# THE PEOPLE V. THE JUDICIARY

*Exploring the relationship between the people, the government and judicial review in the U.S., the U.K., and Germany*

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## ABSTRACT

This thesis examines a familiar, fundamental feature of judicial review: its inherent anti-majoritarian nature. It shows that what is often perceived as an anti-democratic feature of judicial review is often the consequence of the judiciary trying to impose limitation on executive powers.

Through the presentation of case studies from the United Kingdom, the United States, and Germany, I attempt to pin down what the respective courts understand under "the people", as well as when and why they bring up the people as a core argument in their reasoning. This "utilization" of the people in judicial constitutional argumentation is used as the basis for exploring the conflict between the executive and the court.

The thesis aims to define what role the judiciary and the executive play as representatives of the people and the guardians of democratic participation, respectively. While I highlight multiple examples of the democratic dimension and constitutional merits of judicial review, I also underline the reasons why it facilitates attacks against the judiciary not just in illiberal democracies, but also in countries where this practice enjoys a long-standing tradition and constitutional entrenchment.

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# INTRODUCTION

*The three comparators and their different understandings of judicial review and the people*

*"Im Namen des Volkes"*. This sentence, meaning "in the name of the people", is how all judgments of the German courts begin. It was also the first piece of inspiration for this thesis. There are countless books, articles, theses and the like debating the counter-majoritarian nature of judicial review.[1] But what does it mean, then, when the German Federal Constitutional Court, a judicial body known for its wide scope of powers in scrutinizing both legislation and executive action, passes its decisions in the name of the people?

The phrase, originally used in this form during the Weimar Republic, is meant to reference the fact that the judiciary, as the "third branch of public authority", is part of the sovereign power, which rests with the German people according to Article 20 (2) of the Basic Law.[2] As articulated in Article 92, the judges have been trusted with exercise of sovereign power of judicature, which they execute in the name of the people, the source of said sovereign power.[3] It follows that it is not the will of the people that the judiciary is bound by, but rather by the notion of popular sovereignty.

Even if "in the name of the people" is not a reference to vox populi, it is a significant, albeit symbolic expression of the judiciary's bond to the people. At the same time, there is no denying that constitutional adjudication was specifically designed to be counter-majoritarian as a mechanism to defend the minority against the "tyranny of the majority". While I believe that this is not a "difficulty" to begin with, since the purpose of judicial review *is* to limit the popularly elected branches from misusing the powers conferred upon them, it is exactly this

[1] Alexander Bickel (1962), The Least Dangerous Branch
[2] Leiser (1968), p. 502
[3] id.

paradox of the judiciary being bound to the people yet also being inherently counter-majoritarian that lies at the heart of this thesis.

Other than the fact that the judicial review is a concept meant to be a safeguard against the abuse of political power, in doing so, the Courts are exposed to substantial backlash from the executive. In countries like Hungary, Poland, or even Turkey that are considered illiberal, defective or backsliding democracies, attacks from the executive branch on the independence and powers of the judiciary are not surprising. Rather, the illiberal abuse of constitutional courts is only one puzzle piece in a whole scheme to dissolve the previous constitutional order and the rule of law.

Here, I attempt to show that this tension between the executive and the judiciary also exists in states where supposedly, the separation of powers and the system of checks and balances have not been obstructed by populist, authoritarian governments. While the depth and scope of the conflict may not be truly comparable to what is happening in illiberal states, the possibility that the respective courts may be shutting down executive decisions on the grounds of unconstitutionality can still trigger some hostility towards the judiciary.

In the selection of the three major case studies – the UK, the US, and Germany – my aim was to choose three established democracies with a completely different constitutional history. This reflects the reality of judicial power and how it varies from each country, with some courts having the power to declare laws unconstitutional, and others issuing mere, unbinding recommendations.[4]

On the one end of the scale, there is the United Kingdom and its historical, unwritten constitution based on countless conventions, practiced and developed for centuries. In the

[4] Schulze/Caroll (2011) p. 1

aftermath of the Glorious Revolution of 1688, with the adoption of the Bill of Rights (1689) and the Act of Settlement (1701), the British constitutional monarch, and with it, the notion of the sovereign Crown-in-Parliament was born.[5] It refers to the working relationship between both Houses of Parliament and the Crown: legislation passed by the Commons and the Lords are sent to the King or Queen for royal assent in order to become law.[6] The sovereignty lies with the Crown-in-Parliament and not with the people, as in the U.S. or Germany, which is a core reason why the judiciary was never granted the power to invalidate the laws born out of this arrangement.[7] Though the practice of constitutional review has never been codified, it is an invaluable element to upholding the doctrine of supremacy, limiting the executive from encroaching upon the powers allocated to the sovereign parliament.

On the other end is Germany with a highly technical Basic Law that includes a powerful eternity clause and lays down the rules governing judicial review in great detail. The Basic Law is a post-WWII constitution based on the principles dictated by the allied powers and adopted without any substantial contribution from the German people in 1949 for the Federal Republic. Since then, especially following the reunification of the two German territories under the Basic Law and its former Article 23, it has grown to enjoy an almost religious level of respect and appreciation by the public, with many even dubbing it the "Bible of the Germans"[8]. So much so that its 70th birthday was a cause for a big celebration in 2019.[9,10] According to a study conducted for the celebration in 2019, 88% of respondents answered the newspaper *Zeit* that they believed the Basic Law has been a success and that they were satisfied with it. The powers allocated to the Federal Constitutional Court in Article 93 (1) explicitly state the competence to



[5] Calabresi/Owens (2012), p. 28
[6] id.
[7] id.
[8] Berthold Kohler in the Frankfurter Allgemeine Zeitung, May 2019 (https://www.faz.net/aktuell/politik/inland/70-jahre-grundgesetz-eine-zeitlose-verfassung-16201310.html)
[9] https://www.70jahregrundgesetz.de/70jgg-de
[10] https://community.beck.de/2019/05/23/70-jahre-grundgesetz-das-grundgesetz-bedeutet-fuer-uns

invalidate federal and state laws, as well as acts of the executive for violating the catalogue of fundamental rights or for incompatibility with other provisions of the Basic Law. On a more symbolic note, judicial review has also been understood as an institutional guarantee of "never again", a reflection on the horrors of the NS-regime and a solemn constitutional promise to protect democracy and fundamental human rights.[11]

Somewhere in the middle, there is the United States, with an old, hard to amend constitution that has survived centuries – and introduced judicial review to the legal system from its inception. It is also the one that starts with the phrase "We the people", a famous nod to popular sovereignty, but then seems to somewhat forget about people in the subsequent provisions. In perhaps the most well-known, often cited *Marbury v. Madison* (1804), Chief Justice Marshall brings several reasons why it is inherent to the written, supreme Constitution that the judiciary is the one enforcing constitutional provisions and limitations on the exercise of public authority, marking a departure from the British practice. However, the extent of the judiciary's review powers, though significantly broader than in the UK, remains controversial and oft debated to this day, which is a far cry from the detailed allocation powers to the Constitutional Court in the German Basic Law.

Overall, through the following case studies, I aim to showcase how and to what end these courts refer to "the people", "popular sovereignty" or "democracy" in constitutional adjudication as ratio decidendi, as well as to highlight the indispensable democratic dimension of the counter-majoritarian judicial review.



[11] Baer (2019), p. 90

# CHAPTER 1 - THE THEORETICAL BASIS

At the core of the argumentation against judicial review is the objections over its compatibility with democracy. The principle of democracy is based on an inherent majority rule – therefore, the legislative decisions are made by the representatives of the citizens, giving power to those elected by the majority.[12] When the judiciary reviews these legislative decisions, it scrutinizes the policies of the representatives elected by the people, even though the judges themselves tend to lack the same popular endorsement and elective legitimacy.[13]

Notably, the practice of judicial review has been introduced to legal orders all over the word, with over 80% of the constitutions currently in force assigning the power of constitutional review to the respective judiciaries.[14]. The keyword here is "constitution" - in 1789, when the Constitution of the US entered into force and famously included a clause establishing judicial review, both having a written constitution as well as explicitly assigning the power of constitutional adjudication to the judiciary was considered a novelty. Since then, almost all countries have a written constitution and, counting the UK and the US, only ten of them were originally adopted prior to the twentieth century.[15]

Consequently, having a codified legal, constitutional basis has become the "norm" along with passing a written constitution. It is now considered to be a default that a new constitution needs a provision about judicial powers and constitutional review. It is therefore despite the



[12] Arias-Castaño (2021), p. 5
[13] id.
[14] Ginsburg/Versteeg (2013)
[15] According to the Constitute Project's database, https://www.constituteproject.org/constitutions?lang=en&status=in_force&status=is_draft

constitution's explicit provisions – and in several cases, the people who voted to adopt it – that many continue to argue that judicial review is anti-democratic.

There is little use in denying that it is indeed counter-majoritarian. Insofar as democratic legitimacy goes, the judiciary is the sole branch without any substantial popular backing. While the members of the legislature, often the head of government, and sometimes even the head of state, are directly elected by the people, judges, especially the justices on the highest courts with constitutional authority, are nominated and confirmed by one or both branches. In Germany, for example, the Constitutional Court's judges can only be elected by a two-thirds majority in the legislation, requiring a broad consensus across the aisles.[16] In the United States, the President nominates, and the Senate confirms the new judges of the Supreme Court, thereby allowing the bench to somewhat reflect the election returns.[17] Though this nomination process confers upon them an indirect democratic legitimation, it still cannot be equated with the direct electoral mandate of the legislation. Essentially, judicial review gives unelected judges the power to override the representatives to whom the people specifically delegated the competence to pass laws on their behalf[18].

