

MANN UND MANN, FRAU UND FRAU: THE  
 JURISPRUDENCE AND DEMOCRATIC THEORY  
 OF GERMAN CIVIL PARTNERSHIPS

MICHAEL ARDELJAN\*

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\* J.D. Candidate, 2017, New York University School of Law; A.B., 2013, Harvard University. I am grateful to Professors John Ferejohn and Jeremy Waldron for their guidance and incisive commentary in developing this Note, along with Professor Jochen Wohlfeil for making German language, culture, and history immediate and accessible to me. I would also like to thank the editors of the *New York University Journal of International Law and Politics* for their tireless work on preparing this Note for publication. Unless otherwise indicated, all translations are those of the author.

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## I. INTRODUCTION

On June 26, 2015, the U.S. Supreme Court found for the petitioner in *Obergefell v. Hodges*, thereby recognizing the nationwide right to same-sex marriage pursuant to due process and equal protection of the law under the Fourteenth Amendment.<sup>1</sup> The ruling was monumental not only because it impacted American society by recognizing marriage as a fundamental right, but also because it achieved this result in a 5-4 vote that bound an entire democratic republic. Federal judicial review thereby superseded legislative action on the state level, as the dissenting justices and conservative critics emphasized at the time.<sup>2</sup> Among critics, the feeling persists that the majority's decision infringes on democracy by depriving U.S. citizens of the ability to decide for themselves whether or not to recognize same-sex marriage—in direct contradistinction, for instance, to Ireland's contemporaneous national referendum of May 22, 2015.<sup>3</sup>

Whether by democratic vote or judicial review, same-sex marriage has garnered increasing recognition worldwide, making the Federal Republic of Germany a timely and fascinating case study of the interplay between democracy and judicial review through the lens of same-sex marriage. In 2001, the German *Bundestag* (Federal Diet) passed the *Gesetz über die*

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. *Id.* at 2611–12 (Roberts, C.J., dissenting) (“Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.”); Richard A. Epstein, *Hard Questions on Same-Sex Marriage*, *DEFINING IDEAS* (June 29, 2015), <http://www.hoover.org/research/hard-questions-same-sex-marriage> (“The Scalia dissent scores big points in attacking Kennedy for judicial hubris, by insisting that the whole point of democracy is not just to inform the justices but to let the people decide on the issue.”). Prior to the *Obergefell* ruling, thirty-seven states had legislated in favor of recognizing same-sex marriage. For an overview of gay marriage's legalization by state prior to *Obergefell*, see Julia Zorthian, *These Are the States Where SCOTUS Just Legalized Same-Sex Marriage*, *TIME* (June 26, 2015), <http://time.com/3937662/gay-marriage-supreme-court-states-legal/>.

3. Danny Hakim & Douglas Dalby, *Ireland Votes to Approve Gay Marriage, Putting Country in Vanguard*, *N.Y. TIMES*, May 23, 2015, at A1.

*eingetragene Lebenspartnerschaft* (Law on Registered Civil Partnerships, hereinafter “*Lebenspartnerschaftsgesetz*,” or “Civil Partnership Law”), codifying the right of same-sex couples to enter into civil unions similar to, but legally distinct from, marriage.<sup>4</sup> The *Bundesverfassungsgericht* (Federal Constitutional Court) subsequently upheld the law as constitutional, and in the last fifteen years has used its power of judicial review to recognize additional rights afforded to same-sex couples in civil unions.<sup>5</sup> However, the *Bundesverfassungsgericht* has not gone so far as to recognize same-sex marriage per se as a constitutionally protected right, a profound distinction with widespread ramifications. The result has been a motley patchwork of legislation augmenting partnerships, without conferring upon them the same legally recognized status as marriage in the *Grundgesetz* (the Basic Law, or the Federal Republic’s constitution). This ad hoc approach has had implications for taxation and adoption rights of gay couples, as well as a broader metaphysical impact on the perception of gay people in the country.<sup>6</sup>

In Part II of this Note, I elaborate on Germany’s suitability for examination, outlining in particular its federalist system of government and constitutional jurisprudence. In Part III, I explore a case study of the jurisprudential and political history of *eingetragene Partnerschaften* (civil partnerships). In Part IV, I summarize the discourse concerning judicial review and democracy, and whether the two can be reconciled. In Part V, I draw on this discourse to assess the future of gay marriage in Germany. The ultimate question is not so much *whether* gay marriage will acquire full constitutional recognition in Germany, but rather *how* it would or could, given the judicial review of the *Bundesverfassungsgericht* and political realities of

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4. DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 606 (3d ed. 2012).

5. See Christoph Gröpl, *Marriage, Parents, and Family – Constitutional Amendments by Recent German Federal Constitutional Court’s Decisions Without Legislative Participation*, 2 *REVISTA DE ȘTIINȚE JURIDICE* 9, 19 (2014) (criticizing the *Bundesverfassungsgericht* for overextending its canons of constitutional interpretation in several cases to expand rights for *eingetragene Partnerschaften*).

6. See *id.* at 11 (listing the cases in which the *Bundesverfassungsgericht* expanded civil partnership rights); David B. Oppenheimer et al., *Religiosity and Same-Sex Marriage in the United States and Europe*, 32 *BERKELEY J. INT’L L.* 195, 236 (2014) (“In Germany, however, gay rights advocates have good cause to be skeptical of a center-right party’s willingness to grant marriage equality rights.”).

passing legislation. My conclusion will seek to draw a connection between this prognostication and its significance for democratic theory in Germany. In a country that has continually sought atonement for its actions since the end of World War II, the *Bundesverfassungsgericht* has militantly upheld both the democratic order and fundamental rights of the German citizenry. As a result, its judicial review has proved a necessary means of protecting modern Germany's conception of democracy, even if it means protecting the body politic from itself.

## II. FEDERALISM AND CONSTITUTIONAL JURISPRUDENCE IN GERMANY

The Federal Republic of Germany is defined in its own constitution, the *Grundgesetz*, as a "democratic and social federal state."<sup>7</sup> It is the focal point for this Note's examination because it has served as the economic, political, and social lynchpin of the European Union and broader European integration since the 1990s.<sup>8</sup> It is a nation which has striven towards political legitimacy, democratic accountability, and the protection of fundamental rights with exceptional vigor in the wake of the horrors and destruction of World War II and the Holocaust, and as some commentators have observed, its Federal Constitutional Court "hold[s] Europe's fate in [its] hands."<sup>9</sup> Before proceeding to the case study of gay marriage in Germany, it is essential to review the country's federalist system of government, as well as the structure and function of its highest court.

### A. German Federalism

Germany's federalist system operates on the principle that all state authority emanates from the people. Per the *Grundgesetz*, the people's political will is manifested through *Parteien-*

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7. GRUNDGESETZ [GG] [BASIC LAW], Art. 20(1), translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) ("[E]in demokratischer und sozialer Bundesstaat.").

8. Russell A. Miller, *Germany vs. Europe: The Principle of Democracy in German Constitutional Law and the Troubled Future of European Integration*, 54 VA. J. INT'L L. 579, 580 (2014) ("Germany has been an essential contributor to, and an energetic participant in, the project of European integration.").

9. *Id.* at 582 (citing Henry Chu, *German Judges May Hold Europe's Fate in Their Hands*, L.A. TIMES (Sept. 11, 2012), <http://articles.latimes.com/2012/sep/11/world/la-fg-germany-court-20120911>).

*staat* (political parties) and exercised through direct elections and the devolution of power across the executive, legislative, and judicial branches on the federal and state levels.<sup>10</sup> Interestingly, this method of political organization also means that national plebiscites, referenda, and initiatives are disallowed as an exercise of the sovereign power. Instead, parliamentary legislation is the chief means of creating positive law.<sup>11</sup>

The federal government consists of the presidency,<sup>12</sup> federal cabinet (Chancellor and ministers),<sup>13</sup> federal judiciary, and federal legislature. The legislature is split between the *Bundestag* (Federal Diet) and *Bundesrat* (Federal Council), which directly represent the people and the *Bundesländer* (federal states), respectively.<sup>14</sup> Unlike in the United States, the German federalist state does not operate on two wholly formed and concurrent federal and state levels.<sup>15</sup> Rather, the federal parliament and president draft and approve legisla-

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10. GRUNDGESETZ [GG] [BASIC LAW], ART. 20(2) (“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 organs.”); GRUNDGESETZ [GG] [BASIC LAW], ART. 21(1) (“Political parties shall participate in the formation of the political will of the people.”); see also Donald P. Kommers, *The Federal Constitutional Court: Guardian of German Democracy*, 603 ANNALS AM. ACADEMY POL. & SOC. SCI. 111, 112–16 (2006); Christian Schweiger, *Towards Institutional Gridlock? The Limitations of Germany’s Consensus Democracy*, 6 GER. POL’Y STUDIES 3, 6–7 (2010).

11. See generally Kommers, *supra* note 10.

12. The German president is the head of state and last person to authorize bills, but otherwise retains a position more ceremonial than authoritative. See Michael L. Fremuth, “Patchwork Constitutionalism”: *Constitutionalism and Constitutional Litigation in Germany and Beyond the Nation State – A European Perspective*, 49 DUQ. L. REV. 339, 347 (2011) (distinguishing the president’s diminished powers today from those of the *Reichspräsident* during the Weimar Republic).

13. The Chancellor and ministers comprise the ultimate executive in Germany. See *id.* at 347 (expounding that the Chancellor and ministers are “the visible face of Germany abroad” and are “responsible for the political agenda-setting on the federal level”).

14. *Id.* at 346.

15. See Hans-Peter Schneider, *German Federalism After Reunification: Political and Economic Outlook*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 155, 157 (1995) (noting that there is “doctrinal support for the proposition that under the Constitution the *Bund* and the *Länder* have a ‘separate but equal’ relationship,” appropriating politically charged diction from the American historical context to indicate the tensions charged arise in the German federalist system).

tion, and the sixteen *Länder*—which also have state executive, legislative, and judicial branches beholden to state constitutions—are chiefly responsible for the administrative execution of federal laws.<sup>16</sup> However, the *Länder* are constrained to do so in concomitance with the *Grundgesetz*,<sup>17</sup> and the federal government still retains the ability to regulate the administrative state.<sup>18</sup> The ministerial heads of the *Länder* comprise a third tier of the federalist system, coordinating policy and political strategy distinct from but related to governmental action on the federal level.<sup>19</sup> As a result of this arrangement, the German federalist state operates as an interwoven system that demands multiparty compromise for consensus rule. However, critics point out that this arrangement has tended towards institutional gridlock in the last decade.<sup>20</sup> Nevertheless, this system has been in place since 1949 in a strident effort to represent the people's will while respecting regional differences.

### 1. *Der Bundestag*

Of key interest to our exploration of democratic theory is the structure of the *Bundestag*, the Federal Diet directly elected by the German people. Article 38(1) of the *Grundgesetz* provides that its members shall be elected in general, direct, free, equal, and secret elections, and that they shall be accountable to the whole people.<sup>21</sup> Representatives are elected to four-year

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16. See Fremuth, *supra* note 12, at 346–47 (noting that the federal government depends on enumerated powers in the *Grundgesetz*, and that federal law is supreme). Meanwhile, the *Länder* can legislate their own affairs where such powers are not enumerated to the Federation, per Article 70 of the *Grundgesetz*. Katrin Auel, *Intergovernmental Relations in German Federalism: Cooperative Federalism, Party Politics and Territorial Conflicts*, 12 COMP. EUR. POL. 422, 424 (2014).

17. GRUNDGESETZ [GG] [BASIC LAW], Art. 83 (“The *Länder* shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit.”).

18. *Id.* at Art. 84(2) (“The Federal Government, with the consent of the *Bundesrat*, may issue general administrative rules.”); see also Hans G. Rupp, *Judicial Review in the Federal Republic of Germany*, 9 AM. J. COMP. L. 29, 30 (1960) (Rupp served as a justice on the *Bundesverfassungsgericht*).

19. Schneider, *supra* note 15, at 156.

20. As discussed in Part II.A.4, *infra*.

21. GRUNDGESETZ [GG] [BASIC LAW], Art. 38(1) (“Members of the German *Bundestag* shall be elected in general, direct, free, equal and secret ballots. They shall be representatives of the whole people . . . responsible only to their conscience.”); see also Kommers, *supra* note 10, at 112.

terms on the basis of “personal” or “modified” proportional representation. Of the 598 seats in the *Bundestag*, half are filled by plurality victories of direct elections of single-member districts, and the other half by proportional representation. In the latter case, the franchise casts votes for political parties, and the percentage of votes each party receives dictates the percentage of seats they fill in accordance with internal party lists of candidates.<sup>22</sup> Certain statutory restrictions, such as the *Fünf-Prozent-Hürde* (five-percent hurdle), mandate that a party receive at least five percent of the popular vote to receive seats in the *Bundestag*—a measure designed to prevent extremist fringe parties from destabilizing the state as during the Weimar Republic.<sup>23</sup>

## 2. *Der Bundesrat*

The Federal Council comprises the minister-presidents and cabinets of the sixteen *Bundesländer*, who are delegated by the *Länder* to represent their interests, rather than the people directly.<sup>24</sup>

## 3. *Legislative Procedure*

The federal executive, *Bundesrat*, and *Bundestag* can all initiate bills for contemplation as fully promulgated laws. In the first case, the Federal Chancellor submits a bill to the *Bundesrat* and the two bodies communicate and revise it before transmitting it to the *Bundestag*.<sup>25</sup> If the *Bundesrat* proposes a bill, a majority vote is required to submit it to the Chancellor for the same process.<sup>26</sup> When the *Bundestag* initiates legislation, it requires either a whole parliamentary party or at least five percent of its membership to move for it.<sup>27</sup>

Bills are then deliberated extensively in three readings before the *Bundestag*, during which process committees subdivide for revision, and parliamentary groups or percentages of

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22. Kommers, *supra* note 10, at 113–14.

