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Summary

A longstanding debate in constitutional theory concerns the legitimacy of constitutional review and the scope of judicial interpretation. The core of the conflict is the conceptualization of the separation of powers and the related distinction of law and politics. Strategic litigation stresses this existing normative tension, because it brings issues to court with an agenda that goes beyond the individual case. In climate mitigation cases, litigants turn to courts to enforce or improve climate change mitigation policies. Because they often invoke human rights violations to urge courts to compensate for legislative inaction, climate cases reignite the debate on the legitimacy of constitutional review. In light of increasingly polarized political climates and democratic backsliding, this puts courts in the center of a legal and political controversy, threatening to become detrimental to their authority. This thesis addresses the question of how courts can balance their engagement in climate cases, while maintaining their institutional legitimacy and also adequately protecting human rights. I will show that the reasonable criticism of judicial overreach can be addressed by commenting on institutional concerns explicitly, emphasizing the democratic and collective elements of intergenerational equity and leaving room for the legislator to impact the specification of the means to achieve climate goals. Furthermore, I will demonstrate that the reasonable criticism needs to be distinguished from disingenuous criticism that solely aims at discrediting the judicial institution in its entirety. Whereas courts do have a margin of action in resisting democratic backsliding, the decline in the rule of law is not averted by exercising judicial restraint. Thus, while courts have to exercise restraint to respect their constitutional mandate, this restraint cannot be expanded to accommodate for opportunistic criticism intended to undermine judicial authority.

Preface

I am very grateful to be able to say that I had wonderful support while writing this thesis. So, before diving into the latter, I want to thank some people for their impact on my work and my time here in Lund.

Firstly, I want to thank my supervisor Laurianne Allezard, for all the encouragement and advice.

Thank you to my mom, Yvonne, for reading my work, taking interest in my rabbit hole and for thinking with me together. Thank you Viveka for being the best emotional backup anyone could wish for. And thank you Holger for all your great feedback.

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GAI Statement

This thesis used generative artificial intelligence tools for language correction and for language enhancement, specifically to check for spelling mistakes and to look for synonyms of words or translations of individual sentences.

1. Introduction

1.1. Problem statement

Traditional conceptions of the separation of powers have been under pressure for a while. The rise of constitutional review, the development of human rights and the internationalization of law and judicial institutions challenge the distinction of what is legal and what is political, leading to both a judicialization of politics and a politicization of law. Simultaneously, political debates become increasingly polarized and even on the most pressing issues it becomes increasingly difficult to reach a democratic consensus. As a result, interest groups and activists turn to courts as arbiters in a political stalemate. While constitutional and human rights provide the ground to bring some of those claims to court, litigants often have to rely on vague principles and progressive interpretations of existing rights to accommodate for their goals.

An exaggerated manifestation of this circumstance is strategic human rights litigation whereby claimants bring issues before court with an overarching aim of creating precedents and evolving the law, navigating between *lege lata* and *lege ferenda*. This moves courts into the heart of polarized debates on fundamental societal issues which amplifies the tension between what is legal and what is political and exacerbates debates on legitimacy.

Climate litigation is emblematic of this phenomenon. In various types of cases, litigants not only strive to obtain justice in their individual situation, but aim to enforce, develop and improve climate policies. Since the *Urgenda*¹ case, litigants rely increasingly on fundamental rights and human rights to bring forward their claims. Especially in cases concerning the judicial review of public policy and climate legislation, voices criticizing judicial overreach have been loud, inciting debates on the separation of powers in the context of climate justice. The controversy resurfaces fundamentally different interpretations of an essential constitutional principle. Therefore, the position an author defends, is substantially determined by the argument's underlying philosophical basis. Both, ideological political positions and the conceptualization of separation of powers become entangled in the debate, making it difficult for courts and scholars to strike a balance.

This thesis aims at shedding light on this problem of uniting opposing philosophical stances in practical adjudication. While the second chapter will lay out the theoretical foundations of the debate surrounding constitutional review, the following two chapters will delve into a more functional discussion of the specific issue of climate litigation. Keeping in mind the theoretical perspectives, this argumentative part of the thesis will discuss the scope, limits and practical implications of climate judgements. This functional perspective relies on the societal and political context in which the litigation is taking place. Since my personal perception of this context informs the line of argumentation and might even imply some form of normative perspective, I will

¹ *Stichting Urgenda v Government of the Netherlands* [2015] Rechtbank Den Haag ECLI:NL:RBDHA:2015:7145.

sketch out the most central elements here. The underlying issue I am basing my arguments on, are opposing issues that fall under different elements of sustainability.

On the one hand, a sustainable society needs the resources that are fundamental to its existence. It requires the prospect of continuity in an existential sense. This prospect is threatened by climate change, which will severely impact human rights in the foreseeable future.² While the substantial threat of climate change has been scientifically predicted for a while, impacts on human rights are progressively becoming an issue of the present. Consequences of climate change are manifesting in increasing extreme weather events, rising sea-levels, water scarcity and consequent food scarcity, impacting the ecosystem alongside a broad range of human rights.³ On top of that, climate change raises issues of racial, social and generational injustice with regard to both its causes and its effects.⁴ Both the expectable and highly destructive extreme weather events, and their injustice pose an existential threat to society.

On the other hand, the realization of human rights strongly depends on a functioning legal system, which requires a commitment to the rule of law. Sustainable human rights protection must build on its interdependence with democracy and the rule of law. Realizing human rights in a democracy requires public trust, both in judicial institutions and in the quality of the law. In light of the global rise of authoritarianism and the decline of democracy, protecting institutional trust becomes critical. Populists across countries are rolling back on international commitments to human rights and attacking the independence of national courts.⁵ This challenges the role of courts and their institutional stance in the separation of powers. On an international level, courts have long been struggling with the balance between progressive interpretation and maintaining the support of states.⁶ Today, given the increasing pressure they find themselves under, constitutional courts could arguably face a similar problem. What role can courts play in a world where the commitment to the rule of law is in gradual decline? These are the questions that form the context of my line of argumentation.

1.2. Research objective

The aim of this thesis is to analyze the debate, both on the level of climate litigation and on the conceptual level. Since the debate is highly polarized and

² Benoit Mayer, ‘Climate Change Mitigation as an Obligation Under Human Rights Treaties?’ (2021) 115 *American Journal of International Law* 409, 414–416 <<https://doi.org/10.1017/ajil.2021.9>>.

³ Ibid.

⁴ Başak Çalı, Cathryn Costello and Nora Markard, ‘Constitutional Judging under Pressure: The Role of Judges in Safeguarding the Rule of Law, Equality, and Planetary Survival’ (2025) 26 *German Law Journal* 139, 144 <<https://doi.org/10.1017/glj.2025.13>>.

⁵ Kim Lane Scheppele, ‘Rights into Structures: Judging in a Time of Democratic Backsliding’ (2025) 26 *German Law Journal* 255, 256 <<https://doi.org/10.1017/glj.2025.7>>.

⁶ Jed Odermatt, ‘What the Court Didn’t Say: The ICJ’s Climate Opinion and the Politics of Judicial Restraint’ (*Verfassungsblog*, 30 July 2025) <<https://verfassungsblog.de/what-the-court-didnt-say/>> accessed 16 May 2026.

the positions seem at times irreconcilable, it is impossible to leave out the conceptual level from a meaningful compromise. Nevertheless, the structure of this thesis is argumentative, comparing conceptualizations with the ultimate aim of contributing to a basis of communication and possibly even the development of meaningful balancing criteria.

The interest of this has a practical and a theoretical element. On the practical side, the analysis is meant to contribute to a constructive dialogue in court, helping both judges and litigants to discuss, argue and ultimately come to an agreement. But in a more theoretical sense, the interest of creating a dialogue between deeply diverging conceptualization is democratic. In many areas of human rights law, but also in society, underlying conceptualization have reached a point of irreconcilability that polarizes debates and solidifies positions to a degree that almost removes the common ground necessary to reach a democratic compromise. But since the communication across conceptualizations is essential for a deliberative society, this thesis is aiming to promote a receptivity to compromise.

1.3. Research Question

The question this thesis aims to answer is: How can courts justify judicial engagement in climate policy, balancing between institutional legitimacy and effective human rights protection?

To answer this question, I will start by explaining the theoretical conflict about the legitimacy of constitutional review and the separation of powers (Chapter 2). Subsequently, I will first argue why courts should refrain from extreme judicial restraint in climate cases (Chapter 3), before analyzing what risks are on the other hand associated with judicial overreach (Chapter 4). Finally, I will discuss three arguments that could contribute to a compromise, examining their compatibility with the normative arguments set out before (Chapter 5).

1.4. Delimitation

The first delimitation of this thesis is the focus on civil law systems. When appropriate, I will borrow concepts from common law systems, but the context on which I will stress the tension of the debate are civil law systems.

A more important delimitation relates to the definition of climate litigation. For the purpose of this thesis, I will limit my analysis to so called government framework cases, since they raise the issue of separated powers most prominently. Such cases challenge the implementation and overall ambition of state's climate policies, by requesting climate-aligned remedies such as the reduction of greenhouse gas (hereinafter GHG) emissions.⁷

Finally, I will not argue against or in favor of constitutional review in general. Rather, the point of departure of my argumentation is a pragmatic view on constitutional review as an existing and evolving aspect of constitutional

⁷ Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2025 Snapshot' (London School of Economics and Political Science 2025) 9, 24 <<https://doi.org/10.21953/LSE.LH46LE9Y8SGI>> accessed 19 May 2026.

design, whose scope and implications are and can be debated. To this effect, the two chapters that form the middle of this thesis are separated in a dialectic manner, each positioned against one of the extremes in the spectrum of interpretative solutions between originalism and living constitutionalism. Importantly however, the case I am making against extreme judicial restraint in chapter three, does not in turn mean I am arguing for judicial overreach or vice versa. In fact, the underlying assumption of my argumentation is, that judicial practice must navigate between these two poles, extensive restraint and judicial overreach. They are not inevitable alternatives, but rather the object of demarcation in two opposite directions.

1.5. Method

In this paper, I will be using the normative-theoretical legal method, combining, normative constitutional theory with doctrinal analysis and legal philosophy. The debate between originalism, living constitutionalism and opponents of judicial review is a long-standing debate in normative legal theory⁸. I will apply this debate to the problem of climate change litigation with the aim of identifying arguments and investigating how these interplay in the international legal order.⁹ In my analysis I will combine reasons relating to the outcome of legal and constitutional rules with considerations of legitimacy and institutional capacity, to provide a holistic basis for the normative balance which I will develop in the last chapter.

The legal doctrinal method also plays an important role in my analysis, as relevant legal provisions of climate litigation form the empirical foundation for the normative tension. In this regard, my method follows the view of the legal system serving a double function both as the subject matter and the theoretical framework.¹⁰ Object and method collapsing into one another, this causes the practical orientation, and intrinsic normativity as well as an emphasis on importance of overview, characteristic of legal doctrinal research.¹¹

Finally, I will combine the legal doctrinal method with some critical legal theory informed by democratic and constitutional theory to introduce the complicating factor of democratic resistance to a court ruling. Analyzing what role the criticism of judicial overreach plays will serve as a consequentialist addition to the normative analysis.

⁸ Larry Solum, 'Outcome Reasons and Process Reasons in Normative Constitutional Theory' (2024) 172 University of Pennsylvania Law Review 913, 915 <<https://doi.org/10.58112/UPLR.172-4.1>>.

⁹ Ibid, 916; Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing 2012) 98 f. <<https://doi.org/10.4337/9780857936554>>.

¹⁰ Pauline C Westerman, 'Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark Van Hoecke (ed), *Methodologies of legal research: which kind of method for what kind of discipline?* (Hart 2011) 87 <<https://doi.org/10.5040/9781472560896>>.

¹¹ Ibid.

2. Constitutional review and the separation of powers

Climate litigation is an emblematic illustration of a cross point between the political and the legal sphere. While climate policy issues are part of highly controversial and ideologically charged political debates, the effects of climate change are starting to have an increasing impact on the realization of human rights. More significantly, this impact is both expected and scientifically proven to drastically escalate in the years to come effecting especially future generations. While this raises legal issues that can be brought to court, it also involves complex balancing of environmental, economic and social interests and thus even more complex policy choices that affect all of society. Because of the scale of their impact, climate issues necessitate decisions that have to be legitimate, both politically and legally.

