



Constitutional courts between law and politics: another view of the cathedral

Giorgio Pino

School of Law, Roma Tre University, Roma, Italy

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1. The book

In 2021, on the occasion of the seventieth anniversary of the first judgement of the *Bundesverfassungsgericht*, the Federal Constitutional Court of Germany (hereinafter FCC), Professor Dieter Grimm published a collection of essays he had written over several decades on the topic of judicial review of legislation, or constitutional adjudication, and its place in a contemporary constitutional democracy.¹ That book has now been translated into English and published in the relatively young but already authoritative book series ‘Hart Studies in Constitutional Theory’², making several important essays that were previously available either in German, in *Festschriften* and other specialised publications, or both, more readily accessible to a larger audience.

An Emeritus Professor of Public Law at the Humboldt-Universität, Berlin, and himself a former judge of the FCC over 12 years, Professor Grimm has written extensively on constitutional law, constitutional theory, constitutional history and European law, and can be safely counted among the most prominent theorists and defenders of contemporary constitutionalism – the theory and practice of harnessing politics and public power with the legal limits and safeguards provided by a judicially enforceable Constitution.³ The essays collected in this book explore several crucial aspects of contemporary constitutionalism, with a special interest in the nature, the role, and the effects of constitutional adjudication in a constitutional democracy.⁴

The book is composed of seven parts. The first part offers a general introduction to the FCC – its history, structure, place in the political system, as well as the methodology it

CONTACT Giorgio Pino ✉ giorgio.pino@uniroma3.it

¹D Grimm, *Verfassungsgesgerichtsbarkeit* (Suhrkamp 2021).

²D Grimm, *Constitutional Courts and Judicial Review. Between Law and Politics* (Hart 2025).

³In this respect, this book follows another important collection of Dieter Grimm’s essays in constitutional theory that was published a few years ago: D Grimm, *Constitutionalism. Past, Present, Future* (Oxford University Press 2016). Also relevant for the issues discussed here is *Dieter Grimm: Advocate of the Constitution* (Oxford University Press 2020, particularly chs VI-IX), a book-long conversation entertained by Grimm with O Lepsius, C Waldhoff, and M Rossbach.

⁴The book comprises 15 chapters (out of the 16 of the original edition), 6 of which have already appeared in English. The less recent essay dates back to 1976, the more recent to 2024 (but only three essays were published before 2000). For some reason, the collection does not include an important essay by Grimm on the jurisprudence of the FCC in the field of fundamental rights (D Grimm, ‘The Role of Fundamental Rights after Sixty-Five Years of Constitutional Jurisprudence in Germany’ (2015) 13 *International Journal of Constitutional Law*, 9), which would have fitted very well in – and nicely completed – the book’s overall argument.

employs and the effects of its judgements, etc. The second part discusses the relation between judicial review and democracy, and – among other things – it advances the argument that judicial review is neither in contradiction with, nor necessary for, democracy. The third part analyses the place of constitutional adjudication between law and politics; to that end, Grimm also draws important insights from the famous controversy over constitutional adjudication between Hans Kelsen and Carl Schmitt, which anticipates in many interesting ways the contemporary debate between ‘legal constitutionalism’ and ‘political (or popular) constitutionalism’. The fourth part centres on constitutional adjudication from the point of view of legal interpretation and methodology, including a critical review of Kelsen’s theory of legal interpretation (and its relation to his theory of judicial review) and of Jürgen Habermas’ views on constitutional jurisprudence. It also offers a highly detailed and almost philological analysis of the *Elfes* judgment (one of the first decisions of the FCC, in which the notion of the Constitution as a system of values – a central idea in the jurisprudence of the FCC – began to take form), along with an overview of the relations between constitutional jurisprudence and constitutional scholarship (in Germany). The fifth part deals with certain institutional questions regarding the operation of the German system of a specialised Constitutional Court and the relations between such a court and ordinary courts. The sixth part defends the role of national constitutional courts as the main, or even the only, counterweight to the increasing democratic deficit of the European Union. In this light, it explores the tense relations between the FCC and the CJEU in the aftermath of the FCC’s judgment (2020) on the bond-buying programme undertaken by the European Central Bank, in defiance of the ruling of the CJEU.⁵ The seventh and final part returns to the topic of contemporary criticisms of constitutional adjudication, countering both their ‘radical’ versions expounded by ‘popular’ or ‘political’ constitutionalism (Mark Tushnet, Larry Kramer, Jeremy Waldron), and the more moderate ones, such as those that call for some ‘weak form of judicial review’ (the ‘New Commonwealth Model of Constitutionalism’: Stephen Gardbaum) or other strategies of limitation or self-limitation of judicial review (Ran Hirschl, Richard Fallon).

While the book appears to be especially centred on the German experience of the FCC, and understandably so in light of the reasons behind its original publication⁶, its main arguments are bound to raise the interest of a wider readership across jurisdictions and disciplines, for at least two obvious reasons.

On the one hand, the problems and challenges faced by the FCC are, in a fundamental sense, basically the same problems and challenges that constitutional adjudication faces everywhere around the world, irrespective of the specific technical arrangements that are put in place in different jurisdictions. Most prominently, such problems and challenges revolve around the legitimacy of judicial review – a cluster of thorny issues that include the complicated relation between judicial review and democracy (the notorious ‘counter-majoritarian difficulty’), as well as the general widening of decisional power and interpretive discretion normally enjoyed by Constitutional Courts, and the political dimension of constitutional adjudication. From this point of view, as Grimm aptly notes, the dynamics

⁵A more detailed exposition of Grimm’s ideas on the current state of health of the EU, with a special attention to the problem of its democratic legitimacy (or lack thereof), can be read in another recent collection of his essays: D Grimm, *The Constitution of European Democracy* (Oxford University Press 2017).

⁶See above, text accompanying n 1.

of constitutional adjudication inevitably become the subject-matter not only for constitutional law scholarship, but also for political science and political philosophy.