23. Miller, *supra* note 8, at 598.

24. Auel, *supra* note 16, at 422.

25. *Passage of Legislation*, DEUTSCHER BUNDESTAG, [https://www.bundestag.de/htdocs\\_e/bundestag/function/legislation/passage/245704](https://www.bundestag.de/htdocs_e/bundestag/function/legislation/passage/245704) (last visited Oct. 4, 2016).

26. *Id.*

27. *Id.*

the membership can move for further discussion or amendments.<sup>28</sup> At the third reading, the president of the *Bundestag* holds a vote, and if the bill receives approval by plenary majority it is submitted as an act to the *Bundesrat*.<sup>29</sup>

Although the *Bundesrat* cannot amend acts submitted by the *Bundestag*, it can withhold consent and demand that a Mediation Committee comprised in equal parts of members from both legislative bodies convene to revise the act.<sup>30</sup> For certain legislation, such as financial or administrative bills affecting the *Länder*, the *Bundesrat*'s final consent is necessary. Otherwise, the *Bundestag* can circumvent an impasse in the Mediation Committee by an absolute majority vote.<sup>31</sup>

After parliamentary approval, the act is sent to the Chancellor and relevant federal ministers for examination and signatures.<sup>32</sup> Thereafter, the Federal President reviews that the legislation comports both procedurally and substantively with the *Grundgesetz* and signs it into law.<sup>33</sup>

#### 4. Criticism

Despite the structural composition of the German federalist state aimed at promoting direct democracy while simultaneously bolstering the regional autonomy and legislative input of the *Länder*, the system has sustained increasing waves of criticism in light of what is perceived as institutional stagnation and legislative gridlock. Explanations for this destabilization vary from the socioeconomic burden of integrating five additional East German *Länder* as part of German Reunification in 1990, to the *Grundgesetz*'s frustrating mandate that the *Länder* fulfill their regional duties while simultaneously guaranteeing equal quality of life and uniform living standards across the

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* The Bundesrat can veto entire bills, even for reasons unrelated to the bill's overarching purpose. See Auel, *supra* note 16, at 425 (detailing that the *Bundesverfassungsgericht* also strengthened the Bundesrat, for example, "by adhering to the 'Unity Principle' (*Einheitsprinzip*), which means the consent of the Bundesrat is necessary for the whole legislative proposal – and not just the parts that directly impact the financial or administrative interests of the Länder" (citations omitted)).

32. *Passage of Legislation, supra* note 25.

33. *Id.*

*Länder*.<sup>34</sup> The central manifestation of these issues revolves around the multiparty political system.

Because legislation depends on consensus in the federal parliament and executive, multiparty modified proportional representative elections necessitate coalitions to form a sustainable government. Since parties more likely than not capture only pluralities of the electorate, they must compromise on policies and unite to effect legislation.<sup>35</sup> However, the highly interdependent structure of German federalism between the *Bund* and *Länder* at the parliamentary level can hinder legislative efforts. Dr. Christian Schweiger analyzed the *Große Koalition* (Grand Coalition—from 2005 to 2009 and 2013 to the present—of the two largest parties, the *Sozialdemokratische Partei Deutschlands* (Social Democratic Party of Germany or SPD) and the *Christlich Demokratische Union* (Christian Democratic Union or CDU)) and concluded that its legislative inefficiency promoted greater party diversity at the cost of long-term and effective policy platforms.<sup>36</sup> The SPD and CDU are committed to maintaining their voting records while working in concordance with one another, so as to retain their popularity among the electorate while forming a functioning governmental coalition. Despite the parties' attempts to cooperate, however, their primacy in the *Bundestag* frequently faces strong opposition from the *Bundesrat*—especially when the latter, as is often the case, comprises different majority party rule than the *Bundestag*.<sup>37</sup> The net result is that the *Länder* stymie legislation. Schweiger observed that the electorate's discontent led to a surge in small-party representation in the 2009 federal

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34. Compare GRUNDGESETZ [GG] [BASIC LAW], Art. 29(1) (“The division of the federal territory into *Länder* may be revised to ensure that each *Land* be of a size and capacity to perform its functions effectively.”), with GRUNDGESETZ [GG] [BASIC LAW], Art. 72(2) (reserving for the Federation the legislative power to produce socioeconomic equality among the *Bundesländer* when necessary) and with GRUNDGESETZ [GG] [BASIC LAW], Art. 106 (detailing, particularly through tax law, the equal treatment of citizens in the various *Länder*, which both the Federation and *Länder* retain). See also Schweiger, *supra* note 10, at 9–10 (detailing the burden of integrating East German *Länder* after Reunification); Schneider, *supra* note 15, at 157 (discussing the conflicting duties of the *Länder* and federal government with respect to one another).

35. Schweiger, *supra* note 10, at 4.

36. *Id.* at 4–5.

37. *Id.* at 4.

elections.<sup>38</sup> With more party multiplicity and a less unified coalition, the government's overarching legislative agendas became further diluted and effete; Schweiger noted that "[t]he ability of . . . coalitions to . . . respon[d] to a new complexity of internal and external challenges [was] therefore severely restricted by an institutional culture in which regional interests and short-term electoral prospects dominate[d]."<sup>39</sup> Into this complex set of circumstances enters the highest German court.

## B. *German Constitutional Jurisprudence*

An innovation of utmost importance to the nascent post-war German democracy, the *Bundesverfassungsgericht* was established in 1951 as a specialized court of constitutional review solely imbued with the power to declare German statutes and government actions unconstitutional.<sup>40</sup> As the highest court in the country, its judicial supremacy makes its determinations final and binding on the entire government and the people.<sup>41</sup> In this way, the Court embodies strong judicial review. Accordingly, understanding its composition, jurisdiction, and jurisprudence is integral to analyzing the status of gay marriage in Germany.

### 1. *Composition and Jurisdiction*

The *Bundesverfassungsgericht* is comprised of two senates of eight justices, all of whom are appointed to a single twelve-year term by the *Bundestag* and *Bundesrat*.<sup>42</sup> Although the *Bundesverfassungsgericht* is the supreme court in the German judiciary, it is not an appellate court in the procedural sense as understood in the United States. Rather, it is charged with the

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38. *Id.* at 4–5. Quantification of the electorate's discontent can be alarming. See Hermann Pünder, *More Government With the People: The Crisis of Representative Democracy and Options for Reform in Germany*, 16 GER. L. J. 713, 714 (2015) ("In Germany, the approval rates [for democracy] almost reach ninety percent. But over half of those questioned in surveys express dissatisfaction with [its] practice . . . Only fifteen percent are persuaded that their representatives seek to serve the interests of the people . . . compare[d] to forty-two percent as recently as two decades ago" (citations omitted)).

39. Schweiger, *supra* note 10, at 3.

40. Kommers, *supra* note 10, at 114–15; Rupp, *supra* note 18, at 30.

41. Rupp, *supra* note 18, at 30–32.

42. Kommers, *supra* note 10, at 115.

determination of the constitutionality of legislation and government actions, as well as the maintenance and promotion of the *Grundgesetz's* integrity and German democracy as a whole.<sup>43</sup>

Matters can be brought before the Court in a variety of ways. The one method not originally prescribed by the *Grundgesetz*, but initially elaborated upon in the *Bundesverfassungsgerichtsgesetz* (Federal Constitutional Court Act), is the *Verfassungsbeschwerde* (constitutional complaint) by a private citizen.<sup>44</sup> An individual may bring a claim to the Court within a year of a statute's enactment by detailing the manner in which the statute on its face deprives them of their constitutionally protected *Grundrechte* (fundamental rights), or within a month of an adverse legal proceeding.<sup>45</sup> They may do so only after exhausting all other legal remedies. It is notable, however, that of the 195,018 cases docketed in the Court's history up to 2011, 188,187 (96.5%) have arisen from constitutional complaints.<sup>46</sup>

The *Grundgesetz* provides for the Court's remaining jurisdictional standing. With respect to the judiciary, the *Bundesverfassungsgericht* alone, as the highest German court, retains the power of judicial review of constitutionality. This means that all lower courts—on both the federal and state levels—may not interpret the constitutionality of laws on their own or decline their application in adjudicating disputes on

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43. *Id.* at 115; Rupp, *supra* note 18, at 32; see also DAVID ROBERTSON, *THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW* 61 (2010) (elaborating that the *Bundesverfassungsgericht* relies on the constitution as “laying down an ‘objective’ moral order of the society”).

44. Rupp, *supra* note 18, at 36. It should be noted, however, that the *Verfassungsbeschwerde* is now accounted for in GRUNDGESETZ [GG] [BASIC LAW], Art. 93(1)(4a).

45. Rupp, *supra* note 18, at 36; Bundesverfassungsgerichtsgesetz [BVerfGG] [Federal Constitutional Court Act], Mar. 12, 1951, § 93, last amended by Gesetz [G], June 30, 2015, BGBl. I, at 973 (Ger.), [https://www.gesetze-im-internet.de/bverfgg/\\_93.html](https://www.gesetze-im-internet.de/bverfgg/_93.html).

46. KOMMERS & MILLER, *supra* note 4, at 11. It bears noting that of the 166,608 constitutional complaints ultimately decided, only 4,034 reached a full senate of eight justices for deliberation. *Id.* The remainder were disposed of by three-justice panels, called *Kammern* (“chambers”), which can resolve cases where the law is clear, and otherwise submit them to the full senate when the panel feels that a complex and unresolved question of constitutional law merits fuller consideration. *Id.* at 20.

the merits.<sup>47</sup> Instead, should a judge doubt the constitutionality of a statute or executive action, he may certify the question to the *Bundesverfassungsgericht*. The *Bundesverfassungsgericht*, in turn, reviews the record and defers to the lower court's belief that the case requires the resolution of a constitutional question, unless it is clearly irrational to do so.<sup>48</sup> The Court does not decide the issue on the merits, but rather addresses the statute's constitutionality and returns its answer to the lower court to apply the Court's interpretation in making its own ruling.<sup>49</sup> This procedure is considered part of the Court's "concrete judicial review" because it relates to an ongoing case or controversy, which falls without the Court's jurisdiction.<sup>50</sup>

The remaining avenue to the *Bundesverfassungsgericht* is retained by the Federal Government, state governments, or by a vote of one-fourth of the *Bundestag*'s membership.<sup>51</sup> These parties may avail themselves of the Court's "abstract judicial review," wherein they request that the Court analyze the constitutionality of a state or federal law of disputed meaning or application.<sup>52</sup> This can arise in cases where either state or federal laws are at odds with the *Grundgesetz*, or with each other.<sup>53</sup> What is fascinating about this component of the Court's jurisdiction is that it is not tethered to a concrete case or contro-

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47. Rupp, *supra* note 18, at 32.

48. *Id.* at 32–33.

49. *Id.* at 32.

50. *See id.* at 30 ("[The Court] has only original, no [ ] appellate jurisdiction."); Danielle E. Finck, *Judicial Review: The United States Supreme Court Versus the German Constitutional Court*, 20 B.C. INT'L & COMP. L. REV. 123, 146 (1997) (specifying that the regular German judiciary presiding over discrete cases must refer constitutionality questions to the *Bundesverfassungsgericht* for "concrete norm control").

51. GRUNDGESETZ [GG] [BASIC LAW], Art. 93(1)(2); *see also* Rupp, *supra* note 18, at 37 (delineating the various avenues to the court, though at the time of his publication the jurisdictional threshold via the *Bundestag* was a one-third vote).

52. *See* Mher Arshakyan, *The Impact of Legal Systems on Constitutional Interpretation, A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court*, 14 GER. L. J. 1297, 1299 (2013) (describing the abstract review power as "both *a priori* and *a posteriori*," thereby giving the Court substantial policymaking power); KOMMERS & MILLER, *supra* note 4, at 15 ("When deciding cases on abstract review, the Court is said to be engaged in the 'objective' determination of the validity or invalidity of a legal norm or statute.").

53. KOMMERS & MILLER, *supra* note 4, at 15.

versy, hence “abstract,” but rather empowers the government—and, with respect to democratic theory, a political minority—to challenge the validity of laws per se without a formal dispute. Some critics of this jurisdictional ground therefore consider it incompatible with democracy because it can empower the losing side of a legislative vote to prolong a political dispute by means of the Court.<sup>54</sup> Indeed, this is precisely what happened when two *Länder* challenged the Civil Partnership Law in 2001. However, the Court’s stewardship of German democracy means it is fully prepared to address such controversies whenever they generate serious political discord.

## 2. *Philosophy and Methods of Judicial Review*

German jurisprudence is rooted in the history of the continental civil law system,<sup>55</sup> distinct from the common law traditions of the United States and United Kingdom in the following manner: 1) The sole legitimate authority for making laws is the sovereign parliament; 2) the law comprises a closed system of logically arranged and internally coherent rules; and 3) judges are independent of the political system and charged

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54. See, e.g., Arshakyan, *supra* note 52, at 1299 (“This mechanism is often used by political minorities who oppose the adoption of a law by parliament as their last chance to hinder the promulgation of the law.”); KOMMERS & MILLER, *supra* note 4, at 33 (“The apparent manipulation of the judicial process for political purposes in these cases has led some observers to favor the abolition of abstract judicial review.”).

