

Governing by Nudging: A Critical Inquiry into Liberty and Equality

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ABSTRACT

This paper aims to bridge the ethical and constitutional perspectives on nudging to shape a framework for assessing the legality of behavioral interventions in contemporary constitutional states. The first part outlines the broad ethical debate surrounding nudging, clarifying the terms in which ethical and political philosophers have traditionally criticized it. Particular attention is given to competing conceptions of autonomy in the literature and to the distinct normative status of informative nudges. The second part explores which ethical critiques can be translated into a constitutional argument. The authors argue that nudges operating within rights-protected areas – where strong conceptions of autonomy have been codified – should be treated as interferences requiring compelling constitutional justification. They further propose that well-established legal tools, such as the proportionality test, must be reinterpreted to account for the specific nature of nudging. Finally, drawing on constitutional traditions, the paper advances the idea that a broader critique of nudging can be grounded in the principle of equality, given the structurally unequal effects of nudges depending on the individual characteristics of those targeted – an issue largely undertheorized in both ethical and legal debates.

L'articolo combina la prospettiva etico-giusfilosofica a quella costituzionalistica per offrire un contributo alla definizione di un *framework* di valutazione della legalità dei *nudge* negli Stati costituzionali contemporanei. A tal fine, la prima parte ricostruisce l'ampio dibattito etico sul *nudging*, chiarendo i termini in cui la riflessione morale e filosofico-giuridica lo ha generalmente criticato. Particolare attenzione è dedicata alle diverse concezioni di autonomia presenti nella letteratura e allo specifico statuto normativo dei *nudge* informativi. La seconda parte esplora quali problemi etici possano essere riconfigurati come questioni costituzionali. Gli autori sostengono anzitutto che i *nudge* operanti in aree protette da diritti – in cui sono state positivizzate concezioni forti di autonomia – dovrebbero essere trattati come interferenze che richiedono una giustificazione costituzionale. In questo contesto, inoltre, anche dottrine consolidate, come il test di proporzionalità, dovrebbero essere ristrutturare per tenere conto della specifica natura del *nudging*. Infine, dato che i *nudge* tendono ad avere una efficacia in concreto disuguale a seconda delle condizioni personali dei destinatari, è avanzata l'idea, finora poco esplorata in letteratura, che alcuni limiti costituzionali più generali al *nudging* possano essere derivati dal principio di eguaglianza.

KEYWORDS

nudge, autonomy, fundamental rights, liberty, equality, vulnerability

nudge, autonomia, diritti fondamentali, libertà, eguaglianza, vulnerabilità

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1. *Introduction*

Nudge theory has increasingly attracted attention as a framework for shaping behavior and designing large-scale public policies. Richard Thaler and Cass R. Sunstein advocate for nudging as a form of liberal paternalism, enabling institutions to guide individuals toward outcomes that enhance their well-being – drawing on insights from behavioral science – while preserving their freedom of choice¹.

Despite its wide diffusion, nudge theory has been subject to persistent criticism for its alleged incompatibility with the principle of individual autonomy, which lies at the core of constitutional theory. Nudges operate by exploiting non-reflective cognitive processes – automatic, intuitive, and often unconscious mechanisms – thereby steering individuals’ behavior without engaging their deliberative faculties. From a constitutional perspective, such interventions risk reducing citizens from autonomous rights-bearers to mere objects of policy design, insofar as they diminish the individual’s capacity for conscious self-determination. If autonomy is understood, in line with much of ethical and constitutional doctrine, as the ability of persons to exercise control over their choices through reflective endorsement of preferences, nudges appear to compromise this very capacity. The risk is that individuals may be induced to adopt courses of action they would not otherwise have taken, absent the external influence, thereby raising serious concerns about the preservation of agency and the authenticity of consent within a constitutional democracy.

Our central argument is that, in much of the prevailing discourse on nudging, legal analysis tends to accord insufficient attention to the ethical objections raised within philosophical scholarship. We argue that a specific risk associated with nudges is their heightened likelihood of going unnoticed and remaining beyond the critical scrutiny of citizens, more so than traditional policy instruments. Unlike conventional measures such as fines or regulations, nudges are frequently embedded in subtle ways within complex decision-making environments, rendering it unreasonable to assume that citizens possess the requisite knowledge or expertise to identify them. More significantly, even when individuals are able to discern “particular features” of their environment, they may nevertheless be unable to ascertain whether these constitute deliberate nudges or merely incidental characteristics. Moreover, the article underscores that mere awareness of a policy’s existence constitutes a fundamental precondition for the realization of an informed public debate. Nevertheless, even in circumstances where nudges are transparently disclosed, the problem of citizens’ unawareness of morally salient information endures. The claim that such information ought to be made available does not imply that every citizen must, in all circumstances, acquire comprehensive knowledge of it; rather, it requires that individuals be granted the opportunity to

* Sections 1 and 4 represent a collective effort by the Authors. Sections 2, 2.1, 2.2 were authored by S. Zullo, while Sections 3, 3.1, 3.2 by P.F. Bresciani. Overall, this work is the product of a close collaboration, combining the authors’ complementary expertise.

¹ THALER, SUNSTEIN 2021; SUNSTEIN 2014.

access and examine it if they so choose. When applied in practice, these difficulties are further compounded by social inequalities, as individuals differ in their capacities for awareness, understanding, and critical evaluation.

We argue that these issues take on particular importance within contemporary constitutional theory, inviting reflection on how existing constitutional frameworks may be mobilized to confront them.

The argument unfolds as follows. Section 2 examines the principal claims advanced by proponents of nudging and engages with the core ethical issues concerning the conditions necessary to safeguard individual autonomy. This discussion proceeds on the assumption that autonomy is not equally distributed across individuals. Section 3 then turns to the implications of nudging for the legal domain within contemporary constitutional theory, exploring how – and to what extent – moral critiques of nudging can be framed in the constitutional discourse, particularly in light of the fundamental values of liberty and equality.

2. *The Notion of Autonomy in Nudge Ethics: An Overview*

Nudges are regarded as effective forms of influence that maintain individuals' autonomy while bypassing their deliberative reasoning processes². Nevertheless, ongoing debates about what it truly means in a nudge world³ to preserve autonomy raise a critical ethical and normative question: can interventions that engage automatic cognitive mechanisms genuinely uphold autonomy in a morally meaningful way for evaluating actions and policies?

This issue is especially significant because one of the most frequently debated ethical concerns in the literature is that nudges may infringe upon individual autonomy.

The concept of autonomy adopted in this analysis aligns with that commonly used in discussions on the ethics of nudging – namely, autonomy understood as freedom of choice, personal agency, and self-determination⁴. Autonomy, understood as freedom of choice, entails having access to meaningful alternatives without being compelled to choose a specific option, adopting a negative conception of liberty – defined as the absence of control, pressure, or coercion⁵. Au-

² According to Sunstein and Thaler, the ability to influence behavior in these ways is based on a division of mental processes, inspired primarily by the work of Kahneman and others on the dual nature of psychological processes and the structure of the mind. Sunstein and Thaler have categorized nudges into two groups, corresponding to the division of psychological processes into fast, parallel, automatic, associative processes that require little effort – what is known as “System 1” – and slow, controlled processes that require effort, which make up “System 2”. Based on this distinction, we can differentiate between nudges that exploit the unintentional processes of System 1 and those that instead enhance individuals' reflective and self-control capacities. For example, nudges of the first type include interventions that take advantage of decision inertia and status quo bias – people's tendency to stick with familiar choices or avoid changing a given situation, even when doing so might be beneficial. Choice architects can act by setting the more rational or beneficial option as the default, anticipating that the individual is unlikely to change it. Other examples involve leveraging the framing effect – that is, the tendency of individuals to react differently to the same information depending on how it is presented – or the use of explicit imagery to make certain information more salient (e.g., the design of cigarette packages intended to raise smokers' awareness of the harms of smoking). Nudges of the second type help individuals translate their plans into concrete decisions and actions, avoid falling into traps associated with weakness of will, or better understand information about certain products or situations, thereby enabling them to make more rational choices. See THALER, SUNSTEIN 2021, 19-22; SUNSTEIN 2016, 26-27. For more on Systems 1 and 2, see KAHNEMAN 2011.