However, the judiciary was never meant to be a pro-majoritarian branch. While judicial review has many purposes, being the guardian and the support system for the political majority was never one of them. In the Federalist No. 78, Alexander Hamilton famously declared that the courts represent the "bulwarks of a limited Constitution against legislative encroachments" and that "liberty can have nothing to fear from the judiciary alone"[19]. At its inception, judicial



[16] §§ 6, 7 BVerfGG (Act on the Federal Constitutional Court)
[17] Calabresi/Owens, p. 40
[18] Poole (2005), o. 698
[19] Federalist No. 78

review was meant to be a counterweight to the "tyranny of the majority", an assignment that was contra-majoritarian by design.

It is, fundamentally, an institutional guarantee and a defense mechanism against executive self-interest and the abuse of the careful balance of the allocated powers. The courts have the "unique institutional capacity" to offer protection and freedom from "government domination", while not imposing a threat to other essential democratic values.[20] After all, if we recall the historical circumstances that preceded the passage of the US Constitution, it was a culmination of a long fight towards independence from the arbitrary exercise of power from the colonizer British. The list of grievances included in the Declaration of Independence details how King George III abused his sovereign power to make laws serving solely his will[21] and obstruct any independence of the judiciary[22]. What fundamentally informed the Constitution a decade after the Declaration was the experience of unjust governance that failed to respect the people and their wish of democratic participation and governance, as well as the lack of an independent judiciary to offer remedies for such violations. Hamilton, once again, argued in the Federalist that

*"In a monarchy [an independent judiciary] is an excellent barrier to the despotism of the prince; in a republic it is no less an excellent barrier to the encroachments and the oppressions of the legislative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."*[23]

Consequently, the establishment of an independent judiciary with review powers was a deliberate bid to make sure that encroachment like the one the former colonists suffered under the hands of the colonizer can never happen again.[24] Furthermore, Hamilton makes it clear that

[20] Hall (2016), p. 404-405
[21] Grievances 1, 2 and 3, Declaration of Independence (1776)
[22] Grievances 8 and 9, id.
[23] The Federalist No. 78
[24] Cox (1996), p. 570

judicial review was conceived not just as a protector of the democratic institutional design, but also as a decidedly counter-majoritarian force that can keep the legislation and executive in check.

But perhaps even more importantly, the focus of judicial constitutional review was always supposed to be one the people. At its core, its establishment meant a valuable tool for the protection of fundamental rights from violations by the legislative and the executive.[25] Rights that have been conferred upon the people by the constitution, by legislation, by the simple act of being born. It represents something of a safety net for people whose rights may have been violated, for whom executive or legislative action may mean serious harm.

By their very nature, fundamental rights are anti-democratic and counter-majoritarian. Their core purpose is to be enforceable "weapons" of the minority against the state, which is built on the ideas of the majority. It follows that they were never meant to be matters of popular support, but instead a means to protect the minority against the majority that makes up the popularly elected branches. Hamilton's use the phrase "impartial administration of laws"[26] also shines a light on the fact that the judiciary is required to stay away from aligning itself with the majority and instead dedicate itself to make sure the laws do not unjustly give some preferential treatment. If fundamental rights were dependent on what the majority wanted them to mean and be, they would not make much sense and certainly would not be effective tools for protection of arbitrary discrimination.



[25] Cox (1996), p. 571
[26] see supra footnote 21

Consequently, judicial review is also about the fundamental rule of law notion of equality and equal protection before the law[27]. As Susanne Baer, a judge on the German Federal Constitutional Court writes,

*"Critical approaches to the law and studies in comparative constitutionalism allow us to understand why judicial review matters, namely: to whom. From that point of view, judicial review is not just a debatable idea, but it is about, specifically, children and women, non-patriarchal men and social and cultural minorities, poor people and others who are excluded. These are people in need of courts. For people, the rule of law is not just another concept of how things may be run, but is a protective device against arbitrariness, or outright hostility, of political majorities."*[28]

Finally, constitutional review provides a chance for minorities, both in the legislation as well as in society, to be heard and to be protected from being marginalized and silenced. For all intents and purposes, the courts are the guardians of the minorities whose interests and wishes may not be represented by the elected majority.

These functions assigned to the judiciary demonstrate that there is in fact an inherent, all-important democratic dimension to judicial constitutional review. Other than being a vehicle for the protection of democracy, as mentioned earlier, the judges do enjoy an indirect legitimation because they are nominated and appointed by the popularly elected legislation, the executive, or both. Furthermore, it provides a forum for constitutional dialogue between the public, the executive, and legislature. This also means that through constitutional review, the people are granted a chance of active political participation. It follows from the above-mentioned virtues of impartial administration of laws and the equal protection of the law, as Hamilton already argued, the judiciary allows the people to "force" their elected representatives to respect the constitutional constraints on the exercise of their power. And this duty is best left

[27] Baer (2019)
[28] id., p. 75

to the justices to carry out, because, unlike the elected representatives, the judiciary is independent and impartial.

In the following three chapters, I elaborate further on this observation and show the depth of the "democratic dimension" through the way people get involved in the cases presented below and how the courts takes them into consideration in their reasoning.

## CHAPTER 2 - UNITED KINGDOM

### The constitutional context of the *Miller* cases and what they mean for the Supreme Court's relationship to the people

*The following chapter focuses on two landmark cases in Brexit-related litigation: Miller I (2017) and Miller II (2019). Through analyzing these judgments, I seek to highlight the democratic dimension of judicial constitutional review. Secondly, I aim to underline how "the people" may be central to the constitutional reasoning used by both sides, and why that can potentially exacerbate an existing, but often dormant conflict between the judiciary and the executive.*

### 1. Introduction

*Miller I* and *Miller II*, arguably the most famous cases of the post-referendum era, were both fundamentally about the separation of powers within the domestic legal system. At first sight, they are typical examples of the "classic English" style of judicial constitutional review, which is based on the role of law and its principle of ultra vires [29] and therefore, revolves around the question whether the branch in question violated the power delegated to them by the sovereign parliament or encroached upon the powers that exclusively rest with Westminster.[30] However, the implications for the people and popular sovereignty run much deeper than that.



[29] Selway (2002), p. 218
[30] Poole: Legitimacy, Rights and Judicial Review (2005), at 697

While the *Miller I* judgment highlights a core tension between the elements of representative and direct democratic processes, *Miller II* revolves more around the conflict between the executive and the judicative branch.

They are also rare examples of constitutional strategic litigation, which allow private persons – or ordinary citizens, if you will –, to get involved in the affairs of the state and become important constitutional actors.[31] As such, the cases provide a stellar example of the democratic-participatory merits of judicial constitutional review. Simultaneously, they give an interesting peek into how the notion of "the people" can find its way into the arguments of two, diametrically opposing sides – and how the executive tends to define who "its people" are.

### *2.* Miller I

Around the time the case *R (Miller) v Secretary of State for Exiting the European Union* was referred to the Supreme Court on an appeal of the respondent, many who voted to remain in the EU had hoped that the Court would overturn the results of the referendum, or at least provide a loophole that would have allowed the UK to somehow backpedal from the decision to leave the integration.

This was a misconception, because the case now known as *Miller I* was never about the validity of the referendum or the merits and consequences of its results. Above all else, Gina Miller, a Guyanese-British businesswoman and legal activist, sought out the Court on a question about the separation of powers and the interpretation of parliamentary sovereignty. In essence, the central question of the case was whether parliamentary authorization was needed for the

[31] Powell (2019), p. 3

executive to invoke Article 50 of the Treaty on European Union (TEU), thereby commencing the UK's withdrawal proceedings from the EU.

Representing the May Cabinet, the Brexit Secretary David Davis argued that triggering Article 50 was a prerogative power, the execution of which did not require prior parliamentary consent. Miller and her fellow respondents instead referred to parliamentary sovereignty: the UK entered the EU by a corresponding act of Parliament, which meant that leaving the EU would require the consent of the representatives, as well. Thus, the case was less about giving those who wished to remain hope, and more about redrawing the parliamentary competency lines May's cabinet was determined to blur.

Though the case became synonymous with Miller's name, the Supreme Court's judgment followed a joint hearing of the appeal alongside two references with the same goal as Miller, from the Attorney General and the Court of Appeal of Northern Ireland, respectively. The Northern Irish references were launched in the wake of Northern Ireland voting to remain in the European Union in the referendum, and incumbent Prime Minister Nicola Sturgeon's insistence that the cabinet alone cannot decide about triggering Article 50 – Westminster's as well as the Scottish Parliament's assent was necessary.[32]

Curiously enough, both sides built their case around "the people" as a central argument. The cabinet asserted that it was merely fulfilling the public's wish by exercising the royal prerogative of notification in accordance with Article 50 TEU, which obliged solely to the executive under the power to conduct foreign relations.[33] Miller, meanwhile, argued that it is the sovereign parliament, the elected representative of the people, must get a say in a legal



[32] https://www.independent.co.uk/news/uk/politics/brexit-nicola-sturgeon-scotland-theresa-may-legal-challenge-supreme-court-appeal-case-a7404591.html
[33] Cygan (2022), p. 52

decision that will result in the loss of the domestically valid rights acquired from the EU treaties, as it is only Westminster that can expressly repeal one statue with another.[34]

The Supreme Court ruled in favor of Miller and the Northern Irish government, but Brexit was not defeated: the judgment was not concerned with the merits of the referendum, it merely stated that by the virtue of parliamentary sovereignty and the nature of the relationship between domestic law and Union law, Westminster was required to vote on commencing the Article 50 TEU procedure. In theory, the core of the decision itself had little to do with politics: if we peel back the layers of the media attention, political discourse and vicious attacks surrounding *Miller I* to the reveal the core matter of constitutional law, then it was a simple, well-known question of whether the executive planned to act ultra vires or not.