55. *Richterliches Prüfungsrecht* (judicial review) in Germany as understood today was preceded in the nineteenth century by *Verfassungsgerichtsbarkeit* (constitutional review), a mechanism associated with constitutional monarchy from the inception of the German Confederation of 1815 to the collapse of the *Kaiserreich* in 1918. In this juridical conception, judges established the sovereign rights of constituent states with respect to the greater political unions they formed, but were otherwise restrained to applying codified law. By contrast, judicial review as the safeguard of individuals’ fundamental rights did not gain traction until the Weimar Republic’s ascendancy, despite the failed attempt of the Frankfurt Constitution of 1849 to institute such a practice with a *Reichsgericht* (Imperial Court of Justice). Indeed, the Weimar government established a constitutional democracy and bill of rights which the *Reichsgericht* (established by the Hohenzollerns in 1879) utilized to claim interpretive powers of judicial review. However, the practice remained highly controversial and unevenly applied across the country’s courts, and did not take its current form until it was imbued as such in the *Grundgesetz* in 1949 and *Bundesverfassungsgerichtsgesetz* in 1951. KOMMERS & MILLER, *supra* note 4, at 4–6.

simply with interpreting and applying the law in conformity with the written law and pursuant to the legislature's will.<sup>56</sup>

Despite this legally positivistic bent, it turns out that the *Bundesverfassungsgericht* is driven by a hybrid philosophy of positive civil law and normative natural law due to the unique experience and pressure of drafting the *Grundgesetz* in 1949. Namely, the Allies supervised its creation at Bonn by Germans who had both lived with and as part of Nazism in the wake of World War II, and in anticipation of establishing the rule of law for the Federal Republic of Germany formed out of a nascent German polity rent in two during the Cold War.<sup>57</sup> In fact, the first nineteen articles of the *Grundgesetz*, akin to a "bill of rights," establish fundamental, inalienable human rights, and Article 20 proclaims that Germany is a democratic and social federal state.<sup>58</sup> In so doing, the German constitution supplanted the prior German legal philosophy of state primacy, instead adopting a moral philosophy akin to Hegel's and Kant's rationalism wherein individual freedom and human dignity precede the state.<sup>59</sup> The result is that the government became beholden to a higher notion of justice, and the *Bundesverfassungsgericht* both inherited a positivistic civil law tradition and was charged with the duty of upholding normative human rights and preserving *Demokratieprinzip* (German democracy).<sup>60</sup>

The dichotomy of positive and normative law manifests itself in the Court's jurisprudence in conflicting ways. On the one hand, it is committed to upholding democracy, most clearly manifested by Germany's elected legislatures and the laws they create pursuant to the sovereign will of the German people—enshrined in the *Grundgesetz* as the source of all state authority.<sup>61</sup> This calls for judicial restraint by avoiding statutory interpretation and judgments tantamount to deciding po-

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56. Arshakyan, *supra* note 52, at 1321.

57. See Miller, *supra* note 8, at 590 ("[I]n the light of the Basic Law's self-conscious renunciation of the Nazi tyranny and counterpoise to the socialist experiment that was unfolding just across the [Berlin] Wall . . . democracy [is] the very heart of the constitutional system" (citation omitted)).

58. *Id.*

59. KOMMERS & MILLER, *supra* note 4, at 56.

60. Arshakyan, *supra* note 52, at 1321; KOMMERS & MILLER, *supra* note 4, at 51; Miller, *supra* note 8, at 590–91; ROBERTSON, *supra* note 43, at 71.

61. GRUNDGESETZ [GG] [BASIC LAW], Art. 20.

litical questions and effecting legislation, which would essentially supersede the legislative branch of government.<sup>62</sup> On the other hand, the Court is not officially barred from adjudicating a constitutional dispute because it has political implications, and is in fact duty-bound to render an analysis and judgment to preserve the integrity of the *Grundgesetz* and German democracy.<sup>63</sup> That being said, the Court maintains that it does not usurp legislative determinations of appropriate public policy, but instead considers issues only when they ripen and overturns statutes only in the event that they violate the dictates of principles like proportionality and justice.<sup>64</sup>

The constitutional laws and democratic principle are inviolable.<sup>65</sup> Just as the Court has done much to protect the electorate and enhance participatory democracy on procedural grounds by supporting campaign finance laws and voting rights, it has upheld the *Fünf-Prozent-Hürde* and other illiberal laws to preserve German democracy in light of its fascist history.<sup>66</sup> Similarly, just as the Court respects the legislature's prerogative to decide whether positive legislation is required on a given matter, it has asserted constitutional obligations imposed upon the legislature and held unconstitutional those laws that do not accomplish "enough." For instance, the Court held in

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62. See Rupp, *supra* note 18, at 38–39 (“[T]he Federal Constitutional Court has declined to look into the question whether a ‘need for federal legislation’ actually existed because this decision was wholly within the province of legislative discretion.”).

63. See *id.* at 39 (“[T]he Federal Constitutional Court has held that the failure of the legislative department to act violated the constitutional rights of individual petitioners.”). This will become especially clear in light of the Court’s decisions regarding *eingetragene Partnerschaften*, see Part III, *infra*.

64. KOMMERS & MILLER, *supra* note 4, at 34.

65. See Peter E. Quint, “The Most Extraordinarily Powerful Court of Law the World Has Ever Known”? – Judicial Review in the United States and Germany, 65 MD. L. REV. 152, 165 (2006) (“[T]he German Court has clearly proclaimed that it has the authority to strike down constitutional amendments if they are inconsistent with certain fundamental characteristics of the Basic Law, [although] the Court has never actually exercised this authority.”); see also GRUNDGESETZ [GG] [BASIC LAW], Art. 79(3) (“Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 [the inviolability of human dignity] and 20 [the sovereignty of the German people and social democratic character of the state], shall be inadmissible.”).

66. Miller, *supra* note 8, at 596, 598.

2013 that the Civil Partnership Law was incompatible with the *Grundgesetz* insofar as its adoption rights for gay couples were not more expansive.<sup>67</sup>

With its provisional guidance on how to apply and amend the laws, the Court possesses very strong judicial review power. It has thus been described as exercising “strong constitutionalism” pursuant to a “militant democracy,”<sup>68</sup> vigilantly employing judicial review through negative and positive legislation to maintain German democracy by upholding the rule of law in pursuit of justice. The Court considers this necessary, lest the errors of the country’s Nazi past be repeated. It simultaneously strives to be independent, deferential to legislative power, and dispassionately logical, but also proactively protective of German democracy—even from itself. And although positive civil law does not observe *stare decisis*, the Court tends to respect its precedent.<sup>69</sup>

Ultimately, the Court must determine whether statutes comport with the *Grundgesetz*. It proceeds from the presumption that statutes are constitutional, and attempts to construe them in the light most favorable to respecting *verfassungskonforme Auslegung* (constitutional law).<sup>70</sup> In all instances, should the Court find that a statute is repugnant to the *Grundgesetz*, it can declare it either *nichtig* (null and void) or *unvereinbar* (incompatible) with respect to the *Grundgesetz*. It then becomes incumbent upon the relevant government to amend the legislation in accordance with the Court’s constitutional interpretation.<sup>71</sup> The Court provides guidance thereto

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67. Gröpl, *supra* note 5, at 12.

68. Miller, *supra* note 8, at 596–97. To counter threats to the political system, the *Grundgesetz* provides for illiberal measures in various articles to protect German democracy, including Articles 9(2) (the power to prohibit associations which threaten the constitutional order), 11(2) (the power to restrict freedom of movement to avoid imminent threats), 18 (the power to waive an individual’s fundamental rights when they are used to harm the free, democratic basic order), and 21(2) (the power to ban political parties which threaten the free, democratic basic order). KOMMERS & MILLER, *supra* note 4, at 285.

69. Arshakyan, *supra* note 52, at 1322.

70. *Id.* at 1328.

71. Bundesverfassungsgerichtsgesetz [BVerfGG] [Federal Constitutional Court Act], Mar. 12, 1951, § 31, last amended by Gesetz [G], June 30, 2015, BGBl. I, at 973 (Ger.), [https://www.gesetze-im-internet.de/bverfgg/\\_31.html](https://www.gesetze-im-internet.de/bverfgg/_31.html) (it is important to note that the legislature granted the Court this

in one of two ways: 1) When a statute is voided and therefore immediately ceases to exist, the Court may provide an advisory opinion that actually leaves the legislature with little discretion on how to draft new legislation;<sup>72</sup> or 2) when a statute is ruled incompatible, the Court may stipulate in its rulings what legislation must be amended, and may provide provisional orders for how to apply the law until the amendment is made.<sup>73</sup> Alternatively, the Court can choose to uphold a statute entirely but admonish the legislature to amend it or otherwise suffer voidance down the road. All three possibilities typify a form of both negative and positive legislation in that the Court can both strike down legislation in full or in part, thereby negating its existence, as well as augment legislation by detailing affirmative changes necessary to bring it in harmony with the *Grundgesetz*.

In its interpretation, the Court is driven by its positivistic civil law heritage to consider constitutional questions with respect to the *Grundgesetz* as a unitary body of law. It does so in part by contemplating the constitutional laws as part of an objective order of values—to wit, human dignity and the free development of the personality, as enshrined in Articles 1 and 2 of the *Grundgesetz*, followed by liberty and equality, which mandate the government's affirmative duty to respect those values.<sup>74</sup> The justices render their judgment with a teleological approach, analyzing the function and purpose of rules, structures, and practices while relying on the “history and spirit” of the *Grundgesetz*.<sup>75</sup> They exalt the constitutional text and gener-

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power in its foundational legislation); KOMMERS & MILLER, *supra* note 4, at 35–37.

72. Kommers and Miller, for instance, describes how the German parliament “felt obliged” to pass a new law that the Court “effectively rewrote” when it struck down a permissive abortion statute in 1975. KOMMERS & MILLER, *supra* note 4, at 37.

73. *Id.* at 35–36.

74. *Id.* at 57–58. It is noteworthy that the Court often talks in terms of “justice” instead of natural rights, but cases vary in their explicit reliance on some sort of legal positivism that ranks constitutional rights. It remains unclear whether the Court believes suprapositivist norms exist apart from the constitution, reflect values in it, or account for the hierarchy the Court has construed. *See id.* at 58.

75. Arshakyan, *supra* note 52, at 1330.

ally avoid interpreting it with radical departures from the common understanding of its provisions.<sup>76</sup>

However, as stated before, the Court is also dedicated to upholding the fundamental rights prioritized in the constitutional law, and does so with “dynamic interpretation.”<sup>77</sup> This means the justices do not confine themselves to the historical significance or purpose of provisions in the *Grundgesetz* to fulfill their duty. As the Court has said, “Any decision defining human dignity in concrete terms must be based on our *present understanding of it* and not on any claim to a conception of timeless validity.”<sup>78</sup> The Court contextualizes its jurisprudence in its contemporary sociopolitical milieu, all the while seeking mutual respect for the logical rule of law, German democracy, and inalienable human rights. Concomitantly, it endeavors to balance the competing interests of the state and the individual with the principle of *Verhältnismäßigkeit* (proportionality), akin to rational review in the United States. This optimizes the effects of competing interests by inquiring about a law’s purpose<sup>79</sup> and whether it provides the least restrictive method to achieve the state’s valid aim.<sup>80</sup> Furthermore, the Court strives to balance fundamental rights when they clash with one another, in fulfillment of *praktische Konkordanz* (practical concordance). This principle calls for the harmonization of constitutional values to optimize their effect in any given case, thus avoiding a zero-sum game with respect to fundamental

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76. *See id.* at 1331 (“Despite the fact that German courts are not formally bound to follow previous the decisions based on the *stare decisis* doctrine, the precedent functionally plays the same role in Germany, at least for the sake of consistency and equality.”).

77. *Id.*

78. *Id.* (emphasis added) (quoting Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Lebenslange Freiheitsstrafe* [Life Imprisonment], June 21, 1977, 45 BVERFGE 187 (229)).

79. *Cf. Rupp, supra* note 18, at 38 (discussing how the Court wants to leave to the legislature’s discretion determinations of political policy, as distinguished from a proportionality analysis scrutinizing the purpose and effect of a particular law in contention).

80. KOMMERS & MILLER, *supra* note 4, at 67. The Court’s proportionality test demands less than the “strict scrutiny” test in the United States, but more than a bare minimum of rationality. *Id.* This is especially clear when considering equal protection of the law in cases concerning unequal treatment premised on immutable personal characteristics, such as sexual orientation. For more discussion, see generally Part III, *infra*.

rights.<sup>81</sup> The result is a constitutional jurisprudence that can be at odds with itself, as in the case of gay marriage. Still, the *Bundesverfassungsgericht* remains the most trusted institution in Germany.<sup>82</sup> It is, after all, a body committed to Germany's political stability, respect for the rule of law, and utmost protection of fundamental rights.

### III. THE HISTORY AND JURISPRUDENCE OF EINGETRAGENE PARTNERSCHAFTEN

As part of a worldwide trend of rapidly expanding advocacy and achievement for gay rights in the twenty-first century, the German *Bundestag* passed the *Lebenspartnerschaftsgesetz* on February 16, 2001.<sup>83</sup> Spearheaded by a socially liberal SPD/GRÜNEN coalition—and vociferously opposed in the conservative-led *Bundesrat*<sup>84</sup>—the law codified the right of same-sex couples to register for civil partnerships that create legally binding contractual rights akin to, but substantially short of,

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81. Compare KOMMERS & MILLER, *supra* note 4, at 67–68 (outlining the Court's approach to harmonizing conflicting constitutional values) with Mark V. Tushnet, *How Different Are Waldron's and Fallon's Core Cases For and Against Judicial Review?*, 30 OXFORD J. L. STUD. 49, 53 (2010) (elaborating on Richard Fallon's view that Courts should not compare conflicting fundamental values). For more discussion, see generally Part IV.B, *infra*.

82. KOMMERS & MILLER, *supra* note 4, at 39–40 (stating that public opinion polls show the Court enjoys more trust than the *Bundestag*, the military, the remainder of the judiciary, television networks, churches, and universities).