³ See WALDRON 2014.

⁴ VUGTS, VAN DEN HOVEN, DE VET, VERWEIJ 2020. Sunstein argues that autonomy is more effectively protected when the range of available choices is thoughtfully limited. In this view, autonomy and freedom of choice are not the same. Gerald Dworkin, before Sunstein, drew this distinction: he defined freedom as the capacity to act on one's desires, provided that meaningful options are accessible and not restricted – even in part – by other individuals or social institutions. Autonomy, by contrast, refers to the capacity for self-determination. See DWORKIN 1988.

⁵ BERLIN 2017.

tonomy is also understood in terms of agency, which involves the capacity to reason, engage in critical reflection, and make deliberate choices. Being autonomous, in this sense, means not only having access to options and being free from external interference, but also having the ability to evaluate those options and act upon them in pursuit of one's personal goals⁶. Unlike the first conception, which focuses on external conditions and freedom from coercion, this view highlights the internal psychological processes of individuals, stressing the importance of mental capacities such as deliberation, critical reflection, and the ability to reason about one's own preferences. Critics argue that by doing so, nudges bypass individuals' capacity for reasoning, thereby treating people not as reflective agents but as manipulable subjects, ultimately diminishing their sense of control and agency⁷. Luc Bovens argues: «there is something less than fully autonomous about the patterns of decision-making that Nudge taps into. [...] we are not fully in control of our actions»⁸. An example of this argument is given by a specific category of nudges: *default options*⁹. When presented with a choice, defaults are the alternative that the chooser ends up with if they take no action or make no active decision, so it is the option that «will obtain if the chooser does nothing»¹⁰. For example, in some countries, individuals are considered organ donors by default, while in others, they are not. The establishment of a default qualifies as a nudge insofar as it preserves individuals' capacity for choice while nonetheless exerting a substantial influence on the option most are likely to adopt. This influence may be explained either by cognitive inertia or by the perception that the default embodies an implicit normative recommendation. Consider, for instance, Frank Furedi, who contends that autonomy must be defended from a growing force of nudgers, asserting that their aim is to deprive individuals of the ability to make wrong choices, thereby reducing them to something less than genuine agents of choice¹¹. In Furedi's perspective, a society increasingly shaped by nudging erodes individual responsibility, weakens the ability to make moral judgments, and endangers people's moral autonomy.

Scholars, such as Bart Engelen, refer to the idea that an agent is rational when they are able to think and reflect clearly as “process-rationality”¹², so that a person can be considered rational when they successfully achieve their intended goals. And while some of these interventions clearly maintain freedom of choice, certain scholars argue that others fall short¹³. From their perspective, protecting freedom of choice involves more than merely avoiding overt coercion; it also requires respecting individuals' ability to exercise control over their own judgments and decisions.

This raises an important question: in what sense do nudges truly preserve autonomy and liberty as freedom of choice?

Thaler and Sunstein defend nudging as a form of “libertarian paternalism” – a public policy tool that allows institutions to guide individuals toward welfare-enhancing outcomes without restricting their freedom of choice. On one hand, they argue that nudges preserve freedom of choice because they leave all existing options intact. On the other hand, they also point to a more substantive view, suggesting that nudges can actively protect and support individuals' autonomy in the decision-making process. If they adopt the first view, a broad range of influences could be classified as nudges, giving policymakers strong justification for using them as regulatory tools. Conversely, if Thaler and Sunstein endorse the second, more substantive interpretation, nudges gain stronger moral credibility – but at the cost of narrowing their applicability, as fewer interventions would meet the more rigorous standards needed to qualify as genuine nudges. In relation

⁶ HANSEN, JESPERSEN 2013; GLOD 2015.

⁷ SAGHAI 2013, 488; see also NOGGLE 1996.

⁸ BOVENS 2009; CONGIU, MOSCATI 2022.

⁹ MACKAY, ROBINSON 2016.

¹⁰ THALER, SUNSTEIN 2021, 83.

¹¹ FUREDI 2011.

¹² ENGELEN 2019.

¹³ HAUSMAN, WELCH 2010; VUGTS et al. 2020; NOGGLE 2018.

to these two interpretations and the question of autonomy, it is not feasible in this context to examine all forms of nudges. Accordingly, our analysis will be limited to two specific types: the framing effect and the use of default rules. The exploitation of the framing effect consists in presenting information using the formulation most likely to induce a specific behavior, whereas an alternative formulation – though conveying the same informational content – would not produce the same effect. Default rules operate in a similar way but exploit the human tendency toward inertia. A well-known example is the use of default rules in structuring retirement plans in the United States. From the perspective of choice architects, the most “rational” approach to pension fund enrollment consists of the automatic inclusion of individuals in a plan with predetermined contribution rates and investment allocations. At the same time, individuals retain the freedom to withdraw from the plan at any moment by exercising their right to opt out. In this light, it becomes evident that both framing effects and default rules operate as instruments that shape individual decision-making while formally preserving freedom of choice. However, precisely because they exploit predictable cognitive mechanisms, such as inertia or sensitivity to wording, they raise important ethical and legal questions: to what extent is it legitimate to steer individual decisions by leveraging cognitive vulnerabilities? How can default rules and the use of framing effects be considered admissible in terms of their impact on individual autonomy? Choice architects aim to create what can be called a “psychological salience” – that is, a salient feature of a particular perceptual state that has the power both to direct the agent’s attention toward a specific element and to motivate the agent to act in a certain way¹⁴.

2.1 *The “Nudge Agenda”*

Thaler and Sunstein contend that nudges respect autonomy – understood as freedom of choice and agency – because they do not alter the available set of options. A nudged individual retains full access to all available options and is still therefore free to choose as they wish. Nudges influence individuals’ decisions by modifying elements of the context in which choices are made – commonly referred to as the choice architecture. The nudges that typically draw autonomy-based criticism from opponents of government intervention are known as “System 1” nudges. These rely on or activate cognitive heuristics – (quasi-)automatic mental shortcuts – that individuals use to conserve their limited cognitive resources instead of engaging in deliberate, reflective thinking. Critics contend that nudges steer individuals toward particular choices and outcomes, which can render them unacceptably paternalistic and, in some cases, even manipulative¹⁵. In many instances, the individual being influenced cannot easily opt out of the structure created by the “choice architect”, as nudges frequently reshape the perception of available options – making some appear more attractive or others less so – without engaging the person in active or conscious deliberation. As a result, one way to refine our understanding of nudges is to explicitly introduce a condition for preserving freedom of choice, as *substantial noncontrol*¹⁶. This condition ensures that the individual preserves the capacity to resist the influence with relative ease, should they wish to do so. Nevertheless, this gives rise to a further question: what is the precise meaning of the claim that nudges may undermine individual autonomy? Could they, under certain conditions, be construed as a form of manipulation?

Addressing whether nudges are genuinely designed to influence behavior while still safeguarding individual freedom of choice is a question that holds significance not only from an ethical standpoint but also within the legal framework of fundamental rights and constitutional guarantees. Sunstein explores more deeply the ways in which governments use nudges to influence

¹⁴ NOGGLE 2018.

¹⁵ HANSEN, JESPERSEN 2013.