However, in an age of backlash and democratic backsliding, political consensus on this highly politicized issue moves further away, while the impacts of climate change continue to escalate. This is one of the reasons why climate activists and advocacy groups are turning to courts to require legislators and governments to protect human rights threatened by climate change.¹² However, this trend creates tensions between the branches of power, and causes fundamental questions on the relation between courts and legislation to resurface.

To connect climate litigation with the separation of powers, we have to take a few steps back. In fact, we must first look at a controversial debate within the concept of separation of powers concerning the legitimacy of constitutional review. Climate litigation is then situated within this discussion both because of its reliance on constitutional rights and due to the concept of strategic litigation itself.

This chapter will therefore start with sketching the concept of the separation of powers and the role it accords to the judiciary (Section 2.1). I will then go on to elaborate on the limits of judicial power, by mapping the discussion on the legitimacy of constitutional review and addressing the relationship between democracy and human rights (Section 2.2). And lastly, I will address the question why climate litigation is such an emblematic case on all levels of the debate (Section 2.3).

2.1. Separation of powers and the role of the judiciary

The concept of separation of powers is traditionally attributed to Montesquieu, according to whom the powers of government are exclusively distributed among three branches, legislature, executive and judiciary. Each branch is independent, separate and may not encroach on the functions of the others.

¹² Mette Eilstrup-Sangiovanni and others, ‘Reorienting Climate Litigation in a Time of Backlash’ (2025) 15 *Nature Climate Change* 1133, 1133 <<https://doi.org/10.1038/s41558-025-02475-y>>.

In this system of governmental powers, the judiciary has the function to sanction violations of the law.¹³ Montesquieu coined the term *bouche de la loi*, which is associated with a role of the judge that is reduced to the mechanical application of the law and therefore bestowed with a limited interpretative authority.¹⁴ At the same time however, Montesquieu emphasized the importance of the court's political independence and argued for a singular position of courts outside of the limitation mechanism between legislative and executive. He was the first to include the judiciary in the branches of government and in his theory, courts do not represent a threat to freedom. Due to their institutional distance to the other branches, they are rather protecting individual freedom.¹⁵

It is therefore possible to interpret Montesquieu's theory in two ways. The first aims at limiting the judicial role, the second is more relational and emphasizes the freedom-enhancing role of courts and their political independence. These two interpretations are essentially the two competing sides in separation of powers theory, more generally.

In the US, a related concept to the separation of powers was developed for preventing a concentration of power, namely the 'checks and balances' system. In this system all branches of power have specific mechanisms designed to limit the others in their power and maintaining the balance between them.¹⁶ While this system is a concept in itself and stems from a different constitutional tradition, it can be argued to have influenced the interpretation of the separation of powers through the ongoing cultural exchange of constitutional conceptions. Such an influence would be in favor of a more relational understanding of the separation of powers, as a tool rather than an end in itself. An example of such an interpretation is the theory of Christoph Moellers, who views the separation of powers as a tool for the balanced protection between collective and individual autonomy.¹⁷

It is worth mentioning that, in any transposition of Montesquieu's theory of the separation of powers to modern debates, it is crucial to keep in mind the context of the enlightenment. The central motive of his conceptualization is the avoidance of a concentration of power and limitation of an absolute

¹³ Antonio Mariconda, 'Separation of Powers and Climate Litigation: International Law as a Guide Between Judicial Activism and Legislative Prerogatives' (2025) 5 *Athena – Critical Inquiries in Law, Philosophy and Globalization* 142, 146 <<https://doi.org/10.6092/ISSN.2724-6299/22114>>.

¹⁴ Hendrik Schoukens, 'Climate Change Litigation and the Separation of Powers: Effective Legal Protection as the Ultimate Yardstick?' in Francesco Sindico and others (eds), *Research Handbook on Climate Change Litigation* (Edward Elgar Publishing 2024) 187 <<https://doi.org/10.4337/9781800889781.00016>> accessed 3 March 2026; Mariconda (n 13) 147.

¹⁵ Christoph Moellers, 'Chapter 1: Division of Powers: Traditions and Meanings' *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) 18 <<https://doi.org/10.1093/acprof:oso/9780199602117.001.0001>> accessed 29 January 2026.

¹⁶ Mariconda (n 13) 148; Schoukens (n 14) 187.

¹⁷ Christoph Moellers, 'Chapter 2: Self-Determination as the Source of Separated Powers' *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) <<https://doi.org/10.1093/acprof:oso/9780199602117.001.0001>> accessed 24 February 2026; Mariconda (n 13) 148.

ruler, in line with the general emancipation from absolutism.¹⁸ Since then, many factors in the equation of separated powers have changed. For example, the development of the welfare state and individual rights marked a widened discretion of the executive, increased political competence and responsibility, followed by a more developed administration. This impacted the traditional balance in the separation of powers, as a growing bureaucracy meant a more detached chain of accountability between administration, government and legislator.¹⁹

The more significant impact on the balance in the separation of powers, however, was the expansion of the role of the judiciary. To map this development, two events merit our attention. The creation of constitutional courts and the internationalization of law in connection with the development of human rights, which we will discuss in the next section.

2.2. The expansion of judicial power and constitutional review

The origin of constitutional review can be traced back to the 1808 US Supreme Court judgement *Marbury v Madison*, which established the judicial authority to review legislation.²⁰ In western Europe, the important caesura for the development of constitutional review was the second World War, which triggered both a constitutional crisis and a re-thinking of individual rights.

Constitutional courts were first developed by Hans Kelsen in the drafting of the Austrian constitution. They were created as a special body standing above the separation of powers, tasked with the adjudication of constitutional questions.²¹ Initially they were intended to control boundaries between the branches of government as a “negative”, unelected legislator.²² The Kelsian model gained in popularity after the Second World War. In post-totalitarian societies a central factor in the development of new constitutional orders, was democratic self-distrust. Therefore, the idea of an institution charged with monitoring and securing the respect of the constitution rose in popularity. In Germany, for instance, the constitution from 1949 institutionalized the supremacy of the constitution through an unprecedented level of constitutional review. Like in Germany, Kelsian constitutional courts spread in many countries which had lost trust in their democratic processes, such as Italy, Spain, and Brazil, as an instrument installed against the danger of totalitarianism.²³ This development significantly changed the role of the judiciary, as it expanded it to the protection of the constitutional order and the separation of power itself.

¹⁸ Mariconda (n 13) 148; Moellers (n 15) 40.

¹⁹ Moellers (n 15) 25.

²⁰ Mila Versteeg, Tom Ginsburg and David Landau, ‘Courts and Constitutional Review’ in Mila Versteeg, Tom Ginsburg and David Landau, *Comparative Constitutional Law and Politics* (1st edn, Oxford University Press New York 2025) 187 <<https://doi.org/10.1093/oso/9780197760482.003.0004>> accessed 26 January 2026.

²¹ Ibid, 209.

²² Ibid, 188; Mariconda (n 13) 150.

²³ Moellers (n 15) 36.

Said expansion was further cemented through another trend that originated from the aftermath of the second World War. Totalitarianism, the holocaust and the refugee crisis in Europe during the war, did not only demonstrate the fragility of the constitutional order, but also the importance of fundamental rights and the legal protection of human dignity. The development of human rights and international bodies tasked with their monitoring, institutionalized an international legal order focused on individual rights.²⁴ This new international order impacted the separation of powers in two ways. Firstly, it conferred upon individuals an unprecedented set of legally enforceable rights, that expanded in areas previously considered political. This development, also referred to as the judicialization of politics, expanded judicial power in relation to the legislator.²⁵ Secondly, the internationalization of law impacted the separation of powers through the asynchrony in the transferability of the different branches of power. While the legal order was transposed into the international system through the establishment of individual rights, democratic self-determination and representation could not be transferred so easily. Therefore, only the judicial branch could benefit from the authority enhancing effects of its adoption on the international level.²⁶

This expansion of judicial power, was not met without criticism and two concerns will be addressed in the following sub-sections. I will first map the debate on the legitimacy of constitutional review (Subsection 2.2.1), before addressing the relationship between human rights and democracy more generally (Subsection 2.2.2).

2.2.1. The legitimacy of constitutional review

The origin of the debate on the legitimacy of constitutional review is a majoritarian conception of legitimacy, a characteristic of democracy. In a democratic system, the legislature derives its legitimacy from free and equal elections, entrusting members of the parliament with the authority to pass laws that decide central societal questions concerning all citizens. It is the representative element that justifies the legislature's power, and which distinguishes it most significantly from the judiciary.²⁷

Against this background, the object of controversy regarding constitutional review of legislation is the so called "counter-majoritarian difficulty". When unelected judges overrule laws that were passed by the legislature, a small group of people overturns the will of a representative majority in society, challenging traditional conceptions of political legitimacy.²⁸ The most

²⁴ John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 *Law and Contemporary Problems* 41, 41–43 <<https://doi.org/10.2307/1192402>>.

²⁵ Ibid.

²⁶ Christoph Moellers, 'Chapter 4: Separation of Powers Beyond the State' *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) 157 f. <<https://doi.org/10.1093/acprof:oso/9780199602117.001.0001>> accessed 29 January 2026.

²⁷ Christina Eckes, "It's the Democracy, Stupid!" In *Defence of KlimaSeniorinnen*' (2024) 25 *ERA Forum* 451, 454 f. <<https://doi.org/10.1007/s12027-025-00828-w>>.

²⁸ Mila Versteeg, Tom Ginsburg and David Landau, 'International Law in the Domestic Legal Order' in Mila Versteeg, Tom Ginsburg and David Landau, *Comparative Constitutional Law and Politics* (1st edn, Oxford University Press New York 2025) 187

controversial function of constitutional courts in this debate on legitimacy is rights-based constitutional review. This is because even though the decision was triggered by an individual concern in form of a rights-based claim, it can arguably entail ramifications of a general scope for the whole of society.²⁹ Hereby rights-based litigation makes the juxtaposition of individual and collective interests most apparent.

Before delving into the different lines of argumentation, it is worth mentioning, that whether or not and especially to what extent constitutional review can be justified has been debated since the beginning of the concept itself, and to this day remains contested and unresolved.³⁰ So, for the purpose of this chapter, I will not attempt to resolve the issue, but only to map the debate.

Authors critical of judicial review typically contend to some degree, that turning to courts to order the government to enact a certain policy undermines democratic principles by aiming to avoid a political stalemate and bypassing the regular democratic process. In this line of argumentation, courts should not decide cases dealing directly with policy issues, since this would encroach on the competence of the other branches of power.³¹ According to Jeremy Waldron, the dissensus about major political questions, characteristic of modern liberal societies should in principle be settled through a legitimate decision-procedure. He assumes, that the disagreement is generally pursued reasonably and in good faith, and as such it should be settled in the society's legislative institutions, not by a court. In absence of legislative dysfunctions, endemic prejudices or other pathologies, rights-based constitutional review, according to Waldron, merely causes disenfranchisement and legalistic obfuscation of moral and political disagreements.³²

In contrast, authors generally in favor of constitutional review, often rely on alternative definitions of legitimacy. The point of departure of such an argumentation is that democratic legitimacy does not only require a majoritarian decision.³³ Ronald Dworkin, for example, argues that democratic procedures are legitimate only among people who respect each other's rights. The respect of fundamental rights is therefore not subjected to but a precondition for democratic legitimacy.³⁴ Other authors contend that the legitimacy of judges derives, in a Kantian tradition, not from their election, but from their judicial expertise. This is especially common in civil law systems which

<<https://doi.org/10.1093/oso/9780197760482.003.0014>> accessed 29 January 2026; Eckes (n 27) 451; Katrina Fischer Kuh, 'The Legitimacy of Judicial Climate Engagement' (2020) 46 *Ecology Law Quarterly* 731, 744 <<https://doi.org/10.15779/Z38M03XX8R>>.

²⁹ Christoph Moellers, 'Chapter 3: Problems of Separated Powers in the Constitutional State' *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) 139 <<https://doi.org/10.1093/acprof:oso/9780199602117.001.0001>> accessed 29 January 2026, although even this is disputed, see for example: Eckes (n 27) 455.

³⁰ Kuh (n 28) 745.

³¹ Schoukens (n 14) 186, 188.

³² Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal* 1346, 1360, 1368, 1371, 1406 <<https://doi.org/10.2307/20455656>>.

³³ Eckes (n 27) 454-456.