On the other hand, it is well known that the FCC has enjoyed a global influence when it comes to the design of tools and methodologies for constitutional adjudication and legal reasoning generally, which over time have been adopted by other Constitutional Courts around the world as well as by many supranational jurisdictions.⁷ The most obvious cases in point are: the idea that constitutional norms, and especially the norms that protect fundamental rights, are principles (or values); the principle of proportionality as a way to assess legislation that apparently encroaches upon fundamental rights; balancing as the proper method to solve conflicts between fundamental rights; the horizontal effect of constitutional rights (i.e., the applicability of fundamental rights also in private relations between individuals, and not only in the ‘vertical’ relations between the individuals and the State).⁸

That said, in the following pages I will, first (§ 2), briefly outline the main themes of the book. Then (§§ 3 and 4), I will point to some shortcomings of Grimm’s position as I have previously identified it. I must state at the outset, though, that my critical remarks should be understood as a somewhat ‘internal’ criticism. By this I mean that I agree with Grimm on many, or even most, of his contentions on constitutional democracy and constitutional adjudication, and I share most of his general assumptions on contemporary constitutionalism – generally speaking, I too tend to sympathise with ‘legal constitutionalism’.⁹ Like Grimm, I too think that, in many circumstances, it is by and large a good idea that some fundamental rights work as limitations against public (as well as private) powers; I too think that it is a good idea that those fundamental rights are enshrined in a legally enforceable constitution; and I too think it is a good idea that courts are empowered to check whether legislation and other legal acts respect those fundamental rights. But, against this backdrop of agreement, I will try to suggest that some important details in Grimm’s picture can be better framed in a somewhat different way.

2. The argument

The main theme of the book is a defence of the role and the legitimacy of judicial review of legislation, or constitutional adjudication, in a constitutional democracy. Grimm’s arguments to that effect are manifold and carefully nuanced, and this comment will probably run the risk of simplifying them to some extent. In any case, the main thrust of the argument can be presented as follows.

⁷Sometimes this ‘methodological’ influence of the FCC over other Constitutional Courts has been indirect rather than direct – which possibly is even more telling. By this I mean that some argumentative styles and tools, originally deployed by the FCC, have later found their way *first* in the jurisprudence of some supranational court such as the CJEU or the ECtHR and then, as a consequence of this, have also filtered in the language of national courts across Europe. This is obviously the case of the principle of proportionality.

⁸Many of the notions mentioned in the text have later received a thorough theoretical treatment in the works of Robert Alexy. Indeed, the conceptual apparatus developed by Alexy is under many respects a rationalisation of the jurisprudence of the FCC. See R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002), as well as the plethora of his essays on principles, rights, balancing, and proportionality.

⁹My own take on constitutional democracy and constitutional adjudication is voiced in *Il costituzionalismo dei diritti. Struttura e limiti del costituzionalismo contemporaneo* (il Mulino 2016) (a summary in English can be read in the ‘book review’ (2019) 10 *Jurisprudence* 444).

A constitutional democracy rests, at once, on two foundations: democracy, and the constitution.¹⁰ The constitution provides the basic framework for the operation of public institutions – those institutions whose legitimacy derives in turn from democratic procedures. The constitutional basic framework consists of procedural rules and institutional arrangements (such as the separation of powers and the rule of law) and a (often open-ended) list of fundamental rights. To complete the picture, constitutional democracies need some institutional arrangements for exercising oversight so that public institutions do not step out of their constitutionally assigned perimeter; of course this is where the judicial review of legislation comes into play, usually in the form of a centralised constitutional court (such as the FCC).¹¹ A constitutional court is necessary in order to enforce the constitution, otherwise the constitution would be swallowed by ordinary (democratic) politics. To put it shortly, the constitutional court protects the ‘constitutional’ part of constitutional democracy, drawing its legitimacy from the constitution itself.

Grimm rightly emphasises here that judicial review is not at all necessary in order to have a democracy¹² – and not even in order to have a *constitutional* democracy.¹³ Ideally, in a social setting where both the political forces and the citizenry at large have a profound respect for the values enshrined in the constitution, there is no need to implement a system of judicial review. The need to implement a system of judicial review, that is, is premised on distrust in the ability of the government and of democratic politics to respect and protect the fundamental rights of the citizens and to adhere to the rule of law. Grimm also rightly stresses that no one single system of judicial review is better than the others – different systems may be appropriate for different social and political settings. Accordingly, the choice of whether to have judicial review or not (constitutional democracy vs ‘bare’ democracy), and the choice of the specific mechanism of judicial review, are entirely dependent on the social and political context at stake.¹⁴

Be that as it may, it is important to stress that in a constitutional democracy the constitution does not – and indeed, should not – play the role of a detailed blueprint, a rigid roadmap for the action of the democratically legitimised political institutions (the legislature and the executive).¹⁵ This is indeed implicit in the very fact that constitutional norms are ‘principles’, i.e., norms that are open to many different modes of concretisation. In a constitutional democracy, it is not even remotely true that everything is already decided at the constitutional level, thus leaving little or no margin of manoeuvre to democratic politics. Quite to the contrary, in a constitutional democracy, the constitution – being mainly composed of principles – needs to be translated (specified, concretised) into operative ‘rules’, and this is primarily the job of the legislature. Moreover, since

¹⁰Grimm (n 2) 55.

¹¹In Chapter 11, Grimm assesses the merits of a centralised system of judicial review as opposed to de-centralised (or ‘diffuse’) ones. Moreover, in Chapter 8 (discussing Habermas’ critique of judicial review of legislation), Grimm explains why it is not a good idea to entrust constitutional review of legislation to political, as opposed to judicial, institutions, such as a parliamentary committee.

¹²Grimm (n 2) 44–46, 287.

¹³*Ibid* 55–56.

¹⁴The history of the 20th century has taught some hard lessons to certain European countries, such as Germany and Italy, and has infused them with a general feeling of distrust towards ordinary politics. The same cannot be said about, for instance, the UK, where ordinary politics is normally supposed to provide a good avenue for the protection of the fundamental rights of the citizen.