¹⁶ FADEN, BEAUCHAMP 1986.

citizens. He observes that «although nudges are commonly employed by businesses, charities, and self-help figures to shape behavior, their use by the State raises distinct ethical concerns»¹⁷. Thus, the core question guiding our analysis mirrors the one examined by Sunstein: how can we determine whether a government's attempts to influence its citizens are ethically justified?¹⁸

Nudges can take many forms – such as default options, information disclosures, and warning messages – and can be applied across a broad range of areas, including healthcare and retirement planning¹⁹, and they are «choice-preserving and low-cost tools»²⁰. Depending on the context, the “right direction” may refer to choices that promote individual well-being, support public health, encourage financial security, or serve other socially beneficial outcomes. Depending on the context, the “right direction” might involve avoiding harm to an individual, providing a personal benefit, or enhancing overall social welfare. A notable example is the GPS system, which not only serves as a practical instance of a nudge – guiding individuals toward a desired destination – but also functions as a broader metaphor for the concept of nudging itself²¹: «A GPS – like many other kinds of nudges – does not tell people their desired destination but instead suggests a route, which they are free to reject, that can get them to where they want to go»²². The GPS metaphor is fundamentally grounded in a core principle of nudging: people are prone to error and often act against their own long-term interests. Human beings can be impulsive and shortsighted²³, which, as Sunstein explains, leads to «behavioral market failures, that occur when people make decisions that reduce their own welfare. Research shows that people make self-defeating decisions under predictable sets of circumstances – when decisions test our self-control, when decisions are complex or difficult, when decisions do not provide the opportunity for us to learn from our previous choices, or when decisions are infrequent or unfamiliar»²⁴.

Sunstein explains that some nudges work because they *inform* people, others work because they *make certain choices easier*. He explains that default options take advantage of the human tendency toward inertia – they become the choice people make when they do nothing: «Some nudges, such as *default rules*, work because of the power of inertia and procrastination»²⁵. And given the seemingly limitless opportunities to implement nudges and the wide array of strategies available to policymakers, Sunstein provides several examples illustrating how nudges can be employed in public policy²⁶. Using this distinction, it becomes clear that default rules are among the few – but widely used and hotly debated – examples of nudging policies that are embedded within legal

¹⁷ See SUNSTEIN 2016, 13-15.

¹⁸ SUNSTEIN 2016, 13-15.

¹⁹ See THALER, SUNSTEIN 2021, 44-45.

²⁰ See THALER, SUNSTEIN 2021, 20-21.

²¹ See SUNSTEIN 2016, 27-28.

²² See SUNSTEIN 2016, 55-56.

²³ SUNSTEIN 2014.

²⁴ Behavioral market failures may occur under these conditions because of normal human cognitive functioning. Sunstein refers to those choice architectures that do not rely on cognitive or decisional limitations as “educative nudges”, thereby introducing a distinction that is not merely descriptive. Influences that enhance deliberative and executive capacities are generally viewed as morally unproblematic, since they engage rational faculties. In contrast, non-educative nudges exploit non-intentional processes which, in many situations, lead to suboptimal responses to environmental challenges and, because they bypass rational scrutiny, are considered problematic: «Other nudges are meant to help people without increasing their knowledge or understanding; default rules have this characteristic» (SUNSTEIN 2016, 32-34).

²⁵ See THALER, SUNSTEIN 2021, 26-27.

²⁶ Well-known nudges include requiring chain restaurants to post calorie labels, placing graphic warnings on packs of cigarettes, and automatically enrolling people in savings plans but giving them the ability to opt out. Nudges that engage System 2 deliberation, like the calorie labels or financial information, and nudges that exploit System 1 automatic thinking, like the graphic cigarette warning or the automatic savings-plan enrollment. Sunstein calls nudges that trigger System 2 “educative nudges” or “boosts”.

systems. Examples include so-called “opt-out” options, such as automatic enrollment in employee retirement savings plans or default rules for organ donation. These defaults are designed to influence behavior effectively by leveraging status quo bias, the tendency to place greater value on options perceived as the default²⁷. In contrast, other nudging strategies – such as simplification, appeals to social norms, increasing ease and convenience, providing disclosures or warnings, and reminders – do not fall within the scope of the legal system. This means they are not codified by law, and the behavioral change they produce occurs outside formal legal mechanisms. Since a large number of individuals tend not to take action, defaults can carry significant influence and produce powerful outcomes²⁸:

«A default nudge works by designating one course of action as the default; it establishes what will happen unless the decision-maker actively makes a change. For example, the choice architect (the person designing the choice) might change from an “opt-in” regime to an “opt-out regime”. That is, if choosers do not desire the preselected course of action, they will need to opt-out of it for it not to happen. To stick with the purchase example theme, think of what the checkout page of an online shop looks like. Often when you select a shipping method, there will be a choice between “environmentally friendly” or “standard” shipping. If sellers want to encourage the green choice, they can make this option the default course of action by preselecting it (subject to opt-out) on the screen. If customers do not make the switch to standard shipping, green shipping will be chosen. This is a default nudge»²⁹.

Nudges are considered non-normative primarily because most of them do not form part of a legal system and, therefore, do not generate obligations through legally binding requirements to act in a specific way. Even in cases where nudges are embedded within legal frameworks – such as the aforementioned examples of default (opt-out) rules – they do not impose a duty to act, but rather influence individuals’ circumstances without mandating a particular response. Additionally, nudges shape behavior in a non-cognitive manner, as their effectiveness relies on automatic, non-reflective reactions to elements of the choice architecture, rather than on deliberate reasoning or conscious decision-making³⁰. The core focus of this implication is that nudges steer individuals toward particular choices and outcomes, making them objectionably paternalistic, and that such methods distort or undermine genuine decision-making, what Martin Wilkinson describes as a “perversion of the decision-making process”, or in other words, that nudging is manipulative³¹. In both cases, critics claim the choice architect is not sufficiently respecting the chooser’s agency and may make the chooser worse off and they contend that nudging fails to respect individual agency adequately and may ultimately harm those being nudged. Concerning paternalism, Sunstein recognizes that whenever one person influences or decides for another, we might be concerned about unacceptable paternalism³²:

«Even if the influence results in an outcome that is, in fact, beneficial to Person B, some anti-paternalists argue that Person A’s behavior is problematic by virtue of their deciding for the other, since that simply is none of their business. The idea of interfering with the liberty or autonomy of Person B raises

²⁷ TVERSKY, KAHNEMAN 1991.

²⁸ See SUNSTEIN 2016, 140-147.

²⁹ See MICHAELSEN, SUNSTEIN 2023, 5.

³⁰ See LEPENIES, MAŁECKA 2015, 432.

³¹ WILKINSON 2013, 345.

³² In this case we have a narrow account of paternalism, that occurs whenever person A interferes with the liberty or autonomy of Person B without B’s consent, to influence or require B to make a choice or end up in a situation deemed by A to be in the interest of B, and a broader account, that occurs whenever Person A influences Person B, so as to steer Person B away from a choice that Person B would otherwise make because Person A believes that another choice is in the interest of Person B. See DWORKIN 2005, 305-331.

questions and puzzles, as does the idea of influences: Is it paternalistic to provide truthful information? Many people do not think so. Is it paternalistic to forbid people from making a decision that affects only themselves? Many people think so. Is a warning paternalistic? A GPS nudges; is it paternalistic? We think so, but many people would not agree; What about a reminder? Automatic enrollment in savings programs? Placement of healthy foods in highly visible, accessible places in a grocery store? With these questions in mind, some people would limit paternalism to cases of mandates and bans. Others would emphasize the state of mind of Person A; is Person A deeming herself superior or being disrespectful to Person B, and if so, in what way? And even if some action is paternalistic, it does not necessarily follow that it is wrong. If Person A is acting paternalistically toward Person B, there might be no ethical problem if, for example, Person B's life is being saved. Even if we bracket the hardest issues, it should not be hard to see how some nudges might be questioned as unacceptably paternalistic. In a typical nudge scenario, a choice architect will have decided what course of action is to be encouraged by a nudge, and the intervention will attempt to influence the object of the nudge in the choice architect's preferred direction. Our own view is that most nudges do not, in fact, run into such objections»³³.

For instance, one suggestion is the creation of a kind of Bill of Rights for nudging, which would include requirements such as full transparency. Additionally, it could be required that nudges be employed only in ways that leave individuals “better off, as judged by themselves”, ensuring that personal well-being and self-assessed interests remain central to the design and application of such interventions. If a nudge meets this criterion, it may be considered a legitimate form of “means paternalism” – one that fully respects individuals' own goals and values. In this view, the decision-maker's personal objectives hold ultimate authority in assessing the appropriateness of a nudge. The emerging field of behavioral welfare economics is increasingly engaging with these foundational questions, seeking to understand how policy interventions can support individuals' well-being without overriding their autonomy.