In the majority decision, the judges based their reasoning on the European Communities Act of 1972 (ECA), an act of Parliament authorizing the UK's membership in the EU. The ECA allowed the transfer of certain legislative competences to the Union and the adoption of EU law into domestic law.[35] Since the withdrawal would inadvertently result in changes in domestic law, particularly in the country's constitutional arrangements[36] and the individual domestic rights of UK residents rooted in EU law[37], they found that the constitution of the UK required that these changes be based on Parliamentary legislation.[38] The Court thus held that it would be "impermissible for the Government" to withdraw from the EU Treaties without prior parliamentary authorization.[39] Finally, the judgment referred to the act of Parliament authorizing the referendum and stated that it did not specify its possible consequences; because



[34] Cygan, id.
[35] Miller I at §§ 60, 67, 68
[36] id. At §§ 78 et seq.
[37] id. At §§ 69, 83
[38] id., at § 82
[39] id., at § 83

no legal change was authorized prior to the referendum, the only way to legally implement the outcome was by way of legislation.[40]

At this point, it is important to note that judicial constitutional review of legislation is contrary to parliamentary sovereignty and therefore non-existent in the UK. In the words of A.V. Dicey, "no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament".[41] This rule remained intact in the Miller I judgment, because the Court did not attempt to tell Parliament what to do. Instead, the Court held that the exercise of the royal prerogative without prior parliamentary authorization would have ultra vires and therefore unconstitutional. Thus, the Supreme Court effectively prevented the executive from denying Westminster its rightful, constitutionally justified place in the whole process.

Interestingly, in the aftermath of the judgment, Parliament complied by voting and confirming the referendums results, authorizing the cabinet to commence the withdrawal procedure. This was an occasion to reinvigorate discussion about the potentially changing scope of parliamentary sovereignty. While being mindful of its own competences vis-a-vis Parliament, the Court did make the following observation, citing a recommendation by the House of Lords Select Committee on the Constitution:

*"[B]ecause of the sovereignty of Parliament, referendums cannot be legally binding in the UK, and are therefore advisory. However, it would be difficult for Parliament to ignore a decisive expression of public opinion."*[42]

From this, it follows that parliamentary sovereignty affords Westminster to remain unbound not only by the other two branches, but also by popular will. Once the people choose to exercise their electoral power to select their representatives, the MPs cease to be bound by any

[40] id., at §§ 116 ff.
[41] Dicey (1915), pp. 39-40
[42] id., at § 125

obligations other than their own conscience. They can vote however they please and are not required to follow the prevailing public opinion in their respective constituencies – or even that of their own party. Consequently, it would have been well within the constitutional rights of the MPs to vote according to their conscience and their conscience only, regardless of what the people expressed in the referendum.

While the reasoning used by the Supreme Court did not by any means attempt to advise Parliament to respect or even disregard the referendum, it did shine a line on the complicated present of parliamentary sovereignty. If Westminster were to go against popular will and deny the consent to Brexit, it would have directly antagonized the majority who voted to leave the Union. At the same time, merely respecting the referendum would have meant disrespecting the constitutional principle of parliamentary sovereignty and essentially submit the MPs to whatever the public wanted.

While the judgment formally upheld the traditional understanding of parliamentary sovereignty, the result shows that Westminster effectively saw no choice but to carry out the will of the people instead of the will of the MPs. It follows that Parliament conceded their constitutional authority to make a final decision about the UK's fate to the people – quite the crucial matter both in legal terms and for the everyday life of each citizen. But then, if Westminster is willing to step aside for popular will, can we still talk about parliamentary sovereignty instead of popular sovereignty?

As Martin Loughlin points out, the use of referendums may as well be a symptom that the fundamental principle of parliamentary sovereignty is not just in jeopardy but has been more recently subject to change.[43] For example, Lord Steyn's 2005 obiter dictum in *R (Jackson) v*

[43] Loughlin, The British Constitution, 2018, p. 18

*Attorney General* seemed to allude to the fact that there may be limits to parliamentary sovereignty vis-a-vis judicial constitutional review. In his words,

*"[T]he Supreme Court might have to consider whether judicial review or the ordinary role of the courts was a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons could not abolish."*[44]

After *Jackson,* in 2011, Parliament passed the 'European Union Act', which subjected any further transfer of competences to the EU to a referendum, alluding to the fact that Parliament may slowly be losing its power to make any law.[45]

As the majority decision itself stated, the judges are "neither the parents nor the guardians of political conventions; they are merely observers."[46] According to A.V. Dicey, the UK constitution is the 'most flexible polity in existence'[47], which had developed over centuries responding to changes in political circumstances.[48] In similar vein, in his classic 1979 piece, 'The Political Constitution', JAG Griffith characterized the UK's constitution as something that "lives on, changing from day to day for the constitution is no more and no less than what happens."[49]

Maybe, then, what the judges "observed" in *Miller I* is another organic change in the constitutional order that might just mark a substantial shift away from parliamentary sovereignty towards popular sovereignty. On the topic of popular sovereignty, Griffith wrote that the UK has



[44] Jackson, at § 120
[45] Loughlin, id.
[46] id., at § 146
[47] Dicey (1915), p. 39
[48] Cygan (2022), p. 53
[49] Griffith (1979), p. 19

*"...stayed clear of one bit of nonsense which is currently advanced in countries as diverse in their political structure as the Chinese People's Republic, the Soviet Union and the United States of America. I mean the view that sovereignty resides with the people who delegate it to their politicians who hold it on trust for them."*[50]

Clearly, something has gradually changed over the forty-something years since Griffith's claim – in its true form, parliamentary sovereignty would have meant that the powers held by Westminster arise from the Crown-in-Parliament itself, and not the people, by whose views and desires no MP is bound.[51] The 2016 referendum encouraged the emergence of another democratic power opposing that of Parliament – the people.[52] With the growing number of referenda in the past couple of decades, the direct democratic power represented by the people and the referenda have grown to become a formidable manifestation of constituent power, ready to challenge the traditional notion of parliamentary sovereignty's staunch stance on representative democracy.[53]

Overall, this case us a more nuanced understanding of the democratic dimension of judicial review. Firstly, it was started on the application of Gina Miller, who was not affiliated with any state agency. The references from Northern Ireland only joined the case after the High Court judgment was passed, which the executive appealed. Applications by members of the public in constitutional affairs, such as this one, are quite rare, as they tend to initiate strategic litigation in local matters instead of state-wide ones that impact the entire constitutional order of the United Kingdom. A recent study, however, found, that this focus on local issues in litigation has proven to be beneficial contribution to the public administration when it comes to the quality



[50] Griffith (1979), p. 3
[51] Powell (2019), p. 11
[52] Laws (2018), p. 217.
[53] Powell (2019), p. 12

of local government services in England and Wales.[54] Whether a legislative body is considered supreme or not, it is the pinnacle of representative democracy that it is only Parliament that can decide to repeal law that conforms all constitutional principles and authorizes the state's membership in a supranational organization, from which obligations of the state and rights of the citizens can be derived. It is possible for the people to voice their opinions on laws, through protests, petitions and referenda, but it is only Parliament who can repeal a law. It follows that when a citizen appeals to the judiciary to have the Parliament's competences reinstated and respected against the agenda of the cabinet, the people personally get involved in the protection of democracy and the majority rule.

Secondly, I argue that the UK's version of constitutional review allows the protection of the democratic process. In *Miller I*, the applicant asserted that Westminster, the supreme legislative body of the United Kingdom that can "make or unmake any law whatsoever"[55] and authorized the country's entry into the Union, must have a say in triggering the exit procedure. The case was not about overruling the majority who voted for the UK to leave the Integration – it was about preserving the central role of Parliament, elected by the people to represent their interest in the process of law-making. Especially in light of the House of Lords Select Committee on the Constitution's recommendation about the non-binding nature of referenda, it is Parliament who is the ultimate arbiter in questions about implementing, amending and repealing laws that it passed in the first place.

Lastly, in a more indirect manner, the Court also revisited some of the ground rules in the relationship between the executive and the legislation, as well as some the core functions entrusted with the judiciary. After all, the key message of Miller I was that it is Parliament that

[54] Platt/Sunkin/Calvo: Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales (2010), p. 243
[55] Dicey (1902), p. 37 et seq.

ultimately needs to decide about the notification of withdrawal, not the executive. This distinction is important from an angle other than the separation of powers. In the constellation of 'Parliament v executive', it is only Parliament that houses representatives of both the majority and the minority, while the executive branch solely represents the majority. By having Parliament be the final authority, the opposition and the minority are, at the very least, given the chance to have their say and voice their concerns, even if in the end their input does not end up bringing about significant changes. Parliamentary scrutiny and authorization are therefore not merely symbolic elements to the formal separation of powers, but also a basic democratic right conferred upon current minorities. Conclusively, the judiciary here allowed the protection of minority rights in the legislation, thus underlining that MPs remain the ones truly representing "the people".