¹⁵Grimm strongly argues to this effect at several points: see for instance Grimm (n 2) 32, 53.

principles can always be specified in many different ways – principles are ‘open-ended’ norms – even in a constitutional democracy the legislature has a considerable margin of appreciation in shaping the specific rules and arrangements that are required by the relevant constitutional principles. Accordingly, the idea that in a constitutional democracy the democratically elected legislature becomes a mere executor of constitutional mandates – an idea often lurking in the background in the discourse of critics of judicial review and of the constitutional entrenchment of rights – is evidently only a myth, or maybe a caricature.¹⁶

Even with these qualifications in mind, there is an undeniable tension between democracy and constitutional adjudication. The two fundamental components of constitutional democracy – democratic decision-making and judicial protection of the constitution – often pull in different directions. It seems that constitutional democracy wants to have her cake and eat it too. Grimm acknowledges this tension, but in framing the ‘democratic problem’ of judicial review, he does not share the standard position voiced by supporters of ‘political constitutionalism’.¹⁷ According to this, in a nutshell, the problem with judicial review is that a non-democratically appointed institution such as a constitutional court is empowered to overturn decisions adopted by democratic institutions such as legislatures. Grimm sees this matter quite differently, and interestingly so.¹⁸ According to Grimm, the constitution itself owes its existence and legitimacy to the value of democracy, since the constitution has been wanted by the people itself (or approved by its representatives). So, if the people have decided that government power should be checked as regards its ability to respect the fundamental rights of the citizens, this cannot be deemed undemocratic – in short, judicial review performs exactly the role that the people has deliberated to assign it, and hence it enjoys democratic legitimacy.¹⁹

But, as anticipated, a tension between democracy and constitutional adjudication still looms large. The problem, according to Grimm, is that judicial review is really compatible with democracy only if the constitutional court performs a strictly ‘legal’ role – better said, only if the court in its decision-making operates in a strictly legal way, as opposed to operating in a political fashion.²⁰ If and when this is not the case, the court becomes yet another political actor – and one that lacks democratic legitimacy at that. Political decisions, those that are adopted on merely political grounds, are better left to the legislature or even to the executive, as long as they enjoy democratic legitimacy. The constitutional court, on the other hand, is supposed to uphold the constitution in a specifically ‘legal’ way, i.e., through (and *only* through) legal reasoning.

It is crucial, then, to understand what it means for a constitutional court – as for any other law-applying institution – to operate in a strictly legal way. According to Grimm, the law possesses ‘a logic of its own’²¹, a specific rationality that marks it as a relatively

¹⁶Grimm (n 2), 32: ‘even in a constitutional state, politics is not just about executing the Constitution, but also about autonomous decision-making within the constitutional framework, for which politicians are accountable to the electorate’.

¹⁷The standard formulation of this position can be found in T Campbell, *The Legal Theory of Ethical Positivism* (Routledge 1996); M Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999); J Waldron, *Law and Disagreement* (Oxford University Press 1999); R Bellamy, *Political Constitutionalism* (Cambridge University Press 2007). A useful summary of political constitutionalism’s main theses can be read in R Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* 86.

¹⁸*ibid* 41–44.

¹⁹*ibid* 90, 275.

²⁰*ibid* 90 (‘if [...] constitutional adjudication is legal by nature, there is no conflict, in principle, with democracy’).

²¹*ibid* 274.

autonomous system vis-à-vis the other sub-systems within a society, such as the political system and the economic system. And the hallmark of legal rationality – of what constitutes a properly ‘legal’ decision-making or legal reasoning – is, for Grimm, the consistent reference to legal methods, legal doctrines, and legal precedents.²² An institution, such as a Constitutional Court, reasons ‘legally’ if its decision-making is consistently guided by legal methods, legal doctrines, and legal precedents. To be sure, in a constitutional democracy, the constitutional court is not a *purely* legal actor. The constitutional court affects the political system in many ways: its decisions have a political *object* (judicial review oversees decisions stemming from political organs) and have clear political *effects* (judicial review can interfere with, and even block, the political agenda of the government).²³ But these obvious truths do not turn the constitutional court into a purely political institution either. As long as its decisional process is based on the specific rationality of the legal system, as opposed to that of the political system, the constitutional court is engaged in a law-applying process rather than becoming just another player in the political arena – it speaks in a genuinely legal language, as it were.

Now, focusing on the legal reasoning involved in judicial review, Grimm notes that reference to legal methods, legal doctrines, and legal precedents somewhat restricts the range of interpretive options available to the court, but it is no guarantee that the interpretive process will reach a univocal outcome (one right answer, *à la* Dworkin). Accordingly, constitutional adjudication cannot be expected to act upon the one true interpretation of constitutional norms. In constitutional adjudication, formalism is not an option, at least if formalism is understood as the idea that the law can dictate only one correct interpretive outcome, which must be discovered by the interpreter. Indeed, constitutional norms are often framed in very broad and vague terms; moreover, constitutions are rife with gaps that need to be filled, and normative contradictions that need to be overcome – in short, constitutions seldom if ever provide the interpreter with just one clear and objective interpretation. Constitutional interpretation, then, requires substantive choices, often decidedly creative ones.²⁴ While legal interpretation is never a purely cognitive act, in constitutional adjudication the creative element of interpretation is bound to become particularly conspicuous.

And *here* is where, according to Grimm, the democratic problem with judicial review really lies.²⁵ For as much as the court manages to act in a properly legal way, adhering to the specific rationality of the law, it will still be required to develop the law (and particularly constitutional law) in ways that can only be ‘guided’, but not at all predetermined, by the text of the constitution as well as by legal methods, legal doctrines, and legal precedents. This democratic blind spot simply cannot be eliminated from a constitutional democracy – if not by dispensing with judicial review altogether.²⁶

²²ibid 67–68, 94–95, 108, 274–76, 278. To be sure, in Grimm’s book the term ‘legal doctrine’ means something like the corpus of theories, interpretations, concepts, and the like, developed by legal scholars over time in a certain field of the law, with a view to the systematization and rationalisation of legislative materials. In this sense it appears to be an approximate translation of the German word ‘Dogmatik’, which has a specific nuance within Civil Law legal cultures. On the difficulty to find an exact correspondence for this term in the Common Law, see A Somek, ‘Two Worlds of Legal Scholarship and the Philosophy of Law’ in N Bersier, C Bezemek, and F Schauer (eds), *Common Law – Civil Law. The Great Divide?* (Springer 2022) 141.

²³ibid 64, 91–92.

²⁴ibid 25, 49–51, 66–67, 92–93, 108, 133.

²⁵ibid 275–78.

²⁶ibid 278.

