theorie der Politik: Eine Abklärung der Staatsgesellschaft* (Westdeutscher Verlag, Wiesbaden, 2003) 138.

however, the political system also provides society with a welfare state, writes Lange; and to do so, it must siphon funds from the economic system, which it does by taxing its output.[267] Consequently, Luhmann appears to fail in his stated aim of both ridding us of an obsolete conception of rationality and adequately portraying the modern state.[268]

Thornhill complements Lange's objection with a more theoretical argument. If the political system's function is to adjudicate conflicts that arise between different subsystems of society, its decisions will necessarily play out *within* those systems. Consequently, they will likely only manage to adjudicate conflicts if they accord with those systems' specific rationality, argues Thornhill.[269] I understand this objection as revealing an apparent contradiction in Luhmann's theory of legitimate law. According to the latter, the political system adjudicates conflicts between *systems*. But to do so effectively, *people*—that is, individuals—must accept its decisions unquestioningly. Because social systems consist of actions, not individuals,[270] the question thus remains which mechanisms within these systems help individuals trust the law and learn to live with its development. And it is unlikely that none of the systems employs the sort of normative principles that Luhmann declares irrelevant.

Yet both Lange and Thornhill have also defended Luhmann's theory. From the beginning, critics have pointed out that Luhmann's political sociology is reminiscent of decisionist theories such as Carl Schmitt's.[271] Schmitt emphasized that the fact a decision has been made is frequently more significant than the decision's content.[272] But there is a crucial difference between Schmitt and Luhmann, Lange and Thornhill argue. The former stressed the importance of social homogeneity for democracy[273] and lamented the pluralistic ascent of social and economic interest groups.[274] In other words, he advocated re-politicizing society. Luhmann, by contrast,

267 See Stefan Lange, *Niklas Luhmanns Theorie der Politik* (n 266) 140.
268 *Ibid.*
269 See Chris Thornhill, 'Niklas Luhmann' (n 54) 47.
270 See n 99 and accompanying text.
271 See Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 242–3.
272 See, e.g., Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, The University of Chicago Press, Chicago, 2005) 6.
273 Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (10th edn, Duncker & Humblot, Berlin, 2017 [1923]) 13–4.
274 Carl Schmitt, 'Der Hüter der Verfassung', 55 Archiv des öffentlichen Rechts 161, 235 (1929).

was perfectly content with accepting 'polycentricity as the evolved condition of modern societal pluralism'.[275] In fact, Luhmann's sociology reveals a clear preference for functional differentiation.[276]

3. Putting Luhmann's Skepticism of Justifiability in Perspective

I agree with Lange and Thornhill that Schmitt's and Luhmann's decisionism are as distinct from one another as they may be similar. Thus, Schmitt's decisionism sought to ensure that the state can wage war against its international adversaries.[277] Because the concept of the state 'presupposes the concept of the political',[278] one might say, therefore, that Schmitt sought to decenter the state but not the political.[279] By contrast, Luhmann's decisionism was a response to the diversity we encounter in a functionally differentiated society. In other words, Luhmann sought to decenter both the state *and* the political.

Yet I also agree with the abovementioned scholars that Luhmann's conceptualization of legitimate authority is ultimately unpersuasive. That is because Luhmann fails to eradicate the notion of justifiability from his very own theory of procedural legitimation.

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275 Chris Thornhill, 'Niklas Luhmann, Carl Schmitt and the Modern Form of the Political', 10 Eur J Soc Theory 499, 507–8 (2007). See also Stefan Lange, *Niklas Luhmanns Theorie der Politik* (n 266) 146 (observing that Luhmann stepped away from Schmitt's ontological approach by replacing Schmitt's emphasis on sovereignty with functional analysis and Schmitt's focus on the state and its people with the distinction between systems and their environment).

276 See Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (n 74) 69–70; Stefan Lange, *Niklas Luhmanns Theorie der Politik* (n 266) 143; and Chris Thornhill, 'Luhmann and Marx: Social Theory and Social Freedom', in Anders la Cour and Andreas Philippopoulos-Mihalopoulos (eds), *Luhmann Observed: Radical Theoretical Encounters* (Palgrave Macmillan, Houndmills, 2013) 263, 266.

277 See, e.g., Armin von Bogdandy, 'Das Öffentliche im Völkerrecht im Lichte von Schmitts „Begriff des Politischen": Zugleich ein Beitrag zur Theoriebildung im Öffentlichen Recht', 77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg J Int'l L) 877, 889–90 (2017).

278 Carl Schmitt, 'The Concept of the Political', in *The Concept of the Political* (George Schwab tr, The University of Chicago Press, Chicago, 2007) 19.

279 See Armin von Bogdandy, 'Das Öffentliche im Völkerrecht im Lichte von Schmitts „Begriff des Politischen"' (n 277) 885.

Central to Luhmann's account of political stability are both the notion of (systemic) trust and people's belief in outcome equality.[280] As we saw above, people must have trust in the overall functioning of the judiciary, and they must believe that they, too, could successfully vindicate their rights in court. If they do not, they will likely sympathize with disgruntled litigants who attempt to extend their courtroom conflict to society at large, and judicial proceedings will fail to absorb the kind of protest that might imperil the political system.[281] Furthermore, we will see in Chapter 3 that we can only expect people to adjust to new legislation, according to Luhmann, if they feel reasonably secure and, again, believe they have an equal chance of seeing policies they like become law.[282]

Luhmann's theory of procedural legitimation thus relies on people's expectations about the political system. But as Peter Graf Kielmansegg has pointed out, it is hard to dissociate such expectations from our background convictions about the grounds of political legitimacy.[283] Luhmann does not address this problem directly, as he does not elucidate the nature of the expectations required by his theory. The one time he does, however, confirms Kielmansegg's objection. Thus, Luhmann equates systemic trust with people's abstract belief that the political system will enable them to lead a dignified life (*eine menschenwürdige Existenz*).[284] But people's conception of a dignified life may include the expectation that they will not be persecuted for their political opinions, and this seems indistinguishable from the conviction that a regime which *does* engage in persecution is unjustifiable.

Luhmann was likely aware of this equivocation. Consider the following caveat he added to one of his several definitions of legitimate authority. At the beginning of *Legitimation durch Verfahren*, he writes that '[o]ne can define legitimacy as a generalized willingness to acquiesce, *within certain tolerance limits*, in decisions whose content remains to be determined.'[285] He does not specify these 'tolerance limits'. They imply, however, that peo-

280 See notes 167–168 and accompanying text.
281 See n 206 and accompanying text.
282 See Chapter 3, subsections IV.C.2. and 3.
283 See Peter Graf Kielmansegg, 'Legitimität als analytische Kategorie', 12 Politische Vierteljahresschrift 367, 391–3 (1971).
284 Niklas Luhmann, *Vertrauen* (n 71) 72.
285 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 28 (my translation; emphasis added) ('eine generalisierte Bereitschaft, inhaltlich noch unbestimmte Entscheidungen innerhalb gewisser Toleranzgrenzen hinzunehmen').

ple continue to set store by their government's justifiability and that they merely refrain from second-guessing the legitimacy of the government's decisions on a *day-to-day* basis.[286]

Moreover, there can be little doubt that Luhmann not only knew that the idea of justifiability remains important but also concluded, for himself, where to look for the political regime's legitimation. According to his sociology, limited government is justified because of the benefits we accrue thanks to society's functional differentiation. And while Luhmann denied that his theory of evolution considers functional differentiation inherently valuable,[287] his take on politicization suggests otherwise.

On his version of systems theory, politicization occurs when the political system abandons its residual function—i.e., to adjudicate conflicts that the other functional subsystems cannot manage on their own—and starts deciding matters more properly left to those systems, thus undoing society's differentiation.[288] Luhmann did not view this de-differentiation kindly: He writes that once the political takes precedence over the economic, we run the risk of repeating the totalitarian catastrophes of the twentieth century.[289] What he appears to be telling us is that only a small government can be justified.[290]

Consequently, the value of Luhmann's theory of procedural legitimation does not lie in its insistence that justifiability is irrelevant to the concept of political legitimacy. It is valuable because it throws into relief that inquiries into the grounds of political legitimacy may be less important, practically speaking, than the study of what makes political systems stable.[291] Of course, maintaining the traditional concept of legitimacy does not bar us from *also* investigating the causes of political stability. But perhaps such an investigation would be unduly biased in favor of those stability sources

286 See Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 264.

287 Niklas Luhmann, 'Gesellschaft' (n 125) 151.

288 See Niklas Luhmann, *Grundrechte als Institution* (n 53) 24.

289 Niklas Luhmann, 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft' (n 98) 201. See also Stefan Lange, *Niklas Luhmanns Theorie der Politik* (n 266) 143.

290 See also Stefan Lange, *Niklas Luhmanns Theorie der Politik* (n 266) 139–40 (concluding that Luhmann's theory of procedural legitimation considers the welfare state unjustifiable).

291 See Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 264–5, and Peter Graf Kielmansegg, 'Legitimität als analytische Kategorie' (n 283) 396.

that originate in people's beliefs about their government's legitimacy. By stripping the concept of legitimacy of the notion of justifiability, Luhmann forces us to focus on sources of stability that are less reliant on such beliefs.

Whether the sources he makes out are plausible and whether they are truly equal in importance to legitimacy beliefs is a different matter, of course. We will discuss these questions in the following subsection.

B. The Sources of Political Stability

When comparing alternative explanations for why people obey the law with Luhmann's analysis of political stability, it quickly becomes apparent that his disregard for legitimacy beliefs is not widely shared.[292] As mentioned above, David Easton, for instance, considered political stability impossible absent people's belief that the regime whose laws they are asked to obey is justified.[293] For the most part, this belief originates in socialization processes, he added.[294]

Research into the significance of legal socialization has enjoyed a renaissance in recent years.[295] Legal socialization aims 'to instill in people a felt obligation or responsibility to follow laws and accept legal authority'.[296] It does so, ideally, by 'instilling values and developing attitudes' in children that help them better understand when to comply with the law and when to reject it as fundamentally immoral.[297] These values concern the way people expect to be treated (e.g., respectfully), the manner in which the authorities are expected to make a decision (e.g., after hearing those concerned), and the areas they are allowed to regulate (e.g., none related to one's lifestyle).[298] Three kinds of actors are deemed especially significant for legal socialization: one's parents, one's teachers, and all legal authorities—such as the juvenile justice system—with whom one comes into contact. If these actors'

292 For a comparison of Luhmann's sociology with recent theories of why people acquiesce in *constitutional-court* rulings, see Chapter 3, subsection IV.D.
293 See n 65.
294 David Easton, *A Systems Analysis of Political Life* (n 65) 280.
295 See Tom R Tyler, 'Legal socialization: Back to the future', 77 J Soc Issues 663, 663–4 (2021).
296 Tom R Tyler and Rick Trinkner, *Why Children Follow Rules: Legal Socialization and the Development of Legitimacy* (OUP, New York, 2018) 3.
297 *Id.*, 30.
298 *Id.*, 30–1.

behavior comports with the abovementioned values, they can create the belief in children that they ought to obey authorities that act in this way.[299]

Perhaps, then, we can expect the parties to judicial proceedings to acquiesce in the outcome not because they become aware of their isolation but because they believe they ought to comply with a judgment delivered after a fair, impartial, and respectful decision-making process. Therefore, Luhmann may have been mistaken to focus his inquiry on the individualizing nature of proceedings and disregard the significance of *procedure*.[300]

However, Tom R Tyler's strand of legal-socialization research adopts a normative perspective on compliance.[301] In other words, it analyzes the mechanisms that promote voluntary compliance with the law.[302] An instrumental perspective, which focuses on people's reactions to incentives and penalties,[303] remains important as well. Thus, Tyler himself admits that authorities also require deterrence—such as the threat of sanctions—if they wish to ensure compliance.[304] A recent study has borne out this assumption.[305] In fact, it also showed that people's character—namely, their impulsivity—likewise has an impact on whether they feel obligated to obey the law.[306] Most importantly, it concluded that 73 to 74 percent of the variation in people's felt obligation to obey the law is not yet accounted for.[307]

Luhmann would likely have felt vindicated by this finding. The variety of personalities required for functional differentiation precludes grounding

299 See *id*., 11 and the references cited therein.

300 On the irrelevance of procedure for *Legitimation durch Verfahren*, Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 36–7, 42.

301 See Tom R Tyler and Rick Trinkner, *Why Children Follow Rules* (n 296) 17.

302 See Tom R Tyler, *Why People Obey the Law* (n 58) 3–4.

303 *Id*., 3.

304 See Tom R Tyler and Rick Trinkner, *Why Children Follow Rules* (n 296) 16–7.

305 See Adam D Fine and Benjamin van Rooij, 'Legal socialization: Understanding the obligation to obey the law', 7 J Soc Issues 367, 384 (2021).

306 *Ibid.*

307 *Id*., 385. Note that there is a terminological inconsistency in the theory of legal socialization here. According to Fine and van Rooij, people may feel obligated to obey the law because they fear being punished if they break it. On their view, then, the perceived obligation to obey the law can suggest that deterrence works. For Tom R Tyler, on the other hand, the perceived obligation to obey the law is distinct from deterrence. Instead, it suggests that the person feeling obligated believes in the law's legitimacy. See Tom R Tyler, *Why People Obey the Law* (n 58) 42–5. For our purposes, this discrepancy is irrelevant, however: All that matters is that there is a link between deterrence and compliance.

political stability in one single source (such as legal socialization), he suggested. That is why we ought not to place all our hope in civic-minded, cosmopolitan people who understand and accept they should follow legally enacted law. Because we need all kinds of people, we must find ways to ensure compliance regardless of individuals' personal attitudes.[308]

It follows that there is still room for the Luhmannian approach—namely, in the instrumentalist perspective on compliance. I suggest conceptualizing his theory of protest absorption as an explanation for how the political system can, without resorting to force, deter people from inciting unrest regardless of whether they consider the court's decision-making process fair. Luhmann teaches us that there is no need for coercion because the social-psychological mechanisms of individualization and isolation already immure litigants who do not feel obligated to obey the judges' verdict.

Consequently, the research into legal socialization and Luhmann's systems-theoretical hypothesis complement each other. The former explains why observers of judicial and legislative processes may conclude that the judiciary or the legislature is working well enough and choose, for that reason, to ignore querulous individuals who seek to perpetuate and enlarge political conflicts. In other words, it throws into relief the mechanisms that help people develop systemic trust.[309] The latter, by contrast, demonstrates that we do not always need the police to enforce the law; society, it teaches us, will do the same by disincentivizing and thus deterring potential lawbreakers.

V. Conclusion

In trying to explain the reasons for political stability, Luhmann addressed a problem that John Rawls would later consider 'fundamental to political philosophy'.[310] Rawls, of course, was interested in stability for 'the right

308 See Niklas Luhmann, *Vertrauen* (n 71) 78.

309 See also Peter Graf Kielmansegg, 'Legitimität als analytische Kategorie' (n 283) 397 (arguing that the social-psychological mechanisms Luhmann describes will only work if people already believe in the government's legitimacy), and Stefan Machura, 'Legitimation durch Verfahren – was bleibt?', 22 Soziale Systeme 331, 348–50 (2017) (explaining that research into procedural justice helps us better understand how observers experience the government's proceedings).

310 John Rawls, *Political Liberalism* (n 57) xix.

reasons',[311] in finding out how 'deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime'.[312] By contrast, Luhmann was uninterested in such consensus. He argued that too much conformity would diminish the amount of complexity which functional systems can manage. Ultimately, it may lead to totalitarianism.[313]

The problem with his argument is that combatting totalitarianism undoubtedly requires *some* conformity as well. As mentioned above, it is unlikely that people will vindicate their constitutional rights—thereby maintaining functional differentiation—if too few of them affirm what Rawls calls the political conception of a constitutional regime. Therefore, Luhmann had good reason to focus on the social-psychological, non-normative causes of political stability; but he was wrong to suggest that normative causes are insignificant by comparison.

It follows that Luhmann's decision to disregard the notion of justifiability is unconvincing. Yet *Legitimation durch Verfahren* remains valuable because it suggests novel non-normative reasons for political stability. In doing so, it has the potential to help the social-psychological theory of compliance better understand why we obey the law.

The ensuing chapter will reflect this conclusion in the following way. In discussing whether judicial review of legislation is legitimate, it will refrain from adopting Luhmann's concept of legitimacy. Instead, it will conceptualize legitimacy as involving a claim to justifiability. Legitimacy, the premise goes, safeguards our political autonomy as justificatory equals. However, the chapter will also argue that Luhmann's theory of stability—coupled with his concept of personality development through functional differentiation—helps explain how constitutional courts can better protect our *legal* autonomy.

311 Brian Barry, 'John Rawls and the Search for Stability' (n 57) 882.
312 John Rawls, *Political Liberalism* (n 57) xx.
313 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 251–3.

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's[314] 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

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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]

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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 States[327] 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

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324 See also Christoph Möllers, *Freiheitsgrade: Elemente einer liberalen politischen Mechanik* (Suhrkamp, 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.

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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 legislatures[337] 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 women[338]. 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]

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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 law[351] or precedent[352], 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 right[355] 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 rights[358] 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]

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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 liberal[381]—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 generally[433] 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.

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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 interpretations[436] 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 356–358359 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 legitimacy[473] —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 general[477]—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 stability[509]—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 punishment[511]—is uninstructive, 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 another[514] 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-making[550] 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 Olúfémi 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 Olúfémi 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 movement[582] 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 schools[584] 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 men'[591]—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 decisions[593] 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 decisions[600] 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 review[602] 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 judgment[603] 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:rk20211219.1bvr107320.

