Judging European democracy
National constitutional review of European law and its democratic legitimacy

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In a large and growing body of case law, constitutional courts from the EU Member States have reviewed EU treaties and related legal instruments, as well as secondary EU law and decisions by EU institutions, on their compatibility with national constitutional law. These EU-related judgments deal with issues of major importance such as the EU’s democratic legitimacy, the protection of persons’ fundamental rights and freedoms, the division of competences between the EU and its Member States, as well as the place of national sovereignty within the EU. Yet are constitutional courts the institutions that should decide such issues of major constitutional importance for the EU? Or is it more democratic to leave these matters to political institutions that represent Europe’s citizens and that are supposedly politically accountable to them?

This book explores these questions and offers a new perspective on the national constitutional courts’ EU-related case law. In the current literature, the national constitutional courts’ EU-related case law is often evaluated in a positive light: it can help ensure respect for the Member States’ national constitutional identities, function as a check on the EU’s powers, open up a space for contestation and dialogue, or serve as a justified response to pressing concerns about the democratic quality of the EU’s decision-making process. By contrast this book argues that the courts impose constitutional limits on the EU in a way that is often difficult to justify democratically. The book builds on key insights from political philosophy and constitutional theory to better understand the democratic legitimacy of the national constitutional courts’ role in the EU. Through in-depth case studies of the German Constitutional Court and its political impact, as well as a comparison with the Netherlands where such review is absent, the book details how the German Court risks debilitating political debate on the future of Europe. The book argues that national courts should instead exercise their review powers in such a way that it promotes political contestation.
JUDGING EUROPEAN DEMOCRACY
NATIONAL CONSTITUTIONAL REVIEW OF EUROPEAN LAW AND ITS DEMOCRATIC LEGITIMACY

NIK DE BOER
JUDGING EUROPEAN DEMOCRACY
NATIONAL CONSTITUTIONAL REVIEW OF EUROPEAN LAW AND ITS DEMOCRATIC LEGITIMACY

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ABSTRACT

In a large and growing body of case law, constitutional courts from the EU Member States have reviewed EU treaties and related legal instruments, as well as secondary EU law and decisions by EU institutions, on their compatibility with national constitutional law. These EU-related judgments deal with issues of major importance such as the EU’s democratic legitimacy, the protection of persons’ fundamental rights and freedoms, the division of competences between the EU and its Member States, as well as the place of national sovereignty within the EU. Yet are constitutional courts the institutions that should decide such issues of major constitutional importance for the EU? Or is it more democratic to leave these matters to political institutions that represent Europe’s citizens and that are supposedly politically accountable to them?

This book explores these questions and offers a new perspective on the national constitutional courts’ EU-related case law. In the current literature, the national constitutional courts’ EU-related case law is often evaluated in a positive light: it can help ensure respect for the Member States’ national constitutional identities, function as a check on the EU’s powers, open up a space for contestation and dialogue, or serve as a justified response to pressing concerns about the democratic quality of the EU’s decision-making process. By contrast this book argues that the courts impose constitutional limits on the EU in a way that is often difficult to justify democratically. The book builds on key insights from political philosophy and constitutional theory to better understand the democratic legitimacy of the national constitutional courts’ role in the EU. Through in-depth case studies of the German Constitutional Court and its political impact, as well as a comparison with the Netherlands where such review is absent, the book details how the German Court risks debilitating political debate on the future of Europe. The book argues that national courts should instead exercise their review powers in such a way that it promotes political contestation.
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CHAPTER 1 - INTRODUCTION

On 12 September 2012, it looked as if the fate of European integration and perhaps the entire world economy, lay in the hands of a small number of national constitutional judges. On that day, eight judges of the German Federal Constitutional Court (GFCC) ruled on the constitutionality of Germany’s participation in two essential legal instruments for solving the Euro area’s ongoing sovereign debt crisis: the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG or Fiscal Compact). The EU’s political leaders had adopted both legal instruments amidst persisting fears on whether the EU would be able to adequately address the Euro crisis.¹ Yet both instruments were controversial and fiercely opposed by those who felt the measures presented an undesirable and even illegal step in further European integration. The case before the GFCC was the result of no less than 37,000 constitutional complaints by German citizens, who essentially argued that both instruments violated the overall budgetary responsibility of Germany’s parliament, the Bundestag.²

Had the GFCC decided that Germany’s participation in the two instruments was unconstitutional, it would have delivered a significant blow to the EU’s attempts at solving the Euro crisis. Germany’s participation was indispensable for the success of the ESM and the TSCG. The GFCC’s constitutional review thus made “the world look at Karlsruhe”, as some commentators put it.³ When the German Court ruled that the ESM and TSCG were compatible with the German Constitution, its Basic Law, the news dominated the front-pages of newspapers all over Europe, and the borrowing costs for Spanish and Italian ten-year bonds fell, while the Euro gained in value relative to the dollar.⁴ Yet despite the GFCC’s approval of the two measures, the Court reiterated a number of constitutional limitations on future European integration. That the Bundestag could not transfer its budgetary responsibility to a European institution created a constitutional obstacle for proposals to

¹ More precisely, the Fiscal Compact was adopted by 25 Member States. The ESM is an inter-governmental treaty concluded by the Euro area Member States.
⁴ See: ‘German court backs eurozone's ESM bailout fund’ BBC news (12 September 2012) ; 'Griechische Anleger feiern ESM-Urteil' Spiegel Online (12 September2012) ; Quentin Peel, 'German court backs ESM bailout fund' Financial Times (12 September 2012).
centralise substantial parts of the Member States’ budgets in order to make the monetary union more sustainable. In addition, the case served as an important reminder of how national constitutional courts can exert a powerful influence over the constitutional development of the EU, given their role to authoritatively interpret the constitution within their respective national legal orders.

The GFCC’s ESM-judgment is part of a growing body of case law by constitutional courts from the EU Member States in which these courts have reviewed EU treaties and related legal instruments, as well as secondary EU law and decisions by EU institutions, on their compatibility with national constitutional law. In relation to the Euro-crisis alone, the GFCC addressed constitutional concerns in no less than nine judgments. Outside Germany, constitutional courts in Austria, Belgium, Estonia, France, Ireland, Portugal, Poland and Slovenia have assessed the constitutionality of the EU’s crisis measures. Beyond the crisis, constitutional courts have raised concerns about diverse legal instruments such as the Framework Decision on the European Arrest Warrant, the Treaty of Lisbon and the Data Protection Directive.


6 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (EFSF); Bundesverfassungsgericht, judgment of 28 February 2012, 2 BvE 8/11 (the ‘9er Committee case); Bundesverfassungsgericht, judgment of 19 June 2012, 2 BvE 4/11; Bundesverfassungsgericht, judgment of 12 September 2012, 2 BvR 1390/12 (ESM interim judgment); Bundesverfassungsgericht, judgment of 12 September 2012, 2 BvR 1390/12 (ESM interim judgment). BVerfG, 2 BvR 1390/12, 18.3.2014 (ESM final judgment); BVerfG, 2 BvR 2728/13 vom 14.1.2014 (OMT); Bundesverfassungsgericht, decision of 18 July 2017, 2 BvR 859/15 et al.


8 Belgian Constitutional Court No. 62/2016, 28 April 2016 (Fiscal Compact).

9 The Supreme Court of Estonia (*Riigikohus*), Judgment (*En Banc*) of 12 July 2012, Case No. 3-4-1-6-12.


13 Polish Constitutional Tribunal, judgment of 26 June 2013, K 33/12.


Retention Directive. These EU-related judgments of national constitutional courts are of key importance. They address fundamental issues of the EU’s constitutional order, namely the EU’s democratic legitimacy, the protection of persons’ fundamental rights and freedoms, the division of competences between the EU and the Member States, as well as the place of national sovereignty within the EU. Through these judgments, national constitutional courts influence the EU’s constitutional foundations, and by imposing constitutional limits on further integration, they shape the EU’s future development.

Yet, is this a role that the national constitutional courts should fulfil? Are constitutional courts the institutions that should decide questions of such fundamental constitutional importance for the EU, and if so, in which situations? It could be considered that something has gone badly wrong when the fate of Europe’s monetary union depends on the decision of eight German constitutional judges. Democratic grounds seem to favour that decisions of major constitutional importance for the EU are left to political institutions that represent Europe’s citizens and can be held accountable by them. On the other hand, constitutional safeguards may be no unnecessary luxury in crisis-ridden Europe. Since the Euro crisis there have been mounting concerns about democratic shortcomings in the EU’s decision-making process. Challenges before national constitutional courts have often raised such concerns and national constitutional courts have in fact claimed to protect democracy in the Member States.

18 See inter alia: Bundesverfassungsgericht, Judgment of 2 March 2010, 1 BvR 256/08 (Data-retention); The Constitutional Court of the Czech Republic (Ústavní soud), judgment of 22 March 2011, Pl ÚS 24/10 (Data Retention); The Constitutional Court of Austria (Österreichischer Verfassungsgerichtshof), decision G 47/2012-49 of 27 June 2014 (Data Retention).
20 See on this point also Franz Mayer, ‘Rebel Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference’ (2014) 15 2 German Law Journal 111, at p. 134-136. Mayer states at page 135 among other things that: “The reasonable thing to do would be to clearly state that in the Euro crisis, we have reached the limits of what law and lawyers can do and that the decisions have to be taken by those who are democratically elected and who will be held accountable.”
This book aims to understand the democratic legitimacy of the national constitutional courts’ role in relation to the EU. It asks how we should assess the democratic legitimacy of the national constitutional courts’ review of EU treaties and related legal instruments, as well as secondary EU law on their compatibility with national constitutional law.

1. Problem

1.1 Democratic Legitimacy and Judicial Review

Concerns about the democratic legitimacy of constitutional courts are not new. They connect to long-standing debates about the democratic legitimacy of constitutional courts in the domestic context and, in particular, to democratic concerns about the power of such courts to strike down democratically adopted legislation on constitutional grounds. According to a number of scholars, allowing courts to override democratically elected legislatures, and giving courts ultimate authority to decide constitutional issues is even undemocratic and lacks a compelling justification. In the national context, the democratic legitimacy of judicial review of legislation (hereinafter simply: judicial review) is contested, because it gives judges the power to strike down legislation adopted by democratically elected majorities in parliament if these judges deem that the legislation violates constitutional norms. For political systems in which democracy is thought to be of key importance in making legitimate laws, this “counter-majoritarian difficulty” raises a normative problem.

The problem relates to two characteristics of constitutional law: entrenchment and indeterminacy. Entrenchment entails that constitutional legal norms are more difficult to change than ordinary legal norms and makes a constitution function as a body of higher law. For example; changing the constitution would require a supermajority of some sort in parliament or a constitutional convention. Indeterminacy entails that the meaning of most constitutional norms is highly indeterminate, often deliberately so, and hence gives broad discretion to those authorised to interpret such norms. For example, constitutional norms

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24 The problem of indeterminacy is not restricted to constitutional law, but may be understood as a general feature of legal norms. For a critical discussion of this debate see: Gerald Postema J., *Legal Philosophy in the*
such as “everyone has the right to life”25 or “human dignity shall be inviolable”26 leave open a wide variety of possible interpretations. They ostensibly also require their interpreter to make complex moral judgments.

Entrenchment is often considered a key feature of constitutionalism. Constitutions generally fulfil three important functions. First, they constitute the political community as such, by establishing public authority and enabling certain institutions to produce law. Second, they divide public authority between different institutions and, in federal states, between different levels of government. Third, they subject public authority to substantive limits, usually and most importantly in the form of fundamental rights.27 A common conception of constitutionalism holds that the exercise of political authority should be subject to legal limits, namely those limits enshrined in constitutional law. Entrenchment of constitutional law against ordinary legislative change is meant to ensure that political power is subject to such legal limits, a purpose which would be defeated if those in power could easily change the limits to their rule.28

The entrenchment of constitutional norms has an undemocratic effect, however, because it limits the scope for ordinary democratic law-making. This is so especially where the constitution subjects the authority of democratically elected legislatures to constitutional limits. Entrenchment of constitutional law entails that constitutional norms are not subject in the same way to political contestation and democratic decision-making as ordinary legal norms.

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25 Article 2 of the Charter of Fundamental Rights of the European Union.
norms. They subject the decisions of present democratic majorities to a political decision made in the past. This temporal problem raises a democratic concern even if constitutional norms seem determinate in their meaning: Even where constitutional norms appear to state clearly how they should be applied in a particular case, they still privilege a past political decision over the potentially different wishes of later elected democratic majorities.

If the constitutional norms are also indeterminate, judicial review entails that judges have the power to make key interpretive choices regarding the meaning of the constitution over and above the interpretive choices of the democratic legislative majority. For example, judges would be authorised to determine whether the protection of human dignity and the right to life is compatible with legislation authorising abortion or whether the citizens’ right to vote is compatible with legislation that authorises a transfer of law-making authority to a supranational body.

For these reasons a key issue is whether and how judicial review can be considered legitimate, given that democratic decision-making is normally essential in making legitimate laws. Justifying judicial review requires answering two questions. The first is: Why is it legitimate to subject the democratic process to constitutional constraints? This question is primarily concerned with the normative relationship between democracy and other values. The second question is: Why should courts be authorised to enforce and interpret these constraints rather than the legislature itself or some other institution? This second question is concerned with whether the institution of judicial review provides a better means to achieve the normatively desired outcome – whatever we think this outcome is - in comparison to a system in which this task is left to the legislature itself or perhaps some other institution. It is primarily a question of comparative institutional analysis that must be rooted in empirical research. Normative arguments concerning the appropriate constraints on political authority do not yet establish that judges should enforce these constraints. Even if one accepts a

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29 To use Jeremy Waldron’s words, constitutional provisions are “compounded with an immunity against legislative change.” Jeremy Waldron, Law and Disagreement 1999, at p. 221.

30 It is unclear whether any legal norm can fulfil this function. I think this can only really be a matter of degree.

See for example the work of Ingo Venzke who in the context of international law argues how the meaning of legal norms is the product of interpretive practice: Ingo Venzke, How Interpretation Makes International Law (Oxford University Press Oxford & New York 2012).

31 See e.g.: Bundesverfassungsgericht, Judgment of 25 February 1975, 1 BvF 1/74 (Schwangerschaftsabbruch I); Bundesverfassungsgericht, Judgment of 28 May 1992, 2 BvF 2/90 (Schwangerschaftsabbruch II).

32 As the German constitutional court assessed in Bundesverfassungsgericht, Judgment of 12 October 1993, 2 BvR 2134/92 (Maastricht) (translation in [1994] 1 C.M.L.R. 57) and several subsequent EU-related judgments.
demanding theory of justice that warrants significant constitutional constraints on any decision-making process, it is still necessary to demonstrate why courts and not the legislature itself - or possibly some other institution - are best placed to enforce these constraints. In fact, giving judges the ultimate say in interpreting and enforcing the constitution runs the risk that these constitutional judges themselves become an unchecked power.33

In this book I argue that constitutional democracies face a fundamental difficulty. On the one hand, democratic legitimacy requires that certain preconditions are fulfilled. Not only must there be a democratic procedure in which people have an equal right to participate, people must also be sufficiently free to begin with in order to participate as free and equal in this collective decision-making process. The point of constitutionalism may be seen as ensuring these preconditions for democratic legitimacy. On the other hand, it seems impossible to fully determine what these preconditions are in a manner that is both uncontroversial and that removes all reasonable interpretive disagreement. As I argue in this book, the best we can hope for is that a democratic society ensures on-going deliberation about the preconditions for a democratically legitimate process. Judicial review may be a better way to ensure such deliberation, instead of leaving constitutional questions to the legislature themselves.34 Yet, an evaluation of the democratic legitimacy of judicial review must be based on an empirically informed assessment of the comparative abilities of legislatures and constitutional courts.

1.2 National Constitutional Courts and the EU
On its face, democratic objections also apply to the role of national constitutional courts in relation to the EU. As guardians of their respective national constitutions, constitutional courts have the authority to constrain the leeway of elected politicians to adopt EU law and to take further steps in European integration. Where they would hold a new EU Treaty or a piece of secondary EU legislation incompatible with the national constitution and declare it inapplicable with their respective national legal order, they override the assessment of the political institutions that chose to adopt these instruments. In the EU context this democratic concern may be seen as particularly pressing, because the national constitutional courts’ judgments have potential repercussions for the course of EU politics as a whole. They can

33 Jeremy Waldron, Constitutionalism: A Skeptical View, Political Political Theory: Essays on Institutions 2016 23, at p.41-42; On these points see also Alexander Bickel. The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1986, at p. 3-4.
34 For support for such a vision see Jan Komárek, 'National constitutional courts in the European constitutional democracy' (2014) 12 3 International Journal of Constitutional Law 525.
affect citizens throughout the EU, a fact that the markets’ reaction to the GFCC’s ESM-judgment vividly illustrated. In this vein, a number of scholars have criticised certain national constitutional courts’ EU-related cases as democratically problematic.\textsuperscript{35}

Still, a large chunk of contemporary EU constitutional scholarship puts the national constitutional courts’ review of European law in a more positive light. An influential narrative is that the national constitutional courts’ EU-related case law benefits the legitimacy of the EU. Much of this scholarship is also distinctly court-centred. It commonly focuses on conflicts between the European Court of Justice (CJEU) and national constitutional courts without addressing the role of political institutions. It largely leaves aside the tension between democratic legitimacy and the role of constitutional courts. The current book instead systematically explores the tension between democratic legitimacy and the role of constitutional courts and enquires whether it is not more democratically legitimate to leave decisions on issues of major constitutional importance for the EU to political institutions.

Within the existing scholarly debate, the GFCC’s \textit{Maastricht-Urteil} of 1993 proved to be a catalyst for extensive discussions on the national constitutional courts’ role within the EU, as well as about the nature of the EU legal order more generally.\textsuperscript{36} In its constitutional assessment of the Treaty of Maastricht the German judges insisted on several constitutional limitations to European integration, despite ultimately judging the Treaty to be compatible with the German Constitution. The Court held that the EU’s democratic legitimacy primarily derived from national parliaments, which put in doubt the EU’s ability to become fully democratic and rejected the competence of the EU institutions – including the CJEU - to determine the scope of their own competences.

\textsuperscript{35}For example, Christoph Schönberger criticized the GFCC’s judgment on the Lisbon Treaty because: “Fundamental decisions on the development of the European integration [sic] must be taken by political institutions, not by unaccountable courts, even if they are constitutional ones. Future transfers of powers to the European Union should, therefore, be left to the parliamentary majorities the Court itself cannot praise enough as the main expression of democratic legitimacy.” Christoph Schönberger, ‘Lisbon in Karlsruhe: Maastricht’s Epigones At Sea’ (2009) 10 8 German Law Journal 1201, at p. 1210. Christian Tomuschat criticized the Court as not feeling bound by “any doctrine of judicial self-restraint”. See Christian Tomuschat, ‘The Ruling of the German Constitutional Court on the Treaty of Lisbon’ German Law Journal 1259, at p. 1259. See also e.g.: Franz Mayer, Rebel Without a Cause? A Critical Analysis of the German Constitutional Court’s OMT Reference 2014 111; Christoph Möllers, ‘Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts’ in Matthias Jestaedt and others (ed), \textit{Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht} (Suhrkamp Berlin 2011) 281; Christoph Schönberger, \textit{Lisbon in Karlsruhe: Maastricht’s Epigones At Sea} 2009, 1201.

One of the influential ideas that emerged in the wake of the *Maastricht-Urteil* was that of constitutional pluralism. The *Maastricht-Urteil* conflicted with basic principles of the EU legal order articulated by the CJEU, namely that the EU’s legal authority derives from the European legal order itself, not from the Member States’ constitutions; that EU law takes precedence over conflicting national law, even if of constitutional rank; and that the CJEU is the sole authority competent to assess the validity of EU law. Faced with the GFCC’s challenge to the primacy of EU law, constitutional pluralists have argued that the relationship between EU law and national constitutional law should not be understood in the hierarchical terms put forward by the CJEU: EU law should not always have primacy over conflicting national constitutional law. In certain cases national constitutional courts would be justified in reviewing EU law on constitutional grounds.

The national constitutional courts’ review of European law has been justified on several related grounds. One idea is that the national constitutional courts' review helps to ensure respect for the national constitutional identities of the Member States, understood as basic constitutional norms specific to a Member State. Relatedly, some have argued that the constitutional courts function as a check on the EU’s powers, guarding against the

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concentration of public power on the EU level and ensuring adequate control.\textsuperscript{41} In addition, some scholars contend that the possibility of constitutional conflict opens a space for contestation and dialogue in which the respective constitutional claims of the EU and the Member States can be addressed. This would allow the EU legal order to better accommodate a diversity of reasonable constitutional viewpoints.\textsuperscript{42} Yet another idea is that the national constitutional courts’ EU-related case law is justified on democratic grounds.\textsuperscript{43} In this respect, scholars have argued that the national constitutional courts’ review is a justified response to pressing concerns about the democratic quality of the EU’s decision-making process.

One such democratic justification is that constitutional courts protect the achievement of democracy in the nation-state. The courts check whether the EU’s exercise of authority remains within the scope of its transferred competences and prevent the further transfer of too many powers to the EU. In this manner they avoid the erosion of state authority and ensure that the nation-states remain the key source of legitimation for the EU. This in turn is said to be necessary, because the social preconditions of democracy have not been realised at the EU level, namely a sufficient sense of shared identity or a European-wide public sphere that allows meaningful political communication between citizens beyond borders.\textsuperscript{44} Prior to


\textsuperscript{43} In a more general sense see Jan Komárek, National constitutional courts in the European constitutional democracy, 2014 525.

Brexit, similar ideas had even found their way into political debate in the United Kingdom, despite the fact that UK courts traditionally have limited powers in reviewing legislation. Still, the UK government proposed to bestow on a UK court the power to review EU law similar to the GFCC in order to protect the sovereignty of the UK Parliament.\footnote{On this issue, see: Jeff King, On the Proposal for a UK Constitutional Court (U.K. Constitutional Law Blog 8 February 2016) <https://ukconstitutionallaw.org/> accessed 27 December 2017; Mike Gordon, The UK’s Sovereignty Uncertainty (U.K. Constitutional Law Blog 11 February 2016) <https://ukconstitutionallaw.org/> accessed 27 December 2017.}

A related idea is that the national constitutional courts can refuse the application of EU law for democratic reasons, if EU law conflicts with a national constitutional provision that is “sufficiently clear and specific, and reflects a national commitment to something constitutionally essential.”\footnote{For similar views see: Mattias Kumm, ‘The Moral Point of Constitutional Paralism’ in Julie Dickson and Pavlos Eleftheriadis (eds), \textit{Philosophical Foundations of European Union Law} (Oxford University Press Oxford & New York 2012) 216; Mattias Kumm, ‘Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism’ in Matej Avbelj and Jan Komárek (eds), \textit{Constitutional Pluralism in the European Union and Beyond} (Hart Publishing Oxford 2012) 39; Mattias Kumm and Victor Ferreres Comella, ‘The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union’ (2005) 3 2-3 International Journal of Constitutional Law 473.} Another argument is that the constitutional courts’ review functions as a catalyst for, or as an alternative to, public debate.\footnote{M. Herdegen, 'Maastricht and the German Constitutional Court - Constitutional Restraints for an Ever Closer Union' (1994) 31 2 Common Market Law Review 235, at p. 249. Mattias Kumm also suggests that the national constitutional courts have acted as “as contributors to and facilitators of democratic deliberations in their respective political orders”, see Mattias Kumm, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty, 2005 262, at p. 292.} In yet another sense, some scholars contend that the national constitutional courts pressure the EU to become more democratic, for example by enhancing the transparency of the EU’s decision-making processes and ensuring better participation of national parliaments in EU affairs.\footnote{For ideas in this direction, see for example: Eyal Benvenisti and George W. Downs, ‘The Democratizing Effects of Transjudicial Coordination’ 8 2 Utrecht Law Review 158.}

Still missing in these justifications of the national constitutional courts’ role, however, is a systematic exploration of the democratic concerns that the courts’ review raises and of the courts’ legitimacy compared to political institutions in deciding issues of constitutional importance for the EU. The lack of attention to this issue is understandable in light of the EU’s historical development. For a long time, the main issue for scholars was probably to explain and justify the primacy of EU law over conflicting national law, a remarkable development itself. The idea of constitutional pluralism can be understood as a third way...
between the absolute primacy of EU law over national law and its wholesale rejection. EU legal primacy could be accepted to a large extent, but in light of the EU’s democratic legitimacy problems, EU law could not justify setting aside cherished principles of national constitutional law.\(^{49}\) In addition, the extent to which the CJEU’s doctrine of primacy empowered the ordinary judiciary at the expense of national legislatures may have alleviated democratic concerns about the role of national constitutional courts. The CJEU’s *Simmenthal* judgment required all national courts to review national legislation with EU law, even in Member States with no or limited judicial review of legislation or Member States that reserved this function to a specialised constitutional court.\(^{50}\)

Yet, the national constitutional courts’ role in relation to the EU may be seen as democratically problematic itself. Where a constitutional court holds a provision of EU law inapplicable within its national legal order, it subjects the EU legislature to a constitutional constraint. Similarly, where a constitutional court objects to the ratification of a new EU Treaty on constitutional grounds, it subjects the decision-making of both the Treaty drafters and the national legislature to a constitutional check. And no matter how undemocratic one thinks the EU is, the democratic shortcomings of the EU do not make the national constitutional courts any more democratic. Even despite a perceived democratic deficit of the EU’s decision-making process, it is not obvious that judges should play a fundamental role in determining the core constitutional principles of the EU legal order. Granting this role to the national courts may simply entail that the authority to shape EU constitutional law shifts from an imperfect political process at the EU level to an even more democratically troublesome game of constitutional courts.

Thus instead of asserting that national constitutional identities should be respected, one must also address who should determine what respect for national constitutional identity entails. Instead of valuing dialogues about the EU’s constitutional foundations, one must also ask who should do the talking. And in light of democratic concerns about the role of constitutional courts, one must wonder whether one can really expect these courts to facilitate

\(^{49}\) This strategy of justification is most explicit in the work of Mattias Kumm, see the references in note 46. The title of the piece by Stephan Schill and Armin von Bogdandy, note 40, ‘Overcoming absolute primacy’, hints at the same strategy.

democratic deliberation or strengthen the democratic quality of the EU’s decision-making process, without constraining political discussion over the most desirable institutional architecture for the EU and its further development.

1.3 Research Question
This book takes up democratic concerns about the role of constitutional courts and their comparative institutional legitimacy to assess these courts’ role in relation to the EU. In light of democratic concerns about the institutional position of these courts, the question arises whether the constitutional courts should not leave constitutional questions concerning the EU to political institutions.

The book’s central question is how the democratic legitimacy of the national constitutional courts’ review of European law should be assessed. For the purposes of this question, the notion ‘national constitutional court’ is understood in a broad sense, namely to refer to all EU Member States’ highest courts that have the competence to constitutionally review legislation. This definition captures both specialised constitutional courts in which the function of constitutional review is concentrated and national highest courts with a wider jurisdiction. The term European law is used as a broad notion that includes EU-related legal instruments that strictly fall outside the scope of the EU Treaties but nonetheless clearly concern the EU. Particularly during the Euro crisis, EU Member States have adopted a number of legal instruments and treaties outside the EU legal framework. Examples are the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and Governance (TSCG). In addition, the term European law in this book also refers to European treaties before their formal entry into force. For example, the review of the Maastricht and Lisbon Treaties by the GFCC count as the review of European law, even though the Treaties had not entered into force at the time of review. The term EU law is used more narrowly, namely to refer to the primary and secondary EU law in force that falls within the scope of the EU Treaty framework. The notion of democratic legitimacy will be understood along the lines of deliberative democratic theory. In this sense democracy is understood as a political procedure based on argumentation and equal political participation. The legitimacy of the law

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51 Case C-370/12 Thomas Pringle v Government of Ireland and Others [2012] EU:C:2012:756. On this issue see: Bruno de Witte, 'Using International Law in the Euro Crisis' (2013) No. 4 ARENA Working Paper 20 December 2016 <www.arena.uio.no> accessed 27 December 2017. Some of the instruments are not even treaties under public international law. For example, the European Financial Stability Facility (EFSF) was registered as a company under Luxembourg law. The founding Member States concluded a framework agreement regarding its use but that was not a treaty as such.
depends on a process of reason-giving among citizens in which they decide themselves on the collective norms that they will be subject to. The notion of democratic legitimacy is further discussed in chapter 2 in light of democratic and constitutional theory. In addition and as chapter 3 will clarify, the notion of democratic legitimacy will not be understood as inherently national in nature.

By addressing this research problem the current book aims to move beyond the existing scholarship in three ways. First and as already discussed, it brings democratic concerns about the role of constitutional courts upfront in assessing their legitimate role in relation to the EU. The book systematically explores this problem by bringing the rich insights on democratic concerns about judicial review from the domestic context to shed light on the role of the constitutional courts in relation to the EU.

Secondly, through its focus on the transnational context of the EU, the book aims to contribute to understanding the democratically legitimate role of constitutional courts in a changing legal context. Most scholarship on the role of constitutional courts and judicial review of legislation has been developed within the framework of a single nation-state. It does not address a situation where law-making competences are transferred to a supranational entity. In addition, such scholarship is based on the assumption that a democratic procedure is firmly established, something still controversial in the EU.52 This book aims to further our knowledge about how democratic considerations inform the normative assessment of the constitutional courts’ role in a transnational context, where public authority is transferred to a supranational organisation that is considered to suffer from various democratic legitimacy problems.

Thirdly, the book contributes to a more empirically informed understanding of the constitutional courts’ role in relation to political institutions. Little is known so far about the impact of the constitutional courts’ judgments on EU-related politics. As I argue, these empirical insights, as well as the way in which they are studied in this book, allow for a better understanding of the democratic legitimacy of the national constitutional courts’ review of European law. In addition, the book develops arguments and methods relevant for assessing the constitutional courts’ legitimacy also in a purely national context.

52 See for example the conditions in: Jeremy Waldron, The Core of the Case Against Judicial Review, 2006 1346.
A final point in this context concerns the scope of the research project. The book focuses on judicial review of legislative action. I consider the legitimacy of the national constitutional courts’ review of European law and consider review of EU Treaties, EU-related treaties and similar instruments that require ratification, as well as EU primary law and secondary legislation after ratification. Although many interesting questions can be raised about judicial review of executive action, I treat this issue mostly as outside the scope of this research. Generally, I believe that the subjection of the executive to the laws decided upon by a democratically elected legislature is a good thing and in accordance with democratic ideals. That said, I do take into account that the executive dominates the political process in the EU and address how this changes the legitimacy of the national constitutional courts’ review. Furthermore, I also consider the role of the CJEU in the interpretation of EU law and address whether the national constitutional courts’ review may be considered as a response to the CJEU’s expansive case law.

1.4 A Note on Methods
In answering its main research question, the book draws on three related disciplines. Firstly, given the normative nature of the research question, the book draws on political philosophy and constitutional theory to better understand the legitimacy problems that judicial review raises. The book thus considers different theories on the legitimacy of judicial review. In this respect, the book treats the legitimacy of judicial review initially as a general problem for democratic political systems, separate from the specific contexts in which this problem arises (see chapter 2). To some this treatment of the problem may be too a-contextual. I agree that context matters. Yet one has to start from somewhere. In this book I start from the assumption that the tension between judicial review and democracy raises a problem for political systems committed to the ideal of democracy. Subsequently I consider how the legitimacy of judicial review depends on context. In my initial discussion of the legitimacy of judicial review I want to show how and why context matters by showing how normative assessments of judicial review rest on contentious empirical assumptions about institutions and the context in which they operate.

Secondly, the book uses traditional legal sources to understand the existing law and judgments of the national constitutional courts. The book thus uses legal texts and relevant
case law as well as legal scholarship to understand EU and national constitutional law, including the EU-related judgments of national constitutional courts.

Thirdly, the book uses qualitative empirical methods in order to analyse the decision-making by courts and political institutions, as well as to understand the impact of the national constitutional courts’ rulings on national and European political decision-making. These empirical enquiries raise a number of specific methodological questions that are addressed in a short separate chapter – chapter 4 – preceding the case studies.

2. Objectives
In assessing the democratic legitimacy of the national constitutional courts’ review of European law the book has three main objectives. As the first and primary aim, the book strives to better understand these courts’ legitimate role in relation to the EU in a way that takes into account concerns about the democratic legitimacy of these courts. Shedding light on this aspect of the courts’ institutional position allows one to see existing scholarship on the role of these courts in a new light. Current EU constitutional scholarship often focuses on the relation between different legal orders and conflicts between judicial institutions at both levels. This perspective blurs one’s vision on the role of political institutions and the impact that the national constitutional courts’ rulings has for them. In the context of the Euro crisis, for example, I aim to show how the GFCC’s case law favoured certain political viewpoints on solving the Euro crisis and the future of the monetary union. The Court’s insistence on the German Parliament’s budgetary sovereignty is mostly compatible with political positions that saw tackling the problem of debt and creating a new “culture of stability” as the main imperatives. Political actors that preferred stronger regulation of the financial markets and favoured remedying design faults in the monetary union as a way to tackle the Euro-crisis, instead face significant constitutional obstacles, even though such proposals aim at achieving better political – and democratic – control over the structure of the economy. Both within German political debate as well as within the decision-making at the EU level, the Court’s case law thus constrained political discussion over the future of the monetary union.

These findings spell doubt on positive evaluations of the national constitutional courts’ case law. The idea that these courts open up a space for contestation and dialogue misses how the German Court’s case law limits the opportunities for dialogue and contestation in political institutions. In a similar vein, I argue how the national constitutional courts not only ensure
respect for a national constitutional identity, but also how the German Court constructed this identity at odds with different political viewpoints and alternative interpretations of the German constitution. In this manner, the constitutional courts fulfil a role that is difficult to justify democratically.

Secondly, by offering a normative assessment of the national constitutional courts’ role, the book aims to contribute to a theory of legitimate constitutional interpretation, although it does not offer a fully-fledged interpretive theory of itself. The book aims to provide insights on how the national constitutional courts should interpret constitutional law in line with the demands of democratic legitimacy when they deal with European law and in which cases these courts should show deference to other institutions and those in which they should adopt more intrusive forms of review.

Third, the book aims to inform ideas for institutional design. Particularly, for Member States without strong judicial institutions for constitutional review, this work aims to help understand whether setting up such institutions can contribute to enhancing the legitimacy of the EU legal order and in what manner such institutions should be designed. For Member States with strong constitutional courts, the book aims to help understand whether these institutions should change or how other institutions may better respond to the courts’ rulings in accordance with the demands of democratic legitimacy.

3. Outline
The book develops the argument that the national constitutional courts’ review of European law frequently risks constraining and narrowing democratic debate over the EU’s constitutional underpinnings. It risks taking essential decisions about the EU’s future out of the hands of democratically elected bodies and makes judges the final arbiters of these issues in a manner that is difficult to justify in democratic terms. Constitutional court rulings on the EU limit the room for elected branches to determine how the EU should develop in light of constitutional ideals. The idea that Member States without constitutional courts should establish such institutions in order to enhance the legitimacy of European law is therefore rejected.53 Existing national constitutional courts should adopt less intrusive forms of review.

53 In the Netherlands there is on-going discussion about the introduction of judicial review on the basis of the constitution. See in particular the legislative proposal to this effect: Kamerstukken II, 2001-2002, 28 331, nr. 2 (wetsvoorstel Halsema); Kamerstukken II, 2001-2002, 28 331, nr. 3 (MvT – wetsvoorstel Halsema).
and aim at strengthening democratic procedures within the context of the European decision-making process. In this respect, the book highlights how the GFCC’s review has been constructive in strengthening parliamentary oversight of EU decision-making, although other aspects of that Court’s review raise serious democratic concerns.

The book’s argument consists of four big steps. As the first step, chapter 2 analyses the relation between democratic legitimacy, constitutionalism and judicial review in the domestic context. Of the different chapters, this chapter is the most theoretical in nature and also the lengthiest. In this chapter I argue that democracy understood as a political procedure based on argumentation and equal political participation offers the best way to legitimise the law. I reject the liberal justification of judicial review, where judicial review is defended as necessary to protect important moral values enshrined in the constitution, typically fundamental rights, against potentially oppressive democratic majorities.54 Liberals prioritise certain values over democracy and submit that constitutional judges are better placed to protect them.55 The difficulty with this approach is that both the justification to give certain values special constitutional protection, as well as these values’ proper interpretation are subject to reasonable disagreement. Reasonable people can disagree about which rights should be protected as fundamental rights, how different rights relate to each other, how they should be balanced in terms of conflict, and how they should be balanced against other considerations. Even where people agree in the abstract that certain rights merit special protection, they are still likely to disagree about their proper interpretation.

This problem has led some to reject judicial review in favour of majoritarian democracy. Critics of the liberal justification of judicial review, such as Jeremy Waldron, Mark Tushnet and Richard Bellamy, argue that the requirements of justice are subject to reasonable disagreement and consequently require justification in a decision-making process to which all

Occasionally it is argued that judicial review should be introduced to allow judicial review of European law. See e.g.: Frits Bakker and Kees Sterk, ‘Geef het koninkrijk een passend geschenk’ NRC Next (7 March 2014 2014); Wetenschappelijke Raad voor het Regeringsbeleid, Europa in Nederland (Amsterdam University Press Den Haag & Amsterdam 2007).


55 Or they argue that these values are an inherent part of democracy, as is Dworkin’s strategy in: Ronald Dworkin, Freedom’s Law: The Moral Reading of the American Constitution (Oxford University Press Oxford & New York 1996).
citizens can contribute on the basis of equality. They contend that this is precisely what the democratic process aims to achieve, whereas judicial review allows judges to decide contested moral issues against the reasonable position of democratic majorities. In this respect, they criticize how legal and political philosophers often paint a degraded picture of legislative practice and an idealised picture of adjudication in order to defend judicial review. Instead, the judicial review sceptics portray the democratic process as a process in which the people’s representatives deliberate in good faith on the common good. Other scholars, such as Jürgen Habermas and John Hart Ely, have sought to justify judicial review in democratic terms. Here, the argument is that judicial review is not undemocratic after all, precisely because it aims to protect the preconditions of a legitimate democratic process.

Following Habermas’ idea of co-originality I argue that democracy presupposes not just the protection of political rights such as the right to vote, freedom of expression and freedom of assembly, but also the protection of liberal rights. Citizens can only meaningfully exercise their public autonomy and consider themselves authors of the law where they have a sufficient degree of freedom. On this understanding, a constitution institutionalises the preconditions for legitimate democratic will-formation, both by setting up a democratic procedure and protecting liberal rights. A key problem, nonetheless, is that it seems impossible to fully articulate these preconditions in the abstract, outside the democratic process, because they leave open a wide variety of different reasonable interpretations. Given reasonable disagreements about the form and content of these preconditions, the constitution itself must also be object of the political. Habermas’ co-originality thesis entails that preconditions for democratic legitimacy must themselves be subject to ongoing political deliberation. Democracy partly concerns democracy itself.


57 This is a prominent theme also in: Jeremy Waldron, The Dignity of Legislation (Cambridge University Press Cambridge & New York 1999). In that book, however, Waldron puts forward a picture of legislation that is explicitly idealised. At page 2 he states: “I want us to see the process of legislation - at its best - as something like the following: the representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all, and they do so in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them.”

The justification for judicial review therefore, cannot be that a constitutional court simply safeguards the preconditions for a legitimate democratic process, as these preconditions must themselves be part of democratic politics. Rather the justification must be that judicial review better ensures that deliberation takes place on the preconditions for a democratically legitimate procedure compared to a political system where this task is left to the legislature itself. Only through a comparison of the actual deliberations of legislatures and constitutional courts is it possible to fully assess the legitimacy of judicial review. In this respect, just as proponents of judicial review have been criticised for idealising the role of courts, so too judicial review critics have perhaps idealised the democratic process. If actual legislative debates rarely engage constitutional questions, one may prefer the deliberations of the courtrooms to the irrationality of the democratic process. For these reasons I argue that the debate over judicial review should pay more attention to how legislatures and constitutional courts function in practice and in specific contexts, rather than trying to assess the democratic legitimacy of judicial review as a question of political philosophy. A more empirically informed analysis that compares legislative and judicial practice would therefore help to advance the debate on the democratic legitimacy of judicial review. Such empirical enquiries should assess how legislatures address constitutional issues; how legislatures’ deliberations compare with the decisions and reasoning of courts; and how courts’ review of legislation influences subsequent legislative deliberations. The outcomes of such enquiries are likely to be highly context dependent. Assessments of the legitimacy of judicial review are likely to change over time, country and context.  

As the second step, chapter 3 investigates the implications of this argument for the context of the EU. As in the national context, the national constitutional courts’ review of European law raises a democratic concern, because it subjects political decision-making to constitutional constraints. Yet assessing the democratically legitimate role of the national constitutional courts in relation to the EU has to take on board specific features of the EU context. One is that the EU is said to suffer from various democratic legitimacy problems. According to some this justifies that national constitutional courts review European law with the aim of correcting the EU’s democratic shortcomings. Another is that the institutional setting in

which the constitutional courts’ review takes place differs considerably from that of the domestic context. Within the EU context, political institutions on different levels of governance may be involved in law-making depending on the specific European legal instrument under review. In chapter 3 I address how these factors matter for the democratically legitimate role of the national constitutional courts. Also crucial is to understand how political institutions address constitutional issues, how these deliberations compare to that of the courts and how the national constitutional courts’ rulings impact on the deliberations and decision-making of political institutions. In relation to the main grounds on which national constitutional courts have reviewed European law, I discuss whether and how such review raises democratic concerns and how further empirical research should allow for a better understanding of the legitimate role of these courts.

As the third step, the book takes up these empirical questions in a select number of case studies related to the GFCC. The goal of these case studies is threefold: to better comprehend how political institutions address constitutional issues relating to the EU in the absence of, or before review by, a constitutional court; how the courts’ treatment of these issues compares to that of the political institutions whose decision-making is subjected to review; and how the courts’ judgments subsequently impact on the deliberations and decisions of these political institutions. Chapter 4 lays out a method for studying these issues and justifies the research design of the empirical component of the book. The case studies consist of an in-depth study of two Member States - Germany and the Netherlands – and the political decision-making on the EU level in relation to the adoption of the Maastricht Treaty and various legal instruments adopted during the Euro-crisis. The choice for an in-depth study is motivated by the challenges involved in studying political processes. They involve researching extensive parliamentary debates and policy documents, and require understanding the context in which this decision-making takes place. The reason for focusing on Germany and the Netherlands is that they differ considerably in the extent to which they allow judicial review of legislation. Germany’s constitutional court is Europe’s most assertive and authoritative constitutional court. It is also the protagonist in most discussions on the role of the national constitutional courts in the EU. In the Netherlands on the other hand constitutional review is left to the political branches, as Article 120 of the Dutch Constitution expressly prohibits the Dutch judiciary from reviewing legislation against the Dutch constitution. The study of Germany thus offers insights on the consequences of strong judicial review of European law, whereas
the Netherlands offers a contrast to the German case as constitutional review is left to political institutions.

Chapter 5 discusses the legitimacy of the GFCC’s review of the Maastricht Treaty. The GFCC’s review of this Treaty formed the basis for the Court’s subsequent approach to European integration and has great significance in existing scholarship on the role of the constitutional courts in relation to the EU. One justification for the GFCC’s judgment is that, despite all its shortcomings, the Court still discussed the constitutional implications of the Treaty and raised issues that the political institutions had failed to consider. In light of an analysis of the German political debates, I argue, however, that this argument is difficult to sustain: the Bundestag did extensively discuss the constitutional implications of the Maastricht Treaty and there was widespread concern about the democratic shortcomings of the EU. A comparison with the deliberations in the Dutch Tweede Kamer shows, moreover, that similar concerns were raised in the Dutch debates.

Instead the GFCC is better understood as having provided an additional forum to those critical of European integration and the Maastricht Treaty. In the context of Maastricht the Court may have contributed to further public debate on European integration, because there was little opposition to European integration as such within Germany’s political institutions. The GFCC took a more critical viewpoint by providing access to the Court and incorporating Euro-critical elements in its own judgment. This did lead to the consideration of some new issues, whereas the Court’s judgment was sufficiently open so as not to constrain decision-making within the political branches. Furthermore, in the aftermath of the Maastricht-judgment, the GFCC adopted a more Euro-friendly stance.

Over the long term the outlook has proved to be more troublesome, as is discussed in chapter 6 on the Euro crisis. In the Euro crisis the GFCC reviewed several legal instruments in relatively quick succession. Yet, within this context the Court does constrain decision-making within the political branches. The requirement that the Bundestag retains its budgetary autonomy reinforces a particular type of politics. A politics in which financial assistance is given only under strict conditions and in which transferring more competences to the EU in economic and fiscal policy is cast as undemocratic, even if pleas for such transfers are rooted in democratic grounds.
Chapter 7 considers a more positive side of the GFCC’s case law and discusses how the GFCC helped to ensure better parliamentary oversight of the executive operating in EU affairs. In this manner the GFCC helped counter a further move in the crisis towards executive dominance and helped safeguard space for democratic politics.

As the fourth and final step, chapter 8 contains the main conclusions of the book and identifies avenues for further research. On the basis of the case studies, I discuss how and why the GFCC’s review of European law raises serious democratic concerns. There is scant evidence that the judgments lead to a better constitutional debate in the political branches. Instead, the Court replaces reasonable assessments by the political branches in a manner that makes the achievement of fully democratic procedures at the EU level more difficult. The conclusion discusses the implications of these findings for the role of constitutional courts across the EU and considers how these findings contribute to ideas for democratically legitimate constitutional interpretation and institutional design.
CHAPTER 2 - JUDICIAL REVIEW AND DEMOCRATIC LEGITIMACY

1. Introduction
In order to understand how we should assess the democratic legitimacy of the national constitutional courts’ review of European law, the current chapter first addresses how we should address the democratic legitimacy of judicial review of legislation within the domestic context. Although judicial review is a feature of many contemporary liberal democracies, its legitimacy remains contested. Justifications of judicial review must answer two questions. The first is, is it legitimate to subject the democratic process to constitutional constraints? The second is, should judges be authorised to enforce and interpret these constraints rather than the legislature itself or some other institution? The first of these questions I shall call hereafter the constitutional question, the second I shall call the institutional question. My principal claim is that making the debate over the democratic legitimacy of judicial review more empirically informed is a way to bring it forward. Different perspectives on the democratic legitimacy of judicial review rely on diverging empirical assumptions about the functioning of legislatures and constitutional courts that require further empirical research. Chapter 3 subsequently draws out the implications of this discussion for the role of the national constitutional courts in relation to the EU.

As a starting point I submit that there are roughly three ways to answer the constitutional question. The first strategy is to argue that other things, such as liberty or justice, are simply more important than democracy and that judicial review serves to protect them. In this chapter I discuss the liberal defence of judicial review as the key example of this approach. Liberal political philosophers justify constitutional constraints on democratic decision-making, usually in the form of liberal rights, as necessary moral side-constraints that no democratic decision can legitimately violate. Judicial review protects these moral values.

1 Democratic concerns about judicial review have not resonated equally in different countries. In the US the debate has been termed an ‘academic obsession’. See: Barry Friedman, 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five' (2002) 112 2 The Yale Law Journal 153. The focus on this issue is partly explained by the lack of an explicit constitutional basis for judicial review in the U.S. Constitution. The basis for the exercise of judicial review was laid down by the Supreme Court itself in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In Germany by contrast, the explicit constitutional basis for the constitutional court’s authority and its review of legislation appears to have limited concerns about its legitimacy. Christoph Möllers, ‘Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts’ in Matthias Jestaedt and others (ed), Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht (Suhrkamp Berlin 2011) 281, at p. 283.
enshrined in the constitution. The key difficulty with this approach is that these moral values are subject to reasonable disagreement. Even if we agree on a high level of abstraction that democratic decision-making cannot legitimately violate certain rights, disagreements are still likely when we try to ascertain what this requires in concrete situations.

The second and opposite strategy is to reject judicial review and constitutional limitations on democratic government, because they are undemocratic. Along such lines, critics of the liberal justification for judicial review argue that reasonable disagreements about justice should be settled in the democratic process, because the democratic process allows careful deliberation between citizens on the basis of an equal right to participation. Constitutionalising legal norms removes them from ordinary democratic debate, and judicial review empowers judges to decide contested moral issues against the position of democratic majorities. The difficulty with this approach is that mere majoritarian democratic decision-making cannot be considered sufficient to ground the legitimacy of legislation, despite the difficulties of articulating appropriate constraints in the abstract. Leaving the democratic process devoid of constraints is problematic because certain democratic decisions appear obviously illegitimate. Majority decisions to abolish the democratic process cannot be considered democratically legitimate, because they do away with the procedure that establishes the law’s legitimacy in the first place. In addition, certain constitutional rights, such as freedom of speech and freedom of assembly, are obviously connected to democratic ideals, as they enable vibrant public debate. Beyond that, the mere fact that a majority of citizens favours a particular law seems insufficient to establish its legitimacy. For example, if democratic majorities treat racial minorities with contempt or are completely unwilling to take their interests into account, it is hard to see why these minorities should accept the authority of such majorities as legitimate.

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The third strategy is to opt for a solution that holds the middle ground between these other two strategies, namely to justify judicial review in democratic terms. This approach argues that judicial review is not undemocratic after all, precisely because it aims to protect democracy or democratic values. Jürgen Habermas and John Hart Ely, for example, have articulated a version of constitutionalism and judicial review that focuses on preserving the preconditions of the democratic process.

Through a critical discussion of these different approaches, I argue in this chapter that there is no fundamental opposition between democracy and the ideals of constitutionalism. In a nutshell, decisions of democratic majorities can only be considered democratically legitimate if they leave in place the democratic procedure itself and if they can be considered reasonable. The point of constitutionalism can be understood precisely as safeguarding these preconditions for democratic legitimacy.

The dilemma is nonetheless that it simply seems impossible to fully articulate these limits in a way that would be both uncontroversial and at the same time would do away with all good-faith interpretive disagreement. I contend that this fundamental difficulty is well captured by Habermas’ idea of co-originality. Habermas argues that liberal rights are preconditions for a deliberative democratic process. They make legitimate democratic will-formation possible, but also require further specification in the democratic process. This idea ultimately emphasises the limits of political philosophy in answering the relationship between constitutionalism and democracy: It is impossible to develop a fully adequate set of liberal rights outside the democratic process and, consequently, it is also impossible to objectively determine when our decision-making procedures are fully democratically legitimate. The best we can have is that every instance of legislation is accompanied by good faith deliberation on whether such legislation is compatible with the preconditions for a legitimate democratic process. In addition, citizens must always be able to contest the outcomes of legislative procedures on the basis that it violates these preconditions. I contend that so-called ‘weak-form’ judicial review is arguably the best system that is compatible with this justification.

The upshot of this argument is that an assessment of judicial review’s legitimacy is highly context-dependent and crucially hinges on addressing the institutional question. An assessment of the democratic legitimacy of judicial review requires a comparison of how legislatures and constitutional judges actually deliberate on whether legislation is compatible
with its preconditions and by asking each time which institution does a better job. In this chapter, I aim to show how different normative theories of judicial review, ranging from the positive to the more sceptical, are informed by empirical assumptions about the respective qualities of courts and legislatures. At the same time these ideas about how legislatures and courts function often lack a firm empirical basis. To advance the debate on the democratic legitimacy of judicial review, further empirical research is thus required. Such empirical work should assess how legislatures deliberate about constitutional issues in practice, how these deliberations compare with the decisions and reasoning of courts, as well as how judicial review of legislation influences subsequent legislative deliberations. The outcomes of such research will be highly dependent on both context and on institutional design. For this reason, a general ‘case’ for or against judicial review is unlikely.

My argument in this chapter proceeds in the following manner. Section 2 offers necessary working definitions of the key concepts used in this chapter: legitimacy, democracy, constitutionalism and judicial review. With these definitions in hand, I further explain why there is a tension between democracy and judicial review of legislation. Section 3 subsequently outlines the liberal justification of judicial review and constitutionalism on the basis of the work of John Rawls and Ronald Dworkin. Section 4 criticises this liberal view on democratic grounds and outlines how democracy forms the basis of the legitimacy of law. Section 5 critically discusses why democratic arguments have led authors such as Jeremy Waldron, Richard Bellamy and Mark Tushnet to reject judicial review. Section 6 explores whether a justification of judicial review rooted in the value of democracy can nonetheless be justified. Here I discuss the idea of precommitment and procedural justifications of judicial review, ultimately drawing on the work of Habermas, and stressing the need for further empirical research about the functioning of legislatures and constitutional courts. Section 7 argues that democratic objections to judicial review also apply to judicial review based on constitutional provisions other than those concerning rights, such as constitutional norms on the separation of powers and federal competence divisions. Section 8 finally discusses the empirical questions on which an assessment of the legitimacy of judicial review depends.

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2. Definitions: Legitimacy, Democracy, Constitutionalism and Judicial Review
In order to provide necessary clarity, I first offer working definitions of the key concepts of legitimacy, democracy, constitutionalism and judicial review used in this and the subsequent chapters. These working definitions are further refined in the remainder of this chapter where necessary, and in light of the different normative theories discussed.

2.1 Legitimacy
The notion of legitimacy is used in different ways and sometimes criticised as “a term much invoked but little analysed”. In this work I refer to legitimacy as concerning political legitimacy. Political legitimacy refers to the justification of political, or public, authority. Within the context of the state, political authority is traditionally understood as a right to rule involving the use of coercive power. In this sense political authority means that the state maintains public order, issues commands and makes rules generally obeyed by its subjects. Forms of governance beyond the state fit such traditional conceptions of authority less well, because they rely less on coercive mechanisms, but do exercise powers comparable to domestic institutions. For this reason, I follow the broader notion of public authority as adopted by von Bogdandy and Venzke who understand it as “the legal capacity to determine others and to influence their freedom, i.e. to shape their legal or factual situation.” They distinguish private from public authority by referencing the legal mandate of an act: where this mandate endows an institution “with the power to define and pursue a common interest, any authority that the institution might exercise in this frame should be qualified as public.”

Similarly, Deirdre Curtin and Albert Jacob Meijer, 'Does transparency strengthen legitimacy?' (2006) 11 Information Polity 109, at p. 111-112: “Within contemporary debates, legitimacy is more often invoked than described and it is more often described than defined.”
In addition, the notion of authority refers to the impact of such acts on other actors’ freedom, legally or factually.\textsuperscript{11}

I understand legitimacy in a normative sense, as a notion that concerns the moral justification of political authority. I take legitimacy to mean that the exercise of political authority is legitimate when it is morally justified in such a way that it at least generates a \textit{prima facie} general moral duty for subjects to obey that authority.\textsuperscript{12} Citizens of a state thus have a general duty to obey the law when the state’s law is legitimate.\textsuperscript{13}

I submit there are broadly two ways to assess the legitimacy of a political decision-making procedure. The distinction is key in assessing the normative relationship between constitutionalism and democracy. The first way is to assess a decision-making procedure on the basis of the quality of the outcomes it produces judged by an independent normative standard. On this basis, a standard could be whether the outcomes of a decision-making process comply with independently determined standards of justice. The second way is to assess a political decision-making procedure based on the process by which decisions are taken, independently of the particular outcomes it produces. Here considerations come into play such as whether the decision-making procedure has allowed citizens to participate in a meaningful way and on the basis of political equality.\textsuperscript{14}

An important point is that any conception of legitimacy that judges a decision-making procedure based on outcome related considerations, must take account of the “fact of reasonable pluralism” that we find in modern democratic societies. To use Rawls’s account, this “fact” means that the “political culture of a democratic society is always marked by a

\textsuperscript{11} Ibid, at p. 133-145.

\textsuperscript{12} Although this duty may not be absolute; for a discussion see: Fabienne Peter, 'Political Legitimacy' in Edward N. Zalta (ed), \textit{The Stanford Encyclopedia of Philosophy} (Summer 2010 edn http://plato.stanford.edu/archives/sum2010/entries/legitimacy/ 2010)

\textsuperscript{13} I do not use legitimacy in a descriptive sense, also known as social legitimacy, or in a strictly legal sense. Social legitimacy concerns people’s actual beliefs about political authority. Political authority is socially legitimate where people accept it as justified for reasons other than their self-interest. Legal legitimacy reduces the question of legitimacy to a question about lawfulness, e.g. a governmental decision is legitimate when lawful, illegitimate when unlawful. See: Richard H. Fallon. Legitimacy and the Constitution.2005 1787, at p. 1794 and further. The descriptive notion of social legitimacy is commonly associated with Max Weber, see: Max Weber, \textit{Economy and Society} (Guenther Roth and Claus Wittich eds, University of California Press Berkeley, Los Angeles & London 1968), at p. 212 and further.

diversity of opposing and irreconcilable religious, philosophical, and moral doctrines”\textsuperscript{15} and “that a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power.”\textsuperscript{16} A conception of legitimacy committed to treating citizens as free and equal, is therefore limited in the range of substantive criteria that can be used for assessing the legitimacy of a decision-making procedure. For example, these criteria cannot be based on a controversial religious view of life not acceptable to all, as in this situation the use of oppressive state power would be needed to ensure compliance and the religious view of some would be privileged over that of others.\textsuperscript{17}

Finally, legitimacy can be seen as an ideal or as a more minimal idea. Taken as an ideal, the attempt is “to specify the necessary conditions for assertions of state authority to be maximally justified or to deserve unanimous respect.”\textsuperscript{18} For example, a political regime may be called legitimate when it complies perfectly with standards of justice. Understood in more minimal terms, legitimacy defines the threshold conditions under which a political regime is sufficiently just to merit the moral support of those subject to it. On this understanding political authority may be unjust, but still legitimate.\textsuperscript{19}

In this chapter, I argue that the legitimacy of judicial review should be seen as a matter of degree. As I hope to explain in what follows, I do not think that judicial review can be seen as illegitimate in minimal terms, i.e. as failing a threshold condition. Rather, one should assess whether a system with judicial review can be seen as more legitimate than one without, as well as to assess what judicial role is more legitimate as compared to others.

2.2 Democracy and Constitutionalism

Both democracy and constitutionalism are often seen as important ways to provide political authority with legitimacy, but in different ways. Democracy refers to a form of government in which “the people rule” and embodies a form of political equality among citizens.\textsuperscript{20}

\textsuperscript{15} John Rawls, Political Liberalism 2005, at p. 3.
\textsuperscript{16} Ibid, at p. 37.
\textsuperscript{18} Richard H. Fallon, Legitimacy and the Constitution 2005 1787, at p. 1797.
\textsuperscript{19} Ibid, at p. 1798; see also Fabienne Peter, Political Legitimacy, The Stanford Encyclopedia of Philosophy 2010.
Democracy is seen as an important way to provide legitimacy to political authority, because it gives citizens an equal right to participate in determining the laws and policies of their government. It is often connected to the idea of popular sovereignty, namely the idea that political authority ultimately derives from the people themselves and that the people themselves should determine the shape of political authority.21

Democracy is often valued for process related considerations, independently of the outcomes a democratic procedure produces. The view known as pure proceduralism holds that only the procedural characteristics of the decision-making procedure are relevant to assess its legitimacy and that there is no independent criterion to judge the outcomes apart from the process. Yet, democratic decision-making procedures can also be valued for the outcomes they are likely to produce.22 For example, democracy can be valued because open deliberation between equal participants is thought to enhance the quality of the outcomes of a procedure. Many authors hold that the value of democratic decision-making depends both on outcome and process related considerations.23

Constitutionalism commonly refers to the idea that the exercise of political authority should be subject to legal limits, namely subject to those limits entrenched in constitutional law.24 The legitimacy of subjecting the democratic decision-making process to such constitutional limits and leaving their enforcement to courts is often based on outcome related considerations. The idea is that the democratic process cannot legitimately violate certain norms, with particular respect to fundamental rights.25

21 On the difference between democracy and popular sovereignty also Jeremy Waldron, *Law and Disagreement* (Oxford University Press Oxford & New York 1999), at p. 255-256; It could be considered that popular sovereignty does not entail democracy. As Jeremy Waldron notes: “Popular sovereignty and democracy share obvious common elements, but the idea that the people have the right to establish their own form of government is in theory compatible with their establishment of a nondemocratic constitution or a heavily compromised or truncated form of democracy. Popular sovereignty can be the source of nondemocratic government.” Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ in Jeremy Waldron (ed), *Political Political Theory: Essays on Institutions* (Harvard University Press Cambridge MA & London 2016) 23, at p. 39.
23 See the introduction section 1.1.
2.3 Judicial Review

In a legal system with judicial review of legislation, judges have the power to review legislation on its compatibility with constitutional law. A distinction can be made between systems with strong-form judicial review and weak-form judicial review.\(^{26}\) In a system with strong-form judicial review, courts have the power to not apply legislation, to modify the legislation’s effects or, in some systems, to declare it invalid altogether if they judge that the legislation violates constitutional law.\(^{27}\) Coupled to constitutional entrenchment, strong-form judicial review means that judges have the power to override ordinary parliamentary majorities. This usually means that they have an important role in interpreting constitutional law and in controlling whether ordinary legislation complies with constitutional law.\(^{28}\)

In systems with weak-form judicial review, judges have the power to assess ordinary legislation on conformity with constitutional norms, but do not have the final say on whether such legislation complies with those constitutional provisions.\(^{29}\) There are a number of variants of systems with weak-form judicial review. In some systems, judges have only the power to interpret ordinary legislation in conformity with a list of constitutional rights insofar as this is possible. In others, courts also have the power to declare that ordinary law and constitutional norms are incompatible, but do not have the power to give legal effects to such a declaration. A third variant is that the judicial interpretation of constitutional norms can be overridden in the ordinary legislative process.\(^{30}\)

Another distinction can be made between systems with specialised constitutional courts, in which the function of judicial review is concentrated, and those where ordinary courts have this power. In the so-called American model of judicial review ordinary courts can declare a law unconstitutional if the issue arises in a case between two litigants before the court. Most

\(^{26}\) Mark Tushnet, Weak Courts, Strong Rights, 2008, at p. 18-42.

\(^{27}\) Ibid, at p. 33; Jeremy Waldron, The Core of the Case Against Judicial Review, 2006 1346, at p. 1353-1359. Tushnet defines strong-form review as “a system in which judicial interpretations of the Constitution are final and unrevisable by ordinary legislative majorities.”

\(^{28}\) Jeremy Waldron, The Core of the Case Against Judicial Review, 2006 1346, at p. 1348-1450; below I offer some reasons on why the say of courts is possibly not really final.


\(^{30}\)Ibid, at p. 24-33. New Zealand is an example of the first variant. The United Kingdom is an example of the second, where the British Human Rights Act 1998 instructs judges to interpret statutes in conformity with fundamental rights and also authorizes them to declare such statutes incompatible with fundamental rights. Such declarations of incompatibility, however, have no immediate legal effects. Canada is an example of the third variant. For a large part of the Canadian Charter of Rights and Freedoms, Section 33 allows the Canadian Parliament and legislatures of the provinces to override court judgments in which legislation is held to have violated the Charter.
European countries, however, vested sole power for judicial review in a separate institution, the specialised constitutional court.\(^3\) Within this model only the constitutional court deals with constitutional questions. In addition, several of these constitutional courts have jurisdiction to review the constitutionality of laws before they come into effect in abstract review proceedings. An important reason for vesting the power of judicial review in a specialised constitutional court is that it allows for a different type of political legitimation compared to the ordinary judiciary.\(^3\) Specialised constitutional courts thus stand apart from both the ordinary judiciary and the legislature. They occupy a space somewhere in between the judicial and political.\(^3\)

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\(^3\) The set-up was inspired by the ideas of Hans Kelsen. See: Hans Kelsen, 'La garantie juridictionnelle de la Constitution (La justice constitutionnelle)' (1928) Revue de Droit Public 197; and Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution' (1942) 4 2 Journal of Politics 183. The specialised constitutional court model has proved very influential in Europe. Specialised constitutional courts were established in Austria (re-established in 1945), Italy (1948), Germany (1949), France (1958) and Belgium (1985). Portugal (1976) and Spain (1978) established such courts following the overthrow of authoritarian regimes and their transition into democracies. After the collapse of the Soviet Union, most Eastern and Central-European states also established specialised constitutional courts. Lithuania, Latvia, the Czech Republic, Hungary, Poland, Romania, Slovakia and Slovenia all founded a specialised constitutional court. See Alec Stone Sweet, 'Why Europe Rejected American Judicial Review - and Why it May not Matter' (2002-2003) 101 Michigan Law Review 2744, at p. 2745. The trajectory of France is different, where the *Conseil Constitutionel* was originally founded to protect the dominance of the executive, but only later developed a rights-based type of review. See Alec Stone Sweet. Governing with Judges: Constitutional Politics in Europe, 2000, at p. 41.

\(^4\) Ibid, at p. 40. See also Christoph Möllers, Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts, *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* 2011 281, at p. 320-323; Victor Ferreres Comella, *The rise of specialized constitutional courts* in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Cheltenham UK & Northampton, MA, USA 2011) 265, at p. 270-271, where the author notes that many countries preferred a specialized constitutional court, because the function of constitutional review was thought to require a particular democratic legitimacy. A specialized constitutional court would allow for a more democratic appointment procedure of its judges in comparison with ordinary judges as well as more limited durations of their tenure. On the German context specifically see also Donald Kommers and Russel Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press Durham & London 2012), at p. 3.

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chapter will focus primarily on the institution of strong-form judicial review. Henceforth, the term ‘judicial review’ is used to refer to strong-form judicial review, unless otherwise stated.

The democratic objection to judicial review is therefore a function of three aspects of a legal system: (i) the degree of constitutional entrenchment, (ii) the strength and scope of judicial review powers, and, (iii) how those review powers are exercised. The fact that the democratic objection to judicial review depends on these three aspects is a primary reason to treat the legitimacy of judicial review as a matter of degree. Strong-form judicial review is more problematic in democratic terms, where the constitution is very difficult or impossible to change. Where the constitution is relatively easy to change, the democratic objection to strong-form judicial review is less pressing. Nonetheless, even in a system where judges have strong review powers and the constitution is heavily entrenched against change, judicial review may not pose a clear democratic problem where courts use their powers sparsely and mostly defer to the judgment of the legislature.

Assessing the legitimacy of judicial review can have different purposes. First, it can be aimed at institutional design. For example, an assessment of judicial review may lead one to conclude that a political system is better off without judicial review at all. Second, an assessment of judicial review may also be aimed at developing an appropriate theory of constitutional interpretation. For example, one could argue that judges should adopt a type of review that is more deferential towards the legislature. Still, theories of constitutional interpretation could also be aimed at the legislature. Rather than arguing that courts should adopt a particular interpretation, one could also argue that legislatures should take the constitution into account in a different way and that this removes the need for judicial review.

It is not clear what kind of argument should be preferred, unless one thinks that no form of judicial review can ever be legitimate. Arguments aimed at institutional design appear to rest more firmly on the idea that particular characteristics of institutions will lead to certain...
results. Conversely, theories aimed at interpretation take these results as a consequence of contingent (interpretive) choices. Both approaches require ideas about possible change. Those who argue for a different institutional design must assume that their arguments can convince the persons in charge of changing the constitution, whereas those who put forward an argument about judicial or legislative interpretation must assume that their arguments can convince judges or legislators. It is not clear whether any priority to these different arguments can be given or what sort of argument could settle such a choice beyond doubt. Therefore, I do not adopt any such priority, but rather embrace an approach that develops both a normative theory of constitutional interpretation and also asks what institutionalisation of the function of judicial review is most likely to favour the desired interpretive outcomes.

3. The Liberal Justification of Judicial Review
Liberal political theorists, which in this chapter I take to be exemplified by the works of John Rawls and Ronald Dworkin, justify judicial review and constitutionalism in the following manner. First, they justify subjecting the democratic process to a set of constitutional constraints in the form of fundamental rights as a requirement of legitimacy. Only a suitably constrained democratic process satisfies the demands of political legitimacy. On this understanding, constitutional constraints are justified pre-politically as opposed to in the democratic process itself. Secondly, it is thought best to leave the enforcement and interpretation of these constitutional constraints to the judiciary, because independent judges are more likely to reach correct outcomes when interpreting these constitutional norms.

3.1 Legitimation by Constitution
The idea that a constitution is a precondition for the legitimate exercise of political power is a central tenet of John Rawls’ liberal political theory. He proposes the ‘liberal principle of legitimacy’, which entails that:

“[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal

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37 Sceptical about the prospect of convincing judges of a particular interpretive theory in the US context is Mark Tushnet: “Arguments about what courts should do are not completely ineffective, but our nation’s experience with judicial review gives little reason to believe that such arguments have a substantial impact on what the justices do.” Mark Tushnet, Taking the Constitution Away from the Courts (Princeton University Press Princeton & Oxford 2000), at p. 155 and see further p. 155-163.
may reasonably be expected to endorse in the light of principles and ideals acceptable
to their common human reason.”

In Rawls’ view the constitution therefore specifies certain conditions that the exercise of
political power has to satisfy in order to be legitimate. This idea has been referred to as
“legitimation by constitution” and proposes that the exercise of political power by a majority
of citizens is justifiable to dissenters if it conforms to the constitution. For example, a law
adopted by a majority in the ordinary democratic process is legitimate insofar it complies
with the constitution.

Rawls argues that such a constitution contains two types of principles. First, principles that
structure the form of government and the political process, namely “the powers of the
legislature, executive and the judiciary” and “the scope of majority rule”. Second, a set of
basic rights and liberties that the legislative majority must respect. These are the standard
civil and political liberties familiar in liberal democracies “such as the right to vote and to
participate in politics, liberty of conscience, freedom of thought and of association, as well as
the protections of the rule of law.”

Rawls submits that the constitutional principles concerning the structure of the political
process can be implemented in various ways. This is not the case with the basic rights and
liberties that “can be specified in but one way, modulo relatively small variations” and have
special priority over other considerations. Given that the constitution contains the conditions
that political power must comply with in order to be legitimate in the first place, the
constitution is itself removed from the political agenda. It takes the content of basic rights and
political liberties “off the political agenda and puts them beyond the calculus of social
interest, thereby establishing clearly and firmly the rules of the political contest.”

The justification for subjecting democratic decision-making to these constitutional norms is
that they reflect minimal requirements of justice that everyone would reasonably agree to.

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38 John Rawls, Political Liberalism, 2005, at p. 137.
at p. 1145-1147.
41 Ibid, p. 227.
42 Ibid, p. 228.
Considerations of justice require us to protect certain basic interests of the individual in the form of rights, because “[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.” These rights therefore have priority over the democratic process. A similar view has been expressed by Ronald Dworkin who maintains that “a man has a moral right against the state if for some reason the state would do wrong to treat him in a certain way, even though it would be in the general interest to do so.”

In *A Theory of Justice*, Rawls uses the idea of hypothetical consent to develop a conception of justice on which he justifies his account of rights. His idea of the *original position* is a hypothetical situation in which people are situated as free and equal and in which they decide on a rational basis the principles of justice that are to order their society, without them having any knowledge about their particular situation, such as their conception of the good life, their race or social position. So doing, Rawls hopes to tease out what principles of justice would be acceptable to everyone under circumstances of moral equality.

A key consideration in Rawls’ account of justice is that it aims to develop a conception of justice under circumstances of reasonable pluralism, which he argues is “a permanent feature of the public culture of democracy.” The goal is to come up with a conception of how to organise our societies in a way that is just, when we disagree about the best way to lead our

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45 Ronald Dworkin, *Taking Rights Seriously* 1977, at p. 138-139. Dworkin sees this as the point of the US Constitution and particularly its Bill of Rights. He argues that the abstract clauses in the US Constitution should be read as expressing moral principles. See p. 133 of *Taking Rights Seriously* and also the later Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press Oxford & New York 1996), at p. 2. In Dworkin’s view the interpretation of these constitutional constraints is tied to history, it “must take into account past legal and political practice as well as what the framers themselves intended to say”. See *Freedom’s Law*, at p. 9-10. Judges must offer a moral reading of the constitution that is supposed to lie in the overall structure of the Constitution: “They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges.” *Freedom’s Law*, at p. 10. Judges are constrained by American history and constitutional practice. “Judges must defer to general, settled understandings about the character of the power the Constitution assigns them. The moral reading asks them to find the best conception of constitutional moral principles – the best understanding of what equal moral status for men and women really requires, for example – that fits the broad story of America’s historical record.” *Freedom’s Law*, at p. 11.
47 Ibid.
The ideal is therefore to come up with a conception of justice that is neutral towards these different views on what a good life consists of.\textsuperscript{51} Rawls argues that people can reasonably disagree about conceptions of the good life, because of the so-called ‘burdens of judgment’.\textsuperscript{52} These are “the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life.”\textsuperscript{53} The most important examples are that the evidence relating to a particular case is often complex and difficult to assess; that different people disagree about the weight to be given to different kinds of normative considerations bearing on a particular case; that our moral and political concepts suffer from a degree of indeterminacy and that we therefore need interpretation and judgment to solve hard cases; that people’s different experiences affect their judgments on moral issues; that there are different kinds of normative issues on each side of a moral issue and that it is difficult to make an overall evaluation; and that “any system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realized.”\textsuperscript{54}

The challenge is to show how people can still agree on the requirements of justice, despite deep ethical disagreement in society about conceptions of the good life. Rawls – and other liberal political philosophers – hope to solve this challenge by appealing to what is common and to justify the conception of justice in light of what is shared. This is reflected in a theory of social primary goods: things that are distributed by social institutions and that any rational person is supposed to want regardless of her ideal form of life. In Rawls’ view they are rights, liberties and opportunities, income and wealth, and the social bases of self-respect.\textsuperscript{55} The principles of justice concern the division of these social primary goods. Admittedly, this idea of social primary goods does entail that Rawls adopts a conception of the good that guides his construction of justice. However, this idea is supposed to be neutral towards the different conceptions of the good life that we find in actual society.\textsuperscript{56}

\textsuperscript{50} Will Kymlicka, Contemporary Political Philosophy, 2002, at p. 228-230; John Rawls, Political Liberalism, 2005, at p. 3-4. On liberalism see also: David Held, Models of Democracy, 2006, at p. 56-60.
\textsuperscript{52} John Rawls, Political Liberalism 2005, at p. 54-55.
\textsuperscript{53} Ibid, at p. 55-56.
\textsuperscript{54} Ibid, at p. 56-57.
\textsuperscript{56} Ibid, at p. 348-350.
On top of this, liberal political philosophers make the necessary assumption “that all ethical commitment has a common form: that there is something like pursuing a conception of the good life that all people, even those with the most diverse commitments, can be said to engage in.”\footnote{Jeremy Waldron, ’Theoretical foundations of liberalism’ in Jeremy Waldron (ed), \textit{Liberal Rights: Collected Papers 1981-1991} (Cambridge University Press Cambridge; New York 1993) 35, at p. 56.} The idea is that “although people do not share one another’s ideals, they can at least abstract from their experience a sense of what it is like to be committed to an ideal of the good life”.\footnote{Ibid.}

Rawls argues that a set of basic liberties should have priority over other political decisions, because they would be chosen in the original position. These rights protect a basic sphere of liberty necessary for persons to live a life according to their conception of the good life, whatever that conception may be. So for example, because persons attach fundamental importance to their religious worldview, they require at least freedom of conscience as a basic right in order to live according to that conception and to be able to revise it in light of new insights.\footnote{John Rawls, \textit{A Theory of Justice} (Revised Edition), 1999, at p. 474-475.} In addition, Rawls argues that people have ‘the capacity for a sense of right and justice’, which is the “capacity to understand, to apply, and normally to be moved by an effective desire to act from (and not merely in accordance with) the principles of justice as the fair terms of social cooperation.”\footnote{John Rawls, \textit{Political Liberalism} 2005, at p. 302.} This capacity means that people are willing to accept reciprocal obligations and organise their political system in line with such obligations. People have a higher-order interest in developing their sense of justice and the persons in the original position would therefore also choose a set of political liberties and a system of representative government that allows them to do so.\footnote{Ibid, at p. 335 and p. 289-371 more generally. A more democratic or procedural reading of Rawls’ work is also possible. Rawls does acknowledge the possibility of disagreement over constitutional issues, see \textit{Political Liberalism}, at p. 231-240, p. 293, 298 and p. 334-340. Rawls also argues the list of constitutional rights should be settled at the stage of a constitutional convention where part of the veil of ignorance is lifted and the delegates to such a convention decide on the adoption of a constitution in light of “general knowledge of how political and social institutions work, together with the general facts about existing social circumstances.” See \textit{Political Liberalism}, at p. 336 and p. 334-340 more generally. See on this point also: Hugh Baxter, \textit{Habermas: The Discourse Theory of Law and Democracy} (Stanford University Press Stanford 2011), at p. 76-82.}

In Rawls’ work constitutional constraints on majoritarian decision-making are thus justified pre-politically. Their justification derives from a hypothetical rational agreement on certain minimal requirements of justice that constrains and legitimates actual political decision-
making. As I discuss in section 4, the idea that the requirements of justice could be adequately determined on the basis of a hypothetical rational agreement as opposed to an actual democratic process, has become subject to an important line of critique. Yet, assuming for now that the liberal justification of fundamental rights works, it provides a strong normative ground for subjecting democratic decisions to constitutional constraints. Whether judicial review is desirable depends on an assessment of whether that institution offers better protection of the constitutional constraints than a situation where the enforcement and interpretation is left to the legislature itself or to some other institution.

3.2 Constitutional Courts as the Forum of Principle
The idea of legitimation by constitution requires that an institution must verify whether the exercise of political power conforms to the constitution. After all, in order to assess whether a law is legitimate, it must be established that it complies with the constitution. Judicial review is one mechanism to provide this ‘service’, but Rawls does not explicitly endorse it. He believes there is no universally best way to protect fundamental rights and thinks that such a solution should be tied to historical conditions and the political culture of a particular legal system. However, he does not consider judicial review anti-democratic and maintains that in a system with judicial review a constitutional court would be “an exemplar of public reason”. When applying the constitutional provisions on rights and governmental structures, such a court would be expected to reason only on the basis of the political principles that the constitution aims to protect and promote. This use of public reason aims to ensure that the constitution’s application is guided by the political principles that free and equal citizens may reasonably be expected to endorse. A constitutional court would also fulfil its role as an exemplar of public reason by performing an educative function to the wider public. It gives “public reason vividness and vitality in the public forum” and often “forces political discussion to take a principled form so as to address the constitutional question in line with the political values of justice and public reason.” On the other hand, Rawls suggests that

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65 In addition public reason encompasses “guidelines of enquiry: principles of reasoning and rules of evidence in the light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them.” John Rawls, Political Liberalism 2005, at p. 224.
66 Ibid, at p. 233 and p. 239.
issues of power and narrow self-interest will influence ordinary democratic processes more easily.67

Similar considerations can be found in the work of Ronald Dworkin, who more explicitly embraces judicial review, albeit in the context of US constitutionalism.68 The key reason for Dworkin to endorse judicial review lies in the virtue of judicial independence and judges’ superior ability to engage fundamental moral issues. In his view it is typical of rights disputes “that the interests of those in political control of the various institutions of the government have been both homogeneous and hostile.”69 Moreover, giving legislative majorities the power to decide issues of rights makes them judges in their own cause. In virtue of their independence, judges are better able to reach correct outcomes in deciding rights issues than the political majorities in the legislature.70

The electoral accountability of legislatures instead makes them unsuitable to decide rights issues. It makes legislatures responsive to the majority’s demands, whereas the majority is thought not to take rights seriously.71 The underlying basis for this claim is a particular understanding of the democratic process. Political majorities are considered not to base their decisions on the basis of moral arguments but on the preferences of self-interested persons instead.72 This gives rise to the threat of the so-called “tyranny of the majority”: Minorities run the risk of having their fundamental interests disregarded by oppressive majorities in the democratic process. The tyranny of the majority arises if citizens vote solely on the basis of their self-interest and for the satisfaction of their private interests, without seriously considering the interests of others. Those in the minority then lose out and see their interests simply disregarded by the majority.73 Dworkin submits that judges come to their decisions on

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70 “Legislators who have been elected, and must be reelected, by a political majority are more likely to take that majority’s side in any serious argument about the rights of a minority against it; if they oppose the majority’s wishes too firmly, it will replace them with those who do not. For that reason legislators seem less likely to reach sound decisions about minority rights than officials who are less vulnerable in that way.” Ronald Dworkin, Law’s Empire 1998, at p. 375.
71 Dworkin submits: “Of course the comfort of the majority will require some accommodation for minorities but only to the extent necessary to preserve order; and that is usually an accommodation that falls short of recognizing their rights.” Ronald Dworkin, Taking Rights Seriously, 1977, at p. 146.
72 Dworkin expects public debate before a referendum or a legislative decision to be of low quality, see also his later work: Ronald Dworkin, Freedom’s Law: The Moral Reading of the American Constitution, 1996, at p. 344.
the basis of moral argument and are therefore better placed than legislatures to decide the moral issues that inevitably come up in constitutional cases:

“Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself.”

Dworkin rejects the argument that process-related reasons count in favour of giving legislatures rather than judges the last word in deciding constitutional rights issues, which he refers to as fairness issues. First, he argues that it cannot be the case “that political fairness so understood is of paramount importance in the constitutional context, that it must steadily be preferred to justice when the two are thought to be in conflict.” By supposing that legislatures base their decisions on the preferences of self-interested persons and judges on moral principle, Dworkin makes it possible to construe the conflict between judicial review and democracy as a direct conflict between justice and fairness, between outcome and process considerations. Secondly, he also offers a different understanding of what fairness requires in a constitutional context: “Fairness demands deference to stable and abstract features of the national political culture, that is, not to the views of a local or transient political majority just because these have triumphed on a particular political occasion.”

Thus, Dworkin acknowledges that constitutional adjudication must be sensitive to the specific history and culture of the country in which this adjudication takes place, but he thinks that judges are better able to take that history and culture into account.

Finally, in later work Dworkin has argued that judicial review has a positive effect on public debate and a nation’s constitutional culture:

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74 Ronald Dworkin, The Forum of Principle, 1981 469, at p. 517; Dworkin does acknowledge that judges may also make incorrect decisions about matters of rights. He thinks, however, that this threat should not be exaggerated, as any decision that proves very unpopular will be eroded in the long run, either because of lacking public compliance or because of political influence in the nomination of judges. See: Ronald Dworkin, Taking Rights Seriously, 1977, at p. 148.
“When an issue is seen as constitutional, however, and as one that will ultimately be resolved by courts applying general constitutional principles, the quality of public argument is often improved, because the argument concentrates from the start on questions of political morality. Legislators often feel compelled to argue for the constitutionality and not the just the popularity of measures they support, and Presidents or governors who veto a law cite constitutional arguments to justify their decision. When a constitutional issue has been decided by the Supreme Court, and is important enough so that it can be expected to be elaborated, expanded, contracted, or even reversed, by future decisions, a sustained national debate begins, in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables.”77

In sum, Dworkin favours judicial review, because judges are better equipped than legislatures to tackle issues of moral principle, because they are better able to reach an understanding of the core democratic commitments of a particular political community and because they will improve the moral quality of public debate. All three claims rest on empirical assumptions that sketch a rather negative picture of democratic politics. Dworkin’s case in favour of judicial review is substantially weakened if legislative debates instead consist of good faith disagreements about moral issues. Furthermore, his case also loses considerable force if the moral quality of judicial decisions is often no better than the outcomes of a legislative process. In addition, where legislative debates consist of good faith disagreements on moral issues, it is unclear why judges would be better able to judge a political community’s core democratic commitments. Finally, under such circumstances it is also uncertain that judicial review would improve subsequent political debates and would not replace the legislature’s interpretation of the constitution with that of judges.

4. Rejecting the Liberal Justification
The liberal justification of judicial review faces the problem that people can reasonably disagree about matters of justice and rights. Such disagreement challenges the liberal justification for constitutionalism and judicial review, which is supposed to be based on a reasonable consensus of the requirements of justice. Reasonable disagreement about justice puts into question the legitimacy of subjecting democratic decision-making to contested

constitutional norms and leaving their interpretation to courts. In this section I discuss this critique on the liberal justification of constitutionalism and judicial review. I defend why democracy understood as a process based on argumentation and citizens’ participation provides a better source of legitimating law than a constitution justified in reference to a hypothetical agreement on matters of justice. In section 5 I subsequently turn to why certain authors reject judicial review on democratic grounds, whereas in section 6 I assess whether judicial review can nonetheless be justified on democratic grounds.

4.1 Reasonable Disagreement
As discussed, Rawls’ theory gives an important place to moral disagreements. He argues that in spite of citizens’ disagreements about moral issues they can nonetheless arrive at a reasonable consensus on issues of justice that in turn would justify higher constitutional law. In fact, this agreement on higher constitutional law is seen as an answer to disagreement in society. The conformity of legal norms to the constitution, gives dissenters a reason to continue to accept them even if they disagree with the prevailing views of the majority of their fellow citizens. The criticism on this defence of constitutionalism, however, is that it presupposes too much agreement on matters of justice and ignores persisting reasonable disagreement about issues of justice in contemporary liberal democracies.

Jeremy Waldron forcefully makes the point that Rawls must allow more room for disagreements about justice, rather than just about conceptions of the good life. The reason why this is so, is offered by Rawls himself. People are subject to the ‘burdens of judgment’ and this matters not just when people evaluate questions about the good life, but also when they evaluate issues of justice. If it is true for example, that the evidence bearing on a normative issue is “conflicting and complex”, that we may disagree about the weight of different normative considerations that are relevant and that “[t]o some extent all our concepts, and not only moral and political concepts, are vague and subject to hard cases”\(^\text{78}\), then we would expect people to reasonably disagree about the requirements of justice as well. They would reasonably disagree about what it entails to treat people as free and as equals, about how that requirement should be translated to the design of a hypothetical ‘original position’, what rights people should have and how those rights should be interpreted in concrete cases.\(^\text{79}\)

\(^{78}\) John Rawls, Political Liberalism, 2005, at p. 56.
\(^{79}\) Jeremy Waldron, Law and Disagreement, 1999, at p. 149-163.
Given the burdens of judgment, reasonable disagreement about justice is a feature of modern democratic societies in a much more fundamental way than Rawls’ liberal account of justice admits. Waldron argues that actual societies are societies “whose politics are dedicated quite explicitly to grappling with fundamental disagreements about justice.” In light of such reasonable disagreements about justice and basic rights it seems no longer possible to appeal to the outcomes of a hypothetical agreement to justify imposing a constitutional framework on the exercise of political authority where this constitution is itself removed from political contestation.

Rawls cannot really claim that his conception of justice stands above such disagreements, given his methodological commitments. Rawls maintains that “a conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.” Rawls’ method aims to achieve a state of reflective equilibrium at which the general principles of justice we accept and our more concrete intuitive judgments about questions of justice form a coherent set. In arriving at that point, one needs to start with uncontroversial judgments about justice and to try and justify these into a coherent set of principles. The discrepancies that arise between more general principles and concrete judgments are to be solved by continuously going back and forth between them and by amending both principles and concrete judgments to form them into a coherent whole. A state of reflective equilibrium is achieved when our principles and considered judgments about justice form a coherent system. The thought experiment of the original position is best understood as an instrument in structuring this process.83

In developing his conception of justice, Rawls thus draws heavily on our present judgments about justice. The conception of justice is not so much discovered but is constructed from what is already there. Rawls also accepts that our considered judgments have evolved

80 Ibid, at p.158.
83 See: Ibid, at p. 17-18 and p. 40-46. Rawls is not always fully clear about the relation between his intuitive arguments and the original position, but I think the original position is best understood as a function of Rawls’ broader method of reflective equilibrium. See Will Kymlicka, Contemporary Political Philosophy, 2002, at p. 60-70.
historically and that they do not have an ultimate – rational or otherwise – foundation.84 The fact that the term ‘justice’ is understood in multiple ways in ordinary language and across different societies, then already presents a considerable problem for Rawls.85 The supposed neutrality of Rawls’ conception of the basic liberties and their priority faces a similar problem.86 The basic liberties are supposed to be essential to persons’ conceptions of the good life and their sense of justice. However, the parties in the original position do not know yet what their particular conception of the good life is. Therefore, it seems impossible that they could determine whether the advantages of being able to exercise their basic liberties are outweighed by the disadvantages of other persons exercising the basic liberties.

Historical evidence appears to confirm that constitutional provisions are often subject to considerable disagreement. For example, Stone Sweet notes how the drafting of rights provisions in European constitutions “proved to be the most difficult aspect of constitutional negotiations in all countries” and “each party was allowed to enshrine its own preferred set of rights, usually watered down somewhat by the ‘horse-trading’, thus giving partial victories to everyone.”87 The fact that constitutional courts in different countries have handed down opposing judgment on similar issues such as on the right to abortion provides another example of rights disagreement.88 In addition, Habermas argues how ideas about the required protection of fundamental rights have historically evolved in light of changing circumstances. He cites the struggle for women’s equal status as an example. At first, he argues, feminist policies focused primarily on formal equality, e.g. they were directed at providing women

84 On this point, see: Thomas W. Pogge, Realizing Rawls (Cornell University Press Ithaca (New York) 1989), at p. 268-269.
85 Here, I found the discussion by Raymond Geuss useful in: Raymond Geuss, Philosophy and Real Politics (Princeton University Press Princeton & Oxford 2008). Rawls appears to acknowledge these points in his ‘Reply to Habermas’ in Political Liberalism, 2005. There he expresses caution about the place of the original position and the principles of justice it leads to. He states that it may be incorrect that the principles agreed to in the original position are the most reasonable ones: “We must check it against the fixed points of our considered judgments at different levels of generality.” (p. 381) He also states the primary aim of ‘justice as fairness’ is: “to be presented to and understood by the audience in civil society for its citizens to consider.” (p. 384). Further such statements can be found on page 399 and page 401. At page 401 he states that “[t]he ideal of a just constitution is always something to be worked toward.”
88 For example by comparing U.S. Supreme Court, Roe v. Wade, 410 U.S. 113 (1973), in which the abortion decision was judged part of the right of personal privacy and the appraisal by the German Federal Constitutional Court. The GFCC judged in 1974 that the right to life of the unborn prevailed over the mother’s right to free development of her personality. This required that the “condemnation of abortion must be clearly expressed in the legal order”. Bundesverfassungsgericht, Judgment of 25 February 1975, 1 BvF 1/74 (Schwangerschaftsabbruch f) Translation from Vicki Jackson and Mark Tushnet, Comparative Constitutional Law (Foundation Press 2014), at p. 113.
with formal equality of opportunity to jobs, education and political positions. Yet this formal equal treatment made substantive unequal treatment more visible. Social welfare politics reacted with special regulations on issues such as pregnancy and childcare. These policies in turn, however, have been criticised as leading to overgeneralised classifications, overprotection and new forms of discrimination. Habermas concludes that:

“[T]he individual rights that are meant to guarantee to women the autonomy to pursue their lives in the private sphere cannot even be adequately formulated unless the affected persons themselves first articulate and justify in public debate those aspects that are relevant to equal or unequal treatment in typical cases.”

Moreover, even if we could agree that a certain set of rights best accords with requirements of justice, we would still be faced with disagreement on the level of interpretation. The constitutionalised standard of these rights cannot settle their proper interpretation by themselves. The constitutional agreement lies in the abstract definition of the higher norms, but runs out when these have to be made more concrete. How particular rights are to be protected and how they should be balanced against other considerations will therefore be a matter of reasonable disagreement. Frank Michelman states the problem thus:

“It seems evident that no liberally satisfactory such standard can possibly be framed with both sufficient breadth to serve as widely acceptable clause in a public contract on legitimacy, and at the same time sufficient closure to fend off good-faith interpretative controversy at the point of application; not ‘freedom of expression;’ not ‘arbitrary arrest;’ no, not even ‘torture,’ to take the extreme case.”