This is the backbone of Grimm's argument – if I am not misconstruing it – about the legitimacy of constitutional adjudication, its uneasy relation with democracy, and the distinction between the 'legal' and the 'political' in constitutional adjudication. The argument is rich and elegantly articulated. It brilliantly steers clear of simplifications and one-sided claims about the role and merits of judicial review – notwithstanding his past role as a constitutional judge, or maybe precisely because of it, Grimm is acutely aware of the limitations and even the risks attached to this institution. Grimm's argument is also refreshing in its ability to link the issue of the legitimacy of judicial review to the domain of legal reasoning and constitutional interpretation – an aspect often entirely overlooked in current debates on judicial review, despite the fact that it lies at the very heart of the matter, as Grimm brilliantly emphasises.²⁷

Against this backdrop, in the next two sections I will highlight two matters of 'internal' disagreement with Grimm's position. While I share Grimm's general stance on judicial review and its importance in a constitutional democracy, I will argue that some points in his argument deserve closer scrutiny – and possibly a different formulation.

3. Just another view (I): constitutional adjudication vs democracy – or how (not) to reply to political constitutionalism

Let's start with Grimm's argument to the effect that judicial review is not necessarily at odds with democracy. Two questions can be asked here. First: is Grimm's argument a good refutation of the counter-majoritarian objection as levelled by the cohort of political constitutionalists²⁸? And second: (leaving aside political constitutionalism's critique of judicial review) is Grimm's argument a convincing way of framing the relation between judicial review and democracy?

It is well known that the critique mounted by political constitutionalism, in its various strands, against judicial review of legislation boils down to the claim that judicial review is undemocratic. In the process of applying (enforcing, protecting, etc.) the constitution, judicial review allows non-democratically elected bodies to overturn decisions produced by democratically elected institutions.²⁹ Now, it seems to me that for a defender of *legal* constitutionalism (i.e., of a constitutional democracy that includes judicial review of legislation) there are two main strategies to deal with the democratic objection to judicial review.

The first strategy is to accept wholeheartedly the objection. In this sense, supporters of judicial review can indeed recognise it as undemocratic, the *raison d'être* of judicial review being exactly to counteract decisions adopted by democratic institutions in violation of the constitution. Put simply, supporters of judicial review may conclude that, in a constitutional democracy, democracy is not enough.³⁰ A constitutional democracy cherishes democracy as much as other 'goods' (human dignity, equality, freedom, the

²⁷ *ibid* 272.

²⁸ Let me recall that a substantial part of Chapter 5 and the entire Chapter 15 are devoted precisely to such refutation.

²⁹ See above, n 17 and accompanying text.

³⁰ See, paradigmatically, M Kumm, 'Democracy is Not Enough: Rights, Proportionality and the Point of Judicial Review', NYU School of Law, Public Law Research Paper No. 09–10 (available at <https://ssrn.com/abstract=1356793>); also published, in slightly revised form, under the title 'Alexy's Theory of Constitutional Rights and the Problem of Judicial Review', in M Klatt (ed), *Institutionalized Reason. The Jurisprudence of Robert Alexy* (Oxford University Press 2012).

rule of law ...), appositely incorporated in the constitution in the guise of values, principles and rights, and is not willing to let democracy sacrifice those goods just for democracy's sake. Democracy is one among several constitutional goods, and it is valuable only insofar as it respects its constitutionally mandated boundaries. A constitutional democracy, accordingly, incorporates a fundamental contradiction, but possibly a healthy one – its ambition, it could be said, is to strike a balance, or a reflective equilibrium, between the free course of democratic politics and the inviolable rights enshrined in the constitution.³¹

The second strategy is to defuse the democratic objection to judicial review by showing that judicial review can be in various ways instrumental to democracy – in other words, by showing that judicial review can contribute to making democracy thrive. This can be argued in different (but mutually compatible) ways. For instance, it can be argued that judicial review does not conflict with democracy provided that we do not identify the notion of democracy simply with electoral procedures and majority rule. In this sense, if we accept a *substantive*, thick definition of democracy, as opposed to a merely *formal* or *procedural* (thin) one, we can easily discover that judicial review is not just compatible with democracy, but even required by it. By a substantive definition of democracy I mean the notion that democracy – far from being limited to the act of casting a ballot and counting the votes – includes a rich list of fundamental rights that are variously and sometimes only indirectly related to the mere act of voting. Under a substantive definition, the concept of democracy includes a set of factual and normative preconditions, whose absence would transform whatever democratic procedures are in place into a hollow facade of a democracy. And such factual and normative preconditions can often be represented as a matter of rights.

For some rights, this is very easy to see³²: democracy requires equality (one head, one vote), as well as freedom of expression, freedom of association (and not limited to just political association), political pluralism, a good degree of personal freedom, privacy, security, protection from discrimination (especially but not only discrimination on political grounds); moreover, democracy requires rights in the area of education (it can be stipulated that democracy works better in a social context with a good degree of literacy); and also rights instrumental to at least some basic level of subsistence, such as job security and health care (it can be stipulated that people that are just fighting for survival are not particularly interested in exercising their right to vote and their political freedoms generally). If that is correct, then a whole host of liberal and welfare rights is actually required by democracy, at least in a thick, substantive definition of it. But of course a (smaller) set of rights is required also by a merely formal or procedural (thin) definition of democracy – at the very least, the right to vote, the right to form and act in political parties and

³¹Discussing political constitutionalism, Grimm notes that in order to fully meet the democratic objection it would be necessary to dispense entirely with constitutional adjudication: D Grimm (n 2) 278. More precisely, I would argue, it would be necessary to dispense with the idea of a *legally binding constitution*. (Of course the two notions – constitutional adjudication and the legal bindingness of the constitution – are strictly connected one to the other.) Political constitutionalists are not willing to put legislation (as the legal expression of democratic politics) under the authority and the limitations imposed by another, and higher, source of law. In this framework, a constitution, in case there is one, should only work as a political inspiration for democratically-appointed institutions. As a consequence, under the auspices of political constitutionalism, it is not just constitutional adjudication, but the very idea of the constitution as a legal instrument, that goes out the window.

³²In passing, Grimm clearly acknowledges this (ibid 43).

associations, possibly the right to some forms of participation in the formation of collective decisions.