83. See Oppenheimer, *supra* note 6, at 202 (the Netherlands legalized gay marriage in 2001, Germany created registered partnerships in 2001, Finland created registered partnerships in 2002, Belgium legalized same-sex marriage in 2003, Croatia recognized same-sex cohabitation rights in 2003, Luxembourg created registered partnerships in 2004, Spain legalized gay marriage in 2005, the U.K. created registered partnerships in 2005, Andorra created civil unions in 2005, Slovenia and the Czech Republic created registered partnerships in 2006, Switzerland created registered partnerships in 2007, Norway and Sweden legalized gay marriage in 2009, Hungary created registered partnerships in 2009, Iceland and Portugal legalized gay marriage in 2010, Austria created registered partnerships in 2010, Ireland and Lichtenstein created registered partnerships in 2011, Denmark legalized gay marriage in 2012, and Britain and France made legislative moves to legalize gay marriage in 2013).

84. Cf. Schweiger, *supra* note 10, at 4 (reflecting, in the case of the *Große Koalition*, on how legislation is stymied especially when the *Bundesrat* is led by parties opposed to the coalition controlling the *Bundestag*).

the scope of rights afforded to marriage in Germany.<sup>85</sup> The *Bundesländer* of Bavaria and Saxony immediately challenged the constitutionality of the legislation pursuant to “abstract judicial review,” but the *Bundesverfassungsgericht* upheld the statute’s validity and has expanded the rights it affords ever since.<sup>86</sup> A brief review of the sociopolitical and jurisprudential history of the institution of marriage in Germany sheds light on the unique struggle to legally recognize same-sex marriage in the country.

In accord with the elaborate scheme of negative and positive fundamental rights enshrined in the first nineteen articles of the *Grundgesetz*, Article 6(1) explicitly provides as follows: “Marriage and family enjoy the special protection of the state.”<sup>87</sup> This proclamation therefore institutionalizes the fundamental right to marriage and the family unit in Germany as a right which the state is bound to protect alongside the constellation of other constitutionally protected human rights. Thus, Article 6(1) not only codifies the right to marriage, but also imposes an affirmative duty on the state to provide for its *special* protection. To fail to do so would be to spurn the integrity and inviolability of the *Grundgesetz* as the embodiment and safeguard of German democracy, all of its provisions being construed as part of a logically unified system of positive law subordinate to suprapositive German moral values. It must be noted, however, that the article does not define marriage; as one may suspect and commentators confirm, the drafters of the German constitution in 1949 took for granted that it was and should remain the immutable and perennial union of heterosexual couples.<sup>88</sup> To this end, the *Bundesverfassungsgericht* directly established as much in various cases related to marriage in general.<sup>89</sup> This is not necessarily a reflection of adher-

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85. Gröpl, *supra* note 5, at 10.

86. See KOMMERS & MILLER, *supra* note 4, at 607 (analyzing the Court’s holding in favor of the Civil Partnership Law in 2002); Gröpl, *supra* note 5, at 11 (listing the various cases in which the Court has expanded the rights provided to *eingetragene Partnerschaften*).

87. GRUNDGESETZ [GG] [BASIC LAW], Art. 6(1).

88. See Gröpl, *supra* note 5, at 13 (quoting the *Sukzessivadoption* case, *infra*, that the notion of anything other than heterosexual marriage in 1949 was simply “beyond the imagination of the times”).

89. See KOMMERS & MILLER, *supra* note 4, at 606 (summarizing the Court’s stance on marriage across various cases from 1959 to 1992 to be “defined by

ence to the “original intent” of the constitution’s framers, but rather an unsurprising maintenance of a generally worldwide social status quo that only began to change in approximately the last two decades.

However, the first-order moral principle and fundamental right guaranteed in Article 1(1) of the *Grundgesetz* is the inviolability of human dignity, a value which pervades all German constitutional jurisprudence and also informs Article 3(1)’s guarantee of equal protection of the law for all people.<sup>90</sup> Indeed, in 1993, a three-member panel of the *Bundesverfassungsgericht*, which maintained that marriage is a heterosexual institution, simultaneously recognized the difficulties faced by same-sex couples relative to married couples.<sup>91</sup> As Donald Kommers observes, this commentary and the substantial growth of gay rights advocacy in the 1990s likely spurred and also mirrored changing societal attitudes towards gay rights.<sup>92</sup> Thus, the Civil Partnership Law of 2001 represents the culmination in Germany of a global shift in sociopolitical values pertaining to gay marriage. Nevertheless, the law faced considerable opposition even though it did not even institutionalize gay marriage in the country.

Once *eingetragene Partnerschaften* for same-sex couples were codified in Germany, Bavaria and Saxony invoked an abstract constitutional review proceeding in the *Bundesverfassungsgericht*. The *Länder* alleged, inter alia, that the civil unions infringed upon Articles 3(1), 6(1), and 14(1) of the *Grundgesetz*—equal protection of the law, the special protection of the institution of marriage, and the protection of property rights, respectively.<sup>93</sup> The Court had little trouble dispensing with the first and third claims, but the core of the case turned on the constitutional institutionalization and special protection of marriage, both commonly and legally understood to pertain solely to heterosexual couples. The *Länder* argued that legally cognizable same-sex civil unions would detract from the sanctity of heterosexual marriage, which alone required the *special*

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a male-female complementarity that is superior to any union between same-sex partners”).

90. See ROBERTSON, *supra* note 43, at 30 (“The dignity clause of Article 1 is the heart of all the basic rights.”).

91. KOMMERS & MILLER, *supra* note 4, at 605–06.

92. *Id.* at 606.

93. *Id.* at 607.

protection of the state. In their view, special protection mandated not only that the state protect marriage by not infringing upon it through diminution, but also that the state had a positive duty to actively promote it more than other forms of association.<sup>94</sup> For them, same-sex civil unions represented an encroachment upon marriage which would disadvantage it.

In assessing the Civil Partnership Law, the Court reconciled it with the constitutional right of marriage by explicitly disavowing the marital character of *eingetragene Partnerschaften*. In its opinion, the First Senate declared that “marriage is only possible for opposite-sex partners . . . . Even after the [Civil Partnership Law], same-sex couples are still unable to marry.”<sup>95</sup> For German civil and constitutional law, the institution of marriage has long represented the cornerstone of familial stability and the development of one’s personality, another fundamental right in the *Grundgesetz*;<sup>96</sup> this task had long been thought uniquely fulfilled by a heterosexual couple raising children.<sup>97</sup> Therefore, in the Court’s view, the legislative recognition of *eingetragene Partnerschaften* did not violate Article 6(1) because partnerships would not be marriages; they would instead manifest a legally protected contractual arrangement creating a set of rights to promote the development of the personality and equal protection of the law for gay couples.<sup>98</sup> As for the assertion that the legislature, in passing the law, was breaching its duty to afford “special” protection to marriage, the Court reasoned instead that:

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94. *Id.*

95. *Id.* (quoting Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Lebenspartnerschaftsgesetz* [Civil Partnership Case], July 17, 2002, 105 BVerfGE 313 (342)).

96. GRUNDGESETZ [GG] [BASIC LAW], Art. 2(1).

97. KOMMERS & MILLER, *supra* note 4, at 605–06. However, the requirement of bearing children no longer serves as the rationale for recognizing heterosexual marriage in any case. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Betriebliche Hinterbliebenenversorgung* [Surviving Dependents’ Pension Provisions], July 7, 2009, 124 BVerfGE 199 (229) (“Nicht in jeder Ehe gibt es Kinder. Es ist auch nicht jede Ehe auf Kinder ausgerichtet.” [“Not every marriage produces children. And not every marriage is geared towards having children.”]).

98. See KOMMERS & MILLER, *supra* note 4, at 608 (“[T]he legislature takes account of Article 2(1) and Article 3(1) and (3) by helping [gay people] to better develop their personalities by reducing discrimination . . . .” (quoting BVerfG, *Lebenspartnerschaftsgesetz*, 105 BVerfGE 313 (346))).

[T]his special element resides in the fact that marriage alone . . . enjoys constitutional protection as an institution. No other way of life, however, merits this protection. Marriage cannot be abolished nor can its essential structural principles be altered without an amendment to the constitution . . . . To attach to the special nature of the protection a meaning above and beyond this to the effect that marriage must always be protected more than other partnerships . . . has no basis either in the wording of the fundamental right or in its genesis.<sup>99</sup>

Concomitant with its jurisprudence of *verfassungskonforme Auslegung* and efforts to optimize colliding fundamental rights within proportionality review, the Court held that *eingetragene Partnerschaften* would promote the fundamental rights of gay couples without impinging on the unique protection of marriage in Germany. Because the new law did not “divest marriage of any promotion that it previously enjoyed,” it was constitutional.<sup>100</sup> However, in drawing its conclusion the Court insisted on the diminished protections of *eingetragene Partnerschaften*—both in the scope of rights they afforded, as well as their exclusion from codification in the *Grundgesetz*—compared to the consummate totality of marriage, because any positive legislation that would diminish marriage would violate its promotion as guaranteed in Article 6(1). As the Court opined, “Such a danger might exist if the legislature created another institution in competition with marriage, with the same function . . . and . . . same rights . . . .”<sup>101</sup> Thus, the *Bundesverfassungsgericht*’s reasoning in 2002 established that gay marriage would likely be a fundamentally flawed and unconstitutional concept,<sup>102</sup> the implications of which remain unresolved to this day.

Despite its limitations, the Court’s decision made available to the approximately 47,000 gay couples as of 2000 in Ger-

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99. *Id.* at 609 (quoting BVerfG, *Lebenspartnerschaftsgesetz*, 105 BVERFGE 313 (348–49)).

100. *Id.* at 609 (quoting BVerfG, *Lebenspartnerschaftsgesetz*, 105 BVERFGE 313 (347)).

101. *Id.* at 610 (quoting BVerfG, *Lebenspartnerschaftsgesetz*, 105 BVERFGE 313 (350–51)).

102. Though Justices Papier and Haas dissented in the first instance. *Id.* at 610–11.

many the right to civil unions which would confer some of the benefits of marriage upon them.<sup>103</sup> In 2004, the *Bundestag* passed a revision to the Civil Partnership Law, again without support from the *Bundesrat*. The revision expanded on some rights, including the right to adoption of a gay partner's biological child, as well as revised tax and social security treatment,<sup>104</sup> provided new financial protections in the event of an abrogated union, and made an explicit declaration that an existing partnership is a bar to marriage.<sup>105</sup> However, the boon of progressive legislation for gay rights in Germany came to an abrupt end in 2005 with the ascendancy of the *Große Koalition* spearheaded by the CDU's Angela Merkel.<sup>106</sup> With an avowed conservative platform, the CDU was able to reign in the SPD's progressivism in pursuit of coalitional compromise and stable government. This development, in turn, cleared the way for the *Bundesverfassungsgericht's* recent spate of judicial activism with respect to gay rights.

Although the CDU/SPD parliament stopped broadening the rights conferred with *eingetragene Partnerschaften*, the *Bundesverfassungsgericht* continued to expand the rights afforded by means of constitutional interpretation. In a series of six cases from 2009 to 2013, the Court recognized the right of same-sex civil unions to surviving dependents' pension provisions, inheritance and donation tax deductions, civil servant salary increases, land acquisition tax deductions, the successive adoption of children from third parties, and income tax splitting.<sup>107</sup> All of these cases incrementally established further

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103. *Id.* at 606.

104. Chris Henry, *Wider Vision: Hate Speech Law, Public Opinion and Homosexual Rights in Germany and the United States*, 30 CONN. J. INT'L L. 123, 139 (2015).

105. Gröpl, *supra* note 5, at 10.

106. *Id.*

107. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Betriebliche Hinterbliebenenversorgung* [Surviving Dependents' Pension Provisions], July 7, 2009, 124 BVERFGE 199 (holding constitutionally incompatible a public agency's denial of equal pension provisions to civil partners as compared to married couples); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Erbschafts- und Schenkungssteuer* [Inheritance and Donation Tax], July 21, 2010, 126 BVERFGE 400 (holding constitutionally incompatible the diminished inheritance and donation tax benefits for civil partners as compared to married couples); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Besoldungsfall* [Salary Case], June

parity between civil unions and marriage in Germany. The Court relied on Article 3(1) of the *Grundgesetz*, equal protection of the law, to argue that the deprivation of the above rights conferred a disproportionate advantage on married couples which could not be denied to same-sex couples.<sup>108</sup> The government's proffered justifications for withholding these rights failed proportionality review, because "the mere reference to a protective mandate for marriage pursuant to Article 6(1) does not justify such a differentiation" between marriage and other forms of association, where marriage is privileged at the expense of those other forms.<sup>109</sup> The Court attuned its scrutiny to the fact that the disadvantaged citizens, as gay people, were disadvantaged on the basis of immutable personal traits accounted for under Article 3(3) of the *Grundgesetz*.<sup>110</sup> In such an instance, a disproportionate legislative scheme could survive proportionality review only where "the extent of the differentiation is invoked on the basis of an

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19, 2012, 131 BVERfGE 239 (holding constitutionally incompatible the reduced bureaucratic salary provisions for civil partners as opposed to married civil servants); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Grunderwerbsteuer* [Land Acquisition Tax], July 18, 2012, 132 BVERfGE 179 (holding constitutionally incompatible diminished property acquisition tax breaks for civil partners as opposed to married couples); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Sukzessivadoption* [Successive Adoption], Feb. 19, 2013, 133 BVERfGE 59 (holding the Civil Partnership Law incompatible with the *Grundgesetz* insofar as it denied civil partners the right to adopt the non-biological adopted children of their partners); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Ehegattensplitting* [Income Tax Splitting], May 7, 2013, 133 BVERfGE 377 (holding constitutionally incompatible the diminished income tax deductions allowed for civil partners as opposed to married couples).

108. BVerfG, *Ehegattensplitting*, 133 BVERfGE 377.

109. A refrain throughout many of the cases. See, e.g., BVerfG, *Betriebliche Hinterbliebenenversorgung*, 124 BVERfGE 199 (199) ("[D]er bloße Verweis auf das Schutzgebot der Ehe gemäß Art. 6 Abs. 1 GG [rechtfertigt] eine solche Differenzierung nicht.").