This problem of interpretive disagreement puts the idea of ‘legitimation by constitution’ into doubt. That idea depended on the expectation that the legitimacy of legal norms could be verified in light of its conformity to a set of higher constitutional norms. Interpretive disagreement, however, suggests that this is not wholly possible in the way that the theory suggests. Legitimation by constitution also requires an institutional mechanism by which interpretive disagreements can be settled. This mechanism could be a court that gives

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authoritative interpretations of the constitution, but this solution runs into democratic objections. Given the existence of reasonable disagreement on moral issues, it is also not clear why judges would have the expertise to decide the moral issues required in constitutional interpretation.

4.2 The Turn to Procedure: Democratic Legitimacy
A response to this problem of reasonable disagreement is to move away from substantive questions about justice to the question of what constitutes a legitimate procedure to settle disagreements. The aim is to develop a procedure by which citizens can legitimately settle their different views about justice and take common action able to command obedience.

In this vein, Jeremy Waldron argues that there are two tasks in political philosophy. Not only must political philosophers occupy themselves with the question of what justice is, they must also theorise about how we can take legitimate political action where we disagree about justice. In theorising about the latter, they need to take into account the circumstances of politics, consisting of “the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be”. Given these circumstances of politics, a crucial concern in political philosophy should be to reflect “on the purposes for which, and the procedures by which, communities settle on a single set of institutions even in the face of disagreement about so much that we rightly regard as important.” Democracy is a likely candidate, because it – potentially - offers a voice to all in an open-ended deliberative process. Within these debates Habermas argues that philosophers should offer their substantive views on justice, but “in the role of intellectuals, not of experts.”

In Waldron’s view, law addresses the need for coordination under circumstances of disagreement about justice. Law claims authority to adjudicate conflicts between persons

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91 Ibid.
94 Jeremy Waldron, Law and Disagreement, 1999, at p. 3.
disagreeing about justice. One’s legal obligations may go against what one considers just.\textsuperscript{97} Disagreement on issues of principle is therefore not the exception “but the rule in politics.”\textsuperscript{98}

Once we accept the pervasiveness of disagreement about questions of justice and rights in our societies, it becomes very difficult to accept that constitutional principles can be seen as the object of a reasonable consensus on principles of justice and that it would be legitimate to remove those principles from further political debate. Rather, because debates on matters of principle are the rule rather than the exception in politics, it seems that we must allow room for reasonable disagreements concerning these principles of justice and constitutional rights in political debate. Moreover, the idea that judges in a democratic system should have the last word in deciding difficult questions of moral principle seems to depend on a supposed moral expertise they cannot justifiably be expected to have.

The next question is then what should be accepted as a fair procedure by which legitimate collective action can be taken under circumstances of disagreement. The idea put forward in theories of deliberative democracy is that the legitimacy of the law depends on an actual process of reason-giving among citizens. It is through a process of exchanging reasons and arguments in which the individuals themselves decide on the collective norms that they will be subject to:

“The notion of a deliberative democracy is rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among equal citizens.”\textsuperscript{99}

Habermas expresses the idea that for legal norms it is the democratic process that serves as the basis of its legitimacy: “only those statutes may claim legitimacy that can meet with the assent (\textit{Zustimmung}) of all citizens in a discursive process of legislation that in turn has been

\textsuperscript{97} Jeremy Waldron, Law and Disagreement, 1999, at p. 6-7.
\textsuperscript{98} Ibid, at p. 15.
legally constituted.” 100 The legitimacy of the law therefore depends on its acceptance in actual democratic discourses. 101

So, whereas Rawls uses the hypothetical decision-making process of the original position to develop a conception of justice in the abstract, deliberative democrats stress that such issues are to be addressed in actual political deliberation. One must rely on the actual political process and develop a fair procedure in order to take legitimate political action:

“Actual deliberation has an important advantage over hypothetical agreement: it encourages citizens to face up to their actual problems by listening towards one another’s moral claims rather than concluding (on the basis of only a thought experiment) that their fellow citizens would agree with them on all matters of justice if they were all living in an ideal society.” 102

It is thus the process of democratic deliberation that serves as the basis of legitimacy. Central to the idea of deliberative democracy are the ideas of deliberation and participation.

4.3 Central Elements of Democratic Legitimacy

4.3.1 Deliberation

A conception of deliberative democracy still demands that the justification of political decisions rests on reasons with a particular quality: they must be public reasons. The key to justifying decisions in the deliberative process is that citizens “appeal to reasons that are shared, or could be shared, by their fellow citizens”. 103 This principle of public reasoning is rooted in the idea that participants in the political process should recognize each other as free and as equals, and therefore should appeal to reasons that could be shared by others. 104

The idea of public reasoning often serves to contrast the deliberative conception of democracy with so-called aggregative conceptions of democracy. On an aggregative conception the existing preferences and interests of citizens are taken as given. An aggregative democratic process serves to give equal consideration to these preferences and

100 Jürgen Habermas, Between Facts and Norms, 1996, at p. 110.
102 Ibid, at p. 16.
103 Ibid, at p. 25.
interests, for example in the form of simple majority rule. On the deliberative conception, the existing preferences and interests of citizens need to be justified as well.\textsuperscript{105} Central to this idea is the notion that citizens are able to revise their preferences in the process of deliberation and that they appeal to reasons acceptable to others.\textsuperscript{106}

Countering the idea that democracy as a simple process of majority voting is sufficient to provide the resulting decisions with legitimacy, deliberative democrats offer the strong argument that “the nature of the moral claims and the quality of the moral arguments that are made before a vote is taken”\textsuperscript{107} are crucial. If, for example, a person’s vote is based on faulty information, it is difficult to see what force the vote could have against someone who is affected in his vital interests by the resulting decision. Rather, a deliberative conception of democracy in which citizens publicly justify decisions towards each other on the basis of reasons that others could accept, in which they learn from each other’s positions and in which they take each other’s claims into account, is best in line with the idea that citizens are to be seen as moral agents who deserve equal respect.\textsuperscript{108}

The requirement of public reasoning limits the possible range of legitimate substantive outcomes that the political system can produce. Nonetheless, precisely what kind of reasons count as public reasons able to justify political decisions, is difficult to say in the abstract. This will also depend on the participants’ perception of those reasons.\textsuperscript{109} If one tries to specify in the abstract what public reasons are, the risk is ending up with a Rawlsian-like conception and reproducing the problem of disagreement that deliberative democracy was supposed to give an answer to. Rawls after all, argues that his conception is the result of a reasonable consensus on matters of justice.

Several less demanding criteria have therefore been articulated to distinguish public reasons from non-public reasons. Examples of private reason are self-interested reasons, prejudice, assertions of power, reasons that appeal to the interests of a particular group over that of


\textsuperscript{107} Amy Gutman and Dennis Thompson, Democracy and Disagreement, 1996, at p. 32.

\textsuperscript{108} Ibid, at p. 39-51.

others, but also reasons that appeal to a particular religious authority that could not be shared by all.\textsuperscript{110} Some authors have usefully distinguished between self-regarding, other-regarding and ideal-regarding justifications. Self-regarding justifications refer to the interests of the speaker herself or the group that she represents. Other-regarding justifications refer to the interests of groups or persons other than that of the speaker herself or the group she represents. Ideal regarding justifications refer to ideals or abstract moral principles. From the perspective of deliberative democracy, speakers should justify their demands on the basis of ideal and other-regarding justifications, whereas mere self-regarding justifications are generally not acceptable because other citizens cannot share them as an appropriate justification.\textsuperscript{111} Nonetheless, the place of self-interest in deliberation is contested.\textsuperscript{112} Mansbridge and others argue that it should have a place in deliberation but in a ‘suitably constrained’ manner.\textsuperscript{113} Finally, it is usually argued that deliberation should take place in good faith or be truthful. That means that the participants in a democratic discourse must genuinely believe themselves the claims they are making.\textsuperscript{114}

Whether the public reason requirement entails that certain basic of rights of citizens should be protected and that it could be determined in the abstract what the protection of such rights requires, is a disputed issue that I return to in section 5 and 6.

4.3.2 Participation
Democratic legitimacy also requires meaningful participation of citizens in political decision-making process and the formation of laws. Still, “the mere fact that decisions are to be made in a generically deliberative way does not go very far toward establishing a case for the principle of participation.”\textsuperscript{115} Perhaps one may conclude that the ideal of deliberation is best

\begin{footnotesize}
\begin{enumerate}
\item Daniel Naurin, 'Dressed for Politics' (PhD Manuscript, Göteborg University, Department of Political Science 2004), at p. 62-64. This idea could be seen as the more general demand of reciprocity, which is key in justifying in norms to others, see: Rainer Forst, The Right to Justification (Columbia University Press New York 2012), at p. 79-121.
\item Joshua Cohen, Procedure and Substance in Deliberative Democracy, Deliberative Democracy 1997, at p. 422.
\end{enumerate}
\end{footnotesize}
achieved when left to a political elite unaccountable to the citizenry as a whole, or more specifically to the issue under consideration, to constitutional courts. However, this view does not accord with the ideal of a deliberative democracy and would at least present a compromise.

There are fundamentally two reasons for valuing actual participation, an instrumental and an intrinsic justification. The instrumental justification is that only a sufficiently participatory political system safeguards an inclusion of all views and interests of the citizens and therefore can only produce decisions acceptable to its citizens. The intrinsic justification is that only a political system that gives its citizens an equal right to participate in the decision-making process of the decisions by which they are bound, treats its citizens as equals.

In reality, democracy requires a division of labour. Habermas develops this idea of a division of labour in modern democracies by drawing a distinction between the “strong public sphere” and “weak public spheres”. The “strong public sphere” consists of the governmental institutions where actual law-making takes place. Participation of citizens here is achieved by a system of representation: “the parliamentary principle of establishing representative bodies for deliberation and decision making.” Citizens choose their representatives in regular competitive elections on the basis of political equality.

The “weak public spheres” are the non-governmental associations of civil society. The ideal on Habermas’ model is that the formation of ideas in the weak public sphere feeds into the law-making process of the strong public sphere. The weak public spheres “identify and thematize problems, conflicts, and deficits in the everyday life of citizens”. This public opinion is then to be taken up in the strong public sphere to be transformed into binding laws.

These two mechanisms of participation both serve two goals. First, they provide mechanisms to hold those equipped with political power accountable. They are mechanisms that oblige the

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117 This point is forcefully made by Jeremy Waldron, Law and Disagreement, 1999, at p. 249-252.
118 Jürgen Habermas, Between Facts and Norms, 1996, at p. 170.
actors equipped with political power to justify and explain their decisions to citizens. These citizens can then make a retrospective assessment of those decisions and their justifications, and possibly accompany that behaviour with sanctions. Secondly, both mechanisms are ways for citizens to contribute prospectively to democratic will-formation and ensure the responsiveness of the strong public sphere to the views of citizens.

An important precondition for participation and deliberation is that both citizens and their representatives have sufficient access to information to judge both the quality of the reasoning and to participate in a meaningful way. Citizens can only reasonably accept decisions that bind them when their justification is public. And only when citizens have sufficient information will it be possible for them to participate meaningfully in democratic decision-making.

4.4 Consensus, Majoritarianism and the Tyranny of the Majority

Before discussing in the next sections whether a system of constitutional rights and judicial review can be justified in a deliberative conception of democracy, it is important to say something about the modality of decision-making that democracy requires. Theorists of deliberative democracy often see deliberation ideally as aimed at creating consensus. However, in reality such a consensus will not always be feasible, which makes majority voting necessary. The idea is nonetheless that the prior deliberation plays an important role and changes the nature of that voting process. Majority voting on the other hand is often said to give rise to the problem of the tyranny of the majority that I discussed in section 3.2. This problem in turn would justify subjecting the democratic process to judicial review.

The idea that deliberative democracy should always regard consensus as the appropriate outcome and that deliberation must be perceived as in some way deficient if consensus is not achieved, has to be rejected. It is precisely because people disagree about matters of justice, that a process of democratic deliberation is needed in which all persons have an equal right to participate. Deliberative democracy posits the idea of consensus as a regulative ideal, because it demands that citizens appeal to reasons that could be shared by others when they deliberate.

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However, given the circumstances of politics it is unrealistic to expect that the outcome of such deliberations should be consensus. Therefore, even on a deliberative account of democracy, majority voting is still to be given a crucial role.

A system of decision-making by majority can, in effect, be seen to give proper respect to “the individuals whose votes it aggregates.” Rather than a system in which consensus is regarded as the proper political outcome, it respects the fact that people have different views about justice and the common good. Secondly, a system of decision-making by majority gives equal weight to each individual opinion and therefore respects the value of political equality. Thirdly, majority decision-making is neutral between different contested outcomes, in the sense that it does not favour any of the outcomes that is the subject of disagreement. A decision-making rule that requires a heightened majority, such as a two-thirds majority, favours those who wish to keep the status quo. Conversely, a rule that would require less than a majority appears to favour those who want to change the status quo.

For these reasons, a democratic process in which deliberation and contestation over different views about justice is coupled to a system of majoritarian decision-making, is essential in legitimating collective decisions under the circumstances of politics. The condition for majoritarian decision-making to provide decisions that are legitimate is that the “approval of the greatest number reflects, in that context, the greater strength of one set of arguments compared to others.” This presumes that views of the losing minority were taken into consideration. It is not the mere fact that a majority supported a particular proposal that made its adoption legitimate. It is rather the idea that the proposal was justified in a process of argumentation to which all citizens had an equal right to participate and that was concluded by a process of voting.

These considerations take the sting out of the fear of the tyranny of the majority discussed in section 3.2. Recall that the tyranny of the majority is thought to arise if citizens vote solely on

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the basis of their self-interest without seriously considering the interests of fellow citizens. Minorities would therefore run the risk of having their fundamental interests disregarded by oppressive majorities.\textsuperscript{130} Courts that protect rights could then be regarded as necessary to remedy this shortcoming of the democratic process, even if citizens can reasonably disagree about the proper protection of rights. Yet, this is different if legislatures do in fact deliberate about rights and the problem is rights disagreement, not neglect of rights considerations at all.\textsuperscript{131} If we accept that idea, we need further reasons to hold that courts would be better at the protection of rights than representative legislatures.

A key question is how idealistic the idea of deliberative democracy is and whether real-life politics still requires constitutional courts and entrenched constitutions to protect persons from defective democratic decision-making. This is the institutional question and I address it further in the following two sections. Some authors have argued that the ideal of deliberative democracy cannot be fully achieved in the democratic process, but that we need constitutional courts to achieve the requisite level of reasoning on fundamental questions of our political order. On this understanding achieving the ideal of deliberative democracy would require a division of labour between representative institutions that aggregate preferences and constitutional courts that engage in the more deliberative and principled reasoning regarding fundamental questions of the political order.\textsuperscript{132} Others argue that courts are not better at addressing rights issues than legislatures. In the next section, I first consider the latter arguments.

5. The Democratic Case Against Judicial Review
For a number of authors, the problem of reasonable disagreement about rights and the importance of democracy lead them to reject rights-based judicial review. These arguments rest on a number of additional arguments of why legislatures are better placed than constitutional courts to address rights issues.

\textsuperscript{130} See section 3.2 above.
\textsuperscript{132} For a critical perspective on a number of such views, see Christopher F. Zurn, Deliberative Democracy and the Institutions of Judicial Review, 2007, at p. 163-220.
5.1 Waldron’s ‘Core Case’ Against Judicial Review

Jeremy Waldron brings forward what he calls a ‘core case’ against judicial review. This core case is distinguished from non-core cases in which “judicial review might be deemed appropriate as an anomalous provision to deal with special pathologies”. He bases his core case on four assumptions about the society in which his arguments against judicial review apply and on which his case against judicial review is conditional. Waldron’s views are similar to those of other prominent judicial review sceptics, such as Mark Tushnet and Richard Bellamy.

The first assumption is that the society has “democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage”. This does not mean that these institutions work perfectly or that they cannot be improved, but that they are in reasonably good order. Waldron also assumes that the legislature has experience in dealing with difficult issues of justice and social policy; that the legislative process includes various safeguards such as committee scrutiny and bicameralism; and that the legislative process connects to wider debates in society. In addition, there is “a culture of democracy, valuing responsible deliberation and political equality.” Moreover, “the institutions, procedures, and practices of legislation are kept under constant review” from the perspective of political equality.

Secondly, Waldron assumes that the society has an independent judiciary that is in reasonably good order and that is not electorally accountable in the way that the society’s political institutions are. He also assumes that these courts would be capable of exercising judicial review. In addition, he assumes the courts deal with particular cases, in an adversarial context, that they refer to their past decisions relevant to the case under consideration and that they stand in a hierarchical relation to each other.

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137 Ibid, at p. 1362.
138 Ibid, at p. 1363-1364.
Thirdly, he argues that there “is a strong commitment on the part of most members of the society we are contemplating to the idea of individual and minority rights.” According to Waldron this means that:

> “[T]hey accept that individuals have certain interests and are entitled to certain liberties that should not be denied simply because it would be more convenient for most people to deny them. They believe that minorities are entitled to a degree of support, recognition, and insulation that is not necessarily guaranteed by their numbers or by their political weight.”

However, and this is Waldron’s fourth assumption, they reasonably and in good faith disagree about rights. Such rights disagreements do not just concern their outer ranges of application. They often concern central applications of the rights, because they raise major issues of political philosophy, such as the legality of abortion, the desirability of affirmative action and what rights criminal suspects should be granted in a fair trial. Nor does Waldron believe that his position amounts to rights scepticism or moral relativism. The recognition of disagreement does not exclude the option that one of the sides of the [dis?]agreement is right, or that there is a true position about rights. It rather recognizes that disagreement is a feature of talk about rights and that such disagreement requires a solution.

Under these conditions, Waldron contends that legislatures can be expected to deliberate seriously about rights issues. What happens when a court is given the ability to strike down legislation incompatible with rights, is that it will take sides in good faith disagreements among elected legislators that have settled their disagreement by majority decision. In this constellation, the legitimacy of the court’s role can no longer be justified solely with the argument that the court protects rights. The question becomes rather whether it is more likely that courts will arrive at a better judgment about rights than legislatures, because judges are better at deliberating about these issues and/or judicial review allows for a better form of citizens’ participation than the ordinary political process. In other words, the case for

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139 Ibid, at p. 1364.
140 Ibid, at p. 1364.
judicial review depends on a comparative assessment of courts’ and legislatures’ abilities on the basis of outcome and process considerations, i.e. an answer to what I defined as the institutional question.

Such a comparison should take into account that no mechanism for settling rights disagreements will be perfect. Any decision-making procedure may lead to errors. In addition, given the existence of rights disagreement, the outcome related considerations cannot state rights outcomes that are controversial. In the next subsections I consider the arguments about the respective qualities of courts both in terms of outcome and process-related considerations of the judicial review critics. I argue again that these arguments rest on empirical claims that are not yet backed up by sufficient evidence in all cases.

5.2 Outcome-based Reasons against Judicial Review
A key argument for leaving the issue of protecting rights to constitutional courts is that the protection of the individual is central to them, because they consider individual cases. This argument faces the problem that cases before courts are often brought by advocacy groups that want to a particular interpretation of rights to be implemented based on general considerations rather than on the basis of individual cases. Moreover, in systems with abstract forms of review, there often are no concrete cases at the source of a judgment. At the same time, the legislative process is an open process in which individuals are able to direct the attention of legislators to the possible impact of legislation on their individual position. Therefore, legislatures may be seen to be in a better position to weigh all the different interests affected by a particular legislative act.

A second argument is that judges will be orientated to a written Bill of Rights. This ensures that cases will focus on the rights issues at stake. Yet, again there are a number of problems with this argument. The text of a Bill of Rights mostly does not provide a clear answer about rights disagreements. Waldron argues that people on different sides of an argument will often consider that the text of a Bill of Rights pleads in their favour:

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143 Ibid, at p. 1373.
“One lesson of American constitutional experience is that the words of each provision tend to take on a life of their own, becoming the obsessive catchphrase for expressing everything one might want to say about the right in question.”

In fact, there is a threat. Because there is a written Bill of Rights interpreted by judges, rights disagreements will focus on the precise wording of the rights provisions rather than on the actual rights issues at stake. Waldron argues that courts are likely to be worried about their legitimacy and therefore “cling to their authorizing texts and debate their interpretation rather than venturing out to discuss moral reasons directly.” The judicial treatment of rights is therefore likely to focus on the wrong issues, rather than the moral issues at stake. The focus on a Bill of Rights may also come at the expense of rights not included in the Bill of Rights, such as socioeconomic rights.

This problem also spells doubt on the idea that courts would be better at protecting rights, because they give elaborate reasons for their judgments. The problem is that courts often do not focus on the moral issues head on. Their reasoning has a partly technical character. It focuses on the words of an authoritative text and they often base themselves on previous decisions on the matter.

“Courts are concerned about the legitimacy of their decisionmaking and so they focus their ‘reason-giving’ on facts that tend to show that they are legally authorized – by constitution, statute, or precedent – to make the decision they are proposing to make.”

Waldron argues in comparison that legislative debate is often very rich. He argues how in the UK House of Commons debate on the Medical Termination of Pregnancy Bill from 1966, politicians talked through and focused “on all of the questions that need to be addressed when

abortion is being debated” and that they “debated the questions passionately, but also thoroughly and honourably, with attention to the rights, principles, and pragmatic issues on both sides.”

On balance, it is therefore doubtful that the reasons offered by judges for particular rights interpretations are better than those offered by legislators. Legislators give reasons for the legislation they adopt in the political debates preceding the adoption of such laws. Waldron argues, however, that unlike judges, legislatures are better able to address the moral issues at stake head on. This provides the opposite picture of that offered by Dworkin, who maintained that judges were much better able than legislatures to address the moral issues implicated in rights adjudication.

5.3 Process-based Reasons Against Judicial Review

Despite these doubts that judges are better than legislatures to protect rights, an alternative justification is that the judicial process allows for a better form of citizens’ participation than the ordinary political process. One argument is that courts are also subject to the participatory mechanisms of elections and public opinion, albeit in a different way. A second argument is that the judicial process offers an additional form of participation, namely direct participation. Although these arguments certainly have merit, the legitimacy of courts in terms of such process values is still weaker than that of legislatures. By themselves these arguments therefore cannot convincingly establish the democratic legitimacy of judicial review.

5.3.1 Elections and Public Opinion

Some authors maintain that constitutional judges have democratic qualities, because judges are appointed by representative institutions. Therefore they have a derived democratic legitimacy. Similarly, it has been argued that constitutional courts are also subject to, and need to take account of, public opinion. The links, however, are more indirect than with legislatures.

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150 Ibid, at p. 1384. Note that Waldron’s standard of assessment seems to be that of an observer with full knowledge of the relevant moral questions and issues who in light of this knowledge is able to assess that legislative debate is of high quality. This standard of evaluation seems inconsistent with his epistemic doubts about moral knowledge and hence the need to accommodate reasonable disagreement in a democratic process. Clearly, the standard of evaluation adopted by Waldron in the quoted phrase cannot be the normal standard for assessing the constitutional quality of legislative debate.

151 Ibid, at p. 1384.

152 See for authors who make this point the references in: Richard Bellamy, 'The Democratic Qualities of Courts: A Critical Analysis of Three Arguments ' (2013) 49 3 333.
The question of the way in which constitutional adjudication reflects decision-making in the democratic process, has been the subject of a substantial amount of research in the US. Authors in this field have argued that the US Supreme Court must often work together with the US President and Congress in order to shape constitutional law. Already in 1957, Robert Dahl wrote that the views of the US Supreme Court are never far out of line with the views of the legislative majority. The main reason is that the US President can bring the views of the Supreme Court in line with the views of the legislative majority, by appointing judges of his political colour on the Supreme Court. Subsequent research by social scientists has largely affirmed this conclusion. The general consensus among them is that "courts have not been a strong or consistent countermajoritarian force in American politics." This suggests that courts in the US play a more subtle role in shaping US constitutional law than often thought.

However, on comparison, courts are likely to score less on the participatory scoreboard than legislatures. Courts have at best a derived participatory legitimacy, which is weaker than a directly elected legislature. It is therefore unclear why on this basis they should be in a position to override democratic legislative majorities.

5.3.2 Direct Participation

The second argument is that constitutional adjudication provides an additional participatory avenue for citizens otherwise excluded from democratic practice. Constitutional litigation by individuals and public interest groups may be an additional way for these groups to bring their viewpoints into the political sphere.

However, there are a number of problems with this view. First, litigants in judicial proceedings are not the decision-makers. They can present their views and arguments to a

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154 Ibid, at p. 970.
159 The recent Dutch case on climate change in Urgenda may be seen as an example of such litigation. The Dutch foundation Urgenda successfully filed a court case against the Dutch government for failing to do more about climate change. District Court of The Hague, Judgment of 24 June 2015, Case NL:RBDHA:2015:7145 (Urgenda). I offered a critical analysis of the case: Nik de Boer, ‘Trias politica niet opofferen voor ambitieuze klimaat-politiek’ (2016) 73 1 Socialisme & Democratie 40.
judge, but ultimately the judges make the final decision. Second, the access to litigation is likely to be uneven. Only litigants with substantial amounts of resources are likely to be able to bring their case successfully before a court. Compared to the legislative process the ideal of political equality is therefore more imperfectly realised.\textsuperscript{160} Again, this participatory argument seems to require the additional argument that normal ways of democratic participation are blocked. This requires further empirical substantiation. Waldron assumes that this is generally not the case when his four assumptions hold.

5.4 Difficulties with the Democratic Case Against Judicial Review

Waldron and other judicial review sceptics offer a number of important arguments against judicial review. Where it concerns the process related arguments, I think they generally establish convincingly that legislatures allow for better citizens’ participation than courts. The idea that courts would be better than legislatures at allowing citizens to partake in the decisions that govern them seems to conflict with cherished ideas about judicial independence and the frequently articulated idea that judicial review exists to protect us from the pathologies of democratic decision-making. That courts do allow for some degree of citizens’ participation is better seen as a counterbalance to the political power they unavoidably exercise in interpreting the constitution. Moreover, even if we could establish that courts had better participatory qualities than legislatures, we may think that it should lead us to improve the workings of our representative democracy rather than to take it as a case for judicial review.

Nonetheless, there are several difficulties with Waldron’s outcome based reasons against judicial review. The first problem is whether we can really expect that Waldron’s four assumptions hold for most contemporary liberal democratic societies. Waldron offers a number of reasons why judges may not be best at deciding moral issues in the way that Dworkin supposes they are. However, Waldron’s arguments are based on the idea that legislatures and citizens more generally do take rights seriously. Because of this assumption, legislatures are expected to be better able to address the moral stakes. This claim seems incomplete, because Waldron does not offer much empirical evidence to back up his claims about legislatures.\textsuperscript{161} Waldron only really dwells on one legislative debate from one country...


\textsuperscript{161} In \textit{Law and Disagreement} Waldron states this as an assumption, but he believes it to be “true empirically that citizens and representatives often do vote on the basis of good faith and relatively impartial opinions about justice, rights, and the common good.” He also sees this part of his theory as “an aspirational quality”. See:
to support this point, namely the UK House of Commons debates on the Medical Termination of Pregnancy Bill from 1966.\textsuperscript{162} His thesis therefore amounts to more of a hypothesis on which further empirical research is required.

The second question is what Waldron’s four assumptions really mean. Waldron argues that citizens and legislatures take rights seriously, but that they reasonably disagree [as to?] what their protection requires. It is not fully clear what this entails. It presupposes a distinction between \textit{reasonable} and \textit{unreasonable} disagreement that is not explicated. If it is not possible to make this distinction, then it is hard to see its meaning. If it is possible to make this distinction, then it should be possible for courts as well. Judicial review could then still be legitimate if it is just aimed at correcting unreasonable democratic decision-making. The key question is then no longer whether judicial review could be legitimate, but rather whether it is necessary and how likely it is that courts would accept a more minimalist theory of interpretation.\textsuperscript{163}

Waldron maintains that people take rights seriously where they accept that “individuals have certain interests and are entitled to certain liberties that should not be denied simply because it would be more convenient for most people to deny them.”\textsuperscript{164} Moreover, he maintains that disagreements should be in good faith. This sounds similar to the requirement of public reasoning discussed in section 3.3. On this basis, persons can be seen to take rights seriously where they appeal in good faith or truthfully to public reasons in justifying their claims to others. One difficulty is that some people are likely to see such a rights conception as insufficiently demanding, because it allows for all kinds of decisions that they feel are \textit{unreasonable} violations of rights. By trying to articulate the difference between the reasonable and the unreasonable, we are likely to end up disagreeing about what is reasonable disagreement as opposed to unreasonable disagreement. At the same time, we must presuppose that such a distinction can be made. There are also a number of outcomes of

\textsuperscript{162} In \textit{Law & Disagreement} Waldron refers to his “experience” with national debates in the United Kingdom and New Zealand, which he regards as equally “robust and well-informed”, as well as to debates in the UK about homosexual law reform. Jeremy Waldron, Law and Disagreement, 1999, at p. 290.

\textsuperscript{163} Mark Tushnet addresses this issue explicitly and still rejects judicial review. See: Mark Tushnet, Taking the Constitution Away from the Courts, 2000, at p. 155-163.

decision-making procedures that appear clearly unreasonable, such as decisions by a
democratic majority to enslave part of the population, to withdraw the right to vote for
women or to fully deny minorities the right to freedom of expression. It is hard to see how
judicial review that aims to correct such outcomes is democratically illegitimate. Yet it is also
important to acknowledge the difficulties of coming up with a clear distinction between
reasonable and unreasonable political decisions in the abstract. I return to this dilemma in
section 6 where I discuss Habermas’ co-originality idea.

A third and related problem is that we probably need a richer conception of rights in order to
establish whether Waldron’s first assumption holds in any society, namely that the society’s
democratic institutions are in reasonably good working order. In order to establish this, one
probably needs to establish that a series of rights are adequately protected, particularly the
right to vote and freedom of expression. Some may go even further and argue that a
democratic system cannot exist if people are not sufficiently free to begin with. Again, if
we can establish whether the assumption holds, then judges should be able to determine this
as well. In addition, some may argue that judicial review precisely aims to protect the
democratic nature of a society’s institutions. When a citizen complains, for example, that her
right to free speech has been violated, her complaint is that democracy has failed. Waldron’s
assumption can therefore be said to simply beg the question. It takes as a given that a
society’s institutions are democratic, whereas that is precisely what is often in question in
constitutional cases. Moreover, it is unclear whether one can presume that these democratic
institutions will remain in place.

A final problem with Waldron’s approach is that he presents the problem of judicial review in
an all-or-nothing fashion. His comparative institutional analysis between courts and
legislatures asks which institution is better at deciding rights issues. This overlooks the
possibility that courts can take considerations about institutional capability into account when

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165 In a similar sense: Rawls’ introduction to paperback edition of Political Liberalism, 2005, at p. xlix; Tomas
166 This is the point articulated by Habermas, discussed below.
addresses the point and argues that judicial review would be legitimate if targeted at ensuring the preconditions
of what he calls ‘ populist constitutional law’. He names three such preconditions: voting, free speech, and
private space in which people can form their own points of view. However, he believes that it is unlikely that
constitutonal judges will stick to this narrow mandate: “Once we tell judges that they ought to exercise the
power to judicial review to secure the preconditions of populist constitutional law, we are going to find that they
will be doing much more than that.” Mark Tushnet, Taking the Constitution Away from the Courts, 2000, at p. 158.
they review legislation. For example, their review may be merely directed at checking whether the prior political process was sufficiently deliberative. In this manner, the question about judicial review concerns not just whether courts or legislatures are better at deciding on rights issues, but whether courts may correct for some of the legitimacy deficits in a prior legislative process without encroaching upon the priority of democracy.168

In sum, Waldron’s arguments and that of other judicial review critics against judicial review cannot wholly rule out the democratic legitimacy of such review. First, they must grant that such review is legitimate if it were directed at preserving the reasonableness of democratic decision-making. Secondly, a democratic decision to abolish the democratic process cannot be considered democratically legitimate.169 Constitutional constraints enforced by judges that aim to preserve the reasonableness and democratic nature of the decision-making process therefore cannot be ruled out completely as illegitimate. Admittedly, defining the threshold condition for when a democratic decision violates such constraints is very difficult. Still, the key question is not whether judicial review can ever be legitimate, but rather whether it is necessary and whether it is likely in practice that judges would fulfil this task better than the legislatures themselves.

This also entails that those disagreeing with Waldron about the relation between democracy and rights must still take something from his arguments. Perhaps it does not even matter crucially for Waldron’s arguments that we reasonably or unreasonably disagree about rights. The fact is that we do disagree.170 Given such disagreements, we cannot expect any institution to be free of such disagreements. Even if I think from a normative viewpoint that it is not possible to reasonably disagree all that much about rights, I must still find an institution that is likely to get the outcomes that I prefer. Yet, given the fact of disagreement, judicial review is likely to simply reproduce our disagreements at the level of judiciary, between judges. In addition, it leads to a loss in terms of democratic legitimacy. For this reason, even a Dworkinian or Rawlsian can have reasons to be sceptical about judicial review. He or she

170 Waldron offers arguments along these lines for what he calls non-core cases, see: Jeremy Waldron, The Core of the Case Against Judicial Review, 2006 1346, at p. 1401-1406.
should still be interested in establishing empirically whether judicial review contributes to what he or she holds to be the best protection of rights. Here, I think, lies a key strength of Waldron’s argument against judicial review, but also its weakness. Waldron points to a number of empirical issues that proponents and sceptics of judicial review should address, yet he does not really offer that empirical evidence himself.

6. Democratic Reasons for Judicial Review

So far, I have critically discussed two different perspectives on the democratic legitimacy of judicial review, a positive one and a critical one. I argued that both approaches are problematic. In answer to the constitutional question, Rawls aims to define constitutional constraints in the abstract by basing these in a reasonable consensus on issues of justice. The difficulty with this approach is that such constraints are contested at the level of justification and cannot settle interpretative disagreements. Nonetheless, the opposite approach of leaving the democratic process devoid of constraints is equally problematic. Decisions of a democratic majority to abolish the democratic process, that violate its preconditions or that are clearly unreasonable cannot be considered democratically legitimate. The dilemma is nevertheless that it seems very difficult, if not impossible, to determine a standard of reasonableness in the abstract by which the legitimacy of democratic decisions could be assessed and that could serve as an uncontroversial basis for judicial review.

In this section I discuss two potential solutions to this problem. The first is the idea that constitutional norms should be understood as the result of a democratic decision rather than of a hypothetical agreement. On this reading, judicial review is democratically legitimate, simply because it enforces a reasonable democratic decision made in the past, a precommitment. I argue that this provides only a qualified justification for judicial review. It is unclear why democratic majorities can legitimately bind successive generations, and constitutional precommitments usually do not resolve reasonable interpretive disagreements either. At the same time the decision to impose constitutional constraints and judicial review on subsequent democratic decision-making, can be seen as a reasonable decision in light of legitimate distrust about the workings of the democratic process given particular historical experiences. Precommitment thus offers a qualified justification for judicial review.

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The second idea is that judicial review can simply be seen to be aimed at safeguarding the preconditions for legitimate democratic decision-making. Habermas’ co-originality thesis entails that rights to private autonomy and public autonomy are co-original: we need a democratic procedure to adequately define liberal rights, but we also require a sufficient degree of freedom in the first place to have a democratically legitimate procedure. I argue, however, that this idea does not lead to a clear conclusion about the relation between constitutionalism and democracy. To the contrary, co-originality entails that this relation cannot be adequately defined from the viewpoint of political philosophy. This dilemma makes the institutional problem more central in enquiries concerning the democratic legitimacy of judicial review. The best one can hope for is a process of reasoned and good faith deliberation on whether democratic decisions comply with the preconditions for their legitimacy. The key issue is to figure out whether a system with or without judicial review better allows for such deliberation. This requires a more informed empirical debate. The preceding analysis has shown that debates over judicial review are informed by empirical assumptions that are yet to be backed up by better empirical evidence.

6.1 Precommitment

One attempt to reconcile democracy and judicial review is to argue that judicial review does no more than enforce a democratic decision made in the past. On this understanding the constitution and the authorisation of judicial review are precommitments made by a nation’s citizens in the past that limit present democratic majorities. Yet, because the constitution stems from a democratic decision made by the citizens themselves in a referendum or through their representative institutions, neither the constitutional constraints it imposes on democratic decision-making nor the judicial review it authorises can be considered undemocratic. This justification for constitutionalism and judicial review is problematic for two key reasons.

The first reason is that it is not clear that such a precommitment is also democratic. There is a distinction between the democratic nature by which a decision is made and the democratic nature of a decision’s content. Democracy can be abolished by means of a democratic decision, yet that does not mean the abolition of democracy is democratic. Likewise, a people may choose to set up a system of constitutional constraints on democratic decision-making
coupled to judicial review. Yet, this does not make those constraints or judicial review democratic. It is doubtful that democracy includes the idea that prior generations should be able to make an agreement that still binds current citizens in the present, when the latter had no possibility to participate in making that agreement themselves. To a certain extent, this critique applies not just to the constitution, but also to other democratically enacted legislation. After all, a significant amount of the legislation currently in force is likely to have been decided upon before many citizens were born or before they achieved the voting age. Nonetheless, an ordinary democratic majority could still change this legislation when they change their mind. So long as a majority has not reversed a piece of ordinary legislation, we can therefore reasonably presume that it has the enduring support of a democratic majority. This does not hold for constitutional law that is entrenched against legislative change. As long as the constitution remains in place, we can only assume that it is still supported by a political minority sufficiently large to block constitutional change.

The second problem is that a precommitment can only settle constitutional controversies where the constitutional norms are sufficiently specific. This is problematic where the norms are highly indeterminate, which is usually the case with rights provisions and other constitutional norms. Even if we agree at time A that the precommitment of a particular right would be important, it cannot settle subsequent moral disagreement at time B about how this right should be interpreted. Judicial review rather reserves this judgment to the judges on a constitutional court.

173 For a similar point, see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press Cambridge MA 1980), at p. 11-12. See also Christoph Möllers, Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts, Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht 2011 281, at p. 331-333. As I pointed out in section 2.4, Möllers notes that this problem in the German context is less pressing compared to that of the United States, because most German constitutional provisions can be amended relatively easily. An exception, however, is the so-called eternity clause of Article 79 (3) BL.
174 See along these lines Jeremy Waldron, Law and Disagreement, 1999, at p. 260-266. For the German context, see: Christoph Möllers, Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts, Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht 2011 281, at p. 329-330. The idea of ‘originalism’ can be seen as an attempt to remedy this problem of indeterminacy and still save the idea of precommitment. The idea is there to track down the historical intentions of the constitution’s drafters or accepted understandings at that time. This, however, opens up a host of new problems, such as which intentions should count, whose intentions should count, how we should interpret these intentions and what we should do if the intentions prove incomplete, absent, indeterminate or conflicting. Particularly, there is an apparent conflict between the open-ended nature of constitutional provisions and the more concrete intentions held by its drafters. The open-ended nature of these provisions seems to be evidence that the constitution’s framers meant its interpretation would require moral judgment. These are familiar critiques of originalism. See for example: Ronald Dworkin, The Forum of Principle, 1981 469, at p. 476-495. For similar thoughts in the context of
The justification for entrenching constitutional norms and judicial review therefore cannot simply rely on the argument that these have been democratically enacted. Additional reasons must be given. For example, it could be argued that the constitutional norms are just or produce stability. However, such reasons for entrenching particular constitutional norms are in turn subject to reasonable disagreement and always drafted in a particular historical and social context. When faced with a conflict between the legislature’s majority decision to adopt a particular law and a constitutional norm, it is not immediately clear why one should privilege the views of the constitution’s drafters over that of current legislators, who are arguably in a much better position to take new developments into consideration, and are presumably equally as intelligent as the constitution’s drafters.¹⁷⁵

The decision by a constituent power to entrench constitutional constraints and/or authorise judicial review may, however, be seen as a reasonable response to historical circumstances. Most European constitutional courts were founded in states at a time when they had little or no experience with democracy and where a general commitment to the idea of rights or democracy among its population could not be taken for granted.¹⁷⁶ For example, when the German Constitutional Court was founded after the Second World War there was a reasonable expectation that the wider population did not yet take the rights of minorities seriously. As the historian Tony Judt reports, in the years 1945-49 “a consistent majority of Germans believed that ‘Nazism was a good idea, badly applied.’”¹⁷⁷ In 1952, three years after West Germany’s new constitution had been adopted, 25% of the West German population still stated that they had a good opinion of Adolf Hitler, whereas 37% still thought it better for Germany not to have Jews on its territory.¹⁷⁸ In Spain and Portugal, constitutional courts were set up after the fall of authoritarian, non-democratic, regimes. In Eastern European countries, they were founded after the fall of Communism. In such

¹⁷⁶ Before World War II most European parliamentary systems embraced legislative supremacy, but the war’s destruction and Europe’s experience with totalitarianism led to a shift in thinking about state power. What emerged in Western Europe was a constrained form of democracy in which stability became a major goal and that was informed by a distrust of popular sovereignty and even distrust of parliamentary sovereignty. On the history related to this see: Jan-Werner Müller, Contesting Democracy (Yale University Press New Haven & London 2011), at p. 128–130 and p. 146-150.
¹⁷⁸ Ibid, at p. 58.
circumstances there are grounds to expect that the democratic process may not be fully respectful of rights.

More generally, as I pointed out in section 5.4, we do not really know whether legislatures take rights as seriously as Waldron and other judicial review critics suggest.\textsuperscript{179} The drafting of a constitution is thus made with incomplete information as to whether one can expect the legislature to take rights issues seriously. Given such uncertainty, it is also possible for citizens to reasonably disagree about the desirability of including constitutional constraints and judicial review in a constitution. For this reason, it is difficult to maintain that the institution of judicial review is democratically illegitimate per se. Rather, the best one can do is to see how it functions in practice compared to a system without such review and to argue why one of these systems is more legitimate. This is particularly important, because the historical circumstances that once justified setting up judicial review, may no longer hold in the present.\textsuperscript{180} The upshot of this argument is again that a satisfactory answer to the institutional question is key in assessing judicial review’s democratic legitimacy. At the same time precommitment offers a qualified justification for establishing this institution.

6.2 Judicial Review to Protect Democracy

An even better justification for subjecting the democratic process to constitutional constraints and judicial review is to argue that they enable rather than constrain democracy.\textsuperscript{181} Many constitutional rules can be seen to perform this function. For example, constitutive rules such as the size of electoral districts, the number of representatives that citizens can choose from, and rules about the frequency of elections are ‘predecisions’ that make democratic decision-making possible.\textsuperscript{182} Constitutional norms that protect free debate and a right to opposition

\textsuperscript{179} Waldron argues against precommitment as a justification for judicial review based on the assumption that legislative deliberations ordinarily include deliberations over issues of moral principle, but are marked by reasonable disagreement over such issues. This expectation may be unwarranted for the reasons I state in the above. See Jeremy Waldron, Law and Disagreement, 1999, chapter 12.


\textsuperscript{181} Stephen Holmes argues to this effect as: “The dead should not govern the living; but they can make it easier for the living to govern themselves.” Stephen Holmes, ‘Precommitment and Disagreement’ in Jon Elster and Rune Slagstad (eds), Constitutionalism and Democracy (Cambridge University Press Cambridge 1988) 195, at p. 240.

\textsuperscript{182} Ibid, at p. 230-232.
form an important precondition for legitimate democratic decision-making. In another sense, constitutional constraints may be seen as democracy enabling, because they take certain controversial issues off the agenda that would obstruct day-to-day politics.

The best-known version of a democratic justification for judicial review is Ely’s “participation-oriented, representation-reinforcing approach.” Ely argues that judicial review should be aimed at clearing the channels of political change and at facilitating the representation of minorities. In this sense, judicial review should protect free speech and the right to vote in order to maintain an open political process. In addition, judicial review should protect minorities that cannot protect themselves through the political process, because widespread prejudice prevents political majorities from taking their interests seriously. Ely claims that courts are better qualified at performing such a representation-reinforcing approach than legislatures themselves. As relative outsiders, judges do not need to worry about staying in office and by definition, prejudiced majorities will not seriously consider the interests of minorities.

In a similar vein, Habermas justifies the function of a constitution and judicial review with reference to the democratic process. He argues that there is an internal connection between the idea of deliberative democracy and the protection of constitutional rights as a whole, not just political rights. In his view, a constitution embodies the institutional conditions for democratic will-formation. Constitutional rights are not to be seen as pre-political liberties externally imposed on the democratic process, as they are in the liberal view, nor solely as the result of a process of political self-determination. Rather, conceptually they are co-original with democracy. They institutionalise the possibility of democratic will-formation, but at the

187 Ibid, in particular at p. 105-134.
188 Ibid, at p. 135-179.
189 “[I]ns have a way of wanting to make sure the out stays out.” (ibid, at p. 106, see further also p. 88 and p. 102-103). On the second point see: Ibid, at p. 151.

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same time need to be specified in the democratic process. Citizens can only exercise their public autonomy, if they are sufficiently free to begin with. They must possess a sufficient degree of private autonomy in order to consider themselves the authors of the law, when they exercise their public autonomy.191 Only under such circumstances can it be assumed that citizens can be convinced by the reasons for adopting a particular law and their approval is not the result of force or coercion. Yet, in order to specify the rights that need to be protected, they also need public autonomy.192 Private and public autonomy are therefore co-original:

“This mutual presupposition expresses the intuition that, on the one hand, citizens can make adequate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent; but that, on the other hand, they can arrive at a consensual regulation of their private autonomy only if they make adequate use of their political autonomy as enfranchised citizens.”193

On this basis, Habermas argues that democratic legitimacy presupposes five types of rights.194 The first three types of rights guarantee citizens’ private autonomy. These are (1) “[b]asic rights that result from the politically autonomous elaboration of the right to the greatest possible measure of equal individual liberties.”195 Two types of rights are then seen as necessary corollaries of this first type of rights, namely (2) basic rights that grant individuals their equal status as members of a legal community and (3) basic rights that ensure the legal protection of the other rights.196 These abstract rights need to be further specified and interpreted in the political process itself and in light of changing circumstances. The classical liberal rights commonly found in modern constitutions are regarded as further specifications and interpretations of these more abstract rights.197 Habermas characterizes the first three types of rights in their abstract form rather as “legal principles that guide the framers of constitutions.”198

194 See generally, Jürgen Habermas, Between Facts and Norms, 1996 at p. 118-131.
195 Ibid, at p. 122.
196 Ibid, at p. 122-123.
197 Ibid, at p. 125.
198 Ibid, at p. 126
The fourth category of rights concerns rights to equal political participation. These are (4): “Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law.” Finally, citizens need (5): “Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4).” These rights must again be given concrete shape in a political system through the political process and in a context-dependent way. So, for example, in the political process it needs to be specified how political rights such as freedom of assembly, freedom of association and freedom of expression are to be protected in relation to the circumstances of society. Habermas understands “the catalogues of human and civil rights found in our historic constitutions as context-dependent readings of the same system of rights.” He also maintains that “every constitution is a living project that can endure only as an ongoing interpretation continually carried forward at all levels of the production of law.”

In Habermas’ political philosophy the function of a constitution is thus understood in procedural terms. It lays down the political procedures by which citizens can adopt democratically legitimate law, and democratic legitimacy presupposes safeguarding both rights to private autonomy as well as to public autonomy.

However, it is not clear where this leads us. If it is aimed at overcoming a tension between the protection of a set of liberal rights and democracy, then it surely fails. Rather, I believe that Habermas shows how the tension between democracy and liberal rights cannot be eliminated, because it is reproduced at this fundamental level. His co-originality thesis leads to the following problem: not only is it impossible to develop a fully adequate definition of a set of liberal rights outside the democratic process, it is also impossible to objectively determine when our decision-making procedures are really democratic.

Suppose, for example, that a particular country wants to adopt a new democratic constitution. If we take Habermas’ co-originality thesis seriously we would not really know where to start.

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199 Ibid, at p. 123.
200 Ibid, at p. 123.
201 Ibid, at p. 128.
202 Ibid, at p. 129.
We would think that the country’s constitution would have to include a set of rights in order for it to be democratic at all. But we would need to specify these rights in a democratic process, because according to the co-originality thesis these rights cannot be specified outside a democratic process. However, before we have specified what these rights mean, we cannot be sure that we really have a legitimate democratic process. Therefore, it is unclear how we should go about designing this constitution.

A second example shows the same point. Imagine now that the country’s constitution has been established. Its democratically elected legislature adopts a piece of legislation by majority in the ordinary legislative process. A citizen in the losing minority subsequently complains that the piece of legislation violates her right to privacy that is enshrined in the constitution. She argues that the piece of legislation therefore cannot be considered legitimate, because it violates a key right that is supposed to be a part of a legitimate democratic process to begin with. The legislature on the other hand argues that the piece of legislation is actually a further specification of the right to privacy. The co-originality thesis cannot tell us which side should win.

In both examples it is not clear how Habermas’ co-originality thesis would help in addressing these questions. Rather, it suggests the opposite, namely that it is impossible to answer these questions. In designing and interpreting a constitution we simply have to specify a certain conception of rights in a process that we think is democratic and that sufficiently protects the rights that are part of its preconditions. We cannot claim the conception is correct, because that would require a vantage point we do not have. At best we can claim that we can reasonably believe it to be correct until someone shows why it is not. In this vein a constitutional settlement can be seen only as a temporary stabilisation between the conflicting ideals of democratic majority rule and liberal rights that should always be open to future contestation.203

For such reasons it is also difficult to determine what Habermas’ co-originality thesis entails for the democratic legitimacy of judicial review. In his view, constitutional courts are to

guard the conditions of procedural legitimacy, “namely to ensure that the process of
lawmaking takes place under the legitimating conditions of deliberative politics.”204. But is
not entirely clear what that role entails. On the one hand Habermas suggests a limited role for
constitutional courts that focuses on a ‘reasoned analysis’ requirement, where the “standard
of judgment is the discursive character of opinion- and will-formation, in particular the
question whether the legislative decision turned on reasons that can be publicly advocated or
on private interests that cannot be declared in the framework of parliamentary
negotiations.”205 On the other hand it seems that Habermas justifies quite a demanding theory
of constitutional adjudication. Constitutional adjudication can be directed at the full set of
constitutional rights, not just those that safeguard public autonomy, but also those that
safeguard private autonomy.206 As Christopher Zürn puts it in an interpretation of Habermas’
theory:

“According to Habermas, the function of constitutional review can be summarized as
simply guaranteeing the procedural fairness and openness of democratic processes.
Yet, concretely, the tasks involved are manifold: keeping open the channels of
political change, guaranteeing that individuals’ civil, membership, legal, political, and
social rights are respected, scrutinizing the constitutional quality and propriety of the
reasons justifying governmental action, and ensuring that the channels of influence
from independent civil society public spheres to the strong public sphere remain
unobstructed and undistorted by administrative, economic, and social powers.”207

Habermas appears to maintain that this function of constitutional review can be performed by
judges and does not lead to problems, because it is aimed at the application of already
justified constitutional norms and does not itself require further justification of the content of
the system of rights. And because judges are specialised in discourses of application, the
function of constitutional review can be located in a court.208 Legal discourses can “lay claim
to a comparatively high presumption of rationality.”209

204 Jürgen Habermas, Between Facts and Norms, 1996, at p. 274.
205 Ibid, at p. 276.
206 Christopher F. Zurn, Deliberative Democracy and the Institutions of Judicial Review, 2007, at p. 239.
208 Jürgen Habermas, Between Facts and Norms 1996, at p. 266; Christopher F. Zurn, Deliberative Democracy
209 Jürgen Habermas, Between Facts and Norms,1996, p. 266.
This idea seems naïve. The constitutional court will unavoidably have to further develop constitutional norms in a legislative manner, because discourses of justification and application cannot be wholly separated and because the abstract nature of many constitutional provisions certainly renders them subject to reasonable interpretive disagreement. Habermas himself argues that the set of basic rights needs to be specified in an on-going manner and in light of changing circumstances. The basis for this would be the democratic process itself. Yet, the constitutionalisation of these rights, especially where coupled to judicial review, appears to hamper this ideal.

This concern also applies to judicial review on the basis of political rights, such as the right to vote and the right to free speech. As Habermas acknowledges, these “basic rights to equal opportunities to participate in processes of opinion- and will-formation” apply reflexively to further development of the different categories of rights, including these political participation rights themselves. Put more simply, by exercising their rights to political participation citizens must also work out how to specify these rights to participation themselves. This makes sense, because reasonable disagreement does not just exist over liberal rights that protect private autonomy, but also over rights that protect public autonomy, such as freedom of expression. Process-based judicial review, as favoured by Ely, therefore does not do away entirely with democratic concerns about judicial review.

Admittedly, there are certain preconditions no democratic decision can ever legitimately violate. Like Ely, Mark Tushnet argues that it would be a good thing to have judicial review for protecting the right to vote, to ensure that people can still criticise the government, to maintain that people have some private space to develop their ideas about politics, and to deal with real constitutional crises. Relatedly, and drawing on the European context, Mattias Kumm has argued that rights-based judicial review institutionalises a practice of Socratic contestation. In his view, proportionality review entails a check of whether the exercise of

211 Jürgen Habermas, Between Facts and Norms, 1996, at p. 123.
public authority conforms to public reason. Judicial review thus ensures that the exercise of public authority remains reasonable. "214

The difficulty with such interpretive theories, nonetheless, is threefold. First, such review may not be necessary in reasonably mature liberal democracies. 215 Secondly, there is no guarantee that judges will actually apply a particular interpretive theory, once given the power to review legislation. By giving judges this power, they may end up doing much more. Thirdly, the interpretive theories are themselves indeterminate and touch upon many issues that people reasonably disagree about. 216

6.3 The Case for Weak Judicial Review

Beyond certain minimal requirements, the idea of co-originality entails that the best we can hope for is that every time a democratic majority adopts legislation, this is accompanied by good faith deliberation on whether such legislation is compatible with the preconditions of democratic legitimacy. Ultimately, better insights on the actual functioning and respective capabilities of legislatures and courts are key in assessing how this function of constitutional review is best institutionalised and whether it justifies judicial review. The institution of judicial review in particular, would be justified if there are good reasons to suppose that legislatures by themselves do not adequately take into account the preconditions of democracy, for example, because they are insufficiently deliberative. 217

In any case, Habermas’ account suggests that constitutional review should be an important part of legislating, where legislatures assess themselves whether legislation complies with the


216 Both points are acknowledged by Tushnet and for such reasons he submits that judicial review is therefore best rejected, Mark Tushnet. Taking the Constitution Away from the Courts, 2000, at p. 154-163. Contra Kumm it could be argued that a proportionality analysis can be very intrusive, particularly where courts engage directly in balancing different interests.

217 See also Christopher F. Zurn, Deliberative Democracy and the Institutions of Judicial Review, 2007, at p. 245-247. Conrado Hubner Mendes argues for judicial review as a mechanism that leads to better deliberation about constitutional essentials. Conrado Hübner Mendes, 'Neither Dialogue Nor Last Word - Deliberative Separation of Powers 3' (2011) 5 1 Legisprudence 1. Mendes submits that in a political system with judicial review “[p]arliament gains the additional burden to demonstrate that it respected the pre-conditions of democracy.” (at p. 30) On the basis of empirical evidence about court-legislative interactions he also submits: “[T]hat the alternative to parliament’s supremacy is not necessary the pure supremacy of court, but a more complex interactive game instead. The inexistence of judicial review, on the other hand, stimulates a culture of parliament’s sovereignty that, in its simplicity, lacks resources for defending itself from the well-known vulnerabilities of the parliamentary mode of decision-making.” (p. 30)
The constitution must be part of an ongoing discourse, in which the constitution serves as a standard both to assess existing democratic practices, as an ideal to be further realised through legislation, and as a standard that must be open to contestation itself.

Given that a constitution embodies the preconditions for democratically legitimate law, law can claim legitimacy only where it is established that these preconditions are fulfilled. There is hence good reason to give citizens the ability to contest legislation before an independent institution on constitutional grounds, e.g. a constitutional court, if they deem the legislative process did not comply with these preconditions. In order to prevent such an institution encroaching too much on legislative decision-making, the institution should be subjected to a degree of popular influence. This could be done, for example, through giving the legislature influence in the appointment of judges, by ensuring the subjection of the court’s decisions to public opinion, as well as to a critical audience of legal specialists.

Existing empirical research on judicial review and constitutional courts does indicate, however, that judicial review leads to the judicialisation of politics, which signifies an increasing influence of courts on political actors. On the basis of a comparative study of the Italian, Spanish, French and German constitutional courts, Alec Stone Sweet concludes that legislatures become more like judges themselves under the spectre of judicial review. The constitutional courts need to maintain their status as neutral arbiters between parties to a dispute and therefore depict their decision-making as merely ‘judicial’ rather than ‘political’. The courts portray their reasoning as logically deriving correct outcomes from the provisions of higher constitutional law and provide partial victories to different parties to a dispute. Such review subsequently affects legislative action. Partisan political debate is partly displaced by a more formal legal discourse about the meaning of constitutional rules in which the different political stakes are no longer addressed directly. Within this discourse the constitutional court’s case law and its interpretation by legal scholars play a key role.

See also Christopher F. Zurn, Deliberative Democracy and the Institutions of Judicial Review, 2007, especially chapter 9.

Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe, 2000, at p. 139-152 and p. 194-204. For similar concerns see also: Yannis Papadopoulos, Democracy in Crisis? Politics, Governance and Policy (Palgrave Macmillan Basingstoke 2013), at p. 191-213. Comparing the German and US context, Michaela Hailbronner has noted how the German Constitutional Court relies extensively on scholarly literature in its judgments. By contrast, the German Court hardly recognises the legislature or citizens as constitutional interpreters. In the United States, on the other hand, she notes that judicial supremacy is more contested and that the Supreme Court more readily acknowledges the importance of public opinion in interpreting the constitution.
As a way to avoid such judicialisation of politics while keeping the benefits of judicial review, the idea of weak-form review has gained currency in contemporary constitutional debates.220 As a form of judicial review in which an ordinary legislative majority could still override constitutional decisions by the judiciary, weak-form review would allow an ongoing discourse between various institutions about the constitution. This seems to fit better with Habermas’ idea of co-originality than strong-form review. It would also allow courts to address constitutional problems unforeseen in the legislative process.221 However, any such institutional argument would benefit from a better empirical understanding of why and how legislatures would be inadequately equipped to protect the constitution by themselves and how judicial review has actually functioned in societies where it exists.

Section 8 sketches a method on the basis of which the comparative abilities of courts and legislatures in constitutional matters need to be assessed. This method is further developed later in this book as well as applied to a number of case studies. In section 7 I first enquire, however, to what extent democratic objections also apply to constitutional norms other than rights.

7. Beyond Rights: Democratic Legitimacy and Structural Judicial Review
The controversy on the democratic legitimacy of judicial review has primarily concerned rights-based review, as well as the discussion in this chapter so far. In this section I argue that democratic objections to rights-based review also apply to so-called structural judicial review, that is, judicial review on the basis of constitutional provisions that establish the basic institutions of government and that regulate the division of powers between different levels of government in a federal state.222 The issue is especially important here, because the national constitutional courts’ review of European law has aspects akin to structural judicial review. Structural review similarly empowers courts to decide important political issues over which

The relevance of scholarly literature instead is much lower. Michaela Hailbronner, 'We the Experts. Die geschlossene Gesellschaft der Verfassungsinterpreten' (2014) 53 3 Der Staat 425.
there is reasonable disagreement at the expense of the representative branches of government. Nonetheless, the democratic case against structural judicial review is more complicated than the rights-based objection. In particular, the maintenance of a federal governmental structure is seen as an important reason for judicial review.

7.1 The Democratic Objection to Structural Judicial Review

Following the Australian scholar Adrienne Stone, the democratic objection against structural judicial review can be based on three main arguments. First, structural judicial review raises similar political or moral issues as rights adjudication. When engaging in structural review, judges must also make evaluative judgments on issues about which there exists pervasive reasonable disagreement. To illustrate this, Stone offers examples of how courts in Australia have developed principles equivalent to rights in interpreting structural constitutional provisions. For example, interpretation of the Australian constitutional principle of political communication has faced the Australian High Court with similar issues to that of interpretations of a general right to freedom of expression. In addition, structural provisions often express an underlying principle that requires an evaluative judgment.

When it comes to judicial review of federalism, Stone notes that the idea of federalism is in itself a contested theory of government and that there is disagreement about how it is best realised even between those committed to the idea. Federalism is commonly understood as a system of government that balances the value of centralised government with that of greater local control. Centralisation allows for coordination of activities across an entire nation. Local control, on the other hand, is thought to prevent a too great concentration of power, to better achieve proximity of the governed to the governors, to foster experimentation and

223 Ibid Jeremy Waldron has suggested that his argument could be extrapolated to other constitutional provisions equally subject to reasonable disagreement, such as provisions on federalism. See: Jeremy Waldron, The Core of the Case Against Judicial Review, 2006, at p. 1358.

224 See e.g. Christoph Möllers, Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts, Das entgrenzte Gericht, Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht 2011 281, at p. 338, quoting Oliver Holmes: “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several States.” Oliver Wendell Holmes, ‘Law and the court’ in Oliver Wendell Holmes (ed), The Collected Legal Papers (Dover Publications Mincola 2007) 291, at p. 295.

225 Stone avoids the term ‘moral’, because she acknowledges that the issues that arise in rights based adjudication may be dissimilar in nature than those that arise in structural judicial review. She therefore uses the term ‘evaluative judgments over matters on which there is reasonable and intractable disagreement’ and argues that on this basis structural judicial review raises the same problem. (Adrienne Stone, Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structual Judicial Review, 2008 1, at p. 11-12).

innovation and to facilitate the living together of diverse cultural groups. The balance between these values, however, is a matter for debate.227

Secondly, just as constitutional rights, provisions on the division of powers, and the form of institutions often equally suffer from a lack of specificity. Structural judicial review therefore gives judges the discretion to decide these issues against majoritarian decisions under circumstances of reasonable disagreement, although judges possess no special capacity to decide these issues.228 Stone notes that in Australia and Canada structural constitutional provisions are interpreted by the judiciary in light of unwritten principles, such as ‘the rule of law’229, ‘federalism’, ‘democracy’, ‘constitutionalism’ and ‘respect for minority rights’.230

Thirdly, Stone argues that structural judicial review is not necessary to settle the meaning of the constitution. She addresses the argument that a federal system would collapse in the absence of federal judicial review and argues how in most federations political mechanisms play an important role in maintaining the federal balance. Furthermore, judicial interpretation has often resulted in the dominance of the central government level.231 An additional argument for federal judicial review, is that the constituent parts of a federation cannot be expected to uphold competence divisions because they would merely act as self-interested: parliaments would always resolve competence conflicts in a way that would enhance their powers. Stone rejects this argument, because it is similar to the argument for rights-based review that parliaments cannot be expected to deal with rights issues in good faith. Yet, where we expect that parliaments do take rights commitments seriously, they may equally be thought to take seriously other constitutional commitments. Just as a political process may concern principled and good faith disagreement over rights, it may concern principled and good faith disagreement over the proper competence divisions between constituent parts of government.232 Whether this assumption holds, however, is again an empirical issue.

227 Ibid, at p. 14 (notes in the original have been omitted).
228 Ibid, at p. 8-10.
229 In the case of Canada and Australia, see ibid, at p. 10.
230 The latter principles have been accepted by the Canadian Supreme Court, ibid, at p. 10.
7.2 Which Majority? The Problem of Federal Judicial Review

An important objection to extrapolating democratic concerns about rights-based review to federal judicial review is that the latter type is not equally counter-majoritarian. The democratic objection to rights-based review stems from the fact that it allows judges to override parliamentary majoritarian decision-making. One argument is that these objections do not apply to federal judicial review, because they concern unitary political societies. Federations instead are not unitary or strictly majoritarian. In federations the political equality of citizens is realised on both the state level as well as the federal level. Commonly the states’ equal representation at the federal level means that citizens from different states do not have equal voting power. The legislative process on the federal level is therefore not equally majoritarian as in unitary states. Democratic legitimation in federations depends on the citizens’ political participation in their capacity as citizens of a state as well as in their capacity as national citizens. Decision-making on the federal level can be seen to derive its democratic legitimacy from both levels.

Yet, that federalism has its own logic does not mean democratic values are not relevant to assess how the resolution of federal conflicts should take shape. The fact that federations seek a balance between local and national power levels means that a mechanism to resolve conflicts between those levels should be judged against respecting that balance. Still that does not mean it should not be judged against democratic values as well.234

A remaining issue with federal judicial review is that arguably the issue under review is which majoritarian institution should decide an issue, i.e. the federal legislature or the state legislature, rather than whether a majoritarian body should decide. The existence of good faith disagreement about the proper interpretation of federalism does not solve the settlement of federal conflicts. In such conflicts it is not clear which view - that of the state or the federal legislature - should prevail. To argue that a parliament on the federal level should decide the issue would not take seriously the character of a federation as made up of distinct political communities. According to some that would be question begging.235

235 Jeffrey Goldsworthy, 'Structural Judicial Review and the Objection from Democracy' 60 1 The University of Toronto Law Journal 137. A similar view is expressed by Nicholas Aroney, Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism, 2008 129.
Nonetheless, federal judicial review does raise counter-majoritarian problems. One reason is that giving judges the power to decide the division of powers between a federal state’s constituent parts, courts will also determine the constitutional principles underlying this division that are not at the disposal of the majoritarian branches at the different levels of government. For example, it may prevent majoritarian bodies at either level from voluntarily transferring powers to the other level, where this would conflict with the judicially determined division of competences.236 Another problem is that state legislatures may not be able to re-enact an invalid federal statute on the state level. The limited territorial scope of state legislation may significantly alter its effect. In this respect, Christoph Möllers points out that the question of whether a particular issue should be regulated at the federal or state level often cannot be separated from the political question of how the issue should be regulated.237

In order to avoid the objection of ‘question-begging’ in the context of federal judicial review, two answers are possible. The first is the judicial option, namely to leave the settlement of conflicts between different levels of authority to a court that is independent of nation-wide and intra-state majority opinions. However, this option is subject to the democratic objections discussed.

The alternative would be to leave the settlement of such competence conflicts to a political mechanism in which both levels of government are equally included. An example would be a decision by a bicameral federal legislature, in which one house represents the nationwide level and the other the states.238 Various authors have in fact argued that federalism is best maintained through political safeguards. In the US context, Herbert Wechsler reasoned that the large extent of the states’ involvement in the national government offered considerable safeguards to the states’ competences, for example because two senators represent each state in the US Senate.239


237 Möllers refers in particular to examples from the US, such as gun control and health care. See Christoph Möllers, Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts, Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht 2011 281, at p. 339-340.

238 Jeffrey Goldsworthy, Structural Judicial Review and the Objection from Democracy, 2010 137.

Given the democratic objections to federal judicial review, the political option has important advantages. Where the national parliament can be seen to represent both the national and local levels of government, judges have good reason to adopt a deferential standard of review where they scrutinise competence boundaries.\(^{240}\) This is particularly so where constitutional competence divisions are hard to change by constitutional amendment.\(^{241}\) If some form of judicial review would be deemed necessary, democratic ideals and structural judicial review are probably better reconciled if such review would come as *weak judicial review* and a combination of the federal and state parliaments would have the ability to override the court’s interpretation.\(^{242}\) This provisional conclusion is of course subject to further empirical enquiries about how well the respective legislatures take competence boundaries into consideration within their deliberations.

8. Conclusion: Towards Critical Engagement with Legislative and Judicial Practice

Judicial review is best justified if aimed at safeguarding the preconditions of democratic legitimacy, understood along the lines of Habermas’ theory of deliberative democracy. On this approach the constitution is understood as laying down the preconditions for a democratically legitimate law-making process, primarily by setting up a system of rights to private and public autonomy. The constitution, however, must be realised and specified in ongoing democratic discourses. This approach avoids the problem of the liberal approach justification of constitutionalism and judicial review, where the democratic process is subjected to the outcomes of a pre-political hypothetical agreement on requirements of justice. On the other hand, it also clarifies how the democratic legitimacy of legislation depends on the continued guarantee of persons’ rights to private and public autonomy.

A crucial difficulty with Habermas’ co-originality thesis is, however, that the precise relation between democracy and constitutionalism becomes unclear. Because constitutional norms are a precondition for a legitimate democratic process, but also require specification within the democratic process, constitutional norms can no longer serve as an uncontroversial standard

\(^{240}\) Jeffrey Goldsworthy, Structural Judicial Review and the Objection from Democracy, 2010 137.
to assess democratically adopted legislation. At the same time, in order to accept the legitimacy of such legislation it must also be ascertained whether legislation complies with constitutional norms.

In a democratic society, a constitution thus functions as both a standard to assess the legitimacy of law, as expressing an ideal to be further realised in law, but also as a set of norms that itself must be open to revision in light of new insights and arguments. Beyond certain minimal requirements, the best we can hope for in the domestic context is that there is on-going deliberation about whether a country’s laws remain compatible with the preconditions of democratic legitimacy. This entails that legislating must be accompanied by a check of whether such legislation complies with the norms and ideals laid down in the constitution, but not necessarily that this check should be exercised by a court. Whether the institution of judicial review is necessary, what type of review a constitutional court should exercise and how this institution should be given shape, depends on an assessment of the comparative abilities of legislatures and constitutional courts to address the legislation’s constitutional implications. Such comparative assessments must be empirically informed.

The key question then becomes whether a political system with judicial review somehow better ensures that such deliberation on constitutional questions takes place, compared to a system without such review. Answering this question requires an answer to at least three empirical questions. The first is how legislatures debate constitutional issues in the absence of judicial review. Answering this question should contribute to further understanding of whether legislatures take the protection of constitutional rights and other constitutional issues sufficiently seriously in their deliberations, although they disagree about their proper protection. The second is how these legislative deliberations over constitutional issues compare to the assessment of constitutional courts on similar issues. The third is how judicial review impacts on subsequent legislative deliberations. For example, when the legislative process appears to fall significantly short of the deliberative ideal, courts may adopt more intrusive forms of review in order to compensate for this legitimacy deficit, especially where it improves the subsequent deliberative quality of the legislative process. The proper judicial function must be tied to a better understanding of the role constitutional issues play in legislative deliberations. As a consequence, any assessment of the democratic legitimacy of judicial review is likely to be highly dependent on specific political, historical and social contexts. At the same time, it must also be acknowledged that there is no unequivocal
normative standard to assess the quality of legislative and judicial deliberations on constitutional issues. It appears that there is no other choice than to critically engage in these debates and to reason whether particular legislation is compatible with the preconditions of democratic legitimacy.\footnote{A possible way to side-step this problem could be to come up with a particular set of constitutional standards—rights and other standards—including their required interpretation and argue that any political system should satisfy them. Although one could acknowledge that these rights will be controversial and subject to disagreement, one could simply claim that people with such beliefs are wrong. Subsequently the set of constitutional standards could be used to compare different political systems with and without judicial review, to enquire which systems achieve better outcomes as assessed by these constitutional standards and research whether the difference in outcomes can be seen as caused by the existence of judicial review. This appears to be the approach followed in the David L. Cingranelli and David L. Richards, The CIRI Human Rights Data Project (Version 2014.04.14) <http://www.humanrightsdata.com/> accessed July 24, 2017 CIRI Human Rights Dataset, see: http://www.humanrightsdata.com/p/data-documentation.html (last accessed 23 July 2017); Drawing on this dataset Arthur Dyevre concludes that "the effect of judicial review on empowerment rights is robust against alternative explanations." (at p. 58) The empowerment rights include rights such as freedom of speech, workers’ rights, freedom of movement, freedom of religion, and rights to political participation. However, he does stress the need for more and better empirical research. See: Arthur Dyevre, ‘Technocracy and distrust: Revisiting the rationale for constitutional review’ (2015) 13 I International Journal of Constitutional Law 30.}

I argued in this chapter that the deliberative conception of democracy is probably best compatible with judicial review in a weak-form. Such a system allows citizens to contest the outcomes of democratic procedures before an independent court on the grounds that the conditions for democratically legitimate legislation were not respected. At the same time, it leaves the ultimate decision on the constitutionality of legislation to the legislature. So, doing weak-form review prevents the court from replacing the legislature’s assessment and ensures that an on-going democratic discourse on the constitution can continue. Nonetheless, the case for weak-form review is contingent on the empirical assumption that legislatures can be expected to seriously consider the constitutional implications of the laws they enact.

Focusing on the stated empirical issues will also foster a better understanding of the validity of the empirical presuppositions on which the debate between critics and proponents of judicial review partly depends.\footnote{Guillaume Tusseau, ‘A Plea for a Hint of Empiricism in Constitutional Theory: A Comment on Cesare Pinelli’s Constitutional Reasoning and Political Deliberation’ (2013) 14 8 German Law Journal 1184.} Such enquiries are therefore of value also for those who reject the democratic objections against judicial review articulated in this chapter.
CHAPTER 3 - THE NATIONAL CONSTITUTIONAL COURTS’ REVIEW OF EUROPEAN LAW AND ITS DEMOCRATIC LEGITIMACY

1. Introduction
In the previous chapter I discussed the normative justification for judicial review in the domestic context. In the current chapter I turn to the legitimacy of the national constitutional court’s review of European law. Recall that in this book I use the term European law as a broad notion. It includes EU-related legal instruments that strictly fall outside the scope of the EU Treaties but nonetheless clearly concern the EU. In addition, the term European law also refers to European treaties before their formal entry into force.¹

As I argued in the previous chapter, the best justification for judicial review of legislation in the domestic context is that it safeguards on-going deliberation on whether legislation complies with the preconditions for democratically legitimate law-making as laid down in the constitution. Yet, to understand whether judicial review better ensures that such deliberation takes place, as compared to a political system without judicial review, further comparative institutional research is required. This research should shed further light on how legislatures and constitutional judges address the constitutional implications of legislation, as well as how judicial review affects subsequent deliberations in the legislative process.

Building on this idea, the current chapter discusses the democratic legitimacy of the national constitutional courts’ review of European law. Generally, this review raises a similar democratic concern as in the domestic context. As in the domestic context, it subjects the authority of political institutions to national constitutional law as interpreted by constitutional courts. There is even reason to see the democratic legitimacy of the national constitutional courts’ review as more problematic in the EU context: more so than in the national context, as such judgments may have repercussions for the EU as a whole rather than just for political decision-making within a single state.²

¹ See the introduction, section 1.3.
² Although the extent of this problem will depend on the nature of the case and the power of the Member State where the constitutional court is from. For example, where a national constitutional court holds EU law inapplicable in the national legal order on constitutional grounds, this will have less consequences for the overall effectiveness of EU law where the court is from say Estonia than in Germany.
On the other hand, there are several concerns about the democratic legitimacy of the EU. The case against judicial review in the domestic context is based on the assumption that democratic institutions are in reasonably good working order. In the EU, however, one could argue that the national constitutional courts’ review of European law is a justified response to the EU’s democratic shortcomings. One idea is that such review helps to counter the undemocratic features of the EU’s decision-making process. A related idea is that the EU’s undemocratic features make the constitutional courts pivotal in ensuring that constitutional issues are duly considered.

Concerns about the supposed democratic shortcomings of the EU inform existing justifications for the national constitutional courts’ review of European law. Several scholars have maintained that the national constitutional courts protect the democratic autonomy of the Member States, put pressure on the EU to democratise, allow contestation over constitutional issues or ensure respect for national constitutional identities. These accounts, however, face the problem that the constitutional standards at the basis of such review are subject to reasonable disagreement: how the EU should be made more democratic and what respect for national constitutional identity requires, are also questions that people will reasonably disagree about. And where national constitutional courts invoke national constitutional law against the EU, they risk constraining political decision-making on issues subject to significant political disagreement.

For such reasons, the democratic legitimacy of the constitutional courts’ review depends on an empirically informed comparative institutional assessment between constitutional courts and other institutions also in the EU context. Also in the EU context, the democratic legitimacy of the national courts’ review largely depends on whether they better ensure ongoing deliberation on constitutional questions compared to a situation in which such review would not take place. In this vein, an account of the national constitutional courts’ legitimate role in the EU context should take account of three issues. The first is that problems with the democratic legitimacy of the EU may negatively impact on how political institutions address

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constitutional issues. The second is that the specific institutional setting of the EU differs from the domestic context. Different institutions located at different levels of government are involved in EU decision-making and the institutional setting differs depending on the type of measure under review. Assessments of a constitutional court’s legitimate role should be sensitive to these institutional settings. The third issue is the grounds on which national courts review European law. Courts may be better placed than other institutions to deal with some constitutional questions, but not with others and some grounds may more easily justify review than others.

The present chapter discusses the national constitutional courts’ review of European law in light of these considerations. My argument is structured in the following manner. In section 2 I first consider whether national constitutional courts should aim to correct the democratic shortcomings of the EU by using democracy as a standard for review. The section thus considers the democratic legitimacy problems of the EU, but also why there is disagreement about how the EU should be further democratised. On this basis I argue that national constitutional courts can legitimately review European law where their review would address the EU’s democratic legitimacy problems in a manner that is relatively uncontroversial and beyond reasonable disagreement. Beyond that, however, the courts’ review would raise a democratic concern, because it is liable to constrain reasonable political disagreements about how democracy in the EU should look. Section 3 subsequently discusses the institutional context in which review by national constitutional courts takes place. It considers the different possible institutional constellations in which such review may take place and how these affect the possible legitimacy of a national constitutional court’s review. Section 4 then discusses the key grounds on which national constitutional courts have reviewed European law: fundamental rights, national constitutional identity, ultra vires review and the role of constitutional courts in strengthening parliamentary oversight. The conclusion sums up the argument.

2. Should Democracy be a Standard for Reviewing European Law?
The first question I consider in this chapter is whether national constitutional courts should aim to correct the EU’s democratic legitimacy problems by relying on democracy as a standard to review European law. My answer to that question is largely negative and based on a fairly simple and by now familiar argument. Although I am convinced that the EU has several democratic legitimacy problems, there is also significant and reasonable disagreement
about how these problems should be addressed. This problem of disagreement undermines the case for the national constitutional courts’ democracy-based review and favours treating the question of how to make the EU more democratic as a political issue. Comparative institutional assessments therefore remain crucial in the EU context to assess the democratic legitimacy of the national constitutional courts’ review of European law.

2.1 The EU’s Democratic Legitimacy Problems and Possible Solutions

2.1.1 Executive Dominance
The Treaty on European Union proclaims that the “functioning of the Union shall be founded on representative democracy.” Yet, there are several reasons to believe that the EU suffers from various democratic legitimacy problems. A primary problem is that executive actors rather than directly representative institutions dominate its decision-making processes. Democratic legitimacy depends on meaningful ways of citizen participation through regular competitive elections, and openness of legislative institutions to the wider public sphere. The formal mechanisms of ensuring democratic accountability and will-formation in the EU proceed in two ways, one directly, the other via the national political domain. The European Parliament (EP) is directly elected by the citizens of the Member States and has formal rights of co-decision in many competence areas of the EU, but some are still excluded. Also, the Commission retains the right to initiate legislation in the EU. The EP thus does not have all the formal competences that national parliaments commonly have. In addition, the EP has less influence on the composition of the European Commission than most national parliaments have on their respective national governments. The EP must approve the President of the Commission as well as its composition, but individual commissioners are proposed by the Member States. Moreover, the Parliament can only force the Commission to resign if it has a two-thirds majority.5

Hix and Føllesdal have argued that the EU’s institutional set-up results in a lack of “electoral contest for political leadership at the European level or the basic direction of the EU policy agenda”.6 The EU decision-making process suffers from a lack of contestation over different policy alternatives and political positions, because “there is no room to present a rival set of

5 Yannis Papadopoulos, Democracy in Crisis? Politics, Governance and Policy (Palgrave Macmillan Basingstoke 2013), at p. 102-103. See also Article 17 TEU.
leadership candidates (a government ‘in waiting’) and a rival policy agenda.”7 Under such circumstances, it is difficult for citizens to distinguish between opposition to the EU as a whole, and opposition to current EU policies.8

During the most recent elections for the EP these concerns may have been alleviated to some degree. Through the Spitzenkandidaten process, the EP elections entailed an indirect election of the Commission presidency, as each of the main EP political groups already proposed a candidate for the Presidency during the elections. Following the elections, the candidate of the party with the relative majority was appointed Commission President.9 To some extent this mechanism has made the EP elections more about rival leadership candidates and policy agendas, and has altered the relation between the EP and the Commission to be closer to parliamentary government. Despite this change, the Commission’s composition is still not subject to the same influence of the EP as most national governments are from their respective national parliaments.10

These problems are not fully remedied by the involvement of national parliaments. Democratic accountability and will-formation in the Council of Ministers or the European Council proceeds indirectly through the national political process. By means of elections, citizens can choose national representatives in their national parliaments, who in turn are supposed to hold their governments acting in the Council accountable. This set-up, however, raises a number of democratic problems. First, there is the problem of the collective. National parliaments can only hold their individual governments to account and not the Council as a whole.11 This is a problem particularly where decision-making in the Council proceeds by qualified majority rather than unanimity, as individual Member States can be outvoted, and national parliaments therefore cannot control the EU’s exercise of legislative powers. Secondly, lack of information hinders democratic accountability and will-formation. Decisions taken in the Council are often the result of compromises without actual voting. Moreover, a lack of transparency surrounds these negotiations.12 Under these circumstances

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7 Ibid, at p. 548.
9 Which in the latest elections was the candidate of the European People’s Party, Jean-Claude Juncker.
10 The success of the Spitzenkandidaten process is contested. For a critical view see: Marco Goldoni, ‘Politicising EU Lawmaking? The Spitzenkandidaten Experiment as a Cautionary Tale’ (2016) 22 3 European Law Journal 279.
12 Ibid, at p. 2-4 and p. 11-29.
“governments can claim credit for the positive aspects as they shift blame to negotiation partners for the negative aspects.”13

The problem of executive dominance has increased with the response of the EU Member States’ governments to the Eurozone crisis. The European Council and the Eurozone summits, composed of the representatives of the Eurozone Member States, have come to play a crucial role for new steps towards further European integration. Yet, these meetings are not public and often lack effective oversight by national parliaments or the EP.14 In addition, this mode of decision-making has been said to follow a logic of international power, rather than respecting the equality of the Member States.15 Finally, the Member States have increased the power of independent technocratic bodies, such as the Commission and the ECB, to supervise each other’s economic and financial policies based on guidelines laid down by the Member States. The resulting situation is one that Jürgen Habermas has called ‘executive federalism’: decision-making by political elites behind closed doors rather than through an “argumentative conflict of opinions with the broad public.”16

2.1.2 Over-constitutionalisation, De-politicisation and Judicialisation

A related democratic problem in the EU results from the skewed balance between law and politics compared to that of the Member States. It is not just the case that the EU’s decision-making processes are dominated by executive actors, but also that the legal and institutional architecture of the EU appears to structurally privilege certain political considerations over others. This problem stems from two factors. The first is what has been called the EU’s over-constitutionalisation: much of EU law is resistant to change, limiting the freedom that political authorities have to consider different policy options, and resulting in excessive power of the CJEU. Secondly, the EU’s functional institutional design is said to privilege certain political considerations over others.

The first problem is that most norms of EU law have the same or similar formal features as constitutional norms in the domestic context. Most of EU law is very difficult to change, but does have direct effect in the Member States’ legal orders, and primacy over conflicting national law. Changing the primary law enshrined in the EU Treaties requires unanimity among the Member States and a burdensome ratification process. As Dieter Grimm has noted, however, the EU Treaties contain a great number of provisions that would be ordinary law in the Member States. They are not restricted to provisions that ordinarily fulfil the functions of a constitution. A similar point can be made regarding secondary EU law. Here the consensus requirements are less demanding, but still considerable.

Because EU law is directly effective and has primacy over conflicting national law, this constellation has made the CJEU a highly powerful institution. The Court is able to further develop the law, whereas it is difficult for political institutions to correct their decisions. The concern mirrors the problematic democratic legitimacy of judicial review in the domestic context, but in a heightened sense, as the EU Treaties are even more difficult to amend than most national constitutions. In turn, the CJEU’s interpretations of EU law have negative effects on the democratic autonomy of the Member States, which has been noted as a problem particularly in the area of internal market law. The CJEU’s broad interpretation of the EU’s free movement rights has essentially made the ‘entire spectrum of the national legal order’ subject to possible review, because any national rule that can be seen as an impediment to transnational trade is subject to review. Although the CJEU allows a wide range of

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17 See Article 48 TEU.
19 Even under the ordinary legislative procedure the Member States acting in the Council still need to agree with a qualified majority. (Articles 289 TFEU and Article 294 TFEU) Such a qualified majority requires “at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.” Article 16 (4) TEU.
21 Miguel Poiares Maduro, We The Court, The European Court of Justice and the European Economic Constitution, A Critical Reading of Article 30 of the EC Treaty (Hart Oxford 1998) , at p. 27. The key case is that marked this expansion is the CJEU’s 1974 Dassonville case, see particularly par. 5 where the CJEU held that ‘[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.” Case 8-74 Procureur du Roi v Benoît and Gustave Dassonville [1974] EU:C:1974:82.
possible justifications for such national rules, the Court still judges both whether national rules satisfy a legitimate purpose, and the requirements of proportionality.

According to Fritz Scharpf, the CJEU’s case law has had important substantive effects on the course of European integration and its democratic legitimacy. First, there are defects in terms of participation, as the cases that come before the Court are likely to be “an extremely skewed sample of all the interest constellations that are affected by European integration.”

For citizens and companies that compose the less mobile majority in Europe, who often benefit from national regulations and policies, there is little interest in bringing a case before the CJEU. Secondly, the exercise of judicial power favours deregulation of national regimes. The CJEU can only disallow national regulations that impede free movement rules, but cannot replace the national policy with a common European framework. The development of such a common European framework by means of EU legislation is difficult, given the high consensus requirements in the EU legislative process and the wide differences between Member States’ interests and preferences. The judicial enforcement of the Treaty freedoms thus makes it likely that there is “a strong asymmetry between judicially imposed negative integration and legislative positive integration.”

The second and related problem is that the EU’s functional design means that EU legislation must be adopted pursuant to certain goals that are not open to full democratic discussion themselves. The EU has been set up to achieve a limited number of goals, which is reflected in a limited set of functional competences. The prime example of this functional design is that a significant number of the EU’s competences are geared towards the creation of an internal market. As a result, the EU’s laws and policies must (often) pursue specific aims determined in the Treaties. One critique is that this functional orientation limits political contestation over the underlying goals and that the EU cannot or does not take certain normative concerns adequately into account. For example, it has been noted that the EU’s economic orientation

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22 Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) [1979] EUC:1979-42, especially par. 8.
23 Fritz W. Scharpf, ‘The asymmetry of European integration, or why the EU cannot be a ‘social market economy” (2010) 8 2 Socio-Economic Review 211, at p. 220
24 Ibid, at p. 221.
25 Ibid, at p. 221 and 223.
26 Ibid, at p. 223. According to Scharpf, this has adverse effects particularly for so-called social market economies with more extensive welfare states, which are more vulnerable to deregulation. The Court’s case law that upholds mobility rights of individuals and firms, risks undermining the solidarity and reciprocity on which these social market economies are built. On these points see p. 233-238.
limits its ability to fully take into account other non-economic normative concerns. At the same time, the goals underlying the EU’s competences are broad enough to authorise legislation that affects a wide range of policy areas: they do not restrict the EU’s legislative authority to specific sectors, and prohibitions of harmonisation in specific fields do not work effectively to contain EU legislative action.27

2.1.3 Possible Solutions for Making the EU More Democratic

In a nutshell, the answer to these challenges of executive dominance, over-constitutionalisation, judicialisation and functional design can be sought in a politicisation of the EU’s decision-making process. Various proposals to this effect have been made. One proposal is to increase the power of directly elected institutions, i.e. the European Parliament and national parliaments.28 Another is to scale back the content of the Treaties to their constitutional elements and to give other norms the status of secondary law, while possibly subjecting the latter to majoritarian voting procedures.29 With respect to the functional design of the EU, some have argued that the EU’s competences should be organised in a more sector-specific manner: they should be defined in terms of a power over a specific field, rather than in terms of a particular goal to be achieved.30 Others have argued for enlarging the EU’s competences or even giving up strictly demarcating the EU and Member State competences altogether to reduce their current functional focus and to put economic values

27 For concerns along these lines with still several differences, see: Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 1 European Law Journal 2; Sacha Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers' (2014) Oxford Journal of Legal Studies 1, particularly at p. 20-22; Marija Bartl, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit' (2015) 21 1 European Law Journal 23. Bartl helpfully explains the problem using the notion of diagonal conflicts as developed by Christian Joerges (at p. 34): “Diagonal conflicts denote situations where the EU has competence to regulate one aspect of a particular field/issue (usually internal market), while the member states retain the competence (and responsibility) for the ‘rest’. In turn, to make new domains amenable to EU competence and regulation, the EU has to reinterpret various social problems in line with its functional objective.” According to Bartl (at p. 24) “the insufficient politicisation of EU objectives has, over time, given rise to an increasing number of ‘assumptions’ in EU policy making, which replace the genuine political debate on various politically salient matters, thus undermining the democratic quality of the EU political processes.”


29 Dieter Grimm, The Democratic Costs of Constitutionalisation: The European Case, 2015 460, at p. 473. See also: Fritz W. Scharpf, 'After the Crash: A Perspective on European Multilevel Democracy' European Law Journal 3 384, at p. 400-405; Another idea is to create a political override of the CJEU, for example by the European Council, See: Fritz W. Scharpf, Legitimacy in the Multi-Level European Polity, *The Twilight of Constitutionalism* 2010.

30 Gareth Davies, Democracy and Legitimacy in the Shadow of Purposive Competence, 2015 2, particularly at page 2 and 14.
on a par with other values.31 Moreover, as the Euro crisis has shown, demarcation of the EU and Member States’ competences does not prevent the Member States from cooperating outside the EU Treaty Framework in a manner that is arguably more questionable in terms of democratic legitimacy.32

I do not wish to discuss the relative merits of these different proposals here. My focus is on another question, namely whether national constitutional courts should aim to correct the democratic shortcomings of the EU by using democracy as a standard for review. Considering the EU’s democratic legitimacy problems, one could argue that the national constitutional courts’ review of European law raises no democratic concern as long as it helps to address the EU’s democratic shortcomings.