³⁴ Waldron (n 32) 1400.

subscribe to a more rational model of self-determination.³⁵ According to Christoph Moellers, who views self-determination to be at the origin of legitimacy, the former is made up of two elements, a rational and a voluntaristic element. While the rational element refers to the reasoning and the cognitive justification of the decision, the voluntaristic element refers to the individual or collective decision-making itself. Legal and democratic traditions that rely more on the rational element of self-determination view democratic procedures as a tool for approaching the ‘right’ or the more rational decision. In contrast, traditions based on a stronger emphasis on the voluntaristic element of self-determination rely on a more absolute and majoritarian conception of the democratic will.³⁶

Thus, depending on the underlying democratic theories and the conception of the separation of powers, opinions on the legitimacy of constitutional review vary between entirely opposing and full endorsement. Somewhere in between both extremes are authors that argue in favor of judicial review under certain circumstances. Similar to Waldron who does admit that judicial review could be legitimate when compensating for certain societal pathologies, other authors have identified specific roles of courts in the democratic process. John Hart Ely for example has coined the term of ‘representation reinforcement’, a theory according to which judicial review should strengthen the representation of minorities or other groups that are not sufficiently represented in majoritarian procedures.³⁷ The role of courts, according to Ely, is to counter certain malfunctions in the democratic process. His theory therefore connects the scope and intensity of judicial review to the concept of democratic dysfunction. In this line of thought, according to Rosalind Dixon’s theory of responsive judicial review, courts should counter democratic dysfunctions and protect democratic responsiveness.³⁸

The controversy of counter-majoritarian, judicial institutions boils down to the distinction of what is legal and what is political. Where this line is drawn determines the separation of branches of government and is therefore constitutionally highly significant. The underlying understanding of the relationship between human rights and democracy is an important theoretical factor in the determination of this line. I will therefore address this theoretical foundation in the next section. To add another layer, the role of courts is deeply intertwined with national constitutional history and a country’s constitutional legal order. The debate on the legitimacy of constitutional review therefore vastly differs across jurisdictions depending on the legal articulation of judicial review. The next section will therefore develop on the relationship between human rights and democracy in connection with certain constitutional models.

³⁵ Moellers (n 17) 57–60.

³⁶ Ibid.

³⁷ Versteeg, Ginsburg and Landau (n 20) 195.

³⁸ Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (First edition, Oxford University Press 2023) 1
<https://doi.org/10.1093/oso/9780192865779.001.0001>.

2.2.2. The relationship between human rights and democracy
Underneath the conceptualization of separation of powers and the distinction of the legal and the political, the reoccurring motive is the relationship between human rights and democracy. To this effect, Jürgen Habermas has identified two traditional schools of thought, republicanism and liberalism. The point of departure for this distinction is the co-originality of popular sovereignty and human rights as the two normative bases for legitimacy. Popular sovereignty protects the public autonomy of citizens which is articulated through an inherently legitimate rule of law. Human rights on the other hand safeguard citizens' private autonomy through private and civic individual rights, protecting a democratic procedure.³⁹ Liberalism and republicanism can be distinguished through the balance they strike between these two sources of legitimacy.

Republicanism prioritizes popular sovereignty over human rights, so citizens' public autonomy, over their private autonomy. The legitimacy of human rights themselves, according to republicanism, is grounded only in the ethical self-understanding and sovereign self-determination of the political community.⁴⁰ A great example of a constitutional tradition built on a republican understanding of the relation between human rights and democracy is France. The French constitution provides for a constitutional court that is subordinated to the democratic dignity of the parliamentary law. The *Conseil Constitutionnel*, as its name suggests, functions more as a council, integrated into the legislative process as an independent advisory organization. Initially it could only intervene in the process of legislation before a law was put into force (*a priori*). This consultative role emphasizes the supremacy of the parliamentary legitimacy. Since 2010 the *Conseil Constitutionnel* is entitled to intervene *a posteriori*, by reviewing questions addressed to it by the two high courts. However, it remains hesitant to invoke basic rights against a democratic statute. This "soft" form of constitutional review reflects the French republican tradition, skeptical of courts reviewing legislative action. It emphasizes the connection of the scope of individual rights to the democratic process, as well as the primacy of democratic legitimacy.⁴¹

Liberalism on the other hand prioritizes human rights over popular sovereignty. As a protection against the danger of a tyrannical majority, human rights prohibit the will of the people from encroaching on the inviolable spheres of individual freedom. According to liberalism, they hereby constitute an inherently legitimate barrier for the sovereign legislator.⁴² While this school of thought originated from John Locke, it significantly gained in popularity after the second world war, for the same reasons as the spread of constitutional review and the development of human rights elaborated above. An

³⁹ Jürgen Habermas, 'Remarks on Legitimation through Human Rights' (1998) 24 *Philosophy & Social Criticism* 157, 159 <<https://doi.org/10.1177/019145379802400211>>.

⁴⁰ Ibid; Clara Valeria Kammeringer, *Between Climate Cases and Legitimacy: A Discourse Theoretical Perspective on Judicial Climate Decisions* (Tectum – ein Verlag in der Nomos Verlagsgesellschaft 2025) 27 <<https://doi.org/10.5771/9783689004675>> accessed 2 March 2026.

⁴¹ Moellers (n 15) 21–23.

⁴² Habermas (n 39) 159; Kammeringer (n 40) 27.

example for a constitutional tradition based in liberalism is Germany. In contrast to the France, the German constitutional order builds on an understanding of the constitution as a legal text as opposed to a political document. The constitution from 1949 institutionalizes a judicial interpretation of the supremacy of the constitution, providing for substantial means of constitutional complaint and a broad range of situations that fall within the sphere of constitutional rights. This form of constitutional review is an expression of the democratic self-distrust that was predominant at the drafting of the German constitution. It also reflects the generally strong trust in courts and a rationality-heavy understanding of legitimacy, prominent in German legal philosophy.⁴³

The distinction between republicanism and liberalism in the debate on the relationship between democracy and human rights can very well be connected with the discourse around the legitimacy of constitutional review and interpretations of the separation of powers. It provides the theoretical foundation of national judicial systems and elucidates the interests at stake. Simultaneously, it serves as an illustration of the conflict, since it showcases that although the intention of liberalism and republicanism is the same, namely protecting legitimacy, their interpretation of the means to achieve this are fundamentally different.

Having established the theoretical background, the next section will now turn to the application of the theory to climate litigation.

2.3. Impact on climate litigation

To tie all these fundamental legal theories back to climate litigation, we have to connect them to the characteristic problems of climate litigation. The discussion of the legitimacy of constitutional review, the distinction between what is legal or political, and the relationship between human rights and democracy only play an important role for climate litigation, because of the articulation in legal claims of issues that are specific to climate change.

First of all, as Jacqueline Peel and Hari Osofsky predicted in 2018, there has been a ‘rights turn’ in climate litigation. Since the *Leghari*⁴⁴ and *Urgenda*⁴⁵ decisions in 2015, litigants of climate cases rely increasingly on claims of human rights violations. This turn is encouraged through both the transnational potential of human rights-based litigation, as well as the aggravating and increasingly direct impacts of climate change on human rights.⁴⁶ Typically, climate mitigation cases raise broader policy issues, such as climate protection laws, their insufficiency or inexistence. Therefore, successful litigation efforts often cause a judicial review of climate legislation regarding their compatibility with constitutional rights. Hereby, climate litigation

⁴³ Moellers (n 15) 36 f.

⁴⁴ *Ashgar Leghari v Federation of Pakistan* [2015] Lahore High Court Green Bench W.P. No. 25501/2015.

⁴⁵ *Stichting Urgenda v Government of the Netherlands* (n 1).

⁴⁶ Jacqueline Peel and Hari M Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7 Transnational Environmental Law 37, 40, 66 <<https://doi.org/10.1017/S2047102517000292>>.

creates the form of constitutional review, that is most controversial. The increased controversy is due to the balancing of interests that is exercised by the court but that impacts the whole of society. Some authors conceive of this judicial balancing of interests as a rationalized legislative procedure.⁴⁷

To add another layer to the problem, strategic climate litigation raises legal issues with the aim of enforcing or developing climate policies. When successful, this can mean that constitutional review is not only exercised, but specifically sought by litigants for political purposes. This is why the clash of conceptions becomes significantly more evident in the debate surrounding strategic litigation.⁴⁸ As a collaborative and mobilizing employment of legal contestation, strategic litigation poses a normative challenge in itself. Its democratic legitimacy can be debated with regard to its capability and intention to empower or disempower citizens. But for the purpose of this thesis, strategic litigation most importantly puts the unresolved debate of the legitimacy of constitutional review further under pressure. The distinction of what is legal and political becomes even more blurred, when legal issues are raised with a political objective in mind. Depending on the author, strategic litigation is symbolic of the undue politicization of the judiciary or a symptom of the problematic judicialization of politics, a misuse of courts for political purposes and a threat to the separation of powers.⁴⁹

In short, strategic litigation amplifies the debate on the legitimacy of constitutional review. It is the epitome of the debate on the separation of powers. And since climate litigation is an area of strategic litigation which receives tremendous public attention, it moves into the heart of the debate itself. Because of its emblematic role for the debate on the legitimacy of constitutional review, and its reliance on human rights claims, climate mitigation litigation provides a perfect playground for the arguments on the separation of powers and the tension between the legal and the political. It is the ideal scenery for a balancing exercise between judicial overreach and judicial restraint, between institutional undermining of democratic decision-making and the politically motivated neglect of human rights protection.

⁴⁷ Moellers (n 29) 136.

⁴⁸ Mariconda (n 13) 146.

⁴⁹ Svenja Ahlhaus, 'Strategic Litigation as a Challenge for Deliberative Democracy' [2025] *American Journal of Political Science* ajps.12981, 4 <<https://doi.org/10.1111/ajps.12981>>.

3. The cost of judicial restraint

Judicial restraint in itself is an important practice of constitutional courts, which honors the concerns about the separation of powers, as elaborated above. A court exercises judicial restraint in order to respect the line between law and politics and to avoid encroaching on the mandate of the legislator and the executive. In principle, judicial restraint protects the constitutional order and the separation of powers and does not threaten the realization of human rights *per se*.

The point where judicial restraint can become a problem, is when it becomes excessive. When the respect for the legislator's area of competence translates into a strictly conservative interpretation of constitutional rights, judicial restraint can become an obstacle for the protection of human rights. Such a conservative orientation of a court can become problematic, when the cases concern relatively new legal issues that the original legal document does not provide for. Climate harm for example, is a relatively new phenomenon, which is difficult to grasp in legal terms, due to its global scale and the multitude of and delay between cause and effect. It therefore depends on a comparatively progressive interpretation, as I will argue in this chapter.

For a long time, doctrines of judicial restraint stood in the way of adjudicating climate cases. Courts generally shied away from ruling on climate issues, for reasons of uncertainty, and judicial restraint. During the past decade courts have, to a large extent, overcome this principled tendency. In this chapter I will lay out the arguments justifying a deviation from judicial restraint in the interpretation of legal provisions concerning issues of climate change. This argument requires two steps. Firstly, I will set forth why climate change has been difficult to grasp in legal terms. While this demonstrates that climate litigation depends on more progressive legal interpretation, it is not sufficient as a justification. A problem's inaptitude for legal articulation does not automatically legitimize deviating from judicial restraint. What does speak in favor of the latter, is the court's singular ability to protect certain interests at stake. For this, I will draw upon concepts developed for the debate on the general legitimacy of constitutional review, representation reinforcement and democratic responsiveness. If a minority interest group is underrepresented in the democratic decision-making progress, or if there are systemic problems that cause legislative inaction, this strengthens the case for judicial engagement. Consequently, it may also speak in favor of courts counterbalancing the incompatibility of climate change with legal requirements.

So, I will start by addressing the general legal obstacles in climate litigation, which explain its dependence on the progressive interpretation of some legal concepts (Section 3.1.). Then, I will examine some arguments, which speak in favor of the legitimacy of judicial engagement in climate cases, tying this chapter back to the last (Section 3.2.).

3.1. Climate Exceptionalism

The notion of climate exceptionalism expresses the idea that climate change is an issue that is not only unprecedented but also fundamentally different from all other issues humanity has faced so far. Of course this is an overstatement, but there are some particularities that make it exceptionally difficult for climate change to fit into legal claims. Or, depending on the perspective, the law is exceptionally unfit to grasp climate change. In either case, the underlying implication remains that climate litigation pushes the boundaries of existing law. And therefore, the success of climate mitigation cases often hinges on progressive judicial interpretation.