Manipulation, by contrast, principally has to do with improper or undue influence on the process by which a decision is made, and involves some underhand interference with the ways in which people see their options. In other words, manipulation is a threat to autonomy because it leads people to choose differently from how they otherwise would have, and for reasons of which they may be unaware. Here, Sunstein says:

«For instance, people are often highly susceptible to what other people do or approve of (that is, of social norms) but may fail to realize the extent to which such social information affects their behavior. On one view, the use of social norms to nudge people might therefore be thought to be unacceptably manipulative and the same might be said about a default rule of which people are unaware. There is also a distinctly welfarist objection to manipulation, rooted in Mill's work on liberty. Manipulators do not allow people to choose for themselves; they displace people's own choices by inclining them, without consent or understanding, in directions favored by the manipulators. If choosers know what is in their best interests (for epistemic reasons, emphasized by Mill), then manipulators will lead choosers in directions that will reduce rather than increase their welfare»³⁴.

Full transparency might weaken the objection that nudges are manipulative, since decision-makers will be equipped to counter the attempted influence. How openly and “directly” transparent information about the intervention ought to be in order to avoid manipulation has been largely debated. Some have viewed the expectation that individuals should be able to identify every single nudge as excessive; nonetheless, this assumption has largely guided empirical research on transparency and nudging. A final response to concerns about manipulation is that nudges should be

³³ See MICHAELSEN, SUNSTEIN 2023, 19.

³⁴ See MICHAELSEN, SUNSTEIN 2023, 20- 22.

evaluated on a case-by-case basis. For example, risk information, taken on its own, is rarely considered manipulative. A truthful warning is not manipulative in principle, as it does not undermine people's ability to reason and make choices. However, some nudges present more nuanced ethical challenges. Consider, for example, the deliberate placement of certain food items in highly visible spots within a grocery store to increase the likelihood of their selection. While this strategy may not amount to overt manipulation, it could still be seen by some as ethically questionable or as subtly crossing the line into manipulative influence³⁵.

Ultimately, Sunstein, in responding to such objections, emphasizes that not all concerns about manipulation are equally compelling and that a balanced, context-sensitive approach is necessary when evaluating the ethics of nudging: «Choice architecture is inevitable, and so it is in a way pointless to complain about it»³⁶.

Sunstein's framework – like much of the literature on nudging – rests on a crucial, often implicit assumption: that people are “nudgeable”. In other words, they are open to influence.

However, the concept of being nudgeable assumes that individuals have access to meaningful choices and the ability to act upon them. This raises a key question: which forms of choice architecture interfere with an individual's self-determination or autonomy? The core concern with nudging is not merely the preservation of freedom of choice, but the potential limitations and intrusions on personal autonomy. Can transparency through disclosure alone effectively protect liberty as freedom of choice from manipulation? And if so, how is autonomy truly preserved?

As we will explore in Section 3, nudges do not affect everyone equally. In some contexts, they may disadvantage the most vulnerable individuals – either by excluding them from the intended benefits or by causing them direct harm.

2.2 *In Defence of Autonomy*

Given this context, we focus primarily on the conceptions of autonomy used in the nudge literature itself in order to clean up the conceptual confusion that pervades it.

In the current ethical debate, we have two strands of criticism that challenge the idea that nudges respect autonomy. The first line of criticism claims that nudging conflicts with the republican concept of freedom. At the heart of this notion is the idea of arbitrary power, which Philip Pettit defines as the capacity to intrude upon, or exert control over, the range of choices that another agent is otherwise in a position to exercise³⁷. Till Grüne-Yanoff applies this framework to government nudges and libertarian paternalism, arguing that such policies enable the state to exercise arbitrary power over citizens, thereby infringing upon their autonomy³⁸. The ethical concern he raises is that, through the deployment of nudges, governments may shape citizens' choices at their discretion, thereby placing individuals in a subordinate position and, in doing so, infringing upon their autonomy³⁹. Of course, we recognize the risk of idealizing autonomy as an unattainable ideal – a flawless form of decision-making grounded entirely in deliberate reflection. Expecting complete independence and fully reflective choices is clearly unrealistic, given that we are always influenced to some extent. Holding autonomy to such an elevated standard would

³⁵ In this context, Robert Baldwin identifies three distinct “degrees” of nudging. First degree nudges aim to support individuals' reflective decision-making by offering tools such as information. Second degree nudges aim to steer individuals toward desirable outcomes, while formally leaving the available options unchanged. A common example of this type is default rules with opt-out mechanisms, which rely on behavioral inertia. Third degree nudges are like those that shape decisions and preferences in a certain way and are “resistant to unpacking”. This is ethically problematic because individuals may not even realize they are being nudged – or how. See BALDWIN 2014, 831-857.

³⁶ See MICHAELSEN, SUNSTEIN 2023.

³⁷ PETTIT 1996.

³⁸ GRÜNE-YANOFF 2012.

³⁹ See HAMILTON 2018.

render it incompatible with the way we acknowledge autonomy in everyday life. It would also overlook the needs of those who struggle with full autonomy – such as individuals with weak will or heightened vulnerability – leaving them unsupported. Moreover, Harry Frankfurt’s example of the “unwilling addict” illustrates that an individual may possess autonomy – in the sense of being capable of setting their own ends and desiring not to smoke – yet, in the absence of self-mastery, fail to realize those ends⁴⁰. On the other hand, people can lack autonomy, for example, when they are completely ambivalent and unable to make up their mind and determine what their whole-hearted goals are. We know that supermarkets are heavily nudged choice environments, with companies using all sorts of marketing techniques to sell specific products. However, most of us manage to stay within the perimeters of our self-determination and avoid alienation. Bart Engelen and Thomas Nys have introduced the concept of “perimeters of autonomy” to refer to the set of identifications, concerns, and commitments that make us who we are. According to the authors, if the nudge changes behavior within this spectrum of possible decisions, it does not violate the agent’s perimeters of autonomy. As if to say that one remains within the bounds of one’s concerns and identifications, the choice is not manipulated by the architecture but genuinely belongs to the agent⁴¹. This claim gives us a realistic idea of what it means to be a self-determining agent. On this account, we position and sometimes reposition the perimeters of our autonomy. Although nudges may at times alter behavior – given that individuals might have acted differently in their absence – this does not necessarily negate autonomy, since one may continue to act autonomously across a spectrum of options provided that such options remain situated within one’s broader parameters of self-determination. This conception of autonomy alleviates many of the concerns that nudging techniques inherently compromise personal freedom. From this perspective, nudges cannot be regarded as an unequivocal violation of individual autonomy. However, defending autonomy alone does not fully address the issue of manipulation. Some nudges may still be manipulative – and such manipulation can be morally troubling. In our perspective, manipulation in these cases occurs through, and at the cost of, individual’s autonomy. That is, manipulation exploits the leeway granted by the boundaries of one’s autonomy – someone may intentionally use what you value or care about to influence your behavior⁴².

In connection with this point, the second major challenge to the claim that nudges respect autonomy centers on the idea that nudges are problematic when they are not “easily resistible”⁴³. According to Yashar Saghai, «an influence does not sufficiently preserve freedom of choice if we are unable to easily resist it»⁴⁴. The easy resistibility criterion thus demands not only that nudges maintain the full range of available options, but also that individuals have a real opportunity to resist the influence being exerted. The easy resistibility criterion holds that nudges must not only preserve the full range of available choices but also provide individuals with a real and accessible opportunity to resist their influence. If a nudge is so forceful that it significantly compromises a person’s ability to make an independent decision, it infringes upon autonomy understood as free-

⁴⁰ See FRANKFURT 1998.

⁴¹ ENGELEN, NYS 2020, 137-156.

⁴² See GALLETTI, VIDA 2018, 65-153.