2.2 The Trouble with Democracy-based Review: Disagreement Yet Again

The problem with the idea that national constitutional courts should aim to correct the democratic shortcomings of the EU is that the further democratisation of the EU is not a straightforward matter, regardless of whether the national courts could successfully perform this function. How the EU should be made more democratic is also subject to reasonable disagreement and there are competing perspectives on how the EU should be assessed in democratic terms. One influential view is that the EU cannot become a fully democratic organisation or cannot be understood as a political community similar to a nation-state. Rather than to try and democratise the EU at the European level, it would therefore be better to defend the decision-making autonomy of national democracies by protecting their essential competences, and prevent the EU’s power expansion.33

Two arguments feature prominently in this critique. The first is that transforming the EU into a real European democracy is impossible, because there is no European people or demos. The ‘no demos’ critique holds that only where citizens identify with each other to a sufficient degree, will they accept being outvoted in a majoritarian democratic process and accept

31 According to Sacha Garben “[i]t is in fact precisely because the current competence constellation does not effectively contain EU integration that we need to enhance the EU’s formal powers, counterintuitive as it may sound.” Sacha Garben. Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers, 2014 1, at p. 2.
32 Sacha Garben voices a similar critique against the Open Method of Coordination, see ibid, at p. 11-15.
redistributive policies. On this view, democracy requires a shared national identity that involves a sense of shared history, culture and common language. Supposedly the EU lacks such a shared sense of identity and consequently, the social bases for majoritarian democracy and redistributive policies is not present.34

The second argument is that there is no European-wide public sphere: the mediation mechanism between formal political institutions on the one hand, and citizens and civil society on the other does not function as well on the European level as on the nation-state level. The reasons are that there is no Europeanised political party system, no well-developed European civil society, no sufficiently Europeanised media and perhaps most importantly, no common European language. European citizens thus lack the ability to effectively influence politics at the EU level.35

These arguments present a challenge to attempts at democratising the EU. Strengthening the powers of the European Parliament could not meaningfully make the EU more democratic, but risks making matters worse by diminishing the powers of the Member State governments in the Council.36 Scaling back the content of the Treaties or enhancing the EU’s legislative powers would likewise threaten the autonomy of the Member States and be ill-advised.37 Both arguments indicate that the democratisation of the EU is by no means a straightforward task. Even if one rejects the no-demos critique and the public sphere argument, a

consideration is still that European institutions are more distant to citizens than national parliaments and thus make it harder for citizens to meaningfully participate in European level politics. For example, on average a national MP represents around 52,000 voters, whereas on average there is one Member of the European Parliament for every 673,000 voters.38

Nonetheless, the no-demos critique and the public sphere argument are contested.39 One problem in particular is that the opposite viewpoint also holds merit, namely that the nation-state by itself suffers from a democratic deficit. This viewpoint is informed by two ideas. First, underlying the ideal of democratic decision-making is an ideal of political equality: persons should have an equal right to participate in the decisions that affect them.40 This ideal of political equality favours including all persons in the decision-making processes that affect them. Yet, in real-life such a right is attached to being a citizen of a particular state. The formation of a political community implies a moment of closure where those who belong to the ‘people’ or ‘demos’ are distinguished from those outside it.41 To reconcile such exclusion with the underlying ideal of political equality, one requires a sufficient degree of congruence between those belonging to the ‘people’ and those affected by its decisions.

It is doubtful whether such congruence can exist and whether convincing criteria can be given to distinguish those ‘affected’ from the ‘non-affected’ by collective decisions of a nation-state.42 The establishment of such boundaries is likely to always have a political character in

39 The idea that a strong sense of shared identity is a prerequisite for a well-functioning democracy, conflicts with the idea that democracy offers a legitimate way for collective action in circumstances of political disagreement. The creation of European-wide democratic institutions could also help in creating a European-wide collective identity. See: Andreas Fallesdal and Simon Hix, Why There is a Democratic Deficit in the EU: A Response to Majone and Moravscik, 2006 533, Jürgen Habermas, ‘Remarks on Dieter Grimm’s ‘Does Europe Need a Constitution?’’ (1995) 1 3 European Law Journal 303, at p. 550. Habermas has also expressed a more optimistic note about the construction of a European public sphere and argues that if the political will is there, the preconditions for a European wide public sphere can be created. Jürgen Habermas, Remarks on Dieter Grimm’s ‘Does Europe Need a Constitution?’, 1995 303, at p. 307. Recent empirical research indicates that a majority of Europeans has developed dual identities. They consider themselves both national and European. Their European sense of identity is moreover thought sufficient to sustain some degree of European redistributive solidarity. In addition, this research indicates that national public spheres have undergone a process of increased Europeanization, particularly as a result of the Euro-crisis. See: Thomas Risse, ‘No Demos? Identities and Public Spheres in the Euro Crisis’ (2014) 52 6 Journal of Common Market Studies 1207.
42 Mattias Kumm makes such a distinction between decisions of states that are ‘justice-sensitive’ and those that are not. This distinction, however, faces the difficulty that it refers to a notion of justice that is politically contested. The normative appeal of democratic decision-making as elaborated in chapter 2 relies on the idea that we use the democratic procedure to settle disagreements about justice in a legitimate way. Kumm’s appeal to a
itself. Yet, particularly in the present-day interconnected world, the assumption of congruence between those affected by the collective decisions of a nation-state and those that have a right to participate in such decision-making, no longer seems to hold. Decisions of one state now fundamentally affect the livelihoods of citizens in other states. Scholars insisting that democracy requires national identity must at the same time acknowledge that such an understanding of democracy is in itself imperfect, in light of the ideal of inclusiveness that lies at its basis.

This connects to a second idea, namely that a democratic polity is “a community that rightly governs itself and determines its own future”. Equally, in today’s world the assumptions at the basis of this ideal of collective self-determination no longer hold with equal force. Processes of globalisation have undermined the capacity of nation-states to solve several pressing political problems. Prominent examples are environmental problems and the effective regulation of global markets. Furthermore, as the decisions of one state now fundamentally affect that of others, the capacity for self-determination of single states is consequently affected. Economic globalisation in particular, is perceived as a force that undermines the democratic capacities of nation-states.

On this reading, the setting up and strengthening of supranational governance structures is a way to enhance the democratic legitimacy of existing governance structures: European integration presents both an opportunity for political decision-making to become more inclusive regarding the persons it affects, as well as an opportunity to take back control over

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43 Chantal Mouffe, The Democratic Paradox, 2000, at p. 49.
44 Jürgen Habermas, The Postnational Constellation (The MIT Press Cambridge, Massachusetts 2001), at p. 70. See also: Nancy Fraser. Scales of Justice, Reimagining Political Space in a Globalizing World , 2010, at p. 92 and further. She proposes a different standard than shared citizenship that she refers to as “the all-subjected principle”. (at p. 96)
46 David Held, Models of Democracy, 2006, at p. 290-304. This argument about ‘effectiveness’ also plays an important role in Nancy Fraser’s arguments about rethinking public sphere theory, see: Nancy Fraser, Scales of Justice, Reimagining Political Space in a Globalizing World, 2010, at p. 96-98.
policy areas on which nation-states no longer possess effective influence. Speaking of an EU democratic deficit would in any case be one-sided.

The existence of considerable reasonable disagreement about how the EU should be democratised makes it difficult to argue that national constitutional courts should review European law in order to address the EU’s democratic legitimacy problems. Rather than straightforwardly enhancing the EU’s democratic legitimacy, such review risks constraining political debate over many fundamental questions about the EU. Particularly so, because existing political left-right divisions are likely to affect ideas about how the EU should be assessed democratically. To name a few examples: for parties that favour liberal economic policies, the loss of the political capacity to intervene in markets is likely to be less of a problem than for social-democratic parties that favour more extensive redistributive schemes, parties that attach greater political value to protecting the environment will see a greater need for transnational cooperation in the field of the environment, whereas parties that value local communities and identities are more likely to resist competence transfers to a transnational level.

2.3 On the Need for Comparative Institutional Assessments

Two conclusions follow. First, the national constitutional courts’ review could be considered as democracy enhancing where it addresses problems concerning the EU’s democratic legitimacy that are beyond reasonable disagreement. For example, it could be the case that courts help strengthen national parliamentary oversight of the executive, and facilitate more transparency in EU decision-making. With such review, national courts do not seem to impose themselves on the contested relationship between the EU and its Member States. Secondly, in other cases an empirically informed comparative institutional assessment between constitutional courts and other institutions becomes more important. If such an assessment shows that the national courts are better placed to address constitutional questions on the EU or that their judgments improve democratic debate rather than constrain it, their review can be seen as positive from a democratic viewpoint even if their case law is not fool-

48 Jürgen Habermas, The Postnational Constellation, 2001, at p. 60-62. Some go even further and argue that the answer lies in a cosmopolitan democracy in which new political institutions would be created that “would coexist with the system of states but which would override states in clearly defined spheres of activity where those activities have demonstrable transnational and international consequences” (David Held, Models of Democracy, 2006, at p. 305). Such proposals have, however, been criticised as naïve or too idealistic. Habermas, for example, here takes up the critique of national identity to argue that such a world community if citizens would lack the civil solidarity necessary to become fully democratic and achieve goals of social justice.

proof. Such comparative assessments, however, must be made with reference to the specific institutional constellations in which review takes place. To this issue I now turn.

3. Making Institutional Comparisons in the EU Context

In the national context, the democratic legitimacy of judicial review depends on a comparative institutional assessment between a national constitutional court and legislature. In the EU context the institutional setting differs. A key difference is that several political institutions located at different governance levels can be involved in the making of European law. As a consequence, the comparative institutional assessment relevant for assessing the legitimacy of a national constitutional court’s review changes. Figure 3.1 provides a general and simplified sketch of how judicial review in the national context thus differs from the EU context. This picture can be further refined depending on the type of measure under review, as this changes the institutional constellation. In the following, I distinguish between the review of EU treaties and similar legal instruments in the context of ratification, and the review of EU primary and secondary law subsequent to ratification.

Figure 3.1 Constitutional Review National and EU Context Compared
A. National Context B. EU Context

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50 For example, in this vein Mattias Kumm has suggested that the national constitutional courts can “play a significant role as contributors to and facilitators of democratic deliberations in their respective political orders”. Mattias Kumm, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty, 2005 262, at p. 292. In addition, he argues along Dworkinian lines that courts could act as a ‘forum of principle’, at p. 280 in particular footnote 54.
3.1 Review of European Treaties and Similar Instruments

Several national constitutional courts engage in constitutional review of EU and related treaties in the context of ratification. Landmark cases such as the GFCC’s Maastricht-Urteil, Lissabon-Urteil and ESM judgments concern the constitutionality of Germany’s ratification of the respective treaties. Such judgments usually address both the constitutionality of ratification as well as the constitutionality of the accompanying implementing legislation.

In several Member States such review commonly takes place prior to ratification, for example in Germany, France and Spain. In other Member States, review of the treaties takes place after ratification. For example, in Denmark the Danish Supreme Court has adopted a wide interpretation of the legal standing of individuals wishing to challenge European treaties after ratification. A common characteristic of the review of treaties is its abstract nature: it does not take place in the context of a specific controversy, but rather concerns the constitutionality of a treaty as a whole.

Where a national constitutional court reviews a treaty, it subjects the decision-making by two political institutions to review: the treaty drafters and the national institution competent to ratify the treaty. Under the current ordinary revision procedure of Article 48 TEU, EU Treaty amendments will be drafted by a Convention “composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission.” Subsequently, a conference of representatives of the governments of the Member States determines the Treaty amendments by “common accord”. Treaties concluded outside the EU Treaty Framework are negotiated by the EU Member States, not in a Convention. To enter into force, EU Treaties and amendments have to be ratified by the Member States in accordance with their respective

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52 In some Member States, the Treaty itself is directly under review, such as in Spain and France. In other Member States, such as Germany, it is the ratification act that is subject to review. Nonetheless, the difference does not seem to have much practical effect. Monica Clae, 'The National Courts' Mandate in the European Constitution' (PhD Manuscript, Maastricht University 2004), at p. 406.

53 See further ibid, at p. 393-418.


55 EU Treaty amendments are generally not subject to judicial review by the CJEU.

56 Article 48 (3) TEU. The European Central Bank will be consulted “in the case of institutional changes in the monetary area.”

57 Article 48 (4) TEU.

58 Or a smaller group of Member States as has been the case with several of the Euro crisis legal instruments.

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Constitutional requirements. The national institution competent to ratify the Treaty is commonly the national legislature.

Consequently, where a national constitutional court reviews the ratification of an EU Treaty or related treaty, the court’s constitutional assessment of the treaty will have been preceded by discussion and deliberation among the treaty drafters and the national legislature. The legitimacy of the national constitutional court's intervention therefore has to be assessed in comparison to these two institutions: it has to be considered how the Court’s assessment of the treaty’s constitutional implications compares to that of the Treaty drafters and the national legislature, as well as how such judgments impact on subsequent political decision-making.

Figure 3.2 Constitutional Review of Treaties by a National Constitutional Court

3.2 Review of Primary and Secondary EU Law After Ratification

The assessment changes where a national constitutional court reviews EU law after ratification. After ratification, national constitutional courts can review provisions of EU law, their interpretation by the CJEU or their implementation into national law. There are only a few cases in which a national constitutional court has explicitly judged EU law unconstitutional. Mostly, national constitutional courts have threatened to review EU law after ratification, but have refrained from actually judging norms of EU law unconstitutional. An exception is the Czech Constitutional Court’s judgment in the Holubec case, where the court declared a norm of EU law – more precisely a judgment of the CJEU - ultra vires. In

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59 See Article 48 (5) TEU.
60 The Constitutional Court of the Czech Republic (Ústavní soud), plenary judgment of 31 January 2012, Pl. S 5/12 (Holubec). The case was a response to Case C-399/09 Marie Landtová v Česká správa socialniho
its preliminary Gauweiler judgment, the GFCC went a long way to suggest that the European Central Bank’s (ECB) policy of Outright Monetary Transactions (OMT) was *ultra vires*.\(^{61}\) Nonetheless, in its final judgment the German Court accepted the CJEU’s finding that the ECB’s policy fell within the confines of its legal mandate. More recently in the *Ajos* case, the Danish Supreme Court refused to comply with the guidelines laid down by the CJEU in a preliminary ruling. The Danish Court effectively ruled the CJEU’s judgment on the principle of non-discrimination on grounds of age as *ultra vires*.\(^{62}\)

Again, an evaluation of the legitimacy of a national constitutional court’s review of EU law after ratification and its implementation, requires an assessment of the institutional setting in each constellation. For this purpose, I sketch the institutional setting in the case of review of EU primary law and that of EU secondary law in the form of Directives and Regulations.

### 3.2.1 Primary EU Law

First, figure 3.3 sketches the institutional constellation should a national court decide to review primary EU law on the basis of national constitutional law, after ratification. Examples are found in the area of free movement where national constitutional norms have conflicted on several occasions with the EU Treaty freedoms. In the case of *Omega*, for example, the protection of human dignity as protected by the German Constitution conflicted with the freedom to provide services.\(^{63}\) In the case of *Sayn-Wittgenstein*, the Austrian constitutional principle of equality and the prohibition on titles of nobility conflicted with EU citizens’ right to move and reside freely in the territory of another Member State under Article 21 TFEU.\(^{64}\) On the one hand, such constellations raise a similar concern as the review of Treaty norms in the context of ratification. Should a national court hold a norm of primary EU law inapplicable within the national legal order on constitutional grounds, the court can be seen to override a particular political choice laid down in the Treaty. In addition, the

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\(^{61}\) Bundesverfassungsgericht, Order of 14 January 2014 2 BvR 2728/13 (OMT referral).


national court’s review may have subsequent effects on the leeway of legislative institutions on both the EU and national level.\textsuperscript{65}

On the other hand, a case involving the review of primary EU law subsequent to ratification may highlight a constitutional problem not foreseen within the Treaty negotiations. This may provide a reason for a national court to raise a constitutional concern. A further difference within this constellation is that a national constitutional court could refer the issue to the CJEU for a preliminary ruling.

Another possibility is that the national court’s review is actually directed at the interpretation of EU primary law by the CJEU. In this sense, the national court could function as a counterforce to expansive interpretations of EU law by the CJEU that are insufficiently subject to political correction, given the burdensome requirements for Treaty change.

Figure 3.3 National Constitutional Review of Primary EU Law

3.2.2 Secondary EU Law
A second constellation is that a national constitutional court reviews a provision of secondary EU legislation, i.e. a Regulation or a Directive, on constitutional grounds.\textsuperscript{66} Figure 3.4 sketches this modality of review. This constellation involves several institutions: the EU

\textsuperscript{65} Admittedly, this is not the case with \textit{ultra-vires review}. An issue that I discuss more elaborately in section 5.

\textsuperscript{66} I focus on legislation and consequently exclude ‘decisions’ as they lack general application, but have to specify to whom they are addressed and “shall be binding only on them.” See Article 288 TFEU.
legislature, the national legislature in case the legal instrument is a Directive, and finally the CJEU to which a national constitutional court could refer the question. Which institutions compose the EU legislature, in turn depends on the legal basis in the Treaty. In the ordinary legislative procedure, the Council and the European Parliament jointly adopt EU legislation, on a proposal by the Commission.\textsuperscript{67} Assessing the legitimacy of the national constitutional court’s review of secondary EU law would then require an assessment of how the constitutional issue has been taken into account by these three legislative actors. Additional questions are: whether the CJEU could address the issue, and how the national constitutional courts’ review impacts on subsequent political decision-making.

A national courts’ review may be directed only at the national implementing legislation, while leaving the underlying EU legal instrument intact.\textsuperscript{68} In such a case the institutional comparison is more straightforward and largely the same as in the national context. A difference with the pure national context, however, is that the measure originates from the EU context. This may alter a national legislature’s perception of its responsibilities and leeway compared to a purely national setting. For example, in the proceedings before the GFCC on the Framework Decision on the European Arrest Warrant (EAW) of April 2005, several Bundestag members gave the impression that they had not fully considered the constitutional implications in the parliamentary proceedings. Green party member Hans-Christian Ströbele even declared he had felt “normatively unfree” to change the legislation because of its European pedigree.\textsuperscript{69}

\textsuperscript{67} See Articles 289 and 294 TFEU.
\textsuperscript{68} As was the case in various national judgments on the European Arrest Warrant. See on this issue Jan Komárek, “European constitutionalism and the European arrest warrant: In search of the limits of “contrapunctual principles”” (2005) 44 | European Law Journal 9.
An assessment of the legitimacy of the national constitutional courts’ review should take into account these different institutional constellations in which review takes place. Next to that, the national courts’ review should be assessed in relation to the specific grounds for such review. In relation to each ground it has to be asked whether a national constitutional court is better placed to address this specific constitutional issue and how its judgment will affect subsequent decision-making by other institutions. To these grounds I now turn.

4. Assessing the Grounds of Review

4.1 Fundamental Rights

Fundamental rights are historically the first ground on which national courts have contested the primacy of EU law over conflicting national law. This story is familiar and my discussion will therefore be relatively brief. Initially, the CJEU refused to recognise fundamental rights as part of the EU legal order.\(^70\) This refusal, however, met with resistance by the German and Italian constitutional courts who threatened to constitutionally review EU law – at the time still Community law\(^71\) - on the ground of constitutional rights.\(^72\) The resulting threat to


\(^71\) To keep matters simple, I simply refer to the EU and EU law in the rest of my discussion.

\(^72\) For the Italian position, see: Constitutional Court (Corte Costituzionale) Judgment of 27 December 1973, no. 183, 27 Giurisprudenza Costituzionale 1973, I, 2401 ss (Frontini v Ministero delle Finanze), English translation in Andrew Oppenheimer (ed.), The Relationship between European Community Law and National Law: The
primacy is regarded as an important reason why the CJEU recognised fundamental rights as part of the general principles of EU law.\textsuperscript{73} In its \textit{Solange I} judgment of 1974, the GFCC nonetheless held that it would not recognise the primacy of EU law as long as there was no adequate protection of fundamental rights at the EU level. The GFCC changed this position in its \textit{Solange II} decision of 1986, holding that it would no longer review EU law on its compatibility with national constitutional rights: because of the improved protection of fundamental rights in the EU, and so long as the protection of fundamental rights in the EU remained substantially similar.\textsuperscript{74} The German Court has essentially affirmed this position in later judgments.\textsuperscript{75}

Because of these events, the protection of fundamental rights, as such, no longer seems an acute ground of constitutional conflict.\textsuperscript{76} An elaborate system for the protection of fundamental rights now exists at the EU level, particularly since the EU Charter of Fundamental Rights has become formally binding.\textsuperscript{77} To a very large extent, this has accommodated the national constitutional courts’ concerns about the protection of fundamental rights at the EU level. Since then there has been a significant rise in the number of preliminary references from ordinary courts that concern fundamental rights amounting to what some have called a “rights revolution”.\textsuperscript{78}

Under these circumstances, there appears little ground for national constitutional courts to
review EU law on the basis of fundamental rights as such. It seems that judicial protection of fundamental rights can also be performed by the CJEU without risk to the uniformity and effectiveness of EU law.79 Where national courts are of the opinion that EU law violates fundamental rights norms, they can refer the issue to the CJEU. Perhaps they should reserve a residual power to review EU law on the basis of rights, if the EU level of protection falls below a certain minimum standard.80 By and large, this approach also appears to be the one adopted by national courts.

The problem under the current system is arguably rather that the CJEU’s elaborate rights protection comes both at the expense of reasonable choices made by both the EU and national legislatures.81 As the CJEU’s judgment in Åkerberg Fransson confirms, the scope of the EU fundamental rights standard is broad.82 It applies not just where Member States act as so-called agents of EU law and implement or enforce EU law provisions, but also where Member States derogate from EU law and where they adopt a national measure that preconditions the exercise of a right established by EU law. Beyond that, there still remains considerable uncertainty about the scope of the EU fundamental rights standards.83 The consequence is that Member State courts will have to apply the EU rights standard in a great number of situations, even if under national law these courts have a more limited mandate to review legislation on the basis of fundamental rights. In a large number of situations, the CJEU will be competent to review the compatibility of Member State action with the Charter,

79 One could of course wonder whether the extent of rights protection at the EU level is a desirable outcome and whether the initial resistance of the German and Italian Constitutional Courts to the primacy of EU law was justified. An argument in favour of Germany’s initial Solange case law is that at the time EU law was directly effective and had primacy over conflicting national law, but a clear democratic procedure at the EU level was not in place. Democratic concerns about rights based review in the domestic context were therefore not as pressing in the EU context, nor could it be taken for granted that the implications of EU legislation for fundamental rights would be subjected to rigorous democratic deliberation. In this sense, see: Joseph Weiler, ‘Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities’ (1986) 61 Washington Law Review 1103. In Bundesverfassungsgericht, Judgment of 29 May 1974, BvL 52/71 (Solange I) the GFCC invoked the democratic shortcomings of the Community as a justification for fundamental rights’ review (see in particular par. 23). The dissenting minority in turn criticized this part of the majority judgment, see in particular par. 62. Whether the democratic shortcomings of the Community at the time really justified the position of the GFCC and Italian Constitutional Court, however, requires further empirical research.
80 This was of course the approach of the GFCC in Bundesverfassungsgericht, Judgment of 22 October 1986, 2 BvR 197/83 (Solange II).
81 The opposite view is taken by Sybe De Vries who has argued that there might be a race to the top, see: Sybe de Vries, Grondrechten binnen de Europese interne markt: een tragikomisch conflict tussen waarden in de ‘Domus Europaea’ (Uitgeverij Paris Zutphen 2015).
82 Case C-617/10 Åklagaren v Hans Åkerberg Fransson [2013] EU:C:2013:280.
83 I rely on the distinctions drawn by Emily Hancox, The meaning of ‘implementing’ EU law under Article 51(1) of the Charter: Åkerberg Fransson’ (2013) 50 5 Common Market Law Review 1411, at p. 1418-1427. The case affirms prior case law of the CJEU concerning the scope of application of EU law’s general principles that include fundamental rights.
thus partly displacing national courts and other institutions as interpreters of rights obligations.

In this context, the CJEU’s case law often fails to acknowledge the contested democratic legitimacy of judicial review that for some EU Member States is still a key reason to reject such review or to concentrate this competence in specialised constitutional courts.\(^4\) In Åkerberg Fransson, for example, the CJEU held that the Swedish judicial practice on the application of human rights was not compatible with EU law. This practice is that judges only disapply national legislation if the infringement with the EU Charter or ECHR followed clearly from the provisions’ text or related case law.\(^5\) Arguably and paradoxically, the role of the national constitutional courts should be to counter these expansive interpretations by the CJEU, thus reclaiming space for politics. I return to this idea in discussing *ultra vires* review.

Despite the generally broad scope of the Charter, the CJEU has been reluctant to apply the Charter to some of the legal instruments adopted in response to the Euro crisis. Instruments adopted under international law, such as the ESM, fall outside the scope of EU law.\(^6\) Consequently, the fundamental rights protection offered by EU law does not fully apply. This is a problem particularly in relation to the macro-economic adjustment programmes that Member States have to adopt as part of receiving financial assistance under the ESM or EFSF.\(^7\) These programmes have raised several concerns from the perspective of social rights.\(^8\) Moreover, there are serious concerns about democratic deficiencies in the procedure

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\(^7\) For a critical assessment see Claire Kilpatrick, ‘Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?’ (2014) 10 European Constitutional Law Review 393. In Joined Cases C-8/15 P to C-10/15 P Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB) [2016] EU:C:2016:701 the CJEU has held the Charter applicable to the EU institutions when they are engaged in making financial assistance conditionality agreements. In Joined Cases C-105/15 P to C-109/15 P Konstantinos Mallis and Others v European Commission and European Central Bank (ECB) [2016] EU:C:2016:702, however, the Court concluded that the Charter does not apply to the euro group. For an assessment of the applicability of the Charter to the assistance programmes, see: Anastasia Poulou, ‘Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?’ (2017) 54 4 Common Market Law Review 991.

\(^8\) See e.g.: Claire Kilpatrick and Bruno De Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges* (EUI Working Paper LAW 2014/05 Florence 2014/5).
by which these adjustment programmes are adopted.89 As a result, rights-based review of such measures by national constitutional courts may be desirable.90 In this vein, the Portuguese Constitutional Court has struck down several measures implementing the Portuguese economic adjustment programme, finding that these measures violated constitutional principles akin to fundamental rights, such as equality, legal certainty and the protection of legitimate expectations.91 Still, a full assessment of the legitimacy of such review would require an analysis of the process by which such adjustment programmes are adopted, the reasons on which they are based and whether the courts’ judgments are an effective way to address the underlying social concerns.92

Another remaining source of potential conflict between the EU constitutional order, and that of the Member States, exists where national standards and the EU standard for the protection of fundamental rights diverge. Despite an important degree in commonality, there is also considerable divergence between the Member States regarding the standards for rights protection. Some Member States constitutionally recognise particular fundamental rights not protected in other Member States, different Member States strike different balances between rights and competing interests, and national courts interpret similar rights provisions differently. In establishing a fundamental rights case law at the European level, the CJEU has always drawn on the common constitutional traditions of the Member States as well as international human rights treaties.93 Yet, the CJEU has also maintained that the EU standard for the protection of fundamental rights is an autonomous standard. Furthermore, the CJEU has claimed the exclusive competence to determine this standard.94 This raises the possibility

89 These issues are more elaborately discussed in chapters 6 and 7.
90 For example Anastasia Poulou states that this is the case because: “Measuring financial assistance conditions against human rights standards would counterbalance the executive-expertise bias of the making of financial assistance conditionality to purely market-driven choices, which already dominate the post-crisis European governance framework. Reliance on the Charter would also induce actors preparing and enforcing lending conditions to more carefully assess the impact of their actions on human rights and to adopt more inclusive and responsive procedures, actively engaging civil society actors and social partners in the making of conditionality.” Anastasia Poulou, Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights? 2017 991, at p. 1024-1025.
93 See Case 4/73, Nold KG v. Commission, [1974] EU:C:1974:51; On this issue see for example: Paul Craig and Grinne De Búrca,
that the EU standard of rights protection may conflict with national standards. I treat this issue in the next section as part of the protection of national constitutional identity.

4.2 National Constitutional Identity

4.2.1 Case Law of the National Constitutional Courts

Different Member States have different understandings of the constitutional norms that should be applicable to public authority resulting in possible constitutional conflicts between European law and national constitutional law. In this vein, several national constitutional courts have invoked ‘national constitutional identity’ or comparable grounds as a limit to further European integration and to the effects of EU law within the national legal order. Generally speaking, national constitutional identity may be seen as encompassing a core of constitutional norms specific to a Member State, such as those relating to its form of government, those expressing particular national values or those containing particular fundamental rights. In addition, constitutional identity is understood as referring to a core of competences that Member States cannot transfer to the EU. The notion of constitutional identity is relevant under EU law as well. Article 4 (2) TEU states that the EU “shall respect the equality of Member States before the Treaties as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” This provision is understood to put a legal obligation on the EU to respect national constitutional identity.

National courts nonetheless differ in what they consider to be part of constitutional identity and the manner in which they are willing to rely on the notion against the EU. The GFCC has the most elaborate case law. Constitutional identity in Germany consists of the principles declared unamendable by Article 79 (3) of the German Basic Law, its so-called “eternity clause”. These principles include the principle of democracy, the rule of law, the principle of the social state, the principle of the federal state, as well as respect for human dignity and the

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96 See e.g. François-Xavier Millet, L’Union européenne et l’identité constitutionnelle des États membres (LGDJ, Lextenso éditions Paris 2013), at p. 11; and for similar ideas Armin Von Bogdandy and Stephan Schill, Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty, 2011 1417, at p. 1430-1440.

core of fundamental rights guarantees. They cannot be amended through the ordinary procedure for constitutional amendments, but only through a decision of the people who are the ultimate holder of all state authority.

In its judgment on the Lisbon Treaty, the GFCC also identified five areas in which the German parliament should retain significant autonomous decision-making power: criminal law, the monopoly on the use of force of both the military and the police, fundamental fiscal decisions, decisions relating to the principle of the social state, and decisions with particular cultural importance. The list does not prohibit the transfer of any legislative authority in these areas, but underlines that the EU’s engagement in these areas is prone to endanger constitutional identity. During the Euro crisis the budgetary autonomy of the Bundestag has become a key issue in several cases. The GFCC has held that the Bundestag cannot transfer its overall budgetary responsibility to the EU or another international organisation. Instead the Bundestag must remain the place in which the autonomous decisions on revenue and expenditure are made.

Other national constitutional courts have likewise articulated limits to the competences that can be transferred to the EU. In contrast to the GFCC, however, some courts have been explicitly deferential to the political process in determining which state competences would qualify as ‘essential’. For example, in its decision on the Maastricht Treaty, the Danish Supreme Court held that the amount of competences could not be such that Denmark could no longer be considered an independent state. Yet, the Danish Supreme Court has ruled

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98 Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08 (Lisbon judgment), at par. 216
99 A two-thirds majority in the Bundestag and Bundesrat, see Article 79 (1) and (2) of the Basic Law.
100 Article 20 (2) Basic Law and its interpretation in par. 216 Lisbon judgment.
101 Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08 (Lisbon judgment), at par. 252.
102 On this point: Dieter Grimm, Defending Sovereign Statehood Against Transforming the Union Into a State, 2009 353, at p. 368
103 This case law is further discussed in chapter 6.
that the determination of when this threshold is passed “must rely almost exclusively on considerations of a political nature”. The Czech Court has likewise refused to lay down a list of essential state functions and leaves this decision to the national legislature.

The German approach to constitutional identity also differs from the French approach. For the French Constitutional Council, this identity appears to refer only to constitutional norms that are specifically French. Where a constitutional principle is part of both the EU and the French legal order, the CJEU must provide protection. Examples of constitutional norms that are part of French constitutional identity are: the constitutional norm determining the category of people entitled to vote in French elections, the criteria for access to public functions, the principle of *laïcité* and the ban on granting specific rights to ethnic, linguistic and other minorities. Another difference to the German approach is that French constitutional identity serves as a standard of review only in relation to secondary EU law, whereas German constitutional identity is also the standard for review when competences are transferred by means of a new Treaty. In the context of Treaty ratification, the French Constitutional Council reviews whether EU Treaty amendments and new treaties are in accordance with specific provisions of the national constitution and whether they transfer competences deemed fundamental for the exercise of national sovereignty. The latter comprises competences that historically belong to the core of national sovereignty, such as defence, foreign affairs, monetary policy and justice and home affairs. Finally, a further contrast is that unlike German constitutional identity, French constitutional identity is not unamendable. It can be changed by a three-fifths majority in both Houses of Parliament or alternatively after approval in a referendum.

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105 The Supreme Court of Denmark (Højesteret), Case 361/1997, Decision of 6 April 1998 (Maastricht) (summary translated in [1999] 3 C.M.L.R. 854). A similar approach was taken by the Supreme Court of Estonia (Riigikohus) in Judgment (*En Banc*) of 12 July 2012, Case No. 3-4-1-6-12. See on these points also: Monica Claes and Jan-Herman Reestman, ‘The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case’ (2016) 16 4 German Law Journal 917.

106 The Constitutional Court of the Czech Republic (Ústavní soud), judgment of 3 Nov. 2009, Pl ÚS 29/09 (Treaty of Lisbon II), at par. 110-111.


108 Ibid, p. 104-105. This comes in addition to fundamental rights review, as mentioned in subsection 4.1.

109 Article 89 (5) of the French Constitution declares that the “republican form of government shall not be the object of any amendment”. Nonetheless, practically this is unlikely to make a difference, because the Constitutional Council does not review the constitutionality of constitutional amendments. Article 89 French
4.2.2 Protecting National Constitutional Identity: Reclaiming the Political Dimension
Respect for national constitutional identities can be considered important, as these identities may reflect a Member State’s basic democratic choices on fundamental values and its collective identity. The Member States’ constitutional identities can be seen as context-dependent interpretations of the preconditions of a democratically legitimate process. In addition, the idea that the Member States should retain decision-making power in certain areas may reflect a concern that these areas are particularly important for the Member States’ democratic self-government.

That said, it is not clear that national constitutional courts should invoke national constitutional identity as a ground to review European law. Firstly, constitutional differences between the Member States can be seen as evidence that people can reasonably disagree about the proper constitutional limits on political authority. For example, that the protection of human dignity in Germany is interpreted so that playing the game laser tag is forbidden, that the Irish constitution protects the life of the unborn and that the Austrian constitutional principle of equal treatment requires the abolition of all titles of nobility, can be seen as evidence that different people in different societies come to different answers about what the protection of fundamental rights requires. Yet, as I argued in chapter 2, one of the main grounds against judicial review of legislation in the national context, is that people reasonably and in good faith disagree about the proper constitutional limits on political authority. The fact that there are constitutional differences between the Member States therefore presents an argument to resolve such differences politically rather than take it as a ground for the national constitutional courts’ review.


Secondly, the notion of national constitutional identity leaves open a wide variety of possible interpretations. If the protection of national constitutional identity is important in order to respect a Member State’s fundamental political choices, this seems a good reason to leave it to the citizens’ elected representatives rather than to constitutional judges to determine what this identity consists of, what it requires and how it should be balanced against the values safeguarded by European integration.

Thirdly, the judicial determination of ‘essential’ Member State competences faces the problem that democratic politics is commonly about what the state or government should do: liberals, social-democrats, libertarians or Christian-democrats have widely different ideas about what essential state competences are. In addition, if the asymmetrical nature of the EU’s competences raises a democratic problem, it is not clear that prohibiting the EU from doing certain things provides a solution. One example are fiscal decisions: these might be politically salient, but the Member States’ ability to effectively raise taxes is also affected by tax competition between the Member States, arguably making EU wide action crucial. Criminal law provides another example: the existence of open borders affects the ability of the national police to effectively tackle trans-border crime. This could be a key reason to increase the EU’s competences in the field of criminal law.

This political dimension seems hardly reflected in existing assessments of the role of national constitutional courts. One idea that has gained significant support is the idea of judicial dialogue: the idea that constitutional differences between the EU and the Member States should be settled in a judicial dialogue between the national constitutional courts and the CJEU. As I argue below, missing from this idea is an assessment of whether judges should address these constitutional questions or instead leave them to political actors. A similar critique can be levelled against the even more far-reaching idea that national constitutional courts should be allowed to invoke national constitutional identity as a constitutional limit to European law. I discuss both ideas in turn and then return to underline the importance of comparative institutional research.

4.2.3 The Case Against Judicial Dialogue

Various scholars support the idea that national courts and the CJEU should solve conflicts between EU law and national constitutional law in a judicial dialogue.115 Such a judicial dialogue does in fact take place. The construction of the European legal order has from the outset been a cooperative process between the CJEU and national legal actors.116 Courts interact formally through the preliminary reference procedure of Article 267 TFEU, but they also meet on a more informal basis.117 Beyond that, they take into account each other’s decisions.118 A key example of the latter is the response of the CJEU to the German Solange I judgment, which prompted the CJEU to strengthen the protection of fundamental rights at the EU level.119

One of the most elaborate defences of judicial dialogue as a way to solve constitutional conflicts in the EU has been brought forward by Aida Torres Pérez in the context of fundamental rights adjudication.120 She argues that the source of the CJEU’s claim to adjudicate on fundamental rights lies in such a dialogue. That claim is based on a more general philosophical claim that the interpretation of fundamental rights is not about discovering universal truths, but rather that values are constituted and shaped inter-subjectively through an exchange of arguments. The advantage of judicial dialogue is that courts construct the constitutional norms of the EU in an argumentative fashion, that it


117 See e.g. Timmermans for a description of some of these more informal dialogues between the ECJ and the national courts. Christiaan Timmermans, ‘Voorrang van het Unierecht door multilevel rechterlijke samenwerking’ (2012) SEW, Tijdschrift voor Europees en economisch recht 50.


119 That this was the primary reason for the CJEU to protect fundamental right. On the history, see Bill Davies. Resisting the European Court of Justice, West Germany confrontation with European Law, 1949-1979, 2012

120 The critique discussed here is similar to my argument in Nik de Boer, “The False Promise of Constitutional Pluralism” in M. Avbelj, & G. Davies (Eds.), A research handbook of Legal Pluralism and EU law Edward Elgar.
stimulates participation in the practice of interpretation, and that it allows the courts to accommodate claims of different national constitutional orders in an open-ended way. In the view of Torres Pérez, this dialogue is to take place within the framework of the preliminary reference procedure of Article 267 TFEU.121

The dialogic ideal also puts certain demands on the CJEU’s reasoning: the European Court needs to take into account the various arguments brought forward and reflect how these arguments are weighed in the judicial process.122 The CJEU is to adopt a form of comparative constitutional reasoning, in which it reflects on the different constitutional viewpoints of the Member States and provides careful arguments why one interpretation is ultimately chosen over the other. Also, the CJEU should pay proper deference to national constitutional law in certain cases. Moreover, where national courts make references to the CJEU, they are to explain the reasons for particular constitutional provisions or interpretations.123

Torres Pérez maintains that there are six prerequisites for a good, working judicial dialogue: (i) there must be competing viewpoints about the law; (ii) at the same time there must be common ground for mutual understanding; (iii) none of the participants must have complete authority over the other; (iv) these participants must see themselves as engaged in a common enterprise in which they respect each other; (v) they should have an equal opportunity to participate; and (vi) the dialogue must extend over time.124

A key difficulty with this view, however, is that prerequisite (v) – equal opportunity to participate – appears problematic. In a judicial dialogue, the range of participants is in principle limited to the Member State courts and the CJEU. Torres Pérez, however, submits that these courts “are far more accessible than EU legislative bodies.”125 That seems a dubious assertion. First of all, access to courts is costly. It is likely that parties with significant financial resources will find it easier to effectively pursue their interests by judicial means. In addition, and as discussed in the above, particularly mobile citizens, organisations and companies are likely to have an interest in litigating on the basis of EU

122 Ibid, at p. 112-117.
124 Ibid, at p. 118 and further.
125 Ibid, at p. 128.
law. The cases that end up before the CJEU are therefore unlikely to be representative of all interests affected by European integration.

Secondly, by comparison the EU’s legislative bodies – the European Commission, the European Parliament and the Council – are likely to be more representative of the citizens’ interests. The EP and the Council do have a degree of electoral accountability towards the EU citizenry, as European citizens directly elect the EP, and the Member States’ government representatives in the Council are supposed to be accountable to national parliaments. Despite democratic problems in the EU’s political process, EU citizens thus have a right to participate in these bodies through their vote for the EP and in national elections. In relation to national courts and the CJEU, such political accountability generally does not exist: once appointed, the judges are supposed to be independent. Further factors limit the ability of citizens to influence CJEU judgments. The EU Treaties declare that decisions in the Union should be taken “as openly as possible”, that the EP shall meet in public and the Council shall meet in public “when considering and voting on a draft legislative act.” Judges and Advocate Generals of the CJEU, however, must instead swear that they will “preserve the secrecy of the deliberations of the Court.” In addition, the parties’ submissions in cases pending before the Court are not accessible until after the hearing. The Court claims that it has to protect itself from external pressure. Also, a large part of the dialogue between European courts appears to take place in informal settings behind closed doors.

126 See on these points see also Richard Bellamy, ‘The Democratic Qualities of Courts: A Critical Analysis of Three Arguments’ (2013) 49 Representation no. 3, at p. 333-346. For the EU context see: Fritz W. Scharpf, ‘The asymmetry of European integration, or why the EU cannot be a ‘social market economy’’ (2010) 8 Socio-Economic Review no. 2, p. 211, particularly at p. 221-222. And the discussion in chapter 2, section 5.3.
128 Article 1 TEU.
129 Article 15 (2) TFEU.
130 Art. 4 Consolidated version of the rules of procedure of the Court of Justice, O.J. 2010 C, p. 177.
Thirdly, even if the Member States’ governments, the European institutions, as well as the parties to a particular legal dispute submit observations before the CJEU, they are not the decision-makers in a judicial dispute.\textsuperscript{133} Therefore they cannot count as equal participants in this dialogue. Fourthly, even between the class of real participants - the courts - there are likely to exist large power differentials. Constitutional courts from powerful Member States are likely to wield more power in such a dialogue. For example, the GFCC is likely to have a more authoritative voice in a European judicial ‘dialogue’.\textsuperscript{134} Also, the ability of Member States’ courts to engage in a judicial dialogue is likely to be uneven. Some courts have more limited jurisdiction than others and in some Member States, courts have no or only a very restricted role in adjudicating constitutional matters.\textsuperscript{135}

For all these reasons, the participatory qualities of a European judicial dialogue should not be overestimated. Steps could of course be taken to enhance the legitimating potential of the European judicial dialogue by furthering the transparency of the judicial process, allowing a wider range of relevant actors to make observations and encouraging the deliberative quality of the judicial process by giving individual judges the option to deliver dissenting opinions.\textsuperscript{136}

Yet, if the judicial dialogue concerns constitutional norms that are supposed to bind the EU legislative bodies and national legislatures when they act within the scope of EU law, the justification for settling constitutional controversies between the EU and its Member States in a judicial dialogue cannot ultimately rest merely on its participatory qualities. Instead, it must be argued that the judges involved in this dialogue are better placed to consider constitutional questions than the political institutions or that their judgments improve political debate. As I have argued before, substantiating this argument requires an empirically informed institutional assessment in the various possible institutional constellations.

\textsuperscript{133} See Articles 23 of the Statute of the Court of Justice of the European Union and 96 of the Rules of Procedure of the Court of Justice.
\textsuperscript{134} On this point see also Michael A. Wilkinson, ‘Economic Messianism and Constitutional Power in a ‘German Europe’: All Courts are Equal, but Some Courts are More Equal than Others’ (2014) 26 LSE Law, Society and Economy Working Papers.
\textsuperscript{135} On such concerns in the Danish context see: Jens Elo Ryttter and Marlene Wind, ‘In need of juristocracy? The silence of Denmark in the development of European legal norms’ (2011) 9 2 International Journal of Constitutional Law 470.
\textsuperscript{136} For a number of proposals in the context of international courts, see: Armin von Bogdandy and Ingo Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’ (2012) 23 1 The European Journal of International Law 7.
4.2.4 The Problem with National Constitutional Identity as a Limit to Primacy

The same criticism can be voiced against those who see constitutional identity not just as a ground for judicial dialogue, but even as a limit to the primacy of EU law. Thus, for example, Armin von Bogdandy and Stephan Schill argue that Article 4 (2) TEU permits “domestic constitutional courts to invoke, under certain limited circumstances, constitutional limits to the primacy of EU law.” They submit that this requires that “a proportional balance be found” between the uniform application of EU law and the national constitutional identity of a particular Member State.

Mattias Kumm has advocated a similar but more limited proposal. In his view the areas of contestation between national constitutional law and EU law are roughly conflicts between the ideal of establishing the rule of law at the EU level and allowing Member States to uphold important national constitutional commitments that reflect a Member State’s fundamental democratic choice. To solve constitutional conflicts between the different legal orders, Kumm offers a set of principles that reflects a balance between those different ideals, rather than a clear-cut hierarchy. He argues that after ratification there are strong democratic grounds for allowing Member States’ constitutional courts to uphold specific national constitutional commitments against EU law in the case of conflict. Where such constitutional norms reflect “a constitutional essential”, he submits that “concerns related to democratic legitimacy override considerations relating to the uniform and effective enforcement of EU law.” That result is justified in the light of the democratic shortcomings of the EU, such as the lack of electoral competition over the EU’s policy direction and the missing sociological prerequisites for a European democracy – a European identity, a shared public sphere and a European civil society. The requirement that a national constitutional commitment is ‘clear and specific’ is thought to ensure that the commitment has in fact been adopted by the

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138 Ibid, at p. 1441.
141 Ibid., at p. 298.
constitutional legislature and therefore reflects an important democratic choice. The requirement that these clear and specific commitments are constitutionally essential is meant to ensure that not every specific constitutional commitment would justify derogation from EU law. Such derogations are only allowed in limited circumstances in order to reflect an appropriate balance between the competing underlying ideals.

Kumm’s account thus justifies a limited exception to the primacy of EU law, based on national constitutional identity. I agree with Kumm that the case for allowing identity-based derogations from EU law is stronger where they are based on specific constitutional norms. Yet, there are two main problems with his view. First, despite democratic problems in the EU, democratic arguments do not unequivocally favour his proposed solution. Secondly, it is not clear that the burden of protecting these commitments should fall to the national constitutional courts.

Let me start with the first point. Whether a commitment is ‘clear and specific’ in a particular situation probably requires interpretation and cannot be settled in advance. The distinction between open-ended principles and ‘clear and specific’ commitments is not clear-cut. In addition, national constitutional courts would still have to determine whether the national constitutional norm is constitutionally essential. Kumm’s conflict rule therefore does not remove judicial discretion. Furthermore, even if national constitutional provisions are judged ‘specific and clear’, their continued democratic legitimacy cannot be assumed. Entrenchment against ordinary legislative change is a key feature of constitutional norms in most EU

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142 Note that Kumm also acknowledges that constitutional conflicts are driven by courts and he argues that the power of Member States to change the constitution in order to prevent the application of EC rules “has not been of any relevance in the process of European integration whatsoever. No state has ever reacted to losing a political legislative battle on the European level by entrenching a specific provision constitutionally to prevent the application of wanted EC rules. It is not surprising, therefore, that it is not the political actors that are most concerned with the issue of constitutional conflict.” Mattias Kumm, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty, 2005 262, at p. 280, see also p. 281.

143 Ibid., at p. 296-298.

144 One example is the Irish constitutional protection for the life of the unborn. The text of Article 40 (3) of the Irish Constitution merely states: “The state acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.” The text itself appears to leave open various interpretations. Also, it was unclear whether this constitutional provision could justify restrictions on the right to travel in order to obtain an abortion. An additional question was how the constitutional provision related to the freedom to provide information on abortions abroad. These issues were the subject of further litigation before the Irish Supreme Court and ultimately clarified by constitutional amendment. On these events, see Monica Claes, The National Courts' Mandate in the European Constitution, 2004, at p. 443-450.
Member States. Changing existing constitutional provisions usually requires a supermajority of some kind. Therefore, if the adoption of a particular constitutional norm proves to be a bad idea, if circumstances change, or political parties change their ideas about the desirability of the norm, the norm will still remain in place as long as a political minority supports it. The fact that a constitutional provision is clear and specific, and is considered constitutionally essential by the courts, therefore does not mean it still has support of a democratic majority.

Yet, perhaps the most important objection in this respect is that the EU’s democratic shortcomings do not entail that EU law necessarily has a weaker democratic legitimacy than national constitutional commitments. Despite democratic shortcomings, the EU’s law-making process may still be more responsive to the interests of the persons affected in a specific policy area than the national political process. And where a national constitutional court holds EU law inapplicable on constitutional grounds, the impact on EU citizens not included in the adoption of the national commitment should also be considered. Democratic reasons therefore, do not clearly favour upholding national constitutional commitments against EU law. An example is provided by the judgment of the French Constitutional Council on the Maastricht Treaty. There, the Council held that the right for EU citizens to vote and stand as candidates in municipal elections conflicted with the French constitutional provision that restricted these rights to French citizens. Yet, the extension to EU citizens of the right to vote and stand as candidate in municipal elections was itself inspired by democratic considerations.

The second problem with Kumm’s proposal is that it is not clear why the burden of bringing these national constitutional concerns should fall on national courts rather than other institutions. Kumm’s proposal seems most convincing if the constitutional concerns were not taken into account in the law-making process. This could be the case if it was not possible for a national legislature to bring these constitutional concerns to the fore. It could also be the

147 A similar point is made by Julio Baquero Cruz, The Legacy of the Maastricht-Urteil and the Pluralist Movement, 2007.
148 See French Constitutional Council (Conseil Constitutionnel), Case No. 92-308 DC Maastricht I, decision of 9 April 1992.
case that the constitutional conflict was not foreseen. Another possibility is that political institutions involved in making EU law are simply less capable than constitutional courts in addressing the constitutional implications of EU legislation or that the courts’ review improves subsequent political debate. However, this again requires a comparative institutional assessment.

4.2.5 Courts or Politics? Assessing the Legitimacy of Identity Review in a Comparative Institutional Perspective

In order to evaluate the legitimacy of the national constitutional courts’ identity-review, it is crucial to take account of the different constellations in which such review takes place. First, where the review concerns a treaty or secondary EU law, the Member States are heavily involved in negotiating these measures through their national governments. They possess a veto over EU Treaty change and the conclusion of other treaties. For the adoption of secondary law, the Council is a co-legislature or in some cases even the only legislative institution operating at the EU level. The Council thus possesses a veto over virtually all EU legislation. If a Member State regards a particular national constitutional concern as crucially important, the Member State Government could raise the problem during the treaty negotiations or the legislative proceedings on the EU level. In addition, the national legislature could raise the issue in the case of Treaty ratification or in the implementation of a Directive. Examples that constitutional concerns are accommodated within these political processes do exist. Upon request of the Irish Government, a protocol was annexed to the Treaty of Maastricht stipulating that nothing in the Treaty would affect the application of Irish constitutional law on abortion. Differentiated integration provides another example. Several Member States have opted-out of European cooperation in certain policy areas. Such opting-out may represent a Member State’s choice to retain political autonomy in policy areas they consider especially important.

149 Fritz Scharpf has even argued that the “consensus requirements of the EU’s ‘Community Method’ are so high that it appears most unlikely that EU legislation would ever override the politically salient interests of even a small group of Member States.” Fritz W. Scharpf, After the Crash: A Perspective on European Multilevel Democracy, 2015 384, at p. 395.

150 And the national legislature could force the government to ensure consideration of the issue if it has put in place adequate parliamentary scrutiny of EU affairs.


There are also examples, however, where political institutions appear not to have taken constitutional concerns sufficiently into account. The adoption of the Framework Decision on the European Arrest Warrant (EAW) may have been such a case. The EAW created constitutional problems in several Member States, particularly because it conflicted with national constitutional prohibitions on the extradition of nationals. Yet, the instrument was hastily adopted on the European level in the aftermath of 11 September 2001. Moreover, the lack of parliamentary involvement may have prevented constitutional concerns from being adequately addressed: the Council adopted the framework decision unanimously and the EP only had to be consulted. There are also indications that some national parliaments did not fully consider the EAW’s constitutional implications in the national legislative procedures. In such cases, national identity review by the constitutional courts could be a way to ensure that constitutional issues are given due consideration.

Still, such shortcomings in the political process leave open various ways for national courts to respond: different types of review may have different consequences for the role of political institutions. For example, the Polish Constitutional Court held the EAW implementing legislation unconstitutional, but temporarily left in place the contested legislation and required the constitutional legislature to amend the Polish Constitution within 18 months.

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156 See the former Article 34 (2) TEU and 39 TEU at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:C2002/325/01&from=EN.
158 The case of Melloni (Case C-399/11 Stefano Melloni v Ministerio Fiscal [2013] EU:C:2013:107) also concerned the EAW, but seems to merit a different assessment. In this case the EAW conflicted with the case law of the Spanish Constitutional Court on trials in absentia. The case law from the Spanish Constitutional Court had established that persons convicted for serious offences in absentia could not be surrendered if the judgment was not subject to review. The EAW itself, however, specifically provided for a different standard that did not allow the Spanish authorities to refuse surrender in the specific case. The Council had thus struck a different balance between the protection of fundamental rights and judicial cooperation in criminal matters. The EAW provision, moreover, complied with the case law of the European Court of Human Rights. In this case it is less clear that the Council had not properly considered the constitutional implications of its decision. See further on these issues: Nik de Boer, 'Addressing rights divergences under the Charter: Melloni' (2013) 50 4 Common Market Law Review 1083.
159 Polish Constitutional Tribunal, judgment of 27 April 2005, P 1/05, available in English at http://trybunal.gov.pl/fileadmin/content/omownienia/P_1_05_full_GB.pdf, last accessed 27 December 2017 (European arrest warrant). The Czech Constitutional Court chose to construe the EAW as consistent with the
The Polish Court thus left it to the constitutional legislature to correct the incompatibility. By contrast, the GFCC not only declared the implementing legislation void in its entirety, but also appeared to reject part of the approach in the EAW as incompatible with the unamendable parts of the German Constitution. The Polish Court’s approach may be preferable from a democratic point of view, but it could also be the case that the GFCC’s approach ensured better consideration of all the relevant constitutional questions. Close study of the political process and the impact of constitutional court judgments on this process should help in clarifying the legitimacy of the national constitutional interventions.

The case for national constitutional courts’ review is stronger in institutional constellations where the constitutional conflict does not directly result from political action. Most commonly, this will be the case where the conflict between national constitutional law results from an interpretation by the CJEU of EU primary law. In such a constellation, the CJEU’s interpretation can only be reversed if the Member States agree to change the EU Treaties by unanimity. The difficulty of doing this gives the CJEU extensive leeway to further develop the norms of EU primary law without legislative control. Review by national constitutional courts may then help to curb excessive judicial power on the EU level, and safeguard interpretive pluralism that is sensitive to national constitutional considerations. A similar consideration could apply to the CJEU’s interpretations of secondary EU law. In this constellation the national constitutional courts could ensure that the CJEU interprets the law in such a manner that it does not encroach upon national constitutional concerns. Yet, at the same time, the national courts should ensure that they do not foreclose the leeway for political actors to interpret national constitutional identity in a different manner.

4.3. Ultra Vires Review

4.3.1 Case Law of the National Constitutional Courts

A further ground that national constitutional courts have put forward to review EU law is
ultra vires review. Ultra vires acts are those EU acts that exceed the EU’s competences. 162 Ultra vires review emerged in the GFCC’s Maastricht-Urteil of 1993, where the German Court judged itself competent to review whether secondary EU law and other EU decisions remained within the scope of the EU’s competences laid down in the Treaties. 163 The Court reasoned that the German parliament had an essential role in providing the EU’s public authority with democratic legitimacy. For this reason, the powers conferred to the EU would have to be limited and sufficiently certain, as otherwise the EU’s exercise of authority would fall outside the powers to which the national legislature had assented. EU law adopted outside this framework would be inapplicable in the German legal order and the GFCC could review whether this was the case. Effectively, the GFCC’s ultra vires review entails that the German Court can independently interpret EU law. 164 This idea contradicts the CJEU’s understanding of the principle of primacy. The CJEU holds that it has the sole competence to review whether EU law has been validly adopted under the EU Treaties. 165

In its Lisbon judgment, the GFCC reaffirmed its position with some qualifications. Ultra vires review would be a last resort, it could only be exercised by the GFCC and not by other German courts, and it would have to be exercised in accordance with the Basic Law’s openness towards European law (Europarechtsfreundlichkeit). The Court would also review whether the EU’s legal acts adhered to the principle of subsidiarity. 166 In the subsequent Honeywell case, however, the GFCC adopted a more restrictive approach. It would only conduct ultra vires review of manifest competence violations with structural significance for the competence division between the Member States and the EU. 167 Furthermore, the GFCC would only conduct ultra vires review after the CJEU had been given the opportunity to rule on the matter in the context of a preliminary ruling. 168

Given these strict conditions, it should come as no surprise that the GFCC has never declared an EU act ultra vires. Yet, it has fired noticeable warning shots. In its decision on the anti-

162 For further elaboration on the notion see Franz Mayer, ‘Kompetenzüberschreitung und Letzentcheidung’ (PhD, Ludwig-Maximilians-Universität München 2000), at p. 24-30.
166 Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08 (Lisbon judgment), at par. 240-241. See also the discussion in Mehrdad Payandeh. Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice.2011 9, at p. 15-16.
167 Bundesverfassungsgericht, Judgment of 6 July 2010, 2 BvR 2661/06 (Honeywell), at par. 61.
168 Bundesverfassungsgericht, Judgment of 6 July 2010, 2 BvR 2661/06 (Honeywell), at par. 60.
terrorism database, the Court stated that the CJEU’s judgment in Åkerberg Fransson would be *ultra vires* if interpreted in an expansive manner. In its preliminary ruling on the ECB’s policy of Outright Monetary Transactions (OMT), the GFCC went a long way in arguing that the policy fell outside the ECB’s mandate, but ultimately backed down after the CJEU held that the policy was not contrary to EU law.

*Ultra vires* review has found resonance with other Member States’ constitutional courts. So far there have been two cases in which a national constitutional court has held an EU act to be *ultra vires*. In 2012, the Czech Constitutional Court declared a decision of the CJEU *ultra vires*. This decision is probably best regarded as an anomaly to be explained against the backdrop of the Constitutional Court’s clash with the Czech Supreme Administrative Court on the specific subject matter of the case. In its decisions on the Lisbon Treaty, the Czech Constitutional Court had stated that *ultra vires* would be an *ultima ratio*. In Denmark, the Supreme Court has also acknowledged the possibility of *ultra vires* review, but likewise only in extraordinary circumstances and after the CJEU has been given the possibility of ruling on the matter. In the recent *Ajos* judgment, however, the Danish Supreme Court refused to comply with the guidelines laid down by the CJEU on the principle of non-discrimination on grounds of age. The Danish Court thus effectively declared the CJEU’s interpretation *ultra vires*.

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169 Bundesverfassungsgericht, Judgment of 24 April 2013, 1 BvR 1215/07 (counter-terrorism database). However, the Akerberg Fransson case did not provide this expansive reading of the Charter’s scope to Member State actions. Editors of the Common Market Law Review, ‘Editorial Comments: Ultra vires - has the Bundesverfassungsgericht shown its teeth?’ (2013) 50 4 Common Market Law Review 925.


172 The Constitutional Court of the Czech Republic (Ústavní soud), judgment of 26 November 2008, Pl ÚS 19/08 (Treaty of Lisbon I); The Constitutional Court of the Czech Republic (Ústavní soud), judgment of 3 Nov. 2009, Pl ÚS 29/09 (Treaty of Lisbon II).


174 The Supreme Court of Denmark (Højesteret), Case 15/2014, Decision of 6 December 2013 (*Ajos*) (translation on...
4.3.2 Democratic Reasons Against Ultra Vires Review

The national courts’ insistence on the limited nature of the EU’s competences finds support in the overall EU legal framework. The principle of conferral is a basic constitutional principle of the EU. It establishes that “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.” Conversely, competences not conferred to the Union remain with the Member States. In addition the principle of subsidiarity states that in areas where the EU does not have exclusive competence it “shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at the central level or at regional and local level, but can rather by reason of the scale or effects of the proposed action be better achieved at Union level.”

Ultra vires review raises similar issues as judicial review on the basis of competence divisions in federal states. A difference with a national setting, however, is that competence review in the EU is already provided for by the CJEU. The national constitutional courts’ review would thus come on top of an already existing judicial safeguard. A reason to concentrate such competence review in the CJEU is that this promotes the uniform interpretation of EU law and legal certainty. These values would be harmed where national constitutional courts adopt their own versions of EU law and, according to some, would even risk undermining the foundations of the EU legal order.

National constitutional courts and several scholars, however, invoke democratic reasons in support of ultra vires review. The idea is that such review offers necessary protection for the democratic autonomy of the Member States against encroachment by the EU. An
overstepping by the EU of its competences would curtail the legislative competences left to national legislatures, without prior authorisation by these national legislatures. Given the EU’s democratic shortcomings, this loss in Member State autonomy results in a loss in democratic legitimacy. The GFCC’s viewpoint in this respect seems particularly strong, as it is informed by the idea that there is no European identity or European public sphere to buttress a European democracy. In this constellation, the EU derives its democratic legitimacy primarily from the Member States. The act by which a national parliament confers authority on the EU is consequently a crucial basis for the EU’s legitimacy. An additional argument for the national courts’ ultra vires review is that the CJEU offers insufficient protection: supposedly, the CJEU is not a sufficiently neutral arbiter between the EU and its Member States, but favours an expansive interpretation of the EU’s competences to the Member States’ detriment. In this respect, it has been argued that the threat of ultra vires review by national constitutional courts has induced the CJEU to take the issue of competences more seriously.

This defence of ultra vires review, however, faces several problems. First, it is informed by a contested interpretation of democracy that directs the interpretation of competence divisions in a particular direction. Most of the EU’s competence provisions are not very specific and require interpretation, particularly the legal bases that allow the adoption of legislation pursuant to broad goals. Their interpretation can thus be subject to reasonable disagreement. For example, where the EU legislature chooses to adopt legislative measures on the basis of Article 114 (1) TFEU, it can only do so if such measures “have as their object

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179 This reasoning is especially present in Bundesverfassungsgericht, Judgment of 12 October 1993, 2 BvR 2134/92 (Maastricht) (translation in [1994] 1 C.M.L.R. 57).
the establishment and functioning of the internal market.” What the establishment and functioning of the internal market requires defies an easy answer and is subject to a panoply of possible political interpretations. The nationally oriented view, mobilised in defence of ultra vires review, favours a limited interpretation of such competences. That view overlooks that European integration may also be seen as a way to overcome the democratic deficits of the nation-state. It discounts that a key reason to adopt legislation on the EU level may be that similar measures on the national level would have limited or no effect, or greatly impact on the interests of outsiders.  

A second reason why ultra vires review in the EU context may be considered problematic is that the EU Treaties are very difficult to amend. Treaty change requires unanimity and in several Member States such amendments require ratification by a qualified majority of some sort, or popular involvement through a referendum. A strict interpretation of the EU’s competences would limit the authority of the EU’s political institutions to rethink the nature of these limits in light of changed circumstances and political preferences. 

Thirdly, a strict enforcement of the EU’s competence limits may actually exacerbate undemocratic features of the EU’s political system. If a key democratic problem of the EU lies in its functional orientation and lack of politicisation over the underlying goals that EU legislation may pursue, the solution is not to ensure stricter scrutiny of whether EU legislation pursues such narrow goals. Rather, democratic grounds would favour a flexible interpretation of these competences, as discussed in subsection 2.2. In addition, the GFCC’s ultra vires review extends to all Treaty norms. If the over-constitutionalisation of the EU is a problem, however, the additional enforcement of these limits on the EU’s political action will only aggravate this problem.

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185 In some Member States ratification of a new EU Treaty merely requires an ordinary majority. This is the case for example in the Netherlands, Belgium, Spain and Italy. Leonard F. M. Besselink, Monica Claes, Šejla Imamovic and Jan Herman Reestman, National Constitutional Avenues for Further EU Integration, 2014, at p. 31. In most Member States, however, Treaty amendments require ratification by a special majority. For example: In Germany, the conclusion of EU Treaty amendments requires a two-thirds majority in the Bundestag and Bundesrat (Article 23 BL); In Ireland, significant competence transfers require constitutional amendment by referendum as determined by the Supreme Court in Supreme Court of Ireland, Decision of 18 February and 9 April 1987, Crotty v An Taoiseach [1987] ILRM 400. In Denmark, certain Treaty changes would require a three-fifths majority in parliament or approval in a popular referendum.
4.3.3 Comparing Political and Judicial Safeguards

The institutional structure of the EU provides further reasons why the consideration of competence issues should be left to political institutions: the EU legislative process contains various political safeguards. First, the Member States are heavily involved in negotiating any piece of secondary EU legislation through their representation in the Council. In principle the national governments that sit in the Council are democratically accountable to their national parliaments. Therefore, if these national parliaments feel that the EU encroaches upon their legislative competences, they could voice their concerns and ensure that they are taken into account by their respective governments.

Secondly, since the coming into force of the Treaty of Lisbon, national parliaments have the opportunity to directly object to legislative proposals on subsidiarity grounds.186 When a third of the national parliaments objects to a legislative proposal on grounds of subsidiarity, the proposal has to be reviewed and the institution that submitted the proposal – usually the Commission – will have to justify its decision to maintain, amend or withdraw its proposal.187 If a majority of parliaments holds that a legislative proposal is incompatible with the principle of subsidiarity, the Commission must review its proposal.188 If the Commission subsequently maintains its proposal, it must justify in a reasoned opinion why it deems the proposal compatible with the subsidiarity principle and submit this opinion to the Union legislature.189 This political safeguard provides national parliaments a further way of preventing the hollowing out of their legislative competence as a result of EU legislative action.

For these reasons, it is not clear that national constitutional courts should engage in ultra vires review of EU legislative action. That the CJEU allows the European legislature considerable leeway in interpreting the competence boundaries between the EU and its Member States is not wholly illogical, given the various political safeguards. It could be the case, however, that these political safeguards do not function adequately in practice, making an additional role of the national courts desirable. In this respect, further empirical research

186 Protocol (no. 2) on the application of the principles of subsidiarity and proportionality. See in this sense, also Mattias Kumm, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty, 2005.
187 Each Member State has two votes, whereas each parliamentary chamber has one vote in bicameral systems. See Article 7 (1) protocol 2.
188 This procedure applies to the ordinary legislative procedure, see Article 7 (3) protocol 2.
189 See article 7 of the Protocol on the application of the principles of subsidiarity and proportionality.
that compares the ability of different institutions to address questions about the EU’s competences, is required.

The best case for national courts’ *ultra vires* review lies where it concerns non-political decision-making. In particular, the national constitutional courts could possibly provide a counterweight to the expansive interpretations of EU primary law by the CJEU.190

The recent *Ajos* judgment by the Danish Supreme Court provides an example.191 The case concerned a conflict between Danish law and the general principle prohibiting age discrimination developed in the CJEU’s case law. In its preliminary ruling, the CJEU required the Danish Court to also apply this principle in situations between private parties. Yet, the CJEU’s solution conflicted with the Danish Court’s long-standing interpretation of the applicable Danish legislation. The Supreme Court reasoned that changing this interpretation would be *contra legem* and violate the principles of legal certainty and legitimate expectations. Moreover, the Danish Supreme Court has an interpretive tradition of judicial restraint that is rooted in democratic considerations.

Against this backdrop, the Danish Court refused to comply with the CJEU’s guidelines. Yet, in reaching that conclusion, the Danish Court did not simply criticise the CJEU’s expansive case law on democratic grounds. Instead, it felt the need to dwell on the relation between EU and national constitutional law. The Court determined that the Danish accession law served as the basis for the applicability of EU law in Denmark and accorded key importance to the Danish parliamentary proceedings in determining the limits of the EU’s legal authority. On this basis the Danish Court concluded that it would overstep its judicial mandate by applying the principle of non-discrimination on grounds of age to the case at hand.192 Yet, the Court’s reasoning overshot its target: the narrow interpretation of the EU’s competences did not

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merely restrict the CJEU, but turned the Act of Accession determinative of the EU’s entire authority in Denmark. The *Ajos* case thus puts in doubt the ability of national constitutional courts to directly address democratic concerns about the power of the CJEU.

Another situation of non-political decision-making concerns decisions of EU executive institutions directly based on the EU Treaties. Here the lack of political safeguards may again make *ultra vires* review more easily justifiable. The GFCC’s review of the ECB’s OMT policy, however, illustrates the complications of such review, as the democratic legitimacy of the GFCC’s threat to declare the policy *ultra vires* was questionable. Even though the democratic legitimacy of the ECB’s role is contested, given its high degree of independence from political institutions, the ECB’s OMT policy has also been widely credited as crucial in preventing the further escalation of the Eurozone debt crisis. In this vein, dissenting Judge Lübbe-Wolff criticised the initial majority judgment:

> “That some few independent German judges – invoking the German interpretation of the principle of democracy, the limits of admissible competences of the ECB following from this interpretation, and our reading of Art. 123 et seq. TFEU – make a decision with incalculable consequences for the operating currency of the euro zone and the national economies depending on it appears as an anomaly of questionable democratic character.”

In addition, Judge Gerhardt stated in a dissent that the competence scrutiny should have been left to Germany’s political institutions, despite the ECB’s political independence. The Federal Government had approved OMT and the German Bundestag had accepted this “with open eyes – against the backdrop of an intensive public debate, after having heard the President of the European Central Bank, and […] on the basis of the Bundestag’s observation and assessment of the acts of the European Central Bank”. In addition, the Bundestag could have criticised the OMT programme and brought actions for annulment before the CJEU: “The fact that it did none of this does not indicate a democratic deficit, but is an expression of

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194 Bundesverfassungsgericht, Order of 14 January 2014 2 BvR 2728/13 (OMT referral), Dissent by Judge Lübbe-Wolff, at par. 28.
195 Bundesverfassungsgericht, Order of 14 January 2014 2 BvR 2728/13 (OMT referral), Dissent by Judge Gerhardt, at par. 23.
its majority decision for a certain policy when handling the sovereign debt crisis in the euro currency area.”

These considerations arguably reveal a more fundamental point: if *ultra vires* review is about protecting the space for democratic politics and the power of national parliaments in particular, it should perhaps be left to political institutions to prevent *ultra vires* acts. Therefore, rather than focusing on the role of courts, efforts should maybe be directed at strengthening political safeguards, such as a political override of CJEU decisions, de-constitutionalisation of the treaties and a strengthening of the position of national parliaments in the EU legislative process. Whether those solutions provide better alternatives to review by national constitutional courts, however, remains an issue in need of further research. Such research should consider how and whether political institutions consider questions about the EU’s competences and their importance for democratic government.

4.4 Court-Ordered Parliamentary Oversight
National constitutional courts could possibly contribute to enhancing the space for democratic politics by demanding improved rights of participation and access to information on EU affairs for national parliaments. In this respect, the GFCC has demanded such rights in several cases. In its Lisbon judgment the GFCC upheld the constitutionality of the Lisbon Treaty, but declared the accompanying legislation on the involvement of the German legislature in European affairs unconstitutional. The Court held that for a number of EU decisions, prior approval by the lower house (Bundestag) and in some cases also the upper house (Bundesrat) was required. Prior legislative approval involving both chambers would be required for use of the general *passerelle* clause of Article 48 (7) TEU, the use of the more specific *passerelle* clause of Article 81 (3) TFEU relating to family law and the use of the flexibility clause (Article 352 TFEU). Prior parliamentary approval, although not in legislative form, would be required for the use of other more specific *passerelle* clauses.

On the basis of the general *passerelle* clause, the European Council can authorise the Council to move from acting by unanimity to qualified majority in a given area, as well as to authorise the use of the ordinary legislative procedure where a special legislative procedure applies.

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196 Ibid., at par. 23.
198 See par. 413-414 and 417 of Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08 (Lisbon judgment).
199 These are: Articles 31 (3) TEU, 153 (2) TFEU, 192 (2) TFEU, 312 (2) TFEU and 333 (1) and (2) TFEU. See par. 416 of Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08 (Lisbon judgment).
The special passerelle clauses contain similar, more specific clauses. The flexibility clause allows the Union to adopt secondary law should such action “prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers.”\textsuperscript{200} The GFCC’s requirement of prior parliamentary approval enhanced the formal rights of the German parliament in overseeing the action by the executive in European affairs and could thus help address the problem of executive dominance in EU decision-making.

In its review of several of the Euro crisis measures, the German Court has adopted a similar stance. In several cases the Court made its acceptance of the measures under review conditional on the creation of better parliamentary oversight. In its review of the European Financial Stability Facility (EFSF) and the Greek loan facility, the Court held that the German Federal Government had to obtain the consent of the Bundestag before the government could give new financial guarantees.\textsuperscript{201} In a subsequent case, the GFCC also struck down legislative provisions that allowed the delegation of important decisions regarding the EFSF to a committee of nine Bundestag members that would decide secretly on cases of particular urgency.\textsuperscript{202} On 19 June 2012 the GFCC held that the German Federal Government had violated the Bundestag’s constitutional rights to be informed in relation to negotiations on the European Stability Mechanism (ESM) and the Euro Plus Pact.\textsuperscript{203} Finally, in its interim-judgment of 12 September 2012 on the ESM and the Fiscal Compact, the German Court stressed that information could not be withheld from the Bundestag that it required to assess decisions of the ESM necessary for the exercise of its budgetary responsibility.\textsuperscript{204}

\textsuperscript{200} See Article 352 TFEU. In addition, the GFCC also held that prior statutory ratification would be required “for the dynamic expansion of EU competences in the area of judicial cooperation in criminal matters.” See: Philipp Kiiver, ‘The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU’ (2010) 16 5 European Law Journal 578, at p. 584. Finally, the Court held that the deployment of German troops would always require Bundestag approval.

\textsuperscript{201} Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF).

\textsuperscript{202} Bundesverfassungsgericht, Judgment of 28 February 2012, 2 BvE 8/11 (Neuner Gremium).


\textsuperscript{204} Bundesverfassungsgericht, Judgment of 12 September 2012, 2 BvR 1390/12 (ESM interim ruling), at par. 255 and further.
The GFCC’s case law on the oversight rights of its national parliament in EU affairs appears to be unique. Other constitutional courts have not adopted similar requirements. For example, the Czech constitutional court has explicitly left it to the legislature itself to determine how parliament should participate in EU decision-making. In France, the Constitutional Council did order a constitutional amendment to expand the powers of the French Parliament in EU decision-making. Yet, this amendment was necessary for the French Parliament to enable it to use the powers conferred by the Lisbon Treaty. The French Council did not aim to enhance those powers beyond what was already in the Treaty.

The various cases in which the GFCC has strengthened the position of its national parliament in EU affairs, seem positive from a democratic perspective. They strengthen the formal position of the Bundestag vis-à-vis the dominant executive in European affairs. By enhancing a national parliament’s oversight of the executive operating in EU affairs, a national constitutional court does not then appear to assert itself on the contested relationship between the EU and its Member States. Nonetheless, the desirable degree of parliamentary oversight is subject to political considerations. It has been argued that tying the hands of government representatives too extensively would hamper the effectiveness of EU decision-making or would have detrimental effects on the national interest. Parliamentary access to information can also result in information overload if a parliament does not introduce procedures to process such information. On the basis of such considerations, one could argue that national legislatures should decide for themselves how to organise oversight of their executives and how to balance competing interests.

Another question is whether it is necessary for courts to strengthen parliamentary oversight or whether this task can also be performed – and perhaps in a better manner – by the respective

206 Although it did recommend such provisions, see: The Constitutional Court of the Czech Republic (Ústavní Soud), judgment of 26 November 2008, Pl US 19/08 (Treaty of Lisbon I), at par. 153 and pars. 165-167; and see also Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7 1 European Constitutional Law Review 96.
208 Philipp Kiiver, The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU, 2010 578, at p. 586 notes this point, but is critical of it.
parliaments themselves. The GFCC’s cases provide an indication that parliaments may be reluctant to provide such oversight themselves. One reason could be that the main political cleavage in parliamentary systems commonly runs between the government-supporting parliamentary majority and the opposition, rather than between the executive and the legislature. The government-supporting majority generally has an interest in sustaining and supporting the government.\textsuperscript{210} Constitutional courts’ review may therefore be instrumental in overcoming the unwillingness of parliamentary majorities to create strong parliamentary oversight in contexts where parliamentarians lack sufficient incentives to develop such mechanisms themselves.\textsuperscript{211} Nonetheless, strong parliamentary oversight institutions have been created in other EU Member States without intervention by constitutional courts: the Finnish, Swedish, Danish and Dutch parliaments all rank highly in terms of their parliamentary control over EU affairs, but have legal cultures in which the role of constitutional courts is limited.\textsuperscript{212} This gives nuance to the idea that national parliaments would be unwilling to strengthen their position by themselves and suggests a more complicated picture.\textsuperscript{213}

A final question is whether court-ordered parliamentary oversight is effective. Even though courts may enhance the formal rights of national parliaments in European decision-making, it is unclear whether such court-ordered change will have an effect in practice, particularly if the parliaments were unwilling to provide the oversight institutions themselves.\textsuperscript{214} Just as a

\textsuperscript{210} Ibid. See also: Thomas Winzen, 'European integration and national parliamentary oversight institutions' (2012) 14 2 European Union Politics 297, at p. 301-306.

\textsuperscript{211} In similar sense Peter Lindseth, Power and Legitimacy: Reconciling Europe and the Nation-State (Oxford University Press Oxford & New York 2010), at p. 178; Eyal Benvenisti and George W. Downs, The Democratizing Effects of Transjudicial Coordination, at p. 166-167.


\textsuperscript{213} Political science research has identified the domestic institutional strength of a parliament as the main explanatory factor for the strength of national parliamentary oversight in EU affairs. Public and party opinion on European integration have also been found to play a role, but their impact is less clear. See: Olivier Rozenberg and Claudia Hefftler, Introduction, The Palgrave Handbook of National Parliaments and the European Union 2015, at p. 19. See in relation to the crisis also: Katrin Auel and Oliver Höing, 'National Parliaments and the Eurozone Crisis: Taking Ownership in Difficult Times?' (2015) 38 2 West European Politics 375. See also: Tapio Raunio, 'Holding governments accountable in European affairs: Explaining cross-national variation' (2005) 11 3-4 The Journal of Legislative Studies 319. Raunio has argued that Euro-scepticism is an important factor in explaining cross-country variation: “If the parliament is strong in domestic politics, and if the parties and/ or the public are divided or sceptical of Europe, then the government is subjected to tighter scrutiny – and vice versa”. Tapio Raunio 'National Parliaments and European Integration: What We Know and Agenda for Future Research' (2009) 15 4 317, at p. 321.

\textsuperscript{214} Similar remarks by Philipp Kiiver, The Lisbon Judgment of the German Constitutional Court: A Court Ordered Strengthening of the National Legislature in the EU, 2010, at p. 579. Studies on the strength of national parliamentary oversight have been criticised in the past for focusing too much on formal mechanisms, rather
parliamentary majority may lack the incentives to create strong mechanisms of parliamentary participation, it may equally lack incentives to use the scrutiny instruments.215

Again, these questions should be subject to further empirically informed research. For example, where court-ordered parliamentary oversight proves ineffective and comes at the expense of reasonable political assessments by the national legislature itself, its democratic legitimacy appears problematic.

5. Conclusion
The EU-related case law of national constitutional courts has been justified for various reasons: as protecting the democratic autonomy of the Member States, as putting pressure on the EU to democratise, as allowing contestation and dialogue over constitutional issues, or as a way to ensure respect for national constitutional identities. Such justifications do not fully address, however, that the courts’ review of European law also raises democratic concerns. Despite the EU’s democratic legitimacy problems, it may still be more legitimate to leave it to political institutions to address constitutional issues in the context of European integration. This institutional consideration also applies where the national courts’ review is directly justified on democratic grounds. Even though there are considerable concerns about the EU’s democratic legitimacy, the question of how the EU should be further democratised is also a complex political issue subject to a variety of diverging reasonable viewpoints.

than their actual use and influence on government behaviour, see: Tapio Raunio, National Parliaments and European Integration: What We Know and Agenda for Future Research, 2009; Olivier Rozenberg and Claudia Heffler, Introduction, The Palgrave Handbook of National Parliaments and the European Union, 2015; Thomas Winzen, Political Integration and National Parliaments in Europe, 2010. As Winzen states though a note of caution is in order: “[I]t is not necessary that the parliament actually engages in any activity. If it is in control, the government will anticipate what is acceptable to the legislature in order to avoid being rebutted. The parliament does not need to act in this case. At the same time, parliamentary inaction can also mean ignorance – the parliament merely has not realised that the government action is against its preferences. Ignorance and control are, thus, observationally equivalent.” In addition he notes that “we cannot easily dismiss the argument that mandating rights induce the government to anticipate parliamentary preferences in order to prevent being constrained by a mandate”.

215 Olivier Rozenberg and Claudia Heffler, Introduction, The Palgrave Handbook of National Parliaments and the European Union, 2015, at p. 20. Existing empirical research on the role of national parliaments in the EU, however, does show a strong positive correlation between the institutional strength of parliaments in EU affairs and their actual EU related level of activity. See: Katrin Auel, Olivier Rozenberg and Angela Tacea, Fighting Back? And, If So, How? Measuring Parliamentary Strength and Activity in EU Affairs, The Palgrave Handbook of National Parliaments and the European Union 2015 60, at p. 78-89; Katrin Auel, Olivier Rozenberg and Angela Tacea, ‘To Scrutinise or Not to Scrutinise? Explaining Variation in EU-Related Activities in National Parliaments’ (2015) 38 2 West European Politics 282. Institutional strength of parliaments in EU affairs in the OPAL-project is based on three indicators: Access to information, the effectiveness of a scrutiny infrastructure to process such information and the strength of the parliament’s ability to influence the government’s position. The research of Auel, Rozenberg and Tacea suggests that public Euroscepticism and opposition to the EU within parliament form a limited incentive for MPs to engage in EU-related activity, at p. 297-298.
Instead, I have argued in this chapter that the democratic legitimacy of the constitutional courts’ review depends on an empirically informed comparative institutional assessment between constitutional courts and other institutions. The constitutional courts’ review could be a way to better ensure that constitutional issues are given due consideration in the making of European law, such as questions relating to constitutional identity or competence issues. In line with my arguments of chapter 2, the constitutional courts’ review of European law may better safeguard on-going deliberation on whether European law complies with the preconditions for democratically legitimate law-making as laid down in the constitution. Yet, to understand whether that is the case, further empirically informed research is required. That research should take into account the institutional constellation in which review takes place, how the constitutional issues that a national court raises have played a role in the prior decision-making process, as well as how the constitutional court judgments impact on subsequent political deliberations.

The case studies in the following chapters study these questions in more depth. These relate to the case law of the GFCC, the main protagonist in most of the literature on constitutional courts in the EU. The case studies consider how the constitutional issues raised by the GFCC in its judgment on the Maastricht Treaty, as well as its Euro-crisis case law, were treated by the German legislature and the relevant European institutions, and how this case law impacted on subsequent decision-making within these political institutions. In addition, the chapters discuss the political decision-making of the same instruments in the Netherlands, to better understand whether and how a national legislature considers similar constitutional questions in the absence of review. These case studies do not exhaust the different possible institutional constellations in which review of European law by national constitutional courts takes place, which I have discussed in this chapter. Yet, they do show several novel insights on the democratic legitimacy of identity review, ultra vires review and the role of national constitutional courts in enhancing national parliamentary oversight.
CHAPTER 4 - RESEARCH DESIGN

1. Introduction
In chapter 3, I argued that the democratic legitimacy of the national constitutional courts’ review of European law depends to a significant degree on whether these courts are better able to address the constitutional implications of European law than the institutions they subject to review. In addition, I argued that their review could be seen as enhancing the EU’s democratic legitimacy, where it contributes to democratic deliberation on these constitutional implications. Whether national courts have actually fulfilled such a role in relation to the EU, is unclear. There is little or no empirical research that has assessed the role of the national courts in this respect.

To justify judicial review of European law by national courts, an assessment has to be made of whether national courts actually fulfil such a role in practice and of what would be missing if a national court refrained from any review at all. As argued in the previous chapters, this assessment requires an enquiry that compares the ability of courts and political institutions to address constitutional issues, broadly speaking, as well as an assessment of how courts influence the law-making process when they review European law.

There are several practical reasons not to undertake such an enquiry. Comparing political and judicial reasoning is a burdensome exercise. Parliamentary debates are often long, and various political actors commonly have different viewpoints based on different reasoning and political ideas. Understanding the means by which a political process unfolds, moreover, often requires one to have a good grasp of the context in which this process takes place and demands one to draw on a variety of sources. These complexities may partly explain why most scholarship on the role of the constitutional courts in the EU is so court-focused. In light of these complexities, the empirical part of this book focuses on a selected number of cases in relation to the role of the GFCC. Additionally, the German decision-making in the same cases was compared to that in the Netherlands, in order to see how a national legislature takes into account constitutional concerns relating to European integration without subsequent court review. Given the limited amount of case studies and countries considered, the empirical study has an exploratory character.
The current chapter explains the research design of the case studies in this book. Section 2 first discusses the justification for a qualitative case based study. Section 3 subsequently justifies the case selection. Section 4 discusses how the quality of deliberation on constitutional issues is studied. Section 5 explains the types of data used in the current study, whereas section 6 discusses the method of analysis.

2. Justification for a Qualitative Case Study Based Research
The method chosen to address the stated empirical questions is a qualitative comparative case based study.¹ Qualitative case studies offer a number of advantages particularly suitable to the current research. Firstly, they allow an in-depth consideration and comparison of the different arguments offered in legislative debates and by constitutional courts. As I argued in the previous chapters and in chapter 2, in particular, in a deliberative democratic understanding a constitution lays down the preconditions for democratically legitimate law-making. At the same time, the constitution requires further specification in democratic discourses and cannot be fully removed from democratic contestation either. The constitution thus functions as a standard to assess the legitimacy of law-making, as an ideal to be further realised in democratic law-making, as well as a set of norms that cannot be placed outside democratic discourse itself. The upshot of this argument is, that the best we can seemingly hope for is that legislation by democratic majorities is accompanied by a constitutional assessment of whether legislation complies with the constitutional norms and principles that embody the preconditions of democratic legitimacy.

Yet, there is no unequivocal standard to assess the constitutional quality of legislative debate and judicial reasoning. The only option seems to be to engage critically with legislative and judicial reasoning, to assess the different arguments offered, and ultimately to argue why in relation to a particular constitutional controversy, one particular institution addressed the underlying constitutional concerns in a better manner. Such an assessment is in turn open to question.

The type of analysis that such an assessment requires is one that describes and closely engages with the different arguments offered in legislative debates and by constitutional courts. The required analysis is therefore intensive and inherently qualitative in nature.

Secondly, comparing the role of courts in deciding constitutional issues with that of legislatures, as well as assessing the courts’ effects on the political process, requires an awareness of the context of the legal system studied, such as the political culture, its history and the institutional position of the respective courts vis-à-vis other political actors. The causal mechanisms at play are likely to depend on many factors. Careful contextual study is therefore required to determine the role of a constitutional court as opposed to other explanatory factors. This justifies the focus on a small number of cases, i.e. a small N-study, and the focus on a within case-study analysis. For these reasons a qualitative case based study is deemed more appropriate to answer the empirical questions of this book.

The case studies offer the advantage of closely studying the causal mechanisms that explain the impact of courts on the legislative process in the EU. The internal validity of the study is enhanced through data triangulation by relying on multiple data sources. The downside of case studies relates to their more limited external validity. The purposive selection of cases and the focus on a small number of cases makes case study research less representative of the population under study than broad cross-case research.

3. Case Selection
The current research project looks at two major constitutional episodes in the EU’s history of the past twenty-five years and the role of the GFCC: the adoption and ratification process of the Maastricht Treaty and the EU’s response to the Euro crisis. These decision-making

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2 Qualitative study are often associated with the study of a small number of cases and can be characterised by their use of within case analysis. See: Gary Goertz and James Mahoney, A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences (Princeton University Press Princeton & Oxford 2012), at p. 10 and p. 87-99; see also John Gerring, Case Study Research: Principles and Practices, 2007, at p. 21.

3 Here I draw on the noted advantages of case based studies as given by: ibid, at p. 49-53; and Alexander L. George and Andrew Bennet, Case Studies and Theory Development in the Social Sciences (MIT Press Cambridge Massachusetts & London 2005), at p. 17-22.


5 External validity concerns the question of whether the results of a particular study are generalizable to other research contexts. Alan Bryman, Social Research Methods, 2012, at p. 47. The use of the notions of external and internal validity in qualitative research is contested, where some researchers argue that different notions should be used. See Bryman 2012, at p. 48-50 and p. 389-394.

processes are studied at the European level and at the level of two Member States, namely that of Germany and that of the Netherlands. The reasons for selecting these episodes and decision-making levels are articulated in the subsequent subsections.

3.1 Case Delineation
A case can be defined as “an instance of a class events”, where the class of events refers to the phenomenon of scientific interest. The current study examines the comparative treatment of constitutional issues by political institutions and national constitutional courts in relation to the adoption of European law. In addition, it aims to assess the effect of national constitutional courts’ review on law-making within these political institutions. The case studies thus comprise instances of European law-making, such as the adoption of an EU Directive or an amendment of the EU Treaties, their assessment by national constitutional courts and the effect of such courts’ review on the subsequent political process.

Temporally, a case consists of the instrument’s adoption on the European level, its implementation or ratification at the national level, its possible review by one or several national constitutional courts, and finally the possible effect of that review by the other branches of government at the national and EU level. Examples are the European adoption, national ratification and national constitutional review of the Maastricht Treaty and the Lisbon Treaty, or similarly the adoption, implementation and constitutional review of the European Arrest Warrant. In sum, the political and judicial decision-making on a specific European legal measure on both the European level and that of the Member States constitutes a case. The case selection thus requires a choice among EU legal instruments and between different Member States.

One difficulty is that a case defined in this manner is sometimes difficult to limit in time. The moment at which a national court exercises constitutional review may be very far removed in time from the moment at which the EU legislation under consideration is adopted or implemented. This is particularly the case with concrete judicial review, where the timing of judicial review depends on when an individual brings a case. In order to assess the impact of the court’s judgment on other institutions, it is therefore often necessary to look at subsequent

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law-making processes in similar situations. The result is a possible fluid boundary between different case studies.

3.2 Selection and Justification
The project analyses six case studies related to two important episodes of constitutional significance in the history of the EU: the adoption and ratification of the Maastricht Treaty and Europe’s response to the Euro crisis. The study focuses on the adoption and ratification process of the Maastricht Treaty and four law-making processes during the Euro crisis, namely the adoption of the European Financial Stability Facility (EFSF), the change to the EFSF in March and July of 2011, the adoption of the European Stability Mechanism (ESM) and finally the Treaty on Stability Coordination and Governance (TSCG). These decision-making processes are studied on the European level and at two national levels, Germany and the Netherlands.

The case studies and Member States were selected for the following reasons. Germany was chosen, because it has the constitutional court with the most elaborate and influential case law in relation to European law. The GFCC has indicated several constitutional limits to European integration and has repeatedly ruled that the powers of the national parliament should be strengthened. Moreover, since the crisis Germany has emerged as the EU’s most powerful Member State and the GFCC’s case law seems highly influential for other constitutional courts as well as in the academic debate on the constitutional structure of the EU. The expectation is therefore, that the GFCC would exert a strong influence on the law-making process, both on the content of the deliberations, as well as with regard to the structural position of national parliaments.

The Netherlands was chosen as a contrast to the German case. In the Netherlands, courts do not have the power to review legislation on the basis of the constitution and there is no judicial scrutiny of European law on the basis of the Dutch constitution. The Dutch Constitution explicitly prohibits strong judicial review of legislation and treaties on constitutional grounds. Constitutioon review is instead left to the Dutch legislature itself. In the Dutch system the independent Council of State delivers advisory opinions on all legislative bills and international treaties before they are debated in the Dutch Parliament. This includes an assessment of the constitutionality of legislative proposals. These opinions

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8 Article 120 of the Dutch Constitution prohibits judicial review of legislation on the basis of the Constitution. See also C. J. A. M. Kortmann, *Constitutioneel Recht* (Kluwer Deventer 2005), at p. 374-381.
are not binding, but the Dutch Government does have the obligation to respond to them when
the Government introduces a legislative bill. In addition, the Dutch upper house of
parliament, de Eerste Kamer, functions as a so-called ‘chambre de réflexion’ by checking the
quality and constitutionality of legislation. The Dutch system is sometimes criticised for
lacking a sufficiently strong constitutional culture and there is an on-going debate about the
need to introduce judicial review. It has been argued, for example, that politicians do not
adequately take into account the constitution in the legislative process. In this context, some
within Dutch debate have argued for the introduction of judicial review in order for Dutch
courts to gain a constitutional role over European matters. If it is true that constitutional
courts play an important role in improving deliberation on constitutional matters relating to
European integration and in strengthening the position of national parliaments, one would
expect there to be little reflection on constitutional issues relating to European integration in
Dutch parliamentary deliberations. Still, within the case studies, the focus is on Germany and
the GFCC, whereas the Netherlands serves mostly as a contrast to the German case. The
reason is that the assessment of the GFCC’s case law and its impact on the political process
requires more discussion than the Dutch political process by itself.