To sum it up: with *Miller I,* the Court put the modern woes of parliamentary sovereignty on full display, and Westminster's subsequent vote confirmed the growing importance of the people in democratic process. Additionally, the case proves that constitutional review gives the people and the public the chance to participate in the constitutional process and protect the fundamental democratic tenets the state is built on.



### 3. Miller II

Some two years after the *Miller I, R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* was decided by the Supreme Court. Similarly, this case centered around the allocation of powers between the legislative and executive branches.

The fact that it was Gina Miller who once again commenced constitutional review proceedings is of crucial importance to assessing the *Miller II* case in context and the executive 'backlash'

the judgment sparked, the latter of which is perhaps of bigger relevance in this case as the holding itself.

Also known as "the case of prorogation"[56], the Court revisited the withdrawal proceedings at a later stage, although indirectly. In August 2019, PM Boris Johnson advised Her Majesty to prorogue Parliament. This prorogation, a royal prerogative power that formally ends a parliamentary session, was supposed to last around a month. When Parliament is prorogued, MPs cannot meet or debate – which would have coincided with the final weeks before the UK was set to complete its withdrawal from the European Union.[57] Since this break was significantly longer than the usual five days to one week, especially due to the looming 'Exit Day' on October 31, 2019, Gina Miller stepped in.[58]

Deciding in September 2019, the Supreme Court found that the advice given to Her Majesty had been unlawful. Arguing with the importance of parliamentary sovereignty, the judges unanimously held that any advice to prorogue Parliament is unlawful, "if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions".[59]

Due to the exceptional circumstances presented by Brexit, there was no reasonable justification for preventing Parliament from "carrying out its constitutional role for five out of a possible eight weeks" leading up to Exit Day.[60] In essence, the unanimous judgment argued that the prorogation would have made the executive's accountability to Parliament regarding the terms of the withdrawal impossible, which is why it was up to the Supreme Court to enforce the



[56] Loughlin, The Case of Prorogation, 2019
[57] Twomey (2020), p. 3
[58] id.
[59] Miller II, § 50
[60] id., at § 56

executive's legal accountability, ensure the proper restoration of Westminster's constitutional powers and prevent the cabinet from abusing its own.[61]

Defeated in Court, Johnson's cabinet answered by launching an independent inquiry into constitutional review and pledging to reform it.[62] These reforms have since been unveiled and include plans to codify the terms of coonstitutional review vis-a-vis executive action.[63]

The cabinet also plans to repeal the 'Fixed-term Parliamentary Act' of 2011, thereby reinstating the prerogative power of parliamentary dissolution and, through the inclusion of a broad ouster clause, would make the exercise of this power non-justiciable, excluding judicial inquiry.[64] From the Explanatory Notes provided to the Draft Repeal Bill, one can quickly notice that the wording of the ouster clause was a deliberate choice from preventing the judiciary from adopting a similar approach as it did in Miller II when reviewing the use of the prerogative.[65] Other than seeking to prevent the judiciary from reviewing any more parliamentary dissolution cases, the cabinet is also aiming to provide ample ground to future ouster clauses that would keep the courts from reviewing certain types of executive action.[66]

Lastly, and perhaps most importantly, plans include the introduction of 'prospective-only quashing orders', which would limit or eliminate the retrospective effects of the nullification of executive action by constitutional review. The latter objective is especially worrying from the perspective of popular access to the courts because those affected by unlawful executive action would be denied remedy, discouraging members of the public from seeking judicial constitutional review.



[61] Cygan (2022), p. 55
[62] Cygan, id.
[63] Elliott (2020), p. 644
[64] id.
[65] Fixed-term Parliaments Act 2011 (Repeal) Bill: Explanatory Notes at [17], available at ⟨www.gov.uk/government/publications/draft-fixed-term-parliaments-act-repeal-bill) = Elliott, id.
[66] Elliott, id.

Johnson's cabinet clearly strives for curbing the judiciary's competences to avoid accountability. Should this plan become reality, people like Gina Miller will not be able to seek effective judicial remedies against an executive that oversteps competency lines. At the same time, fundamental rights violations would be substantially harder to remedy, as the elimination of the retrospective effect of judicial nullification would lead to the upholding of countless violations prior to the judgment. This way, people who suffer from such violations by the hand of the executive would be denied the most effective remedy available, ultimately making the option of litigation less desirable.

Such ambitions are particularly worrisome because strategic constitutional litigations have proven to be effective tools against executive violations so far. It allows the public access to courts, a chance of political participation and reinforces the idea that delegated powers cannot remain unchecked. In fact, the courts are not just the "means" by which the people can hold their leaders accountable, but also represent a public forum for them to realize their role as constitutional actors and commence constructive, important dialogue on the future of constitutional democracy. After all, the cabinet works on a popular mandate, and it serves the people, not the other way around. The people do have the power to express their will outside of the regularly occurring elections, because accountability is not static moment in time – it is a constant, never-ending process, allowing the people to keep the cabinet in check between elections whenever it tries to encroach upon the powers of Parliament. Consequently, the public must be allowed to hold the executive responsible and demand political transparency by vesting this power in other state actors capable to overrule unlawful actions. Therefore, constitutional review can be the "lever of change" [67] that helps keep democratically elected leaders accountable and reinforce the constitutional traditions of the country, like the separation of powers and the sovereignty of Parliament. This is the main reason why *Miller/Cherry* is

[67] Platt et al, id.

connected to the pursuit of this thesis in determining the democratic dimension judicial constitutional review.

However, the cabinet's apparent targeting of judicial constitutional review alone signifies why giving the public the power to join constitutional litigations benefits the democratic process. If constitutional litigation did not allow citizens to voice their concerns against executive conduct and contribute to the supervision of the separation of powers, then the cabinet would not seek to limit its accessibility as much as possible. It is clear, however, that the cabinet feels threatened by the oversight and the curbing of its powers that these types of constitutional cases present.

Furthermore, as touched upon earlier, high-profile cases of constitutional matters such as both *Miller* cases attract significant attention from the public and the media alike. They provide a stellar opportunity for people to inform themselves in-depth about the state's constitutional affairs and how it impacts their rights and privileges as citizens. Limiting the public in their power to seek out the courts and with it, the public's attention, would only benefit the executive in its quest to get away with violations it otherwise could not under close public and judicial scrutiny.

This backlash from parts of the public and the executive shows how significant Miller's constitutional activism was proven to be. On the one hand, it is hard to ignore the implications of having a political activist using her means for public causes, who happens to be a politically independent woman of color born in a then-colony of the UK[68], and who, alongside of her family, has been subjected to constant, violent death threats ever since she first appeared on the



[68] BBC News, 25 September 2019, https://www.bbc.com/news/uk-politics-37861888

scene.[69] Coupled with the executive's ambitious and clearly vengeful plan of attack to curtail judicial constitutional review, another angle becomes visible.

Similarly, as in *Miller I*, this case also has some connections to the protection of democratic minorities. Once again, allowing Parliament to debate the terms and conditions of the withdrawal gives everyone represented a voice, not just the majority behind the executive or behind the referendum results. However, paradoxically enough, a cabinet that is in theory willing to subject itself to parliamentary oversight and judicial scrutiny, tends to really dislike when the two branches seek to carry out these jobs. For the executive, it is not just the mere fact that the opposition MPs may criticize the chosen approach to Brexit or that the judiciary can struck down executive decisions by using the people and democracy as argument that hurts. Rather, it is also about the circumstances: that the Court does so on the application of a person the cabinet may not consider to be a representative of its own image of the people – or that these MPs are representing people who disagree with Brexit and the cabinet's approach entirely. This executive aversion to submit to constitutional-democratic limitations and letting people go to Court in a bid to stop executive action is further proof of the democratic dimension of judicial constitutional review, as well its tremendous contributions to political accountability.

Checks and balances are the lifeblood of functioning democracies, and judicial constitutional review allows the public to participate in this control mechanism. Thus, without the courts, popular oversight cannot function effectively, and neither can a democracy.

My overall assessment is, therefore, that as shown in the *Miller* cases, the people can and must be able to serve as a judicial catalyst towards limiting the executive in its efforts to expand their



[69] Damian Whitworth, The Times, 30 September 2019, https://www.thetimes.co.uk/article/gina-miller-interview-on-death-threats-brexit-and-boris-johnson-jvpxz3jvf

own powers while unlawfully curbing the functions of the democratically elected representatives of the people.

## CHAPTER 3 – THE UNITED STATES

### *We* the people? The dichotomy of "the people" and the woes of a representative democracy

*In this chapter, I turn to the United States to examine the limits of judicial power and two different perspectives when it comes to giving way to the will of the people. Through analyzing two recent, landmark decisions on the legal nature and validity of same-sex marriage, I highlight how the judiciary can possibly both give people a voice and take it away from them at the same time.*

### 1. Introduction

As detailed in chapter one, the constitutional history of the United States was deeply impacted by the centuries of British rule. The introduction of a written, supreme Constitution was certainly influenced by the prior colonial practice and was a deliberate attempt to improve upon several of the perceived shortcomings of the British constitutional order.[70]

While in the UK, the Supreme Court's constitutional power evolved by the nature of a constitutional convention, the US Constitution explicitly prescribes its existence in Article III, Sections 1 and 2. Yet, compared to the German Basic Law's clear, detailed description of review powers in its Article 93, the US Constitution's text leaves many details up to interpretation, including the exact scope and limits of these powers. In fact, what the judiciary can or cannot review was not explicitly written into the Constitution.[71] A somewhat more definitive account of judicial review stems from *Marbury* and *McCulloch* instead of the Constitution – and ever since, there were no serious, substantial attempts to discredit or dispute

[70] Calabresi/Owens, p. 41
[71] Deener (1952), p. 1082

Chief Justice Marshall's argumentation[72]. However, the Constitution's wiggle room in terms of defining the Supreme Court's exact constitutional review powers has since then provided the grounds for judicial controversies and the critique of "judicial activism". Even though both the Constitution and *Marbury* are well over two hundred years old, there is still no agreement on how far the justices can go in scrutinizing acts of legislation, especially when the Constitution remains silent on the issue at hand.