613 See Federal Constitutional Court, 1 BvR 49/00, ECLI:DE:BVerfG:2006:rk20060524.1bvr004900.

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.

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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 Court[635], 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 politburo. 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 review[659]—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 dignity[669] 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 objektivrechtliche Dimension der Grundrechte im internationalen Vergleich', in Detlef Merten 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 above[679] 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.

Chapter 4: Judicial Appointments and the Specter of Politicization

Constitutional adjudication is bound up with the fear of, or the desire for, politicization. Much of this has to do with judicial appointments. Scholars and political observers alike frequently complain that the selection of new constitutional justices tends to politicize the court to which the justices are appointed.[683] Conversely, they sometimes criticize politicians for not politicizing constitutional adjudication enough.[684] While the justices themselves do not necessarily consider their court politicized, they may fear that judicial appointments make the public perceive it as such.[685]

At the same time, there are surprisingly few succinct accounts of judicial politicization generally and of politicization by judicial appointment specifically. Therefore, my first aim in this chapter is to describe what it means for the appointment process to politicize constitutional adjudication. I will show that politicians politicize a constitutional court when they staff it with justices whose constitutional positions mirror specific partisan policy preferences. Thus, a constitutional court is politicized as a result of the judicial-selection system when it is subject to party-political capture.

However, the concept of politicization by judicial appointment leaves a few questions unanswered. The first pertains to the confirmation process, i.e., that part of the appointment process in which the parliamentarians

683 See, e.g., Pierre Rosanvallon, *La légitimité démocratique: Impartialité, réflexivité, proximité* (Éditions du Seuil, Paris, 2008) 256–7; David Leonhardt, 'How to End the Politicization of the Courts', *The New York Times*, 4 April 2017, available at https://perma.cc/AG4G-DEUA**;** Gerald F Seib, 'Supreme Court Opening Adds to Pressure on American Institutions', *The Wall Street Journal*, 21 September 2020, available at https://perma.cc/HEH6-AY5H; and many of the contributions to the debate on 'How to Fix the Supreme Court', *The New York Times*, 27 October 2020, available at https://perma.cc/6QJJ-MV57.

684 Heribert Prantl, 'Politische Entpolitisierung: Die Union beruft einen Spitzenrichter für weniger Einmischung', *Süddeutsche Zeitung*, 25 November 2018, available at https://perma.cc/5KQE-98JH.

685 See, e.g., Robert Barnes, 'The political wars damage public perception of Supreme Court, Chief Justice Roberts says', *The Washington* Post, 4 February 2016, available at https://perma.cc/3H8C-98RP, and Helene Bubrowski and Reinhard Müller, 'Spielball der Politik? Neue Sorgen um Akzeptanz und Statik des Bundesverfassungsgerichts', *Frankfurter Allgemeine Zeitung*, 21 February 2018, p 8.

vote to confirm or reject a candidate nominated by a different institution. We will often blame this stage for contributing to politicization by judicial appointment; in the United States, for instance, the senators are sometimes faulted for politicizing the Supreme Court.[686] However, the senators have little control over whom the president nominates, which means that their confirmation vote may help politicize the Supreme Court even though they may not have intended to capture the Court for their political parties. For that reason, we should analyze more closely what kind of confirmation behavior falls within the meaning of politicization by judicial appointment.

The second question concerns politicization's effect on constitutional adjudication. We fear politicization by judicial appointment because we believe it will cause people to perceive the constitutional court as politicized and will make them support it less, thereby diminishing the authoritativeness of its decisions. So far, however, there is little empirical proof that this will transpire, at least in the United States. In any event, the justices themselves can likely counteract a decline in their institutional legitimacy. In fact, the odd ideologically surprising judgment may be enough to restore the Supreme Court's authoritativeness. Perhaps, then, politicization's drawbacks do not always outweigh its benefits.

The third question is specific to the German system for selecting new justices. On the one hand, the Federal Constitutional Court does not commonly exhibit a partisan divide. On the other hand, the interparty agreement that assigns each justiceship on the Court to a specific party leaves out two parties that are currently represented in the *Bundestag* but are situated on its ideological fringe. Therefore, it is possible that the interparty agreement seeks not only to balance the constitutional bench ideologically but also to keep the fringe parties' ideologies off the Court. In that case, the Constitutional Court may deserve to be called politicized after all.

Therefore, my second aim in this chapter is to refine the concept of politicization by judicial appointment and to apply it to the US Supreme Court as well as the German Federal Constitutional Court. I do so in part by analyzing the concept in the light of Niklas Luhmann's early systems theory, in particular his early political sociology. Central to this theory is the concept of differentiation—both of the political system, internally, and of society, functionally.

686 See, e.g., Geoffrey R Stone, 'Understanding Supreme Court Confirmations', 2010 Sup Ct Rev 381, 396 (2010).

Firstly, Luhmann's model of the political system's internal differentiation into a subsystem of party politics and another of governmental decision-making helps us better understand the confirmation process's role in politicizing constitutional adjudication: By highlighting that the parliamentarians belong to both subsystems and can choose in which capacity to act when they vote on a judicial nominee, it demonstrates that parliamentarians only contribute to politicization when they act as party politicians. Secondly, Luhmann's analysis of the judiciary's role in an internally differentiated political system and his concept of a functionally differentiated society paint a nuanced picture of politicization's effect on constitutional adjudication. Whether politicization is detrimental turns on two things, they suggest: whether the political parties represent society well and whether the constitutional justices know when to step away from the partisanship that characterizes their day-to-day business.

Mine is not the first attempt at a systems-theoretical analysis of judicial politicization. Nor is it the first to draw on Niklas Luhmann's systems theory.[687] But as far as I can tell, it is the first to be based on the early phase of that theory,[688] in which social systems are open, not closed, and consist of actions, not self-referential communications.[689] I will argue that this allows for a better analysis of politicization.

To familiarize readers with the German system for selecting constitutional justices, section I briefly presents its chief characteristics. Section II sets out the concept of politicization by judicial appointment. Section III discusses the points that the concept leaves open, and section IV analyzes some of these points from a Luhmannian, systems-theoretical perspective.

687 See Alfons Bora, 'Recht und Politik. Krisen der Politik und die Leistungsfähigkeit des Rechts', in Armin Nassehi and Markus Schroer (eds), *Der Begriff des Politischen* (Nomos, Baden-Baden, 2003) 189; Basil Bornemann, 'Politisierung des Rechts und Verrechtlichung der Politik durch das Bundesverfassungsgericht? Systemtheoretische Betrachtungen zum Wandel des Verhältnisses von Recht und Politik und zur Rolle der Verfassungsgerichtsbarkeit', 28 Zeitschrift für Rechtssoziologie 75 (2007); and Michael Hein and Stefan Ewert, 'Die Politisierung der Verfassungsgerichtsbarkeit. Eine ideengeschichtliche und systematische Begriffsrekonstruktion', in Jörn Knobloch and Thorsten Schlee (eds), *Unschärferelationen: Konstruktionen der Differenz von Politik und Recht* (Springer VS, Wiesbaden, 2018) 103, 120–3.

688 For research that uses a more holistic approach to Luhmann's theory, see Gert Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory', 29 J Law & Soc'y 258 (2002).

689 On the later phase, Niklas Luhmann, 'Law as a Social System', 83 Nw U L Rev 136 (1989), and Hubert Rottleuthner, 'Niklas Luhmann on the Autonomy of the Legal System', 23 Law & Soc'y Rev 779 (1989).

I. The Judicial-Appointment Process in Germany

Like its American counterpart, the German judicial-appointment process distinguishes the nomination of judicial candidates from their subsequent parliamentary confirmation.[690] But unlike in the United States, both the nomination phase (A) and the confirmation process are opaque (B).[691]

A. The Nomination Phase

The Basic Law provides that the *Bundestag* and the Federal Council shall each confirm half of the nominees for the Constitutional Court's justiceships.[692] But it does not specify who may put forward a nomination. Legislation has partially filled this void by granting a special committee the right to propose candidates for the vacancies assigned to the *Bundestag*. This committee, whose twelve-member composition reflects the *Bundestag*'s,[693] decides on a nomination by a two-thirds majority.[694] There exists no comparable law for the vacancies entrusted to the Federal Council.

What does exist is a system of political patronage, that is, a tradition of interparty agreements that allocate the Court's justiceships to different parties, thus allowing the latter to determine in advance whose name the

690 See U.S. Const. art II, § 2, cl 2, whereby the president 'shall nominate, and by and with the Advice and Consent of the Senate, shall appoint […] Judges of the Supreme Court'.

691 For other accounts of the German appointment process, see, e.g., Uwe Kischel, 'Party, pope, and politics? The election of German Constitutional Court justices in comparative perspective', 11 Int'l J Con L 962 (2013), and Anuscheh Farahat, 'The German Federal Constitutional Court', in Armin von Bogdandy, Peter M Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law*, vol 3 (OUP, Oxford, 2020) 279, 299–302.

692 Art 94 para 1 cl 2. In addition, sec 5 para 1 cl 2 of the Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*) specifies that the two chambers shall select half of the eight justices in each senate of the Court. Each justiceship is tied to a particular chamber, which means that the latter will vote on the successor of a justice it had previously confirmed. Christian Walter, 'Art. 94', in Günter Dürig and others (eds), *Grundgesetz: Kommentar* (loose-leaf, 95th delivery, CH Beck, Munich, 2021) para 16.

693 On its composition over the years, Nicole Schreier, *Demokratische Legitimation von Verfassungsrichtern: Eine rechtsvergleichende Analyse am Beispiel des Bundesverfassungsgerichts und des United States Supreme Court* (Nomos, Baden-Baden, 2016) 171–3.

694 Sec 6 paras 1, 2 and 5 of the Act on the Federal Constitutional Court.

Bundestag's selection committee will put forward (1).[695] The effect of these agreements has been to create a bench of party-affiliated justices (2). Their purpose, moreover, is to help implement the supermajority requirement for judicial appointments.[696] This requirement follows not from the Basic Law but from the Act on the Federal Constitutional Court. Thus, nominees for vacancies entrusted to the *Bundestag* must obtain a two-thirds majority in that chamber as well as a majority of the votes of all *Bundestag* members.[697] By the same token, vacancies entrusted to the Federal Council will only be filled if the nominee obtains two thirds of its votes.[698]

1. The Interparty Agreement

The concrete allocation of justiceships has varied over the years. In the beginning,[699] both the Social and the Christian Democrats claimed four seats in each senate, with three of the four justiceships earmarked for party members or affiliates and one seat reserved for a 'neutral' jurist. Eventually, the two parties began to offer one of their three 'party seats' to their smaller coalition partner, that is, the Liberals and the Green Party.[700] Once the latter became involved in most of the *Länder* governments, thereby changing the composition of the Federal Council in its favor, the existing arrangement became untenable, and the Green Party obtained the right to fill every fifth vacancy assigned to the Federal Council.[701]

The new arrangement proved short-lived, however, for the Christian Democrats appear to have resisted giving up one of 'their' seats once it was time to do so. Moreover, the Court let journalists know that it was

695 See, e.g., Christian Walter, 'Art. 94' (n 692) para 27, and Benedikt Grünewald, '§ 6 BVerfGG', in Christian Walter and Benedikt Grünewald (eds), *Beck'scher Online-Kommentar Bundesverfassungsgerichtsgesetz* (13th edn, CH Beck, Munich, 2022) para 7.

696 See, e.g., Johannes Masing, '§ 15: Das Bundesverfassungsgericht', in Matthias Herdegen and others (eds), *Handbuch des Verfassungsrechts: Darstellung in transnationaler Perspektive* (CH Beck, Munich, 2021) para 67.

697 Sec 6 para 1 cl 2 of the Act on the Federal Constitutional Court.

698 Sec 7 of the Act on the Federal Constitutional Court.

699 The parties first agreed on an inter-party allocation in 1975. Ernst-Wolfgang Böckenförde, 'Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation', 52 Neue Juristische Wochenschrift 9, 16 n 31 (1999).

700 See, e.g., Uwe Kischel, 'Party, pope, and politics?' (n 691) 965.

701 Christian Rath, 'Neue Abrede für BVerfG-Richterwahlen', *Legal Tribune Online*, 1 June 2018, available at https://perma.cc/7L2Z-2LWB.

concerned about its legitimacy, as the new agreement might have tilted the balance in the first Senate toward an even greater liberal majority.[702]

The newly amended, current arrangement apparently grants the Social and the Christian Democrats three seats each and allocates the two remaining seats in each senate to the Liberals and the Green Party, respectively. It does not matter to which parliamentary chamber the vacancy is assigned.[703] By contrast, the leftist *Die Linke* and the far-right *AfD* are not parties to the agreement.

The question of which parliamentary chamber holds the right to confirm the nominee is thus less relevant than the question to which party the unwritten convention assigns the vacant seat on the bench. But it is not immaterial. First, it determines which caucus within the relevant party may designate the nominee: If the duty to fill a vacancy falls to the Federal Council, the prime ministers of the *Länder*[704] that are governed by that party decide among themselves whom to nominate;[705] if the duty falls to the *Bundestag*, members of the relevant party's parliamentary group select a suitable candidate, taking into consideration the guidelines or suggestions of their party superiors.[706] Second, a smaller party has a greater chance of influencing the selection of candidates in the Federal Council, where it can force a *Land* government of which it is a part to abstain from participating in the confirmation vote, than in the *Bundestag*, where it is more easily outnumbered.[707]

This insight prompts a more general inquiry: whether the interparty agreement grants the other parties the right to reject a candidate before their nomination is put to a formal confirmation vote, or whether the parties must help confirm any candidate the designated party has nominated. There is no simple answer to this question. One source reports that under

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702 Helene Bubrowski and Reinhard Müller, 'Spielball der Politik?' (n 685) p 8.

703 Christian Rath, 'Neue Abrede für BVerfG-Richterwahlen' (n 703).

704 Or their ministers of justice. Andreas Voßkuhle, 'Art. 94', in Herrmann von Mangoldt and others (eds), *Grundgesetz: Kommentar* (7th edn, CH Beck, Munich, 2018) para 14.

705 See, e.g., Christian Rath, 'Eine öffentliche Wahl', *Legal Tribune Online*, 16 June 2020, available at https://perma.cc/KPC8-Q6T7.

706 See Uwe Kischel, 'Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter', in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol 3 (3rd edn, CH Beck, Munich, 2005) 1233, 1245–6, and Andreas Voßkuhle, 'Art. 94' (n 704) para 14.

707 See Christian Rath, 'Werden die Grünen ausgebremst?', *Legal Tribune Online*, 12 February 2018, available at https://perma.cc/3WUF-UHD7.

the initial agreement, the two (formerly) large parties required each other's consent for candidates for 'neutral' justiceships; by contrast, they were comparatively free to choose candidates for 'party' justiceships, provided the other side did not voice pressing concerns.[708] A different source suggests that every candidate required the consent of the other party.[709] It is also possible that the parties debate individual candidacies less than they used to.[710]

It remains to be seen how the parties choose to implement the new convention.[711] But regardless of how explicitly the other parties must consent to a candidate, we can assume that no party will venture a nomination which the other parties will consider beyond the pale.[712] The supermajority requirement gives each party to the agreement sufficient leverage because it renders credible the threat of abandoning the agreement—and dooming the candidacy in question—should the other parties not cooperate. Thus, there is no law that allows the governing coalition to appoint a new justice by a simple majority if the regular process fails to yield a consensus candidate.[713]

Disputes are resolved in small inter-party working groups,[714] which include high-ranking party members—lawyers by profession—from both the *Bundestag* and the Federal Council.[715] To win the opposite side's approval, the groups will often suggest package deals that seek agreement not only on

708 Ernst-Wolfgang Böckenförde, 'Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation' (n 699) 16 n 31. See also Stefan Korioth, 'Stellung und Einrichtung des Bundesverfassungsgerichts', in Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen* (12th edn, CH Beck, Munich, 2021) para 45.

709 Dieter Grimm, 'Politikdistanz als Voraussetzung von Politikkontrolle', 27 Zeitschrift für Europäische Grundrechte 1, 2 (2000).

710 Andreas Voßkuhle, 'Art. 94' (n 704) para 14.

711 When the Christian Democrats considered nominating Stephan Harbarth, they did ask the Greens for their consent. Helene Bubrowski, 'Grüne unterstützen Harbarths Wahl', *Frankfurter Allgemeine Zeitung*, 10 November 2018, available at https://perma.cc/8WMZ-MWU2. It is possible, however, that they did so because they hoped to promote Harbarth to the Court's presidency two years later.

712 See also Meinhard Schröder, 'Verfassungsrichterwahl im transparenten Konsens?', 30 Zeitschrift für Gesetzgebung 150, 154 (2015).

713 For the rules in case of delayed appointment, see sec 7a of the Act on the Federal Constitutional Court.

714 Generally on the power brokers within the parties, Uwe Kischel, 'Party, pope, and politics?' (n 691) 967.

715 See, e.g., Uwe Kischel, 'Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter' (n 706) 1245–6, and Friedrich K Fromme, 'Verfassungsrichterwahl', 53 Neue Juristische Wochenschrift 2977, 2978 (2000).

a currently vacant justiceship but on vacancies that will arise in the not too distant future; at times, the deals will encompass other high government offices, such as the presidency of the Federal Court of Audit, the office of the Attorney General, or even the Federal Presidency.[716]

Given the recent upheaval of the party-political landscape in many Continental European democracies,[717] the current convention may prove as impermanent as its immediate predecessor. Unless it is repealed, however, the supermajority requirement for confirming constitutional justices will continue to make some form of pre-nomination arrangement inevitable. Of course, such repeal is possible: If they wish, the parties in government can abrogate the supermajority requirement by a simple majority,[718] the same way the Senate majority has eliminated the filibuster for US Supreme Court nominees.[719]

2. Party-Political Affiliations

Unsurprisingly, the current regime has turned party affiliation into one of the most significant selection criteria for Constitutional Court justices.[720] That is not to say that all justices are card-carrying members of a political

716 For examples and caustic critique, see Rüdiger Zuck, 'Politische Sekundärtugenden: Über die Kunst, Pakete zu schnüren', 47 Neue Juristische Wochenschrift 497 (1994).