110. See, e.g., *id.* at 220 ("Die Anforderungen bei einer Ungleichbehandlung von Personengruppen sind umso strenger, je größer die Gefahr ist, dass eine Anknüpfung an Persönlichkeitsmerkmale, die mit denen des Art. 3 Abs. 3 GG vergleichbar sind, zur Diskriminierung einer Minderheit führt . . . Das ist bei der sexuellen Orientierung der Fall." ["The justifying conditions for the disparate treatment of classes of people are all the more strenuous whenever the danger grows that personal characteristics comparable to those listed in Art. 3(3) GG lead to the discrimination of a minority. This is the case with sexual orientation."]) (citations omitted).

objectively reasonable intrinsic correlation of sufficient weight between the [personal class] disparities and the differentiating regulation.”<sup>111</sup> In all six cases, the Court found the rationales for disparate treatment between *eingetragene Partnerschaften* and traditional marriages—mere reference to marriage’s Article 6(1) protective mandate—lacking. In all six cases, the government amended the corresponding legislation in compliance with the Court’s rulings.<sup>112</sup>

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111. *Id.* (“[F]ür das Maß der Differenzierung [muss] ein innerer Zusammenhang zwischen den vorgefundenen Verschiedenheiten und der differenzierenden Regelung bestehen, der sich als sachlich vertretbarer Unterscheidungsgesichtspunkt von hinreichendem Gewicht anführen lässt . . . .” (citations omitted)).

112. For *Surviving Dependents’ Pension Provisions*, the Federal Finance Ministry amended the statutory scheme of the *Versorgungsanstalt des Bundes und der Länder* (VBL) (Federal and State Provision Agency) to provide civil partners with surviving dependents’ pension provisions. See VBL, *Satzung der VBL, 17. Satzungsänderung* [VBL Statute, 17th Statutory Amendment], [https://www.vbl.de/de/die\\_vbl/auf\\_einen\\_blick/satzung/](https://www.vbl.de/de/die_vbl/auf_einen_blick/satzung/) (“Konkret geht es hierbei um . . . Regelungen zur Einbeziehung von eingetragenen Lebenspartnerinnen und Lebenspartnern in die Hinterbliebenenversorgung.” [“Specifically [the amendment] here concerns regulations for the inclusion of civil partners in surviving dependents’ [pension] provisions.”]) (last visited Oct. 5, 2016). For *Inheritance and Donation Tax*, the Court acknowledged that the legislation of the *Erbschaftssteuerreformgesetz* [Inheritance Tax Reform Act] corrected for disparate treatment reviewed by the Court, along with the equalization accounted for in 2010’s annual tax code. BVerfG, *Erbschafts- und Schenkungssteuer*, 126 BVERFGE 400 (407–08). The Court mandated that the legislature also draft legislation for retroactive effect, which was formally adopted on June 24, 2016. Endgültiges Ergebnis der Namentlichen Abstimmung Nr. 1: Entwurf eines Gesetzes zur Anpassung der Erbschaftssteuer- und Schenkungssteuergesetzes an die Rechtsprechung des Bundesverfassungsgerichts [Final Result of Nominal Vote 1: Draft Law for Adjustment of the Inheritance and Donation Tax Act to the Ruling of the Federal Constitutional Court], DEUTSCHER BUNDESTAG, [http://www.bundestag.de/blob/429322/c4eb651396c8f715d13a27075f1006f2/201\\_60624\\_1-data.pdf](http://www.bundestag.de/blob/429322/c4eb651396c8f715d13a27075f1006f2/201_60624_1-data.pdf) (Ger.) (last visited Oct. 5, 2016). For *Salary Case*, the Court acknowledged that a 2011 civil servant salary amendment corrected for deficits, and thus used its holding to retroactively backdate the amended act to August 1, 2001 as compensation for all disadvantaged civil servants in civil partnerships. BVerfG, *Besoldungsfall*, 131 BVERFGE 239 (245, 265). For *Land Acquisition Tax*, the Court applied retroactive effect to the amended 2010 annual tax code which finally satisfied constitutional requirements of equal protection. BVerfG, *Grunderwerbsteuer*, 132 BVERFGE 179 (180). For *Successive Adoption*, the legislature amended the Civil Partnership Law. *Gesetz zur Umsetzung der Entscheidung des Bundesverfassungsgerichts zur Sukzessivadoption durch Lebenspartner* [Law Implementing the Federal Constitutional Court’s Holding on Successive Adop-

Of the six cases, the most remarkable is the *Sukzessivadoption* (successive adoption) case from February 2013.<sup>113</sup> It came to the Court both as a certified question from the *Hanseatisches Oberlandesgericht* (Hamburg Provincial High Court of Appeal) and as a constitutional complaint by a citizen. Both controversies concerned “successive adoption,” whereby an individual can successively adopt the adopted child of his or her spouse. Until 2013, Civil Partnership Law section 9(7) in its amended form permitted civil partners to legally adopt only the biological children of their partners; successive adoption remained the exclusive right of heterosexual married couples.<sup>114</sup>

In the Hamburg proceeding, an *Amtsgericht* (municipal court) rejected a man’s application to adopt the legally adopted child of his civil partner. They had raised the child together since 2002.<sup>115</sup> When he appealed the rejection to the *Landgericht* (state court), the appellate judges upheld the *Amtsgericht*’s ruling on the basis that “one may not confuse the right to lead ‘one’s sex life according to one’s choice’ with the ‘right to children.’”<sup>116</sup> Furthermore, the *Landgericht* found that Article 3(1) of the *Grundgesetz* does not mandate equal treatment of *eingetragene Partnerschaften* and marriage, and that section 9(7) was a political compromise which explicitly provided for the adoption of only biological children in civil partnerships.<sup>117</sup> The *Landgericht* maintained that only the legislature should expand adoption rights.<sup>118</sup> In stark contrast, the

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tion through Civil Partners], June 20, 2014, BGBL. I at 786. For *Income Tax Splitting*, the legislature passed a law amending the relevant tax provisions. *Gesetz zur Anpassung steuerlicher Regelungen an die Rechtsprechung des Bundesverfassungsgerichts* [Law to Adjust Tax Regulations to the Federal Constitutional Court’s Jurisprudence], July 24, 2014, BGBL. I at 1042.

113. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Sukzessivadoption* [Successive Adoption], Feb. 19, 2013, 133 BVERFGE 59.

114. *Id.* at 61.

115. *Id.* at 64.

116. *Id.* (quoting LG Hamburg, 301 T 527/08, Feb. 16, 2009 (“Man dürfe das Recht eines jeden, ein ‘sexuelles Leben nach seiner Wahl’ zu führen, nicht verwechseln mit einem ‘Recht auf Kinder.’”)).

117. *Id.* at 64–65.

118. *Id.* at 65 (citing LG Hamburg, 301 T 527/08, Feb. 16, 2009 (“Eine weitergehende Regelung [von Adoption] sei nicht Gesetz geworden . . . Es sei aber Sache des Gesetzgebers, diesbezüglich Veränderungen herbeizuführen.” [“A more progressive adoption regulation has not been legislated . . . It is a matter for the legislature to bring about changes in this regard.”])).

*Oberlandesgericht* on subsequent appeal felt that section 9(7) violated Article 3(1)'s equal protection of the law, and certified the question of section 9(7)'s constitutionality to the *Bundesverfassungsgericht* to guide its decision-making.<sup>119</sup>

With respect to the constitutional complaint, an *Amtsgericht* in Münster rejected a woman's application from 2008 to successively adopt the legally adopted child of her civil partner.<sup>120</sup> On appeal, the *Landgericht* upheld the *Amtsgericht's* decision, basing its ruling on Article 6(1)'s constitutional mandate for the state to protect marriage, a union between a man and a woman which was accordingly afforded preferential treatment at law.<sup>121</sup> On subsequent appeal, the Hamm *Oberlandesgericht* likewise upheld the lower rulings, finding not only that marriage enjoyed the special and exclusive protection of the state, but also that childrearing remains the province of a father and a mother despite the role the plaintiff played in her partner's child's life.<sup>122</sup> As a result, she petitioned the *Bundesverfassungsgericht* on the ground that Civil Partnership Law section 9(7) violated her fundamental rights to equal protection of the law under Article 3(1) and to have a family under Article 6(1) of the *Grundgesetz*.<sup>123</sup>

On consideration of the certified question and constitutional complaint, the *Bundesverfassungsgericht* took the largest jurisprudential step with respect to *eingetragene Partnerschaften* since it first upheld their constitutionality in 2002. Employing proportionality review and bearing in mind the principle of concordance to optimize conflicting fundamental rights, the Court found Civil Partnership Law section 9(7) incompatible with Article 3(1) of the *Grundgesetz* insofar as it denied civil partners the right to successive adoption.<sup>124</sup> In so doing, the Court determined that civil partners who wished for successive adoption had been denied equal protection of the law vis-à-vis both married couples, who could adopt biological or adopted children, and civil partnerships, which could adopt biological children.<sup>125</sup> The most striking aspect of the Court's analysis,

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119. *Id.*

120. *Id.* at 66–67.

121. *Id.* at 67.

122. *Id.* at 67–68.

123. *Id.* at 68.

124. *Id.* at 59.

125. *Id.*

however, is that it concluded that the non-biological adopted children of civil partners had also been denied equal protection of the law vis-à-vis children who could otherwise be legally adopted.<sup>126</sup> This portion of the decision is integral because the Court, in discussing the constitutional rights of children under Articles 2(1) (development of the personality) and 6(2) (the fundamental right of parents to care for their children), stated that children have the right to the state's guarantee of parental care and upbringing.<sup>127</sup> Proceeding from that principle, the Court declared that Article 6(2) protects same-sex parents as well as opposite-sex parents: "The text of the fundamental parental right does not conflict with its application to two people of the same sex."<sup>128</sup> To further bolster its point, the Court wrote, "The *Grundgesetz* does not speak of mothers and fathers in Article 6(2), but rather of parents of a non-specific sex."<sup>129</sup> Thus, the *Bundesverfassungsgericht* explicitly proclaimed that the German constitution provides for the fundamental right of gay people to raise children together under Article 6(2), which is only one subsection removed from Article 6(1)'s right to marriage. The implications of this opinion remain to be seen.

Along with its decision, the Court stipulated that the legislature had until June 30, 2014 to amend the Civil Partnership Law in conformance with its opinion, which the *Bundestag* officially did on June 20, 2014.<sup>130</sup> The Court provisionally stipulated that section 9(7) was to be construed to permit successive adoption, a form of starkly positive legislation that had a tremendous impact on civil partnership law in Germany.<sup>131</sup> Of all

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126. *Id.* at 86.

127. *Id.* at 73.

128. *Id.* at 78 ("Der Wortlaut des Elterngrundrechts steht einer Anwendung auf zwei Personen gleichen Geschlechts nicht entgegen.").

129. *Id.* ("Das Grundgesetz spricht in Art. 6 Abs. 2 Satz 1 GG nicht von Mutter und Vater, sondern von geschlechtlich nicht spezifizierten Eltern.").

130. *Id.* at 60; see *supra* note 112 and accompanying text.

131. See *Bundesverfassungsgericht* [BVerfG] [Federal Constitutional Court], *Sukzessivadoption* [Successive Adoption], Feb. 19, 2013, 133 BVERFGE 59 (60) ("Bis zur gesetzlichen Neuregelung ist § 9 Absatz 7 des Lebenspartnerschaftsgesetzes mit der Maßgabe anzuwenden, dass die Adoption des angenommenen Kindes des eingetragenen Lebenspartners möglich ist." ["Until the new legislative scheme is passed, Civil Partnership Law § 9(7) is to be applied subject to the proviso permitting successive adoption of a civil partner's adopted child."]).

six cases relating to civil partnerships from 2009 to 2013, *Sukzessivadoption* is most significant because it mandated an amendment to the Civil Partnership Law itself. In essence, the Court found that the Civil Partnership Law had not afforded *enough* protection to gay couples in civil unions. The justices applied their reasoning in accordance with Article 3(1)'s *Gebot der Folgerichtigkeit*, or consistency precept; if the legislature makes systemic decisions, they must be executed congruently throughout the law.<sup>132</sup> By virtue of the entry of *eingetragene Partnerschaften* into legal force, the incomplete scope of their rights provisions has continuously presented gaps which the Court has consistently filled. It is noteworthy that the *Bundestag* once again revised the Civil Partnership Law in November 2015, of its own volition, as a form of political compromise to further expand the law's scope of rights.<sup>133</sup> However, the current version of the law still lacks complete parity with marriage, and is thus emblematic of the piecemeal legislative and judicial efforts that have incrementally increased the legal standing of *eingetragene Partnerschaften*. Despite these efforts, future litigation is likely.

#### IV. JUDICIAL REVIEW AND DEMOCRACY

In light of the powerful role the *Bundesverfassungsgericht* plays in Germany's sociopolitical order, it is pertinent to ground further analysis of *eingetragene Partnerschaften* in the larger philosophical debate concerning judicial review and democracy. Judicial review is the judiciary's power to declare laws unconstitutional using statutory and constitutional interpretation and judicial precedent. It can take a strong or weak form; with the former, a reviewing court declines to apply a statute or modifies its effect to comport with individual constitutional rights as envisaged by the court, and with the latter, a court

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132. Gröpl, *supra* note 5, at 11.

133. Gesetz zur Bereinigung des Rechts der Lebenspartner [Civil Partner Rights Revision Act], Nov. 20, 2015, BGBL. I at 2010 (Ger.); *see also* Gesetzesentwurf der Bundesregierung [Bill of the Federal Government] DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 18/5901, Sept. 2, 2015 (Ger.) (describing the proposed legislation's need because "marriage and civil partnerships are treated differently for no apparent reason," but also highlighting the traditionally hostile *Bundesrat's* support for the legislation ["Ehe und Lebenspartnerschaft [werden] unterschiedlich behandelt, ohne dass dafür ein überzeugender Grund ersichtlich wäre."]).

scrutinizes legislation to conform with individual rights, but cannot decline to apply a law or modify its effect in an effort to avoid a perceived constitutional violation.<sup>134</sup>

Though its precise definition has varied depending on historical context, democracy as encapsulated by modern liberal democracies like the United States and Germany consists of rule manifested by the consent of the governed and effectuated through the election of representatives.<sup>135</sup> Legislatures pass laws and the executive enforces them pursuant to the will and interests of the electorate, because the electorate's political equality and right to voice beliefs, deliberate, and make decisions serve as the lynchpin of a democratic polity.