This study on the United States is also aimed to highlight different approaches to who "the people" are. On the one hand, people can be the respective, current democratic majorities. On the other hand, they can be represented as such by state and federal legislative bodies. However, there is also there remains n of what popular will truly is – and how it can be expressed. In this chapter, I explore some of the approaches to this dilemma while analyzing how this use of "the people" can contribute to the democratic dimension of judicial review.

The two cases presented here, *Windsor* (2013) and *Obergefell* (2015), are the culmination of a decades-long discussion on the decriminalization and recognition of same-sex relationships, that involved the people, state legislation, Congress, and the courts.

In parallel to the judiciary's growing acceptance of equal rights for same-sex couples, there were similar processes happening within the public. A year after the Minnesota Supreme Court's judgment in *Baker v. Nelson* (1971), holding that a Minnesota county court was required neither by law, nor by the Constitution to issue a marriage license to a same-sex couple, the National Opinion Research Center (NORC) at the University of Chicago found in its first



[72] Calabresi/Owens, id.

General Social Survey (GSS) that 73% of the respondents found "sexual relations between two adults of the same sex" to be "always wrong."[73]

Some fifteen years later, in *Bowers v. Hardwick* (1986), the United States Supreme Court upheld a Georgia sodomy law that classified same-sex intercourse as a felony. NORC's 1987 poll showed that 77% of the respondents found same-sex relationships to be 'always wrong'.[74]

The tide seemed to have turned around the time the Court struck down all sodomy laws as unconstitutional in *Lawrence v. Texas* (2003). NORC's 2002 study found only 55% of respondents continued to feel like same-sex relationships were "always wrong". In a subsequent, May 2004 Gallup poll, 42% of respondents stated to support the recognition of same-sex marriages as legally valid.[75]

In 2013 and 2015, when *Windsor* and *Obergefell* were decided, Gallup's polls recorded 54% and 60% support for the recognition and universal legalization of same-sex marriage, respectively.[76] Thus, as a point of departure, public opinion evolved over the decades from regarding same-sex relationships as taboo and "always wrong" to the majority openly supporting the adoption of marriage equality.

The famous English legal scholar, A.V. Dicey wrote the following in his seminal 1915 work on the courts and popular opinion:

*"[J]udges know nothing of the will of the people except in so far as that will is expressed by an Act of Parliament"*[77]



[73] AEI Studies in Public Opinion, Attitudes About Homosexuality & Gay Marriage (NORC/GSS1973-2002), complied 2004 by Karlyn Bowman, Resident Fellow, AEI, and Bryan O'Keefe, Staff Assistant, AEI – p. 2
[74] id.
[75] id.
[76] Gallup News Service, Gallup Poll Social Series: Values And Beliefs, complied May 2021, at 20.
[77] Dicey (1915), p. 28

While Dicey's observation referred solely to the practice of the British judiciary, its merits may be applicable to the US Supreme Court, as well. After all, popular sovereignty is expressed through the representatives of the people on Congress, who adopt laws on behalf of the public that elected them. In similar vein, the landmark South African death penalty case, *S v. Makwanyane* (1995), prompted Chief Justice Chaskalson[78] to declare that public opinion was "no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour"[79]. In fact, the Chief Justice argued, "there would be no need for constitutional adjudication"[80], if public opinion were to be decisive for the Court's judgment.[81] For the Court to be swayed by current and ever-changing public opinion would simultaneously mean a diversion "from its duty to act as an independent arbiter of the Constitution".[82]

However, as sound as Dicey's and Chaskalson's reasonings are, there is evidence that the Court may take prevailing public opinion into consideration – but not for the reason one might think. Bryan and Kromphardt found that is mostly when public support for the Supreme Court is low or the case salience is high that the justices become more amenable to listening to current popular tendencies.[83] Since there is evidence that the justices' responsiveness to popular attitude can positively affect the maintenance of public support, it is therefore a strategic choice for the justices to show willingness towards listening to the public, even if it goes against their own personal policy preferences[84].

For the purposes of this chapter, therefore, these polls bear relevance only so far that they possibly represent one manifestation of popular will and public participation, as well as

[78] Klug (1996), p. 62
[79] Makwanyane (1995) at § 88
[80] id.
[81] Klug, id.
[82] Makwanyane (1995), at § 89
[83] Bryan/Kromphardt (2016), p. 300 et seq.
[84] Black/Wedeking/Owens/Wohlfarth (2016), p. 703

highlight a certain dichotomy in the institutional understanding of the "people". In the following, *Windsor* and *Obergefell* may show that there are other manifestations that can bear more weight for judicial reasoning then the results of these studies.

## 2. US v. Windsor (2013)

The first case study concerns Supreme Court's 2013 judgment in *United States v. Windsor*. The respondent, Edith Windsor, was set to inherit her wife's entire estate, and subsequently applied for marital exemption from the federal estate tax. However, she did not qualify to receive such an exemption because under Section 3 of the "Defense of Marriage Act" (DOMA), she was not a "surviving spouse".

DOMA was a 1996 Act of Congress, signed into law by then-President Bill Clinton, in which Section 3 (a) defined the term "marriage" as the union of one man and one woman for federal purposes.[85] It also mandated that those states with a ban on same-sex marriage do not have to recognize such marriages performed in other states (Section 2 (a)).[86] Subsequently, by June 2013, ten U.S. states and the District of Columbia legalized same-sex marriage.[87] The first one, Massachusetts, did so after a state supreme court decision,[88] while Vermont became the the first state to adopt marriage equality by legislative means in April 2009.[89]

Edith Windsor and her wife, Thea Spyer, wed in Canada and resided in New York, a state which legalized marriage equality and recognized the couple's marriage as valid.[90] Speyer passed away in 2009 and left her entire estate to Windsor, who sought exemption from federal estate

[85] Kelly, Britannica: Defense of Marriage Act, https://www.britannica.com/topic/Defense-of-Marriage-Act
[86] id.
[87] https://state.1keydata.com/date-same-sex-marriage-legalized-by-state.php
[88] Reuters, 2012 - https://www.reuters.com/article/us-usa-gaymariiage-prop8-idUKTRE8161Y220120207
[89] id.
[90] Windsor (2013), Syllabus, p. 1

tax on the grounds that she was a surviving spouse.[91] However, for federal tax purposes, DOMA's Section 3 was decisive, thereby barring Windsor from being considered a "surviving spouse".

Windsor paid the estate tax after being denied a refund by the Internal Revenue Service (IRS), and then sued for a refund in the United States District Court for the Southern District of New York. While the decision was pending, the Attorney General stated that the Department of Justice (DOJ), on the instructions of President Barack Obama, would no longer defend Section 3 of DOMA, believing it to be unconstitutional.[92]

Even though the District Court ruled against the United States on the merits of the tax refund suit and held that Section 3 was unconstitutional, the DOJ appealed. The Second Circuit, however, affirmed the judgment, prompting the executive branch – which chose not to comply with the judgment –, to turn to the Supreme Court. Despite not defending DOMA, the executive branch, represented by the Attorney General, continued to enforce it in apparent effort to, on the one hand, provide "Congress a full and fair opportunity to participate in the litigation", and on the other, to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised."[93] The Bipartisan Legal Advisory Group (BLAG) of the House of Representatives took the opportunity offered by the Attorney General and voted to intervene in the litigation to defend the constitutionality of §3 of DOMA.[94]

Justice Anthony Kennedy, who also penned the majority opinion in *Lawrence*, helmed the case, with Justices Breyer, Ginsburg, Sotomayor and Kagan joining him striking down Section 3 as unconstitutional.



[91] id.
[92] Windsor, id.
[93] id.
[94] id.

The majority opinion held that Section 3 represented "a deprivation of the liberty of the person protected by the Fifth Amendment"[95]. Furthermore, the justices argued that Section 3 violated its own purpose by "disparaging and injuring those" whom it was "sought to protect in personhood and dignity."[96] The New York law which allowed same-sex couples to wed and to recognize marriages performed elsewhere, "sought to eliminate inequality", while DOMA's "principal effect [was] to identify a subset of state-sanctioned marriages and make them unequal.[97] According to Justice Kennedy, "DOMA's principal purpose [was] to impose inequality", and was not aimed to provide legitimate reasons, such as executive efficiency.[98] Thus, DOMA created "two contradictory marriage regimes within the same state" and forced "same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect."[99] The majority therefore found that DOMA violated "basic due process and equal protection principles applicable to the Federal Government" under the Fifth Amendment to the Constitution.[100]

There is no denying that in the social-political context, *Windsor* was a major step towards creating equal conditions for all kinds of relationships and marriages on the federal level, despite not legalizing same-sex marriage in the entire country. However, the legal dimension of the judgment was not without its controversies.