717 On the crisis of constitutional adjudication in Poland, Piotr Tuleja, 'The Polish Constitutional Tribunal', in *The Max Planck Handbooks in European Public Law*, vol 3 (n 691) 619, 658–72.

718 Provided the Constitutional Court does not declare this amendment unconstitutional. See Andreas Voßkuhle, 'Art. 94' (n 704) para 9 (suggesting that it may be unconstitutional to eliminate the supermajority requirement).

719 On the filibuster's effect on judicial appointments, John O McGinnis and Michael B Rappaport, 'In Praise of Supreme Court Filibusters', 33 Harv JL & Pub Pol'y 39, 40–4 (2010). On its demise, Byron Tau and Siobhan Hughes, 'Senate Eliminates Filibuster for Supreme Court Nominees', *The Wall Street Journal*, 6 April 2017, available at https://perma.cc/DEC8-AANV.

720 See, e.g., Gerd Roellecke, 'Zum Problem einer Reform der Verfassungsgerichtsbarkeit', 56 JuristenZeitung 114, 115 (2001). Merit is also important, however. See Uwe Kischel, 'Party, pope, and politics?' (n 691) 971. So is, to a lesser extent, regional diversity: In 2020, the Social Democrats insisted that a vacant seat be filled with a former East German for the first time. See Anne Hähnig, Martin Machowecz and Heinrich Wefing, 'Eine Richterin als der ultimative Kompromiss', *Die Zeit*, 1 July 2020, available at https://perma.cc/4Q7H-7LCU.

party,[721] let alone that the parties seek to staff the Court with high-ranking politicians. In fact, loyal troopers who have repeatedly bloodied their nose in partisan conflicts may be perceived as too one-sided.[722] One might hypothesize instead that the parties have no qualms putting active politicians on the Court but that they tend to eschew well-known—and therefore possibly controversial—figures.[723] Whether they do so to avoid sullying the Court, to facilitate the confirmation of their candidate, or both, is hard to tell.

Be that as it may, in most cases party membership primarily acts as evidence of sufficient ideological proximity to the party nominating the candidate.[724] If the vacant seat is 'neutral', the party will seek to ascertain this proximity through other means.[725] In other words, the German nomination process does not stigmatize ideology or party affiliation *per se*. Instead, it encourages an equilibrium between divergent judicial philosophies.[726]

721 From 1975 to 2000, for instance, a near third of all justices were not members of a political party. Uwe Wagschal, 'Der Parteienstaat der Bundesrepublik Deutschland. Parteipolische Zusammensetzung seiner Schlüsselinstitutionen', 32 Zeitschrift für Parlamentsfragen 861, 881 (2001).

722 When the Social Democrats suggested appointing their deputy chairwoman, Hertha Däubler-Gmelin, to the Court, the Christian Democrats rejected Däubler-Gmelin for being a 'pronounced party politician'. *Id*., 880–1. In 2018, the justice Michael Eichberger criticized the parties for giving the public the impression that appointing new justices is simply a matter of haggling over political positions. Wolfgang Janisch, 'Institution in Gefahr', *Süddeutsche Zeitung*, 12 October 2018, available at https://perma.cc/N479-RXHS.

723 When he was appointed to the Court, the President-elect, Stephan Harbarth, was a member of the Christian Democrats' national board as well as the deputy chairman of their parliamentary group. See Heinrich Wefing, 'Etwas zu politisch?', *Die Zeit*, 14 November 2018, available at https://perma.cc/EY5X-YZH3. But he was not particularly well-known to outsiders: When Heribert Prantl, a journalist at the *Süddeutsche Zeitung*, suggested in February of 2020 that Harbarth become the Christian Democrats' chairman, he conceded that 'hardly anybody knows his name'. Heribert Prantl, 'Der lachende Vierte', *Süddeutsche Zeitung*, 12 February 2020, available at https://perma.cc/7GW8-RW58.

724 Uwe Kischel, 'Party, pope, and politics?' (n 691) 971.

725 Uwe Kischel, 'Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter' (n 706) 1244.

726 See, e.g., Uwe Kischel, 'Party, pope, and politics?' (n 691) 971–2, and Klaus Rennert, 'Legitimation und Legitimität des Richters', 70 JuristenZeitung 529, 537 (2015). On European constitutional courts in general, John Ferejohn, 'Judicializing Politics, Politicizing Law', 65 Law & Contemp Probs 41, 65 (2002).

B. The Confirmation Process

The confirmation process is similarly opaque, for three reasons: the committee that officially proposes the nominees for vacancies entrusted to the *Bundestag* does not conduct public hearings (1); there is no floor debate on the nominee prior to the confirmation vote; and the vote in the *Bundestag* is secret, not public (2).

1. To Hear or Not to Hear

In decades past, the committee that formally submits nominations for vacancies entrusted to the *Bundestag* did not conduct hearings of its own. It merely voted on the nomination of the candidate upon whom the political parties had previously settled. This may have changed in 2010, but there is no way to know for sure; if there is a hearing of sorts, it is not public.[727] Be that as it may, candidates generally present themselves to the parties' parliamentary groups (in cases in which the *Bundestag* fills the vacancy).[728] As these sessions are conducted in private, we do not know which questions the parliamentarians ask. Accordingly, it is hard to state with any confidence whether the visits represent courtesy calls, a functional equivalent to rigorous committee hearings, or something in between, such as an informational session for the parliamentarians.

The third option may come closest to the truth. On the one hand, the contenders will only pay their visit once the relevant political parties have agreed on their candidacy; because this virtually guarantees their confirmation, non-deferential, probing questions during the visit seem both pointless and improbable. On the other hand, the informality of the unwritten convention theoretically means that the party which did not select the candidate may withdraw its consent. Consequently, an extended visit to the parliamentary group of that party can serve to quell a parliamentarian's

727 See, e.g., Uwe Kischel, 'Party, pope, and politics?' (n 691) 968.

728 See Reinhard Müller, 'Es allen recht machen', *Frankfurter Allgemeine Zeitung*, 3 November 2010, available at https://perma.cc/8VT8-N4EQ; Katja Gelinsky, 'Wise Old Men and Wise Old Women. Vom Rätselraten über den Einfluss der Frauen am Bundesverfassungsgericht und am Supreme Court', in Michael Stolleis (ed), *Herzkammern der Republik: Die Deutschen und das Bundesverfassungsgericht* (CH Beck, Munich, 2011) 82, 93; and Dieter Wiefelspütz, 'Die Bundesverfassungsrichter werden vom Deutschen Bundestag direkt gewählt!', 65 Die Öffentliche Verwaltung 961, 962 (2012).

lingering doubts about whether the candidate suits the job—doubts that could, if uncontested, prompt the party to 'veto' the candidate after all.[729]

The opaqueness of this process is not coincidental, but very much characteristic of the entire post-selection phase. Thus, the law commits the members of the *Bundestag*'s selection committee to 'confidentiality concerning the personal circumstances of the candidates which become known to them in the course of their work in the committee, the selection committee's discussions on this issue, and the casting of votes'.[730] As a result, any hearings that were to take place after all would have to be conducted in private.[731]

Some scholars have criticized this regime. For Ulrich K Preuß, for example, a parliamentary confirmation vote can only legitimate the Court if it can claim to represent the will of the people. For that to occur, the deliberative process prior to the vote must be public.[732] Yet the process also has its defenders. For instance, Uwe Kischel argues that public hearings will necessarily politicize the court. To him, the Bork hearings in the US stand for public humiliation, not frank constitutional debate.[733] Where Americans often consider the intense scrutiny of public figures paramount,[734] Germans will frequently be more solicitous of the candidates' privacy.[735]

729 See Katja Gelinsky, 'Wise Old Men and Wise Old Women' (n 728) 93 (suggesting that Green-Party candidate Susanne Baer, by introducing herself to the Christian Democratic parliamentary group, managed to convince it that she had what it takes to join the bench).

730 Sec 6 para 4 of the Act on the Federal Constitutional Court.

731 While there is no comparable provision for the Federal Council, there is no indication that the Council wishes to conduct hearings in the foreseeable future. Andreas Haratsch, '§ 7 BVerfGG', in Bruno Schmidt-Bleibtreu and others (eds), *Bundesverfassungsgerichtsgesetz: Kommentar* (loose-leaf, 61st delivery, CH Beck, Munich, 2021) para 8.

732 Ulrich K Preuß, 'Die Wahl der Bundesverfassungsrichter als verfassungsrechtliches und -politisches Problem', 21 Zeitschrift für Rechtspolitik 389, 393–4 (1988). See also Rolf Lamprecht, '"Bis zur Verachtung"', 48 Neue Juristische Wochenschrift 2531, 2532–3 (1995), and Jerzy Montag, 'Transparenz und Legitimität: Notwendige Reform der Wahl der Richterinnen und Richter zum Bundesverfassungsgericht', 44 Recht und Politik 139, 141 (2008).

733 Uwe Kischel, 'Party, pope, and politics?' (n 691) 973–4, and 'Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter' (n 706) 1254–5.

734 See, e.g., *Hustler* v. *Falwell*, 485 U.S. 46 (1988).

735 See, e.g., Andreas Haratsch's discussion of potential hearings before the Federal Council. '§ 7 BVerfGG' (n 731) para 9.

2. A Silent Parliament

The fear of judicial politicization (and concern for the nominees' privacy rights) likewise explains why neither the *Bundestag*[736] nor the Federal Council[737] holds a debate on whether to confirm the nominee.[738] Thus, parliamentarians are not supposed to confirm a nominee simply because they like them.[739] Furthermore, scholars worry that the justices' authority might suffer if the parliamentarians publicly dissect a nominee's previous record.[740] The Constitutional Court itself agreed with this rationale in 2012, finding the *Bundestag* committee's duty of confidentiality to be constitutional. It wrote that people perceive the Court as more independent if they hold it in high esteem and that this will safeguard the effectiveness of constitutional adjudication.[741]

Finally, the confirmation vote in the *Bundestag* is secret.[742] Scholars have made out two reasons for this rule. Firstly, the secret ballot is meant to protect the legislators from having to explain their vote to the public. Secondly, the justices will not be able to advocate a constitutional position just because their supporters in the *Bundestag* do so if they do not know who voted to confirm them.[743]

II. The Concept of Politicization by Judicial Appointment

To date, there have been few attempts to describe in detail the causes, meaning, and effect of politicization by judicial appointment. In fact, scholars frequently fail to explain what they mean by judicial politicization in

736 Sec 6 para 1 cl 1 of the Act on the Federal Constitutional Court.
737 Andreas Haratsch, '§ 7 BVerfGG' (n 731) para 8.
738 See Parliamentary Document (*Bundestags-Drucksache*) 18/2737, 7 October 2014, p 4, available at https://perma.cc/MSF8-DSPB.
739 Benedikt Grünewald, '§ 6 BVerfGG' (n 695) para 6. See also Nicole Schreier, *Demokratische Legitimation von Verfassungsrichtern* (n 693) 197.
740 Andreas Haratsch, '§ 6 BVerfGG', in Bruno Schmidt-Bleibtreu and others (eds), *Bundesverfassungsgerichtsgesetz: Kommentar* (n 731) para 35, and '7 BVerfGG' (n 731) paras 8–9.
741 BVerfGE 131, 230 – *Selection of Constitutional Justices* (2012).
742 Sec 6 para 1 cl 1 of the Act on the Federal Constitutional Court.
743 Andreas Haratsch, '§ 6 BVerfGG' (n 740) para 36.

the first place.[744] To remedy this problem, I begin with a brief look at the concept of (judicial) politicization generally (A) before elaborating on politicization by judicial appointment more specifically (B).

A. The Concept of (Judicial) Politicization

The concept of politicization can mean many different things. It makes sense, therefore, to draw a series of distinctions. The first asks whether politicization takes place within one entity or between two or more entities (I). The second—which only applies to politicization that occurs between two or more entities—asks where the effects of politicization occur: within the politicizing entity or within the entity targeted by politicization (II).

1. Politicization Within One Entity vs. Between Entities

Applied to judicial politicization (or, more specifically, the politicization of constitutional adjudication), the first distinction means that a constitutional court can both politicize itself and be politicized by a different entity. Of course, the two variants are frequently interwoven: An entity can continue down a path of politicization another institution charted for it; a constitutional court can further politicize itself after being politicized by someone else. Thus, we will see below that politicization is not an isolated

744 See, e.g., Carl Schmitt, 'Der Hüter der Verfassung', 55 Archiv des öffentlichen Rechts 161, 173 (1929); HLA Hart, 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream', 11 Ga L Rev 969, 972 (1977); José María Maravall, 'The Rule of Law as a Political Weapon', in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (CUP, Cambridge, 2003) 261; Jonathan Remy Nash, 'Prejudging Judges', 106 Colum L Rev 2168, 2173 (2006); Björn Dressel, 'Judicialization of politics or politicization of the judiciary? Considerations from recent events in Thailand', 23 Pac Rev 671 (2010); Eric Hamilton, 'Politicizing the Supreme Court', 65 Stan L Rev Online 35 (2012); Moohyung Chong, Jason D Todd and Georg Vanberg, 'Politics, Polarization, and the U.S. Supreme Court', in Anna-Bettina Kaiser, Niels Petersen and Johannes Saurer (eds), *The U.S. Supreme Court and Contemporary Constitutional Law: The Obama Era and Its Legacy* (Nomos, Baden-Baden, 2018) 41, 42; Mary L Volcansek, 'Judicialization of Politics or Politicization of the Courts in New Democracies?', in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (CUP, Cambridge, 2019) 66; and Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court', 129 Yale LJ 148, 152 (2019).

incident but embedded in larger, more general processes.[745] Nevertheless, we commonly try to keep different instances of politicization apart, the better to analyze the precise impact on the institution in question.[746]

For instance, we say that a constitutional court politicizes itself when its internal decision-making process begins to involve tactics that are more commonly associated with the 'political' branches (that is, the legislature or the executive)[747]. Consider what the New York Times' Supreme Court reporter Adam Liptak wrote after a draft opinion overturning *Roe v. Wade* was leaked to the press, possibly to pressure the justices in the presumptive majority not to withdraw their vote.[748] 'Now, as the court appears to be on the cusp of eliminating the constitutional right to abortion, it looks sparsely different from the other branches: Rival factions leak and spin sensitive information in the hope of gaining political advantage […].'[749] Furthermore, we may say that a court politicizes itself when it starts taking its decisions' political ramifications into account.[750]

Here, we can largely neglect these kinds of internal politicization, however. Politicization *by judicial appointment* refers to politicization that occurs between two distinct entities, for it falls to the other branches of government, not the court, to appoint new members to the Supreme Court or the German Federal Constitutional Court.[751] The question, then, is who is being politicized when judicial appointments politicize constitutional adjudication.

745 See notes 774–776 and accompanying text.

746 See notes 753, 757–759, and 761 (each focusing on isolated, specific instances of politicization).

747 On the legislature and the executive as the 'political branches', Jesse H Choper, 'The Supreme Court and the Political Branches: Democratic Theory and Practice', 122 U Pa L Rev 810, 815 (1974).

748 See Michael D Shear and Zolan Kanno-Youngs, 'As Leak Theories Circulate, Supreme Court Marshal Takes Up Investigation', *The New York Times*, 4 May 2022, available at https://perma.cc/6EDP-4ZUJ.

749 Adam Liptak, 'A Leaky Supreme Court Starts to Resemble the Other Branches', *The New York Times*, 11 May 2022, available at https://perma.cc/D39H-5C5S.

750 Cf Christoph Möllers, 'Why There Is No Governing with Judges', 30 September 2014, p 30, available at https://ssrn.com/abstract=2503729 (criticizing the German Federal Constitutional Court for arguing in a too self-referential fashion and heeding the political context too little).

751 See n 690 and Art 94 para 1 cl 2 of the Basic Law.

2. The Two Angles to Politicization Between Two or More Entities

As mentioned above, the concept of politicization between two or more distinct entities has two possible angles—a subjective and an objective one. The subjective angle adopts the perspective of the entity that is said to politicize a different entity. By contrast, the objective angle describes a change in the entity targeted by politicization.

The subjective angle describes politicization as a catalyst of political action—such as public attention, discussion, or decision—in the politicizing entity.[752] It is most prevalent in political science.[753] However, the precise definition of politicization varies. Scholars who distinguish between innate and converted political subject matters define politicization as 'the demand for, or the act of, transporting an issue or an institution into the sphere of politics'.[754] By contrast, scholars who argue that the political always presupposes prior politicization describe the latter as 'naming something as political', as creating politics in the first place.[755]

According to the objective angle, the entity targeted by politicization comes to be or appears to be political. The attribute 'political' can mean different things in this case. Thus, we may wish to say that the object of politicization has become conscious of and knowledgeable about the political system.[756] But we may also want to say that it has started considering or

752 See, e.g., Colin Hay, *Why We Hate Politics* (Polity Press, Cambridge, 2007) 81, and Michael Zürn, Martin Binder and Matthias Ecker-Ehrhardt, 'International authority and its politicization', 4 Int'l Theory 69, 73–4 (2012).