So it seems that democracy, already in its formal sense, and all the more so in its substantive sense, requires a rich list of rights. Now, since these rights are necessary to democracy (albeit not in a strictly logical sense of ‘necessary’), it seems a good idea to place them out of the reach of ordinary, democratic politics. In this way, ordinary politics will be prevented from harming its own democratic foundations.³³ Hence, it seems a good idea to entrench these rights in a constitution, and especially in a legally binding, judicially-enforced constitution. Of course, all this does not settle the issue of the breadth of the powers entrusted to courts in enforcing the constitution, and neither does it require giving the courts the final word in all the matters of fundamental rights, but certainly it shows that some form of judicial review is indeed required by democracy.

In addition to that, in many contemporary constitutional democracies Constitutional Courts, far from usurping the powers of the legislature, usually show high respect for democratic deliberation. Usually, Constitutional Courts emphatically state that it is not their job to substitute their own assessment on some political, social or moral issue for the one adopted by the legislature – rather, the court is supposed just to oversee that the decisions adopted by the legislature do not overstep the relevant constitutionally permissible boundaries.³⁴ And when several ways to implement a constitutional principle are on a par (are equally constitutionally permissible), the court defers the final decision to the legislature.

Lastly, judicial review could even be seen not just as a ‘democracy-protecting’ and as a ‘democratically deferent’ institution, but also as a ‘democracy enhancing’ institution. This is because on many occasions – such as on matters that are particularly sensitive from an ethical or a political point of view – the court, instead of issuing a precise ruling, invites the Parliament to settle the issue, and to give effect to some constitutional principle, through a comprehensive legislative deliberation. In other words, even in those systems where constitutional adjudication is formally designed as a ‘strong’ form of judicial review, constitutional courts often prefer to resort to some kind of ‘weak’, i.e., ‘dialogical’, form of judicial review.³⁵ And in such cases a constitutional court, far from silencing democratic institutions, indeed promotes democratic dialogue and encourages democratic deliberations on matters that ordinary politics may have overlooked – for whatever reason.³⁶

Let’s take stock. It seems that the democratic objection to judicial review mounted by political constitutionalism could be answered either by embracing it (constitutional

³³This is particularly the case in those societies where democracy has already been endangered, or even defeated, through apparently democratic procedures. On the ‘pragmatic’, rather than ‘logical’, necessity of judicial review for democracy, see above, n 14 and corresponding text.

³⁴On the FCC’s stance on this, see Grimm (n 2) 33–34.

³⁵For instance it has been noted that the decision-making of the Italian Constitutional Court is consistently inspired by a principle of ‘institutional relationality’ and a dialogical attitude towards the Parliament: see V Barsotti, P Carozza, M Cartabia, A Simoncini, *Italian Constitutional Justice in Global Context* (Oxford University Press 2016) 235–37. The distinction between ‘strong’ and ‘weak’ forms of judicial review was first introduced by M Tushnet, ‘Alternate Forms of Judicial Review’ (2003) 101 *Michigan Law Review* 2782; see also J Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *Yale Law Journal* 1346.

³⁶The ‘democracy-enhancing’ virtues of weak judicial review are aptly emphasised by R Dixon, ‘The Core Case for Weak-Form Judicial Review’ (2017), 38 *Cardozo Law Review* 2193.

democracy actually, and willingly, limits democracy) or by defusing it (constitutional democracy ultimately enhances democracy) or, lastly, by re-defining democracy (in a constitutional democracy, what is lost in terms of formal/procedural democracy is gained in terms of substantive democracy).

If that picture is correct, where does Grimm's position stand? As noted above, Grimm concedes that there is a tension between democracy and judicial review, and points to a possible way out: as long as the court performs judicial review in the guise of legal reasoning – in accordance to 'the specific rationality of the legal system' – as opposed to acting as just another political player, the democratic problem of judicial review is, if not resolved, at least alleviated to a considerable extent.

But, as it stands, this is not a reply to political constitutionalism's objection. The point made by political constitutionalism is exactly that it is not a good idea to put a *legal* decision-making institution over a *political* (democratic) one. The fact, if it is one, that a constitutional court operates in a legal way – i.e., through legal reasoning – does not address political constitutionalism's objection: it instead revives it and possibly reinforces it. In order to address this objection, it is necessary to show *why* it is a good idea to have a legal decision-making institution over a political (democratic) one.

Grimm, to be sure, has an argument also to that effect. According to Grimm, it is a good idea to have a legal decision-making institution over a political (democratic) one because also judicial review is grounded on democracy. As already noted (above, § 2) Grimm argues that judicial review is integral to democracy because it is instrumental to ensuring the binding character of the constitution, and the constitution, in turn, has democratic credentials – it has been wanted and agreed upon by 'the people'. And, once again, if judicial review is performed 'legally'³⁷, then it merely acts as a sort of transmission belt between the past democratic decision (namely, the decision of having a constitution) and the present – it actualises in the present a past democratic decision. Hence constitutional adjudication, if performed in a properly 'legal way', is or at least can be democratic.

Unfortunately, though, the democratic gist of this argument faces the objection of necrocracy, or 'the dead hand of the past'.³⁸ From the vantage point of the value of democracy, as such, there seems to be no principled reason why a democratic decision taken in the past should be preferred to a democratic decision taken today – quite to the contrary, from the vantage point of the value of democracy, as such, the decisions of a present-day democratic majority should naturally trump the decisions of a past democratic majority.

Grimm is aware of this difficulty, of course, and seeks a way out by noting that while the present-day democratic majority is bound by the past majority, it could certainly release itself from the dead hand of the past simply *by changing the constitution*, through the super-majority required by the constitutional amendment procedure.³⁹ In fact, according to Grimm, the effect of an entrenched constitution is that a past

³⁷For Grimm, it should be recalled, the hallmark of a properly 'legal' decision-making is the reference to legal method, legal doctrine, and legal precedents. (See above, § 2.).

³⁸See, e.g., JH Ely, *Democracy and Distrust. A Theory of Judicial Review* (Harvard University Press 1980), 11. A perspicuous inquiry into the implications of this objection for constitutional interpretation can be found in M McConnell, 'Textualism and the Dead Hand of the Past' (1997) 66 *George Washington Law Review* 1127.