The different law-making processes were selected primarily because all these legal
instruments were reviewed by the GFCC. Secondly, because these decision-making processes
mark two important moments in time regarding the GFCC’s role. In its Maastricht-Urteil the
GFCC changed its stance on the EU: the Court introduced ultra vires review and elaborately
assessed the democratic credentials of the EU against a sovereigntist interpretation of
democracy. The GFCC’s review of the Maastricht Treaty has been a source of inspiration for
constitutional courts beyond Germany, and is of key importance in the academic debate on
the role of national constitutional courts and the EU’s constitutional architecture more
generally. The Maastricht-Urteil is generally seen as having provided the starting point for
ideas of constitutional pluralism. Yet, for many years the Maastricht-Urteil also remained

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9 On these issues see: Maartje de Visser, Constitutional Review in Europe: A Comparative Analysis (Hart
10 Ibid., at p. 80-82.
11 Maurice Adams, 'Constitutioenle geletterdheid voor de democratische rechtstaat' (2013) 17 Nederlands
Juristenblad 1110; Alex Brenninkmeijer, 'Stresstest rechtsstaat Nederland' (2015) 16 Nederlands Juristenblad
1046.
13 Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2007) 13 EUI
Working Papers; Matej Avbelj and Jan Komárek, 'Introduction' in Matej Avbelj and Jan Komárek (eds),
a relatively isolated case and its full consequences remained unclear. It was followed by more Euro-friendly case law. Only in 2009 did the GFCC fully return to the Maastricht-themes in its Lisbon judgment, followed by several judgments on the Euro-crisis from 2010 onwards. The study of the GFCC’s role in the Euro-crisis thus allows a better appreciation of the Maastricht legacy for the current state of European integration.

The case selection was further informed by a ‘most-similar logic’. On the one hand, the case studies research two national decision-making contexts that vary considerably in the way they allow courts to review European law on constitutional grounds. On the other hand, the selection was meant to provide case studies are similar in other respects, in order to control as much as possible for other factors that may influence the outcome. The study therefore compared the two different national decision-making levels with respect to the adoption and ratification of the same legal measures. Other similarities between the two countries are that they both have parliamentary political systems based on proportional representation, they are both founding Member States of the EU, they are both part of the Euro, they are both creditor states in the Euro crisis and they may be considered relatively close to each other in terms of political culture. The case studies are also similar because the different law-making processes all concern treaties or treaty-like instruments that required ratification or national approval. In addition, the case studies deal with subject matters that are substantively related.

Nonetheless, while the abovementioned reasons justify the selection of case studies and Member States, the study has a number of limitations. The research design requires an intensive study of political and judicial arguments on European law. For this reason, the study is restricted to the in-depth study of a few case studies and two Member States. A key strength of this design is that it allows precisely for the in-depth comparison of political and judicial argumentation that the study requires.

At the same time, the focus limits the overall generalisability of the empirical findings. The case studies do not exhaust the possible range of institutional settings in which national constitutional review can take place, discussed in Chapter 3. Germany and the Netherlands also vary in other respects than in the way they have institutionalised constitutional review.

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14 Here I draw on John Gerring, Case Study Research: Principles and Practices, 2007, at p. 131-139; and Alexander L. George and Andrew Bennet, Case Studies and Theory Development in the Social Sciences, at p. 164-166.
despite important similarities between the two countries. Similarly, the focus on the law-making process of five European legal instruments does not exhaust the possible institutional constellations in which national constitutional review takes place. The case studies focus on Treaty-like instruments that have required ratification or approval in the Member States. The effect of constitutional review in the context of secondary EU law could be different and this caveat should be taken into account in reading the findings of the case studies. These limits have been taken into account in the conclusions drawn from the study.

4. Assessing the Constitutional Quality of Judicial and Political Deliberations
The study compares how political institutions address the constitutional implications of European law with that of national constitutional courts. More specifically, the study compares the treatment of these issues by the political institutions involved in the law-making processes of the respective case studies, with the subsequent treatment of these issues by the GFCC. In addition, the study asks about the possible effects of the GFCC’s review on the treatment of constitutional issues by EU and German political institutions.

In order to provide a fair comparison between political and judicial reasoning, the criteria for comparison must satisfy three constraints. First, they cannot be court-centred. One cannot simply point to court decisions invalidating legislation or criticising legislation in substantive terms as evidence that legislatures’ deliberations lack constitutional quality. The premise on which several scholars criticise judicial review is precisely that courts and legislatures can disagree about the proper interpretation of constitutional norms. Pointing out that courts invalidate legislatures’ statutes confirms that courts and legislatures do in fact disagree, but it is not sufficient to establish that courts are better at constitutional reasoning. Secondly, the criteria should be sufficiently open in order to accommodate a variety of reasonable interpretations of constitutional requirements and ideals. Thirdly, the evaluation of political deliberations should focus on its institutional performance as a whole, not just on the individual behaviour of legislators within these institutions. The reason is that it is no doubt easy to come up with examples of individual legislators behaving in a way that is constitutionally irresponsible. Still, this does not mean that the legislature as a whole acts irresponsibly in a constitutional sense. In order to determine the latter aspect, one also needs to look at the outcome of the decision-making process and the treatment of irresponsible

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legislators’ arguments within a legislative debate. For example, it could be that one political party proposes legislation that is indefensible on constitutional grounds, but is subsequently condemned immediately by a large majority of legislators. Rather than seeing the unconstitutional proposal as evidence of legislative failure to act in a constitutionally responsible way, its immediate condemnation by other legislators is probably better seen as evidence that the legislature as a whole, does a good job in protecting constitutional ideals and norms.

In this study I have used a fairly open and simple criterion to compare the political deliberations with that of constitutional courts: I enquired how the constitutional issues that featured in the national constitutional courts’ case law on the respective measures, were dealt with in prior and subsequent political deliberations. A possible objection is that this criterion is still court-centred. Yet, I do not believe that this objection is too strong. Rather than taking the outcome of the court judgments as determinative, the criterion is based on the lighter assumption that the issues raised by the constitutional court at least deserve consideration in the political process. I submit that this is a justified assumption given that the GFCC’s case law is generally based on an interpretation of the constitutional principle of democracy and the right to vote. From these principles flow more specific considerations on the division of powers between the EU and its Member States, and on parliamentary oversight. To help understand how these constitutional issues could be seen differently to the way the GFCC views them, I have taken into account how similar issues were discussed in the academic literature, primarily those by legal scholars in relation to the case studies.

Deliberative democratic theory does not provide an unequivocal standard to judge the quality of political and judicial reasoning. In the case studies, I instead lay out the different arguments by constitutional courts and political institutions on the respective constitutional issues, discuss them and argue which institution can be said to have done a better job. That said, several aspects inform what constitutes good deliberation.16 As discussed in chapter 2, deliberative conceptions of democracy are usually contrasted with conceptions of democracy that view politics as primarily based on power and interest, or the aggregation of private

preferences. In this sense, deliberative democracy differs in that it perceives the democratic process as a rational process in which given preferences can be transformed, and in which participants are expected to justify the collective decisions that they would impose on each other. Deliberative politics are often contrasted with politics based on bargaining. Bargaining refers to a process in which the actors take their personal preferences as given and aim to maximise these. By contrast, deliberation aims at the transformation of preferences in a process where participants give reasons concerning the merits of a particular proposal. At the core of deliberative democratic theories is therefore a “reason-giving requirement.” Another consideration is how participants in a debate respond to each other’s arguments. Ideally, the participants should be willing to change their position in response to the better argument, articulated by Habermas as “the unforced force of the better argument.”

In this respect, it matters whether positions are justified with reference to public or private reasons and how participants respond to each other’s considerations. Reasons can be judged as closer to the interests of a speaker, where positions are justified on the basis of the interests of a particular group or constituency of the speaker, or on a notion of the common good. Deliberative democratic theory generally demands that collective decisions are based on public reasons, reasons that invoke some notion of the common good. In the European context, a further distinction can be drawn between justifications on the national interests or the interests of national citizens, and those that refer to the interests of non-citizens, the European interests or the interests of the entire world. Justifications invoking the national interest can be considered closer to a speaker’s own interest, although the distinction also reflects different conceptions of democracy. In comparing judicial and political reasoning, I aim to take these considerations on board. Generally, however, deliberations on constitutional matters are built around public reasons. The case studies therefore focus primarily on how constitutional issues were discussed.

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19 Daniel Naurin, Dressed for Politics (PhD Manuscript, Göteborg University, Department of Political Science 2004), at p. 61; see also Jürg Steiner, André Bächtiger, Markus Spördli and Marco R. Steenbergen, Deliberative Politics in Action: Analyzing Parliamentary Discourse, 2004, at p. 5-6.
5. Data Sources
For the study of the national levels of Germany and the Netherlands, three main types of data were analysed. The first source of data consisted of the judgments of the GFCC on the legal instrument under study, more specifically its judgments on the Maastricht Treaty and its judgments on the Euro crisis measures. For the Netherlands, the opinions of the Council of State for these instruments were considered, because the Council of State functions as the advisory body that assesses the constitutionality of legislative proposals. The second source of data consisted of the legislative documents on the legal instruments studied, primarily those providing information on the legal proposals, the parliamentary plenary debates, the parliamentary committee proceedings and the resulting legislation. The study focused on the lower house parliamentary proceedings, namely that of the German Bundestag and the Dutch Tweede Kamer. As a third supplementary source of data, semi-structured interviews were held with three categories of persons: persons working in the legislative branch, namely members of parliaments, their assistants and officials of the parliaments’ registry; judges of the GFCC and their assistants; and legal representatives in the respective cases before the GFCC. In total, twenty such interviews were held, with five for the Netherlands and fifteen for Germany. These interviews served to further understand the political context of the cases studied, the interaction between the GFCC and the political process, as well as possible informal practices that the other data sources provided no information on. An overview of all the interviews as well as the questions raised to the interviewees can be found in the annexes at the end of this book.

For the study of the European level, three main types of data were used. The first was policy documents relating to the negotiation of the Maastricht Treaty and the four crisis measures. Secondly, interviews were held with EU and national government officials involved in the respective negotiations or with a more general insight in EU negotiations. These interviews served to assess how the constitutional repercussions of the respective legal instruments were discussed in the EU negotiations and what impact national constitutional courts’ review has on such negotiations. In total, seven such interviews were held. Several of the interviewed officials were EU legal experts who had been involved in the drafting and negotiation of the respective measures, because I considered them most likely to be knowledgeable of constitutional complications with the respective instruments and about the consequences of national review for EU negotiations. Thirdly, existing scholarly studies and media reports on the respective negotiations provided an importance source of data. The research of the
European level depended more heavily on such existing scholarly studies and is based less on original data gathering than the study of the national level. In particular, the case study on the Maastricht Treaty draws extensively on previous research concerning the Treaty negotiations, rather than original research.

Other types of supplementary data were used. First, existing academic works that described and analysed the courts’ decisions, the ratification process of the measures under study and/or the relation between constitutional review and the political process. Secondly, articles from popular media that provided the context to these constitutional episodes. The use of various different sources allowed for a better understanding of the issues at play and reduced the risk that the conclusions would be too biased because they rely on a single type of sources.²²

6. Analysis
The analysis of the data serves two main goals, namely to compare judicial and political reasoning, as well as to determine the impact of judicial reasoning on subsequent political reasoning. The case study on the Maastricht Treaty focuses on the comparison between political and judicial reasoning, because the impact of the decision on the political process appears to have been limited. The case studies in the context of the crisis pay more attention to the impact of the GFCC’s judgment on the subsequent political process, because the succession of several cases in fairly quick succession better allows the study of this impact. The following choices were made in the analysis of the data.

First, I assumed generally that political disagreements about constitutional requirements in political reasoning on the national level could be divided along political party lines. I thus assumed that arguments on constitutional issues by individual Members of Parliament could be generally attributed to their political party. I also supposed this would not be the case for dissenting party members, defined as party members that explicitly indicated their deviance from party lines on a specific issue or as those that did not vote in line with the majority of their party on one of the legal instruments debated. For example, if a large majority of the party voted in favour of a particular legislative bill, but a particular individual MP abstained or voted against the bill, he or she was considered a dissenter. Where there were several legislative measures subjected to vote in the particular debate, any person that did not vote

²² Joseph Maxwell, Qualitative Research Design (Sage Thousand Oaks & London 2013) at p. 100 and further; also Robert K. Yin. Case Study Research: Design and Methods, 2009, p. 114 and further.
with the large majority of her or his party on any of the measures, was considered a dissenter. When there was no clear majority within the party for or against the measure under debate, I understood this as the absence of a clear party line on the issue. For example, in the Bundestag’s vote on the Maastricht Treaty, three of the members of the group Bündnis 90/Die Grünen voted in favour of the Treaty, whereas the other four voted against. Here the group seemed split, rather than that there were clear dissenters and non-dissenters. Finally, where no formal voting-record existed, I did not consider any party members as dissenters, except where they explicitly indicated their deviance from the party line.

Secondly, I assessed the impact of constitutional court judgments on legislative deliberations by enquiring how GFCC judgments featured in the parliamentary debates and by how interviewees reported about their impact. In addition, I considered how existing research had determined their impact. Furthermore, I interrogated whether arguments in German parliamentary debates had a similar structure as in constitutional case law, how arguments on such issues changed over time and whether such changes could be attributed to the GFCC’s review.

Thirdly, to ascertain the impact of the GFCC’s judgments on political deliberations, the case studies were subjected to cross-case comparison and temporal within-case study. As is common in qualitative case based research, the current study relies to a large extent on within-case analysis. To assess the role of constitutional courts in the legislative process, the situation before and after the intervention of a constitutional court within the different cases was analysed. Compared to cross-case comparison, the within-case study offers the advantage that it is easier to control for factors that are not the object of the study. A pitfall, however, is that the possibility of future judicial review may already have an effect on the political process before the resulting legal instruments were subject to judicial review. For this reason the cross-case comparison with the Netherlands serves to provide further insights on the role played by the GFCC, as such review was absent in the Netherlands and therefore could not have such an effect.

Forthrightly, the study used process-tracing and counterfactual reasoning to determine the causal mechanisms at play and the effect of a constitutional court’s review on the political process.25 If politicians or parliamentary documents indicated a change of position and explicitly referred to a constitutional court judgment for this change in position, I judged it very likely that the court had a causal influence on the new position. By comparing Germany to the Netherlands, where court review is absent, I aimed to gain further insight as to whether the constitutional court judgment also effectively caused the change. In addition, I used counterfactual reasoning to discern the particular causal role that the GFCC played. For this reason, I repeatedly and explicitly tried to determine what would have happened if a court had not reviewed the piece of European law under consideration, or had reviewed it in a different manner.26

7. Conclusion
The present study aims to compare the quality of constitutional courts’ deliberations on European law with those of political institutions. In addition, the study asks how EU-related constitutional court judgments affect the subsequent treatment of constitutional issues by political institutions. This chapter justified the choice of a qualitative case based study that looks at the European level of decision-making, as well as that of the level of Germany and the Netherlands in relation to the Maastricht Treaty and several measures adopted during the euro crisis.

The chapter provided criteria to compare the constitutional quality of political and judicial deliberations. In particular, the chapter proposed a relatively open criterion to compare political and judicial reasoning, namely how the constitutional issues that featured in the national constitutional courts’ case law on the respective measures, were dealt with in prior and subsequent political deliberations. This criterion was further informed by deliberative democratic theory, especially the important distinction between public and private reason. In addition, the chapter discussed the data sources used, as well as the manner in which they were analysed, with special attention to determining the causal relation between court rulings and the subsequent political process. The chapter proposed a combination of a within case

25 Alexander L. George and Andrew Bennet, Case Studies and Theory Development in the Social Sciences. George & Bennet, 2005, at p. 205 and further; Gary Goertz and James Mahoney, A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences, 2012, at p. 100-126.
analysis, cross case comparison, process-tracing and counterfactual analysis to study the data sources. The following chapters report the findings of these case studies, starting with the Maastricht Treaty in chapter 5, the euro crisis in chapter 6 and the development of parliamentary oversight during the euro crisis in chapter 7.
CHAPTER 5 – THE RISE OF JUDICIAL EUROSCEPTICISM: MAASTRICHT

1. Introduction
The current chapter turns the focus to the GFCC’s Maastricht-Urteil of 12 October 1993, in which the German Court reviewed the Treaty of Maastricht on its compatibility with the German Constitution. The adoption of the Maastricht Treaty stands out as a key moment in the history of European integration. The Treaty considerably expanded the EU’s competences and the agreement on a timetable and conditions for Economic and Monetary Union (EMU) presented a sweeping change. This increase in the Union’s powers made questions about the EU’s legitimacy more pressing than before.¹ The GFCC’s Maastricht-Urteil is a landmark case, as the Court assessed the EU’s democratic legitimacy, but in contrast to its previous case law, raised doubts about the possibility of achieving democracy at the European level. The judgment laid the basis for the Court’s future evaluation of European integration and has had a lasting impact on EU constitutional discourse as well as the EU-related case law of constitutional courts in other Member States.²

In line with the purpose of this book, the current chapter considers how the key constitutional issues raised in the Maastricht-Urteil were considered in the prior political deliberations by the Treaty drafters, by the German Bundestag, as well as by the Dutch Tweede Kamer. In addition, it considers how the judgment impacted on political debate in its immediate aftermath.

This discussion serves to assess three possible justifications for the Maastricht judgment. The first justification is that despite the judgment’s shortcomings, the GFCC compensated for a lack of serious discussion of the constitutional implications of the Treaty in the prior political process. The main problem with the GFCC’s Maastricht-Urteil is that the Court chose to construe the constitutional principle of democracy as at odds with the process of European integration: it held that the democratic legitimation of the EU derived primarily from the Bundestag and that the societal preconditions for democracy on the European level – a European public sphere and demos – were not yet present. In light of the EU’s democratic shortcomings, the German Bundestag would have to retain substantial competences. In

¹ See also Claudia Schrag Sternberg, The struggle for EU legitimacy Public contestation, 1950-2005 (Palgrave Macmillan Basingstoke 2013), at p. 104.
addition, the German Court would review whether Union acts, including CJEU judgments, remained within the boundaries of the EU’s conferred competences. This interpretation of the principle of democracy, however, raises a democratic problem itself. It is liable to restrict political contestation over the form that democracy should take in the EU and the sovereignty-focused interpretation dismisses democratic reasons for European integration.

Nonetheless, one could argue that the Court at least addressed the constitutional implications of the Treaty where the political institutions failed to do so. In this vein Justin Collings has argued:

“The judgment’s enduring significance lay in the Court’s willingness to identify democratic deficiencies in the Union treaty about which few politicians in any major party were willing to speak. There had been little discussion or debate among the country’s uniformly Europhile parties about the best or most democratically-legitimate paths towards further integration. It was the contribution of the Maastricht complainants, and of the justices of the Second Senate, to get the conversation going.”

As the chapter shows, this argument cannot be sustained. The constitutional implications of the Maastricht Treaty and the EU’s democratic shortcomings had been amply discussed in the

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1 Justin Collings, Democracy’s Guardians: A History of the German Federal Constitutional Court, 1951-2001 (Oxford University Press Oxford & New York 2015), at p. 280. Various authors have offered similar justifications for the judgment. Mattias Herdegen argued that “The large consensus within Parliament did not allow for a profound discussion of Maastricht’s implications, of the quality the political class of France and of other Member States has offered to its citizens.” M. Herdegen, ‘Maastricht and the German Constitutional Court - Constitutional Restraints for an Ever Closer Union’ (1994) 31 2 Common Market Law Review 235, at p. 249. Juliane Kokott has said about the judgment: “It is also partly a compensation for the lack of a proper political debate on the implications of the Maastricht Treaty and the monetary union. Such a discussion took place too late and too superficially in Germany. This factor furthers ambiguous feelings in the population. The Maastricht decision takes away the basis for some of these ambiguous feelings and fears. This way, European integration is better accepted in the country.” Juliane Kokott, ‘Report on Germany’ in Joseph Weiler, Anne-Marie Slaughter and Alec Stone Sweet (eds), The European Court and National Courts - Doctrine and Jurisprudence (Hart Oxford 1998), at p. 131; Monica Claes has submitted that in the context of European integration “[t]here may be a need to re-think democracy and constitutional foundations tout court, not only from a European perspective, but also in the context of the national Constitutions. The need to take these fundamental constitutional principles – shared throughout Western Europe – seriously may well be the most important message of the Bundesverfassungsgericht sent out in the Maastricht Urteil”. Monica Claes, 'The National Courts'Mandate in the European Constitution' (PhD Manuscript, Maastricht University 2004), at p. 10-11. Mattias Kumm has characterised the Maastricht-Urteil as the best-known instance where a national court played “an important role legitimating political actors as well as addressing the concerns raised by those opposing ratification in a principled fashion.” Mattias Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11 3 European Law Journal 262, at p. 280, in footnote 54.
prior ratification debates. In the Bundestag there was widespread agreement that the Maastricht Treaty had significant democratic shortcomings and that these should be resolved in the future. The German Basic Law was even amended to ensure that the EU would further develop in accordance with the fundamental principles of the Basic Law, democracy included. In the context of the monetary union, the story is somewhat different. There, neither the political institutions nor the Court fully addressed the implications of monetary union, the possibility of a crisis in particular.

A second justification for the judgment is that without the Court’s prior Solange case law and the possibility of constitutional challenge, the political debates on Maastricht would not have had the constitutional quality that they did have. This defence is more difficult to assess, but probably does not stand either, because the wish to strengthen the EU’s democratic legitimacy was a long-held wish of German political elites, that already preceded the Solange case law. In this respect, the comparison with the Netherlands shows that parliaments can seriously consider constitutional issues in the absence of a constitutional court: the Treaty’s constitutional implications were similarly debated in the Dutch parliamentary debates.

A third and more nuanced justification is that the Court catalysed further debate by raising issues not fully addressed within the prior political process. Along these lines, it has been argued that the GFCC played an important democratic role, because it provided a substitute for public debate: in Germany the GFCC provided a forum for resistance to the Treaty, which in other Member States took a political form.4 The view is not without merit. In the strong pro-integration climate of German politics it could be difficult for parliamentarians to make arguments critical of European integration. Missing in the German ratification debates was opposition to the idea of European integration as such. The GFCC eventually provided a more critical viewpoint and through an expansive interpretation of the Basic Law gave those critical of European integration an additional forum to voice their concerns.

Still, for a constitutional court to play this part entails a strange reversal of roles. Apparently German politics was not political enough, whereas the GFCC’s more Euro-critical stance meant to ‘politicise’ a too apolitical debate. This role does not sit very well with the position of the GFCC: it is not merely an influential voice within public debate, but it acts as the

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4 See: M. Herdegen, Maastricht and the German Constitutional Court - Constitutional Restraints for an Ever Closer Union, 1994 235, at p. 249.
guardian of a constitutional framework that is supposed to bind democratic politics. In the context of Maastricht the Court could still play the role of facilitating opposition, because the judgment was sufficiently open to various interpretations. German politicians could frame the ruling as perfectly compatible with their previously held political viewpoints, while outside parliament the judgment did lead to debate on new issues. Over the longer term, however, the Court’s case law has proved more problematic, as the subsequent chapter on the crisis underlines.

The remainder of the current chapter substantiates these arguments and is structured along the two main themes of the Maastricht-Urteil and the judgment’s political reception. Section 2 first considers the general topic of democracy and the related theme of competences. In this section I contrast the Court’s assessment with how the issue was dealt with in the prior political deliberations at both the EU level, and in Germany and the Netherlands. Section 3 similarly considers the EMU, a key part of the Maastricht Treaty and the GFCC’s judgment, yet one that until the crisis hardly featured in EU constitutional scholarship and assessments of the Maastricht-Urteil. Section 4 assesses the reception of the judgment by the German government and Bundestag in the immediate aftermath of the Maastricht judgment and dwells on its reception at the European level. The conclusion draws together the main findings of this case study.

2. Comparing Judicial and Political Assessments of European Democracy

2.1 Connecting Statehood and Democracy: the GFCC’s Maastricht-Urteil

The Maastricht-Urteil primarily addressed whether the German Act of Accession to the Treaty on European Union violated the right to vote of Article 38 BL and the democratic principle of Article 20 BL. Article 38 (1) BL states that “[m]embers of the German Bundestag shall be elected in general, direct, free, equal and secret elections.” In addition, Article 38 (2) BL holds that “[a]ny person who has attained the age of eighteen shall be entitled to vote”. In its Maastricht-judgment, the Court interpreted this formal right and provided it with substantive content: Article 38 guarantees German citizens not just a formal right to elect the German Bundestag, but also “the fundamental democratic content of that
right” by which citizens legitimate and influence the exercise of public authority.\(^6\) Competence transfers by the Bundestag to the EU would affect this democratic content. Such transfers would be permissible unless they reduced the Bundestag’s powers to such an extent that it would breach the democratic principle of Article 20 (1) and (2) BL and the eternity clause of Article 79 (3) BL.\(^7\) In the Court’s view, the complainant Manfred Brunner had sufficiently substantiated that this could be the case, as the Treaty enhanced the powers of the Union and European Communities in several respects.\(^8\)

The Court’s interpretation of Article 38 BL was controversial and a procedural novelty that departed from earlier case law.\(^9\) The Court’s interpretation of Article 38 gives all German citizens the possibility to challenge transfers of German sovereign powers to the EU before the GFCC, without the need to show specific injury. It allows the Court to engage in ‘abstract’ review of the Treaty on the basis of a constitutional complaint, whereas the Basic Law reserves this function to the Federal government, a Land government or a quarter of the Members of the Bundestag.\(^10\) The overwhelming political support for the Maastricht Treaty, however, had prevented a constitutional challenge in abstract review proceedings.\(^11\)

In spelling out the content of the democratic principle, the Court made several claims about the possibility of achieving democracy at the European level, pointing to outer limits of German participation in European integration, as well as determining what form transfers of sovereignty from Germany to the European level should take.\(^12\) Overall, the judgment associated democracy with the protection of sovereign statehood, an idea reminiscent of the

\(^7\) Ibid, at par. 5-6.
\(^8\) Ibid, at par. 7-9.
\(^10\) Article 93 (1) and (2) BL.
\(^11\) Ingo Winkelmann, Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993, Dokumentation des Verfahrens mit Einführung (Dunckler & Humbolt Berlin 1994), at p. 36-37; Tomuschat qualified it as an ‘actio popularis’ that logically should also apply any time competences would be removed from the Bundestag to the executive or Bundesrat. In particular, however, he argued that it would have consequences for every Act approving an international treaty concerning the setting-up of an international organisation. Christian Tomuschat, ‘Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts’ (1993) 20 Europäische Grundrechte-Zeitschrift 489, at p. 491. See also Jo Eric Murkens, From Empire to Union: Conceptions of German Constitutional Law since 1871 (Oxford University Press Oxford & New York 2013), at p. 181-183.
\(^12\) Volkmar Götz argued, however, that the judgment was ‘Europe-friendly’ (integrationsfreundlich): Volkmar Götz, ‘Das Maastricht-Urteil des BVerfG’ (1993) 48 22 Juristenzeitung 1081, at p. 1086.
writings of the judge rapporteur Paul Kirchhoff and a particular strand of German constitutional thought.13

First, the Court accepted that Germany could cede sovereign rights to a supranational community even though this would change the democratic legitimation of public authority. Although such transfers would diminish the Bundestag’s powers and consequently the citizens’ influence on public authority, the Court held that the form of democratic legitimation on the European level could be different from that on the German level. The judges also acknowledged that such power transfers could indirectly enhance the citizens’ powers by increasing the Member States’ potential for influencing the political will of the community. In addition, the Court pointed to the provisions in the Basic Law allowing European integration. It was therefore acceptable that executives in the Council could adopt legislation on the basis of majority decisions rather than unanimity.14 However, the Court also noted that “the majority principle, in accordance with the requirements of mutual consideration entailed loyalty to the community, finds its limits in the constitutional principles and basic interests of the member-States.”15

Secondly, the Court held that the democratic legitimation of the European Communities depended primarily on the national parliaments. The Basic Law determined that a conferral of sovereign powers to the EU would have to be authorised by prior legislation in which the Bundestag - and the Bundesrat - would debate the implications of such transfers: “in the statute assenting to accession to a community of States is found the democratic legitimation of both the existence of the community of States itself and of its powers to take majority decisions which are binding on the member-States.”16 In addition, the German people should have a continued influence on the supranational community. Such legitimation had to come in the first place from the national parliaments.17 The European Parliament was judged important as well, but only as “the source of a supplementary democratic support”.18 In this

14 Bundesverfassungsgericht, Judgment of 12 October 1993, 2 BvR 2134/92 (Maastricht) (translation in [1994] 1 C.M.L.R. 57), at par. 36-37. The Court notes that on the European level legislative competence could lie with executives to a greater degree than at the national level.
15 Ibid, at par. 37. This statement is an allusion to the so-called Luxembourg compromise.
16 Ibid, at par. 37.
18 Ibid, at par. 40.
context, the Court did not discuss the actual powers of the European Parliament, such as the introduction of the co-decision procedure. Nonetheless, it confidently proclaimed that the Treaty confers new competences to the European organs, but that these “are not yet supported by a corresponding strengthening and extension of the democratic bases.”

Thirdly, the Court held that democracy depends on “certain pre-legal conditions”, namely the existence of a European public sphere that could develop in the future, but did not at that time exist. Elements of such a shared public sphere would be common political parties, media and civil society organisations. The Court, moreover, stressed that citizens should be entitled to communicate in their own language with the sovereign authority and noted the importance of openness and transparency. The fact that a shared European public sphere did not yet exist, entailed “that functions and powers of substantial importance must remain for the German Bundestag.” In justifying that proposition, the Court also alluded to the need for a stronger form of national identity that has been the source of considerable criticism:

“The States need sufficiently important spheres of activity of their own in which the people of each can develop and articulate itself in a process of political will-formation which it legitimates and controls, in order thus to give legal expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically.”

This more sceptical statement on the possibility of realising democracy beyond the state can, however, be contrasted with the Court’s more conciliatory statement at the end of its judgment “that the democratic bases of the Union will be built in step with the integration

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21 Ibid, at par. 41-42.
22 Ibid, at par. 44.
24 Bundesverfassungsgericht, Judgment of 12 October 1993, 2 BvR 2134/92 (Maastricht) (translation in [1994] C.M.L.R. 57), at par 44. In this context the Court referred to the work of Herman Heller, but commentators have indicated that the work of Carl Schmitt is probably the true origin of the reference to homogeneity. See Jo Eric Murkens, From Empire to Union: Conceptions of German Constitutional Law since 1871, 2013, at p. 195.
process, and a living democracy will also be maintained in the member-States as integration progresses.”

Given the Bundestag’s importance in providing the EU’s democratic legitimacy, the GFCC reasoned that the Bundestag would have to “decide on German membership of the European Union and on its continuation and development.” For this reason the statute containing the conferral of powers to the Union has to specify the powers and functions of the supranational community with sufficient certainty. Otherwise, the transfer would amount to a general authorisation incompatible with Article 38 of the Constitution. The deciding factor, in the view of the Court, was that the Union’s powers (as laid down in the Treaty and accepted in the national accession law) would be sufficiently ‘predictable’ for the German legislature. If the Union developed powers no longer covered by the Treaty provisions, the legislative instruments adopted would have to be considered as not legally binding in Germany. The GFCC itself would be competent to review whether Community law would still fall within the bounds of these competences.

For several reasons, the Court held that the Treaty satisfied these criteria. The EU was a federation of states or “Staatenverbund”, not a European state based on the people of one European nation. There was hence no need to review whether Germany could become part of a European state. Sovereignty remained with the Member States as ‘Masters of the Treaties’. Germany could revoke its adherence to the EU and thus retained its sovereignty. In addition, the new Article 23 of the Basic Law safeguarded continued influence of the Bundestag. The competences in the Treaty were sufficiently specific: the Community could only act within its limited competences, which were further restricted by the principles of proportionality and subsidiarity. The Court also warned that in the future it would no longer accept a dynamic interpretation of the Treaty by the Union institutions, including the CJEU. Interpretations equivalent to “an extension of the Treaty” would “not produce binding effects for Germany.”

26 Ibid., at par. 47.
27 Ibid, at par. 48-49.
28 Ibid, at par. 51-55. Although the judgment was ambiguous as to whether Germany could do so unilaterally or jointly with the other Member States.
29 Ibid, at par. 56.
30 See par. 59-105.
31 Ibid, at par. 99.
2.2 Intergovernmentalism versus Supranationalism: Democracy in the Treaty Negotiations

The GFCC was not the first institution to raise the topic of democracy. During the Treaty negotiations, democratic legitimacy was explicitly named as one of the five topics discussed in the Intergovernmental Conference (IGC) on Political Union. The Member States nevertheless disagreed whether the future organisation of Europe should be more supranational or intergovernmental in nature and held different viewpoints on whether the EP’s competences should be enhanced. In the course of the negotiations, Germany put strong emphasis on the creation of federal structures and considered alleviating the democratic deficit a top priority. Chancellor Helmut Kohl went so far as to make extending the powers of the European Parliament a condition for approving EMU. Italy, Belgium, the Netherlands and Luxembourg took a similar position, favouring a supranational Europe as well as an extension of the EP’s powers. Spain and Greece also favoured a stronger position of the EP, whereas Spain took the initiative to introduce European citizenship.

France, Portugal, Denmark and the UK, however, favoured European cooperation along intergovernmental lines. France in particular preferred a strong position of the European Council and the Council. It opposed granting more powers to the European Parliament and Commission. In June 1991, French President Mitterand expressed this position in clear terms during a lunch with Dutch Foreign Minister Van Den Broek and Prime Minister Lubbers: “Le Parlement Européen est zéro. La Commission Européenne est zéro. Zéro plus zero fait zéro.” Germany accommodated France to a degree, because of the importance it attached to maintaining French-German relations. This resulted in a strengthening of the European

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34 See Bob van den Bos, *Mirakel en Debacle* (PhD dissertation, Universiteit Leiden 2008), at p. 322; See also the interview with Van den Broek in Roel Janssen, *De Euro* (De Bezige Bij Amsterdam 2012), at p. 170.
Council. France made concessions by accepting more rights for the European Parliament on which Germany insisted.\textsuperscript{35}

During the Luxembourg Presidency in the first half of 1991, a Draft Treaty was negotiated which was more intergovernmental than supranational in inspiration and introduced the so-called three-pillar structure.\textsuperscript{36} Due to the limited administrative capacity of the Luxembourg Presidency, the Treaty-drafting had been largely left to the Member States’ permanent representatives in Brussels and the Council secretariat. The result favoured the position of the Council, and France had a strong influence.\textsuperscript{37} Subsequent attempts by the Netherlands to change the Luxembourg draft into a Treaty with a more supranational orientation, however, failed dramatically. During its Council Presidency in the second half of 1991, the Netherlands presented a new Draft Treaty that replaced the pillar structure with a unified Community structure and extended the powers of the European Parliament considerably.\textsuperscript{38} Yet, on 30 September 1991, ten of the twelve EEC Member States rejected these proposals, including Germany, which had chosen to align itself with France, despite its earlier position on political union.\textsuperscript{39} Thereupon the Dutch returned to the Luxembourg draft as the basis for further negotiations in which the pillar structure was maintained, although the Member States later decided that the procedure of co-decision would apply to a much wider range of areas.\textsuperscript{40} At the final Maastricht summit on 9-10 December 1991, an agreement was reached after the UK opted out on social policy and the reference to the Union’s federal goal was dropped. The agreement at Maastricht meant that the Dutch Presidency ended on a positive note, yet the agreement on political union fell short of both German and Dutch prior wishes.\textsuperscript{41}

\textsuperscript{35} The overview of the countries’ position is based on Bob van den Bos, Mirakel en Debacle, 2008, at p. 87-98.
\textsuperscript{36} Consisting of the European Communities, the Common Foreign and Security Policy, and Justice and Home Affairs. The latter two policy areas would be organised along intergovernmental lines.
\textsuperscript{38} Ibid., at p. 217-219, p. 174-177 and p. 364.
\textsuperscript{39} See ibid, at p. 137-147 and p. 213-216. The decision was possibly influenced by negative personal feelings of Genscher stemming from the Dutch opposition to the German wishes for the recognition of Croatia and Slovenia, as well as the response of Dutch prime minister Lubbers to German reunification.
\textsuperscript{40} Finn Laursen, Sophie Vanhooaaker and Robert Wester, Overview of the Negotiations, \textit{The Intergovernmental Conference on Political Union} 1992 3 at p. 17-19; Bob van den Bos, Mirakel en Debacle, 2008, at p. 149-150.
\textsuperscript{41} Finn Laursen, Sophie Vanhooaaker and Robert Wester, Overview of the Negotiations, \textit{The Intergovernmental Conference on Political Union} 1992 3, at p. 21-23; Bob van den Bos, Mirakel en Debacle, 2008, at p. 150-152.
2.3 Coming to Terms with a Disappointing Result: Ratification

2.3.1 German Disappointment

Given the outcomes on political union, German parliamentarians generally perceived the Maastricht Treaty as a disappointing result.\(^{42}\) Despite their disappointment, a very large parliamentary majority accepted the Treaty as a compromise. Opposition to the Maastricht Treaty as such was fairly limited. A significant pro-European consensus existed within the political branches: the Bundestag approved the Treaty with 543 votes, 8 votes against and 17 abstentions; the Bundesrat adopted it unanimously.\(^{43}\) The main political parties supported the Treaty: the German government coalition of the Christian Democratic Union (CDU), its smaller Bavarian sister party the Christian Social Union (CSU) and the liberal Free Democratic Party (FDP), as well as the main opposition party, the Social Democratic Party of Germany (SPD). Of the two smaller opposition groups from the former East Germany, the Party of Democratic Socialism (PDS/Linke Liste) opposed the Maastricht Treaty, whereas Bündnis 90/Die Grünen was split.\(^{44}\) Unlike the GFCC, the political deliberations showed more appreciation of how the sovereignty of the newly unified Germany connected to the Treaty and European integration: the Government’s Denkschrift on the Treaty noted how European integration and German unification were “two sides of the same coin”.\(^{45}\)

2.3.1.1 The Democratic Shortcomings of Maastricht as a Central Concern

Notwithstanding the pro-European stance of Germany’s main political parties, the democratic shortcomings of the Maastricht architecture were a central, if not the central, concern in the German parliamentary debate. In this sense, the report of the Bundestag’s Special Committee on the EU generally welcomed the Maastricht Treaty as an important step in the process of European integration and as the basis “for a peaceful, secure, social and economically stable

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\(^{44}\) In the first all-German elections of 1990, the five per cent threshold for parties to obtain seats in the Bundestag was applied separately to the former East and West German territories. The PDS/Linke Liste and Bündnis 90/Die Grünen thus entered the Bundestag, although they did not meet the five per cent nation-wide threshold. The Party of Democratic Socialism (PDS/Linke Liste) was the successor of the Socialist Unity Party (SED) that had ruled East Germany. In 2007 it merged with the Electoral Alternative for Labour and Social Justice (WASG) into Die Linke. Bündnis 90/Die Grünen entered the Bundestag as a coalition of the East Germans Greens and Alliance ‘90, a union of opposition groups from the GDR. In May 1993 these groups merged with the West Germans Greens into the party Bündnis 90/Die Grünen.

Europe”. The committee, however, noted the Union’s democratic shortcomings and deemed further control and decision-making powers for the European Parliament necessary. The European Parliament’s position needed to be strengthened in the revision conference of 1996. For the SPD and Bündnis 90/Die Grünen this would not suffice: they called on the government to move the planned revision conference of 1996 forward to 1994 in order to strengthen and democratise the political union. The SPD also demanded that the German Bundestag should only consent to further competence transfers in the future if the European Parliament would obtain an equal right of co-decision over European legislation.

The issue of democracy also featured prominently in the Bundestag plenary debates. Most parliamentarians and government members accepted the Treaty as a compromise that strengthened the EU in democratic terms, but still had many democratic shortcomings. They noted in particular the limited role of the European Parliament and the dominant role of the executive, and put forward that in the future, the European Parliament should develop into a fully-fledged parliament with powers comparable to that of national parliaments, and as an equal to the Council of Ministers. Some combined such concerns with pleas for greater transparency or a strengthened role for national parliaments. Some voiced explicit scepticism about the ability of national parliaments to control the Council appropriately and

47 Ibid., at p. 16.
48 BT-Drucksache 12/3366 of 7.10.1992 Antrag der Fraktion SPD - Wider den Rückfall in den Nationalismus — Für ein demokratisches Europa mit stabiler Währung, at p. 2 and p. 5; BT-Drucksache 12/3367 of 07.10.1992 Antrag der Abgeordneten Gerd Poppe, Werner Schulz (Berlin), Dr. Wolfgang Ullmann, Konrad Weiß (Berlin), Vera Wollenberger und der Gruppe BÜNDNIS 90/DIE GRÜNEN - Stillstand führt zum Rückschritt — Hin zu einer demokratischen, ökologischen und sozialen Union Europa, at p. 3; BT-Drucksache 12/3895, note 46, at p. 16.
49 It also coupled this demand to a plea for further transparency in the Council. See: BT-Drucksache 12/3366, note 48, at p. 2 and p. 5; and BT-Drucksache 12/3895, note 46, at p. 16. It coupled this demand to a plea for further transparency in the Council.
50 See e.g. the following statements in Plenarprotokoll 12/110, Stenografischer Bericht der 110. Sitzung des Deutschen Bundestages am 8. Oktober 1992 (Maastricht first plenary): Kinkel, at p. 9319; Waigel, at p. 9323; Wieczorek-Zeul (SPD), at p. 9328-9330; Graf Lambsdorff (FDP), at p. 9338; Gysi (Linke Liste), at p. 9341; Werner Schulz (Bündnis 90/Die Grüne), at p. 9342-9343; Renate Hellwig (CDU/CSU), at p. 9345-9346; Verheugen (SPD), at p. 9348 and 9351; Staatsminister Gerster, at p. 9358-9359; Staatsminister Goppel, at p. 9361; Gerd Poppe (Bündnis 90/Die Grüne), p. 9370-9371; Irmer (FDP), at p. 9389. See also for example: Wieczorek-Zeul (SPD), p. 10815 and Kohl at p. 10827 in Plenarprotokoll 12/126, Stenografischer Bericht der 126. Sitzung des Deutschen Bundestages am 2. Dezember 1992 (Maastricht second plenary).
51 See e.g. the statements of Kinkel, at p. 9318-9319 and Michael Stübgen (CDU/CSU), at p. 9372 Plenarprotokoll 12/110 (Maastricht first plenary), note 50; Wieczorek-Zeul (SPD), at p. 10815 in Plenarprotokoll 12/126 (Maastricht second plenary), note 50.
52 For example: Graf Lambsdorff (FDP), at p. 9338 and Christian Schmidt (CDU/CSU), at p. 9357; Staatsminister Helmrich, at p. 9359-9360; and Staatsminister Goppel, at p. 9361 in Plenarprotokoll 12/110 (Maastricht first plenary), note 50.
hence stressed the need to strengthen the European Parliament’s powers.\textsuperscript{53} Others instead expressed concerns about the distance between European politics and the citizens and emphasised the need to improve the rights of national parliaments and sub-state entities.\textsuperscript{54} Overall, the democratic shortcomings of the Treaty were a key concern of Germany’s politicians.

2.3.1.2 Constitutionalising Future Aspirations: The New Article 23 in the Basic Law

The aspiration to improve the democratic character of the European Union was even laid down in the German Basic Law with the new Article 23 devoted to the issue of European integration.\textsuperscript{55} The provision not only made Germany’s participation in the further development of European integration a constitutional objective, but also specified the conditions under which such development had to take place. Through a ‘\textit{Struktursicherungsklausel}’ the European Union would have to be committed to “democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity” and should guarantee “a level of protection of basic rights essentially comparable to that afforded by this Basic Law.”\textsuperscript{56} The clause mirrored the eternity clause of Article 79 (3) of the Basic Law with the addition of the subsidiarity principle.\textsuperscript{57}

Article 23 also clarified that sovereign powers could be transferred by the German Federation by statute and with consent of the \textit{Bundesrat}. Accession to the EU, changes in the EU’s treaty foundations “and comparable regulations that amend or supplement this Basic law” would require a constitutional majority of two thirds of the Members in the \textit{Bundestag} and

\textsuperscript{53} See in this sense: Renate Hellwig (CDU/CSU), at p. 9346 in Plenarprotokoll 12/110 (Maastricht first plenary), note 50.

\textsuperscript{54} See for example the statement of Minister Herbert Helmrich in Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. p. 9360-9361 who expressed the concern that the EP would be too distant. Bündnis 90/ Die Grüne stressed both an enhanced role for the European Parliament but also stronger involvement of the regions in EU decision-making, see: BT-Drucksache 12/3367, note 48, at p. 2.

\textsuperscript{55} The change was based on the recommendations of a Joint Constitutional Committee of the \textit{Bundestag} and \textit{Bundesrat} (hereinafter: the JCC) constituted in November 1991 to deal with the constitutional issues relating to German reunification. A considerable part of the discussions by this Committee was devoted to European integration and subsequently taken up by the special committee on European Union Affairs that dealt with the ratification of the Maastricht Treaty. Consequently, many constitutional issues were discussed elaborately during the German ratification process and long before the GFCC would consider them. In addition to the insertion of Article 23, a new Article 44 was inserted into the Basic Law and changes were made to Articles 24, 28, 50, 52, 88 and 115 of the Basic Law. On the deliberations of the JCC see: BT-Drucksache 12/6000 of 05.11.1993 Bericht der Gemeinsamen Verfassungskommission gemäß Beschluss des Deutschen Bundestages — Drucksachen 12/1590, 12/1670 — und Beschluss des Bundesrates — Drucksache 741/91 (Beschluss).

\textsuperscript{56} See Article 23 BL.

\textsuperscript{57} BT-Drucksache 12/6000, note 55, at p. 20; BT-Drucksache 12/3338 of 02.10.1992 Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Grundgesetzes, at p. 4.
Bundesrat\(^{58}\) and be subject to the “eternity clause” of Article 79 (3) Basic Law. Finally, the new Article 23 provided that the German Bundesrat and Bundesrat would participate in matters concerning the EU.\(^{59}\) Article 23 (2) BL required the Federal Government to “keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.”\(^{60}\) Article 23 (3) BL laid down that the Federal Government must allow the Bundestag to take position before the Government cooperates in European legislation and that the Federal Government must take this position into account in the negotiations.\(^{61}\) These rights were further specified in the Act on Cooperation between the Federal Government and the German Bundestag in European Union Matters (EUZBBG).\(^{62}\)

The importance of ensuring adequate democratic legitimisation of the EU’s decision-making procedures, as well as the need to respect the unamendable principles of the German Basic Law, thus featured prominently within the German parliamentary ratification debates. According to the Joint Constitutional Committee of the Bundestag and Bundesrat (hereinafter: the JCC) that prepared the constitutional changes, the main reason for the new Article 23 BL was that European integration had reached a new stage. It had developed from cooperation of a primarily economic nature to a more political one. Therefore, the EU could no longer be satisfactorily characterised as an international organisation in the sense of Article 24 (1) BL, the prior constitutional basis for European integration. Instead the EU had

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58 In accordance with Article 79 (2) of the Basic Law.
59 BT-Drucksache 12/3338, note 57, at p. 6; some parts of the original proposal were changed in the subsequent deliberations. See also BT-Drucksache 12/6000, note 55, at p. 20-24; and BT-Drucksache 12/3896 of 01.12.1992: Beschlußempfehlung und Bericht des Sonderausschusses „Europäische Union (Vertrag von Maastricht)“, at p. 16-17. The latter report also mentions how in an expert meeting, experts agreed that a new ‘Europa-Artikel’ should be included in the Basic Law, at p. 16-17.
60 Article 23 (2) BL; see also BT-Drucksache 12/3896, note 59, at p. 5.
61 A more far-reaching proposal by the SPD was not accepted. On the basis of this proposal the Bundestag’s positions would have to be the basis for Federal Government’s negotiations. An underlying reason appeared to be that this alternative would have been at odds with the equality of the Bundestag and Bundesrat’s positions. See: BT-Drucksache 12/6000, note 55, at p. 22.
62 Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union vom 12. März 1993, Bundesgesetzblatt I 1993, p. 311 (version Maastricht). The Act specified that the government would have to inform the Bundestag about all plans that could be of interest for the Federal Republic of Germany. See Article 3 and also p. 23 of BT-Drucksache 12/3896, note 59. The Bundestag would be sent the proposals for Directives and Regulations and would inform the Bundestag about its essential content and purpose as well as decision-making process. Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union vom 12. März 1993. Article 4. Furthermore, the statute specified that the Government would give the Bundestag ample time to state its position before the government would cooperate in the adoption of legal acts (Article 5). In addition, Article 45 was inserted in the Basic Law and provided that the Bundestag could set up a committee for European Union Affairs. Given the particularities of the European legislative process and the possible time pressure on the government, the Bundestag plenary could authorise the committee to its rights of Article 23 of the Basic Law. The new constitutional article affirmed the special importance of the committee for the further process of European integration. See: BT-Drucksache 12/6000, note 55, at p. 24.
become a supranational body more similar to a state.\textsuperscript{63} Article 23 meant to provide a sound constitutional basis for this qualitative change.\textsuperscript{64}

Whereas the GFCC would relate the issue of democracy to the problem of an absent European public sphere and shared identity, the parliamentary discussion generally did not point to an inherent opposition between the Basic Law and European integration. The *Bundestag’s* Special Committee on the European Union declared instead that the new Article 23 (1) BL expressed the openness of the German constitutional order towards Europe.\textsuperscript{65} Rupert Scholz (CDU/CSU) – one of the two chairpersons of the JCC\textsuperscript{66} – held that the more competences that were transferred to the EU, the more persistent the demand would become to ensure an equivalent democratic legitimation and control of the supranational competences. Concretely, this would mean above all that the European Parliament should develop into a real and effective authority for democratic legitimation, control and legislation.\textsuperscript{67} Similarly, the chairperson of *Bundestag’s* Special Committee on the European Union, Günther Verheugen (SPD), stated that the new Article 23 meant to ensure that further steps in European integration would correspond with democratic requirements through coupling future power transfers to an enhanced role for the European Parliament.\textsuperscript{68} His pro-European stance was far-reaching:

> “We all thought that the unity of our fatherland could be realized first in a unified Europe. It turned out differently. National unity came before European unity. Therefore it is necessary to enshrine in the Basic Law our will for Europe.”\textsuperscript{69}

\textsuperscript{64} Although it was not clear whether the move towards a European Union would go beyond what Article 24 BL still allowed. Ingo Winkelmann. Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993, Dokumentation des Verfahrens mit Einführung.1994, at p. 20.
\textsuperscript{65} BT-Drucksache 12/3896, note 59, at p. 18. Rupert Scholz stated that the provision meant not just to complete the confession to “a united Europe” in the Basic Law’s preamble, but also provided an explicit authorization to create European unity in the form of the EU. Rupert Scholz, Grundgesetz und europäische Einigung - Zu den reformpolitischen Empfehlungen der Gemeinsamen Verfassungskommission, 1992 2593, at p. 2598.
\textsuperscript{66} The other chairperson was Dr. Henning Voscherau (SPD).
\textsuperscript{67} Rupert Scholz, Grundgesetz und europäische Einigung - Zu den reformpolitischen Empfehlungen der Gemeinsamen Verfassungskommission, 1992 2593, at, p. 2598; See in a similar vein, Verheugen (SPD), at p. 9348 in Plenarprotokoll 12/110 (Maastricht first plenary), note 50.
\textsuperscript{68} Verheugen (SPD), Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9348.
\textsuperscript{69} Ibid., at p. 9348 author’s translation.
That the new Article 23 took the place of the former provision on German unification also had symbolic significance. According to Verheugen it showed that after German unification, the unity of Europe was the next big task for the German people.\(^70\)

For certain Bundestag members the democratic shortcomings of the EU were a reason to withhold their consent to the Treaty. For example, Peter Conradi, one of the only two SPD members that opposed the Treaty, expressed doubts that Article 79 (3) of the Basic Law would be compatible with power transfers to the European level without sufficient democratic safeguards.\(^71\) Yet, he still expressed a pro-European stance:

> “I want the political Union of Europe. However, the United States of Europe will only come about when wanted and supported by the peoples of Europe. The Maastricht Treaty, however, does not accomplish this.”\(^72\)

The PDS/Linke Liste also opposed the Maastricht Treaty, but likewise did not disagree with European integration as such. The party opposed the Treaty, because it would prevent Europe from being “open to the world, democratic, socially just, peaceful and in the long run non-military, in which the political fundamental rights and democratic principles are fully realised”.\(^73\) The group supported a stronger position for the European Parliament, but was also more open to direct forms of democracy, such as referenda.\(^74\)

### 2.3.1.3 Contested Connections: Democracy, the People and the State

The legal nature of the EU and the demands that Article 23 would impose on the EU’s organisation were nonetheless subject to some debate. The relation between European integration, democracy, the state and its people were subject to competing visions. The Government’s explanations on the introduction of Article 23 stated that the EU was not yet a state, but a ‘compound of states’ (‘Staatenverbindung’) based on an international treaty. The

\(^{70}\) Ibid., at p. 9348.

\(^{71}\) Peter Conradi (SPD), Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9385-9386. He expected that the GFCC would find the Treaty problematic and doubted the ability of the European Parliament to adequately represent the people. Modrow (PDS/Linke Liste) also argued the Maastricht Treaty’s democratic deficit was unconstitutional, see Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10820.

\(^{72}\) Peter Conradi (SPD), Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9386.

\(^{73}\) BT-Drucksache 12/3322 of 30.09.1992: Antrag der Gruppe der PDS/Linke Liste - Maastrichter Vertrag über die Europäische Union, at p. 4; see also Hans Modrow, Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10819.

\(^{74}\) BT-Drucksache 12/3322, note 73, at p. 2. The Greens similarly supported other forms of democracy in the EU, such as participation of NGO’s and new hearing rights in the decision-making process for specifically affected persons. See: BT-Drucksache 12/3367, note 48, at p. 2

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demand that the EU should be democratic therefore could not entail that identical requirements would be placed on parliamentary representation and the scope of parliamentary legislative competences as within the Member States.75 The government also noted that the factual prerequisites for the existence of a European state were lacking, such as a state people ("Staatsvolk"). Most problematic in the government’s eyes was that furnishing the European Parliament with the competences of a state-like parliament would alter the legal nature of the EU. It would turn into a Federal State ("Bundesstaat"), because this parliament would be elected on the basis of democratic equality and would have to decide according to the democratic majority principle. Given that this degree of integration had not yet been reached, the role of the European Parliament envisaged in the Maastricht Treaty complied with the democratic principle, although further integration could require additional steps.76 The Government also indicated that the constitutional objective of European integration did not entail an inevitable path towards a European federal state. It noted as well how the question remained open as to whether such a transition would require a special act of the constituent power or whether a further constitutional change would be sufficient.77

Some Bundestag members expressly embraced the prospect of establishing a European federal state.78 Others were more cautious. Foreign Minister Kinkel of the FDP as well as Finance Minister Waigel of the CSU took care to stress that the EU would not entail the loss of national identity, or cause centralisation.79 Chancellor Kohl also argued that the EU should not turn into a super-state, but a unified Europe that would respect national identity and unity

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75 BT-Drucksache 12/3338, note 57, at p. 6.
76 The government referred to a meeting with experts of the joint constitutional committee of 22 May 1992. See BT-Drucksache 12/3338, note 57, at p. 6.
77 In this respect, the Government referred to differing opinions on the matter by constitutional experts. BT-Drucksache 12/3338, note 57, at p. 7.
78 For example, Günter Verheugen of the SPD held that the new Article 23 BL would one day allow Germany to establish a European federal state ("Bundesstaat"). Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9348. In the last plenary on the Treaty, however, he expressed caution against defining final goals for the EU, because notions such as a European federal state, could “cause anxiety and mistrust elsewhere.” He noted in particular the smaller Member States’ fear to perish in a superstructure and could imagine a Europe “in which the nation-state would still perform meaningful tasks for a long time.” He also held that probably the time was not ripe to determine “in which form the unification will one day be completed.” Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10832-10833. Another is Andreas Schockenhoff of the CDU/CSU who also explicitly embraced Maastricht as an important step towards a European federal state ("europäischen Bundesstaat"). Dr. Andreas Schockenhoff (CDU/CSU), Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9383.
79 Kinkel, Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9317 and 9318; Waigel, Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9322-9323.
in diversity. A few Bundestag members voiced a more Eurosceptical position. Most critical was probably Jürgen Augustinowitz (CDU/CSU) who supported the Maastricht Treaty only on the condition that the political union would not turn into a federal state (‘Bundesstaat’). His goal was a “united Europe of the fatherlands [‘Vaterländer’] and not a European federal state with a central EC-government”, a Europe in which the national identity of the respective citizens was to be “strictly respected.”

Disagreements about the relation between the people and state authority surfaced also in discussions on the amendment of Article 28 of the Basic Law. The amendment granted Union citizens the right to vote in German municipal elections as required by the EU citizenship provisions. This change led to a wider discussion on the right to vote, reflecting different understandings of democracy and the relation between a people and the exercise of public authority. Whereas the GFCC had alluded to a notion of the people as a pre-political homogenous entity, the political parties on the left instead relied on an ideal of democracy that favoured including all persons in the decision-making processes that affect them. In the JCC, the SPD and the City of Hamburg proposed to extend the right to vote in municipal elections to all foreigners with permanent residence in Germany:

“It is in accordance with the democratic idea, in particular the idea of freedom contained in it, to restore a congruence between the holders of democratic political rights and those durably subject to an authority (Herrschaft). The Bundesverfassungsgericht has also referred to this point of view (BVerfGE 83, 37, 52).”

Bündnis 90/Die Grünen and the PDS/Linke Liste supported such an extension of the right to vote in the ratification debates. Furthermore, the SPD, FDP and Bündnis 90/Die Grünen agreed that it lay “in the logic of the further development of the European Union” to make the

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80 Although this did not seem to exclude a federal Europe, see: Kohl, Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10828.
81 Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10904; Peter Paziorek of the CDU/CSU similarly argued that Europe should not become a centralised state (‘Zentralstaat’) or a federal state (‘Bundesstaat’): Europe should respect the national identity, culture and way of life of each of its Member States. Dr. Peter Paziorek (CDU/CSU), Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10907.
82 They also argued this would further the integration of foreigners with long-term residence in Germany and they opposed the idea that there would be two classes of foreigners – EU citizens and others permanently living in Germany. BT-Drucksache 12/6000, note 55, at p. 98; See als Wieczorek-Zeul, Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10813 - 10814.
83 BT-Drucksache 12/6000, note 55, at p. 98.
place of residence determinative also for votes to the Landtag and the Bundestag, as well as similar elections.\textsuperscript{84}

Opposition to the proposal for extending the right to vote to non-Union citizens in municipal elections, meant that it did not carry the required two-thirds majority.\textsuperscript{85} These opponents doubted the constitutionality of extending the right to vote. They expressed an understanding of popular sovereignty explicitly tied to the German people, more akin to the idea of the GFCC. In their view, the Basic Law attached the right to vote to German citizens. They reasoned that Article 20 (2) BL determined the people of the German Federal Republic as the subject and bearer of state authority. Giving the right to vote in municipal elections to all permanently residing foreigners, could therefore affect Article 20 (2) BL and Article 79 (3).\textsuperscript{86}

2.3.1.4 Democratic Self-determination and the Scope of EU Competences: Too Wide or Too Limited?
The logic of the GFCC’s reasoning was that the Bundestag should remain the primary source of the EU’s democratic legitimacy and that as a derived order, the EU’s competences should be specific and certain. The Court thus judged the limited nature of the EU’s competences as favourable from a democratic viewpoint and the Court approvingly noted the principles of proportionality and subsidiarity as limits on the EU’s powers. This perspective misses, however, that the limitation of the EU’s competence may be seen as democratically problematic itself, because it limits the range of possible policies that the EU can pursue. Such limits are liable to restrict the available political choice on the EU level and may affect various political positions differently. In particular, it has been argued that the economic orientation of the EU’s competences has adverse consequences for the treatment of other non-economic considerations.\textsuperscript{87} In this respect, the competence division between the EU and its Member States is not democratically neutral per se.

\textsuperscript{84} BT-Drucksache 12/3896, note 59, at p. 21. In the plenary debates Hans Eichel, the SPD prime minister of the state of Hessen, explicitly argued that the notion of a state’s people (‘Staatsvolk’) should be freed from the idea of the nation: All persons that legally and permanently resided in Germany should be regarded as equal citizens. See: Ministerpräsident Hans Eichel (Hessen), Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10850. Ulrich Irmer of the FDP expressed ideas that went in the same direction, see Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10818.

\textsuperscript{85} In its legislative proposal on the constitutional changes in the context of ratification the government also stated that “Union citizenship necessarily differs from nationality because the Maastricht treaty does not confer statehood on the European Union; it provides, however, part of the rights normally associated with nationality.” BT-Drucksache 12/3338, note 57, at p. 11.

\textsuperscript{86} BT-Drucksache 12/6000, note 55, at p. 98. In addition, they held that giving the right to vote to foreigners should be the outcome of a process of integration: “Who wants to participate in the political will-formation must commit him or herself to the respective community.”

\textsuperscript{87} As was discussed in chapter 3.
The parliamentary discussions on the subsidiarity principle raised this problem. Generally, the subsidiarity principle was welcomed and even elevated to the level of constitutional law with its inclusion in Article 23 (1) BL. Still, the principle could not mask political disagreements about the areas in which further European integration would be desirable. Unlike the GFCC’s appreciation of the limited nature of the EU’s competences, the left-wing parties actually argued that integration in the area of social and environmental affairs had not gone far enough. The SPD, for example, contended that necessary steps should be taken to create a social and environmental union next to and of equal rank as the economic union.88 The PDS/Linke Liste also called for steps towards a “genuine social union”89, whereas Bündnis 90/Die Grüne similarly called for a social and ecological Union.90

In this context the SPD criticized the subsidiarity principle. The party warned that the principle should not be used as an excuse for deregulation, to stop necessary harmonisation, or to call into question social and environmental standards.91 The SPD Bundestag Member, Heidemarie Wieczorek-Zeul for example argued how the notion of subsidiarity would enter the discussion when “nothing else is clear” and stated:

“I do not want that, if legal Community acts for a social Europe or ecological Europe are considered, the Federal Chancellor or others come to me and say: Subsidiarity; now the EC has nothing more to say.”92

This consideration, however, had no place in the GFCC’s sovereignty-based understanding of democracy on the basis of which the subsidiarity was simply welcomed as “a strict limit on Community action.”93

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88 BT-Drucksache 12/3366, note 48, at p. 3; see in this direction for example also Fritz Gautier, Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9374.
89 BT-Drucksache 12/3322, note 73, at p. 1.
90 See e.g.: Werner Schulz, Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9342; BT-Drucksache 12/3367, note 48.
91 BT-Drucksache 12/3366, note 48, at p. 3.
2.3.1.5 Did the GFCC’s Prior EU Case Law Enhance the Quality of Parliamentary Debate?

The German parliamentary debates on the Maastricht Treaty thus devoted considerable attention to the constitutional implications of the Treaty and more specifically, to the issue of democracy. Also, the Bundestag’s assessment of these issues was not clearly unreasonable or of lesser quality than the GFCC’s subsequent assessment. Both the Bundestag and the GFCC approved the Treaty, despite raising concerns about the EU’s democratic legitimacy. The main difference between the two institutions’ assessment was that a majority of the Bundestag favoured a pro-European understanding of democracy, whereas the GFCC adopted a more sovereigntist conception. Compared to the GFCC’s assessment, the Bundestag’s debate was also more open to different understandings of democracy. For these reasons, I submit that the GFCC’s Maastricht-Urteil cannot be justified as a remedy for the political institutions’ failure to discuss the constitutional implications of the Treaty.

One could of course counter that these constitutional discussions took place only because of the GFCC’s prior case law and the possibility of subsequent constitutional review. This challenge is difficult to answer, because it asks about a counterfactual situation that is impossible to fully assess: how the political deliberations in Germany would have taken place if the GFCC had not existed or had never ruled on European integration.94

A way to approximate an answer is to try to assess the influence of the Court’s prior case law on the political discussions. In this respect, there is support for the claim that the Court’s prior EU-related judgments had an influence. The insertion of Article 23 BL can be seen as the reflection of German academic and public debates, dating back to the 1960s and 1970s. Within these debates a consensus formed around the idea that ‘structural congruence’ between “the fundamental constitution of European and national governance was required for national sovereign competencies to be legitimately transferred.”95 The view entailed that the exercise of public authority at the European level should still respect national constitutional principles of democracy and fundamental rights. In turn this view informed the GFCC’s

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94 That does not mean, however, that the question should not be raised. As Max Weber has stated on raising counterfactual historical questions: “If history is to be raised above the level of a mere chronicle of notable events and personalities, it has no alternative but to pose such questions.” Max Weber, The Methodology of the Social Sciences (The Free Press Glencoe Illinois 1949), at p. 164.

Solange case law. The insertion of Article 23 BL has been cast as “the long-term victory of the structural congruence idea in Germany.”

Still, the quality of the constitutional discussions in Germany cannot be wholly attributed to the prior case law of the GFCC. The parliamentary documents on the changes to the Basic Law, mention the GFCC’s judgments explicitly in only a few cases. The Solange case law served as the backdrop to discussions on when competence transfers would require a constitutional majority. The new article 23 (1) BL also followed the Solange case law insofar as it demanded the EU to guarantee “a level of protection of basic rights essentially comparable to that afforded by this Basic Law.” But beyond these specific references, the parliamentary documents do not mention the GFCC’s case law explicitly as a basis for the constitutional changes. Also, Germany’s political institutions had already favoured strengthening the European Parliament, before the Court’s Solange case law. Furthermore, the primary impetus for setting up the JCC had been to deal with the constitutional implications of the Treaty of Reunification between the former East and West Germany. The constitutional committee eventually defined its task as broader than this, and also considered other constitutional questions that had become relevant in the political debate. The concerns of the German Länder were another driver for setting up the committee. They had made their consent to the Treaty conditional upon change of the Basic Law and a strengthening of their participation rights in EU affairs.

96 Ibid, at p. 458. For more details on these discussions see the rest of this article.
97 For example, it was clear that the change of Article 28 was prompted by the GFCC’s case law, as the GFCC’s interpretation of the existing Article 28 was judged incompatible with expanding the right to vote to EU citizens. See Gesetzentwurf BT-Drucksache 12/3338, note 57, at p. 11; BT-Drucksache 12/6000, note 55, at p. 19; Bundesverfassungsgericht, Judgment of 31 October 1990, 2 BvF 3/89 (Ausländerwahlrecht (Hamburg)).
98 The issue was subject to disagreement between the Bundesrat and the Federal Government. See: BT-Drucksache 12/6000, note 55, at p. 28; BT-Drucksache 12/3338, note 57, at p. 12 and 14; BT-Drucksache 12/3896, note 59, at p. 18-19, where reference was made to Bundesverfassungsgericht, Judgment of 29 May 1974, BvL 52/71 (Solange I).
99 Rupert Scholz, Grundgesetz und europäische Einigung - Zu den reformpolitischen Empfehlungen der Gemeinsamen Verfassungskommission,1992 2593, at p. 2598; BT-Drucksache 12/6000, note 55, at p. 21. There was some discussion on the exact wording, see BT-Drucksache 12/3896, note 59, at p. 19, yet a proposal for amendment was rejected because the wording had been extensively discussed in the joint constitutional committee.
101 See: BT-Drucksache 12/6000, note 55, at p. 5 and 10. The basis for the constitutional committee lay in Article 5 of the Einigungsvertrag.
102 See: Ingo Winkelmann, Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993, Dokumentation des Verfahrens mit Einführung,1994, at p. 20; Rita Beuter, Germany and the Ratification of the Maastricht Treaty: The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications1994 87, at p. 95-96; Beuter notes that the Länder supported the ratification of Maastricht upon the condition that the Basic Law would be amended. In March 1992 the Länder prime ministers had decided unanimously that the
Yet, even if the political discussions had been decisively influenced by the GFCC’s previous case law, this still does not justify the more Eurosceptical stance of the Court in relation to the Maastricht Treaty. Moreover, a comparison with the political deliberations in the Netherlands, to which I now turn, shows that constitutional discussions of a similar nature can take place in a system without a constitutional court.

2.3.2 Dashed Dutch Ambitions

2.3.2.1 Democratic Disillusion and Aiming for a Better Future

The Dutch parliamentary debates evinced a strong similarity to that in Germany: all the main political parties criticised the democratic shortcomings of the Treaty, even though most strongly favoured European integration. Key criticisms were that the position of the European Parliament was insufficiently that of an equal co-legislature to the Council, that the procedures were too complicated and not transparent, and that in several policy areas qualified majority voting was introduced without sufficient involvement of the European Parliament, resulting in insufficient parliamentary control.

Already during the IGC negotiations, the government’s plans for Maastricht had been elaborately discussed and supported by a large parliamentary majority. In December 1990, the liberal VVD had filed a resolution on the democratisation of the European integration process that was supported by a large parliamentary majority of the Christian-democrats (CDA), the Labour Party (PvdA), the social liberals (D66) and the left green party GroenLinks. The resolution stated that the democratic deficit had to be nullified and that the government should only agree with a transfer of new competences to the Communities if “real democratic control of European policy would be possible.” A large majority had similarly criticised the Luxembourg Draft Treaty and supported the different approach of the

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Basic Law should be changed. The Bundesrat had previously set up its own constitutional committee to strengthen federalism in Germany and Europe. Its conclusions formed a basis for the subsequent discussions of the BT-Drucksache 12/6000, note 55, at p. 6.

103 There were a few more critical voices within the Dutch debate. Both the liberal VVD and the smaller conservative Christian parties GPV, RPF and SGP adopted a critical view of the Treaty and further European integration. Other opposition parties were the social-liberal D66, the left green party GroenLinks and the right wing nationalist party CD. Of these parties the latter two opposed Maastricht. At the time only few Dutch parliamentarians occupied themselves with European affairs.

104 See for example the Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), in particular p. 56-70 and an overview of the parties’ positions at p. 1-44.

Dutch government during its Presidency.\textsuperscript{106} The government had partly justified not withdrawing its new draft Treaty by referring to the Dutch parliament’s wishes.\textsuperscript{107}

The resulting Treaty concluded at Maastricht, thus disappointed most parties, and the Council of State was likewise critical of the Treaty’s democratic credentials.\textsuperscript{108} The Dutch government acknowledged that the result was less than it had desired,\textsuperscript{109} but tried to justify the result by arguing that still a lot had been achieved: the European Parliament’s powers had been enhanced, European citizenship was introduced and decisions would be taken as closely as possible to the citizen.\textsuperscript{110} The government indicated a lack of support at the European level for remedying the democratic deficit in the desired manner. Some Member States, notably France, had not accepted the extension of the European Parliament’s competences.\textsuperscript{111}

As in Germany, a large parliamentary majority accepted that the Maastricht Treaty probably presented the maximum achievable at the time. The main parties realised that the negotiations had shown how a more ambitious result was not yet possible.\textsuperscript{112} They supported the Treaty because of their pro-European stance and in the hope that the democratic shortcomings could be remedied in the future. The Dutch Labour Party (PvdA), the Christian democrats (CDA),

\begin{itemize}
\item \textsuperscript{106} Bob van den Bos, Mirakel en Debacle, 2008, at p. 273-281; see also the Kamerstukken II, 1990-1991, 21952, nr. 22 (Motie Van der Linden) and Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 6-7.
\item \textsuperscript{107} It is unclear whether the parliament’s position actually did play a decisive role in the government’s decision to proceed with presenting the Dutch Draft Treaty to the Ministers of Foreign Affairs. On this point, see: Bob van den Bos, Mirakel en Debacle, 2008, at p. 273.
\item \textsuperscript{108} The Council of State noted how the core of enhancing the European Parliament’s position was the co-decision procedure, but that the procedure was complex and devious. Kamerstukken II, 1991-1992, 22 647 (R 1437), A (Advies Raad van State en Nader Rapport), at p. 29-30; In response, the government did maintain that the enhanced role of the European Parliament was a significant step, particularly because co-decision gave the European Parliament the right to reject the Council’s position in the last phase of the procedure. Kamerstukken II, 1991-1992, 22 647 (R 1437), A (Advies Raad van State en Nader Rapport), at p. 29-30.
\item \textsuperscript{109} See for example Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 13 (Memorie van Antwoord), at p. 12 and p. 40.
\item \textsuperscript{110} See particularly p. 5 and p. 16 of Kamerstukken II, 1991-1992, 22 647 (R 1437), nr. 3 (Memorie van Toelichting).
\item \textsuperscript{111} On this point, see: Kamerstukken II, 1991-1992, 22 052, nr. 13, at p. 5 and p. 7-9; Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 13 (Memorie van Antwoord), at p. 40. Whether the Maastricht Treaty actually diminished the EU’s democratic deficit was even contested. In a parliamentary hearing, Edmund Wellenstein, former Secretary-General of the European Community for Coal and Steel, argued that the democratic character had been substantially enhanced. Yet, despite the European Parliament’s enhanced powers, he noted that its influence would be hardly visible, due to the complex procedures. See: Kamerstukken II, 1991-1992, 22 647, nr. 8 (Verslag van een hoorzitting), at p. 4-5. Pieter VerLoren van Themaat, former Advocate-General at the CJEU, also noted that even in cases where Union decision-making would proceed by unanimity, the influence of national parliaments on the decision-making would diminish in practice. The democratic character of the decision-making would therefore diminish. See: Kamerstukken II, 1991-1992, 22 647, nr. 8 (Verslag van een hoorzitting), at p. 12 and p. 30.
\item \textsuperscript{112} See for example the contribution of the PvdA in Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 6-7.
\end{itemize}
the social-liberal D66, the left green party GroenLinks and the liberal VVD all expressed the desire to hold an Intergovernmental Conference before 1996 in order to strengthen the EU’s democratic legitimacy.\(^{113}\) The Dutch government, a coalition of the PvdA and CDA, however, regarded this as unrealistic.\(^{114}\) Ultimately, the parliament adopted a resolution urging the government to provide a perspective for the extension of the co-decision procedure to more competence areas before the next European parliament elections in 1994.\(^{115}\) Two other resolutions called upon the government to further enhance the EU’s democratic legitimacy, one of which stated “there should always be one parliament – European or national – that has the last word over European regulation”.\(^{116}\)

The Dutch parliament also decided to lay down a special legal procedure for its own involvement in decisions in the EU’s third pillar on Justice and Home Affairs, because the Treaty did not provide for parliamentary control or judicial review on the European level.\(^{117}\) The new Dutch statutory provisions provided that any decision binding on the Netherlands within this pillar would require the prior consent of both houses of parliament before the Dutch representative could cooperate with such decisions.\(^{118}\) Previously, similar provisions had been enacted with the ratification of the Schengen implementation agreement.\(^{119}\) For

\(^{113}\) See: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), position of the CDA, at p. 2; position of the PvdA, at p. 7; position of D66, at p. 20. For the positions of Groenlinks and the VVD see at p. 1194 and 1209 respectively of Handelingen II 1992/93, 17.


\(^{115}\) See: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 49. The resolution was supported by the VVD, CDA, PvdA, and the Centrumdemocraaten. See Handelingen II 1992/93, 22, at p. 1653.


\(^{117}\) Nonetheless, a proposal of GroenLinks to provide for a consent procedure for decisions under Article 100c (2) TEC was not supported by a majority. On the basis of this provision, the Council could decide on aspects of visa requirements in case of an emergency, but the EP would not have a say. See: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 31. In addition, a proposal of the SGP to have a similar consent procedure in the field of education policy (Article 126 (4) TEC) was also rejected, see: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 28. Also a proposal for a consent procedure in all cases of unanimous decision-making in the Council was rejected. For the proposal see: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 27.

\(^{118}\) Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 30. Consent would be considered given tacitly if within fifteen days of receiving the proposal, none of the parliamentary chambers had stated that the proposal would require explicit consent.

\(^{119}\) Kamerstukken II, 1991-1992, 22 140, nr. 20. See also: Brecht van Mourik, Parlementaire controle op Europese besluitvorming (Wolf Legal Publishers Nijmegen 2012), at p. 50-58. In addition, a parliamentary resolution provided that the government would have to inform the parliament about conventions adopted in the JHA pillar and joint actions in the CFSP pillar in the preparatory phase, and would have to consult the Dutch government on the design of the text before it would sign it: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 53.
GroenLinks the democratic shortcomings of the Treaty nonetheless remained an important reason to oppose it.\footnote{Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 25. Other reasons for GroenLinks to reject the Treaty were its insufficient environmental and social dimension. See also: Handelingen II 1991/92, 87, at p. 5304. A resolution by GroenLinks, which called for meetings of the national parliaments and EP in advance of each half-yearly European Council and in order to ensure that Council’s democratic control, was rejected. See: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 54 (supported by D66). At some points the Dutch government’s commitment to strengthen the EU’s democracy seemed half-hearted. For example, the government attached great importance to the special position of the European Commission and therefore opposed a right of initiative for the EP, as this would affect the special position of the Commission in the EU’s institutional structure. The government considered the Commission’s position part of the typical Community structure where an adequate balance was sought between the general Community interest, the Member States’ interests and the citizen’s interests. See: Kamerstukken II, 1991-1992, 22 647 (R 1437), nr. 3 (Memorie van Toelichting), atp. 26-27; the further explanation in Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 13 (Memorie van Antwoord), at p. 46; as well as the criticism by GroenLinks in Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 64. In addition, the government refused to provide a clear benchmark for what would count as a democratic EU. The government refused to do so, because “this would be dependent on the entire future institutional structure of the Union.” See: Kamerstukken II, 1991-1992, 22 647 (R 1437), A (Advies Raad van State en Nader Rapport), at p. 13. Nonetheless, the government also stated that the EP should be a full participant in European legislative process in a procedure that would be transparent as possible and that the EP should obtain more rights to control the Commission, particularly in the form of individual ministerial responsibility. See Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 13 (Memorie van Antwoord), at p. 43 More generally, the government refused to sketch an overall goal or finalité of European integration. See e.g.: Kamerstukken II, 1991-1992, 22 647 (R 1437), nr. 3 (Memorie van Toelichting), at p. 13 (no template for end phase integration); and Kamerstukken II, 1991-1992, 22 647 (R 1437), A (Advies Raad van State en Nader Rapport), at p. 13; as well as the criticism on this position by GroenLinks in Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 31-32. \footnote{Constitutional scholars Burkens and Vermeulen did raise a more general concern: the Maastricht Treaty would weaken the constitutional guarantees of legality, democracy and judicial control. Political debate should thus focus on how these guarantees could be maintained also after ratification. A similar point was made by: J. A. Sarolea, ‘Discussie over grondwettelijkheid “Maastricht’ te beperkt; Grondwet is niet statisch; Constitutie stelt grenzen aan overboord goeven democratische waarden’ NRC Handelsblad (20 July 1992). \footnote{In the committee proceedings, the CDA, D66, the VVD and GroenLinks all asked the government for a reaction to these scholars’ publications, the article by Heringa in particular. See: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 5; The PvdA also stressed that the possible discrepancies}}

2.3.2.2 A Euro-friendly Interpretation of the Constitution

Within these debates, the Dutch Constitution as such played a limited role. It hardly provided a framework for the discussion of many important constitutional issues that the treaty ratification process gave rise to. The broader issue of democratic legitimacy was not addressed with reference to the Dutch constitution as such, although (and as discussed above), it was a key part of the debate.\footnote{Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 13 (Memorie van Toelichting), at p. 26-27; the further explanation in Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 13 (Memorie van Antwoord), at p. 46; as well as the criticism by GroenLinks in Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 64. In addition, the government refused to provide a clear benchmark for what would count as a democratic EU. The government refused to do so, because “this would be dependent on the entire future institutional structure of the Union.” See: Kamerstukken II, 1991-1992, 22 647 (R 1437), A (Advies Raad van State en Nader Rapport), at p. 13. Nonetheless, the government also stated that the EP should be a full participant in European legislative process in a procedure that would be transparent as possible and that the EP should obtain more rights to control the Commission, particularly in the form of individual ministerial responsibility. See Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 13 (Memorie van Antwoord), at p. 43. More generally, the government refused to sketch an overall goal or finalité of European integration. See e.g.: Kamerstukken II, 1991-1992, 22 647 (R 1437), nr. 3 (Memorie van Toelichting), at p. 13 (no template for end phase integration); and Kamerstukken II, 1991-1992, 22 647 (R 1437), A (Advies Raad van State en Nader Rapport), at p. 13; as well as the criticism on this position by GroenLinks in Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 31-32.} That did not mean the Constitution was ignored or not taken seriously: considerable attention was devoted to the question of whether the Maastricht Treaty contained provisions that deviated from the Constitution, after several contributions by legal scholars in the academic literature stirred up debate. The debate paid serious attention to the various scholarly publications on the matter.\footnote{Constitutional scholars Burkens and Vermeulen did raise a more general concern: the Maastricht Treaty would weaken the constitutional guarantees of legality, democracy and judicial control. Political debate should thus focus on how these guarantees could be maintained also after ratification. A similar point was made by: J. A. Sarolea, ‘Discussie over grondwettelijkheid “Maastricht’ te beperkt; Grondwet is niet statisch; Constitutie stelt grenzen aan overboord goeven democratische waarden’ NRC Handelsblad (20 July 1992).} Yet, it focused on the relatively narrow issue of whether the
constitution stood in the way of transferring certain competences to the EU level, specifically those related to the monetary system and visa policy. If so, the Treaty would have to be adopted with a two-thirds majority.

Ultimately, a large parliamentary majority concluded the Treaty did not deviate from the Constitution. A parliamentary resolution of MP’s Brinkhorst and Van Den Broek provided a key argument for the government’s stance that the Treaty did not conflict with the constitution. The resolution had been adopted during the constitutional revision process of 1983 and stated that in case of doubt, the Dutch constitution should be interpreted so that the process of European integration would not be limited. The argument appeared decisive in ending the discussions on the Maastricht Treaty’s compatibility with the Constitution.

between the Treaty and the constitution should be discussed carefully, to prevent any subsequent recriminations that the issue had been insufficiently considered. The party doubted that the EMU provisions did not affect the parliament’s constitutional right to determine economic and monetary policy, because the Dutch constitution did not contain any constraints on the economic and monetary system and the budget right of parliament in Article 105 of the Constitution was not limited. See: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 10. In turn, the government explicitly engaged with the various scholarly contributions on Maastricht and the Dutch Constitution and noted the support in various of these publications for its stance that the Treaty did not conflict with the Constitution. See e.g.: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 13 (Memorie van Antwoord), at p. 21-23.

The constitutional scholar Heringa argued that the Maastricht Treaty deviated from the Constitution in two respects. First, he argued that the EMU provisions did actually violate Article 106 of the Constitution, as this Article established that the monetary system had to be determined by Dutch law. Second, he contended that Articles 3(d) and 100C of the EC Treaty on visa policy raised a similar concern. Here the provisions also conflicted with the legislature’s constitutionally mandated task in Article 2 of the Constitution. A. W. Heringa, ’De verdragen van Maastricht in strijd met de Grondwet’ (1992) 24 Nederlands Juristenblad 749. Leonard Besselink noted several further constitutional concerns: Leonard F. M. Besselink, ’Het Verdrag van Maastricht wijkt ook op andere punten af van de Grondwet en eveneens van het Statuut’ Nederlands Juristenblad 27 864. Several scholars, however disagreed. See: See: M. C. Burkens and B. P. Vermeulen, ’Maastricht in strijd met de Grondwet?’ Nederlands Juristenblad 861; C. J. A. M. Kortmann, ’De verdragen van Maastricht niet in strijd met de Grondwet’ Nederlands Juristenblad 862; I. Sewandono, ’Grondwettelijke bezwaren tegen Maastricht zijn ver gezocht’ Nederlands Juristenblad 863. See also the piece by J.G. Brouwer. In response to his critics, Heringa stressed that the Maastricht Treaty’s fundamental nature had primarily motivated his arguments for a constitutional two-thirds majority. See: A. W. Heringa, ’Naschrift’ Nederlands Juristenblad 865.

In accordance with Article 91 (3) of the Constitution.

See also Jeskje Hollander, Constitutionalising Europe: Dutch Reactions to an Incoming Tide (1949-2005) (Europa Law Publishing Groningen 2013), at p. 197-220; A few Dutch parties did maintain that the Treaty deviated from the Constitution. GroenLinks agreed with Heringa that the transfer of competences in the realm of monetary and visa policy did not accord with the Dutch Constitution. See: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 31. The small Christian parliamentary groups of RPF, SGP and GPV were also more sceptical of the Treaty’s conformity to the Constitution, particularly concerning compatibility of the EC’s extension of competences in the field of education with Article 23 of the Constitution. See e.g.: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 43-44 (position of the RPF); Handelingen II 1992/93, 17, at p. 1185 and p. 1199 (for the position of the GPV and SGP respectively).
2.3.2.3 Sovereignty and Identity Concerns as Party Political Viewpoints

The idea that European integration posed a threat to national sovereignty was not widely supported. For example, the PvdA explicitly rejected ‘sovereignty’ as a criterion to judge the Treaty’s constitutionality, because each treaty limited the sovereignty of a state and because the Dutch Constitution did not determine the extent of Dutch sovereignty or even include the notion.127 The party also referred to the notion as “a somewhat mythical, 19th-century national concept”.128 CDA Foreign Minister Van Den Broek characterised the transfer of competences as the sharing of sovereignty rather than as the giving away of competences. He explicitly rejected the idea that such a sharing of sovereignty should be characterised as a loss in sovereignty, because the Netherlands would gain a say on the European level and would obtain the ability to influence transnational issues.129

The small Christian parliamentary groups of RPF, SGP and GPV – particularly the GPV and RPF – did invoke notions of sovereignty, independence and identity to articulate their concerns about the Treaty’s conformity to the Constitution. The RPF, for example, argued that the Treaty posed a threat to the Member States’ national sovereignty, which threatened their national identities, and required ratification with a constitutional majority.130 The three parties were critical of federalist goals and sceptical of the EP’s democratic credentials. For example, the SGP noted that citizens were much more nationally oriented than European and pointed to the low turnout in European Parliament elections.131 The party also argued that the EP was not fully aware of the limits imposed by the Treaties on the EC’s competences.132

In a similar manner, the liberal VVD voiced scepticism about realising a fully-fledged European democracy, although it did ultimately approve the Treaty. The party had still supported the supranational orientation of the government before and during the Treaty

128 See the statement by Jurgens: Handelingen II 1992/93, 17, at p. 1239. Piet Dankert, the PvdA State Secretary for European Affairs, likewise stated that the Constitution allowed the transfer of sovereignty. The key issue was whether the Treaty deviated from a specific provision in the Dutch Constitution. Handelingen II 1992/93, 17, at p. 1292.
129 See the statements by Minister Van den Broek: Handelingen II 1992/93, 17, at 1284; and Handelingen II 1992/93, 19, at p. 1425.
130 The RPF also pleaded for the introduction of judicial review, as in the current constellation the parliamentary majority could simply interpret the Constitution as it suited. See: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 17 (Eindverslag), at p. 18-19; Handelingen II 1992/93, 17, at p. 1175-1176; Handelingen II 1992/93, 19, at p. 1465; and Handelingen II 1992/93, 22, at p. 1601.
131 Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 36.
132 Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 66.
negotiations. Yet, at the time of ratification, the party changed its position under influence of its party-leader and later EC Commissioner Frits Bolkestein.133 The change of heart was reflected in various ways. For instance, the VVD welcomed the provision on national identity, but also asked why the Treaty did not indicate that sovereignty would have to be safeguarded to the largest possible degree.134 Likewise the party did not regret the loss of a reference to Europe’s federal vocation: the Union should be a conglomeration of states in which only certain issues would be dealt with in a federal manner.135 Crucially, the statement of party-leader Frits Bolkestein on democracy in the final debate on the Treaty, resembled the later position of the GFCC:

“As I have remarked at another occasion, there is no European people. There is no European language, nor is there a European public opinion. In my view, therefore there cannot be a European government in the classical meaning of the word, in the sense of a full administration.”136

The points raised by the GFCC in its *Maastricht-Urteil* were thus articulated as the political viewpoints of certain parties in the Netherlands. What is important to note is that these more sceptical stances on European integration fitted with these parties’ political position on other issues. The liberal VVD party wanted the EU to focus on core tasks, which it associated with market liberalisation and deregulation.137 The small Christian parties rooted their sceptical view of European integration in religious beliefs. The SGP for example linked its attachment to “the independence, the own identity of the Netherlands” to the “influence that the blessed

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134 *Kamerstukken II*, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 46.

135 There would have to be strong grounds to transfer competences to the European level. Such grounds would exist in three situations: if it would take away economic barriers between Member States; if it would address transnational problems no longer capable of adequately being addressed at the national level; and/or if it would realise economies of scale on the European level. See: *Handelingen II* 1992/93, 22, at p. 1600; *Kamerstukken II*, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p.11-15.

136 "Zoals ik eerder bij een andere gelegenheid heb opgemerkt, is er geen Europees volk. Er is ook geen Europese taal, noch een Europese openbare mening. Er kan mijns inziens dan ook geen Europese regering zijn in de klassieke betekenis van dat woord, in de zin van een volledige bestuurslaag." *Handelingen II* 1992/93, 22, at p. 1600; similar remarks were made by Van Middelkoop of the GPV in *Handelingen II* 1992/93, 17, at p. 1184. See more elaborately also: Frits Bolkestein, ‘Europa na Maastricht’ (1992) Internationale Spectator


Reformation has exercised on our society”, of which they saw little reflection in the “history and culture of the EC as a whole”. In these concerns lay their “deepest motives against the process of European unification”, which they perceived as “the product of liberal humanist thought” and as providing no place for the “recognition of God’s sovereignty over the entire life, including political life”.

As in Germany, however, a number of Dutch parties perceived the lack of a social and environmental dimension to the European project as a major shortcoming. These different positions illustrate a key difficulty with the democratic objections to European integration, like those of the GFCC and the Dutch liberal VVD. The argument that because of the EU’s democratic deficit, the EU’s competences should be limited in nature, ignores that in the eyes of some political parties, it is precisely the limited and economic nature of the EU that creates a democratic problem: it privileges certain economic considerations over social and environmental considerations to the detriment of the latter. Rather than emphasizing the need to limit the EU’s competences, the left-wing parties thus argued that the EU’s competences should be enhanced in its social and environmental dimension to off-set the negative repercussion of the supposed EU’s free market orientation.

This problem of asymmetry is a central concern in the Maastricht’s EMU architecture, focused as it was – and still is - on price stability. Yet neither the political institutions, nor the GFCC appeared to fully appreciate this concern at the time. I discuss this problem in the next section.