As the legal foundation of climate mitigation action, human rights are conceptually not ideal. They tend to emphasize immediate, proximate and liberal interests, which in the context of climate mitigation puts the costs in the foreground, whereas its benefits remain understated.⁵⁰ I will develop this idea by addressing the temporal dimension within which legal obligations operate (Subsection 3.1.1.), the territorial limitation of human rights obligations (Subsection 3.1.2.), causality requirements (Subsections 3.1.3.), as well as the generally liberal orientation of the legal order (Subsection 3.1.4.). These three structural legal characteristics clash with the globality of climate change, the timeline of climate harm and the underlying interests at stake. The following subsections will expand on each of these conflicts in turn, and explain their respective legal articulation. They make it particularly difficult to prove the existence or imminence of a human rights violation, special vulnerability, and causality. Before I address each of these points in turn, it is important to point out, that these difficulties are not impossible to overcome. To the contrary, the development of strategic climate litigation and the increasing manifestation of climate harm have provided grounds and tools to overcome procedural hurdles. The purpose of this section is precisely to demonstrate, that this would not be possible without some degree of progressive interpretation. Therefore, I will illustrate these initial obstacles by applying a very strict understanding of the law.

Since the procedural rules and legal standards vary heavily depending on the court concerned, I have chosen to largely limit my analysis to concepts from international human rights law. This is justified firstly, because similar rules can be found in domestic legislation, so the gist of the problem remains even if the standards applied vary. And secondly, because cases of rights-based climate litigation influence each other across jurisdictions and legal orders. Irrespective of the dualist or monist legal structure of a country, human rights standards are applied in or influence national courts as well, hence legal interpretations remain comparable.

3.1.1. Dealing With the Future

A central difficulty in climate cases lies in the fact that the majority of the effects of climate changes lie in the future. While the GHG emissions, that are causing climate change have accumulated for a long time and are still

⁵⁰ Mayer (n 2) 413.

produced today, their consequences have only started to manifest themselves as clear damages for humans. The biggest problem in this regard is, that despite this slow onset, the consequences of climate change are irreversible and gradually exacerbating. And the cascading effect of overshooting tipping points, makes it dangerous to await the manifestation of climate harm, before taking action.⁵¹ The significant delay between the causes of climate change and their consequences introduces a new dimension of a timeline, which challenges procedural legal notions, as elaborated in more detail below.

The applicant of a rights-based lawsuit is generally required to indicate their victimhood, as a condition for admissibility. This requires the substantiation of a past, existing or imminent violation of the applicant's human rights.⁵² If the violation at issue has not yet occurred, the probability of the alleged violation occurring must meet a degree of certainty. Legal standards of imminence vary, depending on the jurisdiction in question. Before the European Court of Human Rights (hereinafter ECtHR) for example, the risk of harm must be 'sufficiently severe'.⁵³ The United Nations Human Rights Committee on the other hand applies a standard of imminence, that must exceed the mere theoretical possibility, which is a comparatively lower threshold.⁵⁴ As the rights violations started to move closer, the required degree of severity or imminence of harm became easier to meet. However, for a long time, the slow-onset nature of climate change made it difficult to litigate the connected violations.⁵⁵

3.1.2. The Territorial Limitation of Human Rights

The second fundamental obstacle for climate litigation that merits our attention is the territorial limitation of rights. Both the human rights obligations of states, as well as the obligations arising from constitutional rights are typically limited in their application to the countries' territory and to its nationals. Consequently, both the judicial evaluation of potential human rights violations, and the balancing of interests required for evaluating human rights compliance of climate policy are limited to the national territory.

In contrast, climate change stands out due to the globality of its effects and its causes. The costs of climate harm are global, diffuse and long-term,

⁵¹ Orla Kelleher, 'Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach' (2022) 34 *Journal of Environmental Law* 107, 109 <<https://doi.org/10.1093/jel/eqab037>>.

⁵² Mayer (n 2) 421; Bolanle Erinosh, 'Climate Litigation: Access to Judicial Review in National Courts' in Francesco Sindico and others (eds), *Research Handbook on Climate Change Litigation* (Edward Elgar Publishing 2024) 64 <<https://doi.org/10.4337/9781800889781.00010>> accessed 15 April 2026.

⁵³ Vladislava Stoyanova, 'KlimaSeniorinnen and the Question(s) of Causation' (*Verfassungsblog*, 7 May 2024) <<https://doi.org/10.59704/b23de997b1b05bdc>> accessed 15 April 2026.

⁵⁴ *Daniel Billy et al v Australia (Torres Strait Islanders Petition)* [2022] United Nations Human Rights Committee CCPR/C/135/D/3624/2019 [7.9].

⁵⁵ Sofie Elise Quist and Annika Krafcik, "'Promising More than It Delivers'?: A Critical Reading of the HRC's Daniel Billy et al v. Australia (2022) Decision Linking Climate Change and Human Rights' (2023) 41 *UCLA Journal of Environmental Law and Policy* 411, 428 <<https://doi.org/10.5070/L541262537>>.

whereas the costs of climate mitigation are direct, local and immediate.⁵⁶ So, while the human rights benefits from national mitigation action will be globally distributed, the required national expenditure is high. Indirectly, financial weight of climate mitigation policies will inevitably impact the amount of funds available for the protection of other human rights.⁵⁷

In contrast, the benefits of climate change mitigation are as globally diffused and long-term as the effects of climate change. Therefore, the justification of mitigation policies is not limited to the national territory or population. Instead, climate mitigation is of global utility, and benefits common interests such as global food production, future economic development, or human security. From a global perspective, the immense impacts of climate change on individuals, societies and ecosystems undoubtedly exceed the financial burden of climate mitigation. However, within a state's territory, the direct and the indirect costs of an ambitious mitigation policy are likely to outweigh its' benefits.⁵⁸ This makes it conceptually difficult to establish climate mitigation action as a human rights obligation, because a balancing exercise by a court with national jurisdiction is likely to emphasize the costs of climate mitigation over the long-term costs of climate change.

A procedural requirement conflicting with the globality and diffuseness of climate harm is the admissibility requirement of establishing special vulnerability. In the case of a violation or threat affecting a large group of people, there is an additional requirement to substantiate the applicant's victimhood. To be considered a victim of such a threat, the claimant must exhibit a special vulnerability. The underlying objective is to avoid the *actio popularis*, namely a litigation in a public interest, without direct personal affection. From a pragmatic point of view, the vulnerability requirement functions as a 'floodgate', by reducing the number of potential claimants.⁵⁹ However, since climate harm affects everyone, almost indiscriminately, so there is not only one victim. If everyone is equally affected by climate harm, no one fulfills the requirement of victimhood. Or as Catherine MacKinnon put it: "the more widespread an injury is, the less the Constitution can do about it".⁶⁰ Of course, there are geographic regions that are more affected by climate change, however, due to the territorial limitation of human rights, the pertinent groups are often excluded from the court's jurisdiction. Another group of people that are clearly specifically vulnerable are future generations. However, since only natural, living persons can litigate their human rights, this group is equally excluded from jurisdiction.

3.1.3. Causality and Climate Harm

Not only the effects of climate change are diffuse and global, but also its causes. Because of the multitude of actors contributing to climate change by

⁵⁶ Mayer (n 2) 419, 424; Kelleher (n 51) 109.

⁵⁷ Mayer (n 2) 416.

⁵⁸ Ibid, 418f, 425.

⁵⁹ George Letsas, 'Did the Court in Klimaseniorinnen Create an Actio Popularis?' (*EJIL:Talk!*, 13 May 2024) <<https://www.ejiltalk.org/did-the-court-in-klimaseniorinnen-create-an-actio-popularis/>> Laccessed 17 April 2026; Erinoshio (n 46) 64.

⁶⁰ Çalı, Costello and Markard (n 4) 148.

emitting GHGs, it is difficult to attribute responsibility to a state whose influence on global GHG concentration is modest at best.⁶¹ So, the problem for climate litigation relates to the fact that climate change is not a single-source environmental issue, but a globally distributed problem. The globality of causes and consequential diffusion of responsibility impacts two causal relationships that are in constant oscillation with one another.⁶²

On the one hand, the causal link between national emissions and specific consequences of climate change is a very difficult to substantiate.⁶³ In a narrow sense, this would require the threat of the victim's rights to be attributed to the emissions produced due to the state's failure to mitigate climate change.⁶⁴ However, it is scientifically impossible to link specific impacts of climate change to individual emissions. Strict causation theories, such as the 'but-for' test within an obligation of result, are thus extremely hard to meet.⁶⁵

On the other hand, applicants are also required to establish a causal link between protective measures and the mitigation of the cause.⁶⁶ In light of the minimal influence of national mitigation policies, this causal link is also difficult to substantiate. On top of that, the variety of measures that could be adopted to mitigate climate change makes it difficult to identify the specific omission of the state.

3.1.4. Legal Liberalism

On top of that, international law-making generally favors regulatory subjects in line with liberal interests. How well an issue can be grasped in a judicial proceeding depends on its susceptibility to be translated into an individual freedom.⁶⁷ This exacerbates the short-term, territorial limitation of human rights, by adding an individualistic and anthropocentric orientation. As a result of this, human rights remain to a great degree indifferent to the global utility of climate mitigation for human welfare and future generations.⁶⁸ Furthermore, liberalism favors de-regulation which can therefore be legally advocated for more easily than claims for regulation. In the case of climate litigation however, increased mitigation efforts generally require regulation and positive efforts of the state, whereas defendants can refer to the individual freedoms that will be affected by a stricter climate policy. In many ways, climate change mitigation policies go against economic interests. In a system that prioritizes liberalism, climate litigation is therefore at a disadvantage.

This disadvantage is further cemented by the fact that, as elaborated in the second chapter, climate mitigation necessarily concerns legislation. Climate

⁶¹ Mayer (n 2) 416.

⁶² Stoyanova (n 53); *Verein Klimasenioren und others v Switzerland* [2024] European Court of Human Rights (ECtHR), Grand Chamber Application no. 53600/20 [425].

⁶³ Ibid.

⁶⁴ Mayer (n 2) 422.

⁶⁵ Nataša Nedeski and André Nollkaemper, 'A Guide to Tackling the Collective Causation Problem in International Climate Change Litigation' (*EJIL:Talk!*, 15 December 2022) <<https://www.ejiltalk.org/a-guide-to-tackling-the-collective-causation-problem-in-international-climate-change-litigation/>> accessed 17 April 2026; Mayer (n 2) 422.

⁶⁶ Stoyanova (n 53).

⁶⁷ Moellers, 'Chapter 4: Separation of Powers Beyond the State' (n 26) 158.

⁶⁸ Mayer (n 2) 425.

policy involves fundamental political questions and has broad societal effects; therefore, they are usually provided for in laws passed by the legislator. The judicial control of climate protection frameworks consequently has to take the form of judicial review of legislation, raising all the issues of legitimacy outlined above.

So, to conclude, there are structural obstacles climate litigation faces in the attempt to legally further climate justice. Having had a look at these general obstacles, the next section will address why courts are generally well positioned to legitimately counterbalance these obstacles.

3.2. Courts, systemic dysfunctions and climate change

The partial dissonance of climate change to its legal articulation by itself is not yet reason enough to justify progressive judicial engagement in climate issues. Just because the law is unfit to fully grasp the danger of climate change, this does not mean the court has to compensate said incompatibility. Instead, it could indicate, that the issue simply falls in the mandate of different branches of power, or of other actors in society.

However, what does speak in favor of judicial engagement, is the court's singular ability to protect certain interests at stake. Courts are well positioned to counterbalance systemic dysfunctions of democracies, namely by reinforcing the representation of vulnerable minorities, and by increasing democratic responsiveness. These two functions are what legitimizes judicial generally. While the abstract legitimacy of judicial review is only the very first step of justification, how strong the case for legitimacy is also has implications for the scope of judicial review. This logic can be found in legal doctrines such as the margin of appreciation of the ECtHR, but also in national constitutional courts.⁶⁹ For the purpose of this chapter, the legitimacy is what supports courts in counterbalancing the relative incompatibility of climate change and the law. The strength of the case for legitimacy correlates with the extent to courts may deviate from a restrictive towards a more progressive interpretation of the legal requirements elaborated above.

The first subsection will develop, which minority's representation needs reinforcement (3.2.1.), and the second subsection will elaborate, how courts could counteract a lack of democratic responsiveness to climate change (3.2.2.).