753 See, e.g., Carol H Weiss, 'The Politicization of Evaluation Research', 26 J Soc Issues 57 (1970), and Liesbet Hooghe and Gary Marks, 'Politicization', in Erik Jones, Anand Menon and Stephen Weatherill, *The Oxford Handbook of the European Union* (OUP, Oxford, 2012) 840.

754 Michael Zürn, 'Politicization compared: at national, European, and global levels', 26 J Eur Pub Pol'y 977, 977–8 (2019).

755 See Kari Palonen, 'Four Times of Politics: Policy, Polity, Politicking, and Politicization', 28 Alternatives 171, 181–2 (2003), and Claudia Wiesner, 'Rethinking politicisation as a multi-stage and multilevel concept', 18 Contemp Pol Theory 255, 256–7 (2019).

756 See, e.g., David Easton, 'An Approach to the Analysis of Political Systems', 9 World Pol 383, 397–400 (1957).

pursuing the interests of public welfare.[757] Finally, we may wish to state that the politicized entity has become hostage to a particular partisan agenda.[758]

As a result, a statement such as that 'children are (being) politicized' can mean two things. According to the subjective angle, it means that the decision whether to have children is more political today than it used to be.[759] In other words, it suggests that public debate has extended to an area we previously considered private;[760] *we* have directed our political attention to it. Pursuant to the objective angle, by contrast, the statement declares that the children *themselves* have become political.[761]

It follows that the concept of judicial politicization can likewise mean two things: firstly, that the public has started to debate constitutional adjudication in political terms; secondly, that the constitutional court has become or appears political. Pursuant to the subjective angle, politicization *by judicial appointment* would then signify that judicial appointments direct the public's attention to constitutional courts. According to the objective angle, it would mean that judicial appointments make the court (appear) political.

The first option (i.e., that judicial appointments direct the public's attention to constitutional courts) is not implausible.[762] In fact, there is a specific branch of legal scholarship that explores public discussions about, and

757 See, e.g., David Solomons, 'The Politicization of Accounting', 146 J Accountancy 65 (1978).

758 See, e.g., Susan Wright, 'The Politicization of "Culture"', 14 Anthropology Today 7, 8 (1998), and Toby Bolsen and James N Druckman, 'Counteracting the Politicization of Science', 65 J Commun 745, 746–7 (2016).

759 For an example of a political discussion on the merits of having children, see Jennifer Ludden, 'Should We Be Having Kids in The Age of Climate Change?', *npr.org*, 18 August 2016, available at https://perma.cc/D9D8-Y7N2.

760 Generally on the public/private dichotomy, Nancy Fraser, 'Politics, culture, and the public sphere: toward a postmodern conception', in Linda Nicholson and Steven Seidman, *Social Postmodernism: Beyond Identity Politics* (CUP, Cambridge, 1995) 287. Generally on politicization and the notion of spheres, Colin Hay, *Why We Hate Politics* (n 752) 78–80.

761 See, e.g., Diana Owen and Jack Dennis, 'Gender Differences in the Politicization of American Children', 8 Women & Pol 23 (1988).

762 For such use of the concept, see David A Strauss and Cass R Sunstein, 'The Senate, the Constitution, and the Confirmation Process', 101 Yale LJ 1491, 1513 n 102 (1992); Diarmuid F O'Scannlain, 'Today's Senate Confirmation Battles and the Role of the Federal Judiciary', 27 Harv JL & Pub Pol'y 169, 175 (2003); and Andreas Voßkuhle, 'Art. 94' (n 704) para 15.

criticism of, courts.[763] Generally, however, that is not what we mean when we speak of judicial politicization. What we commonly imply is that the court itself—not our attitude toward it—has changed.[764] In other words, we wish to say that the selection system makes the constitutional court (appear) political.

B. Transforming Constitutional Adjudication into 'Politics by Other Means'

The next question is what it means for constitutional adjudication to be or appear 'political' as a result of politicization by judicial appointment (1). Furthermore, we should specify in what way the confirmation process causes this kind of politicization (2) and what effects the latter has on constitutional adjudication (3).

1. What It Means for Constitutional Adjudication to Be or Appear Political

Put simply, constitutional adjudication is political as a result of politicization by judicial appointment when the constitutional court turns into a partisan institution.[765] This occurs when the court's members espouse constitutional positions that mirror the preferences of the political party to which we can attribute the nomination.[766] Scholars have used different

763 On the different forms of political criticism, Ximena Soley and Silvia Steininger, 'Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights', 14 Int'l J Law in Context 237 (2018).

764 See above, notes 683–685, and Michael Hein and Stefan Ewert, 'Die Politisierung der Verfassungsgerichtsbarkeit' (n 687) 103–4.

765 See Lee Epstein and Eric Posner, 'If the Supreme Court Is Nakedly Political, Can It Be Just?', *The New York Times*, 9 July 2018, available at https://perma.cc/4K2Z-5YG4, and Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court' (n 744) 153.

766 See John Ferejohn, 'Judicializing Politics, Politicizing Law' (n 726) 63–5; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP, Cambridge, 2003) 122; Stephen M Griffin, 'The Age of *Marbury*: Judicial Review in a Democracy of Rights', in Mark Tushnet (ed), *Arguing* Marbury v. Madison (Stanford University Press, Stanford, 2005) 104, 126–7; David L Weiden, 'Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia', 62 Pol Res Q 335, 336 (2011); Michael Hein and Stefan Ewert, 'How Do Types of Procedure Affect the Degree of Politicization of European Constitutional Courts? A Comparative Study of Germany, Bulgaria, and Portugal', 9 Eur J Legal Stud 62, 64 (2016); Moohyung Chong, Jason D Todd and Georg

descriptions for this transformation. They say that the court represents yet 'another forum in which political battles over individual rights are played out',[767] that it 'replicates the political majority/minority relationships',[768] that its jurisprudence constitutes 'politics by other means',[769] or that the justices become the appointers' 'agents'.[770] To be sure, the justices will not see themselves as their appointers' pawns. But their rulings will seem politically—not legally—motivated because a model of ideological voting will be able to predict them accurately.[771]

Politicians frequently resort to politicization because of a phenomenon within politics called judicialization:[772] The more judicial review cabins the exercise of political power, the more they will desire to shape judicial outcomes in their favor, thereby restricting political power in ways that suit them most.[773] But the roots of politicization go far beyond that, as John Ferejohn has pointed out with regard to the Supreme Court. Turning

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Vanberg, 'Politics, Polarization, and the U.S. Supreme Court' (n 744) 42, 46; and Christoph Hönnige, *Verfassungsgericht, Regierung und Opposition: Die vergleichende Analyse eines Spannungsdreiecks* (Verlag für Sozialwissenschaften, Wiesbaden, 2007) 52, 108. I write 'attribute' because neither in the United States nor in Germany do political parties have the formal constitutional power to nominate a judicial candidate.

767 Stephen M Griffin, 'The Age of *Marbury*: Judicial Review in a Democracy of Rights' (n 766) 104, 126.

768 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, 146.

769 John Ferejohn, 'Judicializing Politics, Politicizing Law' (n 726) 63–4.

770 See Viet D Dinh, 'Threats to Judicial Independence, Real and Imagined', 95 Geo LJ 929, 937 (2007).

771 John Ferejohn, 'Judicializing Politics, Politicizing Law' (n 726) 65–6. See also David L Weiden, 'Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia' (n 766) 336, and Michael Hein and Stefan Ewert, 'How Do Types of Procedure Affect the Degree of Politicization of European Constitutional Courts?' (n 766) 64. For an example of such a model, see, e.g., Jeffrey A Segal and Harold A Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (CUP, Cambridge, 2002) 110.

772 Generally on judicialization, John Ferejohn and Pasquale Pasquino, 'Rule of Democracy and Rule of Law', in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (n 744) 242, 247–50.

773 See, e.g., John Ferejohn, 'Judicializing Politics, Politicizing Law' (n 726) 63–4; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, Oxford, 2000) 195; and Ran Hirschl, 'The Judicialization of Politics', in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (OUP, Oxford, 2008) 119, 120.

constitutional adjudication into politics by other means requires jurists whose convictions approximate party-political demands closely enough, and politicians cannot conjure such nominees out of thin air. Accordingly, the parallelism between party-political and constitutional positions begins to develop much earlier.

Ferejohn argues that American lawyers learn from the get-go how to translate ideological positions into law. Thus, 'every interest is entitled to competent legal representation and articulation' in a liberal society.[774] This process is amplified by interest groups, which 'recruit and nurture articulate advocates for [their] views, and [place] them in positions of legal power', especially in the United States.[775] Over time, party politics has come to overlap with these ideological positions.[776] In consequence, there now exists a reservoir of politicized jurists that politicians can tap into at will.

2. How the Confirmation Process Helps Politicize Constitutional Adjudication

There are two ways in which the confirmation process is said to contribute to politicization by judicial appointment. Firstly, the parliamentarians help politicize the constitutional court when they vote to confirm a partisan nominee.[777] The confirmation process in the US Senate facilitates this kind of politicization because it allows a bare majority of senators to confirm ideologically proximate nominees.[778] Secondly, some scholars argue that the senators politicize constitutional adjudication when they elicit declarations

774 John Ferejohn, 'Judicializing Politics, Politicizing Law' (n 726) 64.

775 *Ibid.* See also Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court' (n 744) 169–70 (describing 'the rise of polarized schools of legal interpretation, polarized elite communities of lawyers, and a polarized political culture') and Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 768) 147 (highlighting that the parallelism between political and constitutional positions is more pronounced in the United States than elsewhere, making judicial politicization harder to ascertain in other countries).

776 On the American party system's gradual alignment with ideological coalitions, see, e.g., Hans Noel, *Political Ideologies and Political Parties in America* (CUP, New York, 2013) 133–6.

777 John Ferejohn, 'Judicializing Politics, Politicizing Law' (n 726) 64–5.

778 *Id.*, 65. See also Andreas Haratsch, '§ 6 BVerfGG' (n 740) para 37 (pointing out that a supermajority requirement for confirming judicial nominees helps prevent a partisan divide among the justices).

of ideological intent from the nominees and the latter feel bound to their promises once they join the bench.[779]

3. The Effects of Politicization on Constitutional Adjudication

Scholars see two potential downsides to politicization by judicial appointment. The first is that a politicized constitutional court is less likely to deliberate civil-liberties cases with the kind of coherence that, according to many constitutional theorists, makes it more effective than the legislature at protecting our fundamental rights.[780] 'A continual war of bitter 5 to 4 decisions [makes] it implausible that the Court can perform a special function in educating the citizenry or assuming a vanguard role to promote a national dialogue on rights.'[781]

The second disadvantage is that politicization may make people *perceive* the court as politicized.[782] We commonly believe that such perceptions make the court less authoritative.[783] For instance, Vicki Jackson suggests that perceived politicization may impair people's trust[784] in the judiciary and that this makes it more difficult for a court to hand down unpopular,

779 See Diarmuid F O'Scannlain, 'Today's Senate Confirmation Battles and the Role of the Federal Judiciary' (n 762) 174, Jonathan Remy Ash, 'Prejudging Judges' (n 744) 2173, and Viet Dinh, 'Threats to Judicial Independence, Real and Imagined' (n 770) 937.

780 Stephen M Griffin, 'The Age of *Marbury*: Judicial Review in a Democracy of Rights' (n 766) 126–7. For a discussion of the claim that judicial review of legislation is normatively legitimate because constitutional courts are better than legislators at protecting our fundamental rights, see Chapter 3, subsection II.D.1.

781 *Id*., 127.

782 See Lee Epstein and Eric Posner, 'If the Supreme Court Is Nakedly Political, Can It Be Just?' (n 765), and Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court' (n 744) 155.

783 I use the term 'authoritative' as a synonym for 'likely to be obeyed'. For this use, see, e.g., Richard H Fallon, Jr, 'Legitimacy and the Constitution', 118 Harv L Rev 1787, 1828 (2005).

784 I take 'public trust' to mean diffuse, and not specific, support in this context. On diffuse support, David Easton, 'A Re-Assessment of the Concept of Political Support', 5 Br J Pol Sci 435, 444–57 (1975), and James L Gibson, 'The Legitimacy of the United States Supreme Court in a Polarized Polity', 4 J Empirical Legal Stud 507, 510–3 (2007). On the concept of trust, James L Gibson, 'A Note of Caution About the Meaning of "The Supreme Court Can Usually Be Trusted ..."', 21 Law & Cts: Newsletter of the Law & Courts Section of the American Political Science Association 10 (2011).

countermajoritarian decisions.[785] Some scholars fear that people's trust in the law, and thus the rule of law itself, will be the next to go.[786]

III. Observations on the Concept of Politicization by Judicial Appointment

Some parts of the concept of politicization by judicial appointment remain fuzzy. Others, moreover, appear underinclusive. Thus, we should specify whether only partisan confirmation votes politicize constitutional adjudication or whether unanimous ones can do so, too (A); what the purpose of the confirmation process is (B); and whether only individual parties can politicize the constitutional court or whether a group of them can do so as well (C). Lastly, we should ascertain whether empirical research bears out the assumption that perceived politicization makes a constitutional court less authoritative (D).

A. Partisan vs. Unanimous Confirmation Votes

As we saw above, parliamentarians are said to politicize constitutional adjudication whenever they confirm a partisan nominee. But it is unclear whether this includes unanimous confirmation votes that are (possibly) based primarily on the nominee's professional qualifications.

This question is far from impertinent. In 1986, for example, the Senate confirmed Antonin Scalia, a Republican appointee, by a vote of 98 to 0. Seven years later, it confirmed Ruth Bader Ginsburg, a Democratic

785 See Vicki C Jackson, 'Packages of Judicial Independence: The Selection and Tenure of Article III Judges', 95 Geo L J 965, 979 (2007). German constitutional justices have voiced comparable concerns. See Helene Bubrowski and Reinhard Müller, 'Spielball der Politik?' (n 685). See also Steven G Calabresi and James Lindgren, 'Term Limits for the Supreme Court: Life Tenure Reconsidered', 29 Harv JL & Pub Pol'y 769, 813–4 (2006) (arguing that 'rancorous confirmation battles lower the prestige of the Court' and that the 'increased politicization of the confirmation process' has lessened 'the ability of the Supreme Court itself to function effectively), and James L Gibson and Michael J Nelson, 'Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?', 59 Am J Pol Sci 162, 163 (2015) (fearing for the Supreme Court's independence once it starts losing its sociological legitimacy).

786 Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court' (n 744) 167–8.

appointee, by a vote of 96 to 3. But in the time period from 1995 to 2004,[787] 70 percent of the votes Scalia cast to overturn a federal law tended in a conservative direction, and more than 80 percent of Bader Ginsburg's votes tended in a liberal direction.[788] In theory, then, the Senate politicized constitutional adjudication when it confirmed Scalia and Bader Ginsburg. For three reasons, however, it makes more sense to link only contentious, partisan confirmation processes to politicization by judicial appointment and to attribute other instances of politicization solely to the nominating institution (such as the US president).

Firstly, scholars describe politicization as something proactive, as a deliberate move to gain control of the constitutional court.[789] In my opinion, a nearly unanimous vote does not fit this mold: Different parties will hardly believe that the same candidate will reliably vote in favor of their policy preferences.

Of course, it is possible that partisanship lurks behind unanimous confirmation votes, too. Perhaps the opposition-party legislators allow the nominating institution to politicize constitutional adjudication because they know that they, too, will eventually get to pick a candidate of their own. In this case, one might argue that the parliamentarians politicize constitutional adjudication whenever they fail to insist on a candidate who will likely not contribute to a partisan divide on the court. But that may be too demanding a test. Thus, it is difficult to predict how a justice will evolve on the bench. For instance, Stephen Breyer was considered a 'moderate' or 'centrist' when Bill Clinton nominated him in 1994,[790] but more than 78 percent of Breyer's votes to invalidate a federal law tended in a liberal direc-

787 This time period corresponds to the time in which there were no personnel changes on the Rehnquist Supreme Court.

788 Lori A Ringhand, 'Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court', 24 Const Comment 43, 55 (2007).

789 Cf John Ferejohn, 'Judicializing Politics, Politicizing Law' (n 726) 65 (stating that 'political actors will try to shape and influence [court decisions] for their own political reasons'), Tom Ginsburg, *Judicial Review in New Democracies* (n 766) (describing how having multiple political bodies appoint constitutional justices can prevent politicization by guaranteeing 'mutually assured politicization' if one body seeks to make a political appointment), and David L Weiden, 'Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia' (n 766) 336 (linking high degrees of politicization to selection systems that prioritize partisan considerations over a candidate's qualifications and merit).

790 See Paul Richter, 'Clinton Picks Moderate Judge Breyer for Supreme Court Spot', *Los Angeles Times*, 14 May 1994, available at https://perma.cc/S68E-N546.

tion.[791] Moreover, the classes from which judicial nominees are commonly drawn—the upper-middle and upper classes[792]—tend to be less moderate than others: 'Affluent, educated Americans are disproportionately represented among both strong liberals and strong conservatives, while less affluent and educated citizens are more inclined to be political moderates'.[793]

Secondly, scholars link perceived politicization, which is crucial to the concept of politicization by judicial appointment because we suspect it of making a court less authoritative,[794] to contentious confirmations, not unanimous votes. Thus, Vicki Jackson has argued that closely fought, partisan confirmation votes may lead the public to believe there is no meaningful difference between politics and the law,[795] presumably because they imply that the nominee won the vote solely because their ideology matched the Senate majority's party-political preferences.[796]

This fear of contentious confirmations has been shared by political observers. When President Reagan nominated Antonin Scalia to the Supreme Court, the New York Times noted that Reagan's choice represented the 'capstone' of his administration's efforts to 'reverse the course of the Federal judiciary',[797] but it did not suggest that these efforts constituted some form of illicit political interference. By contrast, the stormy confirmation hearings for Robert Bork one year later prompted the same correspondent to note that the Democrats were 'waging the most openly ideological campaign in the recent history of Supreme Court nominations', and that Bork supporters feared the hearings could 'undermine the court's majesty as a bastion of principle'.[798]

791 Lori A Ringhand, 'Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court' (n 788) 55.

792 E.g., Michael J Klarman, 'What's So Great about Constitutionalism?', 93 Nw U L Rev 145, 189 (1998).

793 Mark A Graber, 'The Coming Constitutional Yo-Yo: Elite Opinion, Polarization, and the Direction of Judicial Decision Making', 56 Howard LJ 661, 695 (2013).