³⁹Grimm (n 2) 90–91, 275.

super-majority binds the present-day (*ordinary*) majority; but a present-day *super*-majority could certainly trump a past *super*-majority. Once again, this is question-begging, as far as democracy is concerned. To begin with, it is not necessarily the case that a constitution is always approved by a *super*-majority in the first place, even though it is true that the entry into force of many contemporary constitutions have been backed by a wide social consensus. More importantly, from the vantage point of democracy, there is no reason why a past *super*-majority should bind even a present-day *ordinary* majority. This is exactly, once again, the critique mounted by political constitutionalism to judicial review, which is first and foremost a critique against the existence of a *legally binding constitution* that acts as a limitation on democratic political deliberations.⁴⁰ (As such, the constitutional entrenchment of a past decision on some issue, in a way that limits the subsequent ability of a democratic majority to decide on that issue, is simply a limitation of democracy).

In short, then, Grimm's answers to the two questions raised at the outset of this section do not seem entirely satisfactory. Grimm's argument is not a good refutation of the counter-majoritarian objection as levelled by political constitutionalism, because – by arguing that judicial review should best be understood as a *legal*, rather than *political*, decision-making process – it merely restates the very problem raised by political constitutionalism, without replying to it. And it is not a convincing way of framing the relation between judicial review and democracy, either, because, under the appearance of vindicating the democratic credentials of judicial review (judicial review enforces the original democratic will of the people entrenched in the constitution), it does not show why – from a democratic point of view – the democratic past should prevail over the democratic present.

Indeed, Grimm could also argue that, though not democratic in itself, judicial review may nonetheless help democratic institutions in reaching better decisions.⁴¹ Certainly this is one possible way to argue for judicial review, but this does not show that judicial review is, in itself, a democratic institution. This argument simply says that, notwithstanding its possible democratic deficit, it is still a good idea to have a system of judicial review in place, because judicial review can provide an 'external' – and possibly beneficial – influence on democratic institutions. Once again, this justification of judicial review may or may not be convincing – I for one find it quite plausible – but it is not, as it stands, a justification based on the value of democracy. If anything, it presupposes that democracy stands in need of external corrections.

One last quick point on democracy and judicial review. As I have already noted, Grimm concedes that at the end of the day, even after an apt clarification of the ways in which judicial review is (in Grimm's opinion) compatible with democracy, there still remains a tension between judicial review and democracy. On the one hand, the tension between judicial review and democracy derives from the inescapable law-creative

⁴⁰As I have already noted (above, n 30), judicial review of legislation is conceptually related to the properly legal character of the constitution – the two things go hand in hand. Hence, political constitutionalism's critique of judicial review is nothing but a rejection of the legal character of the constitution.

⁴¹When arguing for the democratic character of judicial review, Grimm indeed says that the constitution performs some important and beneficial functions for the political system – it exonerates the political process from the burden of re-discussing again and again the substantial and procedural premises of political deliberation, and it makes '*a just solution more likely*' in virtue of the temporal distance between the adoption of agreed-upon principles and the concrete issues in dispute (ibid 43–44, italics added).

role inherent in constitutional adjudication.⁴² On the other hand, the tension between judicial review and democracy emerges from the fact that, according to Grimm, a decision taken by the constitutional court has the effect of settling the issue at stake, thus depriving the democratic law-making institutions of their ability to legislate on the matter in question.⁴³ And this is related also to another key point repeatedly made by Grimm, according to which the constitutional court has ‘the final word’ on constitutionally relevant matters in a constitutional state.⁴⁴ The claim, here, is that as soon as a certain matter is decided by a constitutional court, this prevents ordinary political (democratic) deliberation on that matter.⁴⁵

Now, this claim seems too strong indeed. Of course, there is no denying that constitutional adjudication can sometimes have exactly this ‘chilling’ effect on ordinary politics – for instance, if a constitutional court decides that torture constitutes a violation of the constitutionally protected value of human dignity, this certainly blocks further political deliberations on the merits of torture. But examples such as this do not remotely cover the full range of possible decisions that a constitutional court may take on the constitutionality of legislation. To begin with, when the constitutional court acts strictly as a ‘negative legislator’⁴⁶, it cannot be said that the matter decided by the court is removed from political deliberation – quite to the contrary, the legislator often has to step in to fill the void created by the decision of the constitutional court. Moreover, as I have already noted, oftentimes the constitutional court strives to open a dialogue with the legislator on constitutionally relevant matters, and in these cases the court does not provide the legislator with rigid and detailed mandates, but rather with principle-shaped declarations – pointing to a ‘direction’ or to a ‘goal’ rather than to a precise outcome. And in such cases, of course, ordinary politics still has a lot of work to do, notwithstanding the fact that the constitutional court has ‘decided’ on the matter.

More generally, it seems to me that the ‘logic’ of the constitutional state (the ‘logic’ of constitutional democracy) is fundamentally averse to the very idea of attributing ‘the final word’ to any one single institution – be it the Parliament, the constitutional court, or a supranational court. I have already mentioned the ways in which judicial review can be ‘dialogical’ and ‘democracy enhancing’, i.e., it may open a dialogue between the court and the legislator, rather than simply substituting the judgement of the court for that of the legislator; and in many instances constitutional courts are careful to not trespass into the domain of decisions that are best left to democratic politics. To be sure, excesses and aberrations can always happen. The tyranny of values and juristocracy can loom large in the background of the constitutional state.⁴⁷ But these, just as much as the tyranny

⁴²See above, n 23–25 and accompanying text.

⁴³Grimm (n 2) 54.

⁴⁴ibid 48, 50, 55, 62, 69.

⁴⁵Ironically, this, as it stands, is *exactly* political constitutionalism’s objection to judicial review.

⁴⁶This of course was Hans Kelsen’s idea of judicial review: H Kelsen, ‘The Nature and Development of Constitutional Adjudication’ (1929) in L Vinx (ed.), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015), 22–78.

⁴⁷The obvious reference here is to C Schmitt, *Die Tyrannei der Werte* (Duncker & Humblot 2011) – an English translation can be read in C Schmitt, *The Tyranny of Values and Other Texts* (Telos Press 2018). On ‘juristocracy’, see R Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004); and – particularly remarkable in the German debate – B Rütters, *Die Heimliche Revolution Vom Rechtsstaat Zum Richterstaat* (Mohr Siebek 2016). Grimm effectively discusses Hirschl’s work at various junctures of the book.

of the majority, would represent a betrayal of the ideal of the constitutional state rather than its physiological functioning.