3.2.1. Future Generations and Democratic Short-Termism

Representation reinforcement is a notion coined by John Hart Ely, and expresses the idea, that courts should protect politically weak interests, such as the rights of minorities. Constitutions and legal rights can strengthen interests that are underrepresented in the majoritarian democratic process.⁷⁰

⁶⁹ Schoukens (n 14) 190, 203.

⁷⁰ Versteeg, Ginsburg and Landau (n 20) 192–195; Gabriele Britz, 'Overcoming Democratic Short-Termism through Constitutional Law?—The Difficulty of Making the

In the context of climate change, one group in particular is disproportionately exposed to political decisions about climate policy. Future generations will suffer most from the effects of climate change, since the most extreme effects are predicted to occur in the decades and centuries to come. However, the interests of future generations are quite literally underrepresented in democratic decision making, as they have no right to vote. In addition, the democratic system suffers from one systemic dilemma: democratic short-termism. As a matter of principle, democratic rule must be temporally limited, so, maintaining or obtaining political power depends on the short-term success of policy choices. This makes it relatively unattractive for governments to enact policies that serve future interests, especially, when they come with an immediate expense.⁷¹

As elaborated above, climate mitigation policies are the epitome of short-term costs, but long-term benefits. Decarbonization and the transformation away from fossil energy is costly for the immediate economy and society, whereas the effects of global warming, due to its slow onset, lie in the future and as of today do not seem too catastrophic yet. The implementation of mitigation policies requires the current voting majority to accept these short-term costs in order to protect nonvoting minors and future generations from climate harm. By the time mitigation policies produce any benefits, the careers of politicians in charge today will long have expired. Politically, the incentive to ignore the concerns of future generations is therefore particularly high, which makes it difficult to implement climate mitigation policies.⁷²

Since courts are not directly dependent on their democratic support, they may be better positioned to evaluate matters of intergenerational equity. As the composition of courts does not depend on its re-election, judges are less exposed to the popularity of their decisions. This speaks in favor of their ability to take on a long-term project such as climate mitigation. In this regard, courts are able to reinforce the representation of future generations, nonvoting minors and their interests. Engaging in climate mitigation cases would compensate for a systemic dysfunction, namely democratic short-termism.

3.2.2. Democratic Deliberation and Disinformation

On top of the democratic short-termism, disinformation is another systemic dysfunction in the democratic process that reinforces political reluctance to take action against climate change. The aforementioned economic costs of emission reduction efforts, mostly affect industries such as the fossil fuel industry, which are amongst the most well-funded and powerful industries in the world. In addition to their ability to influence legislative action through lobbying, there is a lot of evidence pointing to disinformation campaigns on the matter of climate change, orchestrated by energy companies. These disinformation campaigns were intended to undermine the authority of climate

Constitutional Veto Work in Climate Protection Cases' (2025) 26 German Law Journal 317, 319 <<https://doi.org/10.1017/glj.2025.5>>.

⁷¹ Britz (n 70) 318, 321.

⁷² Ibid, 321; Kuh (n 28) 749f.

science by sowing doubt about its scientific accuracy and scientific consensus.⁷³ This disinformation campaign significantly influenced public opinion and the political debate surrounding climate change. It notably resulted in an ideologically charged public debate about climate science, and a consequential increase in climate skeptics, which in turn significantly slowed the political response to climate change.⁷⁴

While judges are not scientific experts of climate change, courts present a good forum for filtering out information that is not compliant with the minimum standards of credibility. In order to be heard in court, expert testimonies must pass admission requirements regarding their scientific reliability. Moreover, they can be excluded from the court's reasoning, if the testimony is suspected to be "politically motivated and unsupported".⁷⁵ Therefore, courts are institutionally well equipped to counter the distorting influence of disinformation campaigns and expose their politically motivated scientific bias. Courts hereby can play an important role in ensuring that the democratic will-formation is based on the deliberative process, that according to Jürgen Habermas, is the source of its legitimacy.⁷⁶

⁷³ Kuh (n 28) 750, 758.

⁷⁴ Ibid, 758–760.

⁷⁵ Ibid, 760.

⁷⁶ Ibid, 760–762.

4. The cost of judicial overreach

Typically, judicial overreach is defined as the acting of a court beyond its jurisdiction and its interference “in areas which fall within the executive and/or the legislature’s mandate”.⁷⁷ While this definition sounds relatively simple, for the purpose of this thesis it is difficult to work with. On the one hand, there are of course procedural rules delimitating the jurisdiction of a court, such as territoriality principles or prohibitions of *actio popularis*. These rules are typically institutionalized and determine the structure of the court’s reasoning. Theoretically, there could be a case in which a court overstepped its mandate by flagrantly disregarding one of these rules, and such a case would of course deeply affect a court’s authority. However, such cases of a clear disregard of a court’s procedural rules are extremely rare.

Instead, the cases where judicial overreach is discussed are typically cases where there is disagreement about the interpretation of such a rule. More generally, about the interpretation of the delimitation of the different branches’ mandates. As we have seen in the second chapter, this delimitation, between what is legal and what is political, is deeply contested and disagreed upon independent from any concrete case. Consequently, determining whether a court overreached, in a particular case, is equally controversial. It depends on the underlying conceptualization of separated powers and the author’s stance on the legitimacy of judicial review. Defining what exactly constitutes judicial overreach would thus amount to resolving the conflict of the legitimacy and scope of judicial review entirely.

Since this exceeds the scope of this thesis, I will instead focus on the underlying concerns of this critique. Hereby, it is important to distinguish between different forms of concern, and the role courts play in them. While courts are addressees of the criticism of judicial overreach, and actors in, as well as guardians of the rule of law, they are also victims of democratic backsliding and the decline of the rule of law. So, courts simultaneously have to respond to reasonable criticism articulated in good faith, and resist attacks on judicial independence by anti-democratic political streams.

Rosalind Dixon refers to this criterion of reasonability to distinguish between different kinds of democratic risks of judicial review. Reverse inertia, according to Dixon, is reasonable, widespread disagreement with a court decision, which does not find sufficient articulation in the dialogue between judiciary and legislature. Democratic backlash on the other hand focuses on democratic retaliation and constitutes an attack on the court as an institution.⁷⁸ Since often times the same stream of criticism can include both reasonable and unreasonable elements, this distinction may be difficult to make in

⁷⁷ Chelsea Ramsden, ‘Judicial Overreach’ (*Helen Suzman Foundation Briefs*, 8 June 2017) <<https://hsf.org.za/publications/hsf-briefs/judicial-overreach>> accessed 25 April 2026.

⁷⁸ Rosalind Dixon, ‘Risks to Democracy: Reverse Inertia, Democratic Backlash, and De-bilitation’ in Rosalind Dixon, *Responsive Judicial Review: democracy and dysfunction in the modern age* (1st edn, Oxford University PressOxford 2023) 181–82 <<https://doi.org/10.1093/oso/9780192865779.003.0006>> accessed 25 March 2026.

practice. For the accuracy of the analysis, however, it is essential to disentangle justified criticism from “opportunistic” criticism.⁷⁹

Before going into the substantive analysis, I want to clarify the role of causality in what I call the ‘cost’ of judicial overreach. On the one hand, in the balance of constitutional design, separated powers and the rule of law, courts play a significantly influential role. In this regard they enjoy a certain agency in creating or influencing public support, and trust in institutions. On the other hand, when considering the threat of a declining authority of courts, we cannot disregard the socio-political context. With the general rise of autocratic, populist movements, the rule of law is in decline, and the independence of courts is increasingly undermined. While there are interesting arguments to be made on the role of courts in the origins of this political shift,⁸⁰ I do not wish to imply that progressive climate decisions have in any way caused democratic backsliding. Instead, I want to focus on the way in which courts can react to and resist democratic backsliding. This focus is based on the assumption, that the decline of the rule of law, is a fact that courts are simply confronted with.

The underlying question that ties both lines of problems together is one that I will borrow from Ernst Hirsch Ballin, Gerhard van der Schyff and Maarten Stremmer: “How can courts prevent a situation in which judges exercising their independence become detached from the democratic society that they are required to protect?”⁸¹

To answer this question, I will first address the reasonable concerns with ‘real’ judicial overreach (Section 4.1.) and second, I will go into the role of courts in the social context of democratic backsliding (Section 4.2.).

Finally, I will analyze what implications these risks have for climate litigation (Section 4.3.).

4.1. Legitimacy of Judicial Power

As previously discussed, the important argument against ‘real’ judicial overreach concerns the legitimacy of judicial power, which derives from a “carefully constructed legal edifice of the law”.⁸² Said legitimacy has two elements, “the right to rule and the recognition by the ruled of that right”.⁸³ The

⁷⁹ Charlotte Blattner, ‘Separation of Powers and KlimaSeniorinnen’ (30 April 2024) 1 <<https://verfassungsblog.de/separation-of-powers-and-klimasenioreninnen/>> accessed 21 January 2026.

⁸⁰ See for example: Andrea Pin, ‘The Transnational Drivers of Populist Backlash in Europe: The Role of Courts’ (2019) 20 German Law Journal 225 <<https://doi.org/10.1017/glj.2019.14>>.

⁸¹ Ernst Hirsch Ballin, Gerhard Van Der Schyff and Maarten Stremmer, ‘Introduction: Safeguards and Limits of Judicial Power’ in Ernst Hirsch Ballin, Gerhard Van Der Schyff and Maarten Stremmer (eds), *European Yearbook of Constitutional Law 2019*, vol 1 (TMC Asser Press 2020) 6 f. <https://doi.org/10.1007/978-94-6265-359-7_1> accessed 24 April 2026.

⁸² Michael A Dichio and Igor Logvinenko, ‘Stewards, Defenders, Progenitors, and Collaborators: Courts in the Age of Democratic Decline’ (2025) 47 Law & Policy e12251, 2 <<https://doi.org/10.1111/lapo.12251>>.

⁸³ Jonathan Jackson and others, ‘Why Do People Comply with the Law?: Legitimacy and the Influence of Legal Institutions’ (2012) 52 British Journal of Criminology 1051, 1051 <<https://doi.org/10.1093/bjc/azs032>>.

first concern is a normative one, that speaks to the judicial legitimacy on a theoretical, fundamental level. The second concern, is a consequential consideration, as judicial legitimacy also depends on the public recognition of judicial authority. Since the judiciary is dependent on the respect and implementation of its decisions by the legislature and executive, courts must be mindful of not alienating the other branches of government, and on maintaining the respect for their judgments in the society. Therefore, in cases concerning judicial review of legislation, institutional concerns also have to be part of the court's reasoning. These concerns include firstly, the limits of the judicial role and therefore the adequacy of judicial intervention in the case at hand, and secondly, to what extent a progressive ruling will be publicly accepted.⁸⁴

The section will first develop on the interconnection between judicial restraint and the normative legitimacy of judicial power (4.1.1.). And then, I will complete this concern of legitimacy by addressing the way in which public perception of legitimacy can be reinforced (4.1.2.).

4.1.1. Judicial Restraint and Legitimacy

While effective protection of individual's rights is one of the main responsibilities of courts in public law adjudication, it is not the only value judges must take into account.⁸⁵

The legitimacy of judicial intervention is contingent on judicial independence, which indicates its insulation from other state powers. However, as part of the constitutional order and interconnection of state powers, judicial power is also necessarily limited. In fact, as elaborated in more detail in chapter two, this limitation is another fundamental requirement for the normative legitimacy of courts.⁸⁶ Especially with regard to the separation of powers, courts must respect the overarching ideals of constitutional democracies, if they want to render legitimate decisions.⁸⁷

Because the limitation and the legitimacy of judicial power are deeply interrelated, courts have to justify extensively, why and to what extent they may engage with arguably political issues. Thus, if a case borders too much on politics, courts may have to defer to the legislative branch, to respect the constitutional order. This is what happened in the much-discussed *Juliana v United States* case, where the court held that allocating political power and influence exceeded its mandate and would result in an unlimited scope of judicial power.⁸⁸ Therefore the court reluctantly concluded, that the plaintiffs' case had to be made to the political branches or to the electorate at large. Adding that the electorate would be able to influence the political branch "through the

⁸⁴ Aileen Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60 University of Toronto Law Journal 23, 31 f., 36 <<https://doi.org/10.3138/utlj.60.1.23>>.

⁸⁵ Ibid, 31.

⁸⁶ Hirsch Ballin, Van Der Schyff and Stremmer (n 81) 4.