⁴³ In this regard, Christman’s theory of autonomy proves especially insightful. While there are many competing views on personal autonomy, a common thread among several is the emphasis on an individual’s control over the formation of their preferences. From this standpoint, autonomy is less about the specific choices made and more about the process by which those choices are developed – specifically, whether the individual maintains meaningful control over that process. To bring clarity to this idea of control, Christman outlines two essential conditions for personal autonomy: (i) A person A is considered autonomous in acting on a preference P if A did not, or would not have, resisted the development of P when consciously attending to its formation; and (ii) this lack of resistance must not have taken place (or would not have taken place) under circumstances that compromised the individual’s capacity for self-reflection. See CHRISTMAN 1991, 11 ff.

⁴⁴ SAGHAI 2013, 488.

dom of choice – even if the choice set remains formally unchanged. This critique can be reframed as the claim that nudges are either effective or easily resistible, but not at the same time. From this perspective, a line of reasoning presented by Chris Mills questions whether nudges can achieve behavioral influence without compromising individual autonomy⁴⁵. He argues that choice architects, who define the distinctiveness of nudging in terms of its reliance on unreflective, intuitive reasoning, face a trilemma: a nudge is likely to be either ineffective, effective through ethically questionable means, or effective in a way that is conceptually indistinguishable from other evidence-based policy tools⁴⁶. A nudge will be either willfully unavoidable, indistinct from other policies, or ineffective at securing policy outcomes. If nudges are to be treated as a distinct form of policy intervention, they either fall short of their promise as inexpensive and effective tools – because they are less impactful than often suggested – or they depend on mechanisms that blur the boundaries between nudging and more traditional, and potentially more ethically troubling, forms of influence. Furthermore, nudges may be more restrictive than commonly assumed, as they are often harder to consciously resist than proponents claim.

Mill's perspective is closely connected to the concern that nudging may erode democratic institutions, which must therefore be subjected to the full range of safeguards provided by the rule of law. Governmental nudges – along with their justification through libertarian paternalism and the broader use of behaviorally informed policies – have been criticized for weakening essential pillars of democracy, such as public deliberation and political legitimacy⁴⁷. Nudges have been criticized as undemocratic due to their implementation without adequate public deliberation or open discussion. Critics argue that nudges lack political legitimacy, as there is often no transparent or participatory process in place for their evaluation or approval⁴⁸. Policy makers can independently decide to implement nudges «without putting effort into cumbersome legislative and deliberative processes as they do not require political support, parliamentary procedure and debate»⁴⁹. They argue that for social norms to be legitimately imposed on everyone, transparency and public deliberation are essential prerequisites. An additional benefit of deliberation is that it addresses concerns related to limited epistemic access, allowing diverse perspectives and knowledge to inform the development and justification of such norms⁵⁰.

Robert Lepenies and Magdalena Malecka address this concern by arguing that the legal system – a structured body of codified, publicly accessible, and openly debated legal norms – can serve as a social institution that enhances the visibility and accessibility of nudges⁵¹. By embedding nudges within the legal framework, their non-normative and non-cognitive effects on citizens' behavior can be reduced. This integration encourages individuals to reflect on the influences they are exposed to and enables public debate about the (legal) foundations and legitimacy of such influences. In response to this line of critique, Sunstein argues that nudges are often highly salient and, as a result, tend to be transparent and subject to public debate. He acknowledges, however, that nudges can be particularly concerning when they rely on unconscious cognitive processes, emotions, or both – what is referred to as System 1 thinking. Nonetheless, Sunstein maintains that because System 1 processes are an inescapable part of human decision-making, nudges should not be dismissed solely on the basis that they operate through these mechanisms. If such interventions are publicly disclosed and justified on their merits, he contends, they should remain within the bounds of legitimate policy tools.

⁴⁵ MILLS 2018, 395-414.

⁴⁶ MILLS 2018, 410.

⁴⁷ EWERT 2020.

⁴⁸ IVANKOVIC, ENGELEN 2019, 43 ff.

⁴⁹ LEPENIES, MALECKA 2015, 430.

⁵⁰ SCHIAVONE et al. 2014, 103-113.

⁵¹ LEPENIES, MALECKA 2015, 432 ff.

This reference to nudges being public should however be discussed more critically. In *Nudge*, Thaler and Sunstein refer to John Rawls's publicity principle as one of their guiding principles, arguing that this principle is a good guideline for constraining and implementing nudges⁵². As Lepenies and Malecka argue, Rawls did not intend that publicity criterion to apply to all policies, but mainly to the first principles of justice⁵³. In a democratic society, citizens must be informed about the moral foundations of coercive laws and the true reasons underlying their social and political arrangements:

«We propose that nudging in the case of default rules should be complemented by a mechanism of the following kind: every time citizens are nudged towards a choice, via default rules which policy makers regard as leading to socially desirable outcomes, rules should stipulate that citizens ought to be required to make an active choice between default or opt-out option. Our second proposal states that in order to address possible abuse of default rules, lawmakers should be held liable for the introduction of default rules that infringe rights or are in other regards violations of the constitutional order. These default rules could be recommended as being valid or invalid by nudging oversight bodies. For example, a quasi-public, quasi-independent nudging ombudsman could be appointed by parliaments. The task of this body would be to represent a broad variety of societal and legal concerns, as well as diverse academic and scientific perspectives, and to oversee the conformity of nudges generally (not just default rules) to constitutional and basic legal principles»⁵⁴.

Such an approach necessitates considering the broader legal and institutional framework within which nudges are deployed. It encourages a more robust discussion about the constitutional boundaries and the normative appropriateness of using nudges in different areas of law, potentially paving the way for a more coherent and principled model of behaviorally informed governance⁵⁵.

In the next section, we will explore why these concerns take on particular significance within the framework of contemporary constitutional theory, and how current constitutional legal systems might be leveraged to address them.

3. *Constitutionalizing a Critique to Nudging*

While the philosophical debate on the ethics of nudging has developed considerably over the last decade, the legal discourse on the subject remains relatively limited⁵⁶.

This is likely due to the widespread view, mentioned earlier, that nudging is, by definition, legally insignificant – at least in most cases. In fact, this holds true for both the broadest and the narrowest conceptions of nudges. The broadest interpretations regard even constitutional provisions as “nudges”, due to their expressive function. For example, by granting individuals the right to express their thoughts, constitutions not only impose legal constraints on public authorities but also help shape the choice architecture of a given society⁵⁷. At this level, however, nudges raise no particular concern for the legal domain, as the idea that law also serves a symbolic function is neither contested nor problematic within contemporary constitutional theory. In contrast, the narrowest conceptions typically refer to nudges that are purely factual in nature and do not in-

⁵² THALER, SUNSTEIN 2021, 244-245.

⁵³ RAWLS 1999.

⁵⁴ LEPENIES, MALECKA 2015, 434.

⁵⁵ See GALLETTI, VIDA 2018, 362-382.

⁵⁶ ALEMANNI, SPINA 2014; ALEMANNI, SIBONY 2015; KEMMERER ET AL. 2016; CITINO, CAMERLENGO 2023; ZELISTRA 2024; ZELISTRA 2025.

⁵⁷ SUNSTEIN 2018, 10.

volve law-making at all. Think of the well-known example of a fly placed in a urinal to improve aim, or the strategic arrangement of healthy and junk food in cafeterias⁵⁸. Nudges of this kind tend to make constitutional arguments appear somewhat disproportionate. Furthermore, even when nudges in the narrow sense are enshrined in law (such as through default rules), the opt-out option makes it difficult to imagine legal claims or trigger litigation, since individuals might lack standing to challenge provisions they can simply opt out of.

Against this backdrop, the few legal scholars who have taken nudges seriously have generally sought to adapt constitutional guarantees – particularly those linked to the rule of law – to this new form of public intervention. Notably, Alemanno and Spina have discussed the difficulties of applying the principles of legality, impartiality, and judicial review, given the informal nature of nudges⁵⁹. More recently, Zelistra has argued for the development of a legal doctrine capable of distinguishing between different types of nudges, in order to identify those policies that ought to be subject to rule-of-law safeguards due to their significant impact on individual autonomy and their close connection to personal identity⁶⁰. According to Zelistra, the very meaning of rule-of-law safeguards should be revised to resolve tensions with nudging – for example, by acknowledging that the principle of formal legality need not necessarily serve the purpose of enabling individuals to respond autonomously to regulation⁶¹.