3. Monetary Union: Political and Judicial Mistakes

3.1 The GFCC: Constitutionalising EMU’s Asymmetries

The agreement on EMU was the most important change introduced by the Maastricht Treaty and a key element in the GFCC’s judgment. Yet, prior to the Euro-crisis, the part on EMU in

138 Van Dis (SGP), Handelingen II 1992/93, 17, at p. 1195.
139 Van Dis (SGP) Handelingen II 1992/93, 17, at p. 1195. In a similar vein the RPF complained that the founders of the EC had been inspired by a humanistic worldview instead of “the Biblical views about man and society that the RPF takes as its starting point.” Handelingen II 1992/93, 17, at p. 1174. Ideas in a similar direction were voiced by the GPV, although the GPV was more accommodating of European integration, see: Handelingen II 1992/93, 17, at p. 17-1186.
140 See: Groenlinks Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 22; and the position of D66, at p. 20 and some concerns of the CDA, at p. 4.
the Maastricht-Urteil often played a marginal role in scholarly discussions.\footnote{For example in the seminal contributions of Mattias Kuum and Baquero Cruz to the pluralism literature, the monetary union is not discussed. On this same point: Christian Joerges, 'Where the Law Ends' (2014) Verfassungsblog <http://verfassungsblog.de/where-the-law-ends/> accessed Tuesday 26 December 2017.} That part is nonetheless of key importance and has played a crucial role in the Euro crisis. In a nutshell, the Court accepted Germany’s participation in a future EMU, because it could be considered a ‘Stabilitätsgemeinschaft’, a ‘community based on stability’ geared towards price stability and sound public finances.\footnote{Bundesverfassungsgericht, Judgment of 12 October 1993, 2 BvR 2134/92 (Maastricht) (translation in [1994] 1 C.M.L.R. 57), at par 78.} In hindsight, this assessment appears problematic, because it turned EMU’s stability focus into a constitutional requirement for Germany’s participation. Yet to understand this problem, it is first necessary to outline the Maastricht EMU legal architecture.

3.1.1 Asymmetric Union: Maastricht’s EMU Architecture

Two principal and related considerations informed the original EMU framework: price stability and national fiscal responsibility, that is, the idea that the Eurozone Member States would remain responsible for their own fiscal and economic policies, including their own debts.\footnote{On price stability as goal in EMU see also Matthias J. Herdegen, 'Price Stability and Budgetary Restraints in the Economic and Monetary Union: the Law as Guardian of Economic Wisdom' (1998) 35 Common Market Law Review 9. The ECB regards price stability as the prevention of continued inflation and deflation. The ECB has defined price stability in quantitative terms as “a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%.” The ECB aims at an inflation rate of “below, but close to 2 %”. See: Kaarlo Touri and Klaus Tuori, The Eurozone Crisis: A Constitutional Analysis (Cambridge University Press Cambridge 2014), at p. 59 and also https://www.ecb.europa.eu/mopo/strategy/pricestab/html/index.en.html last accessed 26 December 2017.} In line with the idea of national fiscal responsibility, the Maastricht framework made monetary policy an exclusive EU competence,\footnote{See: Article 3 (1) (c) TFEU.} but left fiscal and economic policy largely to the Member States.\footnote{See: Article 3 (1) (c) TFEU.} Monetary policy generally refers to the policy of a monetary authority to control the supply of money. Fiscal policy refers to the state’s acquirement of public funds through taxation and debt, as well as the assignment of those funds through public expenditure. Economic policy is commonly understood as a broader notion. It captures both monetary and fiscal policy and may be understood to include other public interventions in the economy, such as regulations of the labour market.\footnote{Kaarlo Touri and Klaus Tuori, The Eurozone Crisis, A Constitutional Analysis, 2014, at p. 27-34.} Ordinarily, states control both monetary policy and fiscal policy and can use both as instruments of economic policy.

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The two considerations – price stability and national fiscal responsibility - are reflected in the EMU provisions in several ways. Price stability constitutes the primary objective of EU monetary policy.\textsuperscript{147} Its importance is reflected in the independence of the ECB and the national central banks that together form the European System of Central Banks (ECSB), the governance structure for the monetary policy of the EMU countries.\textsuperscript{148} The objective of price stability also informs the legal constraints on national fiscal and economic policies. These national policies are to pursue the objective of sound public finances in order to prevent the unsustainable fiscal policies of one Member State from providing the ECB with an incentive to adopt a more expansive monetary policy.\textsuperscript{149} Article 104c TEC (currently Article 126 TFEU), and the Protocol on the excessive deficit procedure, laid down the procedure to prevent excessive Member State budget deficits and government debts, which the Protocol put at 3 per cent and 60 per cent of gross domestic product respectively.\textsuperscript{150} The prohibition on monetary financing of Article 123 (1) TFEU\textsuperscript{151} similarly disciplines Member States’ fiscal policies and prevents the ECB from being forced to print money to finance a Member State’s budget deficits.\textsuperscript{152}

The constraints on national fiscal policies and the prohibition of monetary financing also reflect the idea of national fiscal responsibility.\textsuperscript{153} Preventing one Member State’s fiscal policies from becoming unsustainable was additionally meant to ensure that the Member States would not be forced to aid each other. The prohibition of financial bailouts in the so-called “no bail-out clause”\textsuperscript{154} can be understood in this light, and subjects the Member States to the discipline of the markets. The expectation was that financial markets would charge higher interests to those states with unsustainable budgetary policies, thus forcing them to

\textsuperscript{147} See the current Article 119 (1) TFEU and Article 105 TEC at the time of Maastricht. It is also the primary goal of the European System of Central Banks (Article 127 (1) TFEU). At Maastricht the commitment to price stability was also laid down in Article 3A TEC. Currently, it is stated as a general goal of the EU in Article 3 (3) TFEU.

\textsuperscript{148} Article 106 TEC and the current Article 129 TFEU. Its independence is ensured in particular by Article 107 TEC, and the current Article 130 TFEU.

\textsuperscript{149} See the current Article 119 (3) TFEU (Article 3a TEC) and the excessive deficit procedure of Article 126 TFEU (Article 104c TEC).

\textsuperscript{150} In its Maastricht form, this procedure also relied heavily on legally non-binding measures, although as an ultimate recourse the Council could impose sanctions on Member States in the form of non-interest bearing deposits or fines. See Article 104c (11). See also: Jörn Pipkorn, 'Legal Arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union' (1994) 31 Common Market Law Review 263, at p. 277-280.

\textsuperscript{151} Previously Article 104 TEC.


\textsuperscript{153} Alicia Hinarejos, The Euro Area Crisis in Constitutional Perspective, 2015, at p. 5-6.

\textsuperscript{154} In Maastricht this was Article 104b, currently it is Article 125 TFEU.
adjust. Similar reasons informed the prohibition on monetary financing, as this prohibition reduces the incentive for Member States to run deficits.

This stability-oriented EMU architecture raises various democratic concerns. Firstly, as noted by Mattias Herdegen, the legal framework entrenches certain economic priorities in the Treaty and “limits political choices between conflicting objectives.” The overriding importance of price stability limits the consideration of other economic and social considerations, such as high employment. Particularly, the Treaty norms on excessive deficits and government debt limit democratic choice in national economic policy. Assigning monetary policy to a politically independent central bank with the objective of ensuring price stability, moreover, presents a departure from Keynesian thought in which expansionary monetary and fiscal policies are seen as means to ensure high employment and high economic growth.

Secondly, the separation of economic and monetary competences also raises a potentially bigger problem. The transfer of monetary competence also restricts national autonomy in economic and fiscal policy. Economists have argued that a monetary union without a budgetary union is inherently fragile and vulnerable to asymmetric shocks, i.e. shocks that affect the Eurozone Member States unevenly. Within EMU, the Eurozone states have given up control over their national currencies and lost the ability to conduct an independent monetary policy. When hit by an asymmetric shock, a Member State can therefore no longer devalue its currency or use its domestic interest rate to increase its competitiveness to address higher unemployment. Instead, it can try to push down wages to regain competitiveness. This

156 Paul de Grauwe, Economics of Monetary Union, 2014, at p. 218-223. Considerations of price stability and national fiscal responsibility likewise informed the criteria that the Member States had to fulfil for entering the single currency. These convergence criteria required the EMU participants to have stable inflation rates, low government deficits and government debt levels, no devaluation for the previous two years and a stable interest rate. See Article 104c and109j TEC, the Protocol on the Excessive Deficit Procedure, as well as the Protocol on the Convergence Criteria Referred to in Article 109j of the Treaty Establishing the European Community.
158 Ibid, at p. 15.
159 Although a flexible interpretation of these norms could arguably prevent significant encroachment on the policy space of political institutions, On such an argument even after the Euro-crisis: Clemens Kaupa, 'Has (Downturn-)Austerity Really Been 'Constitutionalized' in Europe? On the Ideological Dimension of Such a Claim' (2017) 44 J Journal of Law and Society 32.
160 Paul de Grauwe, Economics of Monetary Union, 2014, at p. 150-151.
option, however, is normally more difficult and depends on the organisation of the labour market.\textsuperscript{161}

An additional problem is that financial markets can force EMU Member States into default. When a Member State faces an asymmetric economic shock, it will typically run a higher budget deficit: economic decline leads to loss in tax income and higher unemployment will lead to higher tax expenditure. Distrust by the financial markets may, however, trigger a liquidity crisis. Fear that a Member State will be unable to repay its debts can lead investors to sell the Member State’s government bonds. Within the monetary union the exchange rate no longer plays a stabilising role and the Member State can no longer finance their government debts with the help of central banks. In this scenario, the Member State can be faced with an outflow of capital, a deeper recession and a consequent further growth in government debt, forcing the Member State to adopt budgetary austerity or default. Allowing the central bank to act as a lender of last resort and centralising substantial parts of national budgets and debts in a budgetary union, would protect the Member States from being forced into default. Budgetary centralisation also allows setting-up a transfer mechanism that would work as a stabiliser and reduce the negative impact of asymmetric shocks.\textsuperscript{162} The centralisation of national budgets, however, would require a significant transfer of sovereignty over taxation and spending from the Member States to the European level. It would require a political union.\textsuperscript{163}

3.1.2 The GFCC’s Assessment: Stability as a Constitutional Requirement

Based on these considerations, the shortcomings of the GFCC’s assessment of the EMU-architecture in its \textit{Maastricht} judgment are twofold. First, in the Court’s sovereignty-based understanding of democracy, the stability focus of EMU is turned into a constitutional


\textsuperscript{162} An alternative mechanism would be to increase labour flexibility, by enhancing wage flexibility or labour mobility. Workers could move from depressed regions to regions that experience an economic boom. Cultural and linguistic barriers between European countries, however, inhibit labour mobility and labour mobility in Europe is lower than in the United States, see: Barry Eichengreen ‘Should the Maastricht Treaty be Saved?’, 1992, at p. 22-23; Paul de Grauwe, Economics of Monetary Union, 2014, at p. 74-79. Achieving wage flexibility would require reforming labour market institutions.

requirement, rather than criticised from a democratic perspective. The logic of the Court’s reasoning dictates that the conferral of powers to the EU has to be sufficiently specific. On the basis of this logic, the Court judged the development of the monetary union sufficiently predictable after entry into the third stage, because it would be geared specifically to maintaining stability, price stability in particular. The Court thus positively evaluated the provisions and institutional arrangements that contributed to price stability, such as the prohibition on monetary financing, the no bail-out clause and the Member States’ duty to avoid excessive deficits. Changes to this ‘community based on stability’ would require Treaty change or justify withdrawal:

“This conception of the currency union as a community based on stability is the basis and subject-matter of the German Act of Accession. If the monetary union should not be able to develop on a continuing basis the stability present at the beginning of the third stage within the meaning of the agreed mandate for stabilisation, it would be abandoning the Treaty conception.”

However, the Court hardly considered that the focus on price stability limits the political consideration of other objectives and affects national autonomy in economic policy. For the Court, these requirements were simply limitations on the EU’s authority and positively evaluated from a democratic point of view. One could defend the Court’s assessment of EMU as simply showing deference to political actors, who, after all, decided the EMU legal architecture. Yet, the Court went further by actively turning the notion of the ‘Stabilitätsgemeinschaft’ into a democratic requirement. The condition is comprehensible as a political demand stemming from German stability anxieties, but as a democratic requirement, it is at least one-sided.

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165 Ibid., at par. 90. In a similar vein the Court held that entry into EMU’s third stage would be sufficiently predictable or subject to sufficient parliamentary responsibility in its development. The convergence criteria, the right of the Bundestag to assess compliance with the convergence criteria, as well as the need for preparatory work by the Member States before entry into the third stage, all ensured sufficient predictability. Therefore, by ratifying the EU Treaty, Germany would not be moving into a monetary union in which guarantees for stability were not in place. See par. 80-88.
At one point, the Court did consider democratic concerns about the focus on price stability, namely in its discussion of the ECB’s independence. According to the Court, the transfer of monetary policy to the ECB did affect the principle of democracy: monetary policy was an “essential political area”, as maintaining the value of the currency supports individual freedom and “through the money supply, the state of public finances and the political spheres dependent thereon are determined.”\textsuperscript{169} However, the Court held this to be an acceptable modification of the democratic principle:

“[I]t takes account of the special characteristic of (tested and proven - in scientific terms as well - in the German legal system) that an independent central bank is a better guarantee of the value of the currency, and thus of a generally sound economic basis for the state’s budgetary policies and for private planning and transactions in the exercise of rights of economic freedom, than state bodies, which as regards their opportunities and means for action are essentially dependent on the supply and value of the currency, and rely on the short-term consent of political forces.”\textsuperscript{170}

The transfer of monetary competences to the ECB was thus considered acceptable, because its mandate focused on price stability. By implication, though, the ECB’s independence would become more problematic if the ECB moved beyond this narrow mandate. This problem lies at the basis of the GFCC’s more recent challenge to the ECB’s decision on Outright Monetary Transactions.\textsuperscript{171}

The second problem is that the Court hardly addressed the fragility of the monetary union. The argument had been made before the Court that EMU would also require an economic union in order to remain effective and that its development would otherwise be factually unpredictable. The GFCC rejected this argument. It argued that such an extension would simply require a Treaty amendment or abandonment of the common currency. The Court also considered the argument that EMU would require a political union “embracing all essential economic functions”\textsuperscript{172}, as had been argued by Bundesbank President Schlesinger in the oral hearings at the Court. According to the Court this was not a question “of constitutional law,

\textsuperscript{169} Bundesverfassungsgericht, Judgment of 12 October 1993, 2 BvR 2134/92 (Maastricht) (translation in [1994]) 1 C.M.L.R. 57), at par. 95.
\textsuperscript{170} Ibid, at par. 96.
\textsuperscript{171} Bundesverfassungsgericht, Order of 14 January 2014 2 BvR 2728/13 (OMT referral).
\textsuperscript{172} Bundesverfassungsgericht, Judgment of 12 October 1993, 2 BvR 2134/92 (Maastricht) (translation in [1994]) 1 C.M.L.R. 57), at par. 92.
however, but of politics” that would similarly require future Treaty amendment and assent of the German Bundestag.\(^\text{173}\)

Writing in 2010, Ernst-Wolfgang Böckenförde - one of the judges that handed down the Maastricht-Urteil - argued that the instability of EMU’s original architecture had been foreseen at the time of the judgment. He reaffirmed, however, that its solution lay in political responsibility. Different options for Europe’s future now had to be discussed and weighed, including whether political union should be completed with a system of financial transfers or if the EMU should be limited to a smaller circle of stronger economies. In this sense, he contended that the crisis presented Europe with a chance to finally decide on the future of Europe and impart it with renewed popular legitimacy.\(^\text{174}\)

These arguments overlook two issues. First, the significant difficulties of Treaty change mean that far-reaching Treaty changes could well be impossible in the context of an economic crisis. Secondly, the Court’s separation of constitutional law and politics ignores that the Court itself had put doubts on the possible attainment of a political union. After all, it had held that the factual preconditions for a democratic EU – a European public sphere and a European \emph{demos} - were not in place and that sufficient sovereign powers would have to remain with the Bundestag. By stressing the dependence of the EU’s democratic legitimacy on the Bundestag, the Court itself seemed to indicate that the development of the EU into a European state-like order would not be compatible with the Basic Law, although it refrained from saying this in so many words.

The Court’s 2009 judgment on the Lisbon Treaty, appears to have made the achievement of such a political union all the more problematic by determining “fundamental fiscal decisions on public revenue and public expenditure” as an area that is especially “sensitive for the ability of a constitutional state to democratically shape itself.”\(^\text{175}\) The puzzle of the Maastricht-Urteil and its subsequent further development in the Lisbon judgment is that the entry into EMU was accepted under conditions that have not worked in practice, and yet that the Court simultaneously seems to have barred an important way to overcome them.

\(^{173}\) Ibid, at par. 93.


\(^{175}\) Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08 (Lisbon judgment), at par. 252.
3.2 The Treaty Negotiations: Incomplete Deliberations and Incomplete Monetary Union

If the GFCC did not fully address the shortcomings of the Maastricht EMU-framework, the same can probably be said about the Treaty negotiations: the EMU negotiations have been noted for their failure to adequately consider EMU’s impact on national sovereignty and its relation to democracy.

The fact that agreement on EMU was possible at Maastricht without a transfer of economic and budgetary competence meant a break with previous political discussions. German Chancellor Kohl and his Foreign Minister Genscher had stated repeatedly that EMU had to be linked to political union. For them, as well as for French President Mitterand, EMU was an instrument to achieve some sort of political union. Yet, there were different understandings about what political union entailed. France preferred the idea of an ‘economic government’, in which decision-making by economic and monetary experts would ultimately be subordinated to politics. Germany, on the other hand, preferred a ‘community of stability’, as its historical experience with hyperinflation favoured depoliticisation of monetary policy in an independent central bank. Ideas about political union were also not fully developed and mutual suspicion between France and Germany prevented an agreement. Germany in particular, feared that French proposals for an ‘economic government’ would undermine the ECB’s independence.

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177 See on this point e.g.: Bob van den Bos, Mirakel en Debacle, 2008, at p. 169 and p. 251-254; the interview with Cees Maas in Roel Janssen, De Euro, 2012, at p. 105-135; On different conceptions of EPU and its linkage with EMU offered by Genscher, Mitterand and Kohl see: Kenneth Dyson and Kevin Featherstone, The road to Maastricht: Negotiating Economic and Monetary Union, 1999, at p. 31-32.

Four factors appear to have been of particular importance for why an agreement on EMU was possible and why it took the specific form it did.\footnote{179} Firstly, German unification led to renewed fears of German dominance. The agreement on EMU meant to safeguard future peace and stability by committing Germany to Europe.\footnote{180}

Secondly, underlying the negotiations was a so-called paradigm about sound money and sound public finances. The economic shocks of the 1970s had discredited Keynesian policies and from the mid-1970s a new consensus emerged among EC central bankers and policy makers around the belief that monetary policy was neutral towards unemployment and growth in the long run.\footnote{181} The new paradigm favoured “disinflation, budgetary discipline, and currency stability” and stressed “the vital importance of credibility of policies within the financial markets.”\footnote{182} Key importance was attached to central bank independence and the German central bank model became leading. This set of beliefs forged an EC wide epistemic community that helped bring about unanimous agreement in the Delors Committee, which in turn, formed a crucial basis for the IGC.\footnote{183} In addition, it ensured that the monetary element had primacy over the fiscal element in EMU.

Thirdly, within the previously existing European Monetary System (EMS), Germany and its \textit{Bundesbank} had the most powerful position. For France, in particular, the agreement on EMU was a way to address this asymmetry. Yet, Germany’s strategic position within the EMS meant it had a strong bargaining position in the EMU negotiations and was able to steer the EMU agreement in line with its strong anti-inflationary preferences.\footnote{184}

\footnote{180} Kenneth Dyson and Kevin Featherstone, \textit{The road to Maastricht: negotiating Economic and Monetary Union}, 1999, at p. 756-758.
\footnote{181} An elaborate treatment of the underlying economic policy beliefs is offered by Kathleen R. McNamara, \textit{The Currency of Ideas}, (Cornell University Press Ithaca & London 1998). She refers to a “neoliberal policy consensus”.
\footnote{182} Kenneth Dyson and Kevin Featherstone, \textit{The road to Maastricht: negotiating Economic and Monetary Union}, 1999, at p. 2 and p. 28-33.
Fourthly, EMU was negotiated in a small circle and had a depoliticised character.\textsuperscript{185} It was a deliberate strategy of Kohl and Delors to bind-in the central bankers by creating the Delors Committee. By asking the Committee how EMU could be realised and not whether it should, the agenda was limited and depoliticised. The Delors Report itself reflected the prevailing norms of central bankers and set the terms for much of the remaining debate on EMU.\textsuperscript{186} The subsequent EMU negotiations were conducted largely in a small executive circle. Dyson and Featherstone note that the “basic substantive content of EMU negotiations was resolved in and around two intimate and relatively isolated institutional venues – the EC Monetary Committee and the Committee of EC Central Banks.”\textsuperscript{187} This privileged a very small number of finance ministry and central bank officials in determining the outcome of the EMU negotiations. The result was that several contentious issues were kept off the agenda, in particular the relationship between political union and EMU.\textsuperscript{188} However, this restriction on the agenda was probably also a key condition for EMU’s successful negotiation, because the “EMU agreement probably represented the maximum sacrifice of national political autonomy that could be reached voluntarily.”\textsuperscript{189} In this respect, democratic reasons informed the decision to leave economic competences with the Member States, as these were thought to require democratic legitimation that could only be provided at the Member State level.\textsuperscript{190}

3.3 Missing the Broader Picture: Monetary Union in the Ratification Debates

3.3.1 German Stability Anxieties
Within the subsequent German ratification debates, the link between monetary union on the one hand, and economic and budgetary competences on the other, played a limited role. German debate instead focused on concerns about the future currency’s stability. The agreement on EMU was not without controversy in Germany. The currency union touched on the important symbolic nature of the D-Mark for German economic success and stability. ‘D-Mark patriotism’ therefore emerged as one strand of opposition to EMU and was voiced primarily in the popular press as well as within the CSU by Peter Gauweiler, then a Bayern

\textsuperscript{185} Kenneth Dyson and Kevin Featherstone, The road to Maastricht: negotiating Economic and Monetary Union, 1999, at p. 748;
\textsuperscript{186} Ibid, at p. 773-774.
\textsuperscript{187} Ibid, at p. 755.
\textsuperscript{188} Ibid, at p. 755. See also the interview with Cees Maas in: Roel Janssen, De Euro, 2012, at p. 105-135; For most sectoral interest groups the implications of EMU were very difficult to oversee. The only sectoral interest the negotiators really had to deal with was that of the central bankers. See: Kenneth Dyson and Kevin Featherstone, The road to Maastricht : negotiating Economic and Monetary Union,1999, at p. 746 and p. 755.
\textsuperscript{189} Ibid, at p. 783.
\textsuperscript{190} Kaarlo Touri and Klaus Tuori, The Eurozone Crisis, A Constitutional Analysis, 2014, at p. 209; Alicia Hinarejos, The Euro Area Crisis in Constitutional Perspective, 2015, at p. 15.
State Minister. The Bundesbank and academic economists expressed critique along the lines of coronation theory, which stressed the need for a comprehensive political union in order to make the monetary union successful.\(^{191}\)

German Chancellor Kohl responded to these challenges by associating opposition to EMU with nationalist politics and by invoking the Basic Law’s preamble for a united and peaceful Europe.\(^{192}\) The justification for EMU by the Bundestag’s financial committee was likewise embedded in the view that European integration was necessary to maintain peace and prevent nationalism.\(^{193}\) In addition, Kohl argued that further progress in the area of political union would have to be achieved in the future.\(^{194}\)

Opposition to EMU was reflected and partly accommodated in the German parliamentary debates, but focused on German stability anxieties.\(^{195}\) The relation between the political and monetary union and the possibility of crisis played a limited role. The Bundestag’s financial committee discussed various concerns about EMU, such as the fear that the new currency would lack stability, that the convergence criteria would not be strictly enforced, or that EMU would turn into a transfer union for which Germany would be its main paymaster.\(^{196}\) The committee sought to allay such fears by emphasising that the convergence criteria would


\(^{193}\) Further reasons were the economic benefits for both Germany and the Community as a whole. In addition, EMU was presented as an important step in the closer integration of the Community, as a logical completion of the internal market, but also as the logical arrangement towards a political union. BT-Drucksache 12/3895, note 46, at p. 20-21.


\(^{195}\) Wieczorek-Zeul also notes that the public discussion on the Maastricht Treaty mainly concerned worries about currency stability: Heidemarie Wieczorek-Zeul, Der Vertrag von Maastricht im Deutschen Bundestag, 1993, at p. 410. In a vote declaration Wolfgang Schulhoff (CDU/CSU) did raise concerns about leaving the path of coronation theory and stressed the need for stronger coordination of financial and economic policies. Schulhoff, Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10905-10906. Also concerned about not following the path of coronation theory was Jürgen Augustinowitz (CDU/CSU), at p. 10904.

\(^{196}\) See the report of the Bundestag’s finance committee in BT-Drucksache 12/3895, note 46, at p. 21.
have to be interpreted strictly: “The future European currency must be and must stay as stable as the German Mark.”197 In addition, the committee stressed the importance of price stability in the ECB’s mandate, as well as the ECB’s political independence. It underlined how the institution was based on the Bundesbank model.198 The committee also acknowledged the D-Mark’s importance as a “symbol not just for a successful economic policy after the Second World War, but also for the retrieval of democratic, successful statehood.”199 Designating Frankfurt as the seat of the future ECB was considered crucial for “the consent of the German people”: this would not just be a choice for the seat of a governing authority, but a “symbol and agenda for a stability oriented politics of the European Central Bank.”200 Finance Minister Waigel of the CSU and Chancellor Kohl similarly underscored the importance of price stability: Waigel declared that he would not have signed the Treaty if he had had worries about the stability of the future currency.201

Most of these issues found their way into a parliamentary declaration adopted by a large parliamentary majority after the final plenary debate on the Treaty.202 Article 88 of the Basic Law was amended to further safeguard price stability in EMU by elevating price stability and central bank independence to the level of German constitutional law.203 As a further safeguard for the currency’s future stability, the Bundestag reserved the right to assess the

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197 BT-Drucksache 12/3895, note 46, at p. 22. See in a similar sense about the entry conditions for EMU: Waigel, Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9321-9322. Waigel saw the Maastricht Treaty in line of a victory for the “politics of stability” (‘Stabilitätspolitik’). 198 Finance Minister Waigel also stressed how the European currency would be based on the German model and that the currency Union would not abolish the strong D-Mark, but rather that the stability of the future European currency would be “even better protected by the Treaty of Maastricht under international law than the German mark by the German monetary constitution.” (Waigel, Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9321). 199 BT-Drucksache 12/3895, note 46, at p. 25. 200 “Wenn die Zustimmung der deutschen Bevölkerung zur Währungsunion nicht in Frage gestellt werden soll, ist diese Entscheidung für Frankfurt unabdingbar: Frankfurt ist nicht lediglich eine Entscheidung für den Sitz einer Verwaltung, sondern Symbol und Programm für eine stabilitätsorientierte Politik der Europäischen Zentralbank.” In addition the finance committee expressed hesitations at creating a single currency given the symbolic importance of the D-Mark: BT-Drucksache 12/3895, note 46, at p. 25. 201 Waigel, Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9320-9321; also stressing the importance of stability: Kohl, Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10826. 202 Such as the need for parliamentary consent before the entry into EMU’s third phase, the desire for Frankfurt as the ECB’s seat, the need for a strict interpretation of the convergence criteria and the overriding importance for stability of the future currency, see: BT-Drucksache 12/3906 of 02.12.1992: Entschließungsantrag der Fraktionen der CDU/CSU, SPD und F.D.P. zu dem Gesetzentwurf der Bundesregierung - Drucksachen 12/3334,12/3895 - Entwurf eines Gesetzes zum Vertrag vom 7. Februar 1992 über die Europäische Union. For the vote, see: Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10879 and p. 10885-10887. 203 Article 88 Basic Law; BT-Drucksache 12/3895, note 46, at p. 18; ibid, at p. 409.
fulfillment of the convergence criteria before EMU’s third phase, an assessment that the government would have to respect in its decision-making on the European level.  

The possibility of a crisis was debated only partly. In the parliamentary deliberations it was acknowledged that giving up the exchange rate instrument and the monopoly over money creation would have important consequences for the Member States’ economic and financial policies. The financial committee accepted that significant economic difficulties affecting one Member State could put political pressure on the other Member States to help out, despite the prohibition on bail-outs. In this respect, the committee noted that there was no historical precedent for a sustainable currency union without it being coupled to an economic, financial and general political bond (‘zusammenhalt’). Consequently, this part of the Treaty would have to be reconsidered in the intergovernmental revision conference of 1996: the existing sanction mechanisms were considered insufficient and new instruments would have to be developed. Yet, the report did not give further details.

The asymmetry of economic and monetary competences in the Treaty was defended as fitting with the principle of subsidiarity. The Bundestag financial committee argued that the Member States’ economic competences should not be transferred to the EU, because this would actually make coping with regional and national problems more difficult. It was in any case clear that a parliamentary majority opposed the idea that EMU would become a transfer union. The cohesion funds were not to be used for general budgetary support. Of all parties, only the PDS/Linke Liste clearly rejected the stability-oriented currency and favoured a Community financial policy “that steers transfer payments to economically

205 See also the concerns of the German Greens, who argued that in case of external macroeconomic shocks affecting individual Member States in particular, it would be difficult for especially economically weaker Member States to still conduct an independent macroeconomic stability politics. For this reason additional mechanisms would be necessary to equalise macroeconomic instabilities between the Member States. BT-Drucksache 12/3895, note 46, at p. 18.
206 BT-Drucksache 12/3895, note 46, at p. 25-26. Similarly stressing the need for progress on political union: Dr. Norbert Wieczorek (SPD), Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10842-10843.
207 BT-Drucksache 12/3895, note 46, at p. 21.
208 BT-Drucksache 12/3895, note 46, at p. 21.
209 BT-Drucksache 12/3895, note 46, at p. 26; see also Waigel, Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10841.
3.3.2 Dismissing Crisis Concerns: Dutch Parliamentary Debate

A comparison with the Netherlands shows similar shortcomings in the political assessment of EMU. Compared to Germany there was less opposition. Most political parties perceived the provisions on EMU as a positive development. Concerns about the loss of monetary sovereignty played a more limited role, because the Netherlands had usually followed the Bundesbank policies anyway, which meant that monetary sovereignty was, in practice, already limited. The government noted that with EMU there would be a real European monetary policy, whereas previously the Bundesbank had delimited the policy space for other Member States, but was led primarily by developments within Germany. The symbolic importance of retaining a national currency did not play a large role.

As in Germany, most parties were attached to strictly maintaining the convergence criteria and most parties welcomed the importance of price stability in the overall EMU framework. Inspired by the German Bundestag, the Dutch Parliament also thought it should have a say about the entry to the third phase of EMU. The ratification legislation...
therefore made the provision that the Dutch government’s position on the fulfilment of the convergence criteria required explicit prior consent of both chambers of parliament. In comparison to the German debates, however, Dutch politicians expressed more concerns about the ECB’s independence, which many felt went too far. Too few safeguards had been put in place to allow for a degree of democratic legitimation of the future ECB’s policies. Although most parties deemed central bank independence important, the independent position of the ECB went beyond the existing status of the Dutch central bank and some degree of political accountability was still considered pivotal.

The possibility of a crisis was raised at a number of points, but did not play a central role in the debates. The Council of State warned that the Member States could have difficulty financing themselves on the capital markets when they no longer had recourse to monetary financing: “In such circumstances in theory even a bankruptcy is not wholly unthinkable.” In a parliamentary expert hearing, Eduard Bomhoff, a professor of monetary economics, also mentioned the risk of a fiscal crisis in Italy and the likelihood that Europe would have to give financial assistance in such a situation. In the absence of the instrument of devaluation, he argued also that EMU would not be in the interest of poorer countries, such as Ireland, Portugal and Greece. They would have to compensate for the loss of devaluation by lowering wages or by emigration. In addition, other European Member States would probably have to aid these countries. Some political parties voiced related concerns during the parliamentary proceedings. For example, the CDA asked the government for a reply to a very critical

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218 The assessment, however, would be based solely on the basis of the convergence criteria and only applied in the relation between the government and the Dutch parliament. See: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 51. The parliament, moreover, adopted a resolution in which the government was requested to provide information on the fulfilment of the convergence criteria in the Member States, see: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 44.


220 Kamerstukken II, 1991-1992, 22 647 (R 1437), A (Advies Raad van State en Nader Rapport), at p. 50: “In deze omstandigheden is in theorie zelfs een bankroetsituatie niet geheel ondenkbaar.” And see further at p. 49-50. The Council also noted that it was unclear whether the excessive deficit procedure would work in practice, at p. 51.


222 The SGP noted, among other things that within EMU the main policy instruments of the Member States to increase competitiveness would be to reduce wages and social norms and the party expressed scepticism about practical effect of the no-bailout provision: Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 11 (Voorlopig Verslag), at p. 144-149; and Kamerstukken II, 1992-1993, 22 647 (R 1437), nr. 17 (Eindverslag), at p. 59. The GPV also argued that difficulties could arise in case of supply shocks “for which in EMU, unlike for example in
article by the American economist Martin Feldstein. Feldstein had argued that EMU should be abandoned, because – among other things – the European Community was not an optimum currency area and because there was no fiscal system in place to absorb asymmetric economic shocks.223

The Dutch government rejected such concerns. It deemed a situation under which Member States would no longer be able to finance themselves on capital markets as “highly exceptional”. Furthermore, in such a situation a government would still be able to cover expenses through taxes.224 At a later stage, the government referred to “situation of a ‘near-bankruptcy’” as “quite hypothetical” and noted that “[t]he ‘no-bailout’-clause in any case prohibits the taking over of obligations by other Member States or the Community.”225 In response to Feldstein’s critical article, the government argued that Feldstein overestimated the effectiveness of using the exchange rate as an instrument of economic policy. The government also maintained that the Community did actually fulfil the conditions of an optimum currency area and that a differentiated national economic policy could sufficiently deal with diverse economic developments in the EU.226
In sum, both in the Treaty negotiations, as well as in the German and Dutch parliamentary debates, the implications of monetary union were not fully addressed. Yet, this shortcoming was not addressed by the GFCC either. Instead, the German Court turned the stability-focus of EMU into a constitutional requirement, which spelled doubt on the possibility of moving towards a full political union.

4. Did the Maastricht Judgment Facilitate Democratic Deliberation?
In the previous sections, I have argued that the GFCC’s Maastricht-Urteil cannot be justified as a remedy for the political institutions’ failure to adequately consider the constitutional implications of the Maastricht Treaty. Regarding the general topic of democracy, the Court partly reiterated democratic concerns already raised at the political level, but also linked the notions of statehood and democracy, thus raising doubts about the potential of enhancing the EU’s democratic legitimacy. In addition, that these political discussions took place in the way they did, cannot be wholly attributed to the Court’s prior case law. The comparison with the Netherlands in this respect showed how the Dutch political debates took a similar form in the absence of a constitutional court. In relation to EMU, the story is different: both the Treaty negotiators, the Bundestag and the Tweede Kamer, as well as the GFCC failed to fully appreciate the implications of EMU. The Court’s assessment, nonetheless, appeared to make matters worse by rendering modifications of the EMU legal framework more challenging.

Notwithstanding these arguments, a different justification for the Maastricht judgment, is that it led to further democratic debate on issues that were not raised within the political institutions, but nonetheless had popular support. This justification fits with a broader diagnosis surrounding the Maastricht Treaty, namely that the difficulties in the ratification process marked a breakdown of the so-called permissive consensus by the public towards European integration. The rejection of the Treaty by the Danes in a referendum and the narrow majority for the Treaty in the French referendum exposed the fact that the broader

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population had more preoccupations about European integration than the political elites. In Germany, the process that led to the constitutional challenge of the Treaty has been typified as a belated response to the political implications of the Treaty, that in other countries were discussed in the context of a referendum.\textsuperscript{228} The judgment also fits with analyses on the politicisation of European integration in post-Maastricht Europe: political debates on Europe have become increasingly politicised over issues of identity, as, in many countries, Eurosceptical parties have come to reject European integration as a threat to national sovereignty and identity.\textsuperscript{229} Within the German context of Maastricht, it was the GFCC that raised similar concerns, thus providing the Euroscepticism that was lacking from the debate within the political branches.

This justification of the \textit{Maastricht} judgment rests on two key elements. Firstly, that the debates within the German Parliament on the Maastricht Treaty did not fully reflect public opinion on the Treaty and that more Eurosceptical viewpoints were hardly discussed. Secondly, that the Court proceedings ensured that these viewpoints could be considered further. I consider both elements in the following subsections, starting with the first in the next subsection.

4.1 German Public Debate before the Maastricht Judgment

Public opinion surveys on the Treaty of Maastricht from 1992 did indicate that the German population had more preoccupations about the Treaty than the overwhelming support in the political branches suggested. According to an opinion poll of August 1992, 44\% of the German population would vote in favour of the Treaty if a referendum were held, but 30\% said they would vote against, and 26\% were undecided. A poll from October in the same year found that 41\% of the German population would vote against the Treaty.\textsuperscript{230} Public opinion enquiries also indicated that the German population had limited knowledge of the Treaty.\textsuperscript{231} Furthermore, the Treaty had not been the object of intense public debate. Debate on the


\textsuperscript{229} See: Liesbet Hooghe and Gary Marks, \textit{A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus}, 2009 1, at p. 17 and p. 21.


Maastricht Treaty remained mostly confined to academia and institutions such as the Bundesbank, whereas public concerns arose over the loss of the D-Mark after critical articles appeared in popular newspapers. The parliamentary proceedings also took place under considerable time pressure, as the government wanted to conclude them before the special European Council in Edinburgh of 10 December 1992, but only introduced the Treaty after the summer break in 1992.

The lack of popular debate on Maastricht has been attributed to the country’s preoccupation with German reunification, the economic recession and a general disinterest. The year of ratification, 1992, was a difficult year for the newly unified Germany. Unification proved costly: rising inflation and high interest rates led to diminishing economic growth and increasing unemployment. In addition, there was an increase in racism, xenophobia and anti-Semitism. A number of violent attacks against foreigners led to fears of a resurgent German nationalism.

Within this context, politicians stressed how Germany needed to show its commitment to a unified Europe to stem fears about revived German nationalism. There was a widespread belief that the Treaty could not fail in Germany. German interest and European integration were construed as compatible, because European integration aimed to protect Germany from itself.

The downside of this overall justificatory frame was that the choice between approving the Maastricht Treaty and rejecting it, was put as a choice between preserving stability and peace in Europe on the one hand, and disorder and disunity on the other. Finance Minister Waigel, for example, argued that the alternative to European integration would be “a return to

235 See for example: BT-Drucksache 12/3366, note 48, at p. 1; the statement by Foreign Minister Kinkel, Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9316-9317; and the statements in Plenarprotokoll 12/126 (Maastricht second plenary), note 50 by Wieczorek Zeul (SPD), at p. 10813; Verheugen (SPD), at p. 10834; Ulrich Briesl, at p. 10876; Chancellor Kohl (CDU/CSU), at p. 10824-10825.
the selfish national fragmentation of Europe” and “instability”. Peter Kittelman of the CDU/CSU bluntly stated that a rejection of Maastricht would take Europe in the direction “of the thirty years’ war” rather than towards “a human, peaceful coexistence.”

These arguments, however, also delegitimised more critical positions on the Treaty, a concern reflected in the statement of Peter Conradi (SPD):

“I do not speak for my party (’Fraktion’), but for some in my party. I speak for those people who feel doubts about the Treaty and who have fears. I take it as wrong to put these people in the corner of the extreme right, to denounce them, as some MEP’s (Europaabgeordnete in the original) do.”

This feature of the German debate entails that opposition to European integration as such is not easy. As Jan-Werner Müller commented in 2010: “Euroscepticism as a principled suspicion of integration (and as a set of nationalist feelings) remains almost a political taboo.”

Nonetheless, concerns about broader popular discontent with European integration did play a role in the political debates, particularly in light of the French and Danish referenda and, as discussed, concerns about losing the D-Mark. They were not ignored, but ideas about their cause and solution diverged.

237 Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9323. The full quote is “Für uns Deutsche wie für unsere Nachbarn liegt die Zukunft in Europa; denn die Alternative lautet: Zurück zur national-egoistischen Aufsplitterung Europas, zurück zu Koalitionen, wechselnden Partnerschaften und zur Instabilität. Wer den Vertrag ablehnt, wird auf den untauglichen Versuch beschränkt, mit den Antworten von gestern die Fragen von morgen zu beantworten.”

238 Peter Kittelmann, Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9387.


240 Peter Conradi (SPD), Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9385.


242 Politicians translated fears about the Treaty as fears about centralisation, bureaucracy, a loss of national identity, as well as fears about the future stability of the common currency. In this sense see for example the contributions in Plenarprotokoll 12/110 (Maastricht first plenary), note 50 of: Kinkel, at p. 9318; Waigel, at p. 9322-9323; Michael Stübgen (CDU/CSU), at p. 9372; Wiczercek-Zeu (SPD), at p. 9329; Graf Lambsdorf (FDP), at p. 9333; Dr. Helmut Haussmann (F.D.P.), at p. 9353. See also: Ulrich Irmer (F.D.P.), Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10817. The SPD and Bündnis 90/Die Grünen held that part of the answer had to be sought in strengthening the social and environmental components of the internal market to
The Bundestag also debated holding a referendum on Germany’s accession to the EU and the Treaty, as had been proposed by the PDS/Linke Liste. The PDS justified this proposal as a means to safeguard popular consent for a decision that would change the constitutional nature of Germany and would affect German sovereignty. For such a decision the parliament itself could not replace the people and a referendum would be necessary to include the German people in the debate.

The CDU/CSU and FDP resisted this call for a referendum and preferred what Otto Graf Lambsdorff (FDP) called an “Aufklärungskampagne”: a campaign in which politicians better explained the benefits and importance of European integration. Some politicians delegitimised the referendum proposal by undermining the credibility of the PDS/Linke Liste as the successor of the GDR’s governing party. Andreas Schockenhoff of the CDU/CSU keep the lasting support of citizens, see e.g.: BT-Drucksache 12/3366, note 48, at p. 3. Some argued that popular discontent stemmed from the EU’s democratic shortcomings. See in Plenarprotokoll 12/110 (Maastricht first plenary), note 50, for example: Heidemarie Wieczorek-Zeul (SPD), at p. 9328; Rita Süssmuth (CDU/CSU), at p. 9332; Otto Graf Lambsdorff (FDP), at p. 9334; Verheugen (SPD), at p. 9349; Staatsminister Herbert Helmrich, at p. 9359-9360; Wolfgang Roth (SPD), at p. 9365; Michael Stübgen (CDU/CSU), at p. 9372; and see also for example Ulrich Irmer (F.D.P.), Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10817. Yet, voices were also heard that seemed to go in the opposite direction. Rita Süssmuth of the CDU/CSU called for enthusiasm for Europe (‘Europabegeisterung’) and recalled a lesson of Monnet: “[T]he closer this Europe comes, the greater the resistance, the more the dream comes true, the greater the danger that it loses energy and strength.” See Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9330 (“Je näher dieses Europa kommt, desto größer werden die Widerstände, je mehr der Traum in Erfüllung geht, desto mehr besteht die Gefahr, daß er an Energie und Kraft verliert.”) In a somewhat similar vein Renate Hellwig (CDU/CSU) stated that politicians needed to persuade the citizens. What was needed was ‘Überzeugungsarbeit’. See: Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9345.

The call for a referendum was explicitly based on Article 20 (2) of the Basic Law, which states that all state authority is derived from the people. See in particular BT-Drucksache 12/3353, note 243, at p. 1-3; and the statement of Gysi (PDS/Linke Liste), Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9339-9340. On arguments for a referendum see also the contributions of Andrea Lederer (PDS/Linke Liste) at p. 9353-9354 and Gerd Poppe, (BÜNDNIS 90/DIE GRÜNEN) at p. 9370-9371. In the final plenary support was expressed also by: Modrow, Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10820; Ingrid Köppe (BÜNDNIS 90/DIE GRÜNEN), Plenarprotokoll 12/126 (Maastricht second plenary), note 50, at p. 10884-10885.

Similar pleas were made by e.g.: Renate Hellwig, CDU/CSU, at p. 9345-9347; Helmut Haussmann, CDU/CSU, at p. 9352 and 9353; Wolfgang Roth (SPD), at p. 9364-9365; Hans Stercken (CDU/CSU), at p. 9366-9367; Cornelia von Teichmann (FDP), at p. 9368; Wilfried Seibel (CDU/CSU), at p. 9376; Andreas Schockenhoff (CDU/CSU), at p. 9384; Peter Kittelmann (CDU/CSU), at p. 9387-9388.
pointed out that the party’s predecessors in the GDR had suppressed and silenced the people.²⁴⁶

Yet, the idea of holding a referendum did receive serious consideration. An important reason against was constitutional in nature: it would not sit well with Germany’s constitutional ordering as a representative democracy.²⁴⁷ The introduction of referenda and other forms of direct democracy had previously been discussed in the Joint Constitutional Committee. In that context, most of the familiar reasons for and against referenda seemed to have been considered.²⁴⁸ The SPD and Bündnis 90/Die Grünen had proposed to supplement the parliamentary system with elements of direct democracy such as referenda and popular initiatives as a way to strengthen German democracy.²⁴⁹ The CDU/CSU and FDP opposed this proposal largely on constitutional grounds: the breakdown of the Weimar Republic had led the Parliamentary Council in 1949 to deliberately choose a system of parliamentary-

²⁴⁶ The original full quote is: “Es ist schon ein Treppenwitz, wenn ausgerechnet die Partei eine Volksabstimmung über den Vertrag von Maastricht fordert, deren Vorgänger in der DDR bis vor wenigen Jahren die Menschen geknebelt und mundtot gemacht hat.” Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9384. See also the statement of Michael Stübgen (CDU/CSU), at p. 9372, who called the party far removed from the other parties in its basic beliefs and stances.

²⁴⁷ Foreign Minister Kinkel stated that the Basic Law made a basic choice for representative democracy: Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9319. In this vein, the Bundestag’s financial committee had stated that on the basis of the German constitution a referendum was “neither required nor possible”. (BT-Drucksache 12/3895, note 46, at p. 23) The PDS/Linke Liste explicitly tried to repudiate such arguments by invoking the views of constitutional experts that the Basic Law did not prohibit referenda. Gysi (PDS/Linke Liste, Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9339-9340.

²⁴⁸ The issue was discussed on 14 may 1992 in the Committee’s sixth meeting. A further hearing with experts was held on 17 June 1992. In the final meeting of the committee on 11 February 1993 it turned out that no proposal could carry the required two-thirds majority. BT-Drucksache 12/6000, note 55, at p. 83.

²⁴⁹ They named the alienation of parts of the population from the political parties as an important reason, evinced by increasing numbers of non-voters and the turn of many to radical parties. In addition, they argued that experiences with direct democracy had shown a willingness of the wider population to actively contribute to the community. The introduction of participatory elements would strengthen the people’s position as the bearer of sovereignty by increasing influence on its exercise. They also argued it would strengthen Germany’s democratic nature, because a democracy rests on active, interested and responsible citizens. In this respect, they contended that the situation had changed with respect to the years in which the German Basic Law was concluded. Unlike then, one could now build on a firm democratic self-understanding of the German people built up over forty years and a peaceful popular revolution in the former GDR. The German people could be considered ‘mature’ (‘reif’), ‘responsible’ (‘verantwortlich’) and ‘rational’. BT-Drucksache 12/6000, note 55, at p. 84. The opponents offered a host of reasons against introducing forms of direct democracy. These would: only allow for a yes or no decision and therefore not allow for the necessary finding of compromises needed in a pluralistic society; endanger the protection of minorities, because neither the groups initiating referenda nor its voters would be committed to the common good; ask ordinary citizens to decide political decisions that would often be too complex for them to decide in an objective manner and would raise problems of populism; benefit well-organised particular interests and give non-democratically legitimated associations instruments to enhance their power; and lead to a weakening of Germany’s federal structure, as it would disrupt the legislative power balance between the Bundestag and Bundesrat. Finally, in their view, it would be illusionary to expect that the introduction of plebiscitary elements of democracy would help in overcoming the alienation of people with politics. Political parties would just use them to their advantage and would hence be able to escape their parliamentary responsibility. BT-Drucksache 12/6000, note 55, at p. 85-86.
representative democracy in the Basic Law. Weimar’s parliamentary democracy had stood under permanent pressure of plebiscitary decision-making possibilities, even though in practice few such decisions were taken:

“Precisely on the basis of this historical experience did the Parliamentary Council for the Grundgesetz deliberately not include forms of direct democracy – with the exception in the area of municipal self-determination (Article 28 GG) and in the area of the ‘Neugliederung’ (Article 29) [the revision of the Länder territories, NdB].”

The proposals of the SPD and Bündnis 90/Die Grünen consequently did not carry the required two-thirds majority. In the subsequent deliberations on the Maastricht Treaty, the SPD submitted that if the possibility of referenda has been introduced in the Constitution, the Maastricht Treaty would have been an occasion for holding a referendum. However, the party did not support the demand for a referendum on only the Maastricht Treaty. In sum, the political branches were not deaf towards public concerns about the Treaty, but for various reasons they rejected directly involving the people, whereas politicians themselves voiced little opposition to the idea of European integration as such.

4.2 Facilitating Euroscepticism: Debate in the Context of, and after the Maastricht Judgment

Within this context, the Court can be seen to have facilitated further democratic debate in two ways. First, the Court proceedings provided an additional forum for certain voices to make their concerns heard. The expansive interpretation of Article 38 BL, moreover, provided that in the future, German citizens would have an additional forum to voice their misgivings about European integration. Secondly, by incorporating more Euro-critical elements into its judgment, the Court itself provided a form of counter-politics to the strong pro-European consensus. It put forward arguments raised in other countries by Euro-critics. In an analysis of German public debate surrounding the judgment, Claudia Schrag Sternberg notes how the Court proceedings impacted on public discourse:

250 BT-Drucksache 12/6000, note 55, at p. 85. The proponents of introducing forms of direct democracy in the Basic Law contested this reading. In their view the Weimar republic did not collapse due to popular referenda. See: BT-Drucksache 12/6000, note 55, at p. 84.
251 Wieczorek-Zeul (SPD), Plenarprotokoll 12/110 (Maastricht first plenary), note 50, at p. 9329; BT-Drucksache 12/3895, note 46, at p. 45.
252 For example similar arguments were raised within the French referendum debates: Claudia Schrag Sternberg, The struggle for EU legitimacy Public contestation, 1950-2005, at p. 116-122.
“In the German public sphere, the court’s decision and the claimants’ arguments boosted discourses that linked concepts of demos (people as in body politic) and ethnos (people as in ethno-cultural community). The possibility of a European Staatsvolk began to be discussed widely – and often in terms of the lack of shared European language, history, and culture.”253

Manfred Brunner, the only complainant whose claim was held admissible, used the significant public attention surrounding the proceedings to launch a book with his vision on Europe.254

The Maastricht-Urteil itself was a partial victory for the various sides to the dispute.255 For this reason, it partly bolstered the position of Euro-critics. Following the Court’s ruling, Manfred Brunner declared the single currency “dead and buried”.256 Likewise his lawyer Karl-Albrecht Schachtschneider - the ‘Euro-Fighter’257 who has attacked almost all the important steps in European integration since the Treaty of Maastricht - has held that “the Federal Constitutional Court has made the counterpolitics, not the government, not the Parliament.”258 Schachtschneider’s quote reflects how the German Court provided an avenue for Euro-critics to voice their dissent about European integration.259 A concern about this role of the Court, however, is that it potentially gives certain political viewpoints an elevated

253 Ibid, at p. 123.
258 Interview with Karl-Albrecht Schachtschneider 29 May 2015.
259 In addition, the judgment seemed to coincide with a change in the political climate, where resistance to European integration seemed more acceptable. On 1 November 1993, the day at which the Treaty entered into force, the Bavarian Prime Minister of the CSU, Edmund Stoiber, gave a critical interview in which he rejected the idea of a federal European state. This interview, however, was not explicitly related to the judgment, although indirectly the Court’s ruling may have contributed to a climate in which such critical views were more acceptable. Roger Morgan and Thomas Christiansen, The New Germany and European Union after Maastricht: The Difficult Way Ahead. The Construction of Europe: Essays in Honour of Emile Noël 1994 113, at p. 124-126. Ingo Winkelmann, Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993, Dokumentation des Verfahrens mit Einführung,1994 Winkelmann, at p. 62.
status not matched by their actual political support. In this respect, the mismatch between a more Euro-sceptical public and the strong pro-European stance of political elites nonetheless may be seen as a justification.

A second concern is more pressing, namely that the GFCC interprets a constitutional framework that is supposed to bind democratic politics. The Court therefore seems badly placed to allow political opposition, as it rules on the legal framework in which the political contest takes place. Nonetheless, the Maastricht judgment did not really constrain subsequent debate within the political branches, because it was sufficiently open to different interpretations. However, neither did the judgment lead to much further debate. Only a few politicians contested the judgment and generally there is little evidence that it altered political positions or views on the future of European integration in the immediate aftermath of the judgment. The political reception of the Maastricht judgment by both the German Government and the Bundestag showed that politicians predominantly framed the judgment as if it coincided fully with their previous political viewpoints and positions on the Treaty, and on European integration more generally.

In a brief press conference devoted to the Maastricht judgment, Chancellor Helmut Kohl focused on the fact that the Maastricht Treaty had been confirmed as compatible with the Constitution:

“For the Federal Government, the decision from Karlsruhe provides an important milestone for the European integration process and its continuation. With this decision the road is free to bring into force the Treaty of Maastricht by 1 November 1993.”


In a further assessment of the judgment, the Government noted that the judgment had confirmed and encouraged the government’s politics directed at European unification. The more Eurosceptical elements in the Court’s judgment did not leave a clear mark. The government saw the openness of the Basic Law towards Europe affirmed, as well as its position that the gradual expansion of the Community would have to result in a more transparent decision-making process and in further powers of the European Parliament being developed. The Government did note that substantial competences would have to remain with the Bundestag. Nonetheless, it also noted that the GFCC had not determined whether the Basic Law would allow or exclude Germany’s participation in a European state.

On 20 October 1993, a Bundestag debate was devoted to the implications of the Maastricht-Urteil. There, both the coalition parties CDU/CSU and F.D.P., as well as the SPD, framed the decision to their political advantage. Wilfried Seibel (CDU/CSU) perhaps best summed up the debate by declaring that the Court’s judgment must have been good, given “that every side has declared itself winner.” In this vein, Klaus Kinkel, Minister of Foreign Affairs, declared the decision “a success for the politics of the German government and also a success for Europe.” In a similar manner, Finance Minister Waigel proclaimed that the judgment was a milestone for “our European politics”. Following the GFCC’s judgment, fundamental critique on the Maastricht Treaty could no longer be justified. The SPD instead used the ruling to criticise Chancellor Helmut Kohl and its government. Heidemarie Wieczorek-Zeul claimed that:

“The Federal Constitutional Court has agreed with all issues that the SPD has anchored in the ratification procedure in the Bundestag and the Bundesrat, with the
German Bundestag and with SPD’s appeals in the ratification debate. One can say: if the Federal Government had gone forward in the way it had planned for the ratification, it would have definitely run against the wall, and the Constitutional Court’s judgment would have run fully against it.”

The political responses to the judgment do indicate that the judgment was perceived as supporting previous political claims to enhance the democratic nature of the EU. From various sides, the Maastricht judgment was used to stress the need for sufficient parliamentary oversight of the executive acting in EU affairs. The GFCC’s scepticism towards the establishment of democracy on the European level was not clearly taken up by the Bundestag. For example, Peter Kittelman (CDU/CSU) merely noted how the judgment had confirmed the democratic importance of both the Bundestag as well as the European Parliament. Foreign Minister Kinkel stated that the government would continue to strive for a stronger European Parliament and noted positively that the GFCC had explicitly emphasised the European Parliament’s complementary role.

Likewise, there were few signs that politicians had altered their political positions regarding the future development of European integration. According to Foreign Minister Klaus Kinkel, the judgment entailed no alteration of German European politics and did not exclude future integration: the democratic foundations of the Union could be built up in step with proceeding integration, as “a confession to proceeding European integration.” A united Europe remained the goal. He did admit that the citizens did not want a European ‘Zentralstaat’ and that the EU would not replace the nation-states. It would develop into a union of its own sort.

269 Wieczorek-Zeul, Plenarprotokoll 12/181 (Maastricht judgment debate), note 261, at p. 15613.
270 Ibid., at p. 15613; and in the same debate: Kittelman (CDU/CSU), at p. 15614; Stübgen (CDU/CSU), at p. 15628; Verheugen (SPD), at p. 15619; Hellwig (CDU/CSU), at p. 15620-15621. Members of Parliament from the FDP, the CDU/CSU and the SPD, as well as Foreign Minister Kinkel on behalf of the government stressed that there could be no automatism into the third stage of EMU. See: Dr. Helmut Haussmann (F.D.P.), at p. 15612; Wieczorek-Zeul (SPD), at p. 15613; Kinkel, at p. 15617; ZARHEIDE (F.D.P.), at p. 15619; Wilfried Seibel (CDU/CSU), at p. 15624. The SPD also contended that the judgment would help end the secret nature of European decision-making, see: Wieczorek-Zeul (SPD), p. 15613-15614; Verheugen (SPD), at p. 15619.
271 The key issue in his view was that European unification had to be better democratically legitimated, more transparent, close to its citizens and predictable. Kittelman, Plenarprotokoll 12/181 (Maastricht judgment debate), note 261, at p. 15614.
272 Kinkel, Plenarprotokoll 12/181 (Maastricht judgment debate), note 261, at p. 15617 See in a similar vein: BT-Drucksache 12/6520, note 261 at p. 692.
273 Kinkel, Plenarprotokoll 12/181 (Maastricht judgment debate), note 261, at p. 15617.
274 Kinkel, ibid., at p. 15617-15618.
European integration fully open, including to a United States of Europe. Nonetheless, Finance Minister Waigel adopted a more cautious tone, pointing out that the CSU was committed to a Europe of the nation-states: “More than a Staatenverbund, but certainly not a Federal State (Bundesstaat).”

Thus, despite its Euro-critical tone, the GFCC’s judgment could be interpreted as support for efforts to further democratise the EU, although the political impact of the judgment appears to have been limited. The special European Council of 29 October 1993 was devoted to the implementation of the Maastricht Treaty and paid special attention to the democratic deficit. The Conclusions asked “all the Institutions and political bodies to combine their efforts for the purpose of effectively promoting - in the letter and in the spirit – the democratic dimension of the Union.” Whether the GFCC’s Maastricht judgment helped bring about this conclusion is an issue for further research. Still, in light of the prior political deliberations, it is clear that strong support for enhancing the EU’s democratic features existed within Germany’s political institutions well before the Court’s ruling.

5. Conclusion
At Maastricht, the GFCC did not function as a ‘forum of principle’ compared to a political process that did not take into account the constitutional implications of the Maastricht Treaty. Despite a strong pro-European political consensus, the Bundestag extensively discussed the Treaty’s constitutional implications and noted the democratic shortcomings of the EU as a particular concern. In addition, it is not clear that the GFCC’s prior case law or the possibility of constitutional review decisively impacted on the German parliamentary deliberations. A comparison with the Dutch parliamentary debates shows that similar constitutional concerns were raised about the Treaty in the Dutch debates, despite the absence of possible constitutional review.

275 Verheugen, ibid., at p. 15620.
276 Waigel, ibid., at p. 15622.
277 Interview with Jean-Paul Jacqué, 8 December 2015; see similarly Franz Mayer, ‘Kompetenzüberschreitung und Letzentscheidung’ (PhD, Ludwig-Maximilians-Universität München 2000), at p. 134. Mayer notes that political reactions were hardly visible and that the judgment did not play a significant role in the revision conference that led to the Treaty of Amsterdam.
The political deliberations on the monetary union tell a different story. In retrospect, the shortcomings of the stability-oriented framework were not fully addressed, either in the Treaty negotiations, or in the subsequent German and Dutch ratification debates. The focus on price stability as a goal of overriding importance in the EMU architecture was hardly seen as raising a democratic concern. That a monetary union without an economic and budgetary union would be highly fragile – as the Euro-crisis has exposed - was likewise not the subject of extensive political debate. Yet, in this respect the GFCC fared no better. Firstly, because the Court turned the stability orientation of EMU into a constitutional condition for German participation. Secondly, because its judgment raised doubts about the possibility of achieving a political union that could help overcoming EMU’s shortcomings.

Ultimately, the main difference between the GFCC’s assessment and the political assessment of the Treaty, lay in its tone. Whereas the political branches had stressed the importance and the potential of European integration, the GFCC focused on its limitations. By connecting the theme of democracy to sovereign statehood, a shared national identity and public sphere, the GFCC raised concerns that, in the wake of Maastricht, have often been voiced by Eurosceptics. The Court provided an additional forum to those critical of European integration to raise their concerns about European integration and partly reflected that concern within its judgment. In the context of Maastricht, the Court’s role in allowing further debate on the Treaty still seemed to work: public debate on the Treaty had been limited and started late; opinion polls indicated that the political branches were more favourable to the Treaty than the wider public; Euroscepticism was still a taboo within German political debate; the Maastricht-Urteil did lead to the consideration of new issues, particularly that of national identity; and at the same time, the constitutional limits of European integration articulated by the Court still allowed several interpretations and therefore did not really constrain political debate.

Following Maastricht, the GFCC adopted a stance more accommodating of European integration and left room for politics. In this vein, the GFCC rejected as “manifestly
unfounded” the constitutional complaints against Germany’s participation in EMU’s third stage, even though the convergence criteria had been interpreted flexibly.  

In the longer term, however, the outlook has proved to be more problematic, particularly after the Court returned to the themes of Maastricht in its 2009 Lisbon judgment. Within the context of the Euro-crisis, the constitutional constraints imposed on European integration have become troublesome: by putting doubt on the realisation of democracy at the European level, but at the same time approving Maastricht, the Court turned the failure of Maastricht into a potentially larger constitutional problem. If the failure of Maastricht was the absence of a political and democratic structure that would make EMU viable as a democratic project, the GFCC put into question the idea that such a union could ever be achieved. In the context of the Euro crisis around twenty years later, this has become a pressing concern that calls into question the democratic justification of the GFCC’s EU-related case law.


CHAPTER 6 - THE EURO CRISIS AND THE JUDICIALISATION OF EURO-POLITICS

1. Introduction

The GFCC returned to the core tenets of its Maastricht judgment with its ruling on the Lisbon Treaty in June 2009.1 The controversial ruling approved the Treaty, but imposed several constraints on European integration that appeared much more restrictive than at Maastricht. The Karlsruhe judges now ruled out that Germany could accede to a European federal state under the Basic Law and were highly critical of the EU’s democratic credentials. At the same time the Court seemed to reject a solution to the EU’s democratic deficit, because otherwise the EU would become a state. Moreover, the Karlsruhe judges held that extensive competence transfers were not permitted in five areas: criminal law, the monopoly on the use of force, fundamental fiscal decisions, decisions on the social state and decisions with particular cultural importance, such as family law and education.2 As a result, the judgment was widely interpreted as limiting the prospects for further European integration. An analysis by the Commission legal service concluded that “Karlsruhe appears to leave (at best) limited room for any future treaties seeking to transfer further competencies to the EU.”3

Yet, just a few months later, it emerged that the euro area could face a major crisis, as problems concerning Greece’s sovereign debt position became apparent.4 In the spring of

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1 Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2:08 (Lisbon judgment).
4 The announcement by the newly elected Greek Prime Minister, George Papandreou, of 16 October 2009 that the previous Greek debt and deficit figures had been fundamentally wrong is generally seen as the starting point for the Euro crisis. It led investors to distrust Greek government bonds and set off a sharp rise in the borrowing costs for Greece. The initially communicated deficit figure for 2009 of 6.7% of GDP had to be revised to 12.7% and ultimately proved to be beyond 15% of GDP. See on these events: ‘Papandreou tries to prop up the pillars’ The Economist (17 December 2009); Andrew Willis, ‘Revised Greek deficit figures cause outrage’ EU Observer (20 October 2009) https://euobserver.com/economic/28853; the Eurostat report Greek debt; European Commission, ‘Report on Greek Government Deficit and Debt Statistics’ (Brussels 8 January) COM(2010) 1 final; Jean Pisani-Ferry, The Euro Crisis and its Aftermath (Oxford University Press Oxford & New York 2013), at p. 8-9; Thomas Mayer, Europe’s Unfinished Currency (Anthem Press London & New York 2012), at p. 107-108.
2010 problems had started to spread to other countries. By May 2010 the financial stability of the euro area as a whole had come under threat with potentially disastrous consequences for the global economy. In response, the euro area Member States and the EU institutions adopted an array of measures that have changed the face of the monetary union: mechanisms of financial assistance to aid euro area Member States in financial difficulties, more extensive supervision on national budgets and strengthened economic governance, as well as an EU Banking Union. The crisis has led to a significant expansion of the EU’s powers, which affects politically sensitive areas, such as the budgetary powers of national parliaments. A discussion about substantial further changes to EMU still continues.

The unprecedented changes in the EU’s powers have raised various constitutional concerns and a great deal of constitutional litigation before the GFCC, as well as other national constitutional courts. In multiple crisis-related judgments, the GFCC has held that the German Bundestag must retain control of fundamental budgetary decisions. Because decisions on taxation and public spending are key political choices that often go to the core of what democratic politics seems to be all about, the GFCC has a point. Yet, the Court’s insistence on the Bundestag’s budgetary powers hardly takes account of the significant interdependencies that already exist between the EMU Member States. In fact, the Member States’ decision-making about economic policy is restricted and the euro crisis has exposed how Member States can be faced with adverse economic developments that they no longer control. Within debates over the monetary union, several commentators therefore argue that budgetary powers should be transferred to the EU in order to make the monetary union viable and ensure political control over economic policy.

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6 'No going back' The Economist (13 May 2010)
8 See for example: European Commission, 'A blueprint for a deep and genuine economic and monetary union' (Brussels 30 November) COM(2012) 777 final/2; European Commission, 'Reflection Paper on the Deepening of the Economic and Monetary Union' (Brussels 31 May) COM(2017) 291; Jean-Claude Juncker, 'Completing Europe's Economic and Monetary Union (Five Presidents' Report)' European Commission (Brussels 22 June); Herman van Rompuy, 'Towards a Genuine Economic and Monetary Union (Four Presidents' Report)' (Brussels 26 June) EUCO 120/12.
9 For an overview of several constitutional concerns raised in the legal debate, see: Thomas Beukers, 'Legal Writing(s) on the Eurozone Crisis' (2015) 11 EUI Working Papers.
As I aim to show in this chapter, the GFCC’s rulings constrain political debate over various alternatives for EMU’s future. There are several signs that the room within the Basic Law for further European integration is largely exhausted: it seems that virtually every significant new step in the European integration process will now be challenged before the Karlsruhe Court, and the GFCC’s case law has had notable effects on the political process in Germany and at the European level. The Court’s insistence on German budgetary sovereignty reinforces a type of politics in which financial assistance is given under strict conditionality and helps to discredit ideas that the EU should have more competences in economic and fiscal policy, or that the Member States should jointly issue debt. A more positive development of the GFCC’s case law is that the Court has strengthened the Bundestag’s position in EU affairs, contributing to better parliamentary control of the executive operating at the EU level. I discuss this development in the next chapter, which focuses specifically on parliamentary oversight.

The chapter follows a slightly different plan from the previous one. Given the variety of GFCC cases and political debates, the chapter focuses on the German situation and draws on the Dutch situation only towards the end as a comparison. My argument consists of the following steps. Section 2 first gives a very brief outline of the EU’s response to the crisis as necessary context to the role of the GFCC during the crisis. Section 3 subsequently discusses the main elements of the GFCC’s euro crisis case law. In section 4, I argue why the GFCC’s national understanding of democracy offers only a partial perspective on the democratic concerns that have arisen out of the crisis and why it privileges particular political viewpoints. Section 5 discusses the role of the GFCC case law in the German political debates on the euro crisis and shows how the GFCC’s case law restricts political deliberation over EMU’s future. In section 6, I discuss how the GFCC’s case law impacted on the decision-making at the EU level. Section 7 discusses the crisis debates in the Dutch Tweede Kamer and shows how sovereignty concerns are a key part of Dutch political debate. I thus reject the idea that the Netherlands should introduce constitutional review to ensure better consideration of constitutional issues in political debates on European integration. The conclusion finally sums up the argument.

2. Fixing the Monetary Union? The EU’s Euro Crisis Response
The announcement by Greek Prime Minister George Papandreou of 16 October 2009 is generally seen as the starting point of the euro crisis. His declaration that the previous Greek
debt and deficit figures had been fundamentally wrong, led investors to distrust Greek government bonds and set off a sharp rise in the borrowing costs for Greece. In the spring of 2010, problems spread to other countries culminating in a European-wide sovereign debt crisis. The EU’s response to that crisis can be divided into three categories: the establishment of financial assistance mechanisms, more extensive supervision on national budgets and strengthened economic governance, and new financial market regulation, primarily in the form of a banking union.

2.1 Providing Financial Assistance
The first of the assistance mechanisms was the Greek loan facility agreement, agreed upon by the euro area Heads of State, or Government, on 25 March 2010 and adopted after much initial hesitation. The facility consisted of coordinated bilateral loans from the euro area Member States, to Greece. In May 2010, two further assistance mechanisms were set up, as the loan facility to Greece proved insufficient to put a halt to the crisis. The first was the European Financial Stabilisation Mechanism (EFSM): an assistance mechanism adopted under EU law allowing the Council to grant financial assistance of up to €60 billion, if necessary, to preserve the stability of the euro area. The second was the European Financial Stabilisation Mechanism (EFSM): an assistance mechanism adopted under EU law allowing the Council to grant financial assistance of up to €60 billion, if necessary, to preserve the stability of the euro area.

10 The initially communicated deficit figure for 2009 of 6.7% of GDP had to be revised to 12.7% and ultimately proved to be beyond 15% of GDP. See on these events the sources referred to in note 4.
13 By May 2010 the financial stability of the Euro area as a whole had come under threat with potentially disastrous consequences for the global economy as a whole. See: ‘No going back’ The Economist (13 May 2010).
Stability Facility (EFSF): a special purpose vehicle (SPV) registered as a company under Luxembourg law with the euro area Member States as its shareholders, established outside the EU Treaties’ framework and with the capacity to grant financial assistance up to a total of 440 billion euros.\(^{15}\) The EFSF was subsequently changed twice. In March 2011, the Heads of State or Government of the euro area agreed to increase their guarantee commitments to the EFSF from 440 billion euros to 780 billion euros to make the lending capacity fully effective. In July 2011 they provided the EFSF with additional powers.\(^{16}\)

The European Stability Mechanism (ESM) is the successor of the EFSF: a permanent assistance mechanism based on a treaty under public international law capable of providing up to 700 billion euros in financial assistance. It is backed up by capital from the euro area Member States and finances its activities through the proceeds of the bonds it issues.\(^{17}\) The EU Heads of State or Government decided to establish the ESM at the European Council of 28-29 October 2010.\(^{18}\) The Member States signed the Treaty on 2 February 2012. The ESM’s establishment was accompanied by an amendment of Article 136 TFEU, that inserted a new paragraph (3) confirming the ability of the Member States to set up a stability mechanism. Assistance under all four mechanisms – the Greek loan facility, the EFSM, EFSF and EFSF – is tied to conditionality: Member States receiving assistance have to agree to extensive economic adjustment programmes as a condition for funds.\(^{19}\)

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\(^{15}\) Decision-making proceeded on the basis of unanimity with the exclusion of the beneficiary state. The EFSF’s last assistance programme expired on 30 June 2015. See further: http://www.efsf.europa.eu/about/index.htm. The EFSF provided assistance with the proceeds of the bonds that it issued on the basis of the Member States’ financial guarantees. The framework agreement between the Member States and the EFSF on the arrangements for the guarantees and the procedure for giving of financial assistance was concluded on 7 June 2010. See the letter of the Dutch Minister of Finance: Kamerstukken II 2009/2010, 21 501-07, 739.

\(^{16}\) These were: the power to intervene in secondary markets to avoid contagion, to finance and recapitalize financial institutions through governments and to provide precautionary credit lines to countries under pressure from the financial markets. Statement by the Heads of State or Government of the Euro Area and EU Institutions, of 21 July 2011 at http://www.consilium.europa.eu/media/21426/20110721-statement-by-the-heads-of-state-or-government-of-the-euro-area-and-eu-institutions-en.pdf, last accessed on 15 December 2017; see also Alberto De Gregorio Merino, Legal Developments in the Economic and Monetary Union During the Debt Crisis: the Mechanisms of Financial Assistance, 2012 1614, at p. 1620.

\(^{17}\) The types of assistance that can be granted are the same as those under the EFSF, except that the ESM also has the competence to recapitalize banks directly. See: ‘ESM direct bank recapitalisation instrument adopted’, https://www.esm.europa.eu/press-releases/esm-direct-bank-recapitalisation-instrument-adopted, last accessed 15 December 2017. The capital is divided in paid-in shares and callable shares. The Member States’ capital shares are based on their capital subscription key to the ECB.


In addition to these mechanisms, the ECB has taken on an expanded role. Most noteworthy is the ECB’s policy of Outright Monetary Transactions (OMT), announced at the height of the crisis in August 2012. With OMT the Bank committed to buy unlimited amounts of sovereign bonds on the secondary markets. The policy has been widely credited with calming sovereign debt markets and bringing the euro crisis under control. The mere announcement of the programme caused euro area government bond spreads to drop, and the programme never had to be put in practice. Yet the policy was also controversial, leading to constitutional challenge in Germany.

2.2 Tightening Budget Rules and Enhancing Economic Governance

The second pillar of the EU’s crisis response consists of measures to enhance budgetary and economic surveillance. Several of these measures aimed to address the weaknesses of the Stability and Growth Pact adopted in 1997. The Stability and Growth Pact was meant to further strengthen the achievement of sound national budgetary policies after entry into the third stage of EMU. It consisted of a preventive arm for the prevention of excessive

agreement and Article 2 (1) of the EFSF Framework agreement. These conditions are laid down in memoranda of understanding negotiated between the Member State concerned and the Troika of the Commission, ECB and IMF. The Commission signs the agreement on behalf of the Council or euro-area Member States respectively, with the Member State concerned. The Troika is also tasked with monitoring compliance with the conditionality attached to assistance programmes. See: Articles 3 and 4(2) EFSM Regulation; and Articles 2 and 3 of the EFSF Framework Agreement. See also Article 13 of the ESM Treaty.

A prior scheme was the 2010 Securities Market Programme (SMP). This programme, however, was not fully successful, partly because the modalities were unclear, the programme was limited in size and the ECB had no effective way of imposing reforms on Member States it helped. In the case of Italy the ECB attempted to impose reforms on Italy as a condition for the buying of Italian government bonds. ECB President Trichet and Italian Central Bank Governor sent a letter on 5 August 2011 in which they laid down several structural reforms that Italy had to implement. However, after the ECB started buying bonds, the Italian government backtracked on the reforms. See on these issues: Thomas Beukers, 'The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention’ (2013) 50 Common Market Law Review 1579. at p. 1598-1601 and Zsolt Darvas, 'The ECB’s magic wand’ (2012) 47 Intereconomics 266.


budgetary deficits, and a corrective arm on the imposition of sanctions in case such deficits existed. However, in 2003 the Stability and Growth Pact was effectively suspended. During the crisis, several measures were intended to reinstate respect for budgetary discipline by reinforcing the system of sanctions in the Stability and Growth Pact.

One of these measures is the Treaty on Stability, Coordination and Governance, also known as the Fiscal Compact. The Fiscal Compact is an international Treaty concluded between the EU Member States, excluding the United Kingdom and the Czech Republic. The Pact requires its parties to implement a balanced budget rule in national law and a correction mechanism “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes.” The inclusion of strict budgetary requirements in the form of a treaty was meant to reduce the risk that they would be softened in the future, as had happened with the Stability and Growth Pact.

27 The first of the series of measures adopted was the so-called Six-Pack, a package of five Regulations and one Directive adopted in November 2011 that aims to improve the surveillance of budgetary and economic policies. Two further Regulations, known as the Two-Pack, supplemented the Six-Pack in May 2013 and aim to further strengthen surveillance of Eurozone Member State budgets. For further details on these measures see: Alicia Hinarejos, The Euro Area Crisis in Constitutional Perspective, 2015, at p. 30-31 and p. 34-35; and Kenneth Armstrong, ‘The new governance of EU fiscal discipline’ (2013) 38 5 European Law Review 601, at p. 601-617.
28 Article 3(2) TSCG. Article 3(1)(b) of the Treaty states that this balanced budget rule “shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5 % of the gross domestic product at market prices.” The model of Germany’s constitutional debt brakes inspired the Fiscal Compact: Interview with EU official #2, 3 November 2013. The duty to implement the budgetary norms into national law is subject to review by the CJEU. See: Article 8 TSCG in combination with Article 273 TFEU.
2.3 Regulating Financial Markets and Establishing a Banking Union

The third pillar of the EU’s crisis response concerns financial regulation, the Banking Union in particular. The EU Banking Union is an EU-level system for both the supervision and resolution of euro area banks. It consists of two pillars: the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). The proposed third pillar of the Banking Union is a common European Deposit Insurance Scheme that is, however, still under negotiation. The SSM brings the supervision of credit institutions of the euro area Member States under a common supervisory system. The SRM is the mechanism for the resolution of failing banks. It consists of an EU level authority that decides on the schemes for the resolution of banks - the Single Resolution Board - and a common resolution fund - the Single Resolution Fund. The Single Resolution Fund is a fund for the resolution of failing banks and is financed by contributions from banks. It is partly based on an intergovernmental agreement concluded between the EU Member States except the UK and Sweden concluded on 21 May 2014.


31 Banks from non-Euro-area Member States can fall under the Single Supervision Mechanism if these Member States join the mechanism.


33 The SSM does not apply to all supervisory tasks, see Niamh Moloney, European Banking Union: Assessing its Risks and Resilience, 2014 1609, at p. 1631. Banks that are “significant” are brought under direct supervision by the ECB, whereas this “significance” is determined by size, economic importance and the extent of cross-border activities. The national supervisory authorities remain responsible for the supervision of smaller banks. See Article 6 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. 2013 L 287/63 (SSM Regulation).

34 The fund consists of national compartments that are gradually merged over the course of eight years. During the initial build-up of the Single Resolution Fund, bridging finance is provided by each participating Member State in the form of “a harmonised Loan Facility Agreement” with the Single Resolution Board. The maximum aggregate amount of these loans amounts to 55 billion Euros. Yet, these are to be used as a last resort. See: Statement on Banking Union and bridge financing arrangements for the Single Resolution Fund adopted by Ministers of the 28 Member States meeting in the margins of the Council (ECOFIN) of 8 December 2015, at http://www.consilium.europa.eu/nl/press/press-releases/2015/12/08/statement-by-28-ministers-on-banking-union-and-bridge-financing-arrangements-to-srf/pdf last accessed on 15 December 2017.
3. The GFCC’s Assessment: Protecting Budgetary Sovereignty

3.1 Main Elements of the Case Law

The GFCC has addressed constitutional concerns about Germany’s participation in the crisis measures in multiple judgments. It has ruled on the constitutionality of the Greek loan facility and the EFSF, the delegation of the parliament’s budgetary responsibility to a special committee of nine Bundestag members, the information rights of the Bundestag on EU affairs, the ESM and the Fiscal Compact, the ECB’s policy of Outright Monetary Transactions (OMT) and most recently the ECB’s Expanded Asset Purchase Programme (EEA). All of these cases have focused on the democratic nature of the euro crisis measures and their implementation in Germany, although none of the crisis measures were found to have violated the German Basic Law. A case on the legality of the Single Supervisory Mechanism (SSM) is still pending.

These rulings have two main elements. Firstly, at various points the GFCC has demanded enhanced participation and information rights for the German Bundestag. In this sense, the Court empowered its national parliament. Secondly, the GFCC insists that the Bundestag must retain its budgetary powers. This requirement also subjects the Bundestag’s powers to constitutional limits and raises a democratic concern.

The Court’s case law builds on its interpretation of Article 38 (1) BL adopted at Maastricht: the transfer of too many Bundestag powers to the EU would hollow out the substance of the right to vote in a manner incompatible with the democracy principle of Article 20 (1) and (2)...

35 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF).
36 Bundesverfassungsgericht, judgment of 28 February 2012, 2 BvE 8/11 (Neuner Gremium).
38 Bundesverfassungsgericht, judgment of 12 September 2012, 2 BvR 1390/12 (ESM interim ruling); Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling).
39 Bundesverfassungsgericht, Order of 14 January 2014 2 BvR 2728/13 (OMT referral); Bundesverfassungsgericht, judgment of 21 June 2016, 2 BvR 2728/13 (OMT final ruling).
41 This does not hold, however, for all aspects of the implementation of these obligations in German law.
BL, which is part of the unamendable core of German constitutional identity of Article 79 (3). 43

The EU Treaty framework has served as a second standard of review. In principle, violations of the EU Treaty framework would be ultra vires and contrary to the right to vote of Article 38 BL. Opponents of the EU’s crisis response have argued that several of the crisis measures constituted a departure from the ‘Stabilitätsgemeinschaft’ envisaged at Maastricht, which the Court had determined as a constitutional requirement for Germany’s participation in EMU. Nonetheless, Union law has not played a prominent role in most of the Court’s crisis case law, given the procedural hurdles for the activation of ultra vires review. Only in the cases on the ECB’s OMT and EEA policies has Union law served as the main standard of review.

A key question in the Court’s crisis case law was whether the euro crisis measures eroded the Bundestag’s budgetary powers in a manner contrary to the right to vote. In its Lisbon judgment, the GFCC had held that the Bundestag should retain significant decision-making power with regard to “fundamental fiscal decisions on public revenue and public expenditure”. 44 Following this tenet, the GFCC has consistently ruled that “fundamental decisions on public revenue and public expenditure are part of the core of parliamentary rights in democracy.” 45 If these decisions were to be transferred to the European level or otherwise seriously curtailed, the right to vote would be infringed. 46 The Bundestag cannot therefore “transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations” 47 or authorise Germany’s participation in a financial mechanism that could lead to “incalculable burdens”: 48

43 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 120; Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), at par. 159.
44 Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08 (Lisbon judgment), at par. 252.
45 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 104; see also par. 161 of Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), although worded in a different way.
46 See e.g.: Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 121: “There is a violation of the right to vote if the German Bundestag relinquishes its parliamentary budget responsibility with the effect that it or a future Bundestag can no longer exercise the right to decide on the budget on its own responsibility.”
47 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 125.
48 Ibid. and Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), at par. 163.
Similarly, these constitutional limits rule out “an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, which – once it has been set in motion – is removed from the Bundestag’s control and influence.”49 Rather, the Bundestag must individually approve each large-scale aid measure.50 In addition, the Bundestag must have access to the information it needs to assess the consequences and background of the decisions with budgetary implications.51 And also, if the magnitude of the supranational agreements is “of structural significance for Parliament's right to decide on the budget”, then Parliament must have sufficient influence on the way the funds are used.52 The Court has held that there could be an ultimate limit to the financial commitments that Germany can constitutionally accede to.53 The Court, nonetheless, only rules out manifest violations of the Bundestag’s budgetary responsibility and gives the Parliament a margin of discretion.54

3.2 Judging Financial Assistance and Budget Rules

These principles have formed the basis of the GFCC’s assessment of German participation in the various crisis measures. The GFCC first considered German participation in the Greek loan facility, the EFSM and the EFSF in a judgment of 7 September 2011 (the EFSF case), and upheld German participation in all three instruments. German participation in the Greek loan facility was constitutional, because the amount and purpose of German financial liabilities were restricted and the loans were conditional on agreements with Greece.55 The Court came to the same conclusion regarding the EFSF, because the implementing legislation specified the volume of the guarantees as well as their purpose, and because the giving of guarantees would be dependent on the conclusion of a financial and economic agreement

49 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 127; Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), at par. 164.
50 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 128.
51 Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), at par. 166.
52 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 128; Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), at par. 165. Or as the Court stated it in the latter judgment: “The larger the financial amount of the liability commitments or of commitment appropriations, the more effectively structured the German Bundestag’s rights to approve and to refuse and its right to monitor must be.” (par. 163).
53 This would be the case “if payment obligations and liability commitments took effect in such a way that the budget autonomy was not merely restricted, but suspended for at least a considerable period of time.” Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), par. 174.
54 See e.g.: Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 132. Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), at par. 175.
55 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 139.
with the Member State concerned. Nonetheless, in relation to the EFSF, the GFCC did rule that the German government would have to obtain the consent of the Bundestag’s budget committee prior to giving a guarantee: the implementing legislation had to be interpreted in this manner, as the wording of the relevant provision had left open a different possible interpretation. The constitutional complaints against the EFSM were declared inadmissible.

The Court adopted similar reasoning in its assessment of the ESM and Fiscal Compact: first in an interim judgment of 12 September 2012, and finally in a judgment in the principal proceedings of 18 March 2014. Again, the Court judged German participation in both instruments constitutional in the face of challenges that these instruments impaired the Bundestag’s budgetary responsibility.

On the Fiscal Compact, the Court held that the principle of democracy of Article 20 (1) and (2) allows the Bundestag to commit itself to a particular budget and fiscal policy, even if made under international or European law. According to the Court, such a commitment might in fact be necessary to avoid problematic levels of debt in the long run, and prevent a de facto restriction of the Bundestag’s budgetary powers. The Court thus explicitly left it to the legislature to determine whether restrictions on democratic decision-making concerning the budget should be made in the present. The lack of an explicit right to terminate the Treaty was also not considered a problem, because the general rules of international law on the termination of treaties provide sufficient safeguards.

56 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 141. It required the Federal Government only to “endeavour to reach agreement with the German Bundestag budget committee” prior to giving guarantees.

57 On the latter point see Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 113-118.

58 Bundesverfassungsgericht, judgment of 12 September 2012, 2 BvR 1390/12 (ESM interim ruling).

59 Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling).

60 Ibid., at par. 168-169.

61 Ibid, at par. 173. In the eyes of the Court, the Fiscal Compact also did not give the EU institutions “powers which affect the overall budgetary responsibility of the German Bundestag and does not force the Federal Republic of Germany to make a permanent commitment regarding its economic policy that can no longer be reversed.” In view of the Court, the Treaty does not give “the European Commission authority to impose specific substantive requirements for the structuring of the budgets”. Important in this respect was the consideration that the correction mechanism laid down in Article 3 (2) of the Treaty is subject to “the reservation that the parliamentary prerogatives shall be respected.” (par. 244).

62 Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), at par. 243-245. See also: Bundesverfassungsgericht, judgment of 12 September 2012, 2 BvR 1390/12 (ESM interim ruling), at par. 300-319.

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The GFCC allowed German participation in the ESM because the amount of German payments to the ESM was limited, and did not exceed the ultimate permissible limits compatible with the principle of democracy. A specific reason why the Court upheld the ESM was that the German representative could veto decisions affecting the overall budgetary responsibility of the Bundestag. Hence German implementation legislation could ensure the democratic legitimation of ESM decisions if the German representative would be bound by clear parliamentary instructions. Under normal circumstances, the ESM Board of Governors decides on the grant of financial assistance by unanimity. However, in case of urgency, decisions can be adopted by a super-qualified majority of 85 per cent of the votes cast. A German veto right also exists under this emergency voting procedure, because Germany’s high share in the ESM’s capital gives it 27.1464% of the voting rights. The same holds for ESM decisions taken by qualified majority, which require at least 80% of the votes.

Nonetheless, in its interim judgment of 12 September 2012 the Court expressed hesitations on two points. First, it considered that the provisions on revised and increased capital calls could be interpreted as giving rise to unlimited German payment obligations. The Court wished to ensure that such an interpretation would be precluded. Secondly, the GFCC was critical of the Treaty provisions, on the basis of which ESM documents were held inviolable and the ESM bodies’ members and staff were subject to professional secrecy. Information could not be withheld from the Bundestag that it needed to assess the decisions of the ESM. The Court held that “a ratification of the Treaty establishing the European Stability Mechanism is only permissible if the Federal Republic of Germany ensures an interpretation of the Treaty which guarantees that with regard to their decisions, Bundestag and Bundesrat will receive the information which they need to be able to develop an informed opinion.”

65 Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), at par. 190-193. The Court did stress, however, that Germany would have to prevent that its voting rights would be suspended under the procedures of the ESM, at par. 194-212.
66 Bundesverfassungsgericht, judgment of 12 September 2012, 2 BvR 1390/12 (ESM interim ruling), at par. 253.
67 Article 32 (1) and article 34 ESM Treaty.
68 Bundesverfassungsgericht, judgment of 12 September 2012, 2 BvR 1390/12 (ESM interim ruling), at par. 259.
In response, the ESM Treaty parties adopted a joint interpretive declaration, in addition to a unilateral declaration by Germany. These declarations state that the ESM Members’ payment liabilities are limited and that “no provision of the Treaty may be interpreted as leading to payment obligations higher than the portion of the authorised capital stock corresponding to each ESM Member, as specified in Annex II of the Treaty, without prior agreement of each Member’s representative and due regard to national procedures.”69 In addition, the declarations hold that “Article 32(5), Article 34 and Article 35(1) of the Treaty do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation.”70 These declarations satisfied the Court that the German payment obligations under the ESM would be limited and that the Bundestag would receive the required information, because they effectively precluded contrary interpretations.71

3.3 ‘Stabilitätsgemeinschaft’ and Review of the OMT Policy

Most of the GFCC’s crisis case law focused on the Bundestag’s budgetary autonomy. Opponents of the crisis measures, however, have also voiced the related but different concern that the measures entailed a departure from EMU’s original design as a ‘Stabilitätsgemeinschaft’. A key question in this respect was whether the financial assistance mechanisms violated the TFEU’s no-bailout clause.72

Initially the Court was reluctant to engage with these challenges. In the EFSF case, the Court declared them inadmissible.73 In its assessment of the ESM and Fiscal Compact, the Court only reflected to a limited extent on the notion of a ‘Stabilitätsgemeinschaft’. It appeared to accept that the nature of EMU had changed to some extent, by the introduction of Article 136 (3) TFEU and the ESM, but considered that essential parts of “the stability architecture” were

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70 Ibid.
73 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 957/10 (Greek loan facility and EFSF). The Court offered limited reflections on the EU Treaty framework in par. 129 of the judgment and hinted that the attacked measures were compatible with that framework in par. 137.
still in place.\textsuperscript{74} The establishment of a permanent assistance mechanism affirmed the wish of the Member States and the EU to restrict the ECB to its limited mandate. In addition, the Court considered it important that Article 136 (3) TFEU would not release Member States from the obligation to pursue budgetary discipline and that assistance would be given only if indispensable to the stability of the euro area as a whole.\textsuperscript{75}

The use of EU law as a standard of review, however, re-emerged in the Court’s assessment of the ECB’s OMT policy, of which the GFCC proved extremely critical. First, the Court doubted that the policy lay within the ECB’s legal mandate. The Court was inclined instead to see the OMT programme as economic policy, given its resemblance to financial assistance measures.\textsuperscript{76} Secondly, the Court questioned whether the policy did not violate the prohibition on monetary financing enshrined in Article 123 TFEU.\textsuperscript{77} Thirdly, the Court stated that the policy could infringe on German constitutional identity, if the OMT policy had negative repercussions for the budgetary responsibility of the German Parliament. This would happen if the policy’s implementation created losses for the Bundesbank with ultimately negative consequences for the German Federal budget.\textsuperscript{78} The GFCC referred the \textit{ultra vires} question to the CJEU, although the GFCC itself already expressed that it was much inclined to consider the OMT programme \textit{ultra vires}.\textsuperscript{79}

The judgment was highly controversial given the widely acknowledged role of the OMT policy in defusing the crisis.\textsuperscript{80} Within the Court, the judgment elicited two powerful dissents. Justice Lübbe-Wolff said that the judgment went “beyond the limits of judicial competence under the principles of democracy and separation of powers.”\textsuperscript{81} Justice Gerhardt held that the ordinary democratic avenues provided sufficient safeguards for respecting the division of powers between the EU and its Member States.\textsuperscript{82} The fact that the Bundestag had not taken steps against the policy did “not indicate a democratic deficit, but is an expression of its

\begin{footnotesize}
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\item \textsuperscript{74} Bundesverfassungsgericht, judgment of 12 September 2012, 2 BvR 1390/12 (ESM interim ruling), at par 233.
\item \textsuperscript{75} ESM interim, at par. 233; Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), at par. 180-182.
\item \textsuperscript{76} Bundesverfassungsgericht, Order of 14 January 2014 2 BvR 2728/13 (OMT referral), at par. 56-83.
\item \textsuperscript{77} Ibid., at par. 84-94.
\item \textsuperscript{78} Ibid., at par. 102-103.
\item \textsuperscript{79} Ibid., at par. 55, par. 69 and par. 84.
\item \textsuperscript{80} See for example the contributions to the special issue in the German Law Journal on the OMT judgment in 15 German Law Journal (2014), no. 2.
\item \textsuperscript{81} Bundesverfassungsgericht, Order of 14 January 2014 2 BvR 2728/13 (OMT referral), Dissenting Opinion of Justice Lübbe-Wolff, at par. 3.
\item \textsuperscript{82} Ibid., Dissenting Opinion of Justice Gerhardt, at par. 8.
\end{itemize}
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majority decision for a certain policy when handling the sovereign debt crisis in the euro currency area.”