⁸⁷ Jasmina Nedevska, 'An Attack on the Separation of Powers? Strategic Climate Litigation in the Eyes of U.S. Judges' (2021) 13 Sustainability 8335, 2 <<https://doi.org/10.3390/su13158335>>.

⁸⁸ *Juliana v United States* United States Court of Appeals for the Ninth Circuit No. 18-36082 D.C. No. 6:15-cv-01517AA 28.

ballot box” the court very clearly prioritized democratic concerns over the rights protection.⁸⁹ Notably, this stance was heavily criticized by Judge Staton in her dissenting opinion.⁹⁰

In the case of international courts, the limitation of the judicial role is a little different from the role of constitutional courts. The ECtHR for example is limited to the interpretation of the European Convention of Human Rights (hereinafter the Convention), and thus cannot derive novel rights from the Convention, through interpretation.⁹¹ This limitation of legitimate judicial reasoning, combined with the refusal of the Contracting Parties to the Convention to expand the Court’s jurisdiction to environmental issues, led Judge Eicke to partially dissent with the ECtHR’s decision in *Verein Klimaseniorinnen and others v Switzerland*. Although he concurred with the urgency of climate mitigation action, according to him, the judgement went beyond the Court’s legitimate mandate.⁹²

Both cases show that concerns relating to the normative legitimacy of judicial intervention are of great concern for courts. Simultaneously, they also demonstrate that opinions on where to strike the balance between effective human rights protection and institutional legitimacy may differ.

4.1.2. The Public Perception of Legitimacy

A court decision means little if the public feels they can ignore it.⁹³ Public respect of the law is essential for the functioning of the rule of law, for the stability of a democracy, as well as for the long-term protection of rights.⁹⁴ Furthermore, it is worth pointing out that courts do not render their decisions in a societal vacuum, but as an institution and a branch of government. The morality or justice of their judgements therefore also depends on the consequences they may entail.⁹⁵ In creating a culture of judicial authority, courts thus depend on the support of the other branches of government, as well as the general support of the public. Therefore, it is important for judicial institutions to safeguard public acceptance of their decisions and consider consequentialist institutional concerns.⁹⁶

Public compliance with the law can derive from the law’s coercive nature or from moral alignment with its content. But personal commitment to law-abiding behavior plays a big role in the respect for the rule of law. This personal commitment is strengthened, when institutions are publicly perceived as legitimate. In turn, the public perception of the law as legitimate increases,

⁸⁹ *Juliana v United States* (n 88) 32.

⁹⁰ *Ibid*, 32–64.

⁹¹ *Verein Klimaseniorinnen and others v Switzerland* (n 62) Partly Concurring Partly Dissenting Opinion of Judge Eicke [18, 18b].

⁹² *Ibid*, [19, 70].

⁹³ Tom R Tyler, *Why People Obey the Law* (Princeton University Press 2006) 19 <<https://doi.org/10.2307/j.ctv1j66769>> accessed 24 April 2026.

⁹⁴ Marc Bühlmann and Ruth Kunz, ‘Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems’ (2011) 34 *West European Politics* 317, 318 <<https://doi.org/10.1080/01402382.2011.546576>>.

⁹⁵ Kavanagh (n 84) 34.

⁹⁶ *Ibid*, 36; Tyler (n 93) 19.

when judicial institutions stick to the principles of procedural fairness.⁹⁷ Consequently, courts can increase public trust through institutional qualities, notably impartiality and ideological neutrality.⁹⁸

The ideological neutrality is institutionally secured by courts basing their decisions exclusively on legal and constitutional arguments, as opposed to the ideological preferences of the judges.⁹⁹ This is why, legal rigor is so important for a courts exercise of equitable power.¹⁰⁰ Legal rigor, as the exclusive basis of judicial decision-making is also a distinctive feature of judicial independence. While courts sometimes have to consider public opinions and societal development, their decisions should not reflect the prevailing political or economic balance of forces.¹⁰¹ Both the independence and impartiality of judicial decisions are important, mutually reinforcing factors in the maintenance and creation of actual and perceived legitimacy.¹⁰²

But in addition to these traditional sources of legitimacy, courts can also influence public acceptance through the manner of presenting their decisions. Tone, authorship and narrative of a decision are significant factors to the public perception of a court's authority and legitimacy.¹⁰³ While openness, transparency and public accountability, are reasons which speak in favor of judicial candor, sometimes the respect for the legislator's mandate may warrant judicial restraint and comity in the articulation of criticism regarding a legislative program.¹⁰⁴

Thus, courts can strengthen their legitimacy by protecting their impartiality and ideological neutrality. Legal rigor and a neutral narrative of a court decision increase public trust in courts, hereby safeguarding the respect for the rule of law.

⁹⁷ Jackson and others (n 83) 1052, 1056.

⁹⁸ Pedro C Magalhães and Nuno Garoupa, 'Populist Governments, Judicial Independence, and Public Trust in the Courts' (2024) 31 *Journal of European Public Policy* 2748, 2749 <<https://doi.org/10.1080/13501763.2023.2235386>>.

⁹⁹ Mariana Velasco-Rivera, 'The Soft Guardrails of Legal Constitutionalism' (2025) 26 *German Law Journal* 299, 300 <<https://doi.org/10.1017/glj.2025.8>>.

¹⁰⁰ *Juliana v United States* (n 88) 27.

¹⁰¹ Bühlmann and Kunz (n 94) 318.

¹⁰² David Kosař, 'Embedding Strategies of the European Apex Courts: Why Court Communication with All Segments of Society Matters' (2025) 26 *German Law Journal* 274, 276 <<https://doi.org/10.1017/glj.2025.3>>.

¹⁰³ Rosalind Dixon, 'A Responsive Judicial Voice: Building a Court's Legitimacy' in Rosalind Dixon, *Responsive Judicial Review* (1st edn, Oxford University Press Oxford 2023) 245 <<https://doi.org/10.1093/oso/9780192865779.003.0008>> accessed 1 May 2026.

¹⁰⁴ Kavanagh (n 84) 37–39.

4.2. Democratic Backsliding

We cannot talk about the criticism of judicial overreach, without taking into consideration how this criticism is also mobilized to serve as an attack on courts and constitutionalism as a whole. While there is a reasonable and historically well-established criticism of the legitimacy of constitutional courts, populist autocrats tie into this criticism but with a different agenda than sincere constitutional deliberation. Instead, populists utilize skepticism towards constitutional courts in order to discredit and undermine the judicial institution, urging them to cater to their ideological orientation.¹⁰⁵

With the rise of autocratic movements and widespread democratic backsliding, judicial authority and independence together with liberal constitutionalism are under increasing pressure.¹⁰⁶ In this field of tension, courts have a dual role because they are both victims of and actors resisting the decline of the rule of law. On the one hand, judicial power depends on the respect and support of other branches of government, which places courts in a vulnerable position within the constitutional democratic order.¹⁰⁷ On the other hand, courts are institutionally tasked with upholding the integrity of the constitutional system, and as such also have a capacity to guard democratic structures.¹⁰⁸ This section will address these two roles of the judiciary in turn, starting with courts as victims of democratic backsliding (Subsection 4.2.1.) and addressing the role of courts as actors resisting the decline of the rule of law second (Subsection 4.2.2.).

4.2.1. Attacks on Judicial Independence

The judiciary is often among the first victims of democratic backsliding because of its ability to constrain the executive, making them a popular target for populist and autocratic movements.¹⁰⁹ Independent constitutional courts can pose a threat to the pursuit of undermining liberal democracies, by blocking autocratic attempts to change and delegitimize democratic governments. Therefore, when populist autocrats come to power, they often resort to methods of court-victimization such as abusive constitutional borrowing, court-packing or extreme reduction of their competence.¹¹⁰

In abusive constitutional borrowing, autocratic leaders instrumentalize liberal democratic constitutional ideas, norms, and institutions as tools for furthering anti-democratic constitutional change.¹¹¹ In a similar line, court packing consists of the alteration of the compositions of courts with the goal of

¹⁰⁵ Susanne Baer, 'To Listen and to Belong. A Personal Take on Constitutionalism at Work Today' (2025) 26 German Law Journal 350, 357 <<https://doi.org/10.1017/glj.2025.10>>.

¹⁰⁶ Çalı, Costello and Markard (n 4) 143; Scheppele (n 5) 256.

¹⁰⁷ Velasco-Rivera (n 99) 300.

¹⁰⁸ Dichio and Logvinenko (n 82) 2.

¹⁰⁹ Sanja Bogojević, 'The Erosion of the Rule of Law: How Populism Threatens Environmental Protection' (2019) 31 Journal of Environmental Law 389, 391 <<https://doi.org/10.1093/jel/eqz030>>.

¹¹⁰ Dichio and Logvinenko (n 82) 7; Kosar (n 102) 275.

¹¹¹ Rosalind Dixon and David Landau, '1989–2019: From Democratic to Abusive Constitutional Borrowing' (2019) 17 International Journal of Constitutional Law 489, 490 <<https://doi.org/10.1093/icon/moz038>>.

gaining judicial support for policy or even constitutional changes. It undermines judicial independence heavily and may also entail judicially backed encroachment of the executive on other branches of government.¹¹² On top of that, populist movements can engage in delegitimization techniques even before they come to power. Such techniques typically target the public perception of judicial legitimacy directly, by framing courts as incompetent, ideologically biased, attacking individual judges and inserting political controversy into the appointment process.¹¹³

A flagrant example of these increasing attacks on judicial independence, was the appointment procedure of constitutional judges in Germany last year. Whilst traditionally, the appointment process in Germany is kept away from public controversy and party politics, the nomination of Frauke Brosius Gersdorf, a distinguished constitutional legal scholar, as a candidate sparked a scandal in the extreme right party and in parts of the conservative party. While the outrage initially arose in regard to the candidate's relatively progressive position on abortion rights, it quickly turned into a defamation campaign questioning Brosius Gersdorf's scientific integrity, legal rigor and overall qualification. The ferocity of the debate and the conduct of politicians led over 300 scholars to sign a petition in protest, warning against the danger this case posed to the integrity of the institution, judicial independence and legitimacy of the constitutional court. Because the controversy would not calm down, it eventually resulted in Brosius Gersdorf withdrawing her candidacy.¹¹⁴

Incidents like this one are not isolated cases and they go beyond what is generally referred to as the politicization of courts. Instead, they are symptoms of the gradually declining mutual toleration and institutional forbearance, characteristic of democratic erosion. In such an environment, constitutional judging becomes increasingly risky and its repercussions can threaten judicial institutions significantly.¹¹⁵

4.2.2. Guardians of the rule of law

While courts are under attack in an environment of democratic decline, they are not powerless and judges have the capacity of playing a significant role in resisting the decline of the rule of law.¹¹⁶ In fact constitutional courts are tasked with the protection of the constitution and therefore are central actors in maintaining the constitutional balance between democracy and the rule of

¹¹² Benjamin Garcia Holgado and Raúl Sánchez Urribarri, 'Court-Packing and Democratic Decay: A Necessary Relationship?' (2023) 12 *Global Constitutionalism* 350, 352 <<https://doi.org/10.1017/S2045381723000011>>.

¹¹³ Baer (n 105) 357.

¹¹⁴ Lara-Marie Honczek, 'Wenn Qualifikation nicht reicht – was die Causa Brosius- Gersdorf über unser Rechtsverständnis sagt' (*bundesfachschaft.de*, 16 July 2025) <<https://bundesfachschaft.de/wenn-qualifikation-nicht-reicht-was-die-causa-brosius-gersdorf-ueber-unser-rechtsverstaendnis-sagt/>> accessed 4 May 2026; 'Stellungnahme Zur Causa „Frauke Brosius-Gersdorf“' (14 July 2025) <<https://doi.org/10.59704/545542e577e5cdfb>> accessed 4 May 2026.

¹¹⁵ Velasco-Rivera (n 99) 301.

¹¹⁶ Kosar (n 102) 275.

law.¹¹⁷ Resistance strategies are targeted towards the public perception of judicial legitimacy and towards substantial efforts of democratic self-defense.