Given these accounts of judicial review and democracy, scholars have long debated about their irreconcilability—if a democracy's *telos* turns on the people's self-rule, how is it that an unelected, politically insulated judiciary can singlehandedly pass judgment on the validity of legislation enacted in pursuit of that *telos*?<sup>136</sup> Indeed, Hans Kelsen, an early proponent of constitutional courts and creator of the Austrian Constitutional Court after World War I, characterized parliaments as *positive Gesetzgeber* (positive legislators) and judiciaries

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134. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1354–55 (2006).

135. See, e.g., George Mace, *The Antidemocratic Character of Judicial Review*, 60 CAL. L. REV. 1140, 1146 (1972) (“In archaic usage . . . *democracy* referred to the direct participation of the citizens in the general affairs of government, while the word *republic* referred to a system of indirect or representative government.’ . . . Democracy means today what republic meant to the founding fathers” (emphasis in original) (quoting DAVID SPITZ, PATTERNS OF ANTI-DEMOCRATIC THOUGHT 8–9 (2d ed.1965))).

136. See, e.g., Waldron, *supra* note 134, at 1349 (“[D]emocratic ideals are bound to stand in an uneasy relation to any practice that says elected legislatures are to operate only on the sufferance of unelected judges.”); H.L.A. HART, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 125 (1983) (English political and legal thinkers find the phenomenon of judicial review “particularly hard to justify in a democracy”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4–5 (1980) (“[T]he central problem of judicial review [is that] a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.”); SIDNEY HOOK, *THE PARADOXES OF FREEDOM* 95 (1962) (“Those who defend the theory of judicial supremacy cannot easily square their position with any reasonable interpretation of the theory of democracy.”).

equipped with judicial review as *negative Gesetzgeber* (negative legislators).<sup>137</sup> The former could enact positivist legislation pursuant to whichever political policy it considered germane, and the latter could negate the former's efforts. In fact, Kelsen cautioned against providing for suprapositive human rights in constitutions, for fear that this would induce constitutional judges to become positive legislators.<sup>138</sup> As the German example demonstrates, his prognostication was correct.<sup>139</sup>

Literature addressing the conflict between judicial review and democracy ranges from proceduralist critiques of judicial review to consequentialist defenses of its virtuous results. It even incorporates different conceptions of democracy and outright repudiation of the significance of questioning whether judicial review is democratic. These unresolved and divergent viewpoints highlight the difficulty of taking a normative stance toward judicial review vis-à-vis democracy.

### A. *The Proceduralist Critique*

Jeremy Waldron strongly opposes judicial review as an undemocratic and inappropriate judicial mechanism that can only detract from a functioning democracy because it disenfranchises its electorate.<sup>140</sup> He arrives at this conclusion not by discrediting the clear societal benefits produced by landmark judicial opinions—e.g. *Brown v. Board of Education*,<sup>141</sup> and arguably, by extension to this Note, *Obergefell v. Hodges*<sup>142</sup>—but by constructing a core case of a functioning democracy which is procedurally harmed by an appointed judiciary taking rights-based decisions into its own hands.<sup>143</sup> In such a state,

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137. Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution*, 4 J. POL. 183, 187 (1942); Tomer Broude, *The Constitutional Function of Contemporary International Tribunals, or Kelsen's Visions Vindicated*, 4 GOETTINGEN J. INT'L L. 519, 524 (2012).

138. Broude, *supra* note 137, at 524.

139. See Part III, *supra*.

140. Waldron, *supra* note 134, at 1353.

141. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

142. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

143. See Waldron, *supra* note 134, at 1348 (“I want[ ] to acknowledge up front the value of many of the decisions [judicial review] has given us and the complexity of the procedural issues.”). The core case consists of a polity in which democratic institutions work reasonably, judicial institutions work reasonably to adjudicate controversies, most of society and state officials are invested in upholding individual and minority rights, and the electorate has

judicial review deprives democratic citizens of their political equality, subverting the deliberative and legislative decisions of the legislatures elected by the citizenry in favor of insular interpretation.<sup>144</sup> Waldron does not entertain questions of the legislature's competence to make democratic decisions vis-à-vis the judiciary—which he argues is not somehow suited to do so any better.<sup>145</sup> Ultimately, the proceduralist critique finds an electoral and democratically representative government a well-suited mechanism for granting democratic citizens political equality. Though decontextualized, this critique compellingly argues that judicial review is an aberration and undemocratic per se.

### B. *The Proceduralist Defense*

Richard Fallon challenges Waldron's core case against judicial review by arguing that it is a necessary mechanism to mitigate the risk of arbitrary legislative power potentially violating fundamental individual rights.<sup>146</sup> Mark Tushnet describes this as the "libertarian presupposition," that is, that less legislation is better than more because legislative action increases the risk of violating those rights.<sup>147</sup> As a result, judicial review provides an additional safeguard of rights by operating as a procedural veto, and Fallon views this as an indispensable and democratic tool.<sup>148</sup>

Although Fallon concedes that the judiciary is theoretically no better equipped than the legislature to make democratic determinations and that judicial review poses the risk of stymying well-intentioned, rights-promoting legislation, he believes the potential harm of under-enforcing fundamental

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good faith disagreements about rights and the scope of their protection. *Id.* at 1360.

144. *Id.* at 1360.

145. Tushnet, *supra* note 81, at 51–52; *cf.* Fallon's views in Part IV.B, *infra*. Others echo Waldron's critique, such as Martí, who does not pass a normative judgment on judicial review, but nevertheless portrays it as inapposite to a democratic system by characterizing strong constitutionalism (i.e. judicial review) and strong democracy as inversely proportional to one another. See José Luis Martí, *Is Constitutional Rigidity the Problem? Democratic Legitimacy and the Last Word*, 27 *RATIO JURIS* 550, 552 (2014).

146. Tushnet, *supra* note 81, at 52.

147. *Id.*

148. *Id.*

rights outweighs the risk of over-enforcing them with multitudinous laws.<sup>149</sup> However, Fallon also stresses that judicial review should not be exercised as part of a zero-sum game, that is, not when fundamental rights clash with one another in a given case.<sup>150</sup> This proves very relevant to the case of Germany, as seen in Part III, *supra*, and Part V, *infra*, wherein the *Grundgesetz*'s competing fundamental rights of equal protection of the law and the special protection of marriage collide on the issue of recognizing gay marriage in Germany. As a result of the proceduralist divide, judicial review finds its strongest support in varied conceptions of democracy.

### C. *Reconceptualizing Democracy for Judicial Review*

On its face, the notion of reconceptualizing democracy to accommodate judicial review connotes a certain capitulation; that is, the two remain irreconcilable but for material alterations of our understanding of the former to satisfy the latter. If one subscribes to the proceduralist view of democracy as both the means and the end in a democratic society by virtue of majoritarian decision-making, then that conception of democ-

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149. *Id.* Arguably, Fallon focuses on the United States' liberal modern democracy and thus his presupposition of legislative error cuts against Waldron's decontextualized core case of a well-functioning democracy. Tushnet even emphasizes this in his analysis of their arguments, but also concludes that Fallon and Waldron are not as far apart from one another as their "pro"/"con" titles suggest. Fallon ultimately favors weak judicial review over strong review, which imposes only small obstacles to a democratic polity's ability to make legally effective the democratic majority's understanding of constitutionally protected rights. *Id.* at 65. But Tushnet identifies a downside to weak review: By addressing the concern of judicial activism by fostering greater legislative power, it runs the risk of diminishing a constitution's supremacy, allowing the legislature to alter it at its whim. See Mark V. Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2786 (2003). If Tushnet's assessment is correct, it seems judicial review—especially as practiced in the United States—does not bolster proceduralist democracy. But on the other hand, John Hart Ely argues that the courts' sole legitimate role is to correct procedural malfunctions, and that judicial review is therefore a procedural mechanism for perfecting process and reinforcing representative democracy. See Terri Peretti, *Democracy-Assisting Judicial Review and the Challenge of Partisan Polarization*, 4 UTAH L. REV. 843, 844 (2014). In the case of the United States, Ely extols the Supreme Court when it bolsters participatory values, such as voting rights and free speech, but not when it imposes substantive value judgments on the nation. *Id.*

150. Tushnet, *supra* note 81, at 53.

racy should be preserved as such or it risks losing its legitimacy and significance as a system of rule by the governed. However, the following accounts of democracy assert other values which, in their authors' view, democracy must fulfill and which judicial review can promote in furtherance of democracy. Although these accounts are presented discretely, in part for organizational purposes to distinguish the way they frame their arguments, they bear a strong resemblance to one another and ultimately posit the same democratic theory: Judicial review pursues justice.

Eugene Rostow shifts the focus of the debate from democracy's proceduralist means and ends to what he considers its actual end: liberty. Democracy's value is to provide as much freedom as possible to all individuals living in a democratic sovereign state.<sup>151</sup> In his conception, individuals are free by virtue of the state not being so; limited powers are delegated by constitutional authority to the three branches of government, which exercise their functions with the presumption of review mechanisms.<sup>152</sup> For the judiciary, that role takes the form of judicial review, whereby judges can resolve disputes between the branches of government and between the government and individuals.<sup>153</sup> Rostow grounds his analysis in American political philosophy, referencing Alexander Hamilton's defense of judicial review to stress that the judiciary is *not* superior to or subversive of the government, and thereby democracy itself. Rather, the judiciary must rely on fundamental laws to protect fundamental rights when the will of the legislature is incompatible with that of the people.<sup>154</sup> Although judges are appointed, Rostow evaluates their role as necessary for protecting democracy for voters by preventing the arbitrary exercise

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151. See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 195 (1952).

152. *Id.* at 197–98.

153. See *id.* at 195 (“The limitation and separation of powers, if they are to survive, require a procedure for independent mediation and construction to reconcile the inevitable disputes over the boundaries of constitutional power which arise in the process of government.”).

154. *Id.* at 196; see also THE FEDERALIST NO. 78 (Alexander Hamilton) (“[T]he courts were designed to be an intermediate body between the people and the legislature, in order . . . to keep the latter within the limits assigned to their authority . . . . Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.”).

of legislative power.<sup>155</sup> Consequently, he considers judicial review profoundly democratic because it protects democracy from abuse.<sup>156</sup>

Ronald Dworkin advocates an alternative approach to democratic theory with the constitutional conception of democracy, which aims to promote the equal concern and respect for individuals vis-à-vis governing institutions, whether legislative or judicial.<sup>157</sup> In his view, majoritarian procedures like electing the legislature and executive can further the state's equal concern and respect for the democratic citizen, but are not democratic ends unto themselves.<sup>158</sup> Instead, he elaborates on the "conditions of democracy" which are necessary to legitimate it: Fundamental rights which guarantee the individual's genuine moral membership as part of the democratic community.<sup>159</sup> Essentially, he argues that one cannot ac-

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155. Rostow, *supra* note 151, at 197 ("The task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected or appointed. . . . Where the judges are carrying out the function of constitutional review, the final responsibility of the people is appropriately guaranteed by the provisions for amending the Constitution itself, and by the benign influence of time, which changes the personnel of courts.").

156. *Cf.* Mace's position in Part IV.D.1, *infra*, which defends judicial review for the same reason, but considers it profoundly *anti*-democratic.

157. RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 17 (1996). For Dworkin, the typical academic debate focuses on "how far democracy can properly be compromised in order to protect other values, including individual rights." *Id.* at 15. However, he wants to reframe the argument away from democracy yielding to other values, instead considering "what democracy, accurately understood, really is." *Id.* One could argue in response, as Waldron does, that this reconceptualization nevertheless diminishes democracy's true value by transforming its meaning to permit judicial review at the expense of democratic decision-making. JEREMY WALDRON, *LAW AND DISAGREEMENT* 293 (1999) ("There is something lost, from a democratic point of view, when an unelected and unaccountable individual or institution makes a binding decision about what democracy requires" (emphasis in original)).

158. DWORIN, *supra* note 157, at 17 (the difference is that the constitutional conception of democracy requires majoritarian procedures "out of a concern for the equal status of citizens, and not out of any commitment to the goals of majority rule" as such).

159. The conditions of moral membership are structural—relating to the polity's overall community character established by historical process with generally recognized and stable territorial boundaries—and relational—referring to how the individual must be treated by the political community to be a moral member of it: By being given a stake in outcomes, being treated

cept a democracy and its decisions as binding unless one's interests are respected. Otherwise, a state which held no regard for the integrity of even just one of its constituents could not claim moral or political legitimacy as a democracy merely on the basis that it acted pursuant to the majority's wishes. Consider, as Dworkin does, German Jews in the face of Nazism's ascent.<sup>160</sup> Concomitant with moral membership is the individual's moral independence, or self-respect, which ensures that the democratic society does not prescribe what the individual's moral values must be. Provided one is treated with equal concern and respect as all other citizens, one can thus accept the state's democratic legitimacy, even if majoritarian decisions yield results inapposite to one's own opinions.

Like Rostow, Dworkin focuses his analysis on a different democratic *telos*, but whereas the former venerates liberty, the latter couches his democratic theory in the language of equality.<sup>161</sup> As is the case for Rostow, Dworkin sees his interpretation of democratic ends as indispensable to protect and enhance democracy; when a majoritarian institution fails to secure the democratic conditions for any of its citizens, Dworkin believes non-majoritarian procedures like judicial review can function as an appropriate substitute to better protect and respect democracy.<sup>162</sup> Therefore, the judiciary's chief inquiry must be whether a law maintains or contravenes the democratic conditions of the polity. Since the judiciary is charged with maintaining those conditions, if the judiciary detracted

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with equal concern vis-à-vis other members of the community, and by reserving moral independence to determine one's beliefs without mandate from others. *Id.* at 24–26.