794 See notes 782–786.

795 See Vicki C Jackson, 'Packages of Judicial Independence' (n 785) 979, 1000.

796 See William P Marshall, 'Constitutional Law as Political Spoils', 26 Cardozo L Rev 525, 537 (2005).

797 Stuart Taylor, Jr, 'Scalia's Views, Stylishly Expressed, Line Up with Reagan's', *The New York Times*, 19 June 1986, available at https://perma.cc/KT9K-JS75.

798 Stuart Taylor, Jr, 'Politics in the Bork Battle; Opinion Polls and Campaign-Style Pressure May Change Supreme Court Confirmations', *The New York Times*, 28 September 1987, available at https://perma.cc/EPU6-59E5.

Lastly, treating all confirmation votes as equal makes it more difficult to characterize a remarkable development in Supreme Court confirmations: the change from frequently unanimous to consistently partisan votes. In 1986, the Senate confirmed Antonin Scalia by a vote of 98 to 0 even though there was little doubt that President Reagan was trying to make the Court more conservative.[799] Thirty years later, the Republican Senate majority refused to schedule as much as a hearing for Merrick Garland,[800] whom the Wall Street Journal described as a 'middle-of-the road judge who has avoided strong ideological opinions'.[801] More, in the last five confirmation votes, only 6, 0, 2, 6, and 12 percent, respectively,[802] of out-party senators voted for the nominee, compared to 100, 98, 100, 100, and 98 percent of in-party senators.[803] In fact, Amy Coney Barrett became the first justice in one and a half centuries to be confirmed without a single vote from the minority party,[804] whereas her predecessor, Ruth Bader Ginsburg, had sailed through the Senate on a vote of 96 to 3.

B. The Purpose of the Parliamentary Confirmation Process

Concluding that the parliamentary confirmation process only politicizes constitutional adjudication if the confirmation vote splits along party lines gives rise to a different problem, however. Political contention is germane to parliamentary bodies, just as disagreement is germane to politics in

799 See n 797.

800 Nina Totenberg, '170-Plus Days And Counting: GOP Unlikely To End Supreme Court Blockade Soon', *npr.org*, 6 September 2016, available at https://perma.cc/DSN9-BFK7.

801 Jess Bravin and Brent Kendall, 'For Supreme Court Nominee Merrick Garland, Law Prevails Over Ideology', *The Wall Street Journal*, 16 March 2016, available at https://perma.cc/Q7YB-NU2N.

802 Beginning with the latest confirmation vote and ending with the oldest. I count as Democrats independent senators who caucus with the Democratic Party.

803 See also Geoffrey R Stone, 'Understanding Supreme Court Confirmations' (n 686) 422–6, and Christopher N Krewson and Jean R Schroedel, 'Modern Judicial Confirmation Hearings and Institutional Support for the Supreme Court' 1, 2–4 (forthcoming, Soc Sci Q), available at https://perma.cc/SM9P-F7SR.

804 See, e.g., Gillian Brockell, 'The last Supreme Court nominee confirmed without bipartisan support never heard a single case', *The Washington Post*, 27 October 2020, available at https://perma.cc/3NXB-ZFXD.

general[805]. This includes the US Senate, where partisan votes are now the rule, not the exception.[806] When they politicize constitutional adjudication, the parliamentarians are thus behaving the way they always do; and this raises the question of why we involve them in the appointment process in the first place.

In Germany, the *Bundestag* and the Federal Council are involved in the appointment process because their input makes the Constitutional Court more democratically legitimate.[807] There is a 'chain of legitimation' between the justices and the electorate, the argument goes, because the latter elects the legislators, who, in turn, get to confirm judicial nominees.[808] In the United States, this claim would fail to gain traction, as Americans tend to characterize the Supreme Court justices as 'unelected'.[809] Here, the right to confirm judicial nominees is said to allow the senators to 'ameliorate the "countermajoritarian difficulty"', that is, to make sure that the justices do not diverge too strongly from the people's elected representatives' ideology.[810] In times of divided government, this turns the Senate into a potential check on the president, who may wish to nominate a partisan candidate whose views differ from the Senate majority's.[811]

805 See Robert Post, 'Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics', 98 Cal L Rev 1319, 1336–40 (2010).

806 See, e.g., Daryl J Levinson and Richard H Pildes, 'Separation of Parties, Not Powers', 119 Harv L Rev 2311, 2333 (2006), and Richard H Pildes, 'Why The Center Does Not Hold: The Causes of Hyperpolarized Democracy in America', 99 Cal L Rev 273, 276–81 (2011) and the references cited therein.

807 See, e.g., Ernst-Wolfgang Böckenförde, 'Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation' (n 699) 15, and Andreas Voßkuhle, 'Art. 94' (n 704) para 8. See also Susanne Baer, 'Who cares? A defence of judicial review', 8 J Brit Acad 75, 90 (2020) (arguing that constitutional courts cannot be considered undemocratic as long as members of parliament have to confirm them).

808 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.

809 See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge MA, 1980) 8.

810 Henry Paul Monaghan, 'The Confirmation Process: Law or Politics?', 101 Harv L Rev 1202, 1203 (1988).

811 See *ibid.* and David A Strauss and Cass R Sunstein, 'The Senate, the Constitution, and the Confirmation Process' (n 762) 1515.

I. The United States

Interestingly, the two functions ascribed to the Senate yield diametrically opposed outcomes when it comes to the politicization of constitutional adjudication. When government is divided, the Senate's right to refuse a partisan nominee of the opposite camp will likely prompt the president to nominate a somewhat more moderate candidate, i.e., someone who is less prone to adhering closely to one of the two party-political sides.[812] (I will disregard the possibility that the Senate starts refusing to consider any candidate nominated by a president from the other party.[813]) In other words, the senators' involvement serves to depoliticize constitutional adjudication; if at all, it will politicize the *appointment process*.[814] But when the president and the Senate majority hail from the same party, the senators' power to make sure that 'the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities'[815] will contribute to the Court's politicization once the Senate majority confirms a partisan nominee.

It is thus more accurate to describe the function of the confirmation process as granting the parliamentarians a *choice*: They can either politicize constitutional adjudication or decouple it from partisan politics. I consider the idea of choice preferable to the vaguer assertion that judicial selection systems involve 'two conflicting goals: one, that triadic conflict resolvers be independent; two, that lawmakers be responsible to the people'[816]. On my conception of politicization by judicial appointment, the crux of involving

812 See David A Strauss and Cass R Sunstein, 'The Senate, the Constitution, and the Confirmation Process' (n 762) 1515 (hoping for a 'moderate candidate of genuine distinction'). But see notes 790–793 and accompanying text.

813 See Lee Epstein and Eric Posner, 'If the Supreme Court Is Nakedly Political, Can It Be Just?' (n 765) (considering this a distinct possibility) and Henry Paul Monaghan, 'The Confirmation Process: Law or Politics?' (n 810) 1203 (arguing that there is no constitutional obligation for the Senate to consider judicial nominees). The reason I disregard this potential development is that it would arguably raise more questions of *perceived* politicization than of politicization as such. After all, the Court's composition would remain unchanged.

814 See David A Strauss and Cass R Sunstein, 'The Senate, the Constitution, and the Confirmation Process' (n 762) 1513.

815 Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker', 6 J Pub L 279, 285 (1957) (rejecting the premise that the Supreme Court is a countermajoritarian institution).

816 Martin Shapiro, *Courts: A Comparative and Political Analysis* (The University of Chicago Press, Chicago, 1981) 34.

parliamentarians is that they get to decide which of the two goals to prioritize.

2. Germany

For two reasons, this conclusion does not seem to apply to Germany. Firstly, the idea of getting to choose between politicization and depoliticization fits uneasily with the confirmation vote's official function of providing the Constitutional Court with democratic legitimacy. After all, this function can be discharged regardless of whether the politicians wish to politicize or depoliticize constitutional adjudication; in both cases, their vote creates a chain of legitimation between the constitutional justices and the electorate.

However, I suspect there is more to the confirmation process in Germany, too. We saw above that the confirmation vote is little more than a rubber stamp for judicial candidates nominated pursuant to an interparty agreement that assigns a specified number of justiceships to different political parties. German constitutional scholars defend this set-up as striking the right balance between too little and too much politicization.[817] It is necessary to involve the parties in the selection system, they argue, because the Constitutional Court can only discharge its function properly if the political branches—which are also staffed by the parties—accept it.[818] Here, too, then, the political system is supposed to exercise some degree of control over constitutional decision-making, and I suggest we conceptualize this control as a question of choice between two options—politicization and depoliticization.

The second reason that may prevent characterizing politicization as a question of rightful choice lies in the supermajority requirement for confirming judicial nominees in the *Bundestag*.[819] By making it harder for the party to which a vacant Court seat is assigned to nominate a clearly partisan nominee,[820] this requirement seemingly seeks to prevent politicians from opting for politicization over depoliticization. But I will argue in subsection (D) that we should not confine the concept of politicization to one single party trying to control constitutional adjudication. Instead, the coalition that commands a parliamentary supermajority politicizes

817 See, e.g., Andreas Voßkuhle, 'Art. 94' (n 704) para 15.
818 Christian Walter, 'Art. 94' (n 692) para 28.
819 Sec 6 para 1 cl 2 of the Act on the Federal Constitutional Court.
820 See Johannes Masing, '§ 15: Das Bundesverfassungsgericht' (n 696) para 67.

constitutional adjudication if it keeps parties outside the coalition from nominating candidates of their own.

C. Politicization by Judicial Appointment and Institutional Legitimacy

Parliament's involvement in the appointment process suggests that politicization may at times be desirable. This prompts us to subject the claim that it makes a constitutional court less authoritative to closer scrutiny: Perhaps politicization is not always as detrimental to constitutional adjudication as we fear.

The question, then, is whether politicization makes a constitutional court less authoritative because it leads people to think of it as politicized and, for that reason, as less legitimate. I will stipulate that a loss in institutional legitimacy[821] will indeed make people less likely to acquiesce in the justices' decisions.[822] But the question remains, firstly, whether perceptions of politicization lead to a drop in institutional legitimacy (1) and, secondly, how persistent such a drop tends to be (2). In the following, I will focus on the Supreme Court, as most of the empirical research hails from the United States.

1. Perceived Politicization and Institutional Legitimacy

In 2017, a study tried to measure whether people who perceive the Supreme Court as politicized support it less. It found that respondents who agreed with one of two statements (namely, that Supreme Court justices are 'little more than politicians in robes' and that they base their decisions 'on their own personal beliefs') or disagreed with the claim that the justices 'can be trusted to tell us why they actually decide the way they do' did exhibit weaker diffuse support for the Court.[823] This appears to corroborate scholars' fear of politicization by judicial appointment.

821 By 'institutional legitimacy', I mean the sociological legitimacy of the institution in question (i.e., the constitutional court). 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).

822 See Chapter 3, subsection IV.C.

823 James L Gibson and Michael J Nelson, 'Reconsidering Positivity Theory', 14 J Empir Legal Stud 592, 601, 609–12 (2017).

However, the study's authors admit that the relationship between perceived politicization and institutional legitimacy may, in fact, be inverse. Thus, people who consider the Court legitimate may tend to think of it as suffering from little to no politicization, and *vice versa*.[824] Moreover, the study conceptualized politicization differently. Thus, the statements quoted above may well describe a 'political' court, but they do not necessarily capture a *politicized* one, that is, a court whose members are in thrall to their appointers' party-political preferences. For instance, one can think of the Supreme Court's members as 'politicians in robes' without believing that Democrat-appointed justices always vote in a liberal direction and Republican-appointed justices in a conservative one. Perhaps some people think of the Court as politicized because the justices behave like politicians prior to handing down a decision—e.g., by leaking a draft opinion[825]—and not because the bench splits along predictable partisan lines.

Other studies measuring perceived politicization have likewise used a broad concept of politicization. For example, asking whether the Court 'gets too mixed up in politics' or hands down decisions that 'favor some groups more than others'[826] does not get to the core of judicial politicization either—namely, a partisan Court whose decisions represent politics by other means. Asking respondents whether they believe that the justices' party-political affiliation plays a big role in their decision-making is likely more accurate in detecting politicization perceptions.[827] But to date, no study has investigated the impact of such perceptions on institutional legitimacy.

2. Contentious Appointments and Institutional Legitimacy

We are thus thrown back on studies that focus on the effect of contentious appointments on the Supreme Court's legitimacy. Because a contentious appointment does not necessarily result in a partisan court, these studies

824 *Id.*, 613.

825 See notes 748–749 and accompanying text.

826 See Brandon L Bartels and Christopher D Johnston, 'Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process', 76 Pub Opin Q 105, 110 (2012); Brandon L Bartels, Christopher D Johnston and Alyx Mark, 'Lawyers' Perceptions of the U.S. Supreme Court: Is the Court a "Political" Institution?', 49 Law & Soc'y Rev 761, 771 (2015); and Benjamin Woodson, 'Politicization and the Two Modes of Evaluating Judicial Decisions', 3 J Law & Cts 193, 199, 200–1, 205 (2015).

827 See, e.g., John M Scheb II and William Lyons, 'The Myth of Legality and Public Evaluation of the Supreme Court', 81 Soc Sci 928, 932 (2000).

thus investigate what effects the *act* of politicization has on constitutional adjudication, not the effects of politicization itself.

For starters, a study conducted after Brett Kavanaugh's confirmation found that his appointment did indeed decrease the Supreme Court's institutional legitimacy.[828] A study conducted after Amy Coney Barrett's confirmation corroborated this result.[829] Admittedly, it found that her confirmation weakened diffuse support only among supporters of the Democratic party and that 53 percent of the respondents believed the Court was either just as or more legitimate than prior to the confirmation.[830] However, Democrats are most likely to disagree with a conservative Court, which makes their support all the more important.[831]

However, focusing on an isolated event such as a judicial appointment raises the question of whether a drop in institutional legitimacy persists over time. Crucially, a study that included a survey right after Kavanaugh's confirmation and a second one ten weeks later found that any correlation between negative views of Kavanaugh and decreased institutional legitimacy had disappeared, with both Democrats and Republicans having roughly the same perception of the Supreme Court's legitimacy.[832]

This finding is plausible because it corroborates what we know about the effect of isolated Supreme Court decisions on diffuse support. It seems

828 See Nathan T Carrington and Colin French, 'One Bad Apple Spoils the Bunch: Kavanaugh and Change in Institutional Support for the Supreme Court', 102 Soc Sci Q 1484, 1488–92 (2021).

829 Christopher N Krewson, 'Political Hearings Reinforce Legal Norms: Confirmation Hearings and Views of the United States Supreme Court' 1, 7–8 (forthcoming, Pol Res Q, 2022).

830 *Ibid*. See also Jon C Rogowski and Andrew R Stone, 'How Political Contestation Over Judicial Nominations Polarizes Americans' Attitudes Toward the Supreme Court', 51 Brit J Pol Sci 1251, 1262–6 (2021) (finding that partisan rhetoric during the appointment process makes people who do not support the president's party—so-called outpartisans—perceive the nominee to be less impartial, and the Court to be less deserving of support, while the opposite holds for supporters of the president's party—the so-called co-partisans); and Brandon L Bartels and Eric Kramon, 'All the President's Justices? The Impact of Presidential Copartisanship on Supreme Court Job Approval', 66 Am J Pol Sci 171, 181–3 (2022) (finding that Democrats approved less of the job the Supreme Court was doing after Neil Gorsuch's confirmation—i.e., after the confirmation of a Republican appointee).

831 See Jon C Rogowski and Andrew R Stone, 'How Political Contestation Over Judicial Nominations Polarizes Americans' Attitudes Toward the Supreme Court' (n 830) 1267.

832 See Christopher N Krewson and Jean R Schroedel, 'Modern Judicial Confirmation Hearings and Institutional Support for the Supreme Court' (n 803) 8–9.

that such decisions do *not* make the Court less authoritative in the long term: While one study found that one single decision[833] sufficed to make people who disagreed with the decision consider the Court less legitimate within a month,[834] a long-term study concluded that this loss had virtually disappeared after four years.[835]

Of course, contentious confirmations occur less frequently than controversial decisions.[836] In consequence, the mechanisms that prevent individual decisions from permanently tarnishing the Court's legitimacy may likewise suffice to keep partisan confirmations from doing so.[837] Once the raucous confirmation fades from public memory, the Court's routine business may be more relevant to its legitimacy than what transpired during the appointment.

It should be stressed that these mechanisms are still shrouded in uncertainty.[838] According to one camp, people support the Supreme Court because they associate it with principled, not self-serving, decision-making.[839]

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833 Namely, on President Obama's Affordable Care Act. *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012).

834 See Dino P Christenson and David M Glick, 'Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy', 59 Am J Pol Sci 403 (2015).