The CJEU likewise held that OMT lay within the confines of the ECB’s powers. The European judges ruled that the policy’s objective of “safeguarding an appropriate transmission of monetary policy” contributed to the ECB’s primary objective of maintaining price stability. The fact that purchases within the OMT programme were selective in nature and conditional on compliance with EFSF and ESM macroeconomic adjustment programmes, did not modify this assessment. The Court further considered that the policy complied with the principle of proportionality and granted the ECB a broad discretion. The Court also dismissed claims that the policy violated Article 123 TFEU, judging that the ECB was not prohibited from purchasing government bonds on the secondary markets. In addition, the Court held that the various safeguards in the programme would ensure that the programme did not have an effect equivalent to primary market purchases. Neither would the programme undermine the underlying objective of Article 123 TFEU, which is to encourage the Member States to pursue sound budgetary policies.

The GFCC has accepted this finding and despite “significant concerns”, has declined to declare the ECB’s policy as *ultra vires*. The Court similarly rejected that German constitutional identity was infringed. In a statement that hardly seemed to reflect reality, the Court’s President Andreas Voßkuhle declared: “The European legal community has emerged from this process in a strengthened manner.”

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83 Bundesverfassungsgericht, Order of 14 January 2014 2 BvR 2728/13 (OMT referral), Dissenting Opinion of Justice Gerhardt, at par. 23.
85 Ibid, at par. 55-65.
86 Ibid, at par. 66-92.
87 Ibid, at par. 93-127.
88 Bundesverfassungsgericht, judgment of 21 June 2016, 2 BvR 2728/13 (OMT final ruling), see in particular: par. 175.
4. Challenging the Court’s Assessment: Protecting Sovereignty at the Expense of Democracy?

That the GFCC sees budgetary decisions as belonging to the core of democratic politics is understandable. Budgetary decisions commonly involve key political choices with important distributive implications. They are ordinarily the source of significant disagreement between different political parties and reflect different visions about what a just society is. Historically, the parliamentary right to adopt the budget is closely connected to the emergence of representative democracy.91 Were citizens to lose the possibility of influencing budgetary decisions, their democratic rights would certainly be impaired.

Yet, the GFCC’s case law tells only part of the story. It overlooks the fact that the budgetary decisions of one state may have significant effects on those of others, particularly within a monetary union. In addition, a monetary union factually restricts the ability of its Member States to determine economic policy. Transferring budgetary competences to the EU level may therefore be a way to gain political control over economic policy in line with the ideal of democratic, collective self-determination.

In this context, it is helpful to understand that different political ideas have been articulated about the euro crisis’ causes and its proper solution. These readings are politically loaded: they reflect different visions on the main political concerns that the crisis has raised and about their proper response. Crucially, they echo different understandings of why and how the euro crisis raises a democratic problem. Simplifying matters a little, I distinguish between two such readings.

4.1 A Crisis of Excessive Debt?

In the first reading, the crisis was caused by the failure of certain Member States to abide by the rules of fiscal discipline necessary for the monetary union to work.92 In this view, a key problem is that the Maastricht architecture, as supplemented by the Stability and Growth Pact in 1997, failed to achieve the desired fiscal discipline.93 According to critics, the failure of the

91 Christoph Gröpl, 'Schritte zur Europäisierung des Haushaltsrechts' (2013) 52 1 Der Staat 1, at p. 24.
93 The Pact consisted of a legally non-binding European Council Resolution and two Council Regulations adopted in 1997 on the basis of the current Articles 121 and 126 TFEU, see above note 24. The expectation was that the Stability and Growth Pact would ensure that in practice the budgetary norms would be complied with,
Stability and Growth Pact opened the door to fiscal profligacy, resulting in the euro crisis when certain Member States’ government debts proved unsustainable. An additional problem is that financial markets did not force the Member States to pursue sound budgetary policies either. Between the start of the euro in 1999 and the financial crisis in 2008, financial markets priced the default risk of different euro area Member States as essentially the same, despite their widely diverging economic and budgetary performances.  

The main threat to democracy in this reading comes from the possibility that one Member State ends up paying for the other, and thus partly loses its budgetary sovereignty. The chief method of addressing the crisis, as seen in this way, would be to tackle the problem of debt by strengthening the rules and enforcement mechanisms on fiscal discipline coupled to merely limited solidarity. A further argument for retaining national budgetary sovereignty is that only the national political spheres are sufficiently democratic to legitimise these important political choices.

The GFCC’s case law is compatible with this reading of the crisis. The Court demands that the German Bundestag retains its budgetary sovereignty and interprets Member States’ obligations to pursue budgetary discipline, mostly as protecting their budgetary sovereignty.

4.2 Or a Crisis of the Markets?

The second reading, however, conflicts with the GFCC’s insistence on national budgetary sovereignty. On this reading, the financial markets, free movement of capital, and the incompleteness of the monetary union were the main cause of the crisis. This view connects to concerns raised by some economists, as discussed in the previous chapter, namely that a monetary union without a budgetary union is highly fragile and significantly reduces national autonomy in economic policy. In this reading, prior to the crisis, the influx of capital from banks in Northern Member States caused a credit bubble in other, mostly Southern Member States. The process was aided by the uniform interest rate policy of the ECB, which was too


97 See on this issue the previous chapter, section 3.1.
low to stop the excessive demand for credit in Southern Member States. After the financial crisis hit with the fall of Lehman Brothers in 2008, credit lines between the North and South dried up. Creditors started to withdraw their capital from these states, ultimately leading to severe difficulties for those Southern Member States in financing their sovereign debt. In connection to these concerns, some have pointed to the high costs that Member States have made in order to save financially troubled banks, leading to increased government debt and pressure on their abilities to borrow. Moreover, some economists have pointed at the negative externalities of German social policies prior to the crisis for other Member States in the eurozone. For example, the decision by Germany to lower social security contributions in 2008 and increase VAT is said to have dropped demand for imports and increased Germany’s exports. Such imbalances within the eurozone have been perceived as a contributing factor to the crisis.

This view stresses that individual Member States can be faced with the negative consequences of free capital movement in a monetary union, without having democratic control. The deep interdependence created by European integration has not been met by the development of adequate political institutions at the EU level. National democracies are unable to effectively address transnational issues, nor do they have a say in the decisions of other nations that do affect them.

A solution to this problem could be further European integration in areas of economic and fiscal policy. The centralisation of considerable parts of national budgets and the joint issue of debt would protect the Member States from default, as discussed in the previous chapter. In addition, the setting-up of a transfer mechanism would reduce the negative impact of

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99 Mattias Kumm, 'What kind of a Constitutional Crisis is Europe In and What Should Be Done About It?' (2013) 801 WZB Discussion Paper SP IV.
102 Ibid, at p. 5-6.
asymmetric economic shocks on the Member States.\footnote{See also the discussion in the previous chapter 5, section 3.1.1.} This solution, however, would require a far-reaching transfer of competences to the European level. Centralising substantial parts of national budgets into a common European budget would entail that key political choices about economic policy would have to take place at the European level: it would require a political union. Yet, this solution conflicts with the GFCC’s insistence on budgetary sovereignty.

An alternative that is compatible with the GFCC’s case law is to dissolve EMU in order to make room for national democracy.\footnote{Wolfgang Streeck, \textit{Buying Time: The Delayed Crisis of Democratic Capitalism} (Verso London 2014), at p. 165-189.} Yet, dissolution of the eurozone would come with massive costs.\footnote{On these dilemmas see also: Claus Offe, 'Europe Entrapped: Does the EU have the political capacity to overcome its current crisis?' (2013) 19 5 European Law Journal 595.} The criticism voiced by many is that the EU has instead chosen a third option in the form of ‘executive federalism’: it has saved EMU and national sovereignty at the expense of democracy. In essence, the EU and its Member States have chosen to tighten the parameters in which national economic policy can take place and have strengthened the coordination of economic and fiscal policies.\footnote{On the notion see: Ben Crum, 'Saving the Euro at the Cost of Democracy?' (2013) 51 4 Journal of Common Market Studies 614; Alicia Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU' (2013) 50 Common Market Law Review 1621.} The result is that economic policy in name remains a national competence, but that national policy space is limited to a great extent.\footnote{Such concerns have also been raised about the original Maastricht Treaty framework, see Matthias J. Herdegen, 'Price Stability and Budgetary Restraints in the Economic and Monetary Union: the Law as Guardian of Economic Wisdom' (1998) 35 Common Market Law Review 9.} Particularly, for debtor states receiving financial assistance under the ESM or EFSF, the conditionality programmes have severely curtailed national policy autonomy, although formally these Member States have remained sovereign.\footnote{For such concerns see: Mark Dawson and Floris De Witte, 'From Balance to Conflict: A New Constitution for the EU' (2016) 22 2 European Law Journal 204, at p. 217-221. Ben Crum, Saving the Euro at the Cost of Democracy? 2013 614; Jukka Snell, 'The Trilemma of European Economic and Monetary Integration, and its Consequences' ibid 157, at p. 166-167.}

On this understanding, the GFCC’s case law protects German sovereignty at the expense of democracy. This problem is further aggravated by the fact that the constitutional provisions at the basis of the Court’s scrutiny are part of the eternity clause: they cannot be changed...
through an ordinary revision procedure of the Constitution, but require authorisation by the German people acting as the original constituent power.109

The GFCC’s case law can also be criticised for adopting a specifically German perspective. For example, only France and Italy have similar decision-making powers within the ESM and are able to veto emergency decisions.110 The GFCC also does not consider the possibly negative repercussions of German decisions for other Member states. The effects of the conditionality agreements on the debtor States’ self-determination do not feature in the judgments. To the contrary, the Court perceives the limited nature of financial assistance and its concomitant conditionality as positive from a democratic perspective. Its requirement that EMU stays a ‘community based on stability’ supports policies that ensure budgetary discipline. In several debtor states, nonetheless, national courts have grappled with the negative repercussions of austerity measures on social rights.111 On such grounds the

109 This, at least, is the position adopted by the GFCC in its Lisbon-ruling, Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08 (Lisbon judgment).
110 See Annex I of the ESM Treaty. When the Estonian Supreme Court judged the constitutionality of the ESM, it had to face the fact that Estonia can be overruled in the ESM’s emergency procedure. The Estonian Court accepted this in order to preserve the stability of the Eurozone and with it the ‘economic and financial stability of Estonia’. The Supreme Court of Estonia (Riigikohus), Judgment (En Banc) of 12 July 2012, Case No. 3-4-1-6-12. See on these points: Jan-Herman Reestman, ‘Legitimacy through Adjudication: The ESM Treaty and the Fiscal Compact before the National Courts’ in Thomas Beukers, Bruno De Witte and Claire Kilpatrick (eds), Constitutional Change Through Euro-Crisis Law (Cambridge University Press Cambridge & New York 2017); Carri Ginter, Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty’ (2013) 9 2 European Constitutional Law Review 335. More extensive discussions of the national courts’ case law have been provided elsewhere, see: Frederico Fabbrini, ‘The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective’ (2014) 32 1 Berkeley Journal of International Law 64; as well as the chapter by Jan-Herman Reestman already referred to in the above. The Austrian Constitutional Court also acknowledged the need to counter ‘potential unpredictable economic and social losses’ and deferred to the decision of the Austrian Nationalrat in this respect: Verfassungsgerichtshof, Decision SV 2/12-18 of 16 March 2013 (ESM), par. B.3.5.3, point 57. The GFCC’s focus on the limits to the EU’s competences likewise finds it contrast in the advisory opinions of the Council of State in the Netherlands. For example, the Dutch Council criticised that the ESM was not subject to control by the EP and CJEU. In the eyes of the Council, national parliaments could only partially replace democratic control by the EP, because they could not hold the ESM as a whole democratically accountable. See: Kamerstukken II, 2011-2012, 33 221, nr. 4 (Advis Raad van State en Nader Rapport), at p. 4-6; Kamerstukken II, 2011-2012, 33 220, nr. 4 (Advies Raad van State en Nader Rapport), at p. 2; see also the Council’s critique on the Fiscal Compact in Kamerstukken II, 2011-2012, 33 319 (Advies Raad van State en Nader Rapport), at p. 2-4.
Portuguese Constitutional Court struck down parts of the State Budget Law in 2012, 2013 and 2014. For all these reasons, the GFCC’s crisis case law raises a democratic problem. Its case law rests on a particular national understanding of democracy that is liable to restrict political debate over how democratic ideals are best realised in the EU post-crisis. Still, one could contend that despite these deficiencies, the GFCC has ensured that constitutional issues and democratic requirements were taken seriously during the crisis and that its case law catalysed further political debate on these important issues. The available evidence, however, indicates that the Court restricts political debate over different solutions to the crisis. As I aim to show, the Court constrains debate both in German politics as well as in decision-making at the EU level.

5. Debilitating Democratic Debate: The GFCC and the German Political Process

5.1 Positions within German Political Debate
To understand the impact of the GFCC’s case law on the political process, I first explain the different positions within German political debates and subsequently situate the role of the GFCC case law within these debates. A strong pro-European consensus has proved to be a lasting feature of German politics, limiting political conflict between political parties over European integration. Still, during the crisis, the centre-right governing coalition and the left-wing opposition offered conflicting visions of the crisis’ causes, and different ideas about how the it should be addressed. The GFCC’s case law is more compatible with the political stance of the governing coalition and limits the possibility for political actors to successfully argue for political alternatives.

5.1.1 Debt as the Problem: The Position of the Government Coalition
In the debates on the EFSF in May 2010, the coalition parties of the liberal FDP and the Christian democratic CDU/CSU put forward an approach to handling the crisis that consisted of three main elements. First, they argued that the assistance measures were necessary as a
last resort. The survival of the currency union was now at stake and if nothing were done this would have disastrous consequences for the European project. As Chancellor Merkel famously expressed, “if the Euro fails, then Europe fails”.

The proposed course of action was therefore presented as without any alternative.

Secondly, both governing parties argued that the main cause of the crisis lay in excessive debt: too many Member States had lived beyond their means. The answer to the crisis thus lay primarily in creating a true European “culture of stability” that would ensure debt consolidation and currency stability. The change and weakening of the Stability and Growth Pact prior to the crisis had been a terrible mistake. A new stability culture should include better and more automatic sanctions against euro Member States with excessive deficits, more efforts towards debt reduction, withholding voting rights of Member States that violated the rules, and orderly state insolvency procedures. Chancellor Merkel also pointed to the good example Germany had set by including debt brakes in its constitution (‘Schuldenbremse’) and the success of German stability culture more generally. The FDP and CDU/CSU opposed the creation of a transfer union in which joint liability would be created for individual Member States. This would remove the incentives for Member States to ensure budgetary consolidation and structural reforms. Financial assistance could be given to Member States in financial trouble, but only as a last resort, under strict conditions.
that would ensure a path towards budgetary stability and only under the condition that Germany itself would decide about the deployment of assistance. In this design, the budget rights of the Bundestag would be fully respected.119

Thirdly, both governing parties acknowledged that the financial markets had played an additional role and that better financial regulation was needed. Chancellor Merkel recognised the need for better European and international financial market regulation.120 In addition, she also stressed that, as a matter of justice, financial market actors should take on a bigger share of the costs of the crisis.121 Nonetheless, Merkel and her coalition partners held that the financial markets had not caused the euro crisis, but had merely aggravated it.122

5.1.2 A Crisis of the Markets: The Position of the Opposition Parties

By contrast, the opposition parties of the SPD, Bündnis 90/Die Grünen and Die Linke pointed to different causes of the euro crisis: the financial markets and the 2008 banking crisis, the incompleteness of the monetary union, and German policies prior to the crisis. The opposition parties also expressed concerns about the negative social and economic consequences of the coalition’s crisis politics. Of these three opposition parties, Die Linke has been the most critical: it rejected the financial assistance to Greece, the EFSF, the ESM and the Fiscal Compact, which it associated with socially unjust and economically unsound austerity politics. The SPD and Bündnis 90/Die Grünen, however, have less strongly opposed policies of debt reduction, but favoured more space for socially and ecologically balanced reform.123

119 Merkel, Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4127; Also stressing a German veto-right was Barthle (CDU/CSU), at p. 4156; for the conditions, see also Schäuble, Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4426.
120 Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4130; also Meister (CDU/CSU), at p. 4414-4415.
121 Merkel, Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4129-4131. Merkel accepted a tax on financial markets, either through a financial activity tax or a financial transaction tax. See also Schäuble supporting the idea of a worldwide, European or even euro-zone financial transaction tax, Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4427-4428.
122 Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4129. See in similar vein: Hans-Peter Friedrich (CDU/CSU), at p. 4151; Homburger (FDP), at p. 4136; and Dautzenberg (CDU/CSU), at p. 4153-4154. See also: Fricke, (FDP), Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4417-4418; Michael Meister (CDU/CSU) argued that both excessive debt as well as the financial crisis had caused the crisis, at p. 4413; Finance Minister Schäuble argued that excessive deficits were the cause of speculation, see at p. 4426; Foreign Minister Westerwelle argued in a similar vein, at p. 4435.
123 See Daniela Kietz, 'Politisierung trotz Parteienkonsens: Bundestag, Bundesrat und die Euro-Krise’ Bertelsmann Stiftung (Gütersloh ), at p. 39-42. See also BT-Drucksache 17/1639 of 06.05.2010: Entschließungsantrag der Fraktion der SPD zu der dritten Beratung des Gesetzentwurfs der Fraktionen der CDU/CSU und FDP – Drucksachen 17/1544, 17/1561, 17/1562 – Entwurf eines Gesetzes zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik (Währungsunion-Finanzstabilitätsgesetz – WFSiG).
In the debates on the EFSF, the SPD’s parliamentary leader, Frank-Walter Steinmeier, demanded that the financial sector should make a bigger contribution towards solving the problems.\footnote{Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4131. The SPD ultimately abstained in the vote on the EFSF, because it demanded more action by the government in regulating financial markets and the introduction of a financial transaction tax. See: Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4134; and also Schneider (SPD), at p.4148. Kessel (SPD), Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4415-4417 offered a similar critique on the government.} He strongly criticised the government’s position that “we had lived beyond our means”, but argued that “those who had lived beyond their means no longer knew what the means of the majority of Germans are.”\footnote{“Die Wahrheit ist: Diejenigen, die über die Verhältnisse gelebt haben, wissen nicht einmal, wie die Verhältnisse für die Mehrzahl der Menschen in Deutschland sind.” Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4133. See similar statement, Sigmar Gabriel (SPD), Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4432-4433.} Sigmar Gabriel contended that another central cause for the crisis was the lack of common European economic and financial politics. These “birth defects” of EMU had to be corrected.\footnote{Gabriel (SPD), Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4433.} This would also make clear how Germany had contributed to the crisis by having pushed down wages and pushed tax competition. Further European integration was required in order to achieve a “social Europe” that was “more than the internal market”.\footnote{Gabriel (SPD), Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4433.} The SPD linked this narrative to concerns about democracy, as Steinmeier declared:

> “Much is at stake. Either we are able to reconcile the situation, reorder the markets and distribute the burden fairly, or we can undermine confidence in Europe and its Member States, as well as confidence in politics and democracy.”\footnote{Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4134.}

The Greens raised similar concerns. They acknowledged that debt consolidation was necessary, but stressed the need to do this in a socially balanced manner. Party leader Jürgen Trittin argued that there was a more fundamental point: in a currency union one could not have distinct economic policies.\footnote{See also Trittin (BÜNDNIS 90/DIE GRÜNEN), Plenarprotokoll 17/39, Stenografischer Bericht der 39. Sitzung des Deutschen Bundestages am 5. Mai 2010 (Greek loan facility first plenary), at p. 3740.} The debt-financed German export surpluses were unsustainable, and demand in Germany had to be stimulated.\footnote{Trittin (BÜNDNIS 90/DIE GRÜNEN), Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4147-4148. See also Trittin (BÜNDNIS 90/DIE GRÜNEN), Plenarprotokoll 17/39, (Greek loan facility first plenary), note 129 at p. 3740-371.} The Greens similarly demanded better financial market supervision, a financial transaction tax, and stressed that
the primacy of politics over the markets had to be restored. In addition, they supported a ‘Green New Deal’ that would come with investment, education and social justice.

Die Linke likewise called for stronger regulation of the financial markets to restore the primacy of politics. In the EFSF debates, party leader Gregor Gysi stated:

“Today we are dealing with a fundamental question for our society and Europe. Today we are deciding whether there is a rule of politics again, whether democracy rules again, or whether it remains with the rule of speculators and banks, so that there is hardly any democracy.”

The party also pointed to the problem that debtor states within the eurozone were no longer able to devalue their currencies. Like the SPD, Die Linke argued that Germany’s own policies had contributed to the crisis: Germany’s policy of wage restraint had contributed to a high export surplus for Germany, but also to significant trade imbalances within the eurozone, and a worsened competitive position for countries such as Greece. The party strongly opposed the austerity policy of the government that led to social cuts in both Germany as well as in the rest of Europe and particularly in the debtor states: the policy was both socially unjust as well as economically unsound, because it would only aggravate the crisis. The party also rejected the idea that people had lived beyond their means:

131 Fritz Kuhn (BÜNDNIS 90/DIE GRÜNEN), Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4424.
132 See BT-Drucksache 17/1808 of 20.05.2010: Entschließungsantrag der Abgeordneten Jürgen Trittin, Renate Künast, Fritz Kuhn, Dr. Frithjof Schmidt, Dr. Gerhard Schick, Kerstin Andreane, Lisa Paus und der Fraktion BÜNDNIS 90/DIE GRÜNEN zu der dritten Beratung des Gesetzentwurfs der Fraktionen der CDU/CSU und FDP – Drucksachen 17/1685, 17/1740, 17/1741 – Entwurf eines Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus, at p. 2 and the rest of this Antrag for the Greens’ concerns.
133 See in Plenarprotokoll 17/42 (EFSF first plenary), note 113 the contributions by Ernst (Die Linke), at p. 4152 and Loetschz (Die Linke), at p. 4142.
135 Gysi, Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4419-4420.
136 Ernst (Die Linke), Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4152-4153.
137 Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4141; also Ernst (Die Linke), at p. 4153. In Plenarprotokoll 17/44 (EFSF second plenary), note 113, see the remarks of Gysi, at p. 4419-44420. Gysi stated “Das ist die Art von Politik, die Sie betreiben, und das kann nicht gut gehen; denn der Sozialabbau ist nicht nur ungerecht, sondern dadurch wird auch die Wirtschaft gedrosselt.” (at p. 4420).
Germany’s debt burden had instead risen as a result of tax cuts for the rich. Instead of the coalition’s austerity politics, Die Linke argued for a European investment programme, debt relief for the debtor countries, a financial transaction tax, a harmonisation of taxes, social and environmental standards, as well as harmonisation in the area of wages.

5.2 The GFCC as a Chamber for the Euro-critics

Despite political conflict between the German opposition and coalition over the best approach to the crisis, a strong pro-European consensus among the major political parties has remained in place. This context helps to explain why the Karlsruhe court is used as a forum for opposition to European integration and the crisis measures more specifically. Large majorities in the German Bundestag supported the Greek loan facility, the EFSF, the ESM and Fiscal Compact. Die Linke opposed these measures, like its predecessor the PDS opposed the Maastricht Treaty, but the party does not oppose European integration as such. It was only in 2013 that a German Eurosceptical party was founded at the federal level with the Alternative für Deutschland (AfD), and not until September 2017, did this party obtain seats in the Bundestag. The barrier for new parties to enter the Bundestag is also significant, as they must obtain a minimum of five per cent of the national vote in order to gain seats there.

There are, nonetheless, several politicians with a more Eurosceptical political position, as minorities within the different Bundestag political groups. Particularly within the FDP and, to a lesser extent, within the CDU/CSU, there was strong opposition against taking over any liability risk for the sovereign debt of other states. Over the course of the crisis, the number of dissenters within the governing coalition has grown. In May 2010, only six members of the coalition parties rejected the EFSF, whereas four abstained. By September 2011, however, 13 members voted against changes to the EFSF and two abstained. In June 2012, 26 Bundestag

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139 Plenarprotokoll 17/42 (EFSF first plenary), note 113, at p. 4141; Gysi, Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4420-4421.
140 The Greek loan facility was supported by 391 votes, 72 votes against and 139 abstentions. See Drucksache 17/41, p. 4019; the EFSF was supported by 319 votes, 73 against and 195 abstentions, Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4443; later changes to the EFSF were supported by 523 votes, 85 against and 3 abstentions, Plenarprotokoll 17/130, Stenografischer Bericht der 130. Sitzung des Deutschen Bundestages am 29 September 2011 (EFSF extension second plenary), at p. 15236; the ESM was supported by 493 votes, 106 against and 5 abstentions, Plenarprotokoll 17/188, Stenografischer Bericht der 188. Sitzung des Deutschen Bundestages am 29 Juni 2012 (ESM and Fiscal Compact second plenary), at p. 22740; the Fiscal Compact was supported by 491 votes, 111 votes against and 6 abstentions, see also Plenarprotokoll 17/188, at p.22736.
members of the coalition groups rejected the ESM.\textsuperscript{142} Within the FDP, moreover, significant debate ensued over the ESM, after \textit{Bundestag} member Frank Schäffler and former FDP politician Burkhard Hirsch called for a vote on the ESM by the party members in September 2011.\textsuperscript{143} Although the internal party vote ultimately did not meet the requisite quorum, 44.2\% of the votes within the FDP were cast against the ESM.\textsuperscript{144}

In the spring of 2012, ten \textit{Bundestag} members of the CDU/CSU and FDP formed an alliance against the ESM, arguing that every Member State in the eurozone should be responsible for its own financial obligations.\textsuperscript{145} Several civil society organisations and associations of undertakings publicly supported this opposition, such as the \textit{Bünd der Steuerzahler} (union of taxpayers), the \textit{Verbund der Familienunternehmern} (association of family entrepreneurs), the “\textit{Bündnis Bürgerville}” group and the \textit{Verband der Jungen Unternehmer} (association of young entrepreneurs). Prominent public figures that opposed the EU’s crisis response included economist Hans Werner Sinn, the former director of the Ifo institute for economic studies, and Hans-Olaf Henkel, former head of the \textit{Bundesverband der Deutschen Industrie} (Federation of German Industries).\textsuperscript{146}

German parliamentary debate has not fully reflected these public controversies. As a result of the \textit{Bundestag}’s procedures, critical voices within the parties are not always represented in the parliamentary debates. Speakers in plenary debates are usually those that stick to the party line, because the parties decide who will speak in the plenary debates. In order to better reflect the controversial nature of the euro crisis measures, \textit{Bundestag} President, Norbert Lammert, granted two dissenters the right to speak in the plenary debates on the EFSF changes in September 2011, independently of the time allotted to the different parties. However, the move was controversial and heavily criticised by several \textit{Bundestag} party leaders. Plenary speaking time is limited and normally determined on the basis of the parties’

\textsuperscript{142} See also: Daniela Kietz, Politisierung trotz Parteienkonsens: Bundestag, Bundesrat und die Euro-Krise, 2013, at p. 35-37.
\textsuperscript{143} See: Peter Müller, ‘FDP Mitgliederentscheid soll Rettungsschirm stoppen’ \textit{Spiegel Online} (9 September 2011) Schäffler and Hirsch opposed the ESM as a move into a transfer union, as a violation of the EU Treaty and as a violation of the Basic Law, because it would hollow out the \textit{Bundestag}’s budgetary sovereignty.
\textsuperscript{144} The quorum was narrowly missed. It required that 33.3 per cent of the FDP party members vote, which only 31.6 per cent did. 54.5 per cent of the votes were in favour of the ESM. See Peter Carstens, ‘Knapper Sieg über Euro-Skeptiker’ \textit{Frankfurter Allgemeine Zeitung} (16 December 2011). On these events see also Daniela Kietz, Politisierung trotz Parteienkonsens: Bundestag, Bundesrat und die Euro-Krise, 2013, at p. 34-38.
\textsuperscript{145} See: Klaus-Peter Willsch and others, Allianz gegen den ESM (23 May) <https://www.steuerzahler.de/files/45189/10Punkte.pdf> accessed 27 December 2017
\textsuperscript{146} See: ‘Wutbürger sammeln sich zum Euro-Angriff’ \textit{Handelsblatt} (29 May 2012); and also Daniela Kietz, Politisierung trotz Parteienkonsens: Bundestag, Bundesrat und die Euro-Krise, 2013, at p. 36-39.
relative strength in the Bundestag, whereas the groups themselves distribute the limited allotted speaking time to different speakers.\footnote{147}

Within this context, the GFCC has served as ‘a chamber for Euro-critics’: a forum for critical Bundestag members, and an extra-parliamentary opposition to contest the euro crisis measures.\footnote{148} By turning to Karlsruhe, this opposition has been able to ensure public attention for their viewpoint: they believe that the crisis measures constituted a dangerous departure from a stability oriented monetary union, and a threat to German welfare and democracy.\footnote{149}

In turn, the German Court has not been unwilling to serve as a forum for such dissent. Not only does the Court’s broad interpretation of Article 38 BL make such review possible, judges have also suggested that the lack of critique on the EU in German political debate is a problem.\footnote{150} Justice Huber, the judge rapporteur in several of the crisis cases, has contended that the Court is an “opposition to the mainstream”.\footnote{151

\footnote{147} ‘Streit um Rederecht für Euro-Rettungskritiker’ Handelsblatt (30 September 2011); ‘Mein Widerstand war grundsätzlich’ Frankfurter Allgemeine Zeitung (21 April 2012); Jasper von Altenbockum, ‘Schwache Chefs’ Frankfurter Allgemeine Zeitung (17 April 2012); Günter Bannas, ‘Auch Abweichler dürfen lange reden’ Frankfurter Allgemeine Zeitung (16 April 2012); Thorsten Denker, ‘Lammert gegen alle’ Süddeutsche Zeitung (29 September 2011).

\footnote{148} The phrase ‘chamber for Euro-critics’ comes from Christoph Möllers, interview, 20 April 2015.

\footnote{149} Daniela Kietz, Politisierung trotz Parteienkonsens: Bundestag, Bundesrat und die Euro-Krise, 2013, at p. 44. For example, in May 2010 Peter Gauweiler opposed the EFSF together with two other dissenting CDU/CSU members in language that resembled the GFCC’s Maastricht judgment: They argued that the assistance measures entailed a break with an EMU based on the pillars of sound budgetary policies and price stability contrary to “the articles, but in any case against the spirit of the existing European Treaties.” Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4500; Similar concerns were expressed by Bundestag members that either abstained or voted against the legislation. Frank Schäffler of the FDP, for example, called the measures “a collective violation of the law” (“kollektiven Rechtsbruch”), Plenarprotokoll 17/44 (EFSF second plenary), note 113, at p. 4496. See also: Alexander Funk (CDU/CSU), at p. 4493-4494; Veronika Bellman (CDU/CSU), at p. 4491-4493; Hermann Otto Solms (FDP), at p. 4498-4499. Gauweiler subsequently filed a constitutional complaint against the aid to Greece, the EFSM and the EFSF and argued before the GFCC that the measures violated the no-bailout prohibition of Article 125 TFEU and that “the concept of the stability union provided for by the Treaty is permanently destroyed, and replaced by the completely different concept of a liability and transfer union.” Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), par. 42.

\footnote{150} Interview with former judge at the German Federal Constitutional Court, 20 April 2015; Interview with Peter Huber, Judge at the German Federal Constitutional Court, 23 April 2015. Another former judge was more cautious and rejects this as a constitutionally relevant ground, Interview with former judge at the German Federal Constitutional Court, 29 June 2015. Christoph Möllers as an observer also sees this as a reason for the Court’s role, Christoph Möllers, interview, 20 April 2015.

\footnote{151} Franz Mayer, ‘Rebel Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference’ (2014) 15 2 German Law Journal 111, at p. 142. Similar remarks were made by Huber in a personal interview with Peter Huber, Judge at the German Federal Constitutional Court, 23 April 2015. There he argued that in his view there was a big gap between the ideas on of Europe of the political elites and the wider population.
Yet, by taking up this role, the Court ultimately limits the scope for political decision-making, both within the Bundestag, as well as on the European level. Although the Court has so far upheld all the core elements of the EU’s crisis response, its focus on the Bundestag’s budgetary sovereignty lends support to claims that the Member States should remain responsible for their own debts in a stability-oriented EMU. Arguments that the EU should have more competences in economic and fiscal policy and that Member States should jointly issue debt in order to make the monetary union both more sustainable and democratic, face significant constitutional obstacles and can be discredited within political debate.

5.3 Constraining Political Debate: The Constitutional Disqualification of Eurobonds

The German political discussions on introducing eurobonds offer a good example of how the GFCC’s constrains political debate. Eurobonds are commonly defined as bonds issued by all the eurozone Member States together or by the EU at a uniform interest rate. For these bonds, the eurozone Member States would have joint and several liability. The idea is that the introduction of such bonds would lower the cost of borrowing for financially troubled eurozone states, because the interest rate on eurobonds would be the same or possibly even lower than the weighted average of the national bonds’ interest rates. Yet, the introduction of eurobonds creates a moral risk, as it could reduce the Member States’ incentives to maintain budgetary discipline. In addition, the common liability that such bonds would entail raises a democratic concern, because it makes one Member State liable for the budgetary policy choices of others. To remedy this problem, the introduction of eurobonds would probably have to be accompanied by further competence transfers in the sphere of economic policy, with requisite democratic legitimation at the European level. eurobonds are probably also

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152 The discussion on Eurobonds is crucial. As Matthijs and McNamara have noted: “Eurobonds were a plausible functional response to the ills that plagued Europe’s monetary union, yet they were set aside in favor of policies of austerity and structural reform, even as they arguably made the problem worse. Telling the story of the rise and fall of Eurobonds allows us to understand the entanglement of economic policy-making around the euro, a project at the heart of European integration and critical to its future path.” Matthias Matthijs and Kathleen McNamara, The Euro Crisis’ Theory Effect: Northern Saints, Southern Sinners, and the Demise of the Eurobond 2015 229, at p. 232.


154 See e.g. Kamerstukken II, 2011-20112, 21 501-07, nr 844, at p. 4-5.
incompatible with the no-bailout provision of Article 125 TFEU, because the euro area Member States would be liable for the commitments of other Member States.\textsuperscript{155}

On 5 December 2010, while negotiations on the ESM were already considerably advanced, Luxembourg’s treasury minister, Jean-Claude Juncker, and Italy’s minister of economy and finance, Giulio Tremonti, published an article in the Financial Times arguing for the introduction of eurobonds as a more lasting solution to the crisis.\textsuperscript{156} The German government swiftly rejected this proposal, because it would make Germany responsible for the debts of other states, lead to higher interest rates on German government bonds, and would also remove the incentives for Member States to have budgetary discipline.\textsuperscript{157} The SPD, however, expressed cautious support for the proposal. On 14 December 2010, SPD party leader Frank-Walter Steinmeier and former finance minister Peer Steinbrück wrote in the Financial Times that a better approach to the euro crisis was needed. They called for “a combination of a haircut for debt holders, debt guarantees for stable countries and the limited introduction of European-wide bonds in the medium term, accompanied by more aligned fiscal policies.”\textsuperscript{158} Eurobonds would have to be accompanied by “political reforms” that would allow “European institutions to establish tighter controls over fiscal and economic stability, alongside common minimum standards on wage and welfare policies, as well as capital and corporate taxation.”\textsuperscript{159}

In the Bundestag debate of the following day, Steinmeier called for the introduction of eurobonds within a fully-fledged political union. This political union aimed to remove the EMU’s birth defects and put in place clear rules for sound budgetary policies, combined with harmonisation in the fields of labour policy, social policy and tax law.\textsuperscript{160} The Greens had already expressed support for eurobonds as a short-term measure in March 2010. Like the SPD they had then already called for more EU action in the area of labour, social and tax

\begin{footnotesize}
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\item \textsuperscript{155} See Alberto De Gregorio Merino, Legal Developments in the Economic and Monetary Union During the Debt Crisis: the Mechanisms of Financial Assistance, 2012 1614, at p. 1630-1632. See on these issues also Expert Group on Debt Redemption Fund and Eurobills, Final Report (Brussels 31 March).
\item \textsuperscript{156} Jean-Claude Juncker and Giulio Tremonti, ‘E-bonds would end the crisis’ Financial Times (6 December 2010).
\item \textsuperscript{157} ‘Merkel bleibt bei Euro-Bonds hart’ ZEIT ONLINE (15 December 2010); ‘Merkel wehrt sich gegen Arroganz-Vorwürfe’ ZEIT ONLINE (16 December ).
\item \textsuperscript{158} Frank-Walter Steinmeier and Peer Steinbrück, ‘Germany must lead fightback’ Financial Times (14 December 2010).
\item \textsuperscript{159} Ibid; Peter Ludlow, ‘Doing Whatever is Required? The European Council of 16-17 December 2010’ (2011) 8 4 Eurocomment Briefing Note, at p. 12-14.
\item \textsuperscript{160} Plenarprotokoll 17/80, Stenografischer Bericht der 80. Sitzung des Deutschen Bundestages am 15. Dezember 2010 (debate on European Council of 16-17 December 2010), at p. 8820-8823.
\end{itemize}
\end{footnotesize}
policy, and more generally for a democratically legitimated European economic government.\textsuperscript{161} Party leader Trittin articulated similar ideas in the Bundestag debate of 15 December 2010 and criticised Merkel as a “teutonic savings monster” (“teutonisches Sparmonster”).\textsuperscript{162} Die Linke also expressed support for eurobonds, even bond buying by the ECB as a transitional solution, before a “fundamental revision of the Lisbon Treaty” could be realised.\textsuperscript{163} The opposition parties thus proposed significant competence transfers to the EU level in areas that the GFCC had determined as ‘sovereignty sensitive’ in its Lisbon ruling. Yet, for these parties the aim was precisely to prevent harmful competition between Member States, that in their view effectively undermined national democratic choices. As a proposed SPD resolution put it: “The European Union is and remains our chance to shape globalisation.”\textsuperscript{164}

The GFCC’s judgment on the EFSF of September 2011, however, raised constitutional doubts about the opposition’s proposals and particularly the idea of eurobonds. The Court declared complaints about the no-bailout clause inadmissible, but did hold as constitutionally impermissible “an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, which – once it has been set in motion – is removed from the Bundestag’s control and influence.”\textsuperscript{165} On this basis, some German scholars have concluded that eurobonds and similar instruments for the mutualisation of debt are constitutionally impermissible.\textsuperscript{166} An additional constitutional hurdle for eurobonds is that there is a quantitative limit to the liabilities that the German Bundestag can constitutionally agree to according to the GFCC.\textsuperscript{167}


\textsuperscript{162} Trittin, Plenarprotokoll 17/80, (debate on European Council of 16-17 December 2010) 17/80, note 160, at p. 8829.

\textsuperscript{163} Lötsch, Trittin, Plenarprotokoll 17/80, (debate on European Council of 16-17 December 2010) 17/80, note 160, at p. 8826.


\textsuperscript{165} Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 127; Bundesverfassungsgericht, judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), at par. 164.

\textsuperscript{166} See e.g. Christoph Gröpl, Schritte zur Europäisierung des Haushaltsrechts, 2013 1, at p. 15.

\textsuperscript{167} Not all modalities of Euro-bonds may raise constitutional problems to the same extent. See also Franz Mayer and Christian Heidfeld, Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds, 2012 422, at p. 428. See also Annex 7 of Expert Group on Debt Redemption Fund and Eurobills, Final Report, 2014.
The Court’s ruling shifted the terms of the political debate, as the governing parties invoked the judgment to disqualify the opposition’s support for eurobonds. In addition, the coalition parties used the judgment to underline that their handling of the crisis had been the right approach. In a debate on budgetary matters held on the day of the judgment, Chancellor Merkel argued that the Court had confirmed the government’s approach of “self-responsibility and solidarity”. By this, she meant that Member States would remain responsible for their own budgetary policies and that assistance would be conditional on debtor states’ steps towards sound budgetary policies.168 In the subsequent parliamentary debates on changes to the EFSF, spokespersons of the governing parties used the judgment to criticise the opposition’s stance on eurobonds. Norbert Barthle of the CDU/CSU stated, for example:

“Dear colleagues of red and green, the Federal Constitutional Court opinion is unambiguous: under the given conditions Euro-Bonds are unconstitutional. Therefore, it is astonishing, how the SPD and Greens now difficultly distance themselves from these Euro-Bonds, while for weeks and months they have previously demanded the Federal Government to introduce Euro-Bonds immediately.”169

Manuel Brüderle of the FDP referred to the GFCC’s pronouncement as “a slap in the face for the basic idea” of eurobonds.170 In a newspaper article, Peter Gauweiler likewise claimed the judgment as a victory, despite the fact that his constitutional complaints had been rejected: the ruling was a victory for “parliamentary democracy” and had put constitutional barriers in place against “the march into a liability and debt union”.171

The Greens and the SPD, nonetheless, framed the judgment in the opposite way, arguing that eurobonds were perfectly compatible with the EFSF judgment, and that the GFCC had left the road to further European integration fully open. Jürgen Trittin called the judgment a “crushing defeat” for “D-Mark chauvinists” within the ranks of the coalition parties.172

170 Statement by Rainer Brüderle (FDP), Plenarprotokoll 17/130, at p. 15211; Fricke of the FDP had stated the previous day in Handelsblatt that the GFCC had prohibited eurobonds: “Urteil ist klare Absage an Euro-Bonds” Handelsblatt (7 September 2011).
172 Trittin (Bündnis 90/Die Grüne), Plenarprotokoll 17/124 (EFSF extension first plenary), note 169, at p. 14565.
Instead he argued that “the message from Karlsruhe” was that the European institutions had to be strengthened.173 Similarly, his fellow party member Manuel Sarrazin declared that the GFCC had pointed towards the limits of the EU treaties rather than to constitutional limits: the Court had left leeway for a pro-European line in German European politics and had in no way foreclosed the introduction of eurobonds.174 Axel Schäfer of the SPD declared that the GFCC “opened the way for further European integration and thus obliges us to go this way.”175

Public statements by constitutional judges, however, put doubts on this reading. In an interview with the Frankfurter Allgemeine of 25 September 2010, the GFCC’s President Andreas Voßkuhle stated that the space within the German Basic Law for further European integration was “probably largely exhausted.”176 The constitutionality of eurobonds would depend on its precise modalities. Nonetheless, for the transfer of further core competences to the EU level, a referendum for a new German constitution would be necessary.177 A few days earlier, Justice Huber had likewise declared in the Süddeutsche Zeitung that the introduction of a supranational European economic government would be difficult to reconcile with the Basic Law. It would require a referendum. Huber did leave room for the introduction of eurobonds under certain modalities, namely if the Bundestag plenary would approve every tranche of bonds.178 Yet overall, these statements seemed to leave little doubt that the oppositions’ far-reaching proposals for further European integration would require a constitutional referendum.179

173 Trittin (Bündnis 90/Die Grüne), Plenarprotokoll 17/124 (EFSF extension first plenary), note 169, at p. 14565.
174 Sarrazin (Bündnis 90/Die Grüne), Plenarprotokoll 17/124 (EFSF extension first plenary), note 169, at p. 14573.
175 Schäfer (SPD), Plenarprotokoll 17/124 (EFSF extension first plenary), note 169, at p. 14569. “Das Bundesverfassungsgericht hat den Weg zur weiteren europäischen Integration geöffnet und uns damit verpflichtet, ihn zu gehen.”
177 Ibid.
179 In an interview of 23 December 2011, departing Justice Udo di Fabio and judge rapporteur for the GFCC’s Lisbon judgment qualified Euro-bonds as a mechanism that “in principle” would raise problems with the German principle of democracy. Nonetheless, he maintained that the Karlsruhe Court had not obstructed further European integration, but had instead strengthened Germany’s position. He qualified Voßkuhle’s remarks on the constitutional limits for further European integration as concerning “far-reaching competence transfers, which currently are not under discussion.” (at p. 34) More generally, he referred to the possible decision of the German sovereign people to enter a European federal state as “a completely theoretical question.” (at p. 36) Moreover, one of his answers betrayed a politically contested reading of the crisis, as he asked rhetorically: “Imagine that all Member States had far underbid the stability criteria, had made their economies more competitive and had conceptually worked better together: what problem would the EU then have had at all?” (“Stellen Sie sich vor,
In this light, it is surprising that the opposition parties did not contest the merits of the GFCC’s ruling. The opposition parties’ arguments about eurobonds fitted within a broader political narrative that gave democratic concerns a key place. Yet, these parties did not contrast their more pro-European interpretation of democracy with the more sovereignty-focused conception of the Court.

The absence of contestation over the merits of GFCC judgments is consistent with the general treatment of the Court’s rulings in German political debate. There is a high degree of respect for the Court’s judgments and explicit contestation by politicians is uncommon.180 Where it happens, politicians generally do not engage with the judgments’ merits, but rather criticise them as too political in nature.181

Three reasons probably explain the absence of such contestation. First, the GFCC’s crisis judgments have all been ‘partial victories’. For example, the SPD and the Greens were happy with the enhanced rights of the Bundestag in the EFSF and used this part of the judgment to criticise the governing coalition.182 Had they criticised the GFCC, they probably would have also undermined their own reliance on the Court’s authority. Gesine Lötzsch of Die Linke, and chair of the Bundestag’s budget committee, similarly declared that Die Linke “felt always partly supported by the judgments”.183 Secondly, the GFCC enjoys broad popular support. It is therefore not in the interest of politicians to take issue with the Court’s rulings.184 Instead, it is in their interest to try and construe the judgments as perfectly compatible with their own political viewpoints or to ignore the judgment altogether. The third

180 Interview with Otto Fricke 6 May 2015; Interview with Peter Huber, Judge at the German Federal Constitutional Court, 23 April 2015; Interview with Franz Mayer 28 May 2015; Interview with former judge at the German Federal Constitutional Court, 29 June 2015; interview with Christoph Möllers 20 April 2015; interview with Ingolf Pernice, 16 April 2015; Gesine Lötzsch does indicate that there is more criticism on the Court than in past, although it remains rare (Interview with Gesine Lötzsch, 27 May 2015).
182 See: Sarrizin (Bündnis 90/Die Grüne), Plenarprotokoll 17/124 (EFSF extension first plenary), note 169, at p. 14572 and Schäfer (SPD), 17/124, at p. 14569. For more details see the next chapter.
183 Interview with Gesine Lötzsch, 27 May 2015.
reason is that respect for the Court is probably informed by a belief in the separation of powers, on the basis of which the GFCC should be recognised as the ultimate authority in constitutional matters.\footnote{This was a view expressed by Lothar Binding (SPD) in an interview held at 29 April 2015.} The Bundestag’s President Lammert made a statement in this vein in the debates on the ESM and Fiscal Compact:

“[N]ot the parliamentary parties have the authority to establish the constitutionality of legislation, not even the constitutional body of the Bundestag, but only the Federal Constitutional Court. I consider it a sign of minimum respect towards the colleagues as well as towards that particular authority of our constitutional order that no exclusive authority is claimed in this respect.”\footnote{Lammert, Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140, at p. 22735. Similar points were made by Lothar Binding made a similar point, Plenarprotokoll 17/188, at p. 22757 and Otto Fricke, Plenarprotokoll 17/188, at p. 22726.}

The Bundestag therefore does not consider itself an interpreter of the constitution equal to the GFCC. For this reason, it is difficult to maintain that the Court’s judgments add to German political debate without constraining it. In the case of eurobonds, its advantages and disadvantages had already been discussed in the prior political debates. The effect of the GFCC’s ruling was that a debate on the merits of eurobonds was partly replaced by an interpretive debate over the Court’s ruling. In addition, the governing coalition tried to use the judgment to simply move the topic off the parliamentary agenda.

Nonetheless, the GFCC’s judgment did not move eurobonds off the agenda entirely.\footnote{‘Rot-Grün distanziert sich von Hollandes Euro-Bonds’ Die Welt (24 May 2012); ‘SPD und Grüne schlagen Alternative zu Euro-Bonds vor’ ZEIT ONLINE (24 May 2012).} In the final debate on the ESM and the TSCG of June 2012, Sigmar Gabriel of the SPD still expressed some cautious support: the introduction of eurobonds would require a “real fiscal union” and a “European finance minister”.\footnote{Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140, at p. 22702.} In the 2013 Bundestag elections, the Greens also still supported the introduction of eurobonds in the medium-term. Both parties favoured a debt redemption fund as a more lasting solution, in which debts above 60 per cent would be mutualised.\footnote{Othmara Glas, Grüne: Für Eurobonds und europäischen Mindestlohn (31 July) <http://www.euractiv.de/section/wahlen-und-macht/news/grune-fur-eurobonds-und-europaischen-mindestlohn/> accessed 27 December 2017; Othmara Glas, SPD: Für Euro-Haftung und Rückübertragung von EU-Kompetenzen (23 July) <http://www.euractiv.de/section/wahlen-und-macht/news/spd-fur-euro-haftung-und-rueckuerbertragung-von-eu-kompetenzen/> accessed 27 December 2017; SPD, Das wir entscheidet, das
SPD no longer supported the introduction of eurobonds within the coalition talks with the CDU/CSU. The newspaper quoted negotiator SPD Martin Schulz as stating that their introduction would not be constitutionally possible and reported that the idea had in any case been controversial within the party.  

5.4 Exploring the Constitutional Limits: Debating a Constitutional Referendum
The GFCC’s EFSF judgment and the newspaper interviews of Justices Voßkuhle and Huber sparked a debate about whether Germany should have a constitutional referendum on further European integration. In November 2011, the SPD’s Michael Roth pleaded for a constitutional referendum on further European integration. By the summer of 2012, various high-profile politicians supported the idea. By this time, the GFCC ruled on issues related to the crisis in two further judgments. In June, newspapers reported that Finance Minister Schäuble supported a referendum for an extensive reform of the European institutions. This would include common budgetary policies, an EU finance minister, and a banking union, as well as a strengthened European Parliament and a directly chosen Commission President. Peer Steinbrück of the SPD similarly supported a referendum: “Who has listened attentively to the constitutional judges knows that things cannot be done differently”. CSU chairman Horst Seehofer had already supported introducing referenda

Regierungsprogramm 2013-2017,

Lisa Caspari, 'Teambuilding-Maßnahme Europa' ZEIT ONLINE (29 October 2013).

See for example the article by Horst Dreier who argued that an assembly model could also be an option, under which the German people would choose a constitutional assembly to draft a new constitution that afterwards would not have to be subjected to a referendum. Horst Dreier, ‘Verfassungsreform: Ein neues Deutschland’ ZEIT ONLINE (20 October 2011).


‘Schäuble erwartet Volksabstimmung über neue Verfassung’ Handelsblatt (24 June 2012); ‘Spitzenpolitiker rechnen mit Volksabstimmung in Deutschland’ Spiegel Online (24 June 2012)

Quoted in ‘Schäuble erwartet Volksabstimmung über neue Verfassung’ 2012, note 194.
on European issues in February 2012 and now supported Schäuble’s plea. Merkel, however, was much more hesitant.

The issue played a role in the Bundestag’s final plenary debate on the ESM and Fiscal Compact of 29 June 2012. The SPD and the Greens again argued that a real political union should be developed that would entail a further power transfer to the EU, but would have to be coupled to a democratisation of the European decision-making process. The latter should be done primarily through a strengthening of the European Parliament. The SPD accompanied this proposal by calls for a referendum. Sigmar Gabriel of the SPD declared:

“For a real political Union we need new democratic structures and also the transfer of national sovereign rights to the European level. Many of these can be made without a change in the Basic Law, others require changes in the Basic Law, for which one definitely should also get the agreement of our citizens through referenda. At the end certainly stands a referendum on our Constitution.”

The call for a referendum fitted the SPD’s longer support for direct democracy. Gabriel also justified his proposal in order to prevent the EU from staying an “elite project”. The preceding events, however, do indicate that the GFCC’s case law played a role. The discussion on holding a constitutional referendum only really started after Huber and Voßkuhle had pointed in this direction.

\[197\] ‘Seehofer unterstützt Schäubles Vorstoß’ Frankfurter Allgemeine Zeitung (26 June 2012).
\[198\] Gabriel (SPD), Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140, at p. 22706.
\[199\] Gabriel (SPD), Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140, at p. 22707.
\[200\] The Greens, however, did not support the calls for a referendum, although they did call for a fundamental change in Europe’s political constitution. Trittin (Bündis 90/Die Grünen), Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140, at p. 22714. They supported a constitutional assembly that would deal with constitutional questions after a comprehensive reform of the European treaties had been adopted by a European convention. See: http://www.gruene.de/fileadmin/user_upload/Dokumente/Beschluesse_Landerrat_20120624_Beschluss_Sonderlanderrat_Mehr_Mut_zu_Europa.pdf; The party supported Europe-wide referenda after a change to the European treaties. In April 2016 the leader of the German Greens in the European Parliament, Rebecca Harms, spoke out against referenda in single Member States that affected the EU as a whole: ‘Grünen-Abgeordnete lehnt EU-Volksabstimmungen ab’ Spiegel Online (8 April 2016) http://www.spiegel.de/politik/ausland/referendum-in-den-niederlanden-harms-ist-gegen-volksabstimmungen-a-1086067.html

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Support for a referendum could also be found at the other side of the political spectrum, namely by dissenters in the FDP and CSU that opposed the ESM and TSCG, as well as further European integration. Frank Schäffler of the FDP and Peter Gauweiler of the CSU contended that the Fiscal Compact and ESM presented a step towards a European state and that a referendum was necessary. Perhaps surprisingly, Die Linke made the same argument during the first plenary on the ESM and Fiscal Compact, because it heavily opposed them. The party, however, did not oppose a federal Europe “if it concerned a social, free, democratic and ecological Europe of the peoples.”

In August 2012, newspapers further reported that the FDP’s parliamentary leader, Rainer Brüderle, supported holding a referendum on further steps in tackling the euro crisis. Opposing reasons motivated the different parties’ support for a referendum. Gabriel of the SPD, and CDU Finance Minister Schäuble, wanted a referendum to achieve further steps in European integration. Seehofer of the CSU, and Brüderle of the FDP, on the other hand, favoured a referendum precisely to prevent this result and particularly to prevent further money flowing to debtor countries.

The debate appears to have come to an end in the coalition negotiations between the CDU, CSU and SPD of 2013. The CSU and SPD initially agreed on a proposal to introduce referenda at the federal level that would give German citizens a say on European issues. Nonetheless, the CDU opposed the idea and moved the proposal off the table.

5.5 The Increasing Importance of Constitutional Arguments: The Fiscal Compact and ESM Debates

Besides the discussion on the referendum, constitutional arguments have come to play a more important role in the German crisis debates over time. In the parliamentary debates on the ESM and the Fiscal Compact of March and June 2012, a whole range of arguments were...

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202 Gauweiler (CDU/CSU), Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140, at p. 22724-22725.
204 'Brüderle hält Volksabstimmung über EU-Zukunft für möglich' Frankfurter Allgemeine Zeitung (10 August 2012); Ludwig Greven, 'Das Volk fragen – aber verantwortungsvoll' ZEIT ONLINE (14 August 2012) For the viewpoint of Bundestag President Lammert see: 'Lammert hält verfassungsgebende Versammlung für vorstellbar' Süddeutsche Zeitung (1 July 2012).
206 'Volksabstimmungen bundesweit geplant' Die Welt (12 November 2013); Robert Rollmann, 'Union und SPD wollen bundesweite Volksabstimmungen' Süddeutsche Zeitung (12 November 2013)
207 'CDU will keine Volksabstimmungen auf Bundesebene' Handelsblatt (12 November 2013); Philipp Wittrock, 'CDU beerdigt Pläne für Volksabstimmungen' Spiegel Online (12 November 2013).
made with reference to the Basic Law. The fact that constitutional arguments played such a prominent role in these debates can also be explained by the fact that the proposed measures were simply very far-reaching: All parties regarded the discussions as fundamental in nature.208

Still, the GFCC’s rulings left their mark. Firstly, in light of a GFCC judgment of 19 June 2012,209 the coalition parties considered that both the ESM Treaty and the Fiscal Compact qualified as ‘matters concerning the EU’ within the sense of Article 23 (1) and (2) BL.210 To remove any constitutional doubts, the coalition parties decided that a two-thirds constitutional majority should adopt the treaties.211 In return for their support to the measures, the SPD and Greens obtained agreement on a “Pact for sustainable growth and employment”. In the Pact, the four parliamentary groups agreed to introduce a financial transaction tax, even if not all EU Member States would participate. In addition, the Pact provided for initiatives on growth and employment and action against youth unemployment.212 Nonetheless, the Frankfurter Allgemeine reported that the governing coalition had rejected any mention of a “debt redemption fund” by pointing to constitutional objections from Karlsruhe.213

208 Volker Kauder of the CDU/CSU called the decisions “existential” for Europe. Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140, at p. 22711. In the same debate Brüderle of the FDP spoke of “constitutionally uncharted territory” (at p. 22707). Gabriel of the SPD stated Europe had arrived at “a crossroad” (at p. 22706). Tödtling of the Greens spoke of the “challenge to re-establish this Europe” (at p. 22714). Sahra Wagenknecht of Die Linke spoke of a “coup against the Basic Law” (at p. 22710).
210 For the Fiscal Compact, however, the coalition parties had already decided in March 2012 that ratification required a constitutional majority. See legal proposal BT-Drucksache 17/9046 of 20.03.2012: Gesetzentwurf der Fraktionen der CDU/CSU und FDP, Entwurf eines Gesetzes zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion, at p. 18; Finance Minister Schäuble, Plenarprotokoll 17/172 (ESM and Fiscal Compact first plenary), note 203, at p. 20213.

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Secondly, Die Linke invoked the GFCC’s case law to attack the measures. The party fiercely opposed both the ESM and the Fiscal Compact. Sahra Wagenknecht argued that Europe should be “a project of peace, democracy and of the social state”. Yet instead, the measures made Europe a “project for the destruction of democracy and social justice, a project to dismantle workers’ rights and a project to reduce wages and pensions.” Die Linke’s concerns were mostly directed at the Fiscal Compact. Party-leader Gysi argued that the Compact violated the democracy principle and the eternity clause of the Basic Law. Laying down debt brakes in an international treaty without the possibility for change, would force the Member States into permanent austerity politics. This would be a significant violation of the Bundestag’s budgetary powers, as the GFCC had determined in its Lisbon judgment. The party also argued against the ESM on constitutional grounds, which in its view would impair the budgetary rights of the Bundestag, because the extent of liabilities was potentially unrestricted. The party’s resistance to the ESM was perhaps more surprising, given that Die Linke had consistently favoured more solidarity in the EU. Still, the party opposed the ESM, because, in its view, the risk of state insolvencies and debt cuts would be transferred to the taxpayer rather than to the banks and the wealthy. In addition, financial assistance would not aid the people, but merely the banks. Instead Die Linke favoured setting up a European bank for public loans with the ability to refinance itself at the ECB. This would decouple state finances from the financial markets. In a resolution, Die Linke also called for a fundamental reform of the EU Treaties: to be negotiated in a European Convention, and to be subjected to a referendum afterwards. Among other things, the Treaty

214 Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140, at p. 22709.
215 Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140, at p. 22709.
216 Articles 20 and 79 (3) of the BL
217 Plenarprotokoll 17/172 (ESM and Fiscal Compact first plenary), note 203, at p. 20219-20220; and p. 22720; see also BT-Drucksache 17/9147 of 27.03.2012: Antrag der Abgeordneten Alexander Ulrich, Wolfgang Gehrecke, Jan van Aken, Christine Buchholz, Sevim Dagdelen, Dr. Diether Dehm, Werner Dreibus, Annette Groth, Heike Hänsel, Inge Höger, Dr. Barbara Höll, Andrej Hunko, Harald Koch, Niema Movassat, Thomas Nord, Paul Schäfer (Köln), Michael Schlecht, Kathrin Vogler, Sahra Wagenknecht, Katrin Werner und der Fraktion DIE LINKE; similar arguments against Fiscal Compact in Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140 voiced in the declarations of (all Die Linke): Matthias Birkwald, at p. 22757-22758; Wolfgang Gehrecke, at p. 22736; Heike Hänsel, at p. 22734-22735; Christine Buchholz, at p. 22759-22760; Dagmar Enkelmann, at p. 22762-22763; Nicole Gohlke, at p. 22765; Annette Groth, at p. 22766-22767; Harald Koch, at p. 22770; Kathrin Vogler, at p. 22784-22785; Inge Höger, Andrej Hunko, Ulla Jelpke, Alexander Süßmair und Katrin Werner, at p. 22794-22795. Wolfgang Gehrecke both opposed the ESM and the Fiscal Compact on the ground that it violated Article 79 (3) BL, at p. 22765.
218 BT-Drucksache 17/10172, note 211, at p. 7.
219 BT-Drucksache 17/10172, note 211, at p. 7-8; see also BT-Drucksache 17/9146 of 27.03.2012: Antrag der Abgeordneten Dr. Gesine Lötzsch, Dr. Kirsten Tackmann, Dr. Dietmar Bartsch, Herbert Behrens, Karin Binder, Heidrun Bluhm, Steffen Bockhuhn, Roland Clauß, Katrin Kunert, Carin Lay, Sabine Leidig, Michael Leutert, Thomas Lutze, Kornelia Möller, Wolfgang Neskovic, Jens Petermann, Ingrid Remmers, Dr. Ilia Seifert, Kersten Steinke, Sabine Stüber, Alexander Süßmair und der Fraktion DIE LINKE.
reform should make the social state a founding principle of the EU; introduce EU-wide minimum wages; cancel free movement of capital; provide a basis for the coordination of tax policies; delete or change the provisions on excessive deficits; as well as do away with the ECB’s mandate focused on price stability. After the parliamentary debates, Die Linke took its constitutional concerns to the GFCC.

Thirdly, several Bundestag members within the SPD and the Greens raised similar arguments against the Fiscal Compact as Die Linke. The Fiscal Compact would lead to permanent austerity politics with troubling social consequences. They also argued that the Treaty violated the Basic Law or at least raised serious democratic concerns, because it significantly restricted the Bundestag’s budgetary powers. In their view, an alternative approach was required with more solidarity, competence transfers to the European level in economic and fiscal policy, as well as enhancing structures for democratic legitimation at the EU level.

Fourthly, within the CDU/CSU and FDP, German liabilities under the ESM raised more concerns. The coalition parties qualified the Fiscal Compact as an essential element of a sustainable stability union (‘dauernhaft Stabilitätsunion’). For them the ESM and the Fiscal Compact presented two sides of the same coin, a nexus between “solidarity and solidity”. A number of parliamentarians from the CDU/CSU and FDP, however, argued that the ESM went too far: It made Germany liable for the debts of other states, turned the eurozone into a transfer union and effectively transformed the EU into a federal state. In their view, this result was not only economically unsound, but also contrary to Article 38 BL and the GFCC’s case

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220 BT-Drucksache 17/9148 of 27.03.2012: Antrag der Abgeordneten Dr. Diether Dehm, Andrej Hunko, Thomas Nord, Alexander Ulrich, Wolfgang Gehrecke, Jan van Aken, Christine Buchholz, Sevim Dağ’delen, Werner Dreibus, Annette Groth, Heike Hänsel, Inge Höger, Harald Koch, Niema Movassat, Wolfgang Neskovic, Paul Schäfer (Köln), Michael Schlecht, Kathrin Vogler, Sahra Wagenknecht, Katrin Werner und der Fraktion DIE LINKE.

221 See for such concerns see Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140 and the vote declarations of: Marco Bulow (SPD), at p. 22760-22761; Dr. Matthias Miersch (SPD), at p. 2272-2273; Beate Müller-Gemmeke (BÜNDNIS 90/DIE GRÜNEN), at p. 22774-22775; Swen Schulz (Spandau) (SPD), at p. 22778; Wolfgang Strengmann-Kuhn (BÜNDNIS 90/DIE GRÜNEN), at p. 22781-22783; Hans-Christian Stöibe (BÜNDNIS 90/DIE GRÜNEN), at p. 22783-22784; joint declaration of Lisa Paus, Katja Dörner and Sven-Christian Kindler (BÜNDNIS 90/DIE GRÜNEN), at p. 22789-22790; Gerhard Schick, Maria Klein-Schmeink and Sylvia Kotting-Uhl (BÜNDNIS 90/DIE GRÜNEN), at p. 22791-22793; Anton Hofreiter, Ulrich Schneider, BeateWalter-Rosenheimer (alle BÜNDNIS 90/DIEGRÜNEN), at p. 22793-22794; joint declaration of Werner Schieder (Weiden), Klaus Barthel, Wolfgang Gunkel, Gabriele Hiller-Ohm, Daniela Kolbe (Leipzig), Hilde Mattheis, Ottmar Schreiner, Rüdiger Veit und Waltraud Wolff (Wolmirstedt) (SPD), at p. 22797.

222 Merkel, Plenarprotokoll 17/188 (ESM and Fiscal Compact first plenary), note 140, at p. 22699. Finance Minister Schäuble, Plenarprotokoll 17/172 (ESM and Fiscal Compact first plenary), note 203, at p. 20210-20213.

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law. They argued that the main problem had not been the absence of a political union tied to EMU, but the violation of the no-bailout clause in 2010. Rather than criticising the Fiscal Compact from a democratic perspective, they named it a “toothless tiger”: an inadequate means to ensure sound budgetary policies.223

By June 2012, the GFCC’s case law was therefore invoked from different sides of the political spectrum to oppose the ESM and Fiscal Compact. The GFCC’s rulings on the ESM and Fiscal Compact nonetheless appear to have affected the various concerns differently. The Court upheld the ESM Treaty, but also ruled that German liabilities should be clearly limited, following the logic of the Euro-critics on the political right. The Fiscal Compact appeared to receive less concern as the Court had always attached key importance to budgetary discipline in qualifying EMU as a community of stability. Moreover, the Court held that the Fiscal Compact could be justified to avoid problematic levels of debt in the long run that would limit the Bundestag’s budgetary powers. Yet this argument could probably have been given for all of the crisis measures, as their introduction has always been aimed at securing the eurozone’s financial stability. Another crisis would surely have had negative repercussions for the Member States’ debt positions.

5.6 A Constitutional Referendum as a Way Out?

With its case law, the GFCC has put in place significant constitutional hurdles against steps towards mutualisation of debts and more integration in economic and fiscal policy, even if calls for such steps are rooted in democratic arguments. The available evidence shows that in this manner the Court’s case law constrains political debate about different visions of the monetary union’s future. Yet the justices themselves have provided a possible way out by arguing that a popular referendum would be sufficient to overcome these constitutional hurdles. Ultimately Karlsruhe’s case law, therefore, may not be as undemocratic as it appears: although there are many arguments against referenda, it seems hard to argue that they are undemocratic.

223 Bellmann (CDU/CSU), Plenarprotokoll 17/188 (ESM and Fiscal Compact second plenary), note 140, at p. 22752, 22751-22753; Frank Schäffler, Sylvia Canel und Dr. Lutz Knopek (all FDP), Manfred Kolbe und Klaus-Peter Willsch (CDU/CSU), at p. 22795-22797. In between these different positions Peter Danckert and Rolf Schwanitz of the SPD took a middle position. They argued both that the possible German liabilities under the ESM exceeded the permissible constitutional limits, as well as that the Fiscal Compact limited the Bundestag’s budgetary sovereignty to a constitutionally impermissible extent. For these reasons, they announced to challenge the measures before the GFCC. Peter Danckert (SPD), at p. 22723-22724; Rolf Schwanitz (SPD), at p. 22779-22781.
The idea that German constitutional hurdles to European integration could be overcome through a popular referendum rests on the doctrinal position that only the German people as the constituent power are able to give themselves a new constitution. This position is based on Article 146 BL:

“This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.”

According to Justice Huber, such a constitutional referendum would not necessarily have to result in an entirely different constitution, but could also make an exception to Article 79 (3) BL for European affairs.

Nonetheless, the idea that a referendum would be necessary for steps in European integration beyond the limits of Article 79 (3) is not merely a doctrinal position. A number of constitutional judges share the idea that such a step would require a higher degree of legitimation that only the German people themselves can provide. According to Justice Huber, a constitutional majority of two-thirds would not suffice, because such a majority can be obtained relatively easily. He also argues that there is “a clear discrepancy between the political elite […] and the population, not just in questions concerning Europe”. More generally, Huber has a favourable view of direct democracy.

Still, this idea of a constitutional referendum raises a number of questions. Firstly, the reading of Article 146 BL on which it rests, is highly contested. Tobias Herbst, for example, argues that Article 146 BL has lost its value since German reunification: the Article only meant to ensure that the Basic Law would not stand in the way of German reunification. To interpret Article 146 BL as an independent ground to move beyond Article 79 (3) BL, would disregard

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224 See par. 179-180 of Bundesverfassungsgericht, Judgement of 30 June 2009, 2 BvE 2/08 (Lisbon judgment); Interview with Peter Huber, Judge at the German Federal Constitutional Court, 23 April 2015.
225 Interview with Peter Huber, Judge at the German Federal Constitutional Court, 23 April 2015.
226 Interview with Peter Huber, Judge at the German Federal Constitutional Court, 23 April 2015; Interview with former judge at the German Federal Constitutional Court, 29 June 2015.
227 Interview with Peter Huber, Judge at the German Federal Constitutional Court, 23 April 2015.
228 Reinhard Müller, ‘Wie demokratisch ist direkte Demokratie?’ Frankfurter Allgemeine Zeitung (7 November 2011).
229 Interview with Franz Mayer 28 May 2015, Berlin Germany; interview with Christoph Müllers 20 April 2015, Berlin, Germany.
the purpose of Article 79 (3), which, in light of the Weimar experience, aims to prevent Germany from falling into a dictatorship. Moreover, the German Basic Law contains very few provisions on direct democracy. As was discussed in the previous chapter, the idea of introducing more elements of direct democracy was debated by the Joint Constitutional Committee at the time of the Maastricht Treaty. A key reason why the JCC rejected the option was that it would entail a break with the clear decision of the constitution’s founders: they held that, in light of the Weimar experience, Germany should have a system of representative government. In order to protect the stability of the German constitutional order, even the introduction of some elements of direct democracy was thus wholly rejected. This makes it difficult to comprehend why a referendum would then be able to legitimate an abrogation of the Basic Law altogether, including the guarantees of Article 79 (3) that aim to preserve the integrity of Germany’s constitutional order.

Secondly, from the viewpoint of the GFCC’s case law, the idea is paradoxical, given that the Court has always attached so much importance to the Bundestag’s position as an exemplar of democratic politics. Apparently, fundamental questions on the future of Europe require a type of democratic debate that the German Bundestag cannot sufficiently provide.

Yet, the most difficult aspect of a constitutional referendum on European integration is that the arguments already seem highly tilted towards rejection of further European integration. Opponents of further integration can muster all the GFCC’s arguments against such a move: logically, further European integration would require Germans to give up their cherished Basic Law and constitute a violation of the democratic principle.

6. Effects of the GFCC Case Law on European Decision-making
The effects of the GFCC’s case law have not been restricted to German politics, but have also influenced decision-making at the European level. The Karlsruhe rulings contributed to a crisis politics in which financial assistance would only be given as a last resort, subject to conditionality that brings debtor states on a path towards budgetary discipline, and in which German liability would be limited and subject to a German veto. A sign of the growing tension is that financial assistance has been granted only when political conditions have been met, and these conditions have often been defined within the context of the German Constitutional Court’s rulings. The Court has also been involved in the negotiation of the European Stability Mechanism, and its rulings have significantly influenced the design of the mechanism. The German Constitutional Court has thus played a key role in shaping the European Union’s approach to fiscal and economic governance.


231 In a similar vein: Christoph Möllers, interview, 20 April 2015.
importance of the GFCC’s case law for European integration is that in April 2013 several GFCC judges visited Commission President Barroso to discuss “how to best ensure the respect of democracy and the rule of law in the EU and its Member States.” 

6.1 Making Financial Assistance a Last Resort: The EFSF and ESM

German constitutional concerns already played an important role in the spring of 2010, in discussions between the euro area Member States over various alternatives to deal with the spreading crisis. A particular concern for Germany was that a rescue mechanism could not violate the no-bailout clause of Article 125 TFEU, because the GFCC had determined the no-bailout clause as an essential part of this “community of stability” in its Maastricht judgment. Consequently, any crisis mechanism that would violate the no-bailout clause risked being defeated in proceedings before the Court in Karlsruhe, particularly after the Court’s critical Lisbon ruling of 2009. Already in February 2010, the four academics that had challenged Germany’s entry into EMU in 1998, threatened to bring another case before the GFCC if assistance were to be provided to Greece.

6.1.1 Moving Outside the Treaty Framework: The EFSF

One of the ideas discussed in the spring of 2010 was to set up a European Monetary Fund (EMF) with features similar to the IMF. The German government had a positive stance towards the idea of an EMF, but it deemed the proposal incompatible with the TFEU’s no-bailout clause. The setting-up of an EMF would therefore require Treaty change. Germany liked the option of providing bilateral loans, because it seemed to be a good way to get around the no-bailout clause. However, the provision of bilateral loans was ultimately

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236 Schäuble fordert Europäischen Währungsfonds, Spiegel Online, 6 March 2010; EMF plan needs new EU treaty, says Merkel, Financial Times, March 9 2010. See also on these events: Ledina Gocaj and Sophie Meunier, ‘Time Will Tell: The EFSF, the ESM, and the Euro Crisis’ (2013) 35 3 Journal of European Integration 239, at p. 242.
deemed insufficient to deal with the extent of the problems and seen as unable to provide a credible solution in the eyes of the markets.\textsuperscript{237}

Ultimately, the idea to create a special purpose vehicle (SPV) in the form of the EFSF was a last minute one. On 7 May, the heads of state, or government, of the euro area declared that the Commission would “propose a European stabilization mechanism to preserve financial stability in Europe.”\textsuperscript{238} The details of this mechanism were worked out over the weekend of 8 and 9 May 2010 by the Commission and submitted to a special Ecofin Council on 9 May 2010.\textsuperscript{239} The original Commission proposals, however, were unacceptable to Germany. The Commission proposed a eurozone rescue fund of €500 billion, operating under Commission authority to be adopted on the basis of Article 122 TFEU.\textsuperscript{240} The German government raised concerns about budgetary sovereignty and objected that the proposal would be difficult to pass review by the GFCC. The proposed fund required the euro area Member States to provide financial guarantees above the ceiling of the EU’s own resources in the EU budget. The proposal would therefore also violate the decision on own resources, which requires approval by the Member States “in accordance with their respective constitutional requirements”.\textsuperscript{241} Director-General of the Council Legal Service, Jean-Claude Piris, consequently intervened and said the proposal violated EU law. From these discussions the EFSF emerged as a compromise.\textsuperscript{242} The original Commission proposal was adopted in the form of the much smaller EFSM, where the total amount of financial assistance is limited to

\textsuperscript{237} Ibid, at p. 242; Yves Leterme, prime minister of Belgium at the time, proposed setting-up a European debt agency that would issue common euro-area debt instruments and mirrored proposals for Eurobonds. This proposal, however, would have also required treaty change. See: Yves Leterme, Pour une agence européenne de la dette \textit{Le Monde} (5 March 2010).


\textsuperscript{242} The description of these events is based on: Tony Barber, ‘Saving the euro: Dinner on the edge of abyss’ \textit{Financial Times} (October 10 2010); Peter Ludlow, In the Last Resort: The European Council and the euro crisis, 2010, at p. 30 and farther; Interview EU official #1, 3 November 2015; Interview EU official #2, 3 November 2013; Interview EU official #3, 4 November 2015. There is disagreement as to whether the concerns under EU law or those under German constitutional law were decisive. The Financial Times article by Barber quotes former EU commissioner Rehn in the following manner: “If Germany had endorsed the Commission’s proposals, they would have flown. But the Germans made the point that there might be problems getting the proposals past their constitutional court.” In addition and according to Peter Ludlow, Merkel had already referred to possible troubles with the GFCC during the working dinner of the Euro area head of state on 7 May 2010, see Peter Ludlow, In the Last Resort: The European Council and the euro crisis, 2010, at p. 32-34.
the funds available within the EU budget. This meant that the EFSM had a maximum lending capacity of €60 billion.243

In the aftermath of the infamous weekend of 8 and 9 May 2010, German Chancellor Merkel was criticised from various sides for her lack of decisive action on solving the growing crisis.244 This behaviour has been partly explained by her reluctance to support assistance measures prior to the important regional elections in Nord Rhine-Westphalia of 9 May 2010.245 Assistance to troubled euro Member States was unpopular among voters and the coalition allegedly wanted to postpone the decision on financial assistance until after the election. This failed, because the situation in the eurozone proved to be so pressing, that a solution was necessary before it took place. Political ideology was another factor, as the giving of financial assistance was controversial within the ranks of the FDP and CDU/CSU. Nonetheless, the threat that assistance measures could be successfully challenged before the GFCC has been noted as a contributing factor. The fear was that elaborate assistance mechanisms would not survive a constitutional challenge, unless it could be shown that aid to Greece was a last resort to save EMU.246 Germany could ultimately accept the compatibility of financial assistance with Article 125 TFEU, if such assistance were to be a last resort granted under strict conditionality that would bring debtor countries on a path towards budgetary stability. It accepted a purposive reading of Article 125 TFEU: the giving of assistance, subject to strict conditionality that replaced market logic, could be accepted because the no bail-out rule was meant to ensure the Member States’ budgetary discipline by subjecting their fiscal policies to the discipline of financial markets.247

243 See Article 2 (2) Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism, O.J. 2010, L 118/1, which explicitly limits the “outstanding loans or credit lines” to “the margin available under the own resources ceiling for payment appropriations.”
245 See e.g.: Katinka Barysch, ‘Germany, the euro and the politics of the bail-out’ (2010) June Centre for European Reform briefing note.
247 Interview EU official #1, 3 November 2015; The German Minister for Interior Affairs, Thomas De Maizière and who acted as the German representative in the negotiations over the EFSF declared on the conditions for bailouts: “One is if the euro is in danger. A second precondition is that countries being helped must do everything to help themselves. Those two preconditions have now been met, and [the eurozone defence fund] is in line with German law: we are providing loan guarantees under strict conditions, including conditions set by the International Monetary Fund.” In the same interview he declared: “And we have a very strong federal constitutional court, as became clear with respect to its ruling on the Lisbon Treaty. The idea that German law can be interpreted strictly on the one hand, but that EU law can somehow be more political than legal, on the other, is not acceptable to Germany. It is not Euroscepticism when a German chancellor has to check that a new
The specific contribution of the GFCC’s case law, compared to the role of electoral politics and political ideology, is difficult to determine. Different factors overlapped and probably reinforced each other. Still, the former permanent representative for the Netherlands at the EU, Tom de Bruijn, recalls that Germany was reticent in putting forward that its hesitations stemmed from constitutional concerns. In his perception, German negotiators generally experience the Court’s case law as a constraint.248

It thus seems fair to say that the GFCC’s case law affected the decision-making on the EFSF and EFSM in three ways. First, it contributed to a relatively strict interpretation of Article 125 TFEU that supported austerity policies in debtor states, policies that later would be heavily criticised by the German opposition. Secondly, the strict interpretation contributed to the German government’s stance that assistance would really have to be given as an ultima ratio. That position ultimately contributed to the fact that the assistance mechanisms had to be designed in a crisis atmosphere over the weekend of 8 and 9 May. The result was that the national parliaments were, to a large extent, excluded.249 Thirdly, the GFCC’s case law contributed to the EFSF’s adoption outside the EU Treaty framework. That decision ensured a German veto on the assistance mechanism and thus safeguarded the Bundestag’s budgetary sovereignty.

6.1.2 Inducing Treaty Change: The ESM
Both the EFSF and EFSM were intended as temporary measures.250 Over the course of 2010, however, it transpired that a permanent assistance mechanism was required.251 Germany

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248 Interview with Tom De Bruijn, 18 November 2015.
249 Which in turn led to accusations by the German opposition that the government had violated its constitutional obligations. See the next chapter on this point.
251 The decision to set up such a permanent mechanism was made at the European Council of 28 and 29 October 2010, where agreement was also reached for a limited treaty change: Conclusions of the European Council of 28-29 October 2010, doc. No EUCO 25/10, at http://data.consilium.europa.eu/doc/document/ST-25-
insisted that a permanent mechanism would require a Treaty change in order to remove legal uncertainties about its compatibility with the Treaties, particularly as, in the meantime, the EFSF and EFSM had been challenged in Karlsruhe.\textsuperscript{252} Other Member States, however, were reluctant to engage in the complex exercise of revising the Treaties, given the possibly burdensome parliamentary ratification process or the need for referenda.\textsuperscript{253} The solution was ultimately found in a minor amendment to Article 136 (3) TFEU using the simplified Treaty revision procedure of Article 48 (6) TEU:

> “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”

This provision effectively laid down the purposive interpretation of the no bail-out clause in the TFEU. The Article states that financial assistance is a last resort to “safeguard the stability of the euro area as a whole” and can only be granted under “strict conditionality.” The Article thus meant to guarantee the compatibility of a permanent assistance mechanism with Article 125 TFEU.\textsuperscript{254} In \textit{Pringle} this interpretation was eventually also accepted by the CJEU.\textsuperscript{255}
Nonetheless, the CJEU’s interpretation of the no bail-out clause seems to have translated the austerity measures imposed on debtor states into a constitutional requirement.  

Finally, German constitutional concerns have further influenced the design of the ESM. The fact that Germany retains a veto-power under the ESM’s emergency voting procedure seems to be no coincidence, but flows from constitutional concerns about budgetary sovereignty. As discussed, such a veto-position is not available to smaller Member States like the Netherlands.

6.2 Banking Union: Making the Single Resolution Fund Intergovernmental

Another episode in which German constitutional concerns have played an important role, is the EU negotiations of the single resolution mechanism (SRM), a key component of the European banking union. As discussed, the SRM is a mechanism for the resolution of failing banks in the euro area. The SRM includes a Single Bank Resolution Fund (SRF) that serves to fund the costs associated with the resolution of banks and is financed by contributions from banks. An important reason for a euro area wide fund was that it would provide a more effective way to deal with a banking crisis. Such crises are often concentrated in some Member States and are thus asymmetrical in nature. In addition, a common fund could contribute to breaking the vicious cycle between national fiscal positions and their banking sector.


Interview EU official #2, 3 November 2013.

Important information on the negotiations and the constitutional concerns was obtained through interviews with EU officials: Interview EU official #1, 3 November 2015; Interview EU official # 2, 3 November 2013; Interview EU official #3, 4 November 2013.


The German government, however, raised objections against the initial Commission proposal for an SRM introduced in July 2013.\footnote{European Commission, proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, COM(2013) 520 final.} Initially the German government argued that the proposal required a Treaty change, because there was no proper legal basis.\footnote{Schäuble made arguments in this sense in an article in the financial times already in May 2013: Wolfgang Schäuble, ‘Banking union must be built on firm foundations’ \textit{Financial Times} (12 May 2013). Initial German responses to the Commission SRM proposal are also described at Commission banking union plans met with scepticism (11 July 2013) <http://openeuropeblog.blogspot.nl/2013/07/commission-banking-union-plans-met-with.html> accessed 27 December 2017. See also: Benjamin Fox, ‘Brussels on collision course with Germany on banking union’ \textit{EU Observer} (10 July 2013).} In the subsequent negotiations, the German government moderated its stance and argued that the proposal could not be adopted on the basis of Article 114 TFEU, but should instead be adopted on the basis of Article 352 TFEU. The Council legal service, in turn, felt confident that the legal basis of Article 114 TFEU was appropriate, which undermined the German position.\footnote{The Commission’s firm opinion that Article 114 was the correct legal basis apparently also helped to disarm German opposition, see Rachel A. Epstein and Martin Rhodes, ‘The political dynamics behind Europe’s new banking union’ (2016) 39 3 West European Politics 415, at p. 427.} It subsequently transpired that the problem for Germany was constitutional in nature. The German government held that an EU act could not impose an obligation to transfer the contributions to the fund raised at the national level, because this would violate the Bundestag’s budgetary sovereignty.\footnote{In a speech at the College of Europe in Bruges on 27 March 2014, Schäuble stated: “Under the current treaties, the EU is not allowed to collect banking levies.” He did not, however, refer to underlying German constitutional concerns. See Wolfgang Schäuble, ‘Strategy for European recovery’, keynote speech, College of Europe, Bruges, 27 March 2014. Available at: http://www.bundesfinanzministerium.de, last accessed 27 December 2017.} In addition, the German government argued that the mutualisation of financial risks would also be incompatible with the Bundestag’s budgetary sovereignty. The Court had already accepted the various previous crisis mechanisms, but as representatives of the GFCC had apparently pointed out to the German government, the SRM could be the last straw for Karlsruhe, finally provoking it into revolt against Brussels.\footnote{The Council Press Release announcing the ultimate agreement on the IGA does not specify any details on the constitutional concerns, but merely notes: “Using an intergovernmental agreement to establish rules on the transfer and mutualisation of contributions is intended to provide maximum legal certainty. The Council decided on this approach in December, given legal and constitutional concerns in certain member states.” Council of the European Union, Press Release of 21 May 2014, 10088/14 http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010088%202014%20INIT, Accessed at 27 December 2017.} Finland supported Germany’s arguments, as did the Netherlands in more moderate fashion.


\footnotetext[262]{Schäuble made arguments in this sense in an article in the financial times already in May 2013: Wolfgang Schäuble, ‘Banking union must be built on firm foundations’ \textit{Financial Times} (12 May 2013). Initial German responses to the Commission SRM proposal are also described at Commission banking union plans met with scepticism (11 July 2013) <http://openeuropeblog.blogspot.nl/2013/07/commission-banking-union-plans-met-with.html> accessed 27 December 2017. See also: Benjamin Fox, ‘Brussels on collision course with Germany on banking union’ \textit{EU Observer} (10 July 2013).}

\footnotetext[263]{The Commission’s firm opinion that Article 114 was the correct legal basis apparently also helped to disarm German opposition, see Rachel A. Epstein and Martin Rhodes, ‘The political dynamics behind Europe’s new banking union’ (2016) 39 3 West European Politics 415, at p. 427.}

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Prompted by high-level political actors in Brussels and Berlin, members of the Council legal service reportedly met informally with staff of the GFCC to discuss the constitutional concerns. These meetings allegedly contributed to easing the pressure and helped bring about a compromise: the German government accepted Article 114 TFEU as the basis for the SRM, except for the obligation on the transfer and mutualisation of the contributions. The latter obligations were put in a separate intergovernmental agreement. The construction entails that the commitment to transfer and mutualise funds in the SRF requires ratification in the national legal orders, which in turn ensures that the German Bundestag has a veto over the agreement and its budgetary sovereignty is guaranteed.

The European Parliament strongly objected to the move, however, not least because it was initially excluded from the intergovernmental negotiations. In a letter of 20 January 2013, written to Commission President Barroso at the request of the Parliament’s Conference of Presidents, EP President Schulz wrote that the decision to exclude certain issues from the Commission proposal constituted an “unacceptable precedent”, because it infringed “the right of initiative of the Commission”, “the legislative powers of the Parliament as co-legislator” and “undermined the Community method”. In a letter of 15 January 2014 to the Council Presidency, the EP’s Committee on Economic and Monetary Affairs had expressed its disagreement in similar terms. The Committee noted that the move violated core constitutional principles of the EU legal order, namely “the principle of sincere cooperation

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266 See also Council of the European Union, Council Decision of the representatives of the euro area Member States meeting within the Council of the European Union and Terms of reference concerning the intergovernmental agreement on the Single resolution Fund, 20 December 2013, 18134/13.
268 As is confirmed by recital 7 of the SRF IGA (note 267): “Nonetheless, the participating Member States who raise the contributions on the institutions located in their respective territories according to the BRR Directive and the SRM Regulation, remain competent to transfer those contributions towards the Fund. The obligation to transfer the contributions raised at national level towards the Fund does not derive from the law of the Union. Such obligation will be established by this Agreement which lays down the conditions upon which the Contracting Parties, in accordance with their respective constitutional requirements, jointly agree to transfer the contributions that they raise at national level to the Fund.” See also recital 9. Recital 20 of the SRM Regulation (note 259) contains similar language and Article 67 (1) of the SRM Regulation confirms that the Fund “shall be filled in accordance with the rules on transferring the funds raised at national level towards the Fund as laid down in the Agreement.”
269 See also Dave Keating, ‘MEPs cry foul over Council plans for banking union that bypass EU’ Politico (12 November 2013).
271 Martin Schulz, Letter to Mr José Manuel Barroso, President of the European Commission, of 20 January 2014, no. 301049.
(Article 4(3) TEU), the principle of institutional balance and the principle of democracy”.272 Eventually, the EP’s concerns were allayed to some extent after the Council invited the Parliament to participate in the intergovernmental negotiations on the SRF.273 A compromise between the EP and Council was ultimately reached on 20 March 2014, which ensured that the deal could be finalised in April 2014 during the last plenary session of the 7th parliamentary term.274

The EP’s exclusion from an important part of the SRM negotiations underlines that the GFCC’s interpretation of democracy comes at the expense of efforts to strengthen democratic structures at the EU level. The reasons for the EP’s exclusion were also not fully transparent. There is an irony in this turn of events: in the name of democracy, the case law of the GFCC contributes to a particular policy outcome that is apparently even negotiated with the help of the GFCC itself; yet, it initially leads to the exclusion of Europe’s directly elected parliament from the negotiations, which then invokes the principle of democracy to protest against this course of events.275

7. Political Debate without Review: Crisis Politics in the Netherlands
As a final step in this chapter, I consider the Dutch political crisis debates in order to grasp whether the Netherlands should perhaps introduce constitutional review to ensure more attention is given to constitutional issues in EU-related politics.276 I submit that the answer to

274 It also has been argued that the intergovernmental agreement is more vulnerable to judicial review by national constitutional courts, because such courts are often competent to review international treaties. See: Frederico Fabbrini, ‘On Banks, Courts and International Law’ (2014) 21 3 Maastricht Journal of European and Comparative Law 444, at p. 456-462. See more generally: Frederico Fabbrini, The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective, 2014 64. In the context of the SRM, this critique seems unjustified, as the relation appears to have been exactly the opposite: The SRF negotiations show that the adoption of an intergovernmental agreement meant to prevent successful constitutional challenges in Germany against the SRM. Given that the GFCC is the most assertive court in relation to European integration, successful constitutional challenges against the SRF agreement in other jurisdictions are unlikely.
275 Dutch politician Geert Wilders did challenge the ESM Treaty on constitutional grounds before a Dutch Court and maintained that the Treaty violated the Dutch parliament’s budget rights. In line with Dutch constitutional
this question is negative. Even if the Dutch Tweede Kamer is not a perfect deliberative forum, it is hard to see what German style constitutional review would add. The reason is that Euroscepticism has become a stronger factor in Dutch politics than in Germany. Only few parties still explicitly favour ‘more Europe’. As a result, the protection of sovereignty is already a pivotal concern in Dutch parliamentary debate.  