David Kosař argues, that court communication with all parts of society is a crucial factor in increasing courts social embeddedness and preemptively countering public distrust based on allegations of elitism. His argument is predicated on the observation that constitutional courts are and can be easily portrayed as detached from the precariat, because of institutional, structural and decision-making features. In order to prevent autocratic populists from exploiting this narrative and undermining public trust in the judiciary, constitutional courts should find ways of improving their communication with all segments of society.¹¹⁸ Such communication strategies could include a media strategy, that translates judicial rulings into a broadly understandable language in order to counter disinformation and shape the public image of the courts. Furthermore, proactive engagement with the precariat, “reaching-out”-social-events, as well as civic education by judges can increase public trust in courts. Naturally, judges should minimize any controversial extrajudicial activities that could cause doubts about their impartiality. And finally, they must be aware of and avoid structural judicial biases relating to their social class.¹¹⁹

Another direction of resisting strategies concerns the ability of the law itself to serve as a ground for the protection of democratic institutions. Typically, international human rights courts are formally limited to the adjudication of human rights violations. In turn, human rights law overlooks the structural components of constitutions, which determine the distribution and limitation of power and ensure the independence of institutions in charge of checking the political branches. This leaves driving elements of democratic backsliding to a legally relatively unconstrained space.¹²⁰ However, according to Kim Lane Scheppele, judges have started to interpret the rights under their protection to include certain democratic requirements, recognizing the danger democratic backsliding poses to the realization of human rights. Especially the right to a fair trial and the right to an effective remedy have served transnational human rights courts as a basis for requiring minimum standards of judicial independence. Moreover, structural conditions for fair and free elections have been recognized as legal obligations under the rights to vote and to stand for office.¹²¹

Thus, courts have the capacity to slow down or possibly prevent democratic erosion. Through exercising control over the political branches and acting in their role of protecting the constitutional order, courts can genuinely resist attempts to undermine democracy. Notably, in several countries, courts have already proven this capacity by successfully averting autocratic encroachment.¹²² However, it is important to note, that this resisting capacity of courts is premised on the assumption that current elements of legal authority

¹¹⁷ Hirsch Ballin, Van Der Schyff and Stremmler (n 81) 8.

¹¹⁸ Kosař (n 102) 284.

¹¹⁹ Ibid, 284 f., 289 f., 292.

¹²⁰ Scheppele (n 5) 261 f.

¹²¹ Ibid, 256, 262.

¹²² Dichio and Logvinenko (n 82) 7; Velasco-Rivera (n 99) 301.

will persist, whereas the changing factors in public perception of judicial legitimacy point at least to uncertainty, if not to the contrary.¹²³ Most importantly, it would be a misconception to assume that judges were able to successfully fight democratic erosion by themselves.¹²⁴

4.3. Implications for Climate Litigation

As we have seen in chapter three on the cost of judicial restraint, given the impact of the climate policy decisions made today, protection for future generations is desperately needed. However, what this chapter has tried to showcase is, that legal restrictions on the legislator in favor of climate protection come at a cost for today's democratic freedom of decision-making.¹²⁵ And this exchange of legislative freedom does not come without concerns, in the form of both democratic and anti-democratic criticism.

To take up the question from the introduction to this chapter concerning the prevention of judges becoming detached from the democratic society when exercising their independence, two points merit a closer look. Firstly, in a general sense, social change has to be grounded in society in order to be successful. No court decision can singlehandedly prevent the disastrous effects of climate change.¹²⁶ Instead, the lasting change that is required can only be realized with the cooperation of all branches of government and the support of a majority of citizens.¹²⁷ This is why sustainable development has and needs three mutually reinforcing dimensions – an environmental, a social and an economic one.¹²⁸ Secondly, the solution to counter the detachment of courts from society cannot be indiscriminate of the democratic threat that is at issue. In the context of reasonable democratic criticism, it is fair to concede, that the aforementioned constraints imposed on the legislator by the judiciary must be applied in strict respect of doctrinal criteria, which certainly demands a degree of judicial restraint.¹²⁹ On the other hand, when it comes to democratic backsliding, it would be wrong to claim that it is because courts have departed from legal rigor and their constitutional mandate, that public responses have become unamicable. Instead, faced with the general decline of trust in judicial institutions, fostered by autocratic, populist politicians, the frame of action available to the judiciary is significantly reduced.

So, the implications for climate change litigation are not necessarily the expected doctor-ordered judicial restraint, at least not only that. Of course, courts must ground their decisions rigorously in the law, especially in cases that are controversial and that can be expected to receive a corresponding amount of public attention. In the context of democratic backsliding however, the communication and justification of the decision might be just as important as the restraint in the substantial part. Insofar, as the decline in public trust is

¹²³ Velasco-Rivera (n 99) 301; Kosař (n 102) 281.

¹²⁴ Kosař (n 102) 275.

¹²⁵ Britz (n 70) 321.

¹²⁶ *Juliana v United States* (n 88) 33.

¹²⁷ Moellers (n 29) 137.

¹²⁸ Nedevska (n 87) 2.

¹²⁹ *Ibid*, 3.

not out of the court's hands, embedding strategies and overall legal safeguarding of democratic institutions may be the more effective resistance against rule of law erosion.

While climate litigation is a controversial topic, that fits regrettably well into the narrative of courts as catering to globalist, international, as opposed to localist and national interests, this cannot deter courts entirely from adjudicating the legal issues at stake. The costs of abstaining from environmental protection have to be communicated to all segments of society, by both courts, as well as other branches of power.¹³⁰

¹³⁰ Kosař (n 102) 281, 283.

5. Balancing judicial engagement

In light of the risks and implications of both extensive judicial restraint and of judicial overreach, the difficulty of judicial engagement in climate cases becomes clear. But the question remains how courts can address this difficulty. On the spectrum of opinions between originalism and living constitutionalism, courts have to try to strike a balance, that ideally is acceptable across conceptualizations.

To navigate between effective legal protection and separation of powers; human rights protection and democratic legitimacy, this thesis has the objective to identify arguments that can guide judicial reasoning. In the interest of strengthening the public perception of legitimacy and given the longstanding disagreement over conceptualizations of separated powers, reaching a compromise may be a more realistic objective than arguing for a conceptual superiority on a normative level. Within the frame of the arguments developed in the last two chapters, this chapter therefore aims to identify balancing criteria for justifying or limiting judicial engagement which could be considered legitimate across conceptualizations of the separation of powers.

A question that must precede this assessment is what the requirements are for such criteria. To reiterate, the common denominators of conceptualizations are that sustainable political change must be grounded in political, social, cultural, philosophical tradition and that they must respect the doctrinal legal tradition. On the other hand, it is also common ground that the law must provide effective protection against major human rights violations. In the context of climate litigation, regulatory clarifications such as the Paris Agreement or the Aarhus Convention are evidence, that this includes human rights violations caused by climate change.

To contribute to the development of a compromise between judicial restraint and overreach, this chapter will address three arguments and their implications for balancing criteria, while placing particular focus on their compatibility with the different conceptions of separated powers.

5.1. Weighing of Institutional and Substantive Concerns

One idea for balancing judicial engagement, developed by Aileen Kavanagh, is to include a direct weighing of institutional limitations against the substantive reasons for intervention in the reasoning of the court. This means that the extent to which courts will defer to the legislature would partially depend on the gravity of the human rights interference that is at stake. The more substantive the human rights violation, or threat thereof, the more extensive the judge's mandate to control the legislature's decision-making.¹³¹

The strength of this approach, is that it transparently acknowledges the issues of legitimacy, including the public perception of the latter, while at the same time recognizing the human rights violation or threat thereof. This

¹³¹ Kavanagh (n 84) 30.

makes it both acceptable for different conceptions of separated powers, and gives the court room to address the democratic risks of judicial intervention. Furthermore, weighing institutional and human rights concerns in each case individually creates a gradual compromise. Because the evaluation is not mechanical, but individual for each case, the balance struck will be highly contextualized and flexible. This may increase the legitimacy of the decision in two ways. First, the result will be more adapted to the specific case, making it more likely to be acceptable for both parties. Secondly, the individualization of the reasoning will decrease its precedential weight. Hopefully, the decision will therefore not to the same degree be projected onto future decisions, which could reduce the agitation of whichever party disagrees with its outcome.

Naturally, the individualization of the assessment also comes with its disadvantages. On the one hand, it increases the workload of the court if judges have to decide on such a fundamental issue in each case individually, taking all relevant circumstances into consideration. On the other hand, individual assessments regularly decrease legal certainty, as it becomes harder to predict which factors will influence the decision's outcome.

On a more theoretical level, there is a normative concern with this approach. Letting institutional concerns influence the substantial consideration of finding a human rights violation, one could argue, undermines the moral integrity of judicial decision-making. It would be fallacious to encourage judges to prioritize expediency over justice.¹³²

Granted, judicial restraint cannot become an "abdication of judicial responsibility to protect rights".¹³³ Nor should judges trade their popularity against the adjudication of human rights violations. However, Kavanagh argues, the justice or morality of a verdict cannot be entirely disentangled from the anticipated public response. Building on the premise that courts do not only have a moral but also a particular institutional responsibility as organs of the state, she argues, that judges are institutionally limited to what is constitutionally appropriate for them to decide. Thus, judicial sensitivity to the decision's consequences may be warranted for reasons of rights protection itself.¹³⁴

Setting aside the normative concerns, a more fundamental difficulty persists with regard to the approach's aptitude to contribute to a balancing of judicial engagement. While it does propose a procedural solution for judicial reasoning, it does not clarify where and along which criteria the balance should be struck. Rather than resolving the problem, this ostensible solution merely defers the balancing problem to a specific point in the judgement.

In conclusion, while this approach does provide a meaningful framework for solving the issue of balancing, it is not the final solution for striking a compromise. Two other ideas therefore merit some further attention.

¹³² Kavanagh (n 84) 32.

¹³³ Ibid, 30.

¹³⁴ Ibid, 33 f.

5.2. Conflation of Individual and Collective Interests

One important argument in favor of limiting judicial engagement is the danger of overamplifying individual interests. As Moellers argues, the central task of a theory of separated powers is to define procedural mechanisms to deal with conflicting interests between individual and collective legitimacy.¹³⁵ Collective interests are thought to be represented through majoritarian, politically accountable institutions, and individual interests are protected through rights and enforced by counter-majoritarian institutions.¹³⁶ This is why the over-reliance on individual rights poses the risk of creating an asymmetry in the representation of collective and individual interests, which strengthens the argument for judicial restraint.

However, in the case of climate litigation, the interests at stake do not necessarily fit into the conflict between collective and individual interests, depicted by Moellers. Instead, the conflict of this thesis, between climate protection and democratic self-determination is one between two collective interests. As elaborated in more detail in chapter three, many of the difficulties in climate litigation relate to the translation of a broad societal concern into an individual legal claim. So, it is precisely the fact that it is not an individual interest, which makes it hard to be grasped legally. The conflict between individual and collective interests arguably only arises, because the collective interest for climate protection is translated into an individual concern in the course of the judicial proceedings and is then contrasted to a majoritarian position. Bearing this in mind, the democratic legitimacy concern is perhaps not as strong as in other cases concerning more emblematic individual concerns.

It is also important to note that even Moellers, although otherwise reserved about human rights adjudication, pointed out that the two potentially conflicting sources of legitimacy, collective and individual do not operate at the expense of one another but instead are mutually dependent and reinforcing.¹³⁷ In the context of climate change, this conflation of collective and individual concerns is further bolstered by the fact that the trade-off between current legislative freedom and future rights protection is not only a trade-off between democracy and the climate. Since democracy also depends on the availability of resources that creates the plurality of choices, as Gabriele Britz points out, the trade-off is also between current and future self-determination.¹³⁸ In this sense the urgency for generational equity operates both on an environmental and on a democratic level.

Both the impact of climate change on the preservation of democracy and legislative freedom, as well as the collective, although future, affectedness of climate change blur the lines between individual and collective interests. In fact, with increasingly imminent effects of climate change, the interests of future generations eventually turn into interests of everyone, which challenges the traditional dichotomy of interests.

¹³⁵ Moellers (n 17) 78.

¹³⁶ Mariconda (n 13) 148.

¹³⁷ Moellers (n 17) 78.

¹³⁸ Britz (n 70) 321.

Unfortunately, it is precisely the source of concern about judicial legitimacy that also makes courts particularly suitable to weigh intergenerational equity. The insulation from electoral pressure is the origin of the need for judicial restraint, but it also makes courts more immune to democratic short-termism and therefore increases their ability to emphasize long-term interests.¹³⁹ While all of the above speaks in favor of intergenerational equity being a considerably important factor in the balancing of judicial engagement, it is not necessarily accepted as a justification of judicial engagement across conceptualizations of separated powers. In fact, intergenerational equity puts a clear emphasis on human rights concerns and although the concept includes a democratic element and collective interests, it may be ideologically too tainted for serving as the basis of compromise. Therefore, one more idea warrants closer consideration.