835 See Michael J Nelson and Patrick Tucker, 'The Stability and Durability of the U.S. Supreme Court's Legitimacy', 83 J Pol 767, 768–9 (2021). It remains to be seen whether this also holds for the Supreme Court's decision to eliminate a federal constitutional right to abortion. See *Dobbs* v. *Jackson Women's Health Org.*, 2022 U.S. LEXIS 3057, and James L Gibson, 'Losing Legitimacy: The Challenges of the Dobbs Ruling to Conventional Legitimacy Theory', last revised 5 January 2023, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4206986.

836 There were none between 1994 and 2005, for instance.

837 In fact, the Supreme Court's job-approval rating hit a ten-year high in 2020. See Justin McCarthy, 'Approval of Supreme Court Is Highest Since 2009', *Gallup*, 5 August 2020, available at https://perma.cc/NF2Z-SEN3. But see Dahlia Lithwick, 'Why I Haven't Gone Back to SCOTUS Since Kavanaugh', *Slate*, 30 October 2019, available at https://perma.cc/JAL8-AEKH.

838 See James L Gibson and Michael J Nelson, 'Reconsidering Positivity Theory' (n 823) 614. There is also a debate about how to measure institutional legitimacy. See Gregory A Caldeira and James L Gibson, 'The Etiology of Public Support for the Supreme Court', 36 Am J Pol Sci 635, 639–41 (1992), and Alex Badas, 'The Applied Legitimacy Index: A New Approach to Measuring Judicial Legitimacy', 100 Soc Sci Q 1848 (2019).

839 James L Gibson and Gregory A Caldeira, 'Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?', 45 Law & Soc'y Rev 195, 209 (2011). 'Principled decision-making' may be synonymous with the rule of law and the protection of minorities. See James L Gibson, 'The Legitimacy of the United States Supreme

Visible judicial symbols such as the Court building, the justices' robes, and the decorum of oral arguments mitigate people's disappointment with rulings they dislike because they reinforce three beliefs that Americans may have internalized as children: that the judiciary differs from the political branches; that it does so because it seeks to be fair; and that this fairness makes it especially deserving of support.[840]

According to another camp, people's subjective ideological proximity to the justices' individual decisions is much more important for institutional legitimacy.[841] If this is correct, politicization bodes ill for the Court's authoritativeness in the medium term: A consistently partisan and conservative bench is less likely to deliver the odd liberal ruling that allows supporters of the Democratic party to feel ideologically close to the Court.

3. Conclusion

In the end, then, it is not clear whether and to what extent politicization by judicial appointment makes the Supreme Court less authoritative. Moreover, the Court's partisanship has only been persistent of late.[842] Therefore, we must wait for future empirical research to investigate whether the justices' politicization has a tangible and long-lasting effect on people's diffuse support for them. Of course, the justices, not wanting to learn the answer to this question, may well de-escalate their partisanship before we can find out.

Court in a Polarized Polity' (n 784) 528–30. But perceptions of procedural fairness may bolster diffuse support as well. See Mark D Ramirez, 'Procedural Perceptions and Support for the U.S. Supreme Court', 29 Pol Psychol 675, 691–2 (2008).

840 See, e.g., James L Gibson, 'Legitimacy Is for Losers: The Interconnections of Institutional Legitimacy, Performance Evaluations, and the Symbols of Judicial Authority', in Brian H Bornstein and Alan J Tomkins, *Motivating Cooperation and Compliance with Authority: The Role of Institutional Trust* (Springer, Cham, 2015) 81, 108–11. On childhood socialization and public support for the Supreme Court, Jeffery J Mondak and Shannon I Smithey, 'The Dynamics of Public Support for the Supreme Court', 59 J Pol 1114, 1124 (1997).

841 See 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, 188–94 (2013), and Alex Badas, 'The Applied Legitimacy Index' (n 838) 1855–6. For criticism of subjective ideological proximity as a gauge of public support, James L Gibson, Miguel M Pereira and Jeffrey Ziegler, 'Updating Supreme Court Legitimacy: Testing the "Rule, Learn, Update" Model of Political Communication', 45 Am Pol Res 980 (2017).

842 See n 899 and accompanying text.

D. The Meaning of Partisanship

The final question is to what extent the concept of politicization covers or ought to cover the German judicial selection system. In the United States, the partisanship we associate with judicial politicization refers to the split between the two major parties.[843] On this understanding, the German Constitutional Court exhibits a very low degree of politicization. While a study of a conservative justice's voting behavior concluded that his (few) dissenting votes and opinions tended to align with other members nominated by the Christian Democrats, it also concluded that party affiliation was not the only indicator of his voting behavior.[844] More important, the twelve-year time period analyzed in the study yielded only twenty decisions in which at least one justice voted against the majority and opted to have their name published in the ruling.[845] According to the justices themselves, many seem to make a conscious effort not to be perceived as overly influenced by their membership in a party.[846]

But perhaps the Constitutional Court would exhibit a party-political split if the two parties that are represented in the *Bundestag* but are nevertheless excluded from the interparty agreement on the appointment of new justices[847] got to nominate candidates of their own. Of course, there is no way to tell whether these candidates would frequently vote against the majority upon joining the bench. Perhaps the high degree of self-referentiality in the Court's jurisprudence[848] would prevent a split between the justices nominated by the other parties and those selected by *Die Linke* or the *AfD*. More, one of the Court's characteristics is that the justices try to

843 See, e.g., Lee Epstein and Eric Posner, 'If the Supreme Court Is Nakedly Political, Can It Be Just?' (n 765).

844 Benjamin Engst and others, 'Zum Einfluss der Parteinähe auf das Abstimmungsverhalten der Bundesverfassungsrichter – eine quantitative Untersuchung', 72 Juristen-Zeitung 816, 822–4 (2017).

845 *Id.*, 820–1.

846 Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts* (Verlag für Sozialwissenschaften, Wiesbaden, 2010) 235. On the institutional and sociological mechanisms that may help distance the justices from the parties that appointed them, Anuscheh Farahat, 'The German Federal Constitutional Court' (n 691) 302–4.

847 See n 703 and accompanying text.

848 See Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 768) 181–3.

compromise when they adjudicate a case;[849] perhaps, then, the justices in the majority would seek compromise with their new colleagues, too. But I believe that the radicality of at least the *AfD*'s positions would make such continued concordance unlikely.[850] And even if it did persist, the Court's jurisprudence would likely change permanently, for it would have to start taking the fringe parties' ideologies into account.

This suggests that the parties which concluded the agreement did so in part to prevent the Court from reflecting these ideologies. For that reason, I argue that the German Constitutional Court is well and truly politicized. The only difference is that a group of parties—not one single party—tries to steer the Court in a particular ideological direction. In other words, the parties to the agreement do not merely seek to balance the Court ideologically, as supporters of the agreement like to point out;[851] they also control where on the ideological spectrum the balance lies.

From the perspective of political science, we can characterize this form of politicization as the established parties' attempt to minimize the non-established parties' share of political power. A party is non-established the smaller and younger it is and the less it gets to participate in government.[852] According to this definition, the leftist *Die Linke* and the far-right *AfD* arguably constitute non-established parties: Neither has participated in government at the federal level, the vote share of the former is small,[853] and the latter is comparatively young;[854] moreover, the established parties have, for the time being, more or less excluded the non-established parties from entering into coalition governments with them.[855] The supermajority

849 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* (n 846) 181–5.

850 For some of the AfD's positions, see, e.g., Jonathan Olsen, 'The Left Party and the AfD', 36 German Pol & Soc'y 70, 78–9 (2018).

851 See n 726.

852 Werner Krause and Aiko Wagner, 'Becoming part of the gang? Established and nonestablished populist parties and the role of external efficacy', 27 Party Pol 161, 164, 166 (2021).

853 *Die Linke* obtained 4.9 percent of the vote. *Bundeswahlleiter*, 'Bundestagswahl 2021: Ergebnisse', available at https://perma.cc/Z7DZ-KHYY.

854 The *AfD* was founded in 2013. Nicole Berbuir, Marcel Lewandowsky and Jasmin Siri, 'The AfD and its Sympathisers: Finally a Right-Wing Populist Movement in Germany?', 24 German Pol 154 (2015).

855 See, e.g., Aiko Wagner, 'Typwechsel 2017? Vom moderaten zum polarisierten Pluralismus', 50 Zeitschrift für Parlamentsfragen 114, 127–8 (2019).

requirement for confirming judicial nominees in the *Bundestag* offers the non-established parties no protection because they currently only hold 16.6 percent of the seats in parliament.[856]

Of course, the German case of politicization is distinct from the American in that it does not become apparent from the Constitutional Court's rulings: By keeping the non-established parties' candidates off the bench, the established parties minimize the risk of overt partisanship, which is linked to perceived politicization and, eventually, to a drop in judicial authoritativeness.

Firstly, however, this difference does not make the Court any less politicized. If the Republicans or the Democrats succeeded in appointing all the Supreme Court's members, there would no longer be a party-political split there either, yet no one would hesitate to call the Supreme Court partisan. Secondly, the absence of a split does not mean that the German form of politicization is necessary to preserve the Constitutional Court's authoritativeness. As mentioned above, the justices' propensity for compromise might prevent a party-political split even if the non-established parties got to nominate candidates of their own. In addition, a study has shown that while people dislike the idea of staffing the Court with party affiliates, they especially dislike the idea of staffing it with affiliates of the non-established parties.[857] I presume, therefore, that they would not support the Court any less if the non-established parties joined the agreement and the justices they appointed frequently dissented from the Court's rulings. Instead, people would likely welcome the fact that the majority does not compromise with jurists whose party-political background they reject.

I find this thought experiment insightful, for it suggests that people's ideological attitude toward a constitutional court is more relevant than whether they believe the court to be 'political'. If this is true, politicization does not imperil the court just because it makes people realize that constitutional law can mirror politics; it only becomes dangerous once enough people frequently disagree with its jurisprudence. This would lend support to those American scholars who argue that perceived ideological distance matters for the Supreme Court's institutional legitimacy. The following

856 Together, the two non-established parties currently hold 122 of the 736 seats in the *Bundestag*. *Bundeswahlleiter*, 'Bundestagswahl 2021: Ergebnisse' (n 853).

857 See Benjamin Engst, Thomas Gschwend and Sebastian Sternberg, 'Die Besetzung des Bundesverfassungsgerichts: Ein Spiegelbild gesellschaftlicher Präferenzen?', 61 Politische Vierteljahresschrift 39, 51–2 (2020).

section will show that Niklas Luhmann's early systems theory corroborates my hunch.

IV. Discussing Politicization from a Systems-Theoretical Perspective

Niklas Luhmann's early systems theory lends itself to the task of underlining and corroborating some of the above observations because its concept of systemic differentiation describes the kind of autonomization and de-autonomization processes that characterize politicization by judicial appointment. With its help, we can better understand at what point the parliamentarians asked to confirm a judicial nominee contribute to constitutional adjudication's politicization; what kind of ramifications we can expect from politicization; and what kind of party-political control over the court qualifies as 'partisan capture' within the meaning of judicial politicization.

I begin the following paragraphs with a brief introduction to Luhmann's concepts of social systems and systemic differentiation (A). Then, I describe the concept of politicization by judicial appointment in systems-theoretical terms and what follows therefrom for the confirmation process (B). In subsection (C), I apply these findings to the confirmation process in the United States. I then discuss what systems theory teaches us about politicization's possible effect on constitutional adjudication (D) before addressing a possible objection to my conceptual lens—namely, that Luhmann's later, more advanced systems theory may offer a better one (E).

A. The Concepts of Social Systems and Systemic Differentiation

In general systems theory, a system describes an interaction between parts.[858] A social system is a system whose parts consist of the actions of different individuals.[859] According to Luhmann, these parts interact by

858 See Ludwig von Bertalanffy, *General Systems Theory: Foundations, Developments, Applications* (George Braziller, New York, 1968) 19.

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

virtue of their meaning.[860] In consequence, a social system designates a meaningful relation between a plurality of actions.[861]

For Luhmann, meaning designates an intersubjective and invariant complex of possible experiences and actions, a complex that simultaneously refers to other, more distant possibilities.[862] It is this coupling of the actual and the potential, Luhmann argues, that allows humans to confront the complexity of the world: By diminishing and yet preserving complexity, meaning prevents the world from suddenly narrowing to only one concrete instance of experience in the individual's consciousness.[863] It explains the evolutionary advantage mankind holds over other organisms.[864]

Therefore, a social system's function is to create a differential of complexity between itself and its environment.[865] For Luhmann, systems are thus primarily distinctions between the inside and the outside, not relations between a whole and its parts.[866] To amplify their function, systems can

860 Niklas Luhmann, 'Organization, membership and the formalization of behavioural expectations [1964]', 37 Syst Res Behav Sci 425, 426 (2020).

861 *Ibid.*

862 Niklas Luhmann, 'Reform und Information: Theoretische Überlegungen zur Reform der Verwaltung', in *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung* (4th edn, Springer, Wiesbaden, 1994) 181, 183. The transcendental element distinguishes Luhmann's theory from his mentor's, Talcott Parsons, as it allows Luhmann to relate social systems to the openness of the world, not to a problem that requires systemic structures. See, e.g., John W Murphy, 'Talcott Parsons and Niklas Luhmann: Two Versions of the "Social System"', 12 Int Rev Mod Soc 291 (1982), and Richard Münch, 'Luhmann und Parsons', in Oliver Jahraus and others (eds), *Luhmann-Handbuch: Leben – Werk – Wirkung* (JB Metzler, Stuttgart, 2012) 19–21.

863 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie', in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung?* (Suhrkamp, Frankfurt am Main, 1971) 25, 31–9. Complexity designates the variety of experiences or actions an actor within the social system may have or engage in. See, e.g., Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 859) 115, and *Legitimation durch Verfahren* (10th edn, Suhrkamp, Frankfurt am Main, 2017) 41.

864 Niklas Luhmann, 'Normen in soziologischer Perspektive', 20 Soziale Welt 28, 30 (1969).

865 Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 859) 113, 116, and *Legitimation durch Verfahren* (n 863) 41.

866 Niklas Luhmann, 'Organization, membership and the formalization of behavioural expectations [1964]' (n 860) 426. For a conception of the legal system as a whole, see, e.g., Henry M Hart and Arthur M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tentative edn, Cambridge MA, 1958) Preface ('a coordinated, functioning whole made up of a set of interrelated, interacting parts'),

enter a process of differentiation. They do so by 'reduplicat[ing] [...] the difference between system and environment within [themselves]',[867] that is, by generalizing new, more specific behavioral expectations that demarcate actions pertaining to the new subsystem from those that belong to its environment.[868]

The newly differentiated subsystem is more selective still than the system from which it originated (and which is now its environment): Not everything that transpires within the larger system will have an immediate effect on the subsystem. The infinite outside world becomes more definite and more manageable as a result, and the individuals who partake in the subsystem through their actions have more actual, feasible possibilities of experience and action.[869] The more subsystems there are, the more selectivity there can be overall.[870] Therefore, differentiation is a way for the larger system to manage complexity.

In the following subsection, we will see that the political system manages complexity by differentiating into a subsystem of party politics and a bureaucratic, decision-making subsystem. An increase in the former's influence over the latter leads to politicization.

B. Systems Theory and Politicization by Judicial Appointment

There are at least two types of differentiation at the societal level.[871] The first, segmentary differentiation, occurs when society differentiates into equal subsystems.[872] Thus, world society has differentiated into distinct yet equal political systems, of which there are as many as there are independent states.[873] The second type of differentiation, functional differentiation, occurs when each differentiated subsystem has a specific function.[874] Within

and Lawrence M Friedman, *Law and Society: An Introduction* (Prentice-Hall, Englewood Cliffs, 1977) 5 ('a working process, a breathing, active machine').

867 Niklas Luhmann, 'Differentiation of Society', 2 Can J Soc 29, 31 (1977).

868 See Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 859) 121.

869 See Niklas Luhmann, 'Differentiation of Society' (n 867) 30, 31–2.

870 *Ibid.*

871 On stratification as yet another form of differentiation, *id.*, 33–5.

872 Niklas Luhmann, 'Differentiation of Society' (n 867) 33.

873 *Id.*, 41.