By redesigning legal frameworks to accommodate nudges within democratic government, this body of literature tends to imply that nudging constitutes a form of governance whose admissibility in constitutional states is generally indisputable. The idea we want to put forward is that, in this common way of discussing nudging, legal discourse tends to minimize the ethical objections raised by philosophers. In fact, the moral critiques developed in Section 2 are highly relevant within the constitutional dimension as well.

In the legal literature, building on arguments from the moral debate, Morag Goodwin has already advanced the idea that a critique of nudging can be grounded in the principle of human dignity, which lies at the core of constitutionalism. In particular, according to Goodwin, governing through nudges may alter our relationship to the institutions that govern us, disrupting our fundamental status as moral agents and political beings⁶².

Here, we aim to develop a similar status-based argument against certain forms of nudging, grounded in the constitutional values of liberty and equality. Our argument does not outlaw nudges outright but instead calls for a strict scrutiny of their justifiability and empirical effects in certain contexts.

On the one hand, nudging calls into question a basic tenet of constitutional rights theory: that individuals must remain free to determine whether and how to exercise or enjoy their rights. Section 3.1 examines this theoretical tension and argues that, in rights-protected areas, nudges should not be regarded as legally insignificant, but rather as interferences that require constitutional justification. To this end, it may be necessary to develop a legal doctrine aimed at protecting individuals from undue pressure to exercise or enjoy their rights – just as they are protected from actions that discourage them from doing so – and to rethink how the proportionality test operates, since it cannot function in the same way as it does for more traditional forms of regulation, given the distinctive manner in which nudges interfere with rights.

On the other hand, even when nudging does not interfere with the exercise or enjoyment of rights, it nonetheless raises a fundamental question of equality before the law. As people are not all equally nudgeable, nudges might disproportionately benefit better-off individuals in society or,

⁵⁸ THALER, SUNSTEIN 2021.

⁵⁹ ALEMANNO, SPINA 2014; a similar approach is also adopted by CASSESE 2016.

⁶⁰ ZELISTRA 2024.

⁶¹ ZELISTRA 2025.

⁶² GOODWIN 2016, 306-307.

even worse, directly harm vulnerable categories⁶³. More radically, the very fact that people are not all equally nudgeable seems to indicate that nudges inherently discriminate against individuals based on their capacity to resist them, which ultimately depends on their personal conditions. Section 3.2 develops the argument that this leads to an unequal distribution of compliant behaviors, disproportionately affecting the most nudge-vulnerable members of society, which is constitutionally problematic.

Both the constitutional critique grounded in freedom in the enjoyment of rights and the one based on the principle of equality rest on the idea that nudges exploit individuals' (variable) automatic responses to push them towards what is presumed to be their good – or, for that matter, society's. As explained earlier, this is generally the case when System 1 processes are involved. Where nudging does not involve this kind of manipulation, but instead merely provides individuals with information to support a free and informed choice, no specific constitutional objection can be raised against its use⁶⁴. In the end, this appears to be the most relevant distinction from a legal perspective: that between nudges and mere informational interventions⁶⁵.

3.1 *The Liberty Argument: Nudges as Interferences with the Freedom to Exercise Rights*

Constitutions guarantee varying degrees of liberty to individuals. In our time, most of this is done through the recognition of fundamental rights, which protect against hindrances to individuals' freedom to make choices about their lives⁶⁶. While different constitutional orders may protect different choices – and the qualification of a choice as a right is often a matter of political conflict (e.g., recognizing or not the right to a self-determined death) – a common feature of constitutional discourse is that, once a right is recognized as such, the law acknowledges a protected space for free decision-making in its exercise or enjoyment⁶⁷.

The point we aim to argue is that nudging endangers this space for free decision-making and does so in a way that traditional forms of regulation typically do not.

Consider nudges in the health sector, where individuals generally enjoy a constitutional right to decide freely whether to undergo medical treatments. Traditional public interventions in this field include both mandatory treatments and public information campaigns. The former, like other coercive measures, eliminates any space for free decision-making in exercising the right to refuse treatment. The latter, by contrast, empowers individuals by providing relevant information to support autonomous decision-making. Offering substantial incentives or imposing significant costs on individuals' choices, though not common in this area, would also be regarded as an interference with constitutional rights and, like mandatory treatments, would require adequate justification. This is because such measures ultimately alter the choice architecture established by the very existence of a constitutional right.

As we described in Section 2, nudges can either act like public information campaigns, empowering individual autonomy by providing information, or like incentive- or cost-based interventions, if they aim to push people toward the choice the nudger thinks is best. According to pro-nudging theorists, what distinguishes nudges is the nature of the push involved, which is said to preserve substantial freedom of choice by avoiding significant incentives or costs. From a fundamental rights perspective, however, what seems really decisive is the fact that – just like

⁶³ ROBERTS 2018, 1047 ff.

⁶⁴ For a similar conclusion in relation to the human-dignity-based critique, see GOODWIN 2016.

⁶⁵ Cf. MICHAELSEN, SUNSTEIN 2023, 2-3.

⁶⁶ WENAR, CRUFT 2025.

⁶⁷ This seems to be a tenet shared by both will and interest theories of rights. Even interest theorists – despite allowing for inalienable rights – generally oppose the forced enjoyment of those rights, and reject the idea that grounding rights in individuals' interests provides a backdoor justification for wholesale paternalism (see, e.g., RAZ 1988, 199).

incentive- or cost-based interventions – nudges tamper with the protected space for free decision-making, even if the interference is quantitatively minor.

Most constitutional orders do not recognize a general freedom of self-determination, making a broad autonomy-based objection to nudging constitutionally untenable⁶⁸. However, all constitutions recognize fundamental rights, which entail a protected space for free decision-making. It is precisely here that the moral critique of nudging gains relevance in the legal domain. And, just as in the moral domain, the decisive question is: what do we mean by “free”? Should we consider any interference in the protected space for free decision-making incompatible with the right holder’s freedom? Or should admissible interferences be limited to those above a certain threshold of significance? Moreover, should that threshold vary depending on personal circumstances, or be based on a general standard?

Within contemporary constitutional theory, not all conceptions of free choice are considered analytically acceptable⁶⁹.

Recently, for example, Pettit has argued that non-frustration theory should not be accepted. According to the non-frustration paradigm – dating back to Thomas Hobbes – a choice is considered free if a person is not hindered from doing what they prefer. In Hobbes’s account, freedom is consistent with both fear and necessity⁷⁰. On the one hand, even a person who pays their debt out of fear of imprisonment should be considered to have made a free choice, since nothing prevented them from not paying. On the other hand, all voluntary actions are free, even if they proceed from some cause (echoing the compatibilist position in contemporary debates on free will).

A similar conception of free choice could permit any pushes on right holders, as long as no coercion is exercised. Even nudges that purposely exploit human cognitive biases would not appear problematic, since freedom as non-frustration concerns itself only with whether behavior aligns with the subject’s perceived will, and not with the causes of personal preferences.

However, not only is such a conception analytically refutable, as Petit has argued, but it also does not align with contemporary constitutional practices.

When assessing violations of fundamental rights, courts generally consider how personal preferences regarding the exercise of those rights have developed. A particularly striking example in this regard is the well-established doctrine of the “chilling effect”. Starting from *Cumpănă and Mazăre v. Romania*⁷¹, the European Court of Human Rights has held that conventional rights can be violated by acts that dissuade individuals from exercising them (e.g., the abstract provision of prison sentences for defamation may itself violate journalists’ freedom of expression because of their deterring effect)⁷². In these cases, individuals remain non-frustrationally free – they could even be acquitted eventually – but the mere fact that fear of legal proceedings and sanctions interferes with their protected space for decision-making in exercising their rights is legally significant and might constitute a violation of such rights.

Overall, the actual functioning of constitutional guarantees aligns more closely with alternative conceptions of free choice, namely non-interference and non-domination⁷³. Non-interference con-

⁶⁸ Cf., for the German case, where Article 2 of the Basic Law guarantees a general right to self-determination LÜBBE-WOLFF 2016.