Firstly, up until *Windsor*, the regulation of marriage and divorce was usually covered by the sovereignty of the states, and not the Union.[101] For this reason, many found it curious that the

[95] id., p. 25
[96] id., p. 26
[97] id., 22
[98] id.
[99] id.
[100] id., p. 20
[101] Prescott (2013), p. 51

majority chose, as Justice Scalia pointed out, a mix between equal protection, substantive due process and federalism to strike down DOMA[102], instead of merely applying the principle of federalism to protect state competences in passing policies that involve marriage and divorce.[103] As Chief Justice Roberts highlighted, the majority did not answer the question whether individual states could still exercise their authority and define marriage in the traditional way, so that it would exclude same-sex couples.[104]

But beyond federalism, the *Windsor* opinion had multiple implications for the nature of judicial power as well as the considerations of "the people". In fact, it goes to back to one of the fundamental discussions presented in this thesis: the counter-majoritarian difficulty. When the Supreme Court struck down DOMA, it invalidated an Act passed by the democratically elected Congress almost twenty years prior.

As a universal rule, a representative democracy lives by the principles that laws and decisions governing areas of life, such as marriage, are made by the representatives of the people. This is the first and foremost power of the legislation and it does not belong to either the executive branch or the judiciary. In *Windsor,* the majority faced criticism for attempting to blur these clear lines by engaging in something reminiscent of "judicial legislation".

Particularly Justice Scalia's strongly worded dissent shines a light on this conflict. Already in the very first paragraph, he stated that *Windsor* was "about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former."[105] He argues that the Court did not have power to hear the case, but even if did, it had no power under the Constitution to



[102] Windsor, Scalia, J. dissenting, p. 18
[103] Prescott (2013), p. 55
[104] Windsor, Roberts, CJ., dissenting, p. 2
[105] Windsor, Scalia, J. dissenting, p. 1

invalidate this democratically adopted legislation".[106] The Constitution was crafted specifically to enable the people to "guard their right to self-rule against the black-robed supremacy that today's majority finds so attractive."[107] It is not within the power of the Court "to say what the law is."[108] His final assessment on the merits of the case refers to the usefulness of the public debate surrounding the issue in *Windsor:* not only does he state that the judgment will lead to the "distortion of our society's debate over marriage" but also that it essentially frustrates the US "system of government that permits us to rule ourselves".[109] Since this discussion led to different results in each of the states, with some legalizing, others banning gay marriage, and then some adopting civil partnerships, Scalia argued that the power to reach decisions about same-sex marriage should have remained with the people, and not the Court.[110]

For Scalia, then, "the people" here mean the respective inhabitants of each state, who, under the traditional understanding of the state's authority in issues concerning marriage, have the power to decide whether they support marriage equality or not. For Kennedy, "the people" whose rights were to be protected were the ones impacted by DOMA's Section 3 and the unequal approaches to same-sex marriage among the states. The fundamental difference here is that Scalia prefers to fall back on popular sovereignty and its virtue to allow the people to elect their representatives who will implement laws on their behalf – an arrangement that cannot be overridden by the judiciary in a counter-majoritarian effort. Meanwhile, Kennedy places the Court's invaluable role in protecting the liberty and equal rights of those who are discriminated against, above this sentiment. Consequently, these two different definitions who "the people" are in this case stand in diametrical opposition of one another.



[106] id.
[107] id., p. 3
[108] id., p. 4
[109] id., p. 25
[110] id., p. 25-26

At this point, one could argue that DOMA, the invalidated federal statute in question, did no longer enjoy majority support – as seen by Gallup's findings above, that the support for same-sex marriage was higher than its opposition –, therefore, its overturning did not constitute a "nullification of the will of the lawmaking majority" and thereby a counter-majoritarian action from the Court.[111] However, as discussed earlier, the mere fact that popular attitudes are changing does not compel the judiciary to fall in line with public opinion. Yet, it may signify that the branch with "the democratic credentials to review and reconsider this legislation" can be subject to change and does not necessarily depend on the existence of majoritarian support.[112] Overall, this perspective shows that there is more to the democratic dimension of judicial review than the proponents of the counter-majoritarian argument let on.

### 3. Obergefell v. Hodges (2015)

Though widely known as *Obergefell v. Hodges*, the decision that legalized same-sex marriage on the federal level was the combination of multiple lawsuits from U.S. states where marriage equality was yet to be recognized. The lead plaintiff, Jim Obergefell, was a widower following the death of his husband, whom he legally married in Maryland. However, the State of Ohio, their place of residence, did not recognize marriage, which was the reason why Obergefell was not allowed to be listed on his terminally ill husband's death certificate as his surviving spouse. This prompted the couple to file a lawsuit against Ohio Governor John Kasich, in the case known as *Obergefell v. Kasich*.

The separate cases from Ohio, Tennessee, Michigan and Kentucky were joined by the Supreme Court to determine whether the petitioners had the liberty to have their same-sex marriages

[111] Padilla-Babilonia (2019), p. 78
[112] id.

"deemed lawful on the same terms and conditions as marriages between persons of the opposite sex".[113]

At the time the Supreme Court reached its decision in June 2015, 37 of the 50 states have legalized same-sex marriage.[114] The way this was achieved varied between them, with some adopting marriage equality by way of referendum or legislation, while others did so after a decision by a state or federal court.

In the majority opinion delivered by Justice Kennedy, who was once again joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, the petitioners' liberty to have their marriages deemed lawful in all US states was affirmed. The Court overturned *Baker*, holding that the "petitioners ask for equal dignity in the eyes of the law", a right which is granted to them by the Constitution.[115]

Justice Kennedy based his argument on four main principles to demonstrate that the right to marry is indeed a fundamental right,[116], with the first one stating that "the right to personal choice is inherent to the concept of individual liberty.[117] The second principle, as held by the Court in earlier decisions, encompasses that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to committed individuals."[118] Thirdly, there is precedent that marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[119] The final principle states that the "Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order."[120] In fact, the state provides some benefits for those with marital status,



[113] Obergefell, Syllabus, 1.
[114] https://state.1keydata.com/date-same-sex-marriage-legalized-by-state.php
[115] Obergefell, at 28
[116] Watts (2020), p. 9
[117] Obergefell, Majority Opinion, p. 12
[118] id., p. 13
[119] id., p. 14
[120] Obergefell, Majority Opinion, p. 16

therefore, when same-sex couples are not afforded these benefits, "exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects."[121]

Justice Kennedy applied these four principles to same-sex couples under the argument of the Substantive Due Process, writing that "laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by [the Constitution]."[122]

Even though *Obergefell* authorized the performance and recognition of same-sex marriage over the entire U.S. territory, thereby giving many couples equal footing to their heterosexual peers, it remains a deeply controversial decision. On the hand, critiques highlighted the fact that even though the majority opinion heavily relies on the concept of equal dignity, it has neither a legal definition in the Constitution nor was it ever used in any prior Supreme Court judgments.[123] Others called it "undoubtedly one of the worst decisions ever made by the US Supreme Court in all its history", pointing out that the Court engaged in judicial legislation, even though that role was always assigned to Congress.[124]

This aspect of the case was of the greatest importance to the four dissenting justices, who, in similar vein to *Windsor,* each filed their own opinion, scrutinizing both the merits of the case, as well as the Court's decision to take up *Obergefell* at all.

Chief Justice Roberts, once more referring to the counter-majoritarian difficulty, demanded more sensitivity "to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment."[125] He expressed his disappointment over the "majority's extravagant conception of judicial supremacy", which he believed to manifest itself in the "description— and dismissal—of the public debate regarding

[121] id.
[122] id., p. 18
[123] Watts (2020), p. iii
[124] Zimmermann (2015), p. 77
[125] Obergefell, Roberts, CJ., dissenting, p. 29

same-sex marriage."[126] According to Roberts, this "accumulation of power" comes "at the expense of the people", who are "in the midst of a serios and thoughtful public debate in the issue".[127]

Justice Scalia's dissent was aimed to "call attention to this Court's threat to American democracy," because the "constitutional revision by an unelected committee of nine" essentially robbed "the People of the freedom to govern themselves."[128] Similarly, as the Chief Justice, Scalia wrote on the merits "public debate" over the issue, which he characterized as "American democracy at its best".[129] In perhaps his most scathing indictment of the majority opinion, Scalia expressed the following:

*"This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."*[130]

Calling the bench "strikingly unrepresentative"[131] in the realm of this issue, Scalia accuses the Court of taking from the "People a question properly left to them"[132].