4. Just another view (II): law and politics in constitutional adjudication

Another part of Grimm's argument that, in my opinion, deserves some scrutiny concerns the interplay between the 'legal' and the 'political' dimensions of constitutional adjudication. As already noted⁴⁸, this is a crucial point in Grimm's overall argument on the legitimacy of judicial review: judicial review can claim democratic legitimacy if the court, instead of being yet another political player, acts as a properly *legal* actor.

The point of departure of this line of argument is the undisputable fact that, in a constitutional democracy, courts inevitably participate in the law-making process.⁴⁹ And more generally, the interpretation and application of the law – especially, but not only, in constitutional matters – include an aspect of law-creation.⁵⁰ This endangers the legitimacy of constitutional adjudication, because if the constitutional court derives its (democratic) legitimacy from the constitution, then its decision-making should be confined to just applying the constitution. And here's the rub. In fact, if it turns out to be impossible to 'just apply' the constitution because constitutional adjudication inevitably involves law-creation rather than law-application (it involves the creation of new legal norms rather than the application of pre-existing norms), the obvious consequence is that constitutional adjudication is not legitimate, at least from the point of view of democracy. This is, for Grimm, the point where the tension between judicial review and democracy really lies.⁵¹

Grimm's answer to this problem, as we have already seen, is that judicial review can retain its democratic legitimacy as long as it acts 'legally', i.e., through legal reasoning proper.⁵² At this point we can appreciate that the reason for this move is actually twofold. On the one hand, the court, when acting in a specifically legal way, is prevented from becoming just another political actor – and one that would lack direct democratic (i.e., representative) legitimacy at that. On the other hand, the specific resources afforded by legal reasoning can reduce – but of course never entirely eliminate – the margin of law-creation that is inevitably incorporated in constitutional adjudication.

There are many interesting things to note in this part of Grimm's argument.

Let's recall that Grimm carefully disentangles what is 'political' from what is 'legal' in constitutional adjudication, and to this end he acknowledges that constitutional adjudication is indeed political in its *object* (constitutional adjudication oversees the decisions of political actors) and in its *effects* (constitutional adjudication affects the actions of many political institutions).⁵³ However, constitutional adjudication is not political in its *decision-making process* – and this is where its specifically legal dimension kicks in.

⁴⁸See above, §§ 2 and 3.

⁴⁹D Grimm (n 2) 31, 51.

⁵⁰See above, n 24 and accompanying text.

⁵¹See above, n 25–26 and accompanying text.

⁵²Let me recall the gist of Grimm's argument to that effect (above, §§ 2 and 3): (a) the constitution has democratic legitimacy; (b) the constitution entrusts the constitutional court with the legal enforcement of the constitution itself; thus (c) as long as the constitutional court ensures the *legal* enforcement (as opposed to the *political* implementation) of the constitution, it enjoys democratic legitimacy.

⁵³See above, n 21–23 and accompanying text.

The legal dimension of constitutional adjudication consists in the fact that legal reasoning is constrained – even if not rigidly so – by legal methods, legal doctrines, and legal precedents. These elements ensure that constitutional adjudication, far from taking place in a legal vacuum, is guided if not constrained by legal resources. Since – and to the extent that – legal reasoning is anchored in factors such as these (legal method, legal doctrine, and legal precedents), it is preserved from being transformed into either mere political decision-making, or open-ended moral speculation on the substance of constitutional rights.⁵⁴

The distinction proposed by Grimm between object, effects, and decision-making process, with a view to separating what is political from what is legal in constitutional adjudication, is sound in many respects.⁵⁵ But I think that it ultimately obscures an important dimension of legal reasoning that indeed *is* political, both within and beyond constitutional adjudication.

To clarify this point it must be recalled that, as Grimm of course acknowledges, any sufficiently complex legal culture incorporates a variety of different legal methods. Jurists (legal scholars and judges alike), far from sharing a single interpretive methodology, can resort to various methods to do their interpretive work, and hence they can frequently disagree on how to properly interpret sources of law. One interpretive methodology may direct the interpreter to give pride of place to the literal meaning, another one to the purported aims of the norm, another one to the intentions of the law-maker, another one to the systemic connections of the law to other parts of the legal system, and yet another one to the social and/or economic effects of the law. Moreover, one single method of interpretation can often be employed in different ways. For instance, when using the interpretive method based on the ‘intention of the law-maker, the interpreter must choose between competing accounts of both ‘intention’ (the mental state of specific individuals? the ‘objective will’ of the statute?) and of ‘the law-maker (the individuals that have drafted the statute? or those that have voted for it? or some ‘ideal legislator’?). And the same applies also to the other interpretive methods listed above, each of which has several internal variations. Lastly, it is even possible that many jurists do not consistently follow any method at all, but rather do their job on a results-oriented basis: they simply choose whatever method is able to take them to the desired result. As a consequence, when engaged in legal interpretation, the jurist inevitably has to choose among the various interpretive methods available, and also among the several possible ways to use one single interpretive method.

Now, the choice of methodology is normally guided by some fundamental ideas that the interpreter has about the law, about the place and role of the legal system vis-à-vis the social and political systems (e.g., is the legal system autonomous and separate from the social system, or rather does the legal system have to respond to social needs, or to certain moral or political values?), and about the place and the role of the jurist himself in the legal system (e.g., is the jurist supposed to act as a guardian of the integrity and autonomy

⁵⁴The risk of a fusion, or confusion, between legal and moral reasoning in constitutional adjudication is exacerbated by the long-standing tendency of the German constitutional court to refer to the constitution as an ‘order of values’. Grimm is aware of this risk and aptly clarifies that the value-talk of the German constitutional court is basically an emphatic way to refer to legal principles (*ibid* 130).

⁵⁵On various senses of ‘political’ that may be relevant in the context of judicial decision, see also J Waldron, *The Law* (Routledge 1990), 120–22.

of the law, or rather should he act as a driver of legal innovation?). It is exactly along such lines that it is possible to attach to a jurist such labels as ‘formalist’, ‘functionalist’, ‘conservative’, ‘progressive’, ‘conceptualist’, ‘literalist’, ‘textualist’, ‘originalist’, ‘crit’, and the like.