⁶⁹ PETIT 2025, 71 ff.

⁷⁰ HOBBS 1651, xxi.

⁷¹ ECHR, *Cumpănă and Mazăre v. Romania*, GC, 17 December 2004, §114 ff. More recently see, e.g., ECHR, *Baka v. Hungary*, GC, 23 June 2016, §§160, 167, 173. Within ECJ’s jurisprudence see *Real Madrid Club de Fútbol*, GC, 4 October 2024, §60 ff. («the proportionality of a sanction, any undue restriction on freedom of expression entails a risk of obstructing or paralyzing future media coverage of similar questions. What matters is the very fact of judgment being given against the person concerned, even where such a ruling is solely civil in nature and the sanction imposed is a minor one»).

⁷² A similar doctrine is established in the jurisprudence of the U.S. Supreme Court. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

⁷³ PETIT 2025, 75 ff.

ceptions require that all options be equally available to individuals, excluding any choice from being considered free if it is subject to interference that alters its architecture (through penalties, costs, or misrepresentation of the options). Non-domination conceptions, as mentioned above, go even further: the mere absence of actual interference is not sufficient. For a choice to be truly free, individuals must be protected from even hypothetical interferences through an adequate legal framework.

Insofar as nudges interfere with spaces of decision-making protected by the recognition of rights, a solid constitutional critique grounded in liberty can be raised. If one accepts that fundamental rights always entail the freedom to exercise or enjoy them, and that the idea of freedom must be construed at least in non-interference terms, then nudges – just like other incentive- or cost-based interventions that alter choice architecture within rights-protected areas – appear constitutionally problematic.

This means that nudges in rights-protected areas (apart from those that merely provide individuals with information) should always be considered interferences, regardless of the significance of the pushes they entail, and should therefore require constitutional justification. This form of interference can be legally conceptualized through doctrines such as the chilling effect, though it may also require developing a reversed version of that doctrine to address cases where individuals are pushed to exercise their rights. Positive pushes, in fact, should be considered equally problematic, unless one is willing to functionalize rights for the benefit of society rather than for the individual who holds them⁷⁴. Such a doctrine should protect the negative dimension of rights, including, for example, the right not to undergo medical treatment, not to express oneself, not to join an association, not to vote, and so forth.

Of course, especially in cases where a mandate could be constitutionally justified, nudging might be as well. A constitutional critique grounded in liberty does not rule out nudges as a policy option outright. It simply requires that they be taken as seriously as any other interference with the exercise or enjoyment of fundamental rights, and that courts be allowed to assess their justifiability accordingly.

In this regard, the way nudges interfere with rights is not irrelevant. The fact that nudges formally leave individuals with the possibility to exercise their rights tends to make them appear less intrusive than mandates. This could suggest that, in cases where imposing a mandate would be difficult to justify, a nudge might be more easily accepted. However, scrutiny over their justification should consider that nudges function differently from mandates: they do not directly restrict the exercise of fundamental rights but rather affect the effectiveness of the freedom of choice entailed by those rights. The proportionality test should therefore be framed at this level, and not by comparing nudges with different types of interferences. For example, when it comes to the requirement of necessity, one should ask whether less manipulative measures – such as more

⁷⁴ For rights-theory consequences of this view, see nt. 67. Within the preparatory works of the Italian Constitution, the distinction between the conceptions of liberty traditionally adopted by constitutional theory and alternative conceptions – whereby liberty is framed not as an individual entitlement but as a means to advance collective or societal interests – emerges clearly in the debates on Article 2, where communist, socialist, and (some) catholic framers argued for the latter, explicitly distinguishing it from the idea codified in the 1789 Declaration (see *Prima Sottocommissione della Commissione per la Costituzione*, 1 October 1946: «La Pira dichiara che la sua preoccupazione è stata di dare della libertà un concetto diverso da quello che è alla base della dichiarazione del 1789 [...] È, questo, un concetto negativo della libertà; invece nella Costituzione italiana si vuole introdurre un concetto positivo di questa libertà, il concetto di una libertà finalizzata. Mentre la Costituzione del 1789, e in genere le costituzioni a tipo liberale, parlano allo Stato per limitarne la libertà nei confronti dei diritti imprescrittibili dell'uomo, la nostra Costituzione vuole parlare non soltanto allo Stato, per limitare la sua autonomia circa i diritti della persona, ma anche alla persona, per orientare la sua libertà e limitarla rispetto ai diritti della persona. Quindi la nostra Costituzione dovrebbe parlare contemporaneamente allo Stato, per limitare la sua libertà o meglio per finalizzarla, e alla persona pure per finalizzarne la libertà. [...] Togliatti: Le libertà sono garantite dalla Costituzione, ma debbono essere esercitate in un determinato modo»). In the end, although rights were counterbalanced by duties of political, economic, and social solidarity, the proposal to functionalize liberty did not make it into the final text of the Constitution. See also PALADIN 2008 [1997], 161.

transparent or informational nudges, or nudges that operate more within individuals' "perimeters of autonomy" –⁷⁵ could achieve the same objective. Similarly, with respect to the essential core of the right as a limit to permissible interference, courts should verify whether the nudge preserves a sufficiently substantial space for free decision-making (maybe in terms of effective resistibility), and not whether the minimum substantive content of the right is guaranteed⁷⁶. Only a proportionality test constructed at this level – drawing on the debate outlined in Section 2 – would allow for the constitutionalization of autonomy-based critiques, creating space for legal challenges aimed at assessing how far such behavioral interventions can be said necessary in a democratic society, which is ultimately a matter of constitutional politics.

3.2 *The Equality Argument: Nudges as Interventions with Inherently Unequal Impact*

Even if it has received far less theoretical attention than autonomy-based critiques, a stronger, principled constitutional objection to the admissibility of nudging can be grounded in the principle of equality.

Indeed, nudges are interventions with a structurally unequal impact, because their effectiveness depends on personal characteristics of the nudgees. In particular, factors such as wealth, education⁷⁷, and intellectual capacity or disposition⁷⁸ influence how individuals respond to a given nudge. On the contrary, traditional forms of regulation, such as mandates, generally apply equally to everyone (e.g., a criminal prohibition), which makes hard-paternalistic measures⁷⁹ comparatively preferable from a strictly egalitarian standpoint.

Our argument here does not concern the variability in compliance *per se*, which exists for every form of regulation, but rather the variability in the substantive burden imposed on the nudgees. In this respect, a distinction can be drawn between traditional forms of regulation and nudges, much like the distinction between sanctions affecting personal liberty and those that are pecuniary. A prison sentence tends to affect individuals in broadly similar ways, whereas a monetary sanction – if imposed without regard to a person's economic condition – can be disproportionately burdensome for poorer individuals. This unequal afflictive potential raises constitutional concerns⁸⁰, prompting many legal systems to adopt models for determining economic sanctions that reflect their adverse impact on equality before the law⁸¹. However, despite nudges being entirely analogous in this respect, no effective solutions have yet been explored to mitigate this inherent threat.

Since at least the 1970s, a strand of constitutional theory and practice has emphasized the inadequacy of formal ideals of equality. These approaches have been challenged for failing to account for how individuals are socially differentiated, for overlooking the role of political and economic structures in creating and reinforcing such differentiations, and for failing to ensure that individuals can participate equally in making the laws they live under⁸². Within European constitutional legal orders, more substantive conceptions of equality have been codified in post-WWII constitutions. For example, the Italian Constitution, at Article 3, explicitly recognizes it as «the duty of the Republic to remove those obstacles of an economic or social nature which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country».

⁷⁵ See § 2.3.

⁷⁶ See also CITINO, CAMERLENGO 2023, V, who advanced a comparable line of reasoning.

⁷⁷ ROBERTS 2018.

⁷⁸ VIALE 2018, 29.

⁷⁹ For cases in which hard-paternalistic measures are usually justified within contemporary constitutional systems – such as to protect vulnerable individuals or to uphold moral values – see BRESCIANI 2021.

⁸⁰ FERRAJOLI 2000 [1989], 386, 415; WHITMAN 2009.

⁸¹ FARALDO-CABANA 2018.