874 *Id.*, 35.

each independent state, for instance, society, the largest possible system, creates the political system to provide collective and binding decisions.[875]

The political system's differentiation from society means that not every societal input translates into a preordained political output. While the political system does not exist in a vacuum, it can decide according to its own criteria which input to process and how to do so.[876] One of the ways in which it may wish to process societal input is through internal differentiation.[877] For instance, the political system erects an artificial barrier between the public and the decision-makers by creating a bureaucracy that renders its decisions according to a predetermined program.[878]

The bureaucracy is the subsystem of the political system that is dedicated to making binding decisions.[879] It includes legislation, administration, and adjudication[880]—in short, the government.[881] The judiciary constitutes a subsystem of the bureaucracy.[882] Moreover, each judicial proceeding within the judiciary constitutes a subsystem of its own that harnesses its autonomy to isolate the disputants and shield the political system from their conflict.[883]

Luhmann writes that the subsystem of (party) politics exists alongside the bureaucracy. Its function is to 'articulate interests' and to 'promote demands', to 'condense, generalize, and spread political topics, to form and consolidate power, consensus, and political support for persons and programs'.[884] He adds that party politics and the bureaucracy are interwoven in different ways. The legislature, for one, is fully subject to party-political influence.[885] Because legislation is not programmed, it must manage a

875 See *id*., 38.
876 Niklas Luhmann, *Legitimation durch Verfahren* (n 863) 160.
877 Niklas Luhmann, *Politische Soziologie* (André Kieserling ed, Suhrkamp, Berlin, 2010) 116.
878 See Niklas Luhmann, 'Lob der Routine', in *Politische Planung* (n 862) 113, 117.
879 See *Legitimation durch Verfahren* (n 863) 184.
880 E.g., Niklas Luhmann, *Politische Soziologie* (n 877) 151.
881 Niklas Luhmann, 'Funktionen der Rechtsprechung im politischen System', in *Politische Planung* (n 862) 49.
882 *Id*., 46.
883 See Niklas Luhmann, *Legitimation durch Verfahren* (n 863) 82–128, and *A Sociological Theory of Law* (Elizabeth King-Utz and Martin Albrow tr, 2014) 164–5, 257–8 (eBook).
884 Niklas Luhmann, *Politische Soziologie* (n 877) 254. See also *Legitimation durch Verfahren* (n 863) 183–4.
885 Niklas Luhmann, 'Funktionen der Rechtsprechung im politischen System' (n 881) 49.

particularly high degree of complexity;[886] to decrease this complexity and make law, parliament relies on its members' party affiliation.[887] By contrast, the executive branch is only partly subject to such influence, for it is also bound to the law that parliament enacts.[888]

Finally, the judiciary is not subject to party-political influence in Luhmann's model. Its function is to protect the legislature and the executive from transgressive party-political demands, for both the legislators and the members of the executive can refuse such demands by pointing out that the resulting legislation would be incompatible with the courts' case law.[889] This means the judiciary is essential to maintaining the political system's internal differentiation: By allowing the legislature and the executive branch to alternate between party-political influence and relative independence, the courts render the political system's decision-making simultaneously responsive and autonomous.[890]

According to this model, politicization by judicial appointment occurs when the party-political subsystem extends its influence into the constitutional court and staffs it with justices who will agree with the parties' policies instead of shielding the legislature and the executive from them. The first insight we can draw from this is that a group of parties—not all of which need to be ideologically close—can politicize constitutional adjudication just as well as one single party. After all, Luhmann links politicization to the subsystem of party politics as such, not to an individual party. This provides conceptual support for my claim that the German political parties' agreement on filling vacancies on the Constitutional Court has politicized that institution.

The systems-theoretical lens also allows us to distinguish more clearly between politicizing and non-politicizing behavior during the confirmation process. As members of the legislature, the parliamentarians who are asked to confirm judicial nominees are members of two subsystems, the party-political and the bureaucratic one. Thus, they wear two hats, as decision-makers and as party politicians, and depending on which one they choose, they either contribute to the party-political subsystem's politicization of constitutional adjudication or not.

886 Niklas Luhmann, *Legitimation durch Verfahren* (n 863) 179.
887 See *Legitimation durch Verfahren* (n 863) 184 and *Politische Soziologie* (n 877) 156.
888 Niklas Luhmann, 'Funktionen der Rechtsprechung im politischen System' (n 881) 49.
889 *Ibid.*
890 *Ibid.*

In other words, parliamentarians contribute to politicization by judicial appointment when their party-political membership trumps that in the bureaucratic subsystem—that is, when their party affiliation determines how they vote. In the following subsection, I apply this test to the confirmation process in the US Senate.

C. Politicization by Judicial Appointment and the Confirmation Process in America

Generally, senators rely on one or more of the following four factors when deciding whether to support a nominee: whether the nominee is sufficiently meritorious; whether the president nominating the candidate is from their own party; how ideologically distant the nominee is; and whether the nomination threatens to affect the Court's ideological balance.[891]

The last three factors are arguably party-political in nature. This may not be evident when it comes to the nominee's (or the Court's) ideology. After all, ideology is sometimes used as a synonym for 'judicial philosophy',[892] which we might define as 'the judge's understanding of the role of courts in our society, of the nature of and values embodied in our Constitution, and of the proper tools and techniques of interpretation, both constitutional and statutory'.[893] However, the different judicial philosophies run more or less parallel to the Republican and the Democratic parties' preferences.[894] That is why scholars also lump 'ideology' together with partisanship or, quite simply, 'politics'.[895]

Of course, several factors may inform a senator's decision. The Republicans who voted to confirm Amy Coney Barrett presumably did so because they deemed her well-qualified, the president who nominated her was a

891 See Lee Epstein and Jeffrey A Segal, *Advice and Consent: The Politics of Judicial Appointments* (OUP, New York, 2005) 102–13. See also Jonathan P Kastellec, Jeffrey R Lax and Justin H Phillips, 'Public Opinion and Senate Confirmation of Supreme Court Nominees', 72 J Pol 767 (2010) (finding that public opinion in their home state likewise influences the senators' decision).

892 E.g., Geoffrey R Stone, 'Understanding Supreme Court Confirmations' (n 686) 391.

893 Elena Kagan, 'Confirmation Messes, Old and New', 62 U Chi L Rev 919, 935 (1994).

894 See n 775.

895 See Lee Epstein and Jeffrey A Segal, *Advice and Consent* (n 891) 102, and Lee Epstein and others, 'The Changing Dynamics of Senate Voting on Supreme Court Nominees', 68 J Pol 296, 302 (2006) ('politics, philosophy, and ideology').

Republican, Barrett was perceived to be conservative, and her appointment was thought to solidify the conservative majority on the bench.[896]

However, the absence of a secret ballot for Senate confirmation votes[897] partly defuses this problem, for it allows us to ascertain whether the vote splinters along partisan lines. If it does, we can presume that party-political considerations weighed heavily in the senators' minds; it is sufficiently unlikely that the partisanship is coincidental, especially if several confirmation votes in a row are partisan.

1. From Unanimous to Partisan Confirmation Votes

As we saw above, the last few confirmation votes in the Senate have indeed been partisan.[898] This means that the senators have contributed to the Supreme Court's politicization if the latter exhibits the kind of partisan divide that scholars associate with judicial politicization. It does: 'since Elena Kagan succeeded John Paul Stevens in 2010, every Justice who was appointed by a Democratic president has had a more liberal voting record than every Republican appointee.'[899]

It bears emphasizing that the justices do not always divide along partisan lines in constitutional cases. There will always be unanimous constitutional decisions,[900] just as there will be non-unanimous ones that do not pit all Democratic against all Republican appointees.[901] In some cases, there may be a good explanation for the Court's unanimity, one that does not call into doubt our general finding of partisanship. For instance, not every

896 See Nicholas Fandos, 'Senate Confirms Barrett, Delivering for Trump and Reshaping the Court', *The New York Times*, 26 October 2020, available at https://perma.cc/P3RT-8Y5E.

897 When the Senate debated abandoning secret confirmation deliberations, Senator Norris argued that '[p]ublic business should be transacted in public. [...] No democratic government can continue to endure if its public business is transacted behind closed doors.' 'Publicity on West Agitates Senate', *The New York Times*, 24 January 1929, p 5. For modern instances of accountability, see, e.g., Sheryl Gay Stolberg, 'Susan Collins, A Fixture in Maine, Has Twin Troubles: Trump and Kavanaugh', *The New York Times*, 6 July 2019, available at https://perma.cc/N28L-UPLM.

898 See notes 802–804 and accompanying text.

899 Neal Devins and Lawrence Baum, 'Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court', 2016 Sup Ct Rev 301, 309 (2016). For evidence, see *ibid*.

900 E.g., *Caniglia* v. *Strom*, 141 S. Ct. 1596 (2021).

901 E.g., *Mahanoy Area Sch. Dist.* v. *B.L.*, 141 S. Ct. 2038 (2021).

constitutional issue involves strong ideological questions that trigger the familiar party-political divide.[902] Nevertheless, it bears asking how often the justices must divide along party-political lines for us to deem the Court 'partisan'. I will not pursue this inquiry further, however, as my objective in this chapter is chiefly conceptual, not empirical. Therefore, I will defer to the verdict that the current partisan trend on the Court is 'extreme—and alarming'.[903]

In the past, scholars have linked partisan confirmation votes to the politicization of the appointment process, not of constitutional adjudication.[904] After all, the principle of judicial independence allows Supreme Court justices to depart from the ideology that made a majority of the senators vote to confirm them; in other words, there is no guarantee that a partisan confirmation vote will help create a partisan Court.[905] Now that the Court does appear to be increasingly partisan, this distinction is obsolete, however, and we can make the following statement: The senators contribute to constitutional adjudication's politicization when the justices vote in accordance with their appointer's political preferences and the senators, in confirming the nominees, politicize the appointment process.

Implementing the systems-theoretical lens becomes more difficult when the confirmation vote is (nearly) unanimous, as it was nine out of fourteen times between 1974 and 2005.[906] It seems that the senators confirmed any meritorious justice who was not too ideologically distant from the Senate majority.[907] Therefore, it is likely that the senators in the majority voted

902 For instance, two of the Court's unanimous constitutional decisions in its 2020–2021 term involved the Fourth Amendment, which prohibits 'unreasonable searches and seizures'. See *Caniglia* v. *Strom* (n 900) and *Lange* v. *California*, 141 S. Ct. 2011 (2021).

903 Lee Epstein and Eric Posner, 'If the Supreme Court Is Nakedly Political, Can It Be Just?' (n 765).

904 See, e.g., David A Strauss and Cass R Sunstein, 'The Senate, the Constitution, and the Confirmation Process' (n 762) 1493–4, 1513; Vicki C Jackson, 'A Democracy of Rights: The Dark Side? – A Comment on Stephen M. Griffin', in Mark Tushnet (ed), *Arguing* Marbury v. Madison (n 766) 147, 154–5; and Geoffrey R Stone, 'Understanding Supreme Court Confirmations' (n 686) 450, 453–4, 459 n 165, 462.

905 See Vicki C Jackson, 'A Democracy of Rights: The Dark Side? (n 905) 155.

906 The total number of nominations includes William Rehnquist's elevation to chief justice. For an overview of the confirmation votes, see Lee Epstein and others (eds), *The Supreme Court Compendium: Data, Decisions, and Developments* (6th edn, SAGE, Los Angeles, 2015) 410ff.

907 See, e.g., Lee Epstein and others, 'The Changing Dynamics of Senate Voting on Supreme Court Nominees' (n 895) 302–6.

to confirm the nominee for two reasons: because they considered the candidate well-qualified and because they could live with the candidate's ideology. If these senators belonged to the same party as the president, the latter factor may even have been more important.[908] Consequently, it is possible that, in times of unified government, most senators primarily voted to confirm for party-political reasons.

This would spell trouble, conceptually speaking, if the Supreme Court exhibited a partisan divide during this time: While systems theory would indicate that the senators contributed to this politicization, the concept of politicization by judicial appointment would probably suggest otherwise, given the confirmation vote's unanimity.[909] However, we just saw that the Court only became partisan when Elena Kagan joined the bench, and by that time, the Senate confirmation votes had turned into party-political affairs as well: 98 percent of Democratic senators, but only 12 percent of Republicans, voted to confirm her.

2. The Confirmation Hearings

According to Luhmann's systems theory, the senators do not contribute to judicial politicization when they make their vote solely contingent on the nominee's qualifications. In times of divided government, this divests the senators in the majority from counteracting the president's attempt to steer the Court in the president's ideological direction. For that reason, many constitutional scholars have advocated for a more proactive senatorial role, regardless of whether it can be said to politicize constitutional adjudication.[910]

It bears emphasizing, however, that a systems-theoretical lens does not categorically suggest restraining the senators either. For example, it does not keep them from using the confirmation *hearings* to try to influence—within the boundaries of the law—the justices-to-be. Scholars have often

908 In fact, a senator was still likely to confirm a mediocre nominee if there was little ideological distance between the two. Charles M Cameron, Albert D Cover and Jeffrey A Segal, 'Senate Voting on Supreme Court Nominees: A Neoinstitutional Model', 84 Am Pol Sci Rev 525, 531 (1990).

909 See subsection III.A.

910 See, e.g., David A Strauss and Cass R Sunstein, 'The Senate, the Constitution, and the Confirmation Process' (n 762) 1493–4, 1513, and Robert Post and Reva Siegel, 'Questioning Justice: Law and Politics in Judicial Confirmation Hearings', 115 Yale LJ Pocket Part 38, 49–51 (2006).

taken a dim view of the hearings, criticizing them for producing nothing but 'platitudinous statement and judicious silence'[911] or a 'choreographed minuet'.[912] Recently, however, they have started to look at them with fresh eyes. Thus, Paul Collins and Lori Ringhand argue that the colloquy, by teaching the future justices how the public views constitutional law, elevates the hearings into a forum that ratifies past constitutional change and expands the ever-growing canon of 'indispensable' seminal cases.[913] Others have suggested that the senators' questions allow them to represent their constituents even when it is clear their individual votes will not help block the nominee's confirmation.[914]

Consequently, the senators can confront the nominees, during the confirmation hearings, with their conception of constitutional justice: They can debate questions of constitutional interpretation with the candidate as well as, if need be, among themselves. If we briefly conceptualize politicization from a subjective angle,[915] we might say that the senators may politicize constitutional decision-making by debating it in public, and that this politicization is beneficial.

D. Politicization's Effect on Constitutional Adjudication and the Political System

In this subsection, I discuss what systems theory can teach us about politicization's effect on constitutional adjudication. We saw above that scholars fear for the quality as well as the authoritativeness of a politicized constitutional court's decisions.[916] I believe that Luhmann's sociology helps us refine both points. On the one hand, it indicates that a partisan court may disrupt the political system's internal differentiation into party politics and bureaucracy (1). On the other hand, its concept of functional differentiation

911 Elena Kagan, 'Review: Confirmation Messes, New and Old' (n 893) 928.
912 Ronald Dworkin, 'Justice Sotomayor: The Unjust Hearings', *The New York Review of Books*, 24 September 2009, available at https://perma.cc/BA4F-V5XH.
913 Paul M Collins, Jr, and Lori A Ringhand, *Supreme Court Confirmation Hearings and Constitutional Change* (CUP, Cambridge, 2013) 140ff. See also Neal K Katyal, 'Legislative Constitutional Interpretation', 50 Duke LJ 1335, 1339–46 (2001).
914 Jessica A Schoenherr, Elizabeth A Lane and Miles T Armaly, 'The Purpose of Senatorial Grandstanding during Supreme Court Confirmation Hearings', 8 J Law & Cts 333, 347, 353 (2020).
915 See above, notes 752–760 and accompanying text.
916 See subsection II.B.3.

suggests that a partisan court can, under certain circumstances, maintain people's trust in it (2).

1. Partisan Capture and the Political System's Internal Differentiation

Luhmann's model of the political system's internal differentiation into party politics and bureaucracy suggests that a constitutional court's partisan capture can be disadvantageous for two reasons. The more constitutional adjudication is beholden to party politics, the more the latter's deficiencies become a problem for society. Furthermore, the political system becomes less flexible once its decision-making potential remains tethered to the political parties' programs.

Firstly, Luhmann reminds us that political parties prioritize winning elections over matters of substance, rely on personal relationships to protect those in positions of authority, and are susceptible to societal influences that are difficult to check. And he adds that one of the reasons we can accept this is that the judiciary is not subject to party-political influence.[917] In other words, constitutional adjudication's politicization can be detrimental because it leaves society defenseless against the political parties' quirks and deficiencies.

I believe the Supreme Court's politicization is instructive in this regard. Recall that the American electorate has undergone partisan sorting, with liberals voting for Democrats and conservatives siding with Republicans.[918] Crucially, however, partisan sorting does not mean that people are more polarized with regard to political issues. In fact, it seems that the public suffers from behavioral polarization more than from issue polarization: While conservatives and liberals are a bit farther apart ideologically than they used to be, they still tend to agree on many things.[919] By contrast, the Republican and the Democratic *parties* are subject to strong issue

917 See Niklas Luhmann, 'Funktionen der Rechtsprechung im politischen System' (n 881) 49–50.

918 See n 776.

919 See Lilliana Mason, 'The Rise of Uncivil Agreement: Issue Versus Behavioral Polarization in the American Electorate', 57 Am Behav Scientist 140, 147–55 (2013), and '"I Respectfully Disagree": The Differential Effects of Partisan Sorting on Social and Issue Polarization', 59 Am J Pol Sci 128, 133–4 (2015). Behavioral polarization is characterized by 'increasing partisan strength, partisan bias, activism, and anger'. 'The Rise of Uncivil Agreement' 141.

polarization.[920] And because the parties, not the public, get to determine the ideology they would like to see implemented on the constitutional bench, the politicization of constitutional adjudication means that people are saddled with more constitutional issue polarization than they may want.

This 'disconnect' between the American political class and the mass public[921] dilutes politicization's democratic benefits. In theory, politicization helps politicians ensure that the Supreme Court does not stray too far from voters' policy preferences.[922] In practice, however, the politicians will likely overshoot the mark and satisfy the ideological fringe more than the center of American politics.

Secondly, Luhmann teaches us that politicization decreases the amount of complexity the political system can manage. One of internal differentiation's benefits is that the political system can transfer, to the bureaucracy, issues which the party-political subsystem struggles with. Where the political parties fall short, the legislature, the executive, and the judiciary can step in to adjudicate—or, in Luhmann's terms, 'depoliticize'—the issue in need of resolution.[923] Once party politics have come to dominate the constitutional court, however, this potential is lost, and society is stuck with the political parties' capacity for addressing its problems.

On this view, the predictability that inheres in a partisan court is not only potentially detrimental because it may make people think of the justices as the parties' pawns; it is also disadvantageous because it makes the court less flexible, and hence reduces the jurisprudential variety it can offer society. As we will see presently, this variety is crucial, from a systems-theoretical perspective, to maintaining constitutional adjudication's authoritativeness.