160. *See id.* at 23 (“German Jews were not moral members of the political community that tried to exterminate them, though they had votes in the elections that led to Hitler’s Chancellorship”).

161. This is not to suggest that liberty and equality are incompatible—Dworkin does not regard them as separate values—only that they are different analytic focal points doing the same thing to reconcile democracy with judicial review.

162. *Id.* at 17. To be sure, Dworkin poses no objection to majoritarian institutions themselves, but rather disagrees over the interpretation of their significance. “When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to other procedures *that protect and respect them better.*” *Id.* (emphasis added).

from them it would act the same way as a malfunctioning, authoritarian legislature disrespecting democracy.<sup>163</sup> Instead of rejecting judicial review on proceduralist grounds because it is non-majoritarian, Dworkin believes judicial review is a democratic component of the state which need not be majoritarian to be democratic.<sup>164</sup>

Samuel Freeman frames democracy not merely as a form of government, but as a form of sovereignty in which judicial review can play a vital role.<sup>165</sup> Whereas proceduralists focus solely on political equality by majoritarian procedure in their assessment of democracy, Freeman argues that democratic sovereignty stems from the same fundamental value which equal political participation pursues: justice.<sup>166</sup> As he frames it, equal political participation and the rights necessary therefor—freedom of speech, freedom of assembly, and so forth—ensure that the entire electorate is accounted for in the political process; free and equal sovereign individuals agree on procedural equality to vouchsafe self-respect in the political system. As Freeman explains, procedural political equality is an extension of the equal political jurisdiction of sovereign democratic citizens, who equally divide their participatory role in the sovereign power of the state.<sup>167</sup> However, he asserts that political equality alone cannot guarantee liberty of conscience, freedom of thought, freedom of association, freedom of occupation, independence, and, above all, *integrity of the person*.<sup>168</sup>

Into this gap enters judicial review as a thoroughly democratic safeguard. Freeman writes:

By granting to a non-legislative body that is not electorally accountable the power to review demo-

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163. *Id.* at 32–33.

164. Admittedly, he concedes the difficulty of delineating when judicial review is actually required. Resolving that question would require procedural analysis, but this is not a refutation of judicial review's ability to be democratic. But Waldron argues that Dworkin's theory remains a capitulation, as I phrase it *supra*, because its defense of judicial review "turns on an elision between a decision *about democracy* and a decision *made by democratic means*." WALDRON, *supra* note 157, at 292 (emphasis in original).

165. Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 L. & PHIL. 327, 327, 340 (1991).

166. *Id.* at 350.

167. *Id.* at 327.

168. *Id.* at 347.

cratically enacted legislation, citizens provide themselves with a means for protecting their sovereignty and independence from the unreasonable exercise of their political rights in legislative processes. Thereby, they freely limit the range of legislative options open to themselves or their representatives in the future. By agreeing to judicial review, they in effect tie themselves into their unanimous agreement on the equal basic rights that specify their sovereignty. Judicial review is then one way to protect their status as equal citizens.<sup>169</sup>

In his view, judicial review thus operates at the interstice of the equal rights of political participation and the civil rights which should supersede political consideration. In effect, judicial review becomes the mechanism by which fundamental rights are accounted for in the legislative process. Whatever procedural clashes ensue should not, as he conceives of it, discredit judicial review as a constitutive element which achieves democracy, because it is necessary to promote justice where the public fails to recognize it, or the legislature is incapable of effecting it.<sup>170</sup> Freeman's conception of democracy therefore aligns with both Rostow's and Dworkin's as a political theory compatible with judicial review to preserve fundamental rights when majoritarian procedures fail to do so. For all three of them, democracy requires judicial review to dispense the justice necessary to maintain democracy itself.

#### D. *Repudiating the Debate*

##### 1. *Embracing Judicial Review as Anti-Democratic*

In contrast to the aforementioned theorists, there are others who actually embrace judicial review as an anti-democratic device and outright repudiate the significance of debating judicial review's anti-democratic impact on a democracy. For instance, George Mace directly confronts the judiciary's politicization and influence on a democratic legislature by virtue of constitutional interpretation. As he puts it, the courts do not merely analyze whether legislation squares with constitutional laws, but rather engage in active interpretation some-

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169. *Id.* at 353–54.

170. *Id.* at 361.

what akin to legislation itself—the positive legislation which Kelsen would have preferred to avoid and which the *Bundesverfassungsgericht* embraces.<sup>171</sup> Honing in on the American context, he invokes Hamilton's rationale for a strong judiciary in the Federalist Papers. For Hamilton, judicial review functioned as a check on unlimited congressional power whereby judges should respect the supremacy of the Constitution as the law of the people over legislation as the law of their representatives.<sup>172</sup> Building off of this, Mace also reconceptualizes democracy away from the proceduralist view, defining it as rule in the interest of the whole people.<sup>173</sup> To him, it is not simply the process of democratic participation, but rather the compromise to reach a consensus in policy to benefit the polity as a whole, which drives democracy.<sup>174</sup> The U.S. Supreme Court is therefore the agent charged with protecting that interest from instances where the people through their elected representatives may willfully, ignorantly, or tyrannically harm their overall interest.<sup>175</sup> In contrast to Rostow, Dworkin, and Freeman, Mace does not use protective rhetoric to assert judicial review's democratic character, but wholeheartedly embraces that this function necessarily makes judicial review the anti-democratic mechanism which improves democracy when required.

## 2. *Instrumentalism*

Further removed from the starting point of this debate are the instrumentalists, or consequentialists, who, in contrast to both the proceduralists and their critics, focus their attention on the fruits of *judicial review* itself. Their argument, which Waldron acknowledges at the very beginning of his article, is that judicial review is justifiable by its outcomes. In a work rebuking his own former views, Alon Harel surveys five different instrumentalist theories before outlining his overall skepticism

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171. Mace, *supra* note 135, at 1140.

172. Mace, *supra* note 135, at 1141; *see also* THE FEDERALIST NO. 78, *supra* note 154.

173. Mace, *supra* note 135, at 1148. Insofar as this harmonizes with Ely's view of democracy, *supra* note 149, in respect of which Ely values judicial review's ability to buttress participatory process, Mace agrees but ultimately values judicial review as an anti-democratic mechanism.

174. Mace, *supra* note 135, at 1148–49.

175. *Id.*

of instrumentalism, including his own former rights-based theory of judicial review.<sup>176</sup> His erstwhile belief was that judicial review was justified by its ability to protect fundamental rights efficaciously; to the extent that judicial review can undo legislative decisions violative of rights, it is a good thing. While this sounds quite similar to Rostow's, Dworkin's, and Freeman's arguments, instrumentalism draws more attention to judicial review "gone right" than to the theoretical underpinnings of democracy and *its ends*.<sup>177</sup> Although there are many instances—such as the seminal cases Waldron references—where a prejudiced or otherwise constitutionally violative majority is set aright by judicial review, there are also examples of judicial review "gone wrong."<sup>178</sup> By focusing on judicial review's positive outcomes, whether framed in terms of protecting rights or otherwise, the consequentialist approach does not fully square with democracy in any case.

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176. The five theories include rights-based theories (that the judiciary can more effectively protect fundamental rights than the legislature), democracy-enhancement theories (such as Ely's belief in judicial review promoting participatory democracy), settlement theories (that judicial review can authoritatively put an end to disputes), dualist democracy theories (preserving seminal constitutional politicking accomplished by the *people* against the whimsy and pretensions of politicians engaged in quotidian policymaking), and institutional instrumentalism theories (advocating that the scope of judicial review be determined by institutionally weighing the relative strengths and weaknesses of the judiciary and the political process). To Harel now, instrumentalism suffers from overestimating the judiciary's ability to outperform the legislature in promoting the democratic rule of law, concluding that courts should necessarily have review power by virtue of their instrumental success, and misunderstanding that the debate concerning judicial review is actually about political and moral institutional legitimacy, not the efficient and effective results of judicial review. Aron Harel, *The Easy Core Case for Judicial Review*, 2 J. L. ANALYSIS 227, 232–35 (2010).

177. To the extent that Harel's categorization and definition of instrumentalism encompasses the ideas of any of the scholars discussed here in Parts IV.A-C, *supra*, suffice it to say that instrumentalism, broadly speaking, reduces to the adage of the ends justifying the means, without necessarily critically exploring in the debate at hand precisely what that end—here, of *democracy*—actually is.

178. See Waldron, *supra* note 134, at 1348 (identifying the "Lochner era," when U.S. courts aggressively struck down labor statutes from 1880 to 1935, as such an example).

E. *Contextualizing the Debate with Democratic Constitutionalism*

In further removal from the theoretical divide over judicial review's place in a democracy, many scholars have contextually engaged with the realities of judicial review as practiced. For instance, Tony Peretti distinguishes a divide in the scholarship between the countermajoritarian, normative constitutional debate on judicial review as initiated by Alexander Bickel, and the recent focus on "democracy-assisting judicial review."<sup>179</sup> Put simply, this is the argument that courts can utilize judicial review to offset or compensate for democratic deficits in other branches of government, especially when politicking takes its toll by rendering the legislature polarized and gridlocked.<sup>180</sup>

In this new conception, judicial review becomes a pragmatic tool that can enhance democracy *and* advance the majoritarian will, which even proceduralists like Fallon would agree with. Professor Lain characterizes this as "upside-down" judicial review; that is, despite the traditional theory of the legislature being majoritarian and the courts countermajoritarian, the real practice is that deadlocked, effete legislatures are anything but representative, requiring judicial intervention to vindicate majority preferences denied by poor legislative and executive process.<sup>181</sup> As Lain explains, mainstream elected officials tend to appoint candidates who also align with them, and therefore the judiciary can become reflective of the changing attitudes of a democratic majority.<sup>182</sup> Barry Friedman and Jeffrey Rosen concur in this assessment that courts can practice democratic constitutionalism and tend to align with and defer to public views over time.<sup>183</sup> But given that this is not structurally mandated, since judges are ultimately independent, one may question the soundness of justifying judicial review on the observation, perhaps even hope, that a judge will "stick with the times," so to speak. On the other hand, they are also citizens of the state, ostensibly molded by their surroundings and contributing to societal development in turn.

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179. Peretti, *supra* note 149, at 843.

180. *Id.*

181. *Id.* at 844–45.

182. *Id.* at 845–46.

183. *Id.* at 847.

To be fair to the proceduralist critique, democratic constitutionalism eschews Waldron's core case, which may be inevitable in the shift from the theoretical to the practiced form of judicial review. But given the contextualization of judicial review as practiced, Peretti advocates for a shift from the democracy-assisting conception lest the judiciary become as polarized and extremist as the dysfunctional legislators and executives who are responsible for their appointment.<sup>184</sup> Pursuant to this, he proposes higher judicial turnover and the appointment and election of genuinely representative judges, legislators, and executives.<sup>185</sup> Interestingly enough, this sounds like the viewpoint of an observer attempting to restore democracy to the core case.

Where does this leave the notion of democracy-assisting judicial review? Eskridge and Ferejohn share in Friedman's and Rosen's belief that the U.S. Supreme Court consistently reflects popular attitudes on disputes.<sup>186</sup> Although appointed, the justices are constitutionally provided for to take to task statutes which may infringe upon the U.S. Constitution despite voter preferences; if the judiciary uses judicial review to analyze and promote genuinely deliberative, democratic legislation, it can be reconciled with democracy.<sup>187</sup> Falling in line, so to speak, is what judicial review would have to do to respect democracy.

#### F. *Summation*

As seen above, there is no unitary interpretation of judicial review and democracy that satisfyingly makes them complementary in both theory and practice. Scholars have grappled with the inherent tensions of these two concepts and must make assumptions or qualifications to support their arguments. Proceduralists like Waldron treat the means and ends of democracy as one and the same; the whole point of the democratic enterprise is its procedure guaranteeing political

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184. *Id.* at 861.

185. *Id.*

186. See William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1283 (2009) ("Since the Marshall Era, the Supreme Court has continued to defer to national (and, to a lesser extent, state) deliberation as to issues on which the constitutional text is ambiguous.").

187. *Id.* at 1301–02.

equality to its constituents, and anything which detracts therefrom is anti-democratic and inappropriate. Still other proceduralists, like Fallon and Ely, rationalize judicial review as part of a democratic framework to ensure rights are respected. Judicial review's strongest advocates, including Rostow, Dworkin, and Freeman, must reformulate the debate by conceptualizing democracy's ends as something other than procedure. Scholars like Mace consider judicial review anti-democratic, but believe that its anti-democratic character is necessary for democracy to flourish. In the meantime, instrumentalists may wholly obviate the debate by justifying judicial review on their perception of judicial review's ends, without contemplating its impact on democracy. When the debate becomes contextualized to judicial review in practice, political realists celebrate the judiciary's ability to advance democracy because the other governmental branches are actually ineffective.

It seems that the necessity of molding democracy to comport with judicial review, or vice versa, weakens the integrity of judicial review in a democracy. It is important to bear in mind, however, that the appointed officials who adjudicate legal disputes, the judges themselves charged with interpreting the law, are democratic citizens as well. It is essential that they understand the nuance and complexity of this debate, at least so that they are fully informed of the magnitude of their responsibility when deciding any single case. If they are properly apprised, perhaps one may take some solace in the fact that that the choices they make are not done so lightly. This does not serve as a panacea to this debate, but rather as a focal point for the final analysis of gay marriage in Germany.