Dutch sovereignty and the national interest have become prevalent concerns for several parties and there is an unwillingness to regard debtor states as equals in this respect. For example, in the initial EFSF debates, Frans Weekers of the liberal VVD argued that the competence to decide on financial assistance would have to remain with the Dutch government and parliament. Yet, at the same time he favoured “abrogating the budgetary sovereignty of the Member State that does not sufficiently abide by the rules and begs for money with those Member States that have their house in order.” Prime Minister Balkenende stated: “Of course I also see the current protests in Greece. Of course pain is suffered. But it has to after all that has happened!” Tony Van Dijck of the PVV stated that Greece, Spain and Portugal were “corrupt” and did not take budget discipline or taxation seriously.  

The national interest has likewise become the dominant justification in the crisis debates. In Germany, the centre-right coalition still justified strong conditionality as something that would benefit both debtor states and Europe as whole. In the Netherlands, several political parties showed little willingness to equally consider the interests of the debtor countries. During the initial debates on the EFSF, the independent member Verdonk even filed a parliamentary resolution requesting the Minister of Finance to “let the interests of our country weigh heavier and no longer to make available money and guarantees for other EU-
doctrine, however, the District court of the Hague rejected all challenges, primarily because the court ruled itself unable to intervene in a legislative process. See: District Court of The Hague, Judgment of 1 June 2012, Case NL:RBSGR:2012:BW7242.

277 The 2005 negative Dutch referendum on the Constitutional Treaty has contributed to a more Euro-critical political context. For a discussion of some of the political consequences of the referendum Th J. A. M. Bruijn, ‘De veranderende rol van nationale parlementen in de Europese Unie’ (2011) 26 6 RegelMaat 327.


279 Handelingen II 2009/10, 82 (Plenary debate on EFSF), at p. 6957.

280 Handelingen II 2009/10, 82 (Plenary debate on EFSF) at, p. 6979.

281 Handelingen II 2009/10, 82 (Plenary debate on EFSF), at p. 6973; See similarly Van Dijck (PVV), Kamerstukken II, 2009-2010, 21501-07, nr. 734, at p. 11-12.
countries.”282 According to the PVV, financial assistance to other countries could not be maintained, given the sharp budget cuts in the Netherlands at the time. The party rejected the EFSF, because the government was taking an “irresponsibly big risk with our taxpayers’ money”.283 The CDA explicitly stressed that the financial assistance for Greece had been agreed to in the national interest and “not for the Greeks”.284 The VVD stated that it was concerned with “the Dutch interest”.285 During the debates on the changes to the EFSF in 2011, the VVD spokesperson expressed that, morally speaking, he was very reluctant to approve assistance, but that he agreed to it in the interest of “Dutch savers, retirees, pension assets and exporting companies”.286 Several parties seemed convinced that the debtor countries were responsible for the crisis, because they had violated budgetary norms and had refused to strengthen their competitiveness, whereas the Netherlands had always done a proper job and abided by the rules.287

In Dutch debates there has consequently been less discussion about what caused the euro crisis. Only in some respects have the crisis narratives that have played a role in the Dutch debates been similar to those in Germany. For example, GroenLinks has argued that better regulation of the financial markets was needed to restore the primacy of politics.288 The SP and the PvdA have similarly criticised the role of the financial markets and favoured a financial transaction tax.289 Among the PvdA, the SP and GroenLinks, the Fiscal Compact


283 Handelingen II 2009/10, 82 (Plenary debate on EFSF), at p. 6957 and also at p. 6958; See in a similar sense Verdonk, at p. 6961. The PVV has consistently opposed the crisis measures. See also e.g.: Van Dijck (PVV), Handelingen II 2012-2013, 63 (Fiscal Compact plenary), at p. 52.

284 De Nerée tot Babberich (CDA), Handelingen II 2009/10, 82 (Plenary debate on EFSF), at p. 6955; see also Kamerstukken II, 2009-2010, 21501-07, nr. 734, at p. 2.


286 Harbers (VVD), Handelingen II 2011/12, 8 (Plenary debate on EFSF changes), at p. 16. In the debate on the Fiscal Compact the VVD adopted a more European perspective. Its spokesperson Harbers argued that the reforms and budget cuts would make the eurozone countries and the continent as a whole more wealthy country on the long term, see: Handelingen II 2012-2013, 63 (Fiscal Compact plenary), at p. 53-54.

287 See for example the statement of Harbers (VVD), Kamerstukken II, 2010-2011, 21501-07, nr. 787, at p. 13: “Why should we and a number of other North-western European Member States transfer competences to Brussels to solve a specific problem in a number of Southern European Member States?” Very explicit in this sense was also Dijkgraaff (SGP), Handelingen II 2011/12, 8, p. 39-53 (Plenary debate on EFSF changes no. 2), at p. 53.

288 Handelingen II 2009/10, 82 (Plenary debate on EFSF), at p. 6959 – 6960; see also Vendrik (GroenLinks), Kamerstukken II, 2009-2010, 21501-07, nr. 734, at p. 17-21.

289 Tang (PvdA), Handelingen II 2009/10, 82 (Plenary debate on EFSF), at p. 6958; Irrgang (SP), Handelingen II 2011/12, 8 (Plenary debate on EFSF changes), at p. 25-27; Merkies (SP), Handelingen II 2012-2013, 63 (Fiscal Compact plenary), at p. 47. Unlike its German social-democratic counterpart, the PvdA did not make its consent to the assistance mechanisms conditional on the introduction of such a tax. See Handelingen II 2011/12,
has also proved more controversial. The SP in particular called the Compact the wrong cure, because it would only entrench failing European austerity politics. Yet, overall there appears to have been significant political agreement on the need to tackle excessive debt as the crisis’ main cause.

Within this political context, most Dutch political parties have proved reluctant to transfer competences to the EU level or to take any steps in the direction of a European political union. In February 2011 the Tweede Kamer even adopted a resolution, which stated that national competences on pensions, taxes and wages should be retained and that the government should “take distance from any movement towards a more political union”. At the same time, the resolution demanded that the government should continue to strive for “strict compliance with the Stability and Growth Pact with fitting sanctions for countries that do not comply with the agreements made”. Despite the tension between the wish to preserve sovereignty and a stricter enforcement of the Stability and Growth Pact, the resolution was supported by a parliamentary majority of the SP, PvdD, PvdA, SGP,

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9, (Plenary debate on EFSF changes no. 4), at p. 58-59; also the discussion between Minister De Jager and Plasterk, Handelingen II 2011/12, 9 (Plenary debate on EFSF changes no. 4), at p. 74-75; The VVD and CDA have strongly opposed the introduction of such a tax. See e.g. Weekers, Handelingen II 2011/12, 9, p. 37-80 (Plenary debate on EFSF changes no. 4), at p. 55.

200 Merkies (SP), Handelingen II 2012-2013, 63 (Fiscal Compact plenary), at p. 47-48. The PVV made the same point, see Van Dijck (PVV), Handelingen II 2012-2013, 63 (Fiscal Compact plenary), at p. 52. For criticism in the same direction see: Klaver (GroenLinks), Handelingen II 2012-2013, 63 (Fiscal Compact plenary), at p. 49-50; and Braakhuis (GroenLinks), Handelingen II 2011/2012, 85 (First plenary debate on the ESM), at p. 68.


201 The liberal VVD, the christian-democratic CDA, the conservative anti-European PVV, the small Christian parties SGP and CU, but also the left-wing Socialist Party (SP) and the Party for Animals (PvdD) already expressed such hesitation during the initial EFSF debates. See: Irrgang (SP), Kamerstukken II, 2009-2010, 21501-07, nr. 734, at p. 13; Irrgang (for SP and PvdD), Handelingen II 2009/10, 82 (Plenary debate on EFSF), at p. 6955; CU, Handelingen II 2009/10, 82 (Plenary debate on EFSF), at p. 6975; SGP, Handelingen II 2009/10, 82 (Plenary debate on EFSF), at p. 6976. Prime Minister Balkenende for example stressed how he had strived for a mechanism that would preserve the Member States’ autonomy and also voiced skepticism towards further moves to a political union: Handelingen II 2009/10, 82, at p. 6971. Finance Minister De Jager also stated that strengthening the Stability and Growth Pact would be the goal, not the curtailing of the parliament’s right to assess the budget: Handelingen II 2009/10, 82 (Plenary debate on EFSF), at p. 6978.

202 The liberal VVD, the christian-democratic CDA, the conservative anti-European PVV, the small Christian parties SGP and CU, but also the left-wing Socialist Party (SP) and the Party for Animals (PvdD) already expressed such hesitation during the initial EFSF debates. See: Irrgang (SP), Kamerstukken II, 2009-2010, 21501-07, nr. 779.
ChristenUnie and PVV. Parties on both the political left and right have thus expressed considerable hesitations about further sovereignty transfers in politically sensitive areas. Dutch parliamentarians feared that strengthening economic coordination would introduce political union through the backdoor. Nonetheless, the rejection of political union does not necessarily stand in the way of seemingly significant sovereignty transfers. The Dutch government has proposed significantly stricter European oversight on budgetary discipline and economic policy in a letter on the future of the eurozone. On this understanding, the rejection of any move towards a political union means that Member States can still determine themselves the measures to take.

The ratification of the ESM Treaty also proved controversial. The ChristenUnie, for example, raised the problem that the Dutch parliament’s right to assess the budget could not be respected, because the Netherlands would not have a veto in the emergency voting procedure. The Party for Animals (PvdD) argued that the Netherlands was handed over to

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296 *Handelingen II* 2010-2011, 54, at p. 126.
297 Slob (ChristenUnie), *Kamerstukken II*, 2010-2011, 21501-07, nr. 787, at p. 5 and p. 15; as well as the contributions by Harbers (VVD), at p. 5 and Irgang (SP), at p. 23.
298 In a similar vein the VVD has welcomed the Fiscal Compact as a way to strengthen budgetary discipline: *Handelingen II* 2012-2013, 63 (Fiscal Compact plenary), at p. 53. The government granted that there should be stronger incentives for Member States to strengthen their competitiveness and even sanctions for Member States that would fail to take action. See: Mark Rutte, Jan Kees de Jager, Maxime Verhagen & Ben Knapen, Visie toekomst Economische en Monetaire Unie [Letter of government], available at: https://www.rijksoverheid.nl/documenten/kamerstukken/2011/09/07/kamerbrief-visie-toekomst-economische-en-monetaire-unie, last accessed 27 December 2017.
299 Mark Rutte, Jan Kees de Jager, Maxime Verhagen & Ben Knapen, Visie toekomst Economische en Monetaire Unie [Letter of government], available at: https://www.rijksoverheid.nl/documenten/kamerstukken/2011/09/07/kamerbrief-visie-toekomst-economische-en-monetaire-unie, last accessed 27 December 2017. Dijsselbloem gave a similar position on the obligations and the role of the Dutch parliament under the Fiscal Compact, see: *Handelingen II* 2012-2013, 63 (Fiscal Compact plenary), at p. 58-59. Concerns about sovereignty were raised in this debate by Schouten (ChristenUnie), at p. 48 and Dijkgraaf (SP), at p. 53. The government’s position has been accepted by the Tweede Kamer in the context of the Fiscal Compact, see *Kamerstukken II*, 2012-2013, 33 319, nr. 7.
300 Schouten (ChristenUnie), *Handelingen II* 2011/2012, 85 (First plenary debate on the ESM), at p. 56; Schouten (ChristenUnie), *Handelingen II* 2011/2012, 87 (ESM last plenary), at p. 7. The SP, PvdD expressed similar concerns, see: *Handelingen II* 2011/2012, 85 (First plenary debate on the ESM), at p. 70, 57-58 and 51 respectively. The PvdA, CDA and VVD, however, argued that the emergency voting procedure was necessary to safeguard the mechanism’s effectiveness: *Handelingen II* 2011/2012, 85 (First plenary debate on the ESM), at p. 58 (PvdA), p. 63 (VVD) and p. 65-66 (CDA). In a similar sense see also: Finance Minister De Jager, *Handelingen II* 2011/2012, 86, p. 3-22 (Second plenary debate on the ESM), at p. 5. D66 also accepted that the ESM was subject to sufficient parliamentary oversight, *Handelingen II* 2011/2012, 85 (First plenary debate on the ESM), at p. 52-53. These parties took the position that the ESM did not violate the parliaments’ budget right. The PvdA specifically contended this was not the case, because the emergency procedure could not be used to raise the ESM’s capital stock. *Handelingen II* 2011/2012, 85 (First plenary debate on the ESM), at p. 60; see also the similar arguments by Finance Minister De Jager *Handelingen II* 2011/2012, 86, p. 3-22 (Second plenary debate on the ESM), at p. 10-11.

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“the United States of Europe”. The PVV wanted to delay the approval of the Treaty until after the upcoming elections. This would give the voters a necessary say on the mechanism, given the Treaty’s effects on Dutch sovereignty. The independent Member of Parliament, Hero Brinkman, argued that a referendum on the Treaty was necessary. In the final debates on the ESM, the PVV’s leader, Geert Wilders also called for “a real democracy with referenda like in Switzerland” and called the Tweede Kamer proceedings a “sham democracy”.

A further sign of the changed political context is that in 2013 the Dutch Tweede Kamer voted to abrogate the parliamentary resolution of MPs Brinkhorst and Van Den Broek from 1983, and which determined that, in case of doubt, the Dutch constitution should be interpreted so that the process of European integration would not be restricted. The new resolution stated that the Dutch Constitution would have to be interpreted in the ordinary manner instead of the previous “EU-consistent constitutional interpretation”.

Only the parties of D66 and GroenLinks are still wholeheartedly supportive of further European integration. Both parties have explicitly supported the move to a European political union. For D66 this meant that the European Commission should be turned into a real European government, with a chosen President and a strongly democratic European Parliament. GroenLinks has argued for a real European economic government and criticised other parties’ “sovereignty paranoia”. Its spokesperson Braakhuis argued that the intergovernmental route had led to French and German dominance. It would have been better

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301 Ouwehand (PvdD), Handelingen II 2011/2012, 85 (First plenary debate on the ESM), at p. 55 similarly, Ouwehand (PvdD), Handelingen II 2011/2012, 87 (ESM last plenary), at p. 7.
302 Van Dijck (PVV), Handelingen II 2011/2012, 85 (First plenary debate on the ESM), at p. 67. The SP expressed a similar view in Handelingen II 2011/2012, 85 (First plenary debate on the ESM), at p. 49-50;
303 Brinkman, Handelingen II 2011/2012, 85 (First plenary debate on the ESM), at p. 72.
304 Wilders (PVV), Handelingen II 2011/2012, 87 (ESM last plenary), at p. 11.
305 Kamerstukken II, 1979-1980, 15049 (R1100), nr. 16.
306 Kamerstukken II, 2012-2013, 21 501-20, nr. 732. The new resolution was supported by a majority of the PVV, SGP, CDA, ChristenUnie, VVD, PvdD and SP, see: Handelingen II 2011/2012, 60, p. 36.
307 See: Koser Kaya (D66), Handelingen II 2009/10, 82, p. 6955-6980 (Plenary Debate on EFSF), at p. 6959;
Kamerstukken II, 2010-2011, 21501-07, nr. 787, at p. 12 (D66) and p. 20 (GroenLinks); Handelingen II 2011/12, 8, (Plenary debate on EFSF changes no. 2), at p. 39 (D66) and p. 48 (GroenLinks); Braakhuis (GroenLinks), Handelingen II 2011/12, 9 (Plenary debate on EFSF changes no. 4), at p. 69.
308 Sap (GroenLinks), Handelingen II 2009/10, 82, (Plenary Debate on EFSF), p. 6960; Koolmees (D66) in Handelingen II 2011/2012, 85, p. 48-72 (First plenary debate on the ESM), at p. 52.
309 Koolmees (D66) in Handelingen II 2011/2012, 85, p. 48-72 (First plenary debate on the ESM), at p. 54.
310 Braakhuis (GroenLinks), Handelingen II 2011/2012, 86 (Second plenary debate on the ESM), at p. 6.
if the power had resided in “a democratically controlled Commission”.

D66 likewise questioned whether the insistence on Dutch sovereignty was consistent with the approach to debtor states, as its spokesperson Koolmees argued: “You cannot say on the one hand that you don’t want to pay for people that lie in the Greek sun, and on the other hand refuse a discussion about the Dutch retirement age.” Yet, these parties’ views are clearly a minority position within the Dutch political debate.

In Dutch political debates, several political parties have thus voiced arguments similar to those that, in Germany, have been voiced by the GFCC: concerns about retaining budgetary sovereignty, a rejection of political union and even an apparent preference for direct democracy. In this light it is unclear what German style constitutional review would add to Dutch political debate. Rather, the Dutch parliamentary debates appear to show that national parliaments are ill-placed to justify decisions that affect citizens across Europe. Dutch preoccupations with sovereignty and the national interest evince a one-sidedness of political debate that is probably best remedied by opening it to the voices of outsiders, not through the introduction of constitutional review.

8. Conclusion

A positive way of looking at the GFCC’s role during the crisis is that it contributed to the democratic legitimacy of the German political process by providing an additional avenue for Euro-critics to voice their dissent. As discussed, such voices are not always fully represented within the Bundestag. Politicians with a Eurosceptical viewpoint are still minorities within the different parties and the Bundestag debates have not fully reflected the controversial nature of the crisis measures. By contrast, in the Dutch Tweede Kamer there are various parties with a more Euro-critical position. The arguments that in Germany are raised before and by the GFCC, mirror political positions of specific parties in the Dutch parliament. It could even be said that the GFCC employs similar strategies as populist political parties: it puts itself forward as the real voice of the people, legitimates its own position on the basis of distrust of political elites, and appears to share a preference for direct democracy.

311 Braakhuis (GroenLinks), Handelingen II 2011/2012, 85 (First plenary debate on the ESM), at p. 68-69. The party also criticised Fiscal Compact’s intergovernmental nature that had led to the exclusion of the European Parliament and favoured its inclusion in the EU Treaties, see: Klaver (GroenLinks), Handelingen II 2012-2013, 63 (Fiscal Compact plenary), at p. 49.

312 Koolmees (D66), Kamerstukken II, 2010-2011, 21501-07, nr. 787, at p. 12.
It is highly doubtful that a constitutional court can legitimately provide an avenue for opposition to European integration. Despite a still strong pro-European consensus in German politics, there has also been significant inter-party contestation about the best approach to handle the euro crisis. German political parties have adopted different narratives about the crisis, which have led to different views on the EU’s future. The centre right governing coalition of the CDU/CSU and FDP, generally aimed at creating a true European ‘stability culture’ to replace the failed Maastricht stability architecture. These parties have favoured a handling of the crisis that focuses on debt consolidation, limited financial assistance under strict conditionality, as well as a rejection of more extensive debt sharing. The left-wing opposition parties, however, have put forward a narrative that focused less on debt, but more on the role of the financial markets and the lack of a shared European economic policy. These parties expressed support for more solidarity and sharing of liabilities, opposed austerity politics, and argued for further Europeanisation of Member States’ economic and fiscal policies. In addition, these proposals have been rooted in the idea that further European integration would better ensure citizens’ collective self-determination, as well as a more social Europe.

The problem is that the GFCC’s case law affects these different positions unequally. The Court’s case law reinforces and reifies a particular type of politics: a politics in which budgetary discipline and retaining German budgetary sovereignty is of overriding importance. The Court makes the achievement of political alternatives more burdensome and, in the name of democracy, constitutionalises a type of politics that several commentators see as the antithesis of democratic government. It is doubtful that the left wing’s alternatives would still be achievable within the framework of the Basic Law. The idea that the GFCC’s interventions have simply enriched German political debate on the EU’s future is difficult to maintain, because the Court’s judgments are rarely contested in German politics. Instead, the Court is accorded the final authority in interpreting the German Constitution. The Court’s case law therefore limits the room for political contestation over different possible interpretations of the constitution and on how constitutional ideals should be realised within the EU.

The Court’s case law is also at odds with strengthening democratic legitimacy at the European level. The European negotiations on the SRM illustrate how the Court’s insistence on budgetary sovereignty came at the expense of the European Parliament. From a European
perspective this appears problematic. For example, within the ESM a veto position is certainly not available to all Member States. Yet, at the same time, the GFCC prevents a democratic solution at the European level.

In the end, Karlsruhe itself may have provided a way out of this conundrum: apparently the constitutional limits on European integration could be amended through a vote of the German people in a referendum. This position is ultimately recognition that fundamental constitutional questions on European integration cannot be answered outside democratic debate. In a way, the GFCC’s case law therefore brings us back to a choice between representative democracy and direct democracy in deciding Europe’s future. From a purely democratic perspective it is difficult to make a choice between the two. However, from a constitutional point of view the position is paradoxical, given the very limited provisions in the Basic Law for direct democracy. Moreover, the GFCC’s case law already seems to have steered the debate towards the rejection of further European integration. An even-handed debate on Europe’s future will only ensue if German politicians start contesting the GFCC’s EU-related case law. Germans should treat the Court’s pronouncements on democracy for what they are: a particular and contested position on the issue, yet by no means the only legitimate one.
CHAPTER 7 – COURT-ORDERED PARLIAMENTARY OVERSIGHT

1. Introduction
Despite the GFCC’s negative repercussions for democratic politics on the euro crisis, there is also a more positive side to the GFCC’s crisis case law. The Court requires that the *Bundestag* must have a say in decisions affecting its budgetary responsibility. In this manner, the Court’s case law has contributed to a progressive strengthening of the *Bundestag*’s participation and information rights, both in EU affairs generally, as well as regarding decisions of the EFSF and ESM more specifically. By doing so the Court has created space for democratic politics rather than constrained it and contributed to democratic control of the executive. There is also considerable evidence that this strengthening of the *Bundestag*’s position would not have occurred without the GFCC’s interventions. Nonetheless, a comparison with the Netherlands shows that some of the dynamics between the national parliament and its government were specific to the German context. Although the GFCC’s interventions ultimately helped bring about a much more elaborate system of parliamentary rights in Germany, the Dutch parliament took several measures to protect its own position. Evidence from other countries also indicates that other parliaments have been able to protect their own prerogatives without being prodded to do so by a constitutional court.

In the current chapter, I first discuss the role of the GFCC in strengthening parliamentary oversight by the *Bundestag* in EU affairs (section 2). In section 3, I subsequently compare the German situation with the Netherlands, showing how the Dutch *Tweede Kamer* protected its own position better than the German *Bundestag*, although several concerns remain. Section 4 considers further comparative insights to determine whether a constitutional court is necessary to strengthen parliamentary oversight. Section 5 concludes.

2. Demanding Parliamentary Oversight: The GFCC Case Law and Its Implications
The *Bundestag*’s information and participation rights in EU affairs were the source of a pronounced conflict between the *Bundestag* and German Government over the course of
the crisis. At several points the GFCC played a crucial role in settling this conflict. Two issues regarding the Bundestag’s position were disputed. One issue was the involvement of the Bundestag in decisions by the EFSF and ESM: the Government preferred to restrict the direct involvement of the Bundestag in these decisions. Another issue concerned the participation and information rights of the Bundestag in the design of most of the euro crisis measures: the German Government only provided limited information on the European negotiations and thus limited the ability of the Bundestag to influence these negotiations. Regarding both issues, the GFCC played an important role in ensuring better participation and information rights for the Bundestag. The following sections first show how the Court contributed to enhancing the Bundestag’s position within the EFSF and ESM. Subsequently, I discuss the role of the Court in enhancing the Bundestag’s information rights regarding negotiations at the EU level.

2.1 Parliamentary Participation and Information within the Rescue Mechanisms

2.1.1 The EFSF: From Limited to More Extensive Oversight

At the start of the euro crisis, the German Government proved reluctant to give the Bundestag extensive decision-making rights within the EFSF. The Government preferred limiting the Bundestag’s role to a single approval of the mechanism rather than providing the Bundestag with a veto on specific decisions to give financial assistance. In its view, such a parliamentary veto would undermine the instrument’s credibility in the eyes of the capital markets. The Government’s initial legislative proposal on the EFSF – the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (StabMechG) – thus provided little in the form of parliamentary participation or information rights. Article 1 (4) merely provided that the Bundestag’s budget committee would be informed if German guarantees were used to finance assistance, unless there were compelling reasons to make an exception. In addition, the proposed Article 1 (4) stipulated that the budget committee would be informed quarterly about the financial guarantees already given and their use.

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1 Similar concerns arose for the Bundesrat, which are not discussed here. See on this issue Daniela Kietz, ‘Politisierung trotz Parteienkonsens: Bundestag, Bundesrat und die Euro-Krise’ Bertelsmann Stiftung (Gütersloh), at p. 31-33.
2 On the Bundesrat see ibid, at p. 21-33.
3 See: Schäuble, Plenarprotokoll 17/44, Stenografischer Bericht der 44. Sitzung des Deutschen Bundestages am 21. Mai 2010 (EFSF second plenary), at p. 4427; See also the later Blankoscheck article in Handelsblatt.
4 BT-Drucksache 17/1685 of 11.05.2010: Gesetzentwurf der Fraktionen der CDU/CSU und FDP Entwurf eines Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus
The CDU/CSU, FDP and Bündnis 90/Die Grüne parliamentary groups subsequently changed this provision in order to strengthen the Bundestag’s rights, a move supported by the SPD.\(^5\)

In the new version, Article 1 (4) stated that the government should endeavour to reach an agreement with the budget committee prior to agreeing to financial assistance, instead of merely providing information. An exception was possible if there were compelling reasons to give guarantees before an agreement was reached, in which case the budget committee would have to be informed immediately afterwards. Still, the government would have to justify in detail the absolute necessity of taking up these guarantees prior to an agreement.\(^6\)

The issue became the topic of debate again in the spring and summer of 2011 when changes to the EFSF and the establishment of the ESM were debated. At that time, parliamentarians from both the coalition and opposition parties expressed the need for significant parliamentary involvement within the EFSF and ESM.\(^7\) There were also visible disagreements between the Government and the parliamentary coalition groups. Bundestag President Norbert Lammert (CDU/CSU), the parliamentary leader of the CDU/CSU Volker Kauder, as well as the FDP’s secretary-general Christian Lindner publicly insisted on the need for adequate decision-making rights for the Bundestag on rescue operations.\(^8\)

The GFCC judgment of 7 September 2011 on Germany’s participation in the EFSF, and the financial aid to Greece, helped bring about a strengthening of the Bundestag’s rights.\(^9\) The Court upheld the constitutionality of both acts, but also concluded that the provisions did not ensure the “continuing influence of the Bundestag on the guarantee decisions” and “would not prevent parliamentary budget autonomy being affected in a manner which would


\(^8\) Daniela Kietz, Politisierung trotz Parteienkonsens: Bundestag, Bundesrat und die Euro-Krise, 2013, at p. 29; see also ‘Bundestagspräsident blockiert Schäubles Blankoscheck-Pläne’ Handelsblatt (24 August 2011); ‘Lammert fürchtet Entmündigung des Bundestags bei Euro-Rettung’ ZEIT ONLINE (24 August 2011).

\(^9\) See also the expectation of the Bundestag President Lammert in ‘Bundestagspräsident blockiert Schäubles Blankoscheck-Pläne’ 2011.

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adversely affect the right to vote.” The Court demanded that Article 1(4) of the StabMechG was to be interpreted in a specific manner: the Federal Government would have to obtain the consent of the Bundestag’s budget committee before new guarantees could be given. Nonetheless, the Court upheld the exception that no such consent was needed if there were compelling reasons.

The judgment subsequently played an important role in the parliamentary debates of September 2011 on the changes to the EFSF and the required modifications to the StabMechG. On the same day as the GFCC’s judgment, the parliamentary groups of the CDU/CSU and FDP introduced a proposal to strengthen the participation and information rights of the Bundestag in the framework of the EFSF. The original legislative proposal of 5 September 2011 had left the issue open in anticipation of the GFCC’s judgment. The Court’s ruling inspired the proposed changes, although the coalition parties argued that the new provisions went beyond what the Court had required. In contrast to the initial debates on the EFSF, the Government now seemed to affirm the involvement of the Bundestag as essential. For example, in his opening speech to the Bundestag plenary Finance Minister Schäuble declared that the “budget right of the Bundestag is the basic principle of our parliamentary democracy.”

10 Bundesverfassungsgericht, judgment of 7 September 2011, 2 BvR 987/10 (Greek loan facility and EFSF), at par. 141.
11Ibid., at par. 141.
12 BT-Drucksache 17/6945 of 07.09.2011: Antrag der Fraktionen der CDU/CSU und FDP Parlamentsrechte im Rahmen zukünftiger europäischer Stabilisierungsmaßnahmen sichern und stärken.
13 BT-Drucksache 17/6916 of 05.09.2011 Gesetzentwurf der Fraktionen der CDU/CSU und FDP Entwurf eines Gesetzes zur Änderung des Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus, see especially p. 6.
15 Plenarprotokoll 17/124, Stenografischer Bericht der 124. Sitzung des Deutschen Bundestages am 8 September 2011 (EFSF extension first plenary), at p. 14551. In the second plenary debate on the EFSF changes, Volker Kauder (CDU/CSU) stated that the legislative bill represented a paradigm change from a Europe of national governments that decide matters in the Councils to a Europe of the parliaments (“Von einem Europa der nationalen Regierungen, die in den Räten beieinandersitzen, sind wir auf dem Weg zu einem Europa der Parlamente.”), Plenarprotokoll 17/130, Stenografischer Bericht der 130. Sitzung des Deutschen Bundestages am 29 September 2011 (EFSF extension second plenary), at p. 15204. Rainer Brüderle of the FDP explicitly stated support for this part of Kauder’s statement and spoke of Germany as an example for the rest of Europe, Plenarprotokoll 17/130, at p. 15211.
The legislation provided for more extensive parliamentary participation and information rights in several ways. Decisions affecting the Bundestag’s overall budgetary responsibility would be subject to the prior consent of the Bundestag as a whole. Without such consent, the German representative on the EFSF could not vote in favour or abstain from a decision in these areas. Consent of the Bundestag plenary would be required in at least four situations: for agreements on financial assistance by the EFSF, for essential changes to such agreements, for changes to the EFSF Framework Agreement, and in case rights and obligations under the EFSF were to be transferred to the ESM. The budget committee would participate in the EFSF’s decision-making in all other matters affecting the budgetary responsibility of the Bundestag. Furthermore, the government would have to inform the German Bundestag “comprehensively, at the earliest possible date, continuously and as a general rule in writing.”

2.1.2 The Lure of Confidentiality: The ‘Neuner Gremium’ and Its Constitutional Demise

Despite these changes, a major shortcoming remained. A special committee could take over the participation rights of the plenary in cases of particular urgency and confidentiality (the so-called ‘Neuner-Gremium’). The Bundestag plenary would elect this committee from the ranks of the budget committee. The government could assert such urgency and confidentiality, which in turn could be rebutted by a majority of the special committee’s

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17 And more specifically for changes that would have effects on the amount of financial guarantees.
18 See Article 3 (2) of the amended StabMechG.
19 See Article 4 of the amended StabMechG. Article 4 (2) of the Act determined that two specific areas required prior consent of the budget committee, namely the adoption or amendment of EFSF’s Board of Directors’ guidelines, as well as decisions by the EFSF to employ further instruments in the context of an existing assistance agreement or the alteration of the conditions attached such assistance. Again, in these situations the German representative on the EFSF could not vote in favour or abstain from a decision with this content absent prior approval of the budget committee.
20 Article 5 of the amended StabMechG. The Article also require the German government to communicate all available documents that the budget committee and plenary would need to exercise its rights within the scope of the Act. In addition the Government was obliged to communicate an assessment of a new application of financial aid within seven days (Article 5 (4)) and needed to give information on the use of the guarantees quarterly (Article 5 (5)).
21 See Article 3 (1) of the of the amended StabMechG.
members. In case of particular confidentiality, the information rights of the Bundestag could also be restricted to the special committee.

The provisions for the special committee were the source of disagreement. The coalition parties and the Greens saw no constitutional problems, but Die Linke and particularly the SPD voiced doubts. The establishment of the committee was also the subject of a heated exchange during an expert meeting. Franz Mayer, a constitutional scholar and the Bundestag’s legal representative in the EFSF case, argued that the special committee did not comply with constitutional requirements. However, the CDU/CSU and FDP defended the committee quite aggressively. A proposal of the SPD to limit the committee’s competences and room for confidentiality was rejected. Despite these concerns, the SPD ultimately voted in favour of the changed legislation together with all other parties except Die Linke. Nonetheless, the Bundestag’s approval did not conclude the matter, as Peter Danckert and Swen Schulz of the SPD challenged the Act before the GFCC. They did so against the wishes of their own party and initially at their own expense. Danckert and Schulz argued that the provisions on the special committee violated their rights as Bundestag members.

On 26 October 2011 the Bundestag’s plenary unanimously elected the special committee for the duration of one legislature. However, in an interim decision one day later, the GFCC

22 Article 3 (4) and (5) of the amended StabMechG. In case of precautionary measures, loans to recapitalise financial institutions and the purchase of government bonds on the secondary market in order to prevent the dangers of contagion, there would be a presumption of “particular urgency or confidentiality”. The translation comes from Bundesverfassungsgericht, Judgment of 28 February 2012, 2 BvE 8/11 (Neuner Gremium), at paras. 24 and 40.
24 See BT-Drucksache 17/7130, note 14, at p. 4.
26 Gysi (Die Linke), Plenarprotokoll 17/130 (EFSF extension second plenary), note 15, at p. 15213
27 BT-Drucksache 17/7130, note 14, at p. 5.
28 Interview with Franz Mayer, 28 May 2015.
29 BT-Drucksache 17/7130, note 14, at p. 5.
30 Plenarprotokoll 17/130 (EFSF extension second plenary), note 15, at p. 15236-15239.
31 Danckert has indicated that the legal fees amounted to €15,000, by no means a negligible sum. Other parties also exerted significant pressure on Danckert. When the Court decided to uphold his complaint an interim-ruling, Danckert was told in the budget committee that all international consequences would be his fault. The GFCC ultimately ordered the German government to pay Danckert and Schulz’s legal fees. Interview with Peter Danckert, 12 May 2015.
banned it from being used. Subsequently, on 28 February 2012, the GFCC delivered its judgment in the principal proceedings and held that the extensive delegation of powers to the committee was unconstitutional. The provisions on the special committee excluded Bundestag members that were not part of the committee from participating in essential decisions affecting the Bundestag’s budgetary responsibility. This exclusion violated Article 38 (1) BL, because it could not be fully justified in order to maintain parliament’s capability to function. The Court considered that in principle, the Bundestag must exercise its function of representing the people “as a body of representation in its entirety and through the participation of all its members […] not through individual members, a group of members or the parliamentary majority.” Therefore, the Bundestag members all have the same rights of participation, such as the right to speak, the right to vote, the right of initiative, the right to ask questions and the right to information. Moreover, the Court underlined once more that the Bundestag also has a particularly important role in relation to the adoption of the budget, “in a system of intergovernmental governing.” A general authorisation for the government to give guarantees would not be sufficient if this were to leave the risk “of a serious reduction of the latitude for future budgetary decisions”. In such a case, the legislature must also lay down “flanking framework conditions”, which, for example, mean that crucial decisions concerning guarantee authorisations are subject to the Bundestag’s participation.

Legal interests of “constitutional status” could justify limitations on the Bundestag members’ rights, such as the parliament’s ability to function. The Bundestag could therefore organise itself to enable a better handling of the complexities of its legislative task. Nonetheless, this competence is subject to the principle of proportionality, and restrictions on its members’ rights could not go beyond what is “absolutely necessary”. The Bundestag’s delegation of tasks to a subsidiary body must therefore comply with the principle of mirror image: each

35 Ibid., at par. 102.
36 Ibid., at par. 103 and par. 104
37 Ibid., at par. 109; and further at par. 105 – 108.
38 Ibid., at par. 112.
39 Ibid., at par. 112.
40 Ibid., at par. 112.
41 Ibid., at par. 114; and further par. 115-117.
42 Ibid., at par. 125 and par. 119-124.
committee must be a “microcosm of the plenary session in its political weighting”.43 In addition, restrictions on the provision of information to members not belonging to the subsidiary body must be absolutely necessary.44

The extensive power delegations to the special committee did not satisfy these requirements. Only for decisions to buy government bonds on the secondary market could the delegation be justified. For such decisions, confidentiality was necessary: the Court was convinced by Finance Minister Schäuble and Bundestag Member Peter Altmaier that “if even the mere planning of such an emergency measure were to become known, this would be sufficient to defeat its success.”45 This did not apply, however, to other decisions of the EFSF, which all required a number of preparatory measures that would be public. Keeping the subsequent decisions secret could therefore not be justified.46 The Court was also not convinced that requirements of urgency could justify delegation to the special committee. Such reasons could at best justify the delegation of some decisions to the budget committee. Again, a reason for this finding was that all the EFSF assistance measures would require a large number of preparatory measures. There was hence no convincing need to delegate decision-making powers to the special committee for reasons of urgency.47

2.1.3 Parliamentary Oversight Coming of Age: The ESM

The judgment led the Bundestag to adapt the StabMechG again in order to comply with GFCC’s requirements: the special committee would only be able to decide on secondary market interventions, and only in the case of special confidentiality being required.48 The regulation for urgent cases was entirely taken out of the legislation.49 The legislative changes also provided a further extension of the plenary’s powers.50 The parliamentary debates on

43 Ibid., at par. 127.
44 Ibid., at par. 125-131.
45 Ibid., at, par. 150.
46 Ibid., at, par. 151.
47 Ibid., at par. 145-147.
50 In addition, on the basis of Article 4 (5) StabMechG the budget committee could now organize public hearings on governmental proposals and submissions where a quarter of the budget committee’s members, consisting of minimally two parliamentary groups, so requested. BT-Drucksache 17/9435 of 25.04.2012: Beschlussempfehlung und Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN – Drucksache 17/9145 – Entwurf eines Gesetzes zur Änderung des Stabilisierungsmechanismusgesetzes; BT-Drucksache 17/9145 note 48.
these changes were again marked by a change in language among the Bundestag members and the GFCC was credited for enhancing the parliament’s role. Norbert Barthle of the CDU/CSU stated that an urgent crisis politics could not jeopardise the fundamental constitutional rights of single Members of Parliament. Rolf Schwanitz of the SPD spoke of an “emancipation process of the parliament” that lasted over two years and had now come to a good end. Otto Fricke of the FDP named it “a good day for the separation of powers and for democracy.” The FDP and SPD also explicitly acknowledged that the judgment did not fully accord with their previous stances and that they had come to new insights. A further result was that the legislation accompanying Germany’s ratification of the ESM adopted on 29 June 2012 - the Act for Financial Participation in the European Stability Mechanism (ESMFinG) – provided similar participation and information rights for the Bundestag as the amended StabMechG.

Finally, the GFCC’s interim judgment on the ESM further strengthened the Bundestag’s position and even that of other national parliaments. As was discussed in the previous

51 Plenarprotokoll 17/176, (Neuner Gremium second plenary), note 49: Schwanitz (SPD), at p. 20927; Barthle (CDU/CSU) spoke of expressing respect for the Court, at p. 20926; Fricke (FDP), at p. 20928-20929; Hinz (Bündnis 90/Die Grünen), at p. 20931; Kalb (CDU/CSU), at p. 20932.
54 Fricke (FDP), Plenarprotokoll 17/176, (Neuner Gremium second plenary), note 49, at p. 20929-20930.
55 Fricke (FDP), Plenarprotokoll 17/176, (Neuner Gremium second plenary), note 49, at p. 20929; Schwanitz (SPD), at p. 20927.
56 Article 4 ESMFinG requires the approval of the Bundestag’s plenary for decisions to grant stability support, decisions to start negotiations on conditionality and on the ultimate approval of a Memorandum of Understanding, as well as decisions to change the authorised capital stock. See Article 4 of Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus vom 13 September 2012, Bundesgesetzblatt I, p. 1918 (ESMFinG); Article 5 of the ESMFinG lays down that the Bundestag’s budget committee shall be involved in all other matters of the ESM affecting the Bundestag’s budgetary responsibility. Decisions that require prior approval by the budget committee include: decisions on the provision of additional instruments within existing financial assistance agreements and changes in the conditionality requirements, decisions on calling in capital, changes in the guidelines on the modalities for implementing financial assistance, decisions about the detailed terms and conditions that apply to capital changes made under Article 10 (1) TESM, and interpretations or decisions concerning professional secrecy under Article 34 TESM. For other issues the German Federal Government must “involve the budget committee and take account of its opinions.” See Article 5 (3) ESMFinG. The Act allows that a special committee can exercise the Bundestag’s rights, but only where the purchase of government bonds on the secondary market is intended and special confidentiality is required. (See: Article 6 (1) ESMFinG; translation from Bundesverfassungsgericht, Judgment of 18 March 2014, 2 BvR 1390/12 (ESM final ruling), para. 14). Article 7 of the Act provides that the Federal Government has the obligation to inform the German Bundestag and Bundesrat “comprehensively, at the earliest possible date, continuously and as a general rule in writing.” In addition, the Federal Government has the obligation to communicate to the Bundestag all documents available to it so that the Bundestag can exercise its participation rights. See Article 7 (2) ESMFinG. The explanations of the Bundestag’s budget committee show that these provisions of the ESMFinG were substantially influenced by the GFCC judgments on the EFSF and on the special committee. See: BT-Drucksache 17/10172 of 28. 06. 2012: Bericht des Haushaltsausschusses (8. Ausschuss) - a) zu dem Gesetzentwurf der Fraktionen der CDU/CSU und FDP – Drucksache 17/9045 – Entwurf eines Gesetzes zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus (and other matters), at p. 10-15.
chapter, the judgment clarified that the ESM Treaty provisions could not be invoked to prevent the provision of information to the Bundestag and Bundesrat. The adoption of a declaration by the Treaty’s Contracting parties to this effect was a direct result of the judgment.

In sum, the GFCC helped to bring about significant extensions of the Bundestag’s participation and information rights in the framework of the EFSF and later the ESM. Whereas the initial legislation on the EFSF contained only limited provisions on the Bundestag’s involvement, two years and two judgments later, the legislation contained several provisions that safeguard the Bundestag’s involvement in both the EFSF and ESM.

It is unlikely that the described changes would have come about fully without the GFCC’s interventions. On the one hand, the time pressure under which the Bundestag first decided on the EFSF in May 2010 did not help. The initial agreement to establish the EFSF was made in an extremely tense context. The details of the EFSF and EFSM had to be worked out over the weekend of 8 and 9 May and were only made public in the early morning of 10 May, just before the markets in Asia opened.\(^\text{57}\) The legislative proposal for the StabMechG was subsequently introduced on 11 May and adopted by the Bundestag on 21 May. The governing parties clearly wanted to adopt the legislation quickly in order to calm the markets and offer a good example to the other Member States.\(^\text{58}\) Consequently, there was very little time to fully address the issue of parliamentary participation in the EFSF. By the time the changes to the EFSF were debated in 2011, a year had passed and there was cross-party pressure to ensure adequate involvement of the Bundestag within the EFSF and future ESM. In addition, in some respects, the strengthening of the Bundestag’s rights went beyond what the GFCC had required.\(^\text{59}\) On the other hand, the Bundestag was aware of the constitutional objections to the special committee and failed to take action. Only because two Bundestag members decided to challenge the Act against the wishes of even their own party, matters changed. These considerations make it unlikely that the Bundestag would have fully strengthened its position.


\(^{\text{58}}\) See for example the statement of Finance Minister Schäuble to his effect, Plenarprotokoll 17/44 (EFSF second plenary), note 3, at p. 4426-4427.

\(^{\text{59}}\) This was stressed several times by parliamentarians, see e.g. the position of the CDU in BT-Drucksache 17/7130, note14; Buschmann (FDP), Plenarprotokoll 17/124 (EFSF extension first plenary), note 15, at p. 14574.
without the Court’s intervention. The case on the Neuner Gremium also indicates that the Court was able to consider reasons in favour of confidentiality, thus accommodating possible political justifications for the formation of the special committee. The GFCC’s case law helped to strengthen the democratic legitimacy of decision-making within the EFSF and ESM, while leaving room for politics to put in place special arrangements for effective decision-making.

2.2 Acting Outside the EU Framework
A second controversy concerned the Bundestag’s information and participation rights in relation to the adoption of legal measures strictly falling outside the EU legal framework. Article 23 (2) BL refers to the right of the Bundesrat and Bundestag to participate and be informed “in matters concerning the European Union”, whereas Article 23 (3) BL maintains that the Bundestag will have an opportunity to state its position before the Federal Government participates in “legislative acts of the European Union”. Because several of the crisis measures were adopted outside the EU Treaty framework, the Government argued that these issues were not “matters concerning the European Union” and that Article 23 (2) and (3) did not apply. Accordingly, the Government provided little information on the EU-level crisis negotiations to the Bundestag, limiting the parliament’s influence on the EU negotiations. Again, it was the GFCC that settled the conflict between the Bundestag and Government in the Bundestag’s favour.

2.2.1 Cloaked Negotiations: The EFSF
Problems started in the spring of 2010 when the Government provided little information on the EU-level crisis negotiations. As a result, the Bundestag had limited influence on the design of the Greek loan facility, the EFSF or EFSM. As discussed, the initial rescue mechanisms were also decided under considerable time pressure. The Bundestag had to decide on the Greek loan facility in expedited proceedings of four days from 3 May 2010 until 7 May 2010. In the final Bundestag debate on 7 May, the Bundestag had no information on a further rescue package. Nonetheless, on the same evening, the heads of state, or

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60 The influence of the GFCC is acknowledged by those within the Bundestag as well as by close observers of the Court. See: Interview with Gesine Lötzsch, 27 May 2015; interview with Christian Hirte, 24 April 2015; interview with Peter Danekert, 12 May 2015; interview with Franz Mayer, 28 May 2015; interview with Christoph Möllers, 20 April 2015.
61 Basic Law, article 23 (2).
government, of the euro area announced a European stabilisation mechanism that was to be worked out over the weekend and agreed as the EFSF and EFSM.  

When the German government introduced the StabMechG to implement Germany’s financial obligations under the EFSF, a dispute arose as to whether the government had violated its obligations under the Basic Law and the more specific legislation on parliamentary participation. Particularly, the opposition parties heavily criticised the government’s failure to adequately involve the Bundestag in its decision-making, as well as its failure to provide adequate information on the assistance mechanisms prior, during and after the decisions were taken at the European level. A repeated criticism was that the government had delayed the decision on the assistance mechanism, because its establishment would have harmed the governing parties in the important regional elections of 9 May 2010, in North Rhine-Westphalia.

The three opposition parties of Bündnis 90/Die Grünen, SDP and Die Linke deemed the government’s failure to provide adequate information a breach of the government’s duties under Article 23 (2) BL. In addition, they argued that the government had violated Article 23 (3) of the Basic Law, because it had not allowed the Bundestag to take a position before agreeing to the measures in the Council. Finance Minister Schäuble argued, however, that

63 BT-Drucksache 17/1741, note 5, at p. 5-6 (Bündnis 90/Die Grünen); at p. 5 (Die Linke); at p. 4 (SPD). See also Steinmeier (SPD), EFSF first plenary debate, pp. 4132-4133. See also the statements by Carsten Schneider of the SPD in the first plenary debate, p. 4148. Some members of the CDU/CSU also voiced criticism, see: ‘Die Angst der Abnicker’ Focus Magazin (21 May 2010).
64 The opposition parties severely criticised the government’s indecisiveness and its failure to provide adequate information about the possible rescue measures prior to the establishment of the EFSF. See: Steinmeier (SPD), Plenarprotokoll 17/42, Stenografischer Bericht der 42. Sitzung des Deutschen Bundestages am 20 Oktober 1993 (EFSF first plenary), at p. 4132; Lötzsch (Die Linke), at p. 4141; Trittin (Bündnis 90/Die Grünen), 17/42, p. 4144; Volker Beck (Köln) (BÜNDNIS 90/DIE GRÜNEN), Plenarprotokoll 17/44 (EFSF second plenary), note 3, at p. 4411; Sigmar Gabriel (SDP), Plenarprotokoll 17/44, at p. 4434.
65 See: Trittin (BÜNDNIS 90/DIE GRÜNEN), Plenarprotokoll 17/42 (EFSF first plenary), note 64, at p. 4145-4146; Fritz Kuhn (BÜNDNIS 90/DIE GRÜNEN), Plenarprotokoll 17/42 (EFSF first plenary), note 64, at p. 4423; Hans-Christian Ströbele (BÜNDNIS 90/DIE GRÜNEN) at p. 4498; BT-Drucksache 17/1741, at p. 5 (Die Linke); The SPD argued that there had been too little time to properly take a position on the EFSM Regulation, see also BT-Drucksache 17/1810 of 20.05.2010: Entschließungsantrag der Fraktion der SPD zu der dritten Beratung des Gesetzentwurfs der Fraktionen der CDU/CSU und FDP – Drucksachen 17/1685, 17/1740, 17/1741 – Entwurf eines Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus, at p. 3.
the government had not broken Article 23 BL. In his view the Article did not apply to the EFSF, because the instrument was concluded outside the EU legal framework.  

In this respect, the opposition parties also protested that they had limited information on the EFSF’s design. At the time the Bundestag debated the StabMechG, the precise details of the EFSF framework agreement had not yet been communicated to the Bundestag. The German legislature ultimately approved the national legislation authorising the establishment of the EFSF on 21 May 2010, but the EFSF framework agreement was only finally concluded on 7 June 2010, well after the German parliamentary debates. In the course of the debates, the Government only provided a one-page paper, laying down the core points of the EFSF’s design. At the time of the final parliamentary debate on the EFSF of 21 May 2010, the details of the EFSF agreement were still not known to the Bundestag, despite the promises of Chancellor Merkel to give the agreement before the vote. For this reason, the opposition parties of Die Linke and the Greens requested to postpone the vote on the Act until the details of the EFSF agreement were known, while the SPD also voiced strong criticism of the governments’ dealings with the Bundestag. No such postponement followed, but the coalition parties did insert a provision that the Finance Ministry would have to present the EFSF framework agreement to the budget committee before the financial guarantees could be given.

2.2.2 Repeated Failure and Constitutional Challenge: Secrecy in the ESM and Euro Plus Pact Negotiations

The issue arose again in relation to the negotiations of the ESM and the Euro Plus Pact, in the spring of 2011. Despite repeated complaints and requests for more information by Bundestag members, the German Government failed to adequately inform the Bundestag about the ongoing negotiations. Often, the Government only informed the Bundestag orally, but would not provide key documents on the negotiations. For example, the Government had not provided the Bundestag with a Commission text on the ESM already in its possession on 21 February 2011. Nor did the government provide a draft of the ESM Treaty of 6 April 2011. Instead the Bundestag ended up requesting various drafts of the Treaty from the Austrian

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67 Schäuble argued the Article only applied to the establishment of the EFSM, but he contended that in this respect the government had done nothing wrong: The Council formally adopted the EFSM on Tuesday 11 May, whereas the parliamentary leaders of all parties had been informed about this mechanism on Monday 10 May. Schäuble, Plenarprotokoll 17/44 (EFSF second plenary), note 3, at p. 4425.
68 See for example: Trittin, Plenarprotokoll 17/42 (EFSF first plenary), note 64, at p. 4145-4146.
69 See Plenarprotokoll 17/44 (EFSF second plenary), note 3, at p. 4407-4412 and p. 4422-4423. The SPD abstained from voting to postpone the debate.
70 Article 1 (5) of the amended StabMechG; BT-Drucksache 17/1741, note 5, at p. 3.
National Council, the lower house of the Austrian parliament. Concerns about the Government’s information provision were not just voiced by the opposition but also by the President of the Bundestag, Norbert Lammert (CDU/CSU) and Gunther Krichbaum (CDU/CSU), chairperson of the Bundestag’s EU affairs committee. On 12 May 2011, the EU affairs committee protested across party lines against the Government’s failure to forward a draft of the ESM Treaty.

The Greens ultimately took the issue to the GFCC, arguing that the government had violated its constitutional duty to provide information to the Bundestag in EU matters. The GFCC upheld these claims and laid down key standards on the government’s duty to inform the Bundestag in EU matters. The Court rejected the Government’s argument that Article 23 BL did not apply to the ESM and the Euro Plus Pact negotiations because they had been concluded outside the EU legal framework. Instead, the Court adopted a broad reading of the Bundestag’s constitutional right to participate “in matters concerning the European Union”. The Karlsruhe judges granted that the German government has primary responsibility in the area of foreign affairs and security policy for functional reasons. Nonetheless, the insertion of Article 23 into the Basic Law had been a reaction to significant power shifts in favour of the executive associated with European integration. It meant to compensate for the Bundestag’s loss of power and ensure sufficient democratic legitimation of EU decision-making. Consequently, the Bundestag’s right of Article 23 (2) BL to participate “in matters concerning the European Union” had to be understood in a broad sense. It applies not just to EU legislation or amendments of EU primary law, but also to other issues that stand in a particular proximity to EU law, or that supplement EU law, including agreements under international law. Both the ESM and the Euro Plus Pact

71 See on these events: Bundesverfassungsgericht, Judgment of 19 June 2012, 2 BvE 4/11, (Information on ESM and Euro Plus Pact Negotiations), at par. 2-42.
72 See Daniela Kietz, Politisierung trotz Parteienkonsens: Bundestag, Bundesrat und die Euro-Krise, 2013, at p. 23. See also BT-Drucksache 17/4881 of 22.02.2011: Antrag der Fraktion der SPD zum Entwurf eines Beschlusses des Europäischen Rates zur Änderung des Vertrags über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist – Ratsdok. 17620/10 (EUCO 30/10), Anlage I.
74 See the government’s position in Bundesverfassungsgericht, Judgment of 19 June 2012, 2 BvE 4/11, (Information on ESM and Euro Plus Pact Negotiations), at par. 56-70.
75 Ibid., at par. 96-98.
76 Ibid., at par. 99-100 Whether an issue qualifies as an EU matter depends on various factors including its contents, objectives and effects. (par. 100) and see the further considerations in paras. 101-105.
qualified as EU matters, given their close connection to EU objectives and the involvement of EU bodies in their operation.  

The GFCC also laid down important requirements on the scope, timing and form of the government’s information provision to the Bundestag. Article 23 (2) BL was intended to enable an effective Bundestag influence on the government’s positions at the EU level and serve the public nature of the parliamentary process, a key aspect of the principle of democracy. The Government, therefore, must inform the Bundestag comprehensively on EU affairs. This means that the information provision has to be more intensive where the matter is more complex, or where the matter is more intrusive, with regard to the legislature’s competences. The Government’s duty to provide information extends to information on informal meetings as well as on the government’s position. Furthermore, confidentiality cannot bar the information provision to the Bundestag, because information can be sent confidentially. The duty to provide information is moreover a continuing one. The government must actively prevent information asymmetries between the government and the Bundestag as negotiations proceed and the amount of information available to the Government increases.

The early provision of information to the Bundestag is likewise essential. Otherwise the Bundestag could be confronted with faits accomplis. The Bundestag should receive the information “at the latest at a time which enables the Bundestag to consider the matter in depth and to prepare an opinion before the Federal Government makes declarations with outward effect, in particular binding declarations on legislative acts of the European Union and intergovernmental agreements.” Information must therefore be provided as soon as it enters “the sphere of influence of the Federal Government”. In principle the government should provide the information in writing to the Bundestag as a whole. Information to individual Bundestag members does not satisfy the demands of Article 23 (2) BL. The requirement that the information be written serves its “clarity, consolidation and

77 Ibid., at par. 134-144 and par. 154-158. 
78 Ibid., at par. 107-114. 
79 Ibid., at par. 117-123. 
80 Ibid., at par. 127. 
81 Ibid., at par. 128.
reproducibility". Exceptions can be made if this is the only way to provide the information at the earliest possible date.

Finally, the Court held that limits to the government’s duty to provide information flow from the principle of the separation of powers. The government has “a core area of specifically executive responsibility which includes an area of initiative, consultation and action which is fundamentally confidential”. As long “as the internal development of informed opinion of the Federal Government has not been completed”, the parliament has no right to information.

According to the Court, the German government had failed to respect these standards. The ESM related to the Bundestag’s overall budgetary responsibility and the provision of “particularly comprehensive and detailed information” had therefore been necessary. In a similar vein, the Court found that the Euro Plus Pact touched on the legislative competences of the Bundestag. The government should have informed the Bundestag “in full of the initiatives and early stages of the negotiations.” The Government had failed to do so: in the case of the ESM, the government had not forwarded specific documents to the Bundestag that had been in its possession, whereas with the Euro Plus Pact, the Government had failed to share its intention with the Bundestag to draft such a Pact.

2.3 Coda: General Overhaul of Parliamentary Oversight Rights
The GFCC’s judgment of 19 June 2012 proved to be crucial in the further development of the Bundestag’s participation and information rights: it led to a complete overhaul of those rights in the Act on Cooperation between the Federal Government and the German Bundestag in European Union Matters (EUZBBG). On 27 June 2012 the CDU/CSU, SPD, FDP and Bündnis 90/Die Grünen filed a resolution that called for a revision of the EUZBBG in order to implement the Court’s judgment. After its adoption in the Maastricht ratification process,
the EUZBBG had been last amended in 2009. The 2009 version specified the government’s information duties to the Bundestag,90 laid down which documents had to be forwarded to the Bundestag91 and identified for which EU projects the government had to provide the Bundestag the opportunity to state its position.92 Yet after the GFCC’s judgment of 19 June 2012, a large parliamentary majority agreed that these provisions no longer sufficed to safeguard sufficient parliamentary involvement in EU affairs.

Initial changes to the EUZBBG were made in the context of the ratification of the Fiscal Compact.93 These changes clarified first that the Bundestag’s participation and information rights of the EUZBBG would also apply to proposals for international treaties and other arrangements closely related to EU law, as well as matters falling within the scope of the Fiscal Compact and other international treaties or agreements concerning EMU.94 Secondly, the changes clarified that the government’s duty to inform the Bundestag also applied to these intergovernmental settings, as well as to meetings of the Euro-group and Euro-summits, including to all preparatory working groups and committees.95 Thirdly, the changes made clear that information on Euro-group meetings and on the Economic and Financial Committee of Article 134 TFEU should be provided in writing.96

In March and April 2013, the Bundestag fully revised the EUZBBG on the basis of a legislative proposal supported by all parties. An important reason was the need to clarify the application of the EUZBBG to several of the crisis measures adopted outside the EU legal

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91 Articles 3 and 5 EUZBBG version 2009.
93 See BT-Drucksache 17/10171, note 89, in particular p. 7; BT-Drucksache 17/10125 of 27.06.2012: Beschlussempfehlung des Haushaltsausschusses (8. Ausschuss), in particular at page 5.
95 Article 3 (3) EUZBBG September 2012 version.
96 Article 5 (4) EUZBBG September 2012 version. The Economic and Financial Committee is an advisory body set up to promote the coordination of “the policies of Member States to the full extent needed for the functioning of the internal market” (Article 134 TFEU. The Committee is composed “of senior officials from national administrations and central banks, the European Central Bank and the Commission.” See http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/economic-financial-committee/, last accessed 27 December 2017.
framework.\textsuperscript{97} The revised statute clarifies that EU affairs also include activities outside the EU legal framework, that are nonetheless closely related to EU law.\textsuperscript{98} Important further changes are that the government must inform the Bundestag about the negotiation process on the EU level in writing and that oral information only has a supplementary role;\textsuperscript{99} the greater detail in which the legislation specifies the documents that should be transmitted to the Bundestag;\textsuperscript{100} that the Bundestag can also request all “unofficial documents”;\textsuperscript{101} and that a quarter of the Bundestag Members can demand the government to explain in a plenary debate why it has deviated from the Bundestag’s position.\textsuperscript{102}

The events leading up to the revision of the EUZBBG as well as the parliamentary deliberations on the revision, reveal that the changes were a response to the GFCC’s judgment of 19 June 2012.\textsuperscript{103} The repeated failures of the German government to adequately inform the Bundestag on the adoption of several of the euro crisis measures, between 2010 and 2012, and the fact that the Bundestag only moved to change this after the GFCC had so demanded, makes it unlikely that the revision of the EUZBBG would have come about in the same way without the GFCC’s intervention. Although the coalition parties protested against the Government’s information provision during the crisis, they would have had to engage in an open conflict with the Government to change the situation. It has been noted that

\textsuperscript{97} BT-Drucksache 17/12816 of 19.03.2013: Gesetzentwurf der Fraktionen CDU/CSU, SPD, FDP, DIE LINKE. und BÜNDNIS 90/DIE GRÜNEN Entwurf eines Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union (EUZBBG), at p. 8.


\textsuperscript{99} Article 3 (1) EUZBBG 2013 version.

\textsuperscript{100} Article 4 EUZBBG 2013 version.

\textsuperscript{101} Article 4 (3) EUZBBG 2013 version.


politically this would have been almost impossible, making intervention by the GFCC indispensable for change.\textsuperscript{104}

The full practical implications of these changes require further research. Nonetheless, there are signs that the legal changes have not been mere paper tigers. Although, parliamentary majorities will almost always support their government, the fact that assistance decisions are subject to a prior parliamentary discussion has been noted as an advantage.\textsuperscript{105} In addition, the Bundestag’s improved access to information enables better scrutiny, particularly of intergovernmental decision-making fora.\textsuperscript{106} Reported downsides of the system are a possible information overload, also in light of its often complex nature and the sometimes limited time in which decisions have to be taken.\textsuperscript{107} The fact that European negotiations often proceed very quickly has more generally been noted as a remaining problem for effective parliamentary oversight.\textsuperscript{108}

3. Comparison: The Dutch Parliament and the Crisis
Comparative research indicates that the significant overhaul of the Bundestag’s rights in EU affairs has turned the parliamentary chamber into one of the most powerful in Europe.\textsuperscript{109} The GFCC has thus helped to counter the growing dominance of the executive during the crisis and reclaim territory for national democracy. Yet, a comparison with the Netherlands shows that several of the political dynamics to which the GFCC responded were specific to Germany. Unlike the German Government, the Dutch Government did not aim to restrict the involvement of the Tweede Kamer in the EFSF and ESM. And although the information provision by the Dutch Government on intergovernmental and informal decision-making could be improved, it has not proved as much of a problem as in Germany.

\textsuperscript{104} Daniela Kietz, Politisierung trotz Parteienkonsens: Bundestag, Bundesrat und die Euro-Krise, 2013, at p. 27.
\textsuperscript{105} Interview with Gesine Lötzsch, 27 May 2015; interview with Christian Hirte, 24 April 2015; interview with Otto Fricke, 6 May 2015.
\textsuperscript{106} Interview with Christoph Möllers, 20 April 2015.
\textsuperscript{107} Interview with Gesine Lötzsch, 27 May 2015; Lothar Binding (SPD) in an interview held at 29 April 2015.; Interview with Peter Danckert, 12 May 2015.
\textsuperscript{108} Interview with Christian Hirte, 24 April 2015.
An important contextual factor in assessing the role of the Dutch parliament during the euro crisis is that the Dutch government was in a special position when most of the crisis measures were adopted. In February 2010, the Dutch cabinet resigned and assumed the role of caretaker government until the elections in June 2010. This meant that the cabinet could no longer conclude controversial issues and lacked the support of a parliamentary majority. Following the 2010 elections, the government consisted of a minority coalition of the liberal VVD and Christian-democratic CDA, supported in parliament by the PVV, the right-wing conservative party of Geert Wilders. Yet, the PVV refused to support the government on European issues. For European policies the government therefore depended on the support of the opposition parties, particularly the Dutch labour party (PvdA). After the 2012 elections, a peculiarity remained, because the government coalition of the VVD and PvdA lacked a majority in the parliament’s upper chamber, the Eerste Kamer.

3.1 Acting Outside the EU Framework: A Mixed Picture

The involvement of the Dutch parliament in the design of the euro crisis measures provides a mixed picture. In the Netherlands there are few constitutional and legal provisions on the parliament’s rights to participate in EU affairs. General governmental obligations to inform the parliament flow from the constitutional principle of ministerial responsibility and the government’s duty to provide information to the parliament, from Article 68 of the Constitution. The main ways by which the Dutch Government informs the parliament have developed in political practice. Yet, during the crisis, the Dutch government adopted the same practice for meetings of the Eurogroup and eurozone summits. The Government provided annotated agendas and reports on these meetings, as on other EU affairs. Unlike the

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113 Article 42 of the Dutch Constitution.
114 On these issues, see Brecht van Mourik, Parlementaire controle op Europese besluitvorming (Wolf Legal Publishers Nijmegen 2012), at p. 15-33.
115 The government informs the parliament of new Commission proposals with standard form on new Commission proposals that provide a summary of the proposal, an assessment in light of the subsidiarity principle, an estimation of its financial consequences and a provisional indication of the Dutch negotiating position. In addition, the Dutch government provides annotated agendas of upcoming Council meetings that detail the government’s negotiating position. Where necessary, the Tweede Kamer can adopt resolutions on the government’s negotiating position in the plenary. See: Van Mourik 2012, at p. 40-43; Tweede Kamer der Staten-Generaal, ‘Europese besluitvorming in de Tweede Kamer’, December 2014, available at: https://www.tweedekamer.nl/sites/default/files/atoms/files/brochure_europese_besluitvorming.pdf, last accessed 27 December 2017, at p. 3-4. In between the provision of a fiche and the annotated agenda, the government generally does not provide further information. The annotated agendas are the basis for a subsequent discussion between the respective cabinet member and the Tweede Kamer committee that deals with the policy area. Since the end of 2010, the Tweede Kamer’s plenary discusses the annotated agendas of European Council meetings.
German Government, the Dutch Government did not invoke the intergovernmental nature of such negotiations as a ground to refuse information to parliament.\textsuperscript{116}

Yet, as in Germany, the initial rescue mechanisms were presented as without any alternative, given the threat to Europe’s financial stability as a whole.\textsuperscript{117} A number of parliamentarians raised questions about the speed at which the EFSF was adopted and whether the Tweede Kamer had been informed adequately.\textsuperscript{118} In this respect the Finance Minister explained that the Member States’ governments had been overtaken by the urgency of the situation and had not fully anticipated the rapidly changed situation.\textsuperscript{119} In the debates on the Greek loan facility and the EFSF, the Finance Minister and Prime Minister also highlighted several ways in which these mechanisms met the previously expressed wishes of the Tweede Kamer.\textsuperscript{120} Nonetheless, given the crisis atmosphere in which the EFSF was adopted, the effective influence of the Tweede Kamer on its design can only have been limited.

Also, the Government appears not to have provided the underlying documents on several of the intergovernmental crisis negotiations. The adoption of the ESM provides an example. The GFCC’s case of 19 June 2012 established that the German Government possessed a Commission text on the ESM on 21 February 2011 and that this document was the subject of deliberations within the Council. In addition, the Court established that the German government had a draft of the ESM Treaty in its possession on 6 April 2011. The Dutch annotated agendas, however, do not indicate the existence of these documents. Only from 21 March do the agendas refer to a term sheet on the ESM, a public document annexed to the European Council conclusions of 24 and 25 March 2011.\textsuperscript{121}

\textsuperscript{116} On these issues see also: Rapport van een werkgroep uit de commissie voor de Rijksuitgaven van de Tweede Kamer der Staten-Generaal, ‘Aandacht voor het parlementair budgetrecht in Europees perspectief’, Bijlage bij Kamerstuk 31 597, nr. 7, at p. 26-27.

\textsuperscript{117} See e.g.: Finance Minister De Jager, Handelingen II 2009/10, 81, p. 6890-6933 (Plenary Debate on Assistance to Greece), at p. 6907.

\textsuperscript{118} See the statements of Tang (PvdA) and Vendrik (Groenlinks) in Kamerstukken II, 2009-2010, 21501-07, nr. 734, at p. 14 and p. 17 respectively.

\textsuperscript{119} Kamerstukken II, 2009-2010, 21501-07, nr. 734, at p. 21-27. Handelingen II 2009/10, 82 (Plenary Debate on EFSF), at p. 6962.

\textsuperscript{120} Handelingen II 2009/10, 81, at p. 6908 and p. 6910 (Plenary Debate on Assistance to Greece); Kamerstukken II, 2009-2010, 21501-07, nr. 734, at p. 31. See also the statement of Prime Minister Balkenende, Handelingen II 2009/10, 82 (Plenary Debate on EFSF), at p. 6970-6972.

A similar picture emerges on the adoption of the Euro Plus Pact. The GFCC established that the German Government possessed an unofficial document from the Presidents of the European Commission and the European Council of 25 February 2011. This document described essential elements of the Pact. On 16 February 2011, the Dutch *Eerste Kamer* asked the Dutch Government to send a copy of the French-German proposal of the Pact. The Government replied on 4 March 2011 that France and Germany had not put forward a detailed proposal, yet the Government did not provide the unofficial document of 25 February 2011 either. Remarkably, the *Tweede Kamer* still held a plenary debate on the Pact on 23 March 2011, whereas the Pact had already been agreed at the eurozone summit on 11 March 2011. The GFCC concluded that after 11 March 2011, “the German Bundestag no longer had an opportunity to discuss its contents and to influence the Federal Government by an opinion, because the heads of state and government of the Member States of the euro currency area agreed on the Pact on the same date”. Yet, in the debate of 23 March 2011 several parliamentarians still had questions about the Pact. From these events, the picture emerges that the Dutch Tweede Kamer was insufficiently aware of the exact stage of European negotiations, but at the same time, was largely satisfied with the Government’s information provision.

The Dutch parliament’s access to information on negotiations outside the EU Treaty framework only appears to have become an issue in 2016, after experts in the field had raised concerns. Some parliamentarians had complained before about the information provision on European Council meetings and special summits, which had hampered the possibilities for adequate parliamentary control. In addition, concerns had been raised about the speed of

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125 See: Handelingen II 2010/2011, 64, p. 3-23 (Europact no. 1); Handelingen II 2010/2011, 64, p. 26-56 (Europact no. 2). See also: Douwe Douwes, 'PvdA heeft twijfels over 'Pact voor de euro' en wil spoeddebat' de Volkskrant (14 March 2011).
127 Servaes (PvdA), Kamerstukken II, 2012-2013, 22112, nr. 158, at p. 9-10; Verheijen (VVD), Kamerstukken II, 2013-2014, 22 112, nr. 1865, at p. 7; The Dutch Court of Auditors has raised concerns about democratic oversight of the Eurogroup, see: Algemene Rekenkamer, 'Noodsteun voor eurolanden: Inzet van de Europese noordfondsen tussen 2010 en 2015' (The Hague 3 September), at p. 35-36.
decision-making during the crisis.\textsuperscript{128} Still, only in November 2016, did parliamentarian Pieter Omtzigt (CDA) raise the problem that EU-related decision-making was increasingly taking place within informal settings, such as the Eurogroup, the Euro summits and the ESM. With reference to the situation in Germany, the Tweede Kamer proposed that the parliament should receive all documents on these decision-making venues.\textsuperscript{129}

Another problem regarding the information position of the Dutch parliament concerns its access to documents with the labels ‘restreint’ and ‘limité’. The Dutch ratification of the Lisbon Treaty largely abrogated the Government’s duty to seek prior approval for decisions in the area of justice or home affairs.\textsuperscript{130} This abrogation worsened the parliament’s information position, particularly because the government stopped sending confidential Council documents with the labels ‘restreint’ and ‘limité’ in this policy field.\textsuperscript{131} For a long time, the information position of the Dutch parliament was therefore worse than its German counterpart. The EUZBBG already provided in 2009 that the Bundestag could access confidential documents. Only in 2013, did Foreign Minister Timmermans grant the parliament access to ‘limité’ documents and to the list of all Council documents in all

\begin{itemize}
\item \textsuperscript{128} Kamerstukken II, 2013-2014, 33 936, nr. 2 (report ‘Voorop in Europa’), at p. 15. However, the parliamentary report ‘Bovenop Europa’ did not signal problems with the crisis measures, see: Tweede Kamer der Staten-Generaal, ‘Bovenop Europa - Evaluatie van de versterkte EU-ondersteuning van de Tweede Kamer 2007-2011’ (bijlage bij Kamerstukken II 2010-2011, 32726, nr.1). See also: Algemene Rekenkamer, ‘Noodsteun voor eurolanden: Inzet van de Europese noodfondsen tussen 2010 en 2015’ (The Hague 3 September), at p. 32. The Tweede Kamer did not raise concerns about the information on the initial EFSF. Such concerns did arise, however, in the context of the changes to the EFSF in 2011, where a number of parties complained that the guidelines on the new instruments had not yet been decided. For some parties this constituted a reason not to support the legislation approving the EFSF’s extension. Finance Minister De Jager promised, however, that he would submit the guidelines to parliament before approving them. See Handelingen II 2011/12, 9 (Plenary debate on EFSF changes no 3), at p. 8-10.
\item \textsuperscript{129} Kamerstukken II, 2016-2017, 22 112, nr. 2250, at p. 8-9; and see the discussion in Kamerstukken II, 2016-2017, 22 112, nr. 2253.
\item The reasoning behind this was that the European Parliament’s extended powers made the Dutch right of parliamentary approval unnecessary. See e.g. Kamerstukken II, 2007-2008, 31 384 (R 1850), nr. 4 (Advies Raad van State en Nader Rapport Verdrag van Lissabon), at p. 19-20. For counterarguments see: Leonard F. M. Besselink, Deirdre Curtin and Jan-Herman Reestman, ‘Instemmingsvereiste én behandelingsvoorbehoud voor EU-besluiten! Nu of nooit!’ (2008) Nederlands Juristenblad 1073; Commissie Meijers, ‘Vragen ten behoeve van algemeen overleg Commissie Europese Zaken, dd. 21 december 2011 inzake informatievoorziening Europese dossiers’ (2011) CM1117 As a result, the parliament’s right of approval was only retained for a number of decisions in title V of the TFEU on which the European Parliament’s powers were considered insufficient. See Article 3 ratification Act. A right to parliamentary approval still exists for decisions under Articles 77 (3), 87(3) and 89 TFEU. See also Brecht van Mourik, Parlementaire controle op Europese besluitvorming, 2012, at p. 50-53.
\end{itemize}
categories of confidentiality through the Council’s database. In June 2015, the Dutch Government granted the parliament confidential access to documents with the label ‘restreint’. Since then, the Dutch Government has maintained that the Dutch parliament essentially receives the same information as the Bundestag. Yet, the German information arrangements are certainly wider in scope and more precise, particularly on EU-related negotiations that strictly fall outside the EU Treaty framework. In response to these shortcomings, two MP’s have recently proposed a statute on the parliament’s information and participation rights in EU affairs, based on the model of the German EUZBBG. The Dutch proposal for a statute on the parliament’s information and participation rights in EU affairs aims to strengthen the parliament’s information position and put it on a firmer basis. The Tweede Kamer thus shows the ability to safeguard and strengthen its own oversight position, even though this process takes considerable time and is still not concluded.

3.2 Overseeing the EFSF and ESM: Creating Special Arrangements Without Judicial Review

For the operation of the crisis mechanisms specifically, the Dutch parliament ensured special arrangements for its involvement in decision-making within the EFSF and the ESM. In practice, these arrangements are similar to those in Germany, although they are not formalised in legislation. In the initial debates on the EFFS, the Dutch Finance Minister indicated that he would inform the Tweede Kamer of assistance requests by a Member State.

132 Kamerstukken II, 2012-2013, 22112, nr. 1548. In December 2011 the State Secretary for Foreign Affairs had agreed to allow the Tweede Kamer to see confidential negotiation documents if the Tweede Kamer so requested. See: Kamerstukken II, 2011-2012, 22 112, nr. 1346.
133 See Kamerstukken II, 2014–2015, 22 112, nr. 1985. A number of problems have persisted, nonetheless. One of the remaining issues is that confidential documents with the label limité or higher cannot be shared with experts and that parliamentarians cannot make notes when they see these documents. In 2016, the Tweede Kamer demanded that they should be able to share documents with experts and should be able to take notes. Kamerstukken II, 2016-2017, 22 112, nr. 2250, at p. 8; Kamerstukken II, 2016-2017, 22 112, nr. 2253, at p. 3-4. The Minister of Foreign Affairs has in the meantime proposed an arrangement on the basis of which experts can consult limité documents; Bert Koenders, Raadplegen van experts bij EU informatie [Letter of government of 23 December 2016].
135 See also Commissie Meijers, De meerwaarde van een Nederlandse Europawet voor parlementaire informatieverzorging: een verkenning, 2016.
137 Kamerstukken II, 2016-2017, 34 695, nr. 3 (Memorie van Toelichting).
If needed, the Tweede Kamer could then summon the Minister for a debate. The Minister also promised that he would inform the Tweede Kamer before a decision on granting assistance was made, which the Tweede Kamer would be able to discuss with him, except in possible cases of particular urgency.\footnote{Handelingen II 2009/10, 82 (Plenary Debate on EFSF), at p. 6976.}

During the parliamentary debates on the changes to the EFSF, the position of the Tweede Kamer was again discussed extensively. Several parties wanted the Tweede Kamer’s position to be equal to the Bundestag. What has resulted is a similar system, where the Minister of Finance will have to consult the Tweede Kamer on important decisions regarding financial assistance, even though the arrangement is not formalised in legislation.\footnote{See the statement of Finance Minister De Jager, Handelingen II 2011/12, 9 (Plenary debate on EFSF changes no 3), at p. 8-12.} The option of formalising the arrangement in law was discussed, but rejected by a majority as unnecessary and as a possible threat to the EFSF’s effectiveness.\footnote{See e.g.: Van Dijck (PVV), Handelingen II 2011/12, 9, p. 37-80 (Plenary debate on EFSF changes no. 4), at p. 62-63 and p. 68; Schouten (ChristenUnie), at p. 71-73; De Jager, at p. 77-78.}

The Tweede Kamer never seriously considered introducing a special secret committee like the German ‘Neuner Gremium’. Both the Dutch Government and the parliamentary majority therefore appear to have had different beliefs about the appropriate standards for parliamentary oversight than the Bundestag majority and German Government at the time. It is also important to note that the emergence of the Dutch oversight arrangements cannot be clearly attributed to the minority position of the Dutch government in parliament. In fact, it was the PvdA – the largest opposition party - that opposed national vetoes on the granting of assistance, as the party feared the mechanism would be ineffective.\footnote{See e.g. Plasterk (PvdA), Handelingen II 2011/12, 8, p. 2-36 (Plenary debate on EFSF changes), at p. 6-8; Plasterk, tweede termijn, Handelingen II 2011/12, 9, p. 3-30 (Plenary debate on EFSF changes no 3), at p. 8; also Braakhuis (GroenLinks), Handelingen II 2011/12, 9, p. 37-80 (Plenary debate on EFSF changes no. 4), at p. 73; The VVD instead insisted on strong parliamentary rights, see Harbers (Harbers), Handelingen II 2011/12, 8 (Plenary debate on EFSF changes), at p. 19-20; Handelingen II 2011/12, 9, p. 37-80 (Plenary debate on EFSF changes no. 4), at p. 62.}

In 2014, the Dutch arrangement was laid down in an ‘information protocol’.\footnote{The protocol has been influenced by the recommendations of the parliamentary enquiry committee on the financial crisis, also known as the Committee ‘De Wit’. See: Kamerstukken II, 2014−2015, 21 501-07, nr. 1217 (ESM informatieprotocol), at p. 1; Kamerstukken II, 2011-2012, 31 980, nr 61 (Parlementaire Enquête Financieel Stelsel: Eindrapport).} The protocol takes as its starting point, that all measures will be discussed publicly with the Tweede Kamer. The Tweede Kamer will be informed of all assistance requests. Documents that form
the basis for decisions on assistance will be sent to the Tweede Kamer as soon as they are available. Within seven days after sending these documents, the Government will state its position in writing to the Tweede Kamer and will consult with the Tweede Kamer on its position. Relevant documents have to be sent to the Tweede Kamer at least three days before decision-making in the Board of Governors takes place. If sent later, the Dutch government has to make a parliamentary reservation and no irreversible decisions can be taken until the government has consulted the Tweede Kamer.

In case of an emergency voting procedure, the proceedings are slightly different. In such a situation, the Minister of Finance will inform the Tweede Kamer about the reasons for the use of this procedure. In this case too, the Finance Minister will consult with the Tweede Kamer. Yet, should this not be possible, the Minister of Finance will take a position and inform the Tweede Kamer afterwards in writing. In the case of an emergency voting procedure, no parliamentary reservation will be made.

After a decision on financial assistance has been taken, the government will inform the Tweede Kamer of the progress reports on compliance with the assistance’s conditions. In the case of assistance concerning interventions on the secondary market, the government will inform the Tweede Kamer confidentially, as well as publicly afterwards. Once a financial assistance programme has ended, the government informs the Tweede Kamer of the results of the post programme monitoring. In the debates on the ESM, the Tweede Kamer also adopted a resolution, on the basis of which, any changes in the ESM’s authorised capital stock require prior legislative consent. The calling in of non paid-in capital also requires prior consultation with the Tweede Kamer.

These arrangements appear to have worked satisfactorily in practice: the Dutch Court of Auditors concluded in September 2015 that the Minister of Finance had adequately informed

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144 If needed the Tweede Kamer can also request a technical briefing.
145 In practice it seems that the need for confidential meetings between the cabinet and the Tweede Kamer has not arisen: Interview with Mark Harbers, 21 January 2016.
the Dutch Tweede Kamer on the financial assistance operations. The Tweede Kamer had been provided with “a large amount of information” and “regularly the Tweede Kamer was even shown documents before their confidentiality was lifted.”

The body reached this conclusion on the basis of a comparison between the information provided to the Tweede Kamer and that available to the Dutch Ministry of Finance. It did point to three relatively minor cases where the provided information had been insufficient. Several parliamentarians and members of the Registry affirm this picture: they report that in practice, the Tweede Kamer has been closely involved in rescue operations. Overall, the Tweede Kamer has thus obtained a position that in several ways is substantially similar to that of the Bundestag in relation to the crisis mechanisms, even if it is not formalised in law.

4. Judicial Review versus Democratic Self-Protection and Correction
Although the GFCC proved to be important in strengthening the Bundestag’s oversight rights in EU affairs, it is not clear that the German example provides a reason to introduce judicial review in other Member States for similar situations. The comparison with the Netherlands shows that the GFCC responded to problems that were to a significant extent specific to the German context. In parliamentary systems where a parliamentary majority supports the Government, open conflict between the government and parliament may be unlikely. In Germany this factor appears to have been an important reason why the GFCC was ultimately needed to strengthen the Bundestag’s position. By comparison, the fact that the Dutch Government did not have a parliamentary majority during a significant part of the euro crisis may have foreclosed any attempts by the Government to restrict the position of the Dutch parliament. Still, it is not clear that this factor explains the difference between the German and Dutch situations. During the debates over the changes to the EFSF, the biggest opposition party, the PvdA actually opposed national vetoes on the granting of assistance. There are also relevant differences in political culture. Non-public parliamentary meetings are more common in Germany, where committee meetings generally take place behind closed doors. In

149 This had happened with regard to the commitment of Greece towards structural reforms in 2011; about the sustainability of the Greek debt; and about the amount of assistance necessary for the recapitalisation of Spanish banks. See: Algemene Rekenkamer, Noodsteun voor eurolanden: Inzet van de Europese noodfondsen tussen 2010 en 2015, 2015, at p. 33.
150 Interview with Henk Nijboer, 16 November 2015; Interview with Mark Harbers, 21 January 2016; Interview with Jeanette Mak, 7 December 2015; More critical, however, was Pieter Omtzigt (CDA), who complained about the confidentiality of document in the context of financial assistance to Greece (Interview with Pieter Omtzigt, 3 December 2015).
the Netherlands they are, as a rule, open. A further difference between the two parliamentary chambers is that the distance between the Dutch Tweede Kamer and the Dutch Government is greater than that between the Bundestag and German Government. In Germany, many government members, including the Chancellor are also members of the Bundestag, which is not the case in the Netherlands.\footnote{In this sense: Interview with Marit Maij, 18 November 2015; and Interview with Christoph Thum, 26 May 2015.}

Comparative research further indicates that certain parliaments have been able to develop a strong oversight position without judicial intervention. The Finnish Parliament, the Eduskunta, offers an example. It has very strong information and participation rights in EU matters and compared to other Member States’ parliaments, it is both institutionally the most powerful, as well as the most active, when it comes to EU affairs.\footnote{See: Katrin Auel, Olivier Rozenberg and Angela Tacea. Fighting Back? And, If So, How? Measuring Parliamentary Strength and Activity in EU Affairs. The Palgrave Handbook of National Parliaments and the European Union 2015 60.} The parliament is known to exert a strong influence on its government’s European positions. In contrast to Germany, its strong position is not the result of intervention by a constitutional court. Part of the reason appears to lie in the Member State’s strong culture of open government. In addition, the parliament’s constitutional law committee plays an important role. This committee is a political committee of the Eduskunta that has a quasi-judicial function, given the high authority of its opinions. Because of its opinions, many of the crisis measures that have formally fallen outside the EU Treaty framework, have still been treated as EU matters. Consequently, the Finnish parliament has also retained its strong information and participation position for such negotiations. Likewise, the Finnish parliament has a strong position regarding decision-making within the ESM and EFSF. A further factor that has possibly contributed to this outcome is that Finnish politics has become more critical of the EU since the crisis.\footnote{See: Päivi Leino and Janne Salminen, ‘The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?’ (2013) 9 European Constitutional Law Review 451; and Tapio Raunio, ‘The Finnish Eduskunta and the European Union: The Strenghts and Weaknesses of a Mandating System’ in Claudia Heffler and others (ed), The Palgrave Handbook of National Parliaments and the European Union (Palgrave Macmillan Basingstoke & New York 2015) 406. Nonetheless, several Dutch parliamentarians reject a strongly mandate-based system like the Finnish model, because they feel it would unduly constrain the negotiation leeway of the government. Interview with Mark Harbers, 21 January 2016 and Henk Nijboer, 16 November 2015; and Interview with Pieter Omtzigt, 3 December 2015.}

The Finnish example indicates that tasking a specific committee to deal with constitutional questions can be beneficial to strengthening strong parliamentary oversight of EU affairs.
This might provide a better alternative than tasking a constitutional court to do this job, although this issue should be subject to further research. In addition, a full assessment of the GFCC’s role during the crisis nuances the positive picture about its role. As discussed in the previous chapter, the threat that any assistance mechanisms would be struck down by the Court contributed to an escalation of the crisis in the first place, in the spring of 2010. Yet, this escalation initially also marginalised the Bundestag’s role. Also, the decision to adopt the EFSF outside the EU Treaty framework was partly prompted by German constitutional considerations. Ironically, it was also this move that gave the German government an argument not to provide the Bundestag with essential information about negotiations on the ESM and Euro Plus Pact. These events illustrate how the threat of ultra vires review does not clearly benefit democratic legitimacy. The threat did not prevent European measures from being eventually adopted, merely that these were not agreed within the EU framework. Although this move has ensured a German veto, there is no involvement of the European Parliament, and transparency concerns remain.

Finally, and as I argued in the previous chapter, the GFCC’s case law has broader problematic consequences for democratic politics. And although national parliaments may be key in strengthening the EU’s democratic legitimacy, there are limitations: significant asymmetries between national parliaments remain and some national parliaments are able to take decisions that fundamentally affect citizens in other Member States, without them being included in the process. During the crisis, the debtor states’ de facto sovereignty appears to have often been curtailed severely with negative repercussions for the position of their parliaments. For example, in 2011 the ECB addressed secret letters to Spain and Italy containing detailed instructions on reforms to be implemented in exchange for assistance through the ECB’s bond-buying schemes. In Ireland, a draft budget was leaked in November 2011 from the German budget committee, which had obtained the document for the approval of releasing assistance funds. The draft budget had been sent to all EU finance ministers, but not yet to Irish parliamentarians. The leak was consequently seen as evidence of extensive foreign intrusion in Irish affairs. In the GFCC’s interpretation of democracy,

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154 An initial overview of such asymmetries has been provided by Oliver Höing, Differentiation of parliamentary powers: The German Constitutional Court and the German Bundestag within the financial crisis, 2012.
155 Similar allegations about the ECB have been made in the context of Ireland. On all these events see Claire Kilpatrick, ‘On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailout’ (2015) 35 2 Oxford Journal of Legal Studies, at p. 344-345.
156 Arthur Beesley, Our loss of economic sovereignty may be just the beginning! The Irish Times (22 November 2011) ;Stephen Coutts, Constitutional Change through Euro Crisis Law: “Ireland” (2 March 2014)
the potential repercussions for other Member States from German budgetary decision-making plays no role. Although the GFCC’s strengthening of the Bundestag’s position may be seen as positive from a democratic perspective, the Bundestag can hardly legitimise decisions with significant effects on citizens outside Germany.157

5. Conclusion

This chapter discussed the positive democratic effects of the multiple interventions of the GFCC’s crisis case law. There is considerable evidence that the GFCC contributed to a strengthening of the Bundestag’s position in EU affairs. As a result of the Court’s interventions, the Bundestag has a significantly stronger information position as well as stronger participation rights in EU affairs. It is also unlikely that the Bundestag would have obtained an equally strong position without the Court’s interventions. From a democratic perspective this result appears positive. Moreover, the Court was also able to consider and address countervailing concerns. In its judgment on the Neuner Gremium, it admitted that even in a democracy there can be a legitimate need for secrecy. Yet, the Court was also able to distinguish in which cases confidentiality was justified, from those cases in which the grounds were weak. In this respect, the GFCC was thus able to address specific shortcomings in the political process without rejecting the Bundestag’s approach as wholly unconstitutional.

A comparison with the Netherlands showed, nonetheless, that the German Court partly responded to German peculiarities. In particular, the Bundestag’s desire to set up the secret Neuner committee did not arise in the Netherlands. That the GFCC had to intervene against such secret arrangements, should be taken as a cause for concern and would merit further critical reflection by the Bundestag on its own position.

Does the German situation hold a lesson for other Member States? In Member States that have already introduced judicial review, constitutional courts can probably legitimately require enhanced parliamentary oversight, especially if these courts take into account countervailing considerations that militate against such oversight in some cases. For Member

States without judicial review, the German example does not offer a clear reason to introduce it. As the previous chapter indicated, such review can have several other negative repercussions, and once a court is given the power to review legislation, it is not clear that it can be controlled. Moreover, the Finnish case suggests that there are ways to ensure that a parliament itself heeds closer attention to the issue of parliamentary oversight in the light of overall constitutional considerations.
CHAPTER 8 - CONCLUSION

“Ultimately, there is no political issue that does not end up here.”