5.3. Adjudication as Deliberation

Another way of looking at constitutional adjudication is as a channel of democratic dialogue. Climate cases before national and regional courts are an expression of “climate dissensus”, i.e. fundamental disagreement about climate protection policy choices. And this dissensus can be channeled into the democratic forum through national and regional courts adjudicating human rights.¹⁴⁰ This dialogical approach to constitutional adjudication and the relationship between courts and legislature has the advantage of overcoming the assumed “dichotomy between majoritarian democracy and anti-majoritarian human rights”, which is the main source of difficulty for legitimizing the engagement of courts in human rights issues.¹⁴¹

Based on the idea that political leaders must be able to convince the public of having fulfilled their human rights obligation, Sandra Fredman contends that human rights adjudication should enhance deliberation in a democracy. According to her, the role of the judge is to insist on the deliberative process of human rights decision-making, by requiring legislature, courts and civil society to justify all stages of the evaluation, namely interpretation, delivery and balancing.¹⁴²

With regard to the separation of powers and the requirements for judicial legitimacy, this approach has a significant advantage. On a substantial level, this approach allows courts to ensure that legislative decisions are made within the constraints set by human rights, thus channeling constitutional values into the institutional forum.¹⁴³ But since it does so in a deliberative manner, premised on a shared commitment to the “resolution of problems of

¹³⁹ Kuh (n 28) 754.

¹⁴⁰ Christina Eckes, ‘Multilayered Non-Majoritarianism: European Courts and National Climate Action’ (2026) 2026 11 *European Papers - A Journal on Law and Integration* 465, 483 <<https://doi.org/10.15166/2499-8249/878>>.

¹⁴¹ Sandra Fredman, ‘Adjudication as Accountability’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 110, 113 <<https://doi.org/10.1093/acprof:oso/9780199670024.003.0005>> accessed 7 May 2026.

¹⁴² Ibid, 105 f.

¹⁴³ Ibid, 110, 118.

collective choice through public reasoning”¹⁴⁴, it does not result in a judicial aggrandizement, but rather makes the democracy more resilient.¹⁴⁵ Within this interpretative space of the limitation and scope of human rights, this approach allows the legislature to maintain the primary role of deliberation, while endowing courts with a supervisory role to ensure the respect of a deliberative process.¹⁴⁶ Importantly, rather than being the final say in the matter, the verdict provokes a reaction from the legislature, conferring them the final decision.¹⁴⁷

For the balancing of judicial engagement this has an impact on the remedies courts should opt for in rights-based climate change adjudication. In the interest of deliberation, the verdict should not be final. Instead, a deliberative outcome of judicial review would be open ended, leaving room for the process of deliberation to produce an agreed upon solution. A weakened finality of judicial review, according to Rosalind Dixon, will also be beneficial to the judiciary’s democratic responsiveness. It provides for an outlet for democratic disagreement and therefore contributes to the stability and effectiveness of judicial review.¹⁴⁸

In the interest of reducing the finality of a court decision, literature on the right to an effective remedy has already produced some approaches to balance effective protection and democratic legitimacy of a judgement’s outcome. In the search for a judicial remedy for climate mitigation, Kent Roach developed the concept of the “declaration plus” remedy, situated between declaratory and injunctive judicial relief. This form of a remedy is formulated in general terms, thus deferring the means of implementation to the legislative branch. Hereby, the judgment maintains the separation of powers, and/ or respects the principle of subsidiarity in the case of supranational courts. Concurrently, the court retains jurisdiction over the case and can therefore monitor the party’s compliance and intervene in negotiations following the judgement.¹⁴⁹

Examples of such non-final judgements can be found both on the international and national level. In the case of the ECtHR, the remedial structure is actually institutionally embedded. While the Court itself cannot monitor state’s compliance, the Committee of Ministers negotiates the implementation in dialogue with the parties.¹⁵⁰

On the domestic level, an example of general but not purely declaratory remedies is the climate judgment of the German Constitutional Court (*Bundesverfassungsgericht*) from 2021. In Neubauer et al. the court held that the

¹⁴⁴ Fredman (n 141) 114.

¹⁴⁵ Eckes (n 140) 465, 484.

¹⁴⁶ Fredman (n 141) 117.

¹⁴⁷ Ibid, 110.

¹⁴⁸ Rosalind Dixon, ‘Toward Strong–Weak/Weak–Strong Judicial Review and Remedies’ in Rosalind Dixon, *Responsive Judicial Review* (1st edn, Oxford University Press Oxford 2023) 240 <<https://doi.org/10.1093/oso/9780192865779.003.0007>> accessed 1 May 2026.

¹⁴⁹ Kent Roach, ‘Declarations, Injunctions and the Declaration Plus’ *Remedies for Human Rights Violations: A Two-Track Approach to Supra-national and National Law* (1st edn, Cambridge University Press 2021) 384, 388 f. <<https://doi.org/10.1017/9781108283618>> accessed 7 May 2026.

¹⁵⁰ Ibid, 354, 366; Kent Roach, ‘Judicial Remedies for Climate Change’ (2021) 17 *Journal of Law & Equality* 105, 128.

Federal Climate Change Act placed a disproportionate GHG reduction burden on the freedom of future generations. The *Bundesverfassungsgericht* ordered that the legislature revise the Act, with a view to distributing the burden of mitigation action more equitably between generations.¹⁵¹ However, while the decision specified a clear frame in which the new plan should navigate, it left the concrete measures of reduction up to the legislature.

Viewing courts as channels of deliberation frees them in some measure from the weight attributed to the limitation of their mandate. It alleviates some of the pressure from the debate around the balancing of judicial engagement. While this gives the deliberation argument a slight tilt towards legitimizing progressive judicial engagement, it also has very clear implications for the court's reasoning. Therefore, it limits judicial decision-making as well as justifying it. In addition, the concept of the "declaration-plus" remedy is well rooted in the legal doctrine, and can therefore maintain continuity of the legal tradition. Since it displays tolerance for judicial engagement while defining clear limitations for said engagement, this argument comes closest to a compromise that could be acceptable across conceptualizations of separated powers.

¹⁵¹ Moritz Vinken and Paolo Mazzotti, 'The First Italian Climate Judgement and the Separation of Powers' (*Verfassungsblog*, 22 April 2024) 4 <<https://verfassungsblog.de/the-first-italianclimate-judgement-and-the-separation-of-powers/>> accessed 1 December 2025; Agnes Hellner and Yaffa Epstein, 'Allocation of Institutional Responsibility for Climate Change Mitigation: Judicial Application of Constitutional Environmental Provisions in the European Climate Cases *Arctic Oil*, *Neubauer*, and *l'Affaire Du Siècle*' (2023) 35 *Journal of Environmental Law* 207, 218 f. <<https://doi.org/10.1093/jel/eqac024>>.

6. Conclusion

*“The tension between the undemocratic nature of courts and their capacity for democratic guardianship inevitably politicizes courts—and especially so during episodes of democratic backsliding.”*¹⁵²

This quote expresses one of the key conundrums this thesis set out to dissect. Courts play a complex role in democratic constitutional systems. They are non-majoritarian institutions that have the constitutional power to influence and control political branches of government. This is the point of departure for a longstanding debate in constitutional theory about the general normative legitimacy of constitutional review. Depending on the conceptualization of the separation of powers, the extent to which judges are allowed to engage with legislation and control their compliance with constitutional norms varies vastly. The underlying issues of the conflict is the line of distinction between law and politics and the weight accorded to different sources of legitimacy, such as human rights and democracy.

In light of this normative debate, it is essential for courts to reconcile the protection of human rights with the respect for the limits of the judicial mandate. This is not only for normative reasons but also for more functional institutional reasons, as elaborated in chapter four. Because courts depend on the other branches of government for the enforcement of their decisions, they have to maintain their support. In a similar line, the functioning of the rule of law hinges on public trust in the judiciary and public acceptance of the authority of courts. Because of this interdependence and their normatively limited institutional mandate, courts have to be cognizant of strengthening their legitimacy, by exercising restraint, underlining their impartiality, and adopting a tone reflecting their ideological independence. This becomes even more important when the social and political environment is moving into a time of democratic backsliding, attacking democratic and judicial institutions equally.

In order to counter autocratic attacks on the judiciary preemptively, courts can focus on communicating their role and decisions with all segments of society to fight populist allegations of elitism and detachment from social reality. Furthermore, courts can engage in democratic self-defense by extending legal protection to democratic institutions and judicial independence. However, while such strategies may help resist or slow democratic erosion, they should not be misconstrued as an antidote to democratic backsliding. Misunderstanding progressive judgments as the primary source of democratic backlash, dangerously underrates populist drivers behind attacks on judicial independence. From a democracy perspective, catering to political pressure does not even necessarily increase public support for the judiciary, as courts derive a significant part of their authority from their ideological independence from economic and political powers.

¹⁵² Dichio and Logvinenko (n 82) 2.

Besides these aspects relating to the role of courts as guardians of the rule of law, another consideration is the danger of overestimating the effect of judicial restraint. Since the politicization of courts is inevitable, it would be fallacious to defer to judicial restraint as a universal remedy against any disagreement with court rulings. The decline in the rule of law cannot be averted by exercising judicial restraint. Notwithstanding the need for courts to exercise restraint to adhere to their constitutional mandate, this restraint should not be expanded in accommodation of opportunistic criticism intended to undermine judicial authority. Especially in times of democratic backsliding, it is crucial for courts to seize on their ability to fight populist autocrats' attempts to capture and intimidate judicial institutions.

In the context of human rights adjudication, overemphasizing the contribution of extreme judicial restraint to garner public support for judicial institutions will be detrimental to the protection of human rights. As shown in chapter three, legally enforcing or improving climate mitigation policies would not have been successful had the courts acted with extreme judicial restraint. At the same time, there are good arguments in favor of courts counterbalancing legislative reluctance to enact climate policy. As counter-majoritarian institutions, courts are not subject to the same degree of temporal limitations of their mandate or to public elections, which grants them independence of the short-term popularity of their decisions. In addition, courts provide a good forum for filtering out disinformation related to climate change science, which can attenuate the distorting effects that disinformation campaigns have on public deliberation. These attributes of judicial institutions provide solid grounds for the legitimacy of courts counterbalancing legislative inaction in climate cases, notwithstanding the relative incompatibility of climate issues with individual legal claims.

The question that remains is how courts can strike a balance between maintaining their institutional legitimacy and effectively protecting human rights. The fifth chapter argued, that the reasonable criticism of judicial overreach can be addressed by weighing institutional against substantial concerns, emphasizing the democratic and collective elements of intergenerational equity and leaving room for the legislator to impact the specification of the means to achieve climate goals. While these approaches may all form parts of a practical solution, the most practical one in terms of achieving a compromise acceptable across conceptualizations of separated powers, is the last one. Premised on a deliberative conception of the role of courts and the separation of powers, this last approach increases the dialogue between the different branches of government, by decreasing the finality of a court ruling. This way, a court may find a violation of human rights caused by climate change, it may even oblige the legislator to take action, but the determination of the specific measures to be taken is either deferred to the legislator or negotiated in a deliberative procedure between the parties. Such an approach has advantages and disadvantages for both sides of the democracy-human-rights-spectrum. For critics of judicial engagement this means that the court can still rule on climate cases, which consequently limits the legislature's freedom to legislate. However, the deliberative character of the remedy's specification

preserves the freedom of the legislature to act within the frame of the law. Human rights activists on the other hand get a voice in the deliberation on mitigation action both through the impact of the case itself and possibly during the course of the subsequent negotiations. This enables them to advance their cause and hold governments accountable. On the other hand, the remedy developed by or with the legislator may be less effective for the protection of the plaintiff's rights, thereby toning down the impact of the ruling on human rights protection. However, the fact that courts have to abide by their institutional limitations, necessarily means that the effectiveness of human rights protection must be limited to some degree by the legislator's freedom. This is normatively indispensable, but it is also in the interest of human rights protection. Safeguarding the rule of law is not only an end in itself, but indispensable for a sustainable human rights protection. Therefore, in the same way that strategic litigation aims for interests beyond the individual case, exercising some degree of restraint serves an interest well beyond the specific case at hand. Democracy and human rights are not mutually exclusive alternatives, instead they depend on and reinforce each other. Viewing the branches of power as actors in the deliberation process, permits courts to enhance, rather than limit democracy.

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