Fundamental ideas of this kind inevitably influence the methodological choice and also, at least indirectly, the result of the interpretive process. In addition, the above-mentioned ‘fundamental ideas’ also shape other important parts of the interpretive process that do not fall exactly within the issue of legal methods. For instance, these ‘fundamental ideas’ lead the (German) jurist to see the constitution as an ‘objective order of values’, or to affirm the principle of the horizontal application of constitutional rights, or to support the idea that the best way to solve a conflict between constitutional rights is by resorting to balancing and proportionality tests, or to hold that the best way to account for the nature of constitutional norms is in terms of ‘principles’ rather than in terms of ‘rules’.⁵⁶

The crucial point here is that what I have so far been calling ‘fundamental ideas’ are normative ideas on the legitimacy of the legal system, on the fundamental political values (democracy, rule of law, legal certainty, separation of powers, economic efficiency, social justice, etc.) that the interpreter deems relevant for the legal system, and on the way legal interpretation should be carried on in order to fit with those values. And since the object of legal interpretation is the law, i.e., a prominent part of the political and social structure of a community, as well as a ‘morally risky’ enterprise⁵⁷, it is only natural to conclude that the choices, decisions, and judgments that are called for in the course of legal interpretation are necessarily of a moral and political nature. When the interpreter chooses one legal method, or when he prioritises one legal method over another, or when he decides to use a certain legal method in a certain way rather than in another way, this is guided by value-judgements that are political and moral in nature. The fact that such value options are often disguised in the technicalities of legal reasoning (legal method, legal doctrine, legal precedents) does not detract in the least from the fact that the process and the outcomes of legal interpretation are ultimately guided or at least influenced by value-judgements that are political and moral in nature.

Legal interpretation, then, is intensely value-laden, the values that figure prominently in legal interpretation being moral and political in character. And the set of normative considerations (considerations of moral and political character) that operate in the process of legal interpretation can conveniently be labelled as the ‘legal ideology’ of the interpreter.⁵⁸

If the picture sketched above is plausible, then the idea that judicial review retains its legitimacy because – and to the extent that – it functions according to legal reasoning proper, and is hence a-political, is in need of some qualification. The legal reasoning

⁵⁶Grimm refers to notions of this kind (the horizontal effect, the State’s duty of protection of constitutional rights, etc.) as ‘theoretical clarifications’ that precede the doctrinal and methodological operations performed by the jurist (276). As will become shortly apparent, I would strongly object to qualifying this stuff as mere ‘theory’.

⁵⁷L Green, ‘Positivism and the Inseparability of Law and Morals’ (2008) 83 *New York University Law Review* 1035.

⁵⁸I use ‘legal ideology’ here in roughly the same sense as Alf Ross does: A Ross, *On Law and Justice* (Stevens & Sons 1958). The influence of legal ideology on legal interpretation is assessed at various levels by P Chiassoni, *Interpretation Without Truth. A Realistic Enquiry* (Springer 2019). Elsewhere, I have explored the potential for the concept of ‘legal ideology’ to revisit and make sense of the Hartian ‘rule of recognition’: see G Pino, ‘Farewell to the Rule of Recognition?’ (2011) 5 *Problema* 265; see also G Pino, ‘The Politics of Legal Interpretation’ in D Duarte, P Moniz Lopes, J Silva Sampaio (eds), *Legal Interpretation and Scientific Knowledge* (Springer 2019).

involved in judicial review is indeed political, in as much as legal interpretation is political – and, given its peculiar object, constitutional interpretation is even more political than ‘ordinary’ legal interpretation. But of course here ‘politics’ has a specific meaning. The politics of legal interpretation is not ordinary politics, and even less party politics – legal reasoning should strive to steer clear of *this* sense of politics. Legal interpretation is political because it inevitably supposes, and sometimes even brings to the fore, fundamental ideas on the legitimacy of the legal system and on the political values that are supposed to shape it.

5. Endgame

The contemporary ‘constitutional state’ (or ‘constitutional democracy’, or ‘new constitutionalism’) is a complex enterprise – it may even be thought of as a sort of risky gamble. Its architecture is complex, somewhat like a complicated and fragile cathedral.⁵⁹

Whatever the Framers really had in mind when drafting the constitution of a constitutional state, the ‘inner logic’ of constitutional democracy as it has developed over the last fifty years or so, first in Europe and then globally, creates several areas of ‘tension’ between important goods – for instance, between democracy and rights, as well as between different categories of rights (inter-rights conflicts, such as the conflict between liberal rights and welfare rights) and between the same kind of rights that belong to different categories of right-holders (intra-rights conflicts). It also creates tensions between different institutions (the legislator and the courts) and different spheres of legality (most notably, the national and the supranational circuits of law-making and law-application).⁶⁰

These tensions do not arise by accident, or by mistake. They are part of the ‘genetic code’ of constitutional democracy, because its inner logic requires an ongoing search for an equilibrium, for a balance among all these important constitutional goods. The task of searching for such balance is distributed among several actors, in different ways and with different responsibilities – the legislator is more responsive to considerations of general interest, of ordinary politics, and of public opinion, while the courts are more sensitive to the specificities of the case, to systematic considerations, and to the relative autonomy of legal reasoning – without any single institution having the final word on these matters. Judicial review protects the substantive sense of democracy, and to that effect it indeed limits democracy in the formal sense, possibly even enhancing democratic decision-making in several ways. And constitutional democracy makes an inherent feature of legal interpretation even more evident: that constitutional adjudication – just as legal interpretation generally – is political, even if not in the sense of ‘ordinary politics’ or ‘party politics’.

Throughout his career, both as a scholar and as a constitutional judge, Professor Grimm has provided an invaluable contribution to the implementation, consolidation,

⁵⁹Here I am obviously paying homage to the title of world-famous piece of legal scholarship (whose subject-matter is of course totally unrelated to the one of this essay) G Calabresi, D Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 85 Harvard Law Review 1089.

⁶⁰In the contemporary constitutional state, the push towards supranational levels of legal and political integration, or at least interaction, follows the same ‘logic’ of judicial review of legislation – they are both ways to limit the risk of omnipotence (tyranny) of political power, including those political powers that claim democratic legitimacy.

and to defence of the cultural, legal and political enterprise of the constitutional state. I for one share and admire his commitment to constitutional democracy and the constitutional state. Here, I have tried to simply offer another view of the cathedral.

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