920 See, e.g., Geoffrey C Layman, Thomas M Carsey and Juliana Menasce Horowitz, 'Party Polarization in American Politics: Characteristics, Causes, and Consequences', 9 Ann Rev Pol Sci 83, 87–9 (2006) and the references cited therein.

921 Morris P Fiorina and Matthew S Levendusky, 'Disconnected: The Political Class versus the People', in Pietro S Nivola and David W Brady (eds), *Red and Blue Nation? Characteristics and Causes of America's Polarized Politics*, vol 1 (Brookings Institution Press, Washington, DC, 2006) 49, 51–2.

922 See notes 810–811 and accompanying text.

923 See Niklas Luhmann, 'Funktionen der Rechtsprechung im politischen System' (n 881) 49.

2. Functional Differentiation and Judicial Authoritativeness

Systems theory characterizes society as differentiated into a multitude of functionally specific subsystems.[924] Functional differentiation requires a variety of very different personalities, writes Luhmann, because the specialization that accompanies it necessitates a multitude of talents and dispositions.[925] This has ramifications for the political system's stability: Because of their diversity, people will disagree about many things, and the challenge of any political system under these circumstances is to ensure its stability without relying on consensus.[926]

Luhmann argues that the political system's proceedings—such as its legislative or judicial proceedings—are central to mastering this challenge. Thus, the political system ensures its stability if its proceedings achieve three things: absorb potential protest; make people trust in the political system's overall functioning; and give them the feeling that everyone can, from time to time, obtain or witness a favorable policy outcome.[927]

For that reason, I suggested in Chapter 3 that constitutional courts can remain authoritative, on Luhmann's view, if they attend to the ideological variety of their decisions, thus giving most people the feeling that they, too, could obtain a victory in court. It follows that Luhmann's systems-theoretical lens jibes with what my summary of the research on diffuse support for the Supreme Court designated the 'second camp'.[928] According to Luhmann and this camp, a constitutional court need not be less authoritative if people only support it to the extent they feel ideologically close to its rulings; what is important is that it grants both conservatives and liberals victories at more or less the same pace.

At first blush, this spells trouble for constitutional adjudication: A partisan court is less likely to issue ideologically diverse rulings. Yet we saw above that courts that we consider politicized—such as today's Supreme

924 See n 874.

925 Niklas Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (5th edn, Duncker & Humblot, Berlin, 2009) 48.

926 Niklas Luhmann, *Legitimation durch Verfahren* (n 863) 250–2.

927 Niklas Luhmann, *Legitimation durch Verfahren* (n 863) 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.

928 See n 841 and accompanying text.

Court—do, at times, abandon their party-political divide.[929] The more they do so, the less they risk losing their authoritativeness. The less they do so, the harder it will be for out-partisans to think of the Court as a place where they, too, can achieve a constitutional victory.

Accordingly, the negative effects of politicization do not occur more or less automatically once we consider the justices sufficiently partisan to call their court politicized. Instead, the degree of politicization is more significant; not every court that arguably deserves the characterization 'politicized' risks quickly becoming ineffective.

Two observations follow from this conclusion. Firstly, the problem with politicization by judicial appointment is not that it renders a constitutional court less authoritative but that it places the burden of maintaining that authoritativeness squarely on the justices' shoulders. Crucially, that may not be enough to counsel against politicization in the United States, which has a hard-nosed yet romantic appreciation of its judges.[930]

Secondly, the politicians involved in judicial appointments can use politicization to our democratic advantage if they have reason to believe that the justices can shoulder their responsibility and maintain the court's authoritativeness despite an increasingly partisan bench. Americans, for instance, may have a greater say in the composition of the constitutional bench once the confirmation vote in the US Senate splits along party-political lines: If the parties state in advance which kind of nominee they will support, citizens can choose the party whose hypothetical nominee better matches their own preferences.[931]

Admittedly, the abovementioned disconnect between the parties' and people's ideological preferences means that not every nominee will fit that mold. Perhaps, however, the Supreme Court's persistent politicization means that potential nominees' qualifications will matter somewhat less in the future, resulting in a more diverse group of eligible jurists.

In Germany, by contrast, the Constitutional Court presumably need not fear for its authoritativeness. Because the Court's politicization originates

929 See notes 900–901 and accompanying text.

930 See Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (Harvard University Press, Cambridge MA, 1997) 3. Generally on the significance of character and experience for judicial review, Mark Tushnet, 'Constitutional Interpretation, Character, and Experience', 72 B U L Rev 747 (1992).

931 On judicial appointments as an example of popular constitutionalism, Robert Post and Reva Siegel, 'Popular Constitutionalism, Departmentalism, and Judicial Supremacy', 92 Cal L Rev 1027, 1030–1 (2004).

in the non-established parties' exclusion from the informal agreement to divvy up the justiceships among the political parties, the lack of decisions that appeal primarily to the fringe parties' voters will likely not imperil its diffuse support. Thus, both parties received only slightly more than 15 percent of all votes in 2021.[932]

But in my opinion, this does not make the Constitutional Court's politicization a net positive. True, most people agree with the decision to exclude justices nominated by the non-established parties.[933] But a closer look at the interparty agreement reveals it to be democratically deficient after all. Firstly, voters cannot change the allocation of an upcoming vacancy. If a seat is allocated to the Social Democrats, for instance, that party will get to fill it regardless of whether it won or lost votes in the last election. Secondly, the electorate has little say over the total number of justiceships allocated to a party. When the Social and the Christian Democrats first concluded the interparty arrangement, the Social Democrats had nearly 46 percent of the national vote to show for the four justiceships it claimed in each senate of the *Bundesverfassungsgericht*. Today, the Social Democrats claim three seats, thereby decreasing their share by a quarter; but in 2017, their share of the national vote had dropped by more than half, to 20.5 percent.[934]

E. The Likely Objection to My Conceptual Lens

In closing, I wish to address a likely objection to the systems theory I apply in this chapter. This objection challenges the use of Luhmann's early, as opposed to late, systems theory and argues that the later version offers a more sophisticated lens. That is presumably why previous systems-theoretical analyses of politicization have favored it over the conception I follow in this chapter.[935]

I will stipulate that the later version of Luhmann's theory is indeed more sophisticated. What we need to ask, therefore, is whether the increase in sophistication warrants abandoning our conceptual lens, or, conversely, whether the latter possesses some redeeming features that trump the socio-

932 See n 853.
933 See n 857.
934 See *Bundestagswahlleiter*, 'Bundestagswahl 2017: Ergebnisse', available at https://perma.cc/NQ9H-XM72.
935 See above, n 687.

logical currency of Luhmann's later work. Before answering that question, we will take a brief look at that work.

1. Autopoietic Closure

In the second half of the twentieth century, general systems theory gradually shifted its focus from input (into social systems) to closure (of social systems). In each case, organisms—that is, living systems—provided a paradigmatic example.

Thus, von Bertalanffy conceptualized organisms as open systems because they maintain themselves 'in a continuous inflow and outflow, a building up and breaking down of components'.[936] Roughly a decade later, by contrast, Francisco Varela, Humberto Maturana, and Ricardo Uribe qualified organisms as autopoietic organizations.[937] An autopoietic organization is closed, not open, because it produces its components through the network of its components, that is, recursively.[938] It is not only autonomous in its capacity to self-organize; it is also autonomous in that it itself is the product of its operation.[939]

Luhmann decided to harness the concept of autopoiesis for his analysis of social systems.[940] He argued that a social system can only maintain itself if each element within the system provides the nexus for future elements. Accordingly, there is no contact between the elements of a social system and its environment.[941] To provide a nexus, an element is self-referential; this means it contains within itself the unity between identity and difference.[942] Thus, communication—the (new) base unit of social systems—is

936 Ludwig von Bertalanffy, *General Systems Theory* (n 858) 39.

937 Francisco Varela, Humberto Maturana and Ricardo Uribe, 'Autopoiesis: The Organization of Living Systems, its Characterization and a Model', 5 BioSystems 187, 189 (1974).

938 See, e.g., Milan Zeleny, 'Self-Organization of Living Systems: A Formal Model of Autopoiesis', 4 Int'l J General Sys 13 (1977).

939 Francisco G Varela, Humberto R Maturana and Ricardo Uribe, 'Autopoiesis' (n 937) 188.

940 Niklas Luhmann, 'Autopoiesis, Handlung und kommunikative Verständigung', 11 Zeitschrift für Soziologie 366 (1982), and 'The Autopoiesis of Social Systems [1986]', 6 J Sociocybernetics 84 (2008).

941 Niklas Luhmann, *Social Systems* (John Bednarz, Jr, tr with Dirk Baecker, Stanford University Press, Stanford, 1995) 33.

942 Niklas Luhmann, 'Autopoiesis, Handlung und kommunikative Verständigung' (n 940) 369–70.

self-referential because it refers both to itself (the utterance) and, hetero-referentially, to the information the utterance conveys.[943] In other words, communication creates the boundary between the system in which takes place (as an utterance) and the information it conveys, which may lie in its environment.

As a result of social systems' operative closure, the legal system is differentiated from society[944] once legal operations refer to prior legal operations in the system.[945] To that end, communications within the legal system are characterized by a binary code of justice/injustice (or lawful/unlawful).[946] 'Only the law can say what is lawful and what is unlawful, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system's future operations.'[947]

2. Autopoietic Closure and Politicization Research

In consequence, we can no longer stipulate that constitutional adjudication is contained within the political system and thus susceptible to de-differentiating influences.[948] In Luhmann's later theory, the relationship between the political and the legal system plays out instead through 'structural coupling'.[949]

Structural coupling describes the reciprocal relations between different systems. They arise whenever one system presupposes something that exists

943 Niklas Luhmann, 'The Autopoiesis of Social Systems' (n 940) 86, and 'Operational Closure and Structural Coupling: The Differentiation of the Legal System', 13 Cardozo L Rev 1419, 1423–4 (1992).

944 Luhmann introduced the concept of a specific legal system before his scholarship embraced autopoiesis but after he had published the works on which this chapter is based. See Niklas Luhmann, 'Ausdifferenzierung des Rechtssystems', 7 Rechtstheorie 121 (1976).

945 Generally on the significance of codes for functional differentiation, Niklas Luhmann, '"Distinctions Directrices": Über Codierung von Semantiken und Systemen', in *Soziologische Aufklärung 4: Beiträge zur funktionalen Differenzierung der Gesellschaft* (Westdeutscher Verlag, Opladen, 1987) 13, 19–20.

946 Niklas Luhmann, 'Law as a Social System' (n 689) 139–41, and 'Operational Closure and Structural Coupling' (n 943) 1427–8.

947 Niklas Luhmann, 'Law as a Social System' (n 689) 139.

948 On the strict separation of law and politics as two closed social systems, Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main, 1993) 417–22.

949 For the conceptual antecedent in biology, see Humberto Maturana, 'The Organization of the Living: A Theory of the Living Organization', 7 Int'l J Man-Machine Stud 313, 326–8 (1975).

in its environment.[950] For instance, social systems require psychic systems because there is no communication without the latter. Structural coupling does not affect autopoiesis as such, for each system decides itself how to react to external irritations.[951] But it does influence the structures the system chooses to create.[952] To that end, it limits, and hence focuses, the irritations that reach the boundaries of the social systems linked by structural coupling.[953] For example, language provides the structural coupling between social and psychic systems because it limits irritations to things that can be expressed 'through language or the language-like use of signs'.[954]

According to Luhmann, constitutions provide the structural coupling between the political and the legal system[955] because they channel the reciprocal relations between politics and the law.[956] By limiting the points of (superficial) contact between both, they increase the likelihood of contact occurring in the first place.[957] Under a constitution, the legal system can decide itself whether to react to policy proposals and enact legislation; and the political system can learn to accommodate the effects of judicial intervention—such as declarations of unconstitutionality—because the intervention originates in an external system, and not within politics itself.[958]

On this view, constitutional courts are organizations that deal with issues of structural coupling.[959] But they remain part of the legal system because and as long as their operations use the code lawful/unlawful (or, to be exact, constitutional/unconstitutional). Consequently, politicization describes

950 Niklas Luhmann, 'Operational Closure and Structural Coupling' (n 943) 1432.
951 *Ibid.*
952 Niklas Luhmann, *Organization and Decision* (Dirk Baecker ed, Rhodes Barret tr, CUP, Cambridge, 2018) 328.
953 Niklas Luhmann, 'Verfassung als evolutionäre Errungenschaft', 9 Rechtshistorisches Journal 176, 204–5.
954 Niklas Luhmann, *Organization and Decision* (n 952) 329.
955 Niklas Luhmann, 'Operational Closure and Structural Coupling' (n 943) 1436–8.
956 *Id.*, 1436 and Niklas Luhmann, 'Verfassung als evolutionäre Errungenschaft' (n 953) 205–6 (1990).
957 Niklas Luhmann, *Das Recht der Gesellschaft* (n 948) 470.
958 Niklas Luhmann, 'Verfassung als evolutionäre Errungenschaft' (n 953) 207, and *Das Recht der Gesellschaft* (n 943) 478–80.
959 See Niklas Luhmann, *Organization and Decision* (n 952) 329–30, Alfons Bora, 'Politik und Recht' (n 687) 208–9, and Basil Bornemann, 'Politisierung des Rechts' (n 687) 87–8.

the moment in which a court ceases to use the code of the legal system and resorts to the political code of government/opposition.[960]

The problem with this conception of judicial politicization is that it is far too narrow to be of any practical use. The day seems far off when judicial appointments create a Supreme Court that strikes down a statute for the official reason not that it contravenes constitutional law but that it runs counter to the legislative majority's best interests (e.g., the interest in being re-elected). Of course, judicial rulings may reflect the national mood.[961] But to do so, they will claim that a law is either constitutional or unconstitutional, not that it is good or bad policy. What a code-based conception of politicization describes, then, is not so much the transformation of constitutional adjudication as its dissolution.

Systems theorists are aware of this conceptual deficiency.[962] For that reason, an alternative approach suggests extending the autopoietic conception of politicization to cases in which the legal code persists but is merely a façade for party-political considerations.[963] I do not consider this correction an improvement, however, for it describes a similarly implausible scenario. It requires us to assume that constitutional justices experience constitutional law not as real internal constraints but as putty in their hands, and we have no reason to do so.[964] It is not a coincidence, I believe, that the concept of politicization by judicial appointment does not involve the constitutional justices reasoning in bad faith and simply requires their behavior to be predictable, in party-political terms, from an *outsider's* perspective.[965]

Of course, one could go a step further and extend the autopoietic conception of judicial politicization to cases in which the legal and the political code yield similar outcomes. But in that case, we would simply be reformulating the traditional concept of politicization by judicial appointment, without any additional analytical insight. For these reasons, I submit that the theory of open social systems is more instructive than its successor

960 Alfons Bora, 'Politik und Recht' (n 687) 207. On the political system's code, Niklas Luhmann, 'Theorie der politischen Opposition', 36 Zeitschrift für Politik 13, 19–20 (1989), and *Das Recht der Gesellschaft* (n 943) 421.

961 See generally Robert A Dahl, 'Decision-Making in a Democracy' (n 815).

962 Basil Bornemann, 'Politisierung des Rechts' (n 687) 90, and Michael Hein and Stefan Ewert, 'Die Politisierung der Verfassungsgerichtsbarkeit' (n 687) 122.

963 See Michael Hein and Stefan Ewert, 'Die Politisierung der Verfassungsgerichtsbarkeit' (n 687) 123.

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

965 See n 771 and accompanying text.

because it makes explicit just how closely interwoven the political system and constitutional adjudication can—but need not—be.

VI. Conclusion

Politicization by judicial appointment has come to affect both the Supreme Court and the Federal Constitutional Court. What happens now is anyone's guess, however. A lot depends on the justices' cunning. Thus, it remains to be seen whether the justices on the Supreme Court are savvy enough to stave off potential threats to their institutional legitimacy. Furthermore, we have yet to find out how the parties who currently divvy up the Federal Constitutional Court's seats among themselves would react to a rise in the non-established parties' vote share. If they decide to share their power with the latter, it will be interesting to see how the justices react to their new, less ideologically temperate colleagues.

Conclusion

Legitimation durch Verfahren deals a fatal blow to not a single rival theory of political legitimacy or stability. Contrary to what Niklas Luhmann suggests, we still require the idea of justifiability to comprehend the political system. Without it, we would not fully understand why people comply with the law, and we could not measure their legitimacy beliefs against a normative standard of political justification. Therefore, we should treat Luhmann's book as well as his early political sociology in general as a *supplement* to existing theories of compliance or political stability, albeit a necessary one.

Thus, we already knew that people's legitimacy beliefs are not all there is to stability and that the latter is hard to achieve without at least a modicum of force. Thanks to Luhmann, we now have additional leads to follow; he teaches us that there are potentially many more relevant social-psychological mechanisms than legitimacy beliefs and the fear of punishment. I do not know to what extent the phenomena he makes out stand up to closer empirical analysis. In any event, they—as well as their interaction with more well-known mechanisms—deserve further investigation.

Until such time, we can analyze many more government institutions and decisions in the light of *Legitimation durch Verfahren* than Luhmann himself suggested. The variety and sophistication of his observations provide novel and insightful perspectives on long-standing problems of democratic government generally. In this book, I have tried to demonstrate this potential with regard to the US Supreme Court and the German Federal Constitutional Court. To be sure, *Legitimation durch Verfahren* does not allow us to develop a stand-alone theory of these institutions. Again, however, it serves to fill in gaps and suggests alternative readings, thereby helping complete the intricate mosaic that is constitutional adjudication.

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