## V. THE FUTURE OF *EINGETRAGENE PARTNERSCHAFTEN*

As of 2016, gay marriage has gained significant traction in various countries around the world. Meanwhile, the *Große Koalition* continues to govern Germany, led by Chancellor Angela Merkel's conservative agenda. Despite any statements or beliefs of her fellow party members to the contrary, she has vowed to block any legislation formally recognizing gay mar-

riage.<sup>188</sup> Her stance further contextualizes the November 2015 amendment to the Civil Partnership Law as a concession aimed to placate proponents of increased rights for *eingetragene Partnerschaften* without wholly infringing on the constitutionally protected institution of marriage. At the same time, public opinion polls of Germans on the issue of gay marriage have demonstrated support ranging anywhere from 52% to as high as 74%.<sup>189</sup> Unlike in Ireland, Germany cannot have a national referendum on this matter per the *Grundgesetz*.<sup>190</sup> The *Länder* could ostensibly legislate in favor of gay marriage on an individual basis, but not only is that unlikely, any positive enforcement would also either align with a general political shift that would make federal legislation possible, or otherwise be subject to the same constitutional challenges. A constitutional amendment of Article 6(1) to explicitly define marriage as either for heterosexual or homosexual couples would require two-thirds majorities in both parliamentary houses, which seems especially unlikely given the current daunting prospect of effecting even regular legislation in support thereof. What, then, are the future implications for gay marriage in Germany?

On the federal level, one of two things seems most likely given the shifting political attitude towards gay marriage: Either a new coalition without the CDU would need to form a parliamentary majority in favor of it with legislation, or the *Bundesverfassungsgericht* would need to continue its piecemeal expansion of rights for *eingetragene Partnerschaften* until they reach complete parity with heterosexual marriages. In either case, the Court will be confronted with an application from either *Bundestländer*, the CDU, or other conservative forces challenging the constitutionality of gay marriage legislation. The dispute will turn on the interpretation of Article 6(1) and the sanctity of marriage in Germany, and the Court will have no choice but to engage in a proportionality analysis balancing

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188. Oppenheimer, *supra* note 6, at 236; *Marriage Equality in Germany 'Not a Goal' for Angela Merkel*, HUFFINGTON POST (May 27, 2015), [http://www.huffingtonpost.com/2015/05/27/angela-merkel-marriage-equality\\_n\\_7454090.html](http://www.huffingtonpost.com/2015/05/27/angela-merkel-marriage-equality_n_7454090.html).

189. Compare Oppenheimer, *supra* note 6, at 234 (52%), with *At the End of the Regenbogen*, THE ECONOMIST, June 20, 2015, <http://www.economist.com/news/europe/21654639-irish-vote-gay-marriage-reverberates-through-germany-end-regenbogen> (74%).

190. Kommers, *supra* note 10, at 112.

marriage in Article 6(1) against equal protection of the law in Article 3(1).

Critics will say under Article 19(2)—“In no case may the essence of a fundamental right be infringed upon”—that gay marriage violates the character of Article 6(1).<sup>191</sup> By its own admission in its 2002 opinion recognizing the constitutional validity of *eingetragene Partnerschaften*, the Court contemplated that a competing institution with parity in rights and state protection alongside marriage, i.e. gay marriage, could unconstitutionally violate the state’s duty to promote marriage pursuant to Article 6(1).<sup>192</sup> This would be the case whether gay marriage as such were legalized, or if *eingetragene Partnerschaften* were expanded to be coterminous with marriage under Article 6(1). And as far as proponents of gay marriage are concerned, *eingetragene Partnerschaften*, even buttressed with more and more privileges, are still lacking for the metaphysical distinction that they are not constitutionally protected the way that marriage is.

However, the Court’s reservations about parity reflected the contemporary view in 2002 and were made by justices who no longer serve.<sup>193</sup> Technically speaking, the Court is not bound by precedent, owing to its positivist civil law heritage. It is driven by a desire to optimize each conflicting fundamental right’s exercise, taking into account its respective contemporary sociopolitical values and norms when interpreting the order of values evinced in the *Grundgesetz*. And the Court took a substantial leap forward in 2013 when it declared that Article 6(2)’s reference to parents applies irrespective of sexual orientation. Combined with increasingly liberal attitudes towards gay marriage in both Germany and around the world, the leap to constitutionally recognizing gay marriage is not as insurmountable as in 2002.

If, as polls suggest, a substantial majority of Germans favored institutionalized gay marriage, and the Court upheld it on the basis of Article 3(1) outweighing an outdated under-

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191. GRUNDGESETZ [GG] [BASIC LAW] Art. 19(2). This logic featured at the heart of Bavaria’s and Saxony’s abstract judicial review petition to the *Bundesverfassungsgericht* after the Civil Partnership Law was originally passed. KOMMERS, *supra* note 4, at 607.

192. KOMMERS, *supra* note 4, at 610.

193. With twelve-year terms, a justice beginning in 2002 would have served until 2014.

standing of Article 6(1), what would this signify about German democracy? If it were instead the result of reinvigorated progressivism in the Federal Government's ruling coalition, it would be a constitutional interpretation at the behest of legislative sovereignty and the inevitable current of time. But supposing it were the result of the Court taking the interpretation upon itself, what then?

From the perspective of democratic theory, Waldron and proceduralist critics of judicial review would not support the idea of the judiciary making this substantive assessment, and even Fallon as a proceduralist *supporter* of judicial review would not support strong judicial review comparing conflicting fundamental rights.<sup>194</sup> The Court's recognition of gay marriage would extinguish a hitherto constitutionally clear-cut designation of marriage as heterosexual only, changing a legal norm by means of positive legislation. But despite Kelsen's recognition of judicial review as a form of negative legislation and his disapproval of its use for positive legislation, constitutional courts worldwide have increasingly assumed this positivist power.<sup>195</sup> Granted, it would seem that Germany today does not fulfill this core case. The legislature would not be functioning if, as Schweiger estimates, the coalition and multiparty divide prevented the establishment of policy platforms that truly advance the democratic will.<sup>196</sup>

It is important to remember that the legislature is *not* the sovereign in Germany; the *people* are.<sup>197</sup> If parliament failed to reflect the people's wishes on this matter, Lain would hold that it would be the upside-down theory of judicial review in practice, and that the *Bundesverfassungsgericht* should have the right to correct for democratic deficits.<sup>198</sup> Rostow would say the Court is promoting liberty above all else, the true end of democracy: When the will of the legislature is incompatible with the will of the people, the Court should rely on fundamental laws to guarantee fundamental rights—in this case, the

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194. See generally Parts IV.A-B, *supra*.

195. See Broude, *supra* note 137, at 548 (“International tribunals . . . readily address individual rights and freedoms in ways that Kelsen would have censured; but national constitutional courts preceded them in crossing the theoretical line between negative and positive legislation.”).

196. Schweiger, *supra* note 10, at 3.

197. GRUNDGESETZ [GG] [BASIC LAW] Art. 20(2).

198. See generally Part IV.E, *supra*.

equal protection of the law under Article 3(1) for gay Germans to have the freedom to marry one another.<sup>199</sup> Dworkin would say that the democratic end of equality calls for equality in marriage, and that if the legislature could not protect democracy, the Court would need to fill in the gap or otherwise forfeit the democratic conditions insofar as gay citizens are concerned.<sup>200</sup> Freeman would say democracy is about sovereignty. Here, the people are the sovereign power, and the Court respecting their desires would surely be democratic.<sup>201</sup> Consequentialists would extol a holding equivalent to that of the U.S. Supreme Court in *Obergefell* on the premise that the end of judicial activism trumps the procedural quarrel, because more rights make a better democracy no matter the method of execution.<sup>202</sup> As forewarned in Part IV.F, *supra*, the debate on judicial review's place in democratic theory yields conflicting assessments with respect to Germany and the issue of gay marriage. To resolve this, it is imperative that we consider the quintessential factor in the significance for democratic theory of recognizing gay marriage in Germany: The meaning of *Demokratieprinzip*.

*Demokratieprinzip* is not simply a cognate for the "principle of democracy," where democracy generally signifies rule by consent of the governed. It does not merely signify that Germany has a democratic system of government. Rather, this principle serves as the bedrock of the modern German state; *Demokratie* is the character, spirit, structure, and function of the rule of law, of Germany, and of the German people. It is a system of governance, it is a standard, it is an ideal, and it is a goal. *Demokratie* is expiation.

Germany's legacy is a tainted and multifaceted one, equal parts inspiring and horrifying. It is at once a record of Enlightenment, *Sturm und Drang*, Romanticism, technology, liberalism, science, and philosophy, as well as of Nazism, war, genocide, and Cold War anxiety. With the establishment of the Federal Republic and the *Grundgesetz* in 1949, Germany entered into its current statehood with the immense burden of atoning for World War II and the Holocaust. In tandem with Allied

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199. See generally Part IV.C, *supra*.

200. *Id.*

201. *Id.*

202. See generally Part IV.D.2, *supra*.

guidance, the newfangled polity sought legitimation as a humane democratic and free state. This is the end to which the *Grundgesetz* was codified with nineteen articles avowing the suprapositivist supremacy of fundamental rights, all undergirded by Article 1(1): “Human dignity is inviolable. Its respect and protection is the duty of all state power.”<sup>203</sup> There could be no starker message to stand in direct contradistinction to the Third Reich’s evil and destructive ends.

This is the historical context which has informed the German state and its people since the post-war period, encapsulated in the tenet of *Vergangenheitsbewältigung*—often defined as “mastery of” or “overcoming” the past.<sup>204</sup> It is the reason why Germans are not patriotic, but instead venerate *Verfassungspatriotismus* (constitutional patriotism);<sup>205</sup> they do not have the cultural and jingoistic pride of the late-nineteenth century, but instead take solace in the rule of law in pursuit of a just, liberal, and social democracy. *Demokratie* pursues justice.

When the Federal Republic created the *Bundesverfassungsgericht*, it endowed it with the power of judicial review and judicial supremacy. In fact, the Court’s constitutive statute dictates, “The *Bundesverfassungsgericht*’s holdings have the force of law.”<sup>206</sup> The new German democratic order thereby provided for the juridical institution which it empowered to protect German democracy, even from itself. This remains the case whether or not the legislature functions smoothly, and whether or not a popular majority of the citizenry support a

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203. GRUNDGESETZ [GG] [BASIC LAW] Art. 1(1).

204. Michael Wolffsohn, *Von der Verordneten zur freiwilligen ‘Vergangenheitsbewältigung’? Eine Skizze der bundesdeutschen Entwicklung 1955/1956* [From Prescribed to Voluntary *Vergangenheitsbewältigung*? An Outline of German Federal Development 1955/1956], 12 GER. STUDIES REV. 111, 112 (1989) (defining *Vergangenheitsbewältigung* as knowledge of Nazism’s acts against European Jews, other ethnic groups, and the betrayal of its own people; judging the acts as atrocities; symbolically weeping to mourn the dead; but then moving forward in pursuit of humane values).

205. For varied viewpoints in the philosophical debate concerning constitutional patriotism, see generally JAN-WERNER MÜLLER, *CONSTITUTIONAL PATRIOTISM* (2007); Craig J. Calhoun, *Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere*, 14 PUB. CULTURE 147 (2002).

206. Bundesverfassungsgerichtsgesetz [BVerfGG] [Federal Constitutional Court Act], Mar. 12, 1951, § 31(2), last amended by Gesetz [G], June 30, 2015, BGBl. I, at 973 (Ger.), [https://www.gesetze-im-internet.de/bverfgg/\\_31.html](https://www.gesetze-im-internet.de/bverfgg/_31.html).

particular policy or piece of legislation. This is not because Germany disavows the significance of or need for political participation, majoritarian decision-making, and generally, good process. Process and participation are accounted for at all levels of government. Where a democratic majority supports legislation which is effected into law, that is perfectly acceptable *provided the law is just*. This is because German *Demokratie* is fixated on ensuring the country never repeats its past sins, and it accomplishes this through its dedication to justice. Consequently, the *Bundesverfassungsgericht* is an agent of *Demokratie*, and the philosophy which informs the Court thus most closely hews to the reconceptualizations of democracy espoused by Rostow, Dworkin, and Freeman. This is fitting, given that the Federal Republic implemented a reconceptualized notion of democracy when and why it did.

## VI. CONCLUSION

When it comes to gay marriage in Germany, what do the German people want? If they support gay marriage by a majority, will the CDU/SPD-led multiparty coalition in parliament best represent their will? If the parliament does not, but the *Bundesverfassungsgericht* recognizes the constitutional protection of gay marriage, is that necessarily anti-democratic by superseding the legislative process? The Court would not think so, and has evinced as much in six separate cases from 2009 to 2013 where it singlehandedly augmented the rights provided to *eingetragene Partnerschaften*. The status of the Court's democratic character with respect to *Demokratie* has only become clearer: Whether or not a majority of the people supported gay marriage, *not* recognizing it would be anti-democratic. To the extent that a majority of the people support a position, it may help attune the Court to changing sociopolitical norms,<sup>207</sup> but the Court's role in Germany is not to defer to majoritarian desires by default simply because they are majoritarian; the Court safeguards suprapositive fundamental rights as part of the hierarchy of its Continental positivist jurisprudence.<sup>208</sup> As far as *Demokratie*, justice, and equal protection of the law are concerned, it is perfectly acceptable for the

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207. Cf. Eskridge & Ferejohn, *supra* note 186, at 1283 (as the U.S. Supreme Court defers to national discourse).

208. See Part III, *supra*.

Court to effect social change pursuant to the ultimate German mission of recompensing for the nation's past. Over time, that historiographical context will exalt German progressivism and trump criticisms of the *Bundesverfassungsgericht's* judicial review, because in Germany, democracy is inseparable from *Vergangenheitsbewältigung*. The *Grundgesetz* is the codified form of that metaphysical pursuit, and the *Bundesverfassungsgericht* is ever vigilant in ensuring that Germany never wavers from its democratic course. The legalization of gay marriage in Germany is not a question of *if*, but *when*. And that suits *Demokratie* just fine.