⁸² LEVER 2025.

In one of the few studies on the relationship between nudging and distributive justice, Jessica Roberts highlights empirical data suggesting that individuals with lower income, sophistication, or education may not respond to nudges as intended⁸³. In the cases Roberts discusses, more vulnerable individuals appear “nudge-proof”, i.e., unable to benefit from the interventions. For example, studies have shown that employer-sponsored wellness programs – incentivized by the government in the US context – tend to achieve greater engagement and success among advantaged populations, such as individuals who are already healthy, work in white-collar jobs, hold management positions, or have some higher education. In contrast, lower-income individuals are more likely to experience poor health and are less likely to participate in such programs⁸⁴. If this is the case, where those most in need of the intervention are less responsive, and those who are more responsive are already better off, nudging risks exacerbating existing inequalities⁸⁵. That is precisely the opposite of what a constitutional government bound to the value of equality should pursue.

More troubling still is the possibility that disadvantaged groups, precisely because of their conditions, may be less able to resist nudges. Sunstein himself notes that empirical studies have shown that poor people are less likely to opt out of a default rule⁸⁶, suggesting that this «could depend on the fact that low-income workers have a great deal to worry about and so are less likely to take the trouble to think through and alter the default rule»⁸⁷ or «because they are not confident that opting out makes best sense»⁸⁸. For Sunstein, the regressive impact of nudges “weakens” the case for their use and calls for balancing measures, provided such measures do not undermine the original objectives of the nudgers⁸⁹.

From a constitutional perspective, however, the unequal impact of nudges raises serious concerns about the legitimacy of this kind of intervention, requiring strict scrutiny of their effects and a design that is sensitive to this underlying tension.

At the particular level, where empirical data can demonstrate a regressive effect, the constitutional legitimacy of a given policy appears highly questionable, especially in legal contexts that have codified the principle of equality in both its formal and substantive dimensions. Moreover, an equality-based critique might undermine nudging even at the general level. A state measure that structurally discriminates against individuals on the basis of their personal conditions, such as wealth, education, or cognitive capacity, seems hardly justifiable under the standards commonly accepted in contemporary constitutional discourse⁹⁰. If nudges benefit only the better-off or, worse yet, disproportionately shift compliant behavior (and thus the burdens of public policy) onto already disadvantaged groups, they violate the very core meaning of equality before the law. When this occurs, the case for nudges is not merely weakened, as Sunstein suggests, but fails altogether.

⁸³ ROBERTS 2018, 1060.

⁸⁴ ROBERTS 2018, 1055.

⁸⁵ ROBERTS 2018, 1062.

⁸⁶ SUNSTEIN 2016, 174-175.

⁸⁷ SUNSTEIN 2016, 174-175.

⁸⁸ ROBERTS 2018, 179.

⁸⁹ ROBERTS 2018, 179.

⁹⁰ E.g., within US constitutional jurisprudence, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), declared unconstitutional a one-dollar poll tax, affirming that classifications based on wealth or property, like those based on race, are traditionally disfavored. Similarly, in the European context see, for instance, ECHR, *Chassagnou and Others v. France*, GC, 29 April 1999, where the Court found a violation of Article 14 in a case regarding hunting rights, as within the category of landowners opposed to hunting for ethical reasons, only small landowners were required to tolerate the use of their property against their conscience, creating a difference in treatment between large and small landowners that was disproportionate to the aim pursued by the Government. In the Italian context, where a substantive conception of equality is codified, the Constitutional Court recently struck down a provision setting the amount of fines replacing short custodial sentences, holding that they were far beyond what most people can currently afford, thereby transforming the fine in lieu of prison into a privilege for the wealthy, thus violating Article 3.2 (see ItCC, judgment no. 28/2022).

For these reasons, constitutional provisions codifying the value of equality – such as the US Equal Protection Clause, the EU principle of equality, and similar norms – could constitute a basis for legal challenges against nudges, even in areas which are not rights-protected. Although legal protections vary depending on how different systems currently approach anti-discrimination, the broader scope of an equality-based approach to the constitutionality of nudging policies may ultimately prove more effective than autonomy-based critiques, just as it has in many other areas of particular social importance.

4. Conclusion

This paper has sought to show how ethical issues of nudging can be translated into constitutional arguments. We do not claim that current constitutional frameworks categorically forbid nudging, but rather that they may require nudges to be justified, and that such justifications may themselves be constitutionally contestable. This, of course, does not mean that no reforms are needed if behavioral regulation is to become the norm. It simply suggests that we are not entirely without constitutional defenses as things stand.

To this aim, we first outlined the autonomy-based critiques of nudging. From this perspective, a key distinction is between System 1 nudges, which rely on or activate cognitive heuristics, and nudges that merely provide information. Although distinguishing between the two may sometimes require a case-by-case assessment, especially given that epistemic nudges can also carry manipulative potential similar to System 1 interventions, the distinction remains important, as informative nudges are generally not constitutionally problematic. Informative nudges do not appear to raise constitutional concerns different from those posed by other informational interventions by public authorities, which generally require the information to be accurate and the knowledge-production process to meet the standards of a democratic society.

Nudges pose a distinct risk when used as a regulatory tool that affects and limits individual autonomy. In this regard, the analysis of the ethical debate reveals that the critiques are grounded in different conceptions of autonomy, each offering varying degrees of support for the objection to nudging. Within contemporary constitutional theory, a strong conception of autonomy is commonly accepted in rights-protected areas. Since the recognition of fundamental rights implies the existence of a protected space for free decision-making in their exercise and enjoyment, nudging within these areas should be regarded as an interference that requires adequate justification. Even nudges that push individuals to exercise or enjoy their rights constitute interferences at this level, as individuals are generally considered free not to exercise their rights. Well-established legal doctrines, such as the chilling effect doctrine, may help conceptualize this type of interference, which is distinct in nature from that posed by more traditional legal measures. Moreover, arguments developed in the ethical debate can help inform a suitable proportionality test for such interferences – for example, the *substantial noncontrol* criterion could serve as a limit to the admissibility of a nudge, just as the essential core of a right functions in cases of substantive interference.

According to these principles, for instance, a green nudge aimed at informing individuals about their energy consumption and ways to reduce it would raise no significant concerns, provided that the information is accurate and presented in a non-manipulative way. In contrast, a nudge consisting of a notice that most taxpayers have already paid their taxes – since it operates by encouraging conformity to a social norm, exploiting a well-studied System 1 mechanism – should be regarded as an interference with the right to property. The proportionality of such a behavioral intervention should therefore be assessed accordingly, evaluating whether it is suitable and necessary to achieve a legitimate aim in a democratic society. In most cases and contexts, such an intervention is likely to be considered justified; nonetheless, this legal framing creates a space for constitutional contestability of behavioral regulation. In this respect, our point is not that nudges

are always bad, but rather that the burden of proving their legitimacy lies with the nudger, who can no longer avoid the complex conceptual and empirical questions involved in measuring liberty and autonomy.

Finally, drawing on the idea, already present in the ethical debate, that individuals possess different degrees of autonomy, we proposed a potential equality-based objection to nudging, which remains undertheorized in both the ethical debate and legal scholarship. If the ability to resist or benefit from nudges depends on personal conditions such as wealth, education, or cognitive capacity, behavioral regulation risks having a structurally unequal impact. This can exacerbate existing inequalities by disproportionately placing the burden of nudge-compliant behavior on already disadvantaged groups, which is problematic in terms of both formal equality before the law and the principle of substantive equality.

Just like the liberty-based objection, an equality-based one does not rule out nudging altogether. Nonetheless, it requires a strict scrutiny of the empirical effects of nudging policies and, if they do in fact produce discriminatory outcomes, provides a basis for their legal contestability. More broadly, developing an argument grounded in equality appears particularly important in a debate – such as the one on the ethics of nudging – that often focuses too narrowly on the preservation of individual liberty. By contrast, constitutional tradition cannot accept to defend liberty at the expense of equality, particularly when new forms of regulation threaten to reinforce the very structural social hierarchies that constitutions were designed to progressively break down.

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