At the end of the day, both the majority opinion and the dissenters seem to have "expressed an allegiance to principles of deliberative democracy"[133], albeit in different ways. For the dissenters, democratic deliberations of political significance must continue and reach their natural conclusion without judicial interference, as these questions do not belong to the



[126] id., p. 25
[127] id., p. 26
[128] Obergefell, Scalia, J., dissenting, p. 1
[129] id., p. 2
[130] id., p. 5
[131] id., p. 6
[132] id., p. 9
[133] Staszewski 2017, p. 31

Supreme Court[134], since it is "not a legislature" and is therefore not concerned with the question "whether same-sex marriage is a good idea".[135]

Kennedy relies on previous legislative successes and referenda where the people seem to have embraced marriage equality[136], but they also see the democratic process as something that goes beyond legislation and referenda. The majority opinion refers to "grassroots campaigns, countless studies, papers, books, and other popular and scholarly writings, as well as extensive litigation"[137] as elements of the deliberative process that informed the continued conversation on the issue.[138] This is perhaps one of the major reasons why Kennedy dismisses the argument to "await further public discussion and political measures before licensing same-sex marriages", because, as he sees it, "there has been far more deliberation than this argument acknowledges"[139]. In the polls shown above, these deliberations ended up being quite fruitful, considerably contributing to the rise in the acceptance of same-sex relationships. Lastly, for Kennedy, this also has a fundamental rights dimension: in the opinion, he asserted the view that "[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right".[140]

*Obergefell's* core issue is one the Constitution is silent on – and in such cases, it is the legislation – the elected representatives of "We the People" – that needs to decide, not the judiciary. Yet, it is hard to argue that *Obergefell* was anti-democratic. The dissenters' arguments about judicial legislation certainly merit on the grounds of separation of powers, however, that does not mean that the majority opinion essentially ended all democratic discourse on this topic once and for



[134] Landau (2015), p. 35
[135] Roberts, id., p. 2
[136] Landau (2015), p. 35
[137] Obergefell, Majority Opinion, p. 23
[138] Landau, id.
[139] Majority Opinion, p. 23
[140] id., p. 24

all.[141] As Siegel argues, "Brown did not end the debate over racial segregation", and neither did *Obergefell* vis-a-vis marriage equality: it merely channeled it into new forms.[142] While public support for gay marriage is at an all-time high right now[143], passionate groups of dissenters remain, and the conversation continues. The judgment did a tremendous service for the protection of minority rights, encouraging acceptance, and allowing a considerable faction of American society to enjoy equal rights and benefits as every other opposite-sex couple.

Overall, *Windsor* and *Obergefell* shine a light on the dichotomy of "the people", who can be – and are – used in judicial argumentation for limiting the executive, or even the legislature, but also for limiting the judiciary in the scope of its powers. "The people" are both the majority supporting same-sex marriage, as well as the electorate who express their will in this topic one way or another, and they are also the individuals who are part of minority groups that are negatively impacted by the laws and practices of the state. In protecting one of these groups, the Court may end up "offending" the other – and in these two cases, the protection of equal rights prevailed for the majority.



[141] Siegel (2016), p. 4
[142] id.
[143] Gallup, id.

## CHAPTER 4 – GERMANY

### "In the name of the people": democracy and popular sovereignty as trump cards in the jurisprudence of the German Federal Constitutional Court

*The German Federal Constitutional Court is arguably one of the most powerful apex courts on the global scene, with comprehensive review powers and a praxis that has proven the justices are not above scrutinizing even the European Court of Justice. But even though Karlsruhe regularly overturns legislation and executive action, the protection of democracy remains at the heart of most decisions.*

### 1. Introduction

As we have seen in the United States, the adoption of a written Constitution that has continued to survive since 1789 was a tremendous, paradigm-shifting effort of the Framers. Its arguably most famous bit is the very beginning: "We the People". Yet, this grandiose display of the commitment to popular sovereignty fails to find substantial expression elsewhere in the Constitution. Hence, the debate about what the court can or cannot do in terms of invalidating legislation, as well as the meditations on *when* the Supreme Court is truly on the side of "the people", are essentially coded into, if not presupposed by the Constitution itself, and have since become part of the fundamental nature of constitutional adjudication.

The German Basic Law's preamble has a statement akin to the American "We the People":

*"Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law*."

While it similarly rests on the overarching idea of popular sovereignty as the basis of all state power, the Basic Law's approach to the topic is completely different from that of the U.S.

Constitution. Starting from its adoption in 1949 for the Federal Republic of Germany, which was then referred to as "West Germany", the Basic Law was meant to be a provisional constitutional text – hence its name.[144] The expectation was that the reunification, whenever it may happen, would prompt the adoption of a new constitution for the entire German territory, as stated by the original Article 146:

*This Basic Law shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.*

Even though I do not seek to dwell on all the implications of the old Article 146, it does give a necessary context to my pursuit in this chapter. The phrasing "freely adopted by the German people" is quite telling when it comes to the historical context of the Basic Law. The Frankfurt Documents, which contained allied recommendations on the future political-constitutional of West Germany[145], provided the basis for the Constitutional Commission's work in the drafting of a new constitutional text.[146]

With the explicit consent of the three occupying powers, the UK, the US and France,[147] the Basic Law was ratified by the Parliamentary Council, and shortly after, the Federal Republic of Germany was proclaimed.[148] This process shows that the road to the Basic Law was not an independent German effort, encouraged and initiated by the people, like it happened in the United States. Rather, it was a constitution shaped by outside forces, the horrible legacy of the NS-regime, the allied occupation, the subsequent German partition and the emerging cold war.

But even against this backdrop, I aim to present how the German Basic Law was able to overcome this democratic deficiency at its inception and become the foundation of a resilient,

[144] Kommers (2000), p. 477
[145] Gardner (2004), p. 10
[146] Roedel (1992), p. 32
[147] Kommers, id.
[148] Roedel, id.

democratic constitutional order, at the heart of which popular sovereignty remains. Crucially, this order is guarded the German Federal Constitutional Court (BVerfG), which is entrusted with judicial constitutional review power that has perhaps the broadest democratic dimensions of the three courts presented in this thesis. What makes this case study unique, compared to that of the UK and the US, is that when the BVerfG uses "the people" in its reasoning, it does so based on a constitutional provision. Article 20 (2) states that

*"All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies."*

The Basic Law thus explicitly names the people as the source of all state authority, and designates all three branches of power, even the judiciary, as those who carry out this power in their name. Furthermore, the exact scope and details of the BVerfG review powers are enumerated in Articles 93, 99 and 100 of the Basic Law and detailed in the Act on the Federal Constitutional Court (BVerfGG), which preempts debates about the Court's competence to scrutinize and nullify legislation.

It follows that the legal status of the BVerfG is different from what we have learned in the UK and the US. In the following, I discuss the exact virtues of the democratic dimension of the BVerfG's judicial review practice. First, I look at the *AWACS I* (1994) judgment about military deployment to assess how the Court enforces popular sovereignty through the separation of powers. Secondly, I examine the BVerfG's decidedly controversial relationship to the European Integration by analyzing the Court's decision in *Lisbon* (2009) and its implications for the protection of popular sovereignty.

## 2. Military deployment

As a starting point, I analyze the Court's jurisprudence in the area of military deployment, as it is an issue that involves the judicial supervision over the exercise of executive powers in foreign policy[149]. In the past decades, the Court passed several judgments in this realm that further refined the powers of the German Federal Parliament (Bundestag) and the significance of popular sovereignty. At the same time, since the cases concern parliamentary participation, they also highlight another constitutional procedural mechanism in the form of the *Organstreitverfahren*, that allows the indirect participation of the people through their elected representatives.

In the following, I will focus on the AWACS I / Armed Force Judgment (1994), which answered the question whether prior parliamentary consent was required for the deployment of the German Military (Bundeswehr) outside of NATO zones. The Court, for the first time, held that prior, "constitutive" [150] parliamentary consent was indeed required deployment of the Bundeswehr in UN and NATO operations.[151]

The case itself concerned of the Federal Government's decisions to deploy the Bundeswehr in a total of three military missions, all in conflict zones beyond NATO borders.[152] These missions included a maritime operation of NATO/WEU on the territory of the then Federal Republic of Yugoslavia (1992), which was followed by a NATO-AWACS[153] mission to enforce the no-fly zone that the UN Security Council imposed in the airspace over Bosnia-Herzegovina (1993).[154]



[149] Ziegler (2007), p. 141
[150] AWACS I, at Ls. 2 a)
[151] id., p. 154
[152] Ziegler (2017), p. 2
[153] AWACS stends for 'Airborne Warning and Control System'
[154] id.

In the same year, the Federal Government agreed to deploy troops in Somalia for an UNOSOM II mission, meant to "provide military security for humanitarian assistance" (1993).[155]

These decisions were challenged in a procedure called Organstreitverfahren launched by the Bundestag. An Organstreitverfahren, as described in Article 93 (1) No. 1 of the Basic Law, is a constitutional dispute resolution proceeding, in which the BVerfG may exclusively decide disputes that have arisen between two of the highest federal institutions (such as the Bundestag, the Federal Government, the Bundesrat, or the Federal President) over the constitutional conformity of an action taken by one of these institutions. Here, the parliamentary challenge was brought by two opposition factions of MPs, the parties SPD and FDP, representing the Parliament as a whole.[156]

Mainly, the Court argued that that the Bundeswehr was a "parliamentary army", despite the fact that the Basic Laws allocates the power of foreign policy largely to the executive branch.[157] This is to be derived from the provisions of the Basic Law that concern defence (so-called Wehrverfassung), meaning that Karlsruhe derived this concept of the constitutive parliamentary approval as a requirement is from a general constitutional framework instead of a specific provision.[158] In the reasoning, the judges referred to the sense and purpose of these provisions of the Basic Law, which decidedly sought to deny the Federal Government the sole competence over the Bundeswehr in a bid to prevent the army from becoming a potential tool for the executive to unlawfully extend its power.[159] Rather, the Bundeswehr is supposed to be a parliamentary army, because only this way can it be "inserted" into the democratic-



[155] id.
[156] id.
[157] AWACS I, C/IV
[158] Aust/Vashakmadze (2008), p. 2223
[159] AWACS I, id.

constitutional order of the Federal Republic: by giving the Bundestag legally relevant influence over the structure and use of the German troops.

Granted, the requirement of parliamentary participation only extends to the issuance of consent needed for the deployment to be lawful, because "decisions about the modalities of the deployment, in particular with regard to its extent and duration and the necessary coordination within and with organs of international organizations, falls within the competence of the Federal Government."[160] However, the Bundestag retains the competence to legislate "on the modalities and the degree of parliamentary participation", which remains subject to judicial conformity check.[161]

The principle developed in *AWACS I* ended up being codified by the Bundestag in 2004 with the Parliamentary participation act,[162] and Karlsruhe affirmed its prior judgment in the 2008 *AWACS II* case. However, in 2015, the Court developed an exception to this rule in its *Libya Rescue Intervention/Pegasus* judgment. "In cases of imminent danger", the Court held, "the Federal Government may, by way of exception, preliminarily order on its own that armed military forces be deployed."[163] But even in under such exceptional circumstances, the Government is required to immediately inform and consult the Bundestag, and upon its request, even "withdraw the armed forces deployed".[164] If the deployment has been terminated by the time parliamentary consent can be sought out, the Federal Government is not obligated to ask for a retrospective consent but must brief the Bundestag "promptly and in a qualified manner of the reasons for its decision on the deployment of armed forces and of the course of the



[160] Press Release of the German Federal Constitutional Court, 1994
[161] id.
[162] Ziegler (2007), p. 160 ; Ziegler (2017)
[163] Libya Rescue Intervention/Pegasus (2015), at 66
[164] id.

mission" regardless.[165] Even in a case of exception, Karlsruhe referred the right to fully conduct judicial review over the deployment.[166]

The issue of parliamentary consent shows the importance the BVerfG places on the protection of the democratic process, which allows the representatives of the people to ultimately decide about important involvements of the Federal Republic in foreign affairs. Moreover, the judges use the parliamentary approval, a manifestation of popular sovereignty, to curtail any executive attempts of possible abuses of power. Lastly, the cases also highlight the merits of the *Organstreit* proceedings as a further means of the people, to indirectly assert their constitutional right of participation at court, through their elected parliamentary representatives.

## 3. European Integration

### 3.1. Introduction

Even though Karlsruhe passed its fair share of controversial decisions over the years about the functioning of the legislature, the deployment of troops, or the dimensions of the freedom of protection, perhaps the most debated and discussed bundle of cases stem from those revolving around issues of the European Integration.

As a founding member of the European Community, the precursor of the Union, the Federal Republic shares a long and complicated history with the Integration. As the cooperation between the Member States continued to deepen and a more comprehensive, supranational set of institutions was born, Karlsruhe continued to face the constitutional challenges brought about

[165] id.
[166] Lybia/Pegasus, id., at 92-93

by the developing integration head-on. In most of those cases, the judges meditated on the allocation of competences between the Federation and what would later become the EU keenly guarding the powers that remained within the scope of the Federal State. At the center of the argumentation presented by the Court was always the Court's own obligation to make sure that all sovereign power not explicitly delegated to the Integration, as mandated by the people, may be retained by the Federal Republic. Consequently, the Court's insistence of strictly supervising the allocation of powers on the supra-national and national level serves the apparent purpose of simultaneously preserving the democratic requirement mandated by the principle of conferral as well as guarding the constitutional order and the core tenets of German statehood as laid down in the Basic Law.

Through analyzing the *Lisbon* judgment, my aim is not to trace the controversial history between Karlsruhe and the European Court of Justice (ECJ). Rather, my goal is to showcase how the BVerfG sees itself as the ultimate protector of the people and their right of democratic participation.

### 3.2. Lisbon

The Treaty of Lisbon was formally signed in December 2007, amending the Treaty on European Union and the Treaty establishing the European Community. It was followed by multiple applications by individual Members and an opposition faction of the German Federal Parliament (Bundestag) for a procedure called *Organstreit*, as well as four individual constitutional complaints by one Member of the Bundestag and several private persons. In 2009, after joining the applications, the BVerfG passed its eponymous judgment on the constitutional conformity of the Lisbon Treaty.

The Court found the Treaty to be compatible with the Basic Law, however, it held that the Bundestag needed to enact a new law accompanying the Act Approving the Treaty of Lisbon[167] to "ensure the Bundestag's prerogative over the exercise of the core competencies of state authority."[168] The case may be mostly remembered for the introduction of the so-called "identity-control" mechanism that was developed to allow the Court to override ECJ decisions that are ultra vires and as well review EU decisions to make sure that "the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23 (1)[169] in conjunction with Article 79 (3) is respected".[170]

In terms of popular sovereignty and public participation, the judges held that those with the right to vote "can challenge constitutionally relevant deficits in the democratic legitimation of the EU under the same right as deficits of democracy on the national level, which is affected by European integration as regards the extent of its competences."[171] This means that "the right to vote establishes a right to democratic self-determination", which empowers the German people to freely and equally participate "in the state authority exercised in Germany".[172] It further implores compliance "with the principle of democracy including the respect of the constituent power of the people."[173]

Thus, the Court created a subjective right of democratic self-determination, which is derived from Article 38 in conjunction with Articles 20 (1) and (2) of the Basic Law and is conferred upon the German people by the virtue of their right to participate in elections. Furthermore, the judges held that while Article 38 (1) does not just grant "the individual citizen the individual



[167] Lisbon, at 170
[168] Miller (2014), p. 594
[169] Sentence 3
[170] Lisbon, at 240
[171] id., at 177
[172] id., at 208
[173] id.

right to participate in the election of the *Bundestag* and thereby to take part in the legitimation of state authority", it also applies to the Members of the Bundestag.[174]

This democratic right belongs to each citizen and "can also be violated by the organization of state authority being changed in such a way that the will of the people can no longer effectively be shaped within the meaning of Article 20 (2) and citizens cannot rule according to the will of a majority."[175] Thus, if through the transfer of power to the European institution results in the considerable limitation of the Bundestag's rights and therefore, in a "loss of substance of the democratic freedom of action of the constitutional body" as established by the people via "free and equal elections", popular sovereignty may be violated.[176]

In essence, *Lisbon* substantially expanded the scope of Article 38 (1) to include an individual claim of the citizen to the adherence with the constitutional confines of the European Integration.[177] This is a subjective reflection of the objective of principle of democracy[178], derived from Article 20 (1) and (2), which is protected by the eternity clause in Article 79 (3).[179]

*Lisbon* "utilizes" the people in a unique way: they are perceived as "the custodians of democracy" with a joint responsibility to control the integration process and protect the Federal Republic's sovereignty.[180] Hence the European integration can possibly affect the core of German statehood, thereby encroaching upon the powers of the democratically elected legislation, the Court encourages the people pursue and assert their right of democratic self-determination and of free and equal participation.[181]



[174] id., at 132
[175] id.
[176] id.
[177] Schönberger (2009), p. 536
[178] Gärditz/Hillgruber (2009), 872
[179] Miller (2014), p. 590
[180] Gärditz/Hillgruber, id.
[181] id.

Above all else, the BVerfG is concerned with keeping the decision-making power over the depth of the Integration with the Member States, in "which the peoples, i.e., the citizens, remain the subjects of democratic legitimation."[182] From this, it follows that the BVerfG sees it necessary for the Bundestag to "strengthen its own participation-rights in matters concerning the EU."[183] And since "the election of the members of the German Bundestag is the source of state authority"[184], it is the people of the Member States who provide the legitimate basis for EU law.[185]

## 4. Concluding remarks

Overall, the people appear in German constitutional adjudication as the manifestations of popular sovereignty, but also as the "antidote" to abuses of public authority both by the executive branch and the institutions of the European Union. As the source of all sovereign power, they provide the basis for democratic legitimacy. Since all branches of public power are bound by the sovereignty of the people (Article 20.2), as well as the catalogue of fundamental rights conferred upon them in the first nineteen articles of the Basic Law (Article 1.3), Karlsruhe's review powers have a constitutionally mandated democratic dimension. In this function, the BVerfG acts as the guardian of the people's sovereignty, the Basic Law, and the state's adherence to the protection of dignity and fundamental rights.

It follows, therefore, that by putting popular sovereignty above all else, the Court embraces its own democratic obligations by not just giving the people a forum to enforce their claims and



[182] Lisbon, at 229
[183] Kokott (2019), p. 10
[184] Lisbon, at 209
[185] Kokott, id.

rights, but by actively encouraging them pursue them, along with their right to participate in the democratic decision-making process in Germany and in the EU.

# CONCLUSION

The angle that overruling the democratic branches is inherently anti-majoritarian may be persuasive. However, a different perspective allows us to see the democratic merits of judicial review and how the judiciary remains essential in the protection of democracy and the people. State organization, governance, and the allocation of sovereign power are all built upon the basic principle of democracy. The people are the source of all power – ultimately, they are the ones who the state and its representatives serve, not the other way around. Therefore, the democratic mechanism demands the execution of the popular mandate but also the supervision that the people can continue expressing and assigning this mandate. In this constellation, the judiciary is there to make sure that this democratic basis remains respected, thereby ensuring that the power of the people remains an inextricable part of all state action.

It is also part of the democratic dimension that the Court protects all people, not just the majority. With the dedication to counterbalance any majoritarian encroachment upon the rights of minorities, the judiciary is not just the guardian of the constitutional order, but also of the people.

It follows that in an ideal situation, the courts and the people co-exist symbiotically. Judicial review grants the public the right to initiate, participate in the democratic process, and enforce the fundamental rights granted to them. And with this democratic dimension in mind, it becomes clear that the judiciary, even though it was always meant to serve as a check on state power, is not a foe of the people, but perhaps their most valuable ally.

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