In *The Nine*, Jeffrey Toobin’s bestseller on the United States’ Supreme Court, the author starts with a description of the building that houses the country’s highest court: a grand building meant to inspire awe and respect for the Court’s judges. Built on a small plot of land, its architect chose to give the building an impressive stairway. The Court could only be entered after the ascent of a series of steep steps, an experience that few visitors would forget and that emphasized how “the justices would operate, literally, on a higher plane.”

Having read the GFCC’s judgments on European integration and how the Karlsruhe judges have often challenged key principles of EU law, seemingly claiming a higher legitimacy than its Luxembourg counterpart - the CJEU - I always imagined the German Court’s building would look similar to the one Toobin described in his account of the US Supreme Court.

Things turned out differently than I expected. I visited the Karlsruhe Court in April 2015 and initially simply walked past the building. The Court’s building is interesting but unimpressive and not necessarily beautiful. Instead of steep steps, it offers concrete and a lot of glass. When I was later given a tour by one of the Court’s officials I realized how much its architecture had been inspired by a different time and different ideals than its US counterpart. The gigantic windows that surround the pleading room from each side illuminate the chamber and symbolize the importance of transparency. The place where the judges take their robes can be seen from the outside and so demystifies their transition from ordinary citizens into the spokespersons of Germany’s highest law. Finally, the Court’s pleading room sits in the highest part of the building, which symbolizes that the citizens’ interests are the most important and remain the source of the Court’s legitimacy. During that visit, the Court really seemed to be a people’s court and a guardian of democracy.

Yet when it comes to the Court’s EU-related case law, it appears perhaps that the Court’s architects may have better understood the inevitable tension at the basis of constitutional

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1 Judge Peter Huber on the role of the GFCC in the German political system, in Interview with Peter Huber, Judge at the German Federal Constitutional Court, 23 April 2015 (“Es gibt letztlich keine politische Frage, die nicht hier landet.”).

democracies than the judges themselves. Constitutions can be seen as laying down the preconditions for democratically legitimate government. Yet what these preconditions require is unavoidably subject to reasonable disagreement in a democratic society. The ideal of having a democratic constitution is an enduring project of constant rediscovery and elaboration rather than an ideal whose content can be comprehensively determined in the abstract. Allowing courts to review legislation on the basis of constitutional norms may be a wise strategy if it helps promote on-going democratic deliberation about constitutional issues or if it assures that such issues are taken into account at all. Yet it may also obstruct this task if it takes away from the democratically elected branches the power to decide on fundamental societal questions. These considerations apply as well for the way in which constitutional ideals should be realised in the European Union. And even if the EU has several democratic legitimacy problems, a fundamental difficulty is that there is no clear consensus on how the EU’s democratic credentials should be improved.

This book set out to answer how we should assess the democratic legitimacy of the national constitutional court’s review of European law and did so with three main aims. Firstly and primarily, to better understand the national constitutional courts’ legitimate role in relation to the EU in a way that takes into account concerns about the democratic legitimacy of these courts in relation to political institutions. Secondly, to lay the groundwork for, and thus contribute to a theory of legitimate constitutional interpretation when courts review European law. Thirdly, to inform ideas for institutional design. The current chapter answers the main research question and discusses how the findings of this book contribute to fulfilling these three aims. Section 1 first reiterates the main theoretical arguments of chapters 2 on 3 on the democratic legitimacy of judicial review and the national constitutional courts’ review of European law. The section reaffirms why it is important to compare legislative and judicial practice in evaluating the legitimacy of judicial review, and why it is pivotal to take into account the impact of such review on subsequent political decision-making. Section 2 subsequently discusses the main findings of the case studies and considers how they answer the empirical questions raised by the theoretical framework. Section 3 zooms out from the specific findings of the case studies to consider what they teach about the role of the constitutional courts in the EU more generally. In this respect, the section explores how the study lays the groundwork for a theory of legitimate constitutional interpretation and how it informs institutional design. The section also considers which questions should be taken up in further research. Section 4 offers a number of concluding thoughts.
1. On the Importance of Studying Political Processes and Institutions

In chapters 2 and 3 of this book I argued why a critical engagement with judicial and legislative practice is pivotal in assessing the legitimacy of the constitutional courts’ role. This is so both where it concerns the constitutional courts’ review of legislation in the domestic context, as well as where it concerns their review of European law.

Chapter 2 discussed the dilemma involved in addressing the legitimacy of judicial review in the domestic context. Liberal political philosophers commonly justify constitutional constraints on democratic majority government as necessary to protect liberal rights against the possible aberrations of oppressive majorities. The protection of these rights is a necessary precondition for the law’s legitimacy. In this vein liberals defend judicial review as the best mechanism to ensure the protection of these rights. This defence is based on an idealised picture of courts as ‘forums of principle’, which are supposedly very well-placed to address fundamental moral questions. The democratic process is instead regarded in a negative light: political majorities are seen as basing their positions on the preferences of self-interested persons, not on the basis of moral arguments.

Critics of this position have rightly pointed to two major problems with the liberal justification of judicial review. Liberals justify constitutional constraints as necessary preconditions for legitimacy. The constitution protects liberal rights and is placed outside the realm of ordinary democratic politics, as the constitution establishes the legitimacy conditions for democratic politics. The problem with this view is that it largely ignores that people can reasonably disagree about rights. They can disagree about which rights should be protected as a matter of basic justice, how these should be weighed against other normative considerations in case they conflict and how these rights should be interpreted in concrete cases. Habermas, for example, points out that understandings of how to best protect fundamental rights have historically evolved in light of changing circumstances and in light of the different arguments, viewpoints and experiences articulated by affected persons. Critics of the liberal justification of judicial review argue that the democratic process offers a better way to resolve moral disagreements, as it is a process in which citizens have an equal right to participate and in which decisions on collective norms are taken after the exchange of reasons. In connection to this point, judicial review critics also note a second problem with the liberal justification for judicial review: it rests on an idealised picture of the way courts operate and sketches a picture of democratic politics that is too negative. Instead, judicial review critics maintain...
that elected legislatures are forums in which the people’s representatives deliberate in a responsible manner on matters of justice and rights. Judicial review is democratically problematic: by giving courts the ability to strike down legislation incompatible with constitutional rights, these courts will often end up taking sides in good faith disagreements among elected legislators that have settled their disagreement by majority decision.

Although these judicial review critics point to important deficiencies in the liberal defence of judicial review, it must also be acknowledged that mere majoritarian democratic decision-making cannot be regarded as sufficient to understand the legitimacy of law. Democratic majority decisions to abolish the democratic process, or decisions that do away with political rights, such as the right to freedom of expression or freedom of assembly, take away essential elements of a legitimate democratic process. Beyond that, majorities that do not take into account the views of those in the minority can hardly claim that such minorities should accept their decisions as legitimate. In this respect, chapter 2 discussed Habermas’ thesis on the co-originality of constitutional rights and democracy, according to which the constitution lays down the institutional conditions for democratic will-formation. The idea of co-originality expresses the intuition that citizens can only participate as free and equals in a democratic process, when they have a sufficient degree of independence to begin with. At the same time, it acknowledges that the preconditions for a legitimate democratic process are themselves subject to reasonable disagreement. Therefore, one cannot legitimately place the constitution fully outside the realm of democratic politics. Instead, the preconditions for a legitimate democratic process embodied in a constitution, must be specified within the democratic process itself in an on-going manner and in light of changing circumstances. As I argued in chapter 2, a democratic constitution should thus function as both a standard to assess the legitimacy of law, as expressing an ideal to be further realised in law, but also as a set of norms that itself must be open to revision in light of new insights and arguments.

In this vein, the ideal of deliberative democracy demands that there is on-going deliberation on whether a country’s laws remain compatible with the preconditions of democratic legitimacy. Yet Habermas’ notion of co-originality emphasizes the limits of political philosophy in determining the relationship between constitutionalism and democracy: it is impossible to fully articulate in the abstract what the preconditions are for a legitimate democratic process. What deliberative democracy requires is that legislating also involves good faith deliberation on whether such legislation is compatible with the preconditions for a
legitimate democratic process. Judicial review can be a better means to ensure that such deliberation takes place, because it may be that in practice courts are better situated than legislatures to address constitutional questions. While proponents of judicial review may sketch an idealised picture of courts, judicial review critics instead may be seen to rely on a picture of legislative politics that is too idealised. Key to assessing the democratic legitimacy of judicial review, therefore, is an assessment of the comparative abilities of legislatures and constitutional courts to address the constitutional implications of legislation. In this sense, I argued that assessments of the democratic legitimacy should take into account how legislatures and constitutional courts deliberate on constitutional matters in practice, as well as how the courts’ review affects subsequent political decision-making.

Of course, these empirical insights cannot by themselves answer the normative question of how the democratic legitimacy of judicial review should be assessed. It must also be granted that there is no unequivocal normative standard to address the deliberative quality of judicial and political decision-making. Still, a critical engagement with legislative and judicial practice has the potential to advance the debate over the democratic legitimacy of judicial review in at least three ways. Firstly, it helps to see whether the empirical assumptions on the functioning of institutions that inform normative accounts on the democratic legitimacy of review, stand up to reality. Secondly, in line with the main tenets of deliberative democratic theory, such enquiries connect to, and engage with the arguments and reasons already offered within actual political debate. Thirdly, and closely connected to the previous point, bringing in a critical comparison of legislative and judicial practice probably helps to dispel a false sense of necessity that accompanies court judgments once these are handed down.3 Understanding how aspects of court judgments were politically contested in prior political debate, helps to grasp how the choices of courts are politically loaded and how they come at the expense of alternatives.

Chapter 3 drew out the implications of these arguments for assessing the democratic legitimacy of the national constitutional courts’ review of European law. In a nutshell, the chapter argued that the role of constitutional courts in the EU should also be assessed in relation to political institutions. Much has been written about the national constitutional

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3 In this sense Duncan Kennedy speaks of a legitimation effect, which denotes that people associate the development of law through adjudication as ‘natural, necessary, just’ rather than as political. Duncan Kennedy, A Critique of Adjudication (Harvard University Press Cambridge MA & London 1997), at p. 241.
courts’ EU-related case law over the past twenty-five years. Yet little has been said about the courts’ legitimacy compared to political institutions in deciding issues of constitutional importance for the EU. Barely considered is how the national constitutional courts’ review risks taking certain constitutional issues outside the realm of politics, whereas the comparative legitimacy of political institutions in addressing these issues may be greater. Existing scholarship on the constitutional courts’ role in relation to the EU instead can sometimes give one the false impression that courts are the only institutions that address constitutional questions. Scholars that favour the dialogue and contestation that supposedly emanates from the national constitutional courts’ review, have hardly considered the constitutional courts’ legitimacy in relation to other institutions. Similarly, existing scholarship often seems to equate the notion of constitutional identity with what the courts say it is, while little consideration is given to how the courts may construct such notions at the expense of possible other reasonable interpretations. The idea of constitutional pluralism more generally, which has become so influential following the GFCC’s Maastricht-judgment, is easily connected to well-sounding notions of heterarchy, diversity and openness, and opposed to seemingly less attractive notions of hierarchy and uniformity.

The almost exclusive focus on courts to the neglect of political institutions, however, is an important deficiency in current scholarship on the role of the national constitutional courts and can only lead to incomplete assessments of the legitimacy of these courts’ role. As the introduction of this book emphasized, when one asserts that constitutional identities should be respected, it is also important to address who determines what this identity consists of. And when one wishes to promote contestation or dialogue, it is important to consider who should do the contesting or the talking. For these reasons and despite democratic legitimacy problems in the EU’s decision-making processes, assessments of the constitutional courts’ role should take into account the institutional constellation in which such review takes place, how the constitutional issues that a national court raises were considered in the prior political decision-making process, as well as how the constitutional court judgments impact on subsequent political deliberations.

2. A Cautionary Tale: The GFCC and European Integration
What then, can be learned from the case studies on the GFCC’s EU-related case law? And what does a comparison with the political decision-making on the same instruments in the
Netherlands offer to further grasp the democratic legitimacy of the constitutional courts’ review of European law? In this book I have argued that two key conclusions follow from these case studies. On the one hand, a key problem is that the GFCC’s rulings on European integration ultimately raise several democratic problems. That is essentially the case because the Court has adopted a contested understanding of democracy according to which democracy is tied to the nation-state. This conception limits the ability of political actors to put forward different visions on the future of European integration and on the way in which democratic ideals within this process should be realised. That is not to say that politics is always perfect by itself. Yet portraying constitutional courts as ‘forums of principle’ or as necessarily better placed to deliberate on constitutional matters in the context of European integration, is not accurate either. Instead, the case studies showed how both in Germany as well as in the Netherlands, constitutional questions often formed a considerable part of political debate and how these debates showed more openness to a variety of possible understandings of constitutional principles. Moreover, the idea that the GFCC’s judgments have contributed to an improvement of democratic debate on constitutional matters, has limited empirical support.

On the other hand, the case studies also discussed how the GFCC strengthened the position of the German parliament in EU affairs and thus countered the dominance of the executive in this area of decision-making. Such review, which is more limited in nature and focuses more on the relationship between the executive and national parliaments, promotes democratic politics rather than constraining it. Zooming in on the case studies, the next subsections point out that the GFCC has played three main roles in relation to European integration, each of which should be assessed differently from a democratic perspective.

2.1 ‘A Chamber for Euro-critics’: Facilitating Dissent?
A first finding is that the German Court has provided an avenue for Euro-critics to voice their dissent about European integration, starting with its Maastricht-judgment. A strong pro-European consensus has proved to be a lasting element of German political discourse. This consensus makes that the Euro-critical position is not very well represented within the German Bundestag, although the entry of the AfD in the Bundestag in September 2017 will probably change this situation. Before the AfD’s entry, Euro-critics remained minorities within the different Bundestag parties. The analysis of German parliamentary debates showed that it is not always easy for such critics to voice their concerns within the Bundestag debates.
At the time of Maastricht, critical viewpoints on European integration were cast as anti-peace and associated with failed nationalist politics of the past. Although Euroscepticism is no longer as controversial in Germany as it was at the time of Maastricht, the pro-European parliamentary consensus has largely endured during the crisis, despite significant opposition to the crisis measures outside parliament.

In this pro-European climate, the GFCC has provided a place for a more Euro-critical viewpoint. First, it has done so by admitting challenges to European Treaties and EU law through a wide and substantive interpretation of the right to vote in Article 38 BL. Thus, the courtroom has served as a forum for Euro-critics to attack European law in a manner that is also widely covered in the German media. Secondly, the GFCC itself has articulated such a critical perspective. It has done so by opting for a national interpretation of the principle of democracy and by putting down several constitutional limits to European integration. In this sense, the GFCC has served as ‘a chamber for Euro-critics’. ⁴

Still, it is highly questionable that the GFCC should provide an avenue for such dissent. As the trajectory of the GFCC’s case law from Maastricht to the crisis underlines, the Court can provide such an avenue as long as its own judgments produce little concrete effects. At Maastricht that may still have been the case. However, ultimately the Court’s position as a guardian of a constitutional framework that is supposed to bind democratic politics is at odds with merely providing an additional road for political contestation. By adopting a particular and nationally oriented interpretation of the German principle of democracy, the Court ultimately ends up constraining the room for political debate in the Bundestag.

In the Netherlands, by contrast, the Euro-critical position is an important part of parliamentary political debate. In the Dutch crisis debates, concerns about national sovereignty and the national interest have become dominant. Many of the points that were raised by the GFCC, are already part of Dutch parliamentary debate. The Euro-critical position has significant political support leading to similar constraints on European integration as those advocated by the GFCC. Yet, the difference between the two countries is that the political viewpoints in the Netherlands are just political viewpoints. A majority of Dutch citizens can still decide to vote for strongly pro-European parties when they wish and

⁴ The phrase comes from Christoph Möllers: interview with Christoph Möllers 20 April 2015, Berlin, Germany.
change the Dutch stance on the EU. In Germany by contrast the GFCC has elevated the Euro-critical viewpoint to the level of unamendable constitutional law.

2.2 Stifling European Democracy: Limiting Political Deliberation

Over time, the GFCC has not just provided a forum for dissent or a Euro-critical viewpoint in German political debate, but the Court’s rulings eventually constrain the Bundestag’s ability to decide on Europe’s future itself. In addition, the Court’s rulings limit the space for political deliberation at the EU level. For several reasons, this consequence of the GFCC’s EU-related case law is of questionable democratic legitimacy.

First, a study of the German and Dutch political debates showed that constitutional issues often featured prominently in these debates. At Maastricht, the democratic shortcomings of the Treaty were probably the most pressing concern in the debates in both countries. Yet, politicians in both countries did not construe this as a problem of European integration as such, but most advocated a strengthening of the European Parliament. In addition, most parties did not share the idea that competence transfers to the EU would be somehow democratically problematic by themselves. Social-democratic and green parties in both Member States feared in fact that the principle of subsidiarity would prevent a Europeanisation of social and environmental policies and entrench the asymmetry of European integration. In addition, the GFCC’s apparent position that a viable democracy requires one demos - a people with a sufficient common identity - was contested. Several German parties instead favoured granting all permanent residents the right to vote in order to “restore a congruence between the holders of democratic political rights and those durably subject to an authority (Herrschaft).”

For these reasons, it seems not appropriate to qualify the GFCC as ‘a forum of principle’, opposed to an unprincipled political process in which the Maastricht Treaty was justified on the basis of the narrow interests of particular constituencies and in which constitutional issues were not seriously discussed. Instead, the paradox of the German political debates on the Maastricht Treaty is that these debates arguably were not political enough and that the Court’s judgment apparently served to make the debates more political. At the time of Maastricht, the Court may have still successfully played this role, because the Maastricht-

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Urteil was sufficiently vague to allow for widely divergent interpretations by several affected parties. The judgment could be interpreted as support for the German government and even for Europe as a whole, given the Court’s approval of the Treaty; alternatively, it could be interpreted as a victory for democracy, given the Court’s insistence on the role of the Bundestag and the supplementary role of the European Parliament; but at the same time the Court’s constraints on further European integration could also be cast a victory for the Euro-critics.

The GFCC’s judgment on the Lisbon Treaty and its judgments on the Euro crisis, however, have resulted in a situation that is democratically more problematic. Despite the strong pro-European consensus in German politics, the Bundestag parties have offered competing visions on the EU’s future that reflect fundamental political differences and competing ideas of social justice. The GFCC’s case law ultimately affects these different positions unevenly. The Court’s national interpretation of the principle of democracy means that several competences must remain with the German Bundestag. These areas include “fundamental fiscal decisions”, as well as “decisions on the social state”. In addition, the European Parliament is not seen as a democratic alternative to the Bundestag. Such an understanding of democracy is more readily compatible with the political position put forward by Germany’s centre-right governing coalition during the crisis. As explained in chapter 6, this coalition favoured promoting budgetary discipline, the creation of a genuine ‘stability culture’ and only limited financial assistance to debtor states given under strict conditionality in order not to reduce incentives for budgetary discipline. This approach limited the liability of Member States’ for each other’s debts and preserved the national parliaments’ budgetary sovereignty to a significant degree. Yet, at the same time it has not prevented that the Member States’ budgetary policies are increasingly subject to norms on budgetary discipline and that a great degree of coordination of economic policies within the EU now takes place.

The left-wing opposition which, at that time consisted of the SPD, Die Linke and the Greens, instead focused more on the role of financial markets, the original design faults of the EMU, as well as the negative effects of German economic policies on other European Member States. In addition, these parties were much more critical of Germany’s and Europe’s austerity politics. Instead they generally favoured more European integration in tax,

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6 Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08 (Lisbon judgment), at par. 252.
economic and social policy, as well as increased debt sharing between the Member States. In several ways these proposals reflected a concern about democratic self-determination, although not equated with budgetary sovereignty. They felt the need to better regulate the financial markets in order to ensure political power above the markets. Further European integration in sensitive areas such as tax, social and economic policy meant to overcome harmful competition between Member States that in these parties’ view undermined the German social model and citizens’ abilities for collective self-determination. The left wing political parties in Germany favoured competence transfers in these areas precisely in order to restore the citizens’ capacity for self-determination and make alternatives to austerity politics possible. Yet these competence transfers are more difficult to square with the GFCC’s case law.

At the European level, the available evidence is that the Court’s case law also constrains European decision-making. On the one hand, it must be granted that without the GFCC’s case law, the EU probably would not look radically different. On the other hand, however, in several respects it seems that the GFCC’s case law has not helped to make things better. When the crisis showed that the assumptions underlying the Maastricht stability architecture had proven to be false, there was a threat that any departure from the Treaty’s provisions would be struck down in Karlsruhe. This threat probably exacerbated the crisis, because it put in place an additional obstacle in the way of a quick political response. Ironically, this turn of events also side-lined national parliaments, including the Bundestag. Furthermore, the Court’s rulings favoured an intergovernmental approach to the crisis that has helped to retain a German veto on decisions affecting the Bundestag’s budget right. At the same time, this intergovernmental approach has led to further concerns about executive dominance and a lack of transparency. In addition, the Court’s case law appears consistent with the strict austerity policies in debtor states that have led to serious concerns about the rule of law, democracy and social rights in these Member States. Finally, the available insights on the impact of the Court’s case law on the negotiations of the Banking Union, indicate that the Court’s insistence on budgetary sovereignty came at the expense of the European Parliament’s position and the possibility that democratic solutions to Europe’s legitimacy problems can be found at the European level.

The idea that the Court’s interventions have merely contributed to a more informed democratic debate on these fundamental constitutional questions is difficult to uphold. The
Court’s judgments are rarely contested in German politics. Where the Court rules, it replaces the Bundestag as the authoritative interpreter of the German Basic Law. The Court therefore limits the room for political contestation over European integration. And although the Court’s rulings remain abstract and subject to multiple possible interpretations, there are several signs that the room for further European integration within the Basic Law is now largely exhausted.⁷

2.3 A Stronger Parliament: Enhancing Oversight

Despite these significant concerns, a more positive effect of the GFCC’s EU case law is that the Court has strengthened the position of the German parliament in an important way. In this manner it has countered the dominance of the executive in EU affairs. Particularly during the Euro crisis, the Court repeatedly intervened to strengthen the Bundestag’s participation and information position in EU affairs. It is also clear that during the crisis, the German government repeatedly failed to adequately inform the Bundestag about on-going European negotiations and that the Bundestag itself took insufficient action to address this concern. At several points, the Bundestag failed to provide for extensive parliamentary oversight over the EFSF.

Thanks in largely to the GFCC’s interventions the Bundestag obtained sufficiently stronger information and participation rights in EU affairs. The events described in chapter 7 also showed that it is unlikely that the Bundestag would have strengthened its position by itself. Ultimately, the Bundestag failed to do so when it had a chance and it repeatedly strengthened its own position only after the Court intervened. As a result, the German Bundestag is now regarded as one of the strongest Member State parliaments in European affairs. There are also several indications that these legal changes have made a positive difference in practice. Moreover, the Court has been able to take into account countervailing considerations, such as the legitimate need for confidentiality in certain cases.

Nonetheless, a comparison with the Netherlands showed that some of the democratically problematic dynamics were specific to Germany. A similarity between the political process in both Member States, is that the Dutch Tweede Kamer also experienced difficulties in accessing information on intergovernmental negotiations closely related to the EU that strictly fall outside the EU Treaty framework, such as on the ESM and Euro Plus Pact. In this

⁷ As stated by the GFCC’s President Vojtihale at the time: Melanie Mann and Inge Kloepper, „Mehr Europa lässt das Grundgesetz kaum zu“ Frankfurter Allgemeine Zeitung (25 September 2011)
respect, the Tweede Kamer has not strengthened its own information position in the way that the GFCC has done for the Bundestag, although efforts are still under way. The German arrangements on parliamentary access to information on EU affairs are both wider in scope as well as more precise. Nonetheless, the Dutch Tweede Kamer’s participation and information rights in relation to the EFSF and ESM are similar to that of the Bundestag, although they are not formalized in law. The Bundestag’s decision to set-up a special secret committee to deal with bail-outs, the Neuner Gremium, was never seriously discussed in the Netherlands. Evidence from other Member States further indicates that the interventions by a constitutional court are not the only way in which this result can be achieved.

3. Weakening Review, Strengthening Democracy: European Integration and the National Constitutional Courts
What lessons do these findings provide for the legitimate role of national constitutional courts in the EU more generally? In this section I aim to draw a number of more general conclusions on the democratic legitimacy of the national constitutional courts’ review of European law. First, I discuss what the case studies suggest about how we should assess the democratic legitimacy of these courts’ review of European law more generally. In this respect, I discuss what the case studies indicate for the democratic legitimacy of the constitutional courts’ identity and ultra vires review. Secondly, I consider how these insights may contribute to laying the groundwork for a theory of legitimate constitutional interpretation and to inform ideas for institutional design. This book, however, only sketches the contours of these implications. The development of a full-fledged interpretive theory and account of the most legitimate institutional design requires more elaborate treatment in future research. The last subsection adds a note of caution and stresses the limitations of the current research project. In this light, the subsection discusses what other issues should still be taken up in further research.

3.1 Understanding the Democratic Legitimacy of the Courts’ Review
Constitutional identity review and ultra vires review are two types of review that feature prominently in the case law of national constitutional courts. The case studies suggest, however, that their democratic legitimacy is doubtful.

As I argued in chapter 3, respect for national constitutional identity may be as important as respect for a Member State’s fundamental democratic choices on fundamental values and its collective identity. The Member States’ constitutional identities may be seen as context-
dependent interpretations of the preconditions of a democratically legitimate process. In addition, the idea that Member States should retain decision-making power in certain fields may reflect a legitimate concern about democratic self-government. Yet as I also argued in chapter 3, it is not clear that national constitutional courts should define this constitutional identity and invoke it as a ground to review European law. The notion leaves open a wide variety of possible interpretations and is subject to considerable possible disagreement. In addition, the judicial determination of essential state competences seems a democratically troublesome exercise. In light of democratic concerns about the asymmetrical and functional nature of the EU’s competences it is unclear whether asserting that certain competences should remain national, is of any help.

The case studies affirm these problems. The GFCC’s interpretation of constitutional identity has often been at odds with that of the Bundestag. At the time of Maastricht, the German legislature defined the German Basic Law as open to European integration and perceived the constitution’s structural principles not as obstacles to European integration, but as structural demands on the organisation of the EU. The GFCC departed from this perspective by interpreting German constitutional identity as a protection of sovereign statehood. And although the GFCC’s case law is sophisticated, it is also one-sided. At Maastricht, the Court offered limited attention to the possible importance of European integration, to the possible connection between Germany’s emergence as a successful democracy and European integration, or to conceptions of democracy that give a more prominent place to the interests of outsiders. The idea that constitutional identity review would protect a Member State’s most cherished constitutional values thus requires revision. In Germany, the GFCC’s interpretation of constitutional identity by no means reflects the only possible interpretation of that identity. The available evidence indicates that the courts’ review restrict political contestation over what this identity consists of amidst a variety of reasonable understandings. Other Member States that look to the German approach to constitutional identity for guidance on how constitutional ideals should be understood in relation to the EU, will look in vain.

The German and Dutch examples also indicate that different political parties disagree on what the EU should do, in a similar manner to the way they disagree about the role of the state. Such disagreements are often difficult to separate entirely from conflicting conceptions of justice brought forward by different political groups. The political struggles over EMU perhaps best illustrate this. Within this context there are good arguments to maintain that a
monetary union without a budgetary union is highly fragile and significantly reduces national autonomy in economic policy. That might not be a problem for those political parties that favour austerity policies and limited government intervention in markets. Yet, by foreclosing the option of transferring budgetary competences to the EU level, the GFCC constitutionalizes, what according to many is a fundamental flaw in the set-up of EMU and one with catastrophic consequences for European democracy. The approaches of the Czech Constitutional Court or the Danish Supreme Court in this respect are more sensible from a democratic point of view. These courts have rightly held that determining the ultimate limits to European integration is primarily a political question. The question of what powers the EU should have is ultimately a question that can only be answered through democratic politics in light of changing circumstances, knowledge and political perspectives.

There are some institutional constellations in which the case for national identity review is stronger and in which courts may adopt more intrusive forms of review. In this sense, the national constitutional courts may act as a counterweight against the expansive interpretations of EU law by the CJEU and ensure that the European Court takes into account national constitutional concerns in interpreting EU law. Yet, national constitutional courts should take into account the institutional constellation in which their review takes place and ensure that they leave space for political actors to interpret national constitutional identity in different ways.

*Ultra vires* review by national constitutional courts raises similar democratic concerns. Such review is commonly justified to protect the democratic autonomy of the Member States. As I argued in chapter 3, however, there are several counterarguments to this perspective. Not only does a decentralized *ultra vires* review by national courts risk harming the uniform interpretation of EU law and legal certainty, its democratic benefits are not so obvious either. One problem is that the adoption of legislation on the EU level can be informed by the conviction that this legislation is highly desirable for political reasons, but that similar legislation would be ineffective if adopted on the national level. The significant difficulties to amend the Treaties, moreover, appear to favour a flexible interpretation of the EU’s competences by political institutions in light of changed circumstances and changed political

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1 The Supreme Court of Denmark (Højesteret), Case 361/1997, Decision of 6 April 1998 (*Maastricht*) (summary translated in [1999] 3 C.M.L.R. 854); The Constitutional Court of the Czech Republic (Ústavní soud), judgment of 3 Nov. 2009, Pl ÚS 29/09 (*Treaty of Lisbon II*).
preferences. A further problem is that strict \textit{ultra vires} may worsen rather than address the
democratic concern about the EU’s functional orientation that limits political contestation
over the underlying goals of EU policies and legislation. Strict \textit{ultra vires} review may also
exacerbate the democratic problem that stems from the over-constitutionalization of the EU
legal order.

The GFCC’s review of the Maastricht Treaty and its judgments in the context of the Euro-
crisis again underline these downsides of \textit{ultra vires} review. At Maastricht, the GFCC first
determined the stability-orientation of EMU as a constitutional requirement for Germany’s
participation in EMU, subject to judicial review. This interpretation is at least one-sided,
because the stability-orientation of EMU can be seen as imposing significant restrictions on
politics. The orientation towards stability limits the possible consideration of other goals
within the EMU framework, whereas the no-bailout clause of Article 125 TFEU prohibits the
Union and the Member States from taking over commitments of other Member States. The
subjection of Member States’ economic policies to budgetary norms restricts the room for
democratic politics. During the crisis, Germany feared that any assistance to debtor states
would not pass constitutional review in Karlsruhe, unless such assistance could be shown to
be a last resort and given under strict conditions. The threat of review by the GFCC helped to
ensure that this vision was laid down in Article 136 (3) TFEU. In this way, the GFCC appears
to have contributed primarily to upholding a particular contested economic ideology of
austerity.

For these reasons, the democratic legitimacy of \textit{ultra vires} review of EU law is doubtful.
Again, a stronger case for \textit{ultra vires} review exists where it is directed at the expansive
interpretations by the CJEU, which are difficult to correct politically. The recent \textit{Ajos}-case by
the Danish Supreme Court is an example of how national courts may take issue with the
CJEU’s case law. Yet a problem in this respect is still that the Danish Court did not face the
democratic concern head on. Rather than criticizing the CJEU’s expansive interpretation of
the principle prohibiting discrimination on grounds of age for democratic reasons, the Court
addressed the issue as one about the constitutional basis for EU law in Denmark. By
determining the Danish Act of Accession as the legal basis for the authority of EU law in
Denmark, the Court moved far beyond the problem of the CJEU. Its judgment did not just
pose limits to the power of the CJEU, but to the legal authority of the EU as a whole.
3.2 Changing Interpretations and Institutions
What elements should instead feature in an alternative approach for the national constitutional courts? And how do the insights offered in this book help inform institutional design? One solution is that courts adopt a type of review that is more sensitive to legitimate political disagreement. In this vein, rather than seeing constitutional identity as an absolute bar against European integration, national constitutional courts could open up their judgments to arguments that have been brought forward in prior political debates. Instead of trying to determine constitutional identity autonomously, these courts could draw on the different arguments brought forward in political debate and consider whether political institutions reasonably considered the constitutional concerns. In this sense, more can be learned from theoretical justifications of proportionality review, where it has been argued that the standard of review should be whether the justification of collective norms turned on public reasons.9
The case studies already provided some insights into how such a more deferential standard might work. In the case on the Neuner-gremium, for example, the GFCC accepted political arguments for restricting the powers of the Bundestag’s plenary in individual bailouts if there was a legitimate need for confidentiality. At the same time, however, the Court struck down the legislation, because the reasons to support confidentiality could not justify the full range of decisions for which secrecy was allowed. The need to take a number of public preparatory measures, meant that there was no convincing argument to keep subsequent decisions secret.

In a similar vein, one could reimagine how the GFCC could have reviewed the Maastricht Treaty in manner more open to arguments offered in political debate. Rather than constructing the concept of democracy from an autonomous constitutional interpretation, the Court could have reflected on how the Treaty was justified in the prior political process, how the political institutions had considered the democratic shortcomings of the Treaty and why nonetheless they still accepted it. The Court could then have noted the connection between German reunification and European integration, and could have considered the importance of European integration. At the same time it could have reaffirmed the democratic concerns already voiced within political debate.

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A second option for the courts is to direct their review at correcting democratic legitimacy problems of the EU’s decision-making processes that are less subject to reasonable disagreement. As the case studies indicated, a promising way for national constitutional courts to strengthen the EU’s democratic legitimacy is to enhance the information and participation rights of national parliaments in EU affairs, as the GFCC has done in several judgments. Such review appears to raise less problems from a democratic point of view, because it does not foreclose legitimate political disagreement about the best way to democratise the EU. At the same time, where national constitutional courts take into account possible legitimate reasons for restricting parliamentary oversight, this review seems to raise few problems from the perspective of democratic legitimacy. Thus, where national constitutional courts review European law, the strengthening of the national parliaments oversight role over the national executive offers a way to strengthen the democratic legitimacy of the EU.

Institutional changes may support these desired changes in interpretive practice and may induce political actors to more closely consider constitutional questions. Weakening judicial review institutionally could engender a more balanced relationship between courts and political institutions, allowing a more dialogic process between these institutions. Possible avenues to achieve this result are to provide for political overrides of constitutional court judgments or by easing formal requirements for constitutional amendment. In this respect, European constitutional scholarship could still learn more from existing comparative constitutional scholarship on different forms of judicial review. This way of thinking may be fruitful in addition for rethinking the institutional position of the CJEU. Thus although, ultra vires review could be seen as a legitimate response to the role of the CJEU, it also raises concerns for the uniformity of EU law and legal certainty. In this context, I submit that it is more productive to consider political solutions to the democratic concerns posed by the CJEU’s position. One solution is to create a political override for the EU’s political institutions at the EU level, as has been proposed by Scharpf. A more extensive option

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would be to de-constitutionalize the EU treaties as proposed by Grimm.12 These options are to be further researched.

In a similar vein, instead of relying on *ultra vires* review by national constitutional courts to protect the prerogatives of national parliaments, it seems more sensible to invest in strengthening political safeguards that prevent unwanted expansions of the EU’s powers. This could be achieved by ensuring better parliamentary oversight of the executive by national parliaments. An additional option is to strengthen the existing Early Warning Mechanism and further consider additional ways of direct involvement of national parliaments in European decision-making.

Should Member States with limited or no institutions for judicial review of European law set up such institutions? This study suggests that the reasons for doing so are weak. The German example shows that allowing such review comes with several risks. Setting up a constitutional court to let it review European law or extending an existing Court’s jurisdiction to do so, risks that such a court will end up interpreting constitutional identity in a way that is at odds with the ideas of political majorities. For such Member States it seems more appropriate to invest in strengthened constitutional scrutiny of European law within the political institutions. For example, the Dutch parliament could set up a parliamentary constitutional affairs committee that also scrutinizes European proposals on constitutional concerns. In this respect, further research into political systems with such a model for constitutional review would be insightful.

A further question, is whether Member States without or with limited institutions for judicial review set up such institutions to strengthen parliamentary oversight. This idea seems somewhat far-fetched, because national parliaments that would want to strengthen parliamentary oversight could supposedly do so directly without setting up a court to do it for them. In addition, allowing courts to engage in judicial review does not offer a guarantee that courts will restrict their role in this manner. It is unclear whether such review is necessary to improve the oversight position of national parliaments and the best way to achieve this result. The Finnish example suggests that a national parliament could ensure stricter oversight by

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tasking a specific constitutional committee to help conduct constitutional review. Again this issue should be subject to further research.

3.3 Further Research
The full implications of this study for constitutional interpretation and institutional design should be worked out in further research. In addition, further research should enrich the case studies of this book, as a number of aspects to the case studies are not fully generalizable to other cases. One aspect is that the constitutional court judgments in other Member States may not be given the same authority as the GFCC’s judgments are given within German political debate. In other Member States, political criticism on constitutional court judgments may be more common, which could mean that such judgments do contribute to an improved democratic debate on European integration rather than constraining it. This issue requires further study. Probably, the GFCC does enjoy an exceptionally authoritative status in Germany, as Germany is a country in which constitutional interpretation is largely left to legal experts. It could be that legal cultures in which the role of constitutional courts is perceived as more political, allow for more contestation of such court judgments while inducing constitutional courts to adopt more deferential standards of review. That said, concerns about the judicialisation of politics are not restricted to Germany, but have been raised in a range of different legal systems. A further question that should be explored is how the political power of a Member State translates into the possible effects its national constitutional court judgments may have on European decision-making. In this respect, the GFCC is probably unique, given the powerful position of Germany on EU decision-making as a whole. For other Member States’ constitutional courts the effects of their judgment on EU decision-making are likely to be more limited.

Secondly, the case studies do not exhaust the different institutional constellations in which national constitutional courts’ review of European law takes place. It could be that in other institutional constellations the impact of the constitutional courts’ review is different or that constitutional issues were disregarded in the prior political process. In such constellations, the

review by national constitutional courts could provide a way to ensure that constitutional questions are still considered and lead to a more positive evaluation of the courts’ role.

Thirdly, the quality of political debate may diverge in different Member States. Germany and the Netherlands are two Member States in which the discussed European instruments were commonly elaborately discussed by the respective national parliaments. Yet both Member States are mature democracies and the findings from the case studies may not hold for political debate in other Member States. In other Member States it could be the case that constitutional courts, despite the shortcomings of their judgments, do compensate for a lack of attention to constitutional issues in political debate and thus contribute to a better understanding of how constitutional ideals should be realised in the context of European integration. These issues require further research.

4. In Defence of Politics: Judging European Democracy and Its Contradictions
Since the review of the Maastricht Treaty by the GFCC, the review of European law by national constitutional courts has often been discussed in a positive light. Discussions of constitutional pluralism, judicial dialogue and constitutional identity convey the message that the national constitutional courts can help overcome the supposed excessive hierarchy of the EU legal order. As I have argued in this book, these ideas lack a clear perspective on the role of political institutions and the troubled democratic legitimacy of judicial review. Taking into account the role of these institutions offers a more sobering perspective on the role of national constitutional courts: rather than introducing much desired contestation in the EU, the constitutional courts’ review risks stifling debate over the EU’s future. The EU has too much judicial law-making and is in dire need of more political decision-making that allows for conflict and disagreement. Trying to remedy that shortcoming by allowing national constitutional courts to review European law was bound to be a difficult enterprise from the beginning. What the EU requires is more politics, not more courts.

Constitutional judges that judge European democracy must ultimately take into account a fundamental aspect of democratic decision-making, namely its plurality of arguments and viewpoints, as well as its openness to change. It requires courts to accept that they cannot be the ultimate arbiters of what European democracy should look like, lest their position will end up in a democratic contradiction. Constitutional pluralism, despite its name, has failed to heed this insight. By ignoring the role of political institutions and the way in which national
constitutional courts’ case law affects their role, constitutional pluralism seems to have never been pluralist enough. The manner in which democracy in the EU should be realised is a question itself that can only be answered in an on-going democratic debate. It is here that the German Constitutional Court has ultimately failed to see the limitations of its own position.
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ENGLISH SUMMARY

Judging European Democracy - National Constitutional Review of European Law and its Democratic Legitimacy

Chapter I - Introduction

In a large and growing body of case law, constitutional courts from the EU Member States have reviewed EU treaties and related legal instruments, as well as secondary EU law and decisions by EU institutions, on their compatibility with national constitutional law. These EU-related judgments concern fundamental questions of the EU’s constitutional order such as the EU’s democratic legitimacy, the protection of persons’ fundamental rights and freedoms, the division of competences between the EU and its Member States, as well as the place of national sovereignty within the EU. Through these judgments, national constitutional courts influence the EU’s constitutional foundations, and by imposing constitutional limits on further integration, they shape the EU’s future development. Yet are constitutional courts the institutions that should decide such issues of major constitutional importance for the EU? Or is it more democratic to leave these matters to political institutions that represent Europe’s citizens and that are supposedly politically accountable to them?

In light of the contested democratic legitimacy of constitutional courts, this book’s central question is how the democratic legitimacy of the national constitutional courts’ review of European law should be assessed. Although democratic concerns about the national constitutional courts’ review of European law have been raised occasionally, they have not yet been systemically explored. Nor has it been assessed how their judgments impact on political decision-making within the EU context. In the current literature, the role of constitutional courts is often evaluated in a positive light. The national constitutional courts’ case law would help to ensure respect for the Member States’ national constitutional identities, function as a check on the EU’s powers, open up a space for contestation and dialogue, or serve as a justified response to pressing concerns about the democratic quality of the EU’s decision-making process.

This book takes a different approach. Instead of asserting that national constitutional identities should be respected, it also addresses who should determine what respect for national constitutional identity entails. Instead of valuing dialogues about the EU’s constitutional foundations, it also asks who should do the talking. And in light of democratic
concerns about the role of constitutional courts, it discusses whether one can really expect these courts to facilitate democratic deliberation or strengthen the democratic quality of the EU’s decision-making process, without constraining political discussion over the most desirable institutional architecture for the EU and its further development.

In this manner the book aims to move beyond the existing scholarship in three ways. Firstly, it brings democratic concerns about the role of constitutional courts upfront in evaluating their legitimate role in relation to the EU. In this respect, the book builds upon the rich scholarship on the democratic legitimacy of judicial review in the domestic context. Secondly, the book aims to further understand how democratic considerations inform the normative assessment of the constitutional courts’ role in a transnational context, where public authority is transferred to a supranational organisation that is considered to suffer from various democratic legitimacy problems. Thirdly, the book adds to a more empirically informed understanding of the constitutional courts’ role in relation to political institutions within the EU context. I argue that these empirical insights allow for a better understanding of the democratic legitimacy of the national constitutional courts’ review of European law.

The book is multidisciplinary in nature and draws on three related disciplines. It builds on political philosophy and constitutional theory to better understand the legitimacy problems that judicial review raises, it uses traditional legal sources to understand the existing law, and it employs qualitative empirical methods to analyse the decision-making by courts and political institutions. In this manner, the book aims to better understand the national constitutional courts’ legitimate role in relation to the EU, as well as to lay the groundwork for a theory of legitimate constitutional interpretation and institutional design.

Chapter 2 - Judicial Review and Democratic Legitimacy

In order to better understand the democratic legitimacy of the national constitutional courts’ review of European law, chapter 2 asks how we should assess the democratic legitimacy of judicial review of legislation in the domestic context. Liberal political philosophers commonly argue that constitutional constraints on majoritarian democracy are crucial to uphold the legitimacy of law. Democratic majority decisions that violate liberal rights cannot be considered legitimate. Judicial review in turn ensures that liberal rights are adequately protected against potentially oppressive majorities.
A crucial difficulty with this justification for judicial review is that these rights are subject to reasonable disagreement. Even if we agree on a high level of abstraction that democratic decision-making cannot legitimately violate certain rights, disagreements are still likely when we try to ascertain what this requires in concrete situations. Allowing that such reasonable disagreements about rights are settled in the democratic process appears more legitimate, because the democratic process potentially allows for careful deliberation between citizens on the basis of an equal right to participation. However, rejecting judicial review and constitutional limitations on democratic government is problematic as well. Mere majoritarian democratic decision-making cannot be considered sufficient to ground the legitimacy of legislation, because certain majority decisions appear obviously illegitimate. Majority decisions that abolish the democratic process do away with the procedure that establishes the law’s legitimacy in the first place. Certain constitutional rights, such as freedom of expression and freedom of assembly, are obviously connected to democratic ideals, as they enable vibrant public debate. Beyond that, the mere fact that a majority of citizens favours a particular law seems insufficient to establish its legitimacy. For example, where democratic majorities treat racial minorities with contempt or are completely unwilling to take their interests into account, it is hard to see why these minorities should accept the authority of such majorities as legitimate.

On the basis of a discussion of key positions in the debate over the legitimacy of judicial review, the chapter defends that judicial review is best justified if aimed at safeguarding the preconditions of democratic legitimacy, understood along the lines of Habermas’ theory of deliberative democracy. On this conception, the constitution lays down the preconditions for a democratically legitimate law-making process by setting up a system of rights to private and public autonomy. At the same time, however, the constitution must be realised and specified in on-going democratic discourses, given possible reasonable disagreement about what these preconditions are and what their protection requires. This idea avoids the problem of the liberal justification of constitutionalism and judicial review, where the democratic process is subjected to the outcomes of pre-politically justified requirements of justice. On the other hand, it also clarifies how the democratic legitimacy of legislation depends on the continued guarantee of persons’ rights to private and public autonomy.

On this understanding, a constitution in a democratic society functions both as a standard to assess the legitimacy of law, as expressing an ideal to be further realised in law, but also as a
set of norms that itself must be open to revision in light of new insights and arguments. Beyond certain minimal requirements, the best we can hope for is that there is on-going deliberation about whether a country’s laws remain compatible with the preconditions of democratic legitimacy. This entails that legislating must be accompanied by a check of whether such legislation complies with the norms and ideals laid down in the constitution. It does not necessarily mean, however, that a court should exercise this check. Whether the institution of judicial review is necessary, what type of review a constitutional court should exercise and how this institution should be given shape, depends on an assessment of the comparative abilities of legislatures and constitutional courts to address constitutional questions. Such comparative assessments must be empirically informed. The key question is whether a political system with judicial review somehow better ensures that such deliberation on constitutional questions takes place, compared to a system without such review. Answering this question requires one to consider how legislatures debate constitutional issues in the absence of judicial review, how these legislative deliberations over constitutional issues compare to the assessment of constitutional courts on similar issues, and how judicial review impacts on subsequent legislative deliberations. To advance the debate on the democratic legitimacy of judicial review, further research is required that critically engages with legislative and judicial practice.

Chapter 3 - The National Constitutional Courts’ Review of European Law and its Democratic Legitimacy

Based on the discussion in chapter 2, chapter 3 turns to the democratic legitimacy of the national constitutional courts’ review of European law. The chapter argues that the national constitutional courts’ review of European law generally raises a similar democratic concern as judicial review in the domestic context, but that it should be assessed against the specific institutional setting of the EU and take into account democratic legitimacy problems of the EU’s decision-making process.

In this regard, the chapter first considers whether national constitutional courts should use democracy as a standard of review to correct the EU’s democratic legitimacy problems. The problem with democracy as a standard of review, however, is that there is significant and reasonable disagreement about how the EU should be made more democratic. National constitutional courts that invoke democracy as a standard for review especially risk imposing themselves on the contested relationship between the EU and its Member States. Democracy
as a standard of review thus raises a democratic concern itself, unless it is aimed at addressing problems beyond reasonable political disagreement. In other cases an empirically informed comparative institutional assessment between constitutional courts and other institutions becomes crucial.

This chapter thus considers the different institutional constellations in which the constitutional courts’ review of European law takes place, as well as the specific grounds for such review. A key difference in the EU context is that several political institutions located at different governance levels can be involved in the making of European law. This changes the comparative institutional assessment relevant to assessing the democratic legitimacy of the national constitutional courts’ review. Next to that, the national courts’ review should be assessed in relation to the specific grounds for such review: it has to be asked whether a national constitutional court is better placed than political institutions to address a specific constitutional issue and how its judgment will affect subsequent decision-making by political institutions. For example, national constitutional identity is an important standard of review in the national constitutional courts’ case law and respect for such identities may be considered of key importance. Still, a key question here is whether the national constitutional courts should take on the burden of ensuring respect for such identities. The wide variety of possible interpretations of the notion seem to offer good reason for leaving it to political institutions to determine what respect for constitutional identity requires. In addition, the EU’s political decision-making process gives the Member States an important role, which allows them to raise constitutional concerns within this process.

On the basis of these considerations, the chapter argues that the democratic legitimacy of the constitutional courts’ review of European law also depends on an empirically informed comparative institutional assessment between constitutional courts and other institutions. The constitutional courts’ review could be a way to better ensure that constitutional issues are given due consideration in the making of European law or even promote deliberation on such issues. Yet, to understand whether that is the case, further empirically informed research is required. That research should take into account the institutional constellation in which review takes place, how the constitutional issues that a national court raises have played a role in the prior decision-making process, as well as how the constitutional court judgments impact on subsequent political deliberations.
Chapter 4 - Research Design

Chapter 4 and the subsequent chapters address these more empirical questions in a number of case studies related to the German Federal Constitutional Court (GFCC) and political decision-making in the Netherlands. Chapter 4 more specifically deals with issues relating to the research design of the case studies.

First of all, the chapter explains why the case studies only focus on a limited number of cases. The comparison of political and judicial processes is a complex exercise. Grasping how a political process unfolded necessitates careful study and requires one to understand its context. In light of these considerations, the cases studies focus on a selected number of cases.

The case studies focus on two major constitutional episodes in the EU’s history over the past twenty-five years and the role of the GFCC: the adoption and ratification process of the Maastricht Treaty and the EU’s response to the Euro crisis. The choice to study Germany was made, because it has the constitutional court with the most elaborate and influential case law in relation to European law. Additionally, the case studies compare German decision-making with decision-making in the Netherlands in the same instances. The aim of this comparison is to see how a national legislature takes into account constitutional concerns relating to European integration without subsequent court review.

The different decision-making processes were selected primarily because the GFCC reviewed the Maastricht Treaty as well as several of the crisis instruments. In addition, these decision-making processes mark two important moments in time regarding the GFCC’s role. The GFCC’s Maastricht-Urteil is a landmark case with key importance for the role of constitutional courts beyond Germany and within academic debate. The study of the GFCC’s role in the Euro-crisis in turn allows an appreciation of the Maastricht legacy and the GFCC’s role for the current state of European integration.

For these case studies the study compared how political institutions on both the national and European level addressed the constitutional implications of the respective instruments with the GFCC’s assessment. In addition, this study asks about the possible effects of the GFCC’s review on the treatment of constitutional issues by EU and German political institutions. The chapter proposed a relatively open criterion to compare political and judicial reasoning,
namely how the constitutional issues that featured in the national constitutional courts’ case law on the respective measures, were dealt with in prior and subsequent political deliberations. As data sources, the chapter explained the use of parliamentary documents, constitutional court judgments, policy documents and semi-structured interviews as the primary data sources. In addition, the chapter defended a combination of within case analysis, cross case comparison, process-tracing and counterfactual analysis to study the data sources and determine the effect of the GFCC’s judgments on subsequent political decision-making.

Chapter 5 - The Rise of Judicial Euroscepticism: Maastricht

Chapter 5 then turns to the GFCC’s Maastricht judgment. In line with the aims of the book, the chapter considers how the key constitutional issues raised in the Maastricht-Urteil were considered in the prior political deliberations by the Treaty drafters, the German Bundestag, as well as the Dutch Tweede Kamer. In addition, it considers how the judgment impacted on political debate in its immediate aftermath.

A prominent justification for the GFCC’s Maastricht-Urteil is that despite the judgment’s shortcomings, the GFCC raised key constitutional issues that the political institutions had failed to fully consider. In this vein, it has been argued that the GFCC identified democratic deficiencies of the EU at a time when few politicians dared to speak about these problems. The chapter shows how this justification for the Court’s intervention cannot be maintained: the constitutional implications of the Maastricht Treaty and its democratic shortcomings in particular, were amply discussed in the Treaty negotiations and the ratification debates. In the German Bundestag there was widespread agreement that the Treaty had major democratic shortcomings that needed to be remedied in the future. Regarding the deliberations on the monetary union, the story is slightly different. In this respect, it seems rather that both the GFCC as well as the various political institutions failed to fully address EMU’s implications.

A second justification for the Maastricht-judgment is that political debates on the Treaty would not have had the constitutional quality if the GFCC’s prior EU related case law had not raised key constitutional questions and if there was no threat of subsequent review. This justification is difficult to uphold as well. The wish to strengthen the EU’s democratic legitimacy was a long-held one of German political elites. Furthermore, there are few references to this prior case law in German parliamentary debate, and in the Netherlands
constitutional questions were considered in a similar way, despite the absence of a constitutional court with a body of case law on the EU.

A third and more nuanced justification is that the GFCC’s Maastricht judgment catalysed further debate by raising issues not previously considered. In this sense, some have argued that the proceedings before the Court provided a substitute for a public debate in Germany on the Treaty. The chapter considers that this view holds more merit. In the pro-European political climate of German politics, it could be difficult to voice arguments critical of European integration. Opposition to European integration as such missed from political debate. The Court eventually provided such a more critical viewpoint and allowed critics to use the Court as an avenue to voice their concerns. The paradox, however, is that the GFCC’s Euro-critical stance apparently meant to ‘politicise’ a debate that was too apolitical, a role that does not seem to sit very well with the court’s position as guardian of a constitutional framework that is supposed to bind democratic politics. At Maastricht, the Court arguably still played this role successfully, as its judgment was sufficiently open to various possible interpretations and did lead to debate about new issues outside parliament. Nonetheless, over the long term this role appears to have become increasingly problematic. If the Maastricht Treaty failed to put in place a political and democratic structure that would make EMU viable as a democratic project, the GFCC put into question the idea that such a union could ever be achieved. The Court thus turned the failure of Maastricht into a potentially larger constitutional problem. Around twenty years later the Court’s position has become a pressing concern in the context of the Euro crisis.

Chapter 6 – The Euro Crisis and the Judicialisation of Euro-Politics

Chapter 6 discusses the role of the GFCC in the Euro crisis. In 2009, the GFCC returned to the core tenets of its Maastricht judgment with its ruling on the Lisbon Treaty. The Court’s ruling approved the Treaty, but this time the constraints it imposed on European integration appeared much more restrictive than at Maastricht: Germany could not accede to a European federal state under the Basic Law and the Court was highly critical of the EU’s democratic credentials. In addition, the Court determined that extensive competence transfers were not permitted in several areas, including decisions on fundamental fiscal decisions. Just a few months later, however, it materialised that the euro area could face a significant crisis when problems with Greece’s sovereign debts became clear. In response, the euro area Member States and the EU institutions adopted a range of measures that have changed the face of the
monetary union: mechanisms of financial assistance to aid euro area Member States in financial difficulties, more extensive supervision on national budgets and strengthened economic governance, as well as an EU Banking Union. In this manner the crisis has led to an important increase in the Union’s powers, which touches upon the budgetary powers of national parliaments.

These changes have raised various constitutional concerns in the EU Member States and a great deal of litigation before the GFCC. In multiple judgments related to the crisis, the German Court has maintained that the Bundestag must retain control over essential budgetary decisions. This case law, however, largely ignores the significant interdependencies that already exist between the EMU Member States. Several commentators contend that by acceding to EMU, its Member States have greatly restricted their decision-making capacity in economic policy and can be faced with adverse economic developments that they no longer control. On this line of reasoning budgetary powers should be transferred to the EU in order to make the monetary union viable and ensure political control over economic policy.

Within this context, the chapter describes how the GFCC’s crisis-rulings constrain political debate over various alternatives for EMU’s future. On the one hand, the GFCC has continued to provide an additional avenue for Euro-critics to voice their dissent, while such voices are not always fully represented within the Bundestag. Still, it is highly doubtful that a constitutional court should provide an avenue for opposition to European integration. The GFCC’s case law affects different political positions unevenly. Political positions that see public debt as the main problem in the monetary union are more easily compatible with the Court’s case law than positions that perceive the role of financial markets and lack of a shared European economic policy as key problems. The Court’s case law reinforces and reifies a politics in which budgetary discipline and retaining German budgetary sovereignty is of overriding importance. Moreover, the Court makes the achievement of political alternatives more burdensome and, in the name of democracy, constitutionalises a type of politics that several commentators see as the antithesis of democratic government. The idea that the GFCC’s interventions have simply enriched German political debate on the EU’s future is difficult to maintain, because the Court’s judgments are rarely contested in German politics. Instead, the Court is accorded the final authority in interpreting the German Constitution. It thus limits the room for political contestation over different possible interpretations of the constitution and over how constitutional ideals should be realised within
the EU. Finally, the chapter compares the German context to political decision-making on the crisis in the Netherlands. The discussion shows how sovereignty concerns are a key part of Dutch political debate and rejects the idea that the Netherlands should introduce constitutional review to ensure better consideration of constitutional issues in political debates on European integration.

Chapter 7 - Court-ordered Parliamentary Oversight

Chapter 7 discusses a more positive side to the GFCC’s crisis case law, which is that the Court has contributed to a progressive strengthening of the Bundestag’s participation and information rights, both in EU affairs generally, as well as regarding decisions on financial assistance more specifically. By doing so the Court has created space for democratic politics rather than constrained it and has contributed to democratic control of the executive. There is also considerable evidence that this strengthening of the Bundestag’s position would not have occurred without the GFCC’s interventions. Nonetheless, a comparison with the Netherlands shows that some of the dynamics between the national parliament and its government were specific to the German context. Although the GFCC’s interventions ultimately helped bring about a much more elaborate system of parliamentary rights in Germany, the Dutch parliament took several measures to protect its own position. Evidence from other countries also indicates that other parliaments have been able to protect their own prerogatives without being pushed to do so by a constitutional court. On the basis of these insights, the chapter submits that constitutional review geared towards strengthening the position of national parliaments vis-à-vis their own governments in EU affairs can help to counter democratic legitimacy problems in a fairly uncontroversial manner. Especially where national constitutional courts take into account countervailing concerns, the courts’ review seems positive. In Member States that have already introduced judicial review, constitutional courts can probably legitimately require enhanced parliamentary oversight, especially if these courts take into account countervailing considerations that militate against such oversight in some cases. For Member States without judicial review, the German example does not offer a clear reason to introduce it. As the previous chapter indicated, such review can have several other negative repercussions, and once a court is given the power to review legislation, it is not clear that it can be controlled.

Chapter 8 - Conclusion

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Chapter 8 concludes the book and discusses the main findings in light of the overall research question and objectives of the study. Firstly, it reiterates why a critical engagement with judicial and legislative practice is pivotal in assessing the democratic legitimacy of the constitutional courts’ role, both in the domestic context and the EU context. The almost exclusive focus of current scholarship on courts to the neglect of political institutions is an important deficiency. It can only lead to incomplete assessments of the legitimacy of these courts’ role.

Secondly, it argues that two key conclusions follow from the case studies. On the one hand, a key problem is that the GFCC’s rulings on European integration ultimately raise several democratic problems. That is essentially the case because the Court has adopted a contested understanding of democracy according to which democracy is tied to the nation-state, which limits the ability of political actors to put forward different visions on the future of European integration. Portraying constitutional courts as ‘forums of principle’ or as necessarily better placed to deliberate on constitutional matters related to European integration, is inaccurate. The case studies showed how both in Germany as well as in the Netherlands, constitutional questions often formed a considerable part of political debate on the EU. These political debates showed more openness to a variety of possible understandings of constitutional principles. Moreover, the idea that the GFCC’s judgments have contributed to an improvement of democratic debate on constitutional matters, has limited empirical support. On the other hand, the case studies also considered how the GFCC strengthened the position of the German parliament in EU affairs and thus countered the dominance of the executive in this area of decision-making. Such review, which is more limited in nature and focuses more on the relationship between the executive and national parliaments, promotes democratic politics instead of constraining it.

Thirdly, the concluding chapter discusses what these case studies suggest for the legitimate role of national constitutional courts in the EU more generally and how these insights may contribute to laying the groundwork for a theory of legitimate constitutional interpretation and to inform ideas for institutional design. In this respect, the study suggests that the democratic legitimacy of constitutional identity review and ultra vires is doubtful. Instead, it is argued that courts should adopt a type of review that is more sensitive to legitimate political disagreement. In addition, it is argued that the courts should direct their review at correcting democratic legitimacy problems of the EU’s decision-making processes that are
less subject to reasonable disagreement. A promising way for national constitutional courts to strengthen the EU's democratic legitimacy in this manner is to enhance the information and participation rights of national parliaments in EU affairs. In addition, the chapter suggests that weakening judicial review institutionally could engender a more balanced relation between courts and political institutions and allow a more dialogic process between these institutions. The study suggests also that the reasons for Member States with limited or no institutions for judicial review of European law to set up such institutions are weak. For such Member States it seems more appropriate to invest in strengthened constitutional scrutiny of European law within the political institutions. The full implications of this study for constitutional interpretation and institutional design, however, should be worked out in further research. In addition, further research should enrich the case studies of this book, as a number of aspects to the case studies are not fully generalizable to other cases.
NEDERLANDSE SAMENVATTING

Rechtspreken over Europese democratie - Nationale constitutionele toetsing van Europees recht en haar democratische legitimatie

Dit boek gaat over constitutionele toetsing van Europees recht door nationale constitutionele hoven. In verscheidene Europese lidstaten hebben gerechtshoven de bevoegdheid om wetten te toetsen op hun grondwettigheid. In sommige van die lidstaten hebben gerechtshoven die bevoegdheid ook aangewend om de grondwettigheid te toetsen van Europese verdragen waarin competenties worden overgedragen aan de Europese Unie (EU). Evenzeer zijn er nationale constitutionele hoven die op basis van de nationale grondwet eisen stellen aan hoe de EU haar competenties uit mag oefenen. In Nederland is een dergelijke rechterlijke toetsing uitgesloten: artikel 120 van de Grondwet verbiedt de rechter om de grondwettigheid van wetten en verdragen te beoordelen. Dit verbod vindt zijn rechtvaardiging in de gedachte dat de democratisch gelegitimeerde wetgever zelf zou moeten beslissen over de grondwettigheid van wetten en verdragen.

Uitspraken van nationale constitutionele hoven waarin het Europees recht getoetst wordt aan de nationale grondwet raken vaak aan fundamentele constitutionele vraagstukken over de EU. Zo toetste het Duitse Federale Constitutionele Hof tijdens de eurocrisis meermaals of Duitse deelname aan financiële noodfondsen in overeenstemming was met de Duitse grondwet. Dit had potentieel verstrekkende consequenties voor de toekomst van de EU en de eurozone: indien het Duitse Hof de deelname aan de noodfondsen ongrondwettelijk had verklaard, dan had het de pogingen van de EU om de eurozone te stabiliseren een grote tegenslag toegebracht. En hoewel het Duitse Hof de noodfondsen steeds grondwettig achtte, formuleerde het Hof ook een aantal constitutionele obstakels voor verdere hervorming van de eurozone die volgens velen juist hard nodig is.

De oordelen van nationale constitutionele rechters over Europees recht roepen de vraag op of constitutionele gerechtshoven de juiste instituties zijn om over kwesties van zulk groot belang voor de EU te beslissen. Om het wat kort door de bocht te formuleren: is het niet een probleem als een klein aantal nationale constitutionele rechters uitspraken kunnen doen met zeer ingrijpende gevolgen voor de EU als geheel? Is het niet democratischer om dergelijke
beslissingen over te laten aan politieke, niet-rechterlijke instituties? Politieke instituties vertegenwoordigen immers Europese burgers en kunnen door diezelfde burgers verantwoordelijk gehouden worden voor hun acties. Ten aanzien van constitutionele rechters hebben zij die mogelijkheid niet.

Hoewel democratische zorgen over constitutionele toetsing van Europees recht in de rechtswetenschappelijke literatuur sporadisch al eerder naar voren zijn gebracht, zijn ze nog niet systematisch onderzocht. Daarnaast is er weinig aandacht voor de mogelijke impact van deze constitutionele toetsing op politieke besluitvorming in de EU-context. In de bestaande literatuur wordt de rol van constitutionele hoven in de EU vaak juist positief gewaardeerd. Zo zou het leiden tot meer respect voor de constitutionele identiteit van de lidstaten of tot extra debat en dialoog over de constitutionele beginselen en waarden in de EU. Andere ideeën zijn dat de toetsing zou functioneren als een extra controle op de macht van de EU of kunnen dienen als een gerechtvaardigd antwoord op het democratische tekort van het besluitvormingsproces in de EU.

Dit boek kiest voor een andere kijk op deze problematiek en stelt de verhouding tussen politieke en rechterlijke instituties centraal. Ik stel de vraag centraal hoe de democratische legitimiteit van nationale constitutionele toetsing van Europees recht moet worden geëvalueerd. In het beantwoorden van deze vraag put het boek uit drie verwante disciplines: het bouwt voort op inzichten uit de politieke filosofie en constitutionele theorie om beter te begrijpen welke legitimiteitsproblemen constitutionele toetsing oplevert; het analyseert rechtsbronnen en put uit de juridische literatuur om het geldende recht te begrijpen en het maakt gebruik van kwalitatieve empirische methoden om de besluitvorming door constitutionele hoven en politieke instellingen te analyseren. De beantwoording van de centrale vraag bestaat uit de volgende stappen.

In hoofdstuk 2 wordt eerst gekeken naar de nationale context en de vraag hoe de democratische legitimiteit van constitutionele toetsing in deze context beoordeeld moet worden. Deze analyse biedt de basis om de rol van constitutionele hoven ten aanzien van de EU te kunnen beoordelen.

Een belangrijke rechtvaardiging voor constitutionele toetsing in de nationale context is te baseren op het werk van bepaalde liberale politieke filosofen als Ronald Dworkin en John
Rawls. Uit hun werk is de gedachte af te leiden dat constitutionele beperkingen op democratische meerderheidsbeslissingen cruciaal zijn om de legitimiteit van wetgeving te waarborgen. Beslissingen van democratische meerheden die fundamentele rechten schenden, kunnen niet als legitiem worden beschouwd. Rechterlijke toetsing zorgt er op haar beurt voor dat fundamentele rechten adequaat worden beschermd tegen potentieel tirannieke meerheden.

Een probleem met deze rechtvaardiging voor constitutionele toetsing is dat er redelijke meningsverschillen kunnen bestaan over de vraag welke constitutionele beperkingen er op democratische meerderheidsbesluitvorming zouden moeten zijn. Zelfs als we het op abstract niveau eens zijn dat democratische besluitvorming aan bepaalde beperkingen moet worden onderworpen, dan nog bestaat er ruimte voor redelijke meningsverschillen over wat dit in concrete situaties vereist. Verscheidene auteurs beargumenteren dat juist het democratische proces een zorgvuldige afweging tussen de gezichtspunten en belangen van alle burgers mogelijk maakt, omdat burgers op basis van een gelijk recht op participatie vertegenwoordigd zijn en wetten pas worden aangenomen na uitgebreide discussie. Deze redenering vormt een belangrijke grond om constitutionele toetsing op democratische gronden te verwerpen. Constitutionele toetsing zou er namelijk toe leiden dat het beslechten van redelijke meningsverschillen over constitutionele normen wordt overgelaten aan rechters in plaats van aan de wetgever zelf.

Tegelijkertijd is ook de volledige afwijzing van constitutionele toetsing problematisch. Enkel democratische meerderheidsbesluitvorming kan niet voldoende zijn om de legitimiteit van de wetgeving te rechtvaardigen. Bepaalde meerderheidsbesluiten kunnen namelijk niet als legitiem worden geaccepteerd: meerderheidsbeslissingen die het democratische proces afschaffen, schaffen de procedure af waarop de legitimiteit van de wet in de eerste plaats berust. Bepaalde grondwettelijke rechten, zoals de vrijheid van meningsuiting en de vrijheid van vergadering, zijn bovendien sterk verbonden met democratische idealen omdat zij een levendig publiek debat mogelijk maken. Wanneer democratische meerheden daarnaast etnische minderheden met minachting behandelen of helemaal niet bereid zijn rekening te houden met hun belangen en grondrechten, is het moeilijk in te zien waarom deze minderheden het gezag van zulke meerheden als legitiem zouden moeten aanvaarden.
Op basis van een bespreking van de sleutelposities in het debat over de legitimiteit van constitutionele toetsing, wordt in hoofdstuk 2 verdedigd dat het waarborgen van de randvoorwaarden voor democratische legitimiteit de beste rechtvaardiging voor constitutionele toetsing is. Het hoofdstuk sluit in dat opzicht aan bij theorie van deliberatieve democratie van Jürgen Habermas. In deze opvatting stelt de grondwet de voorwaarden voor een democratisch legitiem wetgevingsproces middels een systeem van rechten op private en publieke autonomie. Tegelijkertijd moet de grondwet echter worden gerealiseerd en gespecificeerd in democratische besluitvorming, omdat er redelijke meningsverschillen kunnen bestaan over wat deze randvoorwaarden zijn en wat hun bescherming vereist. Een grondwet functioneert in een democratische samenleving daarom zowel als standaard om de legitimiteit van het recht te beoordelen, als ideaal dat verder tot uitdrukking moet worden gebracht in wetgeving, maar ook als normenkader dat zelf open moet staan voor herziening in het licht van nieuwe inzichten en argumenten.

Afgezien van bepaalde minimale vereisten, is het beste waarop we kunnen hopen dat er voortdurend democratische discussie wordt gevoerd over de vraag of wetten verenigbaar zijn met de voorwaarden voor democratische legitimiteit. Het wetgevend proces zal daarom een toets moeten inhouden waarin wordt bekeken of wetgeving voldoet aan de normen en idealen die in de grondwet zijn vastgelegd. Dit betekent echter niet noodzakelijk dat een constitutioneel hof deze controle moet uitvoeren. Of het instellen van constitutionele toetsing nodig is, welk soort toetsing een constitutioneel hof moet uitvoeren en hoe een constitutioneel hof gestalte moet krijgen, hangt af van een beoordeling waarin de capaciteiten van wetgevers en constitutionele hoven om constitutionele vraagstukken te behandelen met elkaar worden vergeleken. Dergelijke beoordelingen moeten empirisch worden onderbouwd. De hamvraag is of een politiek systeem met constitutionele toetsing er op de een of andere manier beter voor zorgt dat een afweging over constitutionele kwesties plaatsvindt dan een systeem zonder dergelijke toetsing. Om deze vraag te beantwoorden, moet worden nagegaan hoe wetgevers constitutionele vraagstukken meenemen in hun beraadslagingen in afwezigheid van constitutionele toetsing. Daarnaast moet worden nagegaan hoe wetgevingsbemiddelingen over constitutionele kwesties zich verhouden tot de beoordeling van grondwettelijke hoven over soortgelijke kwesties, en hoe constitutionele toetsing van invloed is op latere wetgevingsbemiddelingen. Om het debat over de democratische legitimiteit van constitutionele toetsing te bevorderen, is verder onderzoek nodig dat kritisch kijkt naar de wetgevende en rechterlijke praktijk.
Hoofdstuk 3 behandelt vervolgens de democratische legitimiteit van constitutionele toetsing van Europees recht door nationale constitutionele hoven en bouwt voort op de discussie die gevoerd werd in hoofdstuk 2. In hoofdstuk 3 betoog ik dat de toetsing door nationale constitutionele hoven van Europees recht over het algemeen een soortgelijk democratisch probleem oplevert als constitutionele toetsing in de nationale context. De toetsing in de Europese context moet echter worden beoordeeld op basis van de specifieke institutionele eigenschappen van de EU. Daarbij moet rekening worden gehouden met democratische legitimiteitsproblemen in het besluitvormingsproces van de EU.

In dit hoofdstuk wordt daarom ingegaan op de verschillende institutionele constellaties waarin de toetsing van Europees recht door de constitutionele hoven plaatsvindt, evenals de specifieke gronden voor zulke toetsing. Een belangrijk verschil in de EU-context is dat verschillende politieke instellingen op verschillende niveaus betrokken kunnen worden bij het opstellen van Europese wetgeving en verdragen. Dit verandert de institutionele vergelijking die nodig is voor de beoordeling van de democratische legitimiteit van constitutionele toetsing door de nationale grondwettelijke hoven. Daarnaast moet de toetsing door de nationale hoven worden beoordeeld in het licht van de specifieke gronden voor toetsing: er moet worden bekeken of een nationaal constitutioneel hof beter in staat is dan politieke instellingen om een specifiek constitutioneel probleem te beoordelen. Ook moet worden onderzocht welke gevolgen een rechterlijk oordeel vervolgens heeft voor de daaropvolgende besluitvorming door politieke instellingen. Nationale constitutionele identiteit is bijvoorbeeld een belangrijke toetsingsgrond in de jurisprudentie van nationale constitutionele hoven. Het kan ook zo zijn dat respect voor deze identiteiten van cruciaal belang is, omdat de constitutionele identiteit van een lidstaat grondwettelijke kernwaarden omvat. Toch is een belangrijke vraag hier of nationale constitutionele hoven ervoor moeten zorgen dat deze constitutionele identiteiten gerespecteerd worden. De grote verscheidenheid aan mogelijke interpretaties van wat wel en niet uitmaakt van de nationale constitutionele identiteit lijkt een goede reden om het aan politieke instellingen over te laten wat respect voor de nationale constitutionele identiteit vereist. Bovendien geeft het politieke besluitvormingsproces van de EU de lidstaten een belangrijke rol, waardoor zij constitutionele overwegingen in dit proces kunnen aankaarten.
Op basis van deze overwegingen wordt in dit hoofdstuk gesteld dat de democratische legitimiteit van constitutionele toetsing van Europees recht door nationale hoven ook afhangt van een empirisch onderbouwde institutionele vergelijking tussen constitutionele hoven en andere instituties. De toetsing door de constitutionele hoven zou een manier kunnen zijn om ervoor te zorgen dat grondwettelijke kwesties voldoende aandacht krijgen bij het maken van Europese wetgeving en verdragen. Mogelijk zou die toetsing zelfs democratische discussie over dergelijke kwesties kunnen bevorderen. Om dit te beoordelen is verder empirisch onderbouwd onderzoek vereist. Dat onderzoek moet rekening houden met de institutionele constellatie waarin toetsing plaatsvindt, hoe de grondwettelijke kwesties die door een nationaal hof worden opgeworpen een rol hebben gespeeld in het voorafgaande besluitvormingsproces, en ook hoe de uitspraken van het constitutionele hof invloed hebben op latere politieke beraadslagingen.

**Hoofdstuk 4** en de daaropvolgende hoofdstukken behandelen deze meer empirische vragen in een aantal *casestudies* met betrekking tot het Duitse Federale Constitutionele Hof en politieke besluitvorming in Nederland. De *casestudies* richten zich op een beperkt aantal gevallen. De vergelijking van politieke en rechterlijke oordelen is een complexe en omvangrijke taak. Een goed begrip van een politiek proces vereist zorgvuldige studie en goed besef van de context. In het licht van deze overwegingen concentreren de *casestudies* zich op het besluitvormingsproces rond het Verdrag van Maastricht en het antwoord van de EU op de eurocrisis. In beide gevallen sprak het Duitse Constitutionele Hof zich over Europese maatregelen uit, in het geval van de crisis zelfs meerdere malen. Bovendien markeren deze besluitvormingsprocessen twee belangrijke momenten in de tijd wat betreft de rol van het Duitse Constitutionele Hof. Het *Maastricht-Urteil* van het Duitse Constitutionele Hof is een zaak die van cruciaal belang is binnen het academische debat en heeft een belangrijke invloed gehad op de jurisprudentie van andere nationale constitutionele hoven. De studie van de eurocrisis maakt vervolgens een beoordeling mogelijk van de erfenis van het *Maastricht-Urteil* en de rol van het Duitse Constitutionele Hof voor de huidige stand van de Europese integratie.

De *casestudies* vergelijken de constitutionele beoordeling van de verschillende Europese maatregelen door Europese en Duitse politieke instellingen met die van het Duitse Constitutionele Hof. Daarnaast bekijken de *casestudies* de mogelijke effecten van de jurisprudentie van het Duitse Constitutionele Hof op politieke besluitvorming in Duitsland en
op Europees niveau. De casestudies vergelijken de Duitse besluitvorming bovendien met de besluitvorming in Nederland in dezelfde gevallen. Het doel van deze vergelijking is om na te gaan hoe een nationale wetgever rekening kan houden met grondwettelijke vraagstukken in de context van Europese integratie zonder de mogelijkheid van constitutionele toetsing. Primaire bronnen voor de studie waren parlementaire documenten, uitspraken van het Duits Constitutioneel Hof, Europese beleidsdocumenten en interviews met betrokkenen.

In hoofdstuk 5 wordt het Maastricht-Urteil van het Duits Constitutioneel Hof behandeld en beoordeeld. Een belangrijke rechtvaardiging voor dit Maastricht-Urteil is dat het Duitse Constitutionele Hof, ondanks de tekortkomingen in de uitspraak, belangrijke grondwettelijke kwesties aan de orde stelde die in eerdere besluitvorming nog onvoldoende aan bod waren gekomen. Zo zou het Hof op de democratische tekortkomingen van de EU hebben gewezen in een tijd waarin weinig politici over deze problemen durfden te spreken. Het hoofdstuk laat zien hoe deze rechtvaardiging van het Maastricht-Urteil moeilijk vol te houden is: de grondwettelijke implicaties van het Verdrag van Maastricht en met name de democratische tekortkomingen daarvan werden daarvoor al uitvoerig besproken in de onderhandelingen over het Verdrag en de ratificatiedebatten daarover. In de Duitse Bondsvergadering was er brede overeenstemming dat de EU grote democratische tekortkomingen had die in de toekomst moesten worden verholpen. Het verhaal is enigszins anders met betrekking tot de beraadslagingen over de monetaire unie (EMU). In dat geval lijkt het erop dat zowel het Duitse Hof als de verschillende politieke instellingen de implicaties van de monetaire unie niet volledig overzagen of bespraken.

Een tweede rechtvaardiging voor het Maastricht-Urteil is dat de eerdere jurisprudentie van het Duits Constitutionele Hof over de EU ervoor zorgde dat in de politieke debatten over het Verdrag zoveel aandacht werd besteed aan grondwettelijke vragen over de EU. Zonder dreiging van constitutionele toetsing zou er in het politiek debat daarnaast niet zoveel aandacht zijn voor constitutionele vraagstukken. Ook deze rechtvaardiging is moeilijk vol te houden. De wens om de democratische legitimiteit van de EU te versterken bestond al langer onder Duitse politieke elites. Bovendien zijn er weinig verwijzingen naar deze eerdere jurisprudentie in het Duitse parlementaire debat. In Nederland werden constitutionele vragen bovendien op soortgelijke wijze behandeld, ondanks het ontbreken van een grondwettelijk hof met jurisprudentie over de EU.

In *hoofdstuk 6* wordt vervolgens ingegaan op de problematische rol van het Duitse Constitutionele Hof tijdens de eurocrisis. In 2009 keerde het Duitse Hof terug naar de kernbeginselen van zijn *Maastricht-Urteil* met een controversiële uitspraak over het Verdrag van Lissabon. Het Hof keurde het Verdrag goed, maar legde ook beperkingen op aan verdere Europese integratie. Die beperkingen waren ogenschijnlijk ook nog eens restrictiever dan in het eerdere *Maastricht-Urteil*: Duitse toetreding tot een Europese federale staat werd door het Hof nu als onverenigbaar beschouwd met de Grondwet en het Hof stond zeer kritisch tegenover het, in zijn ogen, gebrekkige democratische karakter van de EU. Daarnaast bepaalde het Hof dat uitgebreide bevoegdheidsoverdracht aan Europese instellingen op verschillende gebieden niet is toegestaan, waaronder de competentie om belangrijke beslissingen te nemen over publieke uitgaven en het genereren van publieke inkomsten door belastingen.
Toen een paar maanden na de uitspraak van het Hof problemen aan het licht kwamen met de Griekse staatsschuld bleek echter dat het eurogebied een ernstige crisis zou kunnen doormaken. Als reactie hierop hebben de lidstaten van de eurozone en de EU-instellingen in relatief korte tijd een reeks maatregelen genomen die de monetaire unie ingrijpend hebben veranderd: noodfondsen voor eurozone-lidstaten in financiële moeilijkheden, uitgebreider toezicht op nationale begrotingen en versterkt economisch bestuur, evenals een bankenunie. Deze veranderingen hebben ook geleid tot verschillende grondwettelijke zorgen in de EU-lidstaten en een groot aantal geschillen voor het Duitse Hof. Een belangrijke reden daarvoor is dat de EMU-hervormingen raken aan het budgetrecht van nationale parlementen.

Tijdens de crisis heeft het Duitse Hof in meerdere uitspraken dan ook herhaald dat de Bondsdag de controle moet behouden over essentiële budgettaire beslissingen (beslissingen over publieke uitgaven en inkomsten). Een kritiek op deze jurisprudentie is dat het Hof daarmee grotendeels negeert dat er al significante onderlinge afhankelijkheden bestaan tussen de EMU-lidstaten. Verschillende commentatoren betogen dat de lidstaten hun zeggenschap over economisch beleid door toetreding tot de EMU al sterk hebben beperkt: de EMU-lidstaten kunnen te maken krijgen met ongunstige economische ontwikkelingen waarop ze nauwelijks controle kunnen uitoefenen of adequaat op kunnen reageren. Op grond van deze redenering zouden de lidstaten juist begrotingsbevoegdheden aan de EU moeten overdragen om de monetaire unie en politieke controle over het economisch beleid te waarborgen.

In het licht van deze discussie wordt in dit hoofdstuk besproken hoe de uitspraken van het Duitse Hof het politieke debat over verschillende alternatieven voor de toekomst van de EMU beperken. Aan de ene kant biedt het Hof aan euro-critici een extra mogelijkheid om hun afwijkende mening te uiten, terwijl deze posities niet altijd volledig vertegenwoordigd zijn in de Bondsdag. Aan de andere kant is het hoogst twijfelachtig dat een grondwettelijk hof deze mogelijkheid voor verzet tegen de Europese integratie zou moeten bieden. De jurisprudentie van het Duitse Hof beïnvloedt verschillende politieke posities uiteindelijk op ongelijke wijze. De politieke positie dat overheidschulden het grootste probleem zijn, is gemakkelijker te verenigen met de jurisprudentie van het Hof, dan de positie dat het gebrekkige toezicht op financiële markten en het ontbreken van een gedeeld Europees economisch beleid de kernproblemen zijn. Die laatste positie loopt immers eerder tegen constitutionele grenzen aan. De jurisprudentie van het Hof versterkt een politiek waarin
begrotingsdiscipline en behoud van de Duitse budgettaire soevereiniteit van doorslaggevend belang zijn. Het Hof maakt het bereiken van politieke alternatieven tegelijkertijd lastiger en constitutionaliseert, in naam van de democratie, een type politiek die door verschillende commentatoren juist wordt gezien als ondemocratisch.

Het idee dat de interventies van het Hof het Duitse politieke debat over de toekomst van de EU hebben verrijkt, is eveneens moeilijk te vol te houden. De uitspraken van het Hof worden in de Duitse politiek zelden ter discussie gesteld. In plaats daarvan wordt het Hof de finale autoriteit toegekend om de Duitse grondwet te interpreteren. De uitspraken van het Duitse Hof beperken op die manier de ruimte voor politiek debat.

Ten slotte wordt in het hoofdstuk de Duitse context met politieke besluitvorming over de crisis in Nederland vergeleken. Die vergelijking laat zien dat soevereiniteitsvraagstukken ook in het Nederlandse politieke debat een belangrijke rol spelen. Het hoofdstuk verwerpt daarom het idee dat Nederland constitutionele toetsing zou moeten invoeren om te zorgen voor een betere afweging van constitutionele kwesties in politieke debatten over Europese integratie.

In hoofdstuk 7 wordt een positievere kant van de jurisprudentie van het Duitse Constitutioneel Hof besproken: het Hof heeft ook bijgedragen aan een geleidelijke versterking van de zeggenschaps- en informatierechten van de Bondsdag in EU-aangelegenheden. Zowel in het algemeen, als met betrekking tot beslissingen over financiële bijstand in het bijzonder. Zodoende heeft het Hof ook ruimte gecreëerd voor democratische politiek en heeft het bijgedragen aan democratische controle op de uitvoerende macht. Er zijn ook duidelijke aanwijzingen dat deze versterking van de positie van de Bondsdag niet zou hebben plaatsgevonden zonder de interventies van het Duitse Constitutionele Hof. Desalniettemin laat een vergelijking met Nederland zien dat de dynamiek tussen het Duitse parlement en de Duitse regering deels specifiek was voor de Duitse context. Hoewel de interventies van het Duitse Hof uiteindelijk hebben bijgedragen aan een veel uitgebreider stelsel van parlementaire rechten in Duitsland, heeft het Nederlandse parlement uit eigen beweging verschillende maatregelen genomen om zijn eigen positie te waarborgen. Bewijsmateriaal uit andere lidstaten geeft ook aan dat andere parlementen hun eigen rechten hebben kunnen beschermen zonder daartoe door een constitutioneel hof te worden gedwongen.
Op basis van deze inzichten wordt in hoofdstuk 7 betoogd dat constitutionele toetsing ook kan helpen om democratische legitimiteitsproblemen van de EU tegen te gaan. Dat is het geval indien de toetsing gericht is op het versterken van de positie van nationale parlementen in EU-aangelegenheden ten opzichte van hun eigen regeringen. Vooral wanneer nationale constitutionele hoven ook rekening houden met andere overwegingen, lijkt constitutionele toetsing positief uit te pakken. In lidstaten met constitutionele toetsing zouden grondwettelijke hoven waarschijnlijk meer parlementair toezicht mogen eisen. Voor lidstaten zonder constitutionele toetsing biedt het Duitse voorbeeld echter geen doorslaggevende reden om dat in te voeren. Zoals in het vorige hoofdstuk werd aangegeven, kan de invoering van constitutionele toetsing verschillende negatieve gevolgen hebben. Zodra een hof de bevoegdheid krijgt om wetgeving te toetsen aan de grondwet is namelijk niet duidelijk hoe de uitoefening van deze bevoegdheid effectief kan worden gecontroleerd of beperkt.

**Hoofdstuk 8** bevat de conclusie en bespreekt de belangrijkste bevindingen in het licht van de algemene onderzoeksvraag en doelstellingen van het onderzoek. Ten eerste wordt herhaald waarom een kritische analyse van wetgevende en rechterlijke praktijk zo cruciaal is om de democratische legitimiteit van constitutionele toetsing te beoordelen. Dat geldt voor zowel de nationale context als de EU-context. De bijna exclusieve focus van de huidige literatuur op gerechtshoven en het gebrek aan aandacht voor politieke instellingen is een grote tekortkoming die slechts kan leiden tot een onvolledige beoordeling van de legitimiteit van constitutionele toetsing.

Ten tweede volgen uit de *casestudies* twee hoofdconclusies. Enerzijds leiden de uitspraken van het Duitse Constitutionele Hof over Europese integratie tot verschillende democratische problemen. Dat is in wezen het geval omdat het Hof een omstreden opvatting hanteert van wat democratie behelst, en democratie expliciet koppelt aan de natiestaat. Die opvatting beperkt de ruimte voor politieke actoren om verschillende visies op de toekomst van de Europese integratie te realiseren. Het idee dat constitutionele hoven beter geplaatst zijn om constitutionele kwesties in verband met Europese integratie te beoordelen, lijkt dan ook onjuist. De *casestudies* lieten juist zien dat zowel in Duitsland als in Nederland constitutionele kwesties vaak een belangrijke rol in het politieke debat over de EU spelen. Deze politieke debatten toonden bovendien meer openheid voor een verscheidenheid aan mogelijke gezichtspunten op constitutionele beginselen. Bovendien is er nauwelijks bewijs...
voor de stelling dat de oordelen van het Duitse Hof hebben bijgedragen aan een verbetering van het democratisch debat over constitutionele kwesties betreffende de EU. Anderzijds werd in de casestudies ook besproken hoe het Duitse Hof de positie van het Duitse parlement in EU-aangelegenheden versterkte en zo tegenwicht bood aan de dominantie van de uitvoerende macht in Europese besluitvorming. Een dergelijke toetsing, die beperker van aard is en meer gericht is op de relatie tussen nationale regeringen en hun parlementen, bevordert de mogelijkheden van democratische politiek in plaats van deze te belemmeren.

Ten derde bespreekt het afsluitende hoofdstuk meer in het algemeen wat deze casestudies suggereren over de legitieme rol van nationale constitutionele hoven in de EU. Ook bespreekt het hoofdstuk hoe deze inzichten kunnen bijdragen aan de theorievorming over legitieme constitutionele interpretatie en het vormgeven van instituties. In dit opzicht suggereert de studie dat de democratische legitimiteit van constitutionele toetsing van Europees recht in veel opzichten twijfelachtig is. Nationale hoven zouden in hun toetsing in ieder geval meer rekening moeten houden met legitieme politieke meningsverschillen. Bovendien zouden nationale hoven hun toetsing meer moeten richten op het corrigeren van democratische legitimiteitsproblemen in het EU-besluitvormingsproces die niet of nauwelijks ter discussie staan. Een veelbelovende manier voor nationale constitutionele hoven om op deze manier bij te dragen aan de democratische legitimiteit van de EU, is het vergroten van de informatie- en zeggenschapsrechten van nationale parlementen in EU-aangelegenheden. Bovendien suggereert de studie dat een verzwakking van constitutionele toetsing zou kunnen bijdragen aan een evenwichtiger relatie tussen gerechtshoven en politieke instellingen. Een verzwakking van constitutionele toetsing zou zo kunnen leiden tot een betere dialoog tussen rechterlijke en politieke instellingen. Voor lidstaten zonder constitutionele toetsing van Europees recht lijkt er geen overtuigende rechtvaardiging om zulke toetsing toch in te voeren.

Voor dergelijke lidstaten lijkt het passender om te investeren in versterkte constitutionele toetsing binnen de politieke instellingen. De volledige implicaties van deze studie voor constitutionele interpretatie en institutionele vormgeving moeten echter worden uitgewerkt in verder onderzoek. Bovendien zal verder onderzoek de uitkomsten van de casestudies verder moeten verrijken, omdat in ieder geval een aantal bevindingen uit de casestudies niet zijn te generaliseren naar andere gevallen.
ACKNOWLEDGEMENTS

Completing this work would not have been possible without the aid of many people. I am grateful to the University of Amsterdam and its Law Faculty for providing me with the opportunity to conduct this research project. I owe special debt to my supervisors Deirdre Curtin, Leonard Besselink and Ingo Venzke. Together they guided me through the PhD process over the past years, read and commented on countless drafts, including multiple bad ones, dealt with my numerous doubts and helped me to complete this work. The discussions we have had over the past years have greatly improved my arguments, my style of writing and the overall work. Deirdre Curtin stimulated me to be ambitious and develop the thesis in directions I had not previously dared to go. Her exemplary scholarship on the EU’s democratic legitimacy problems is an important source of inspiration. Leonard Besselink encouraged me to pursue a doctorate whilst I was still a student in Utrecht. In him, I found a fellow ‘judicial review sceptic’ who never seemed sceptical about my abilities to complete this project. His faith and guidance have proved immensely valuable over the years. Ingo Venzke demonstrated to be a very committed and encouraging supervisor who shared my interest in legal and political philosophy. He read my work with great care and his sharp analytical mind significantly helped me to improve my writings and arguments, imbuing me with a healthy dose of scepticism towards analytical political philosophy in the process.

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taught me to look at money as a constitutional project, which helped me to develop several ideas that found their way into this dissertation and informed further research plans.

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The University of Amsterdam and its Law Faculty were a great home and provided a stimulating research environment. With Emma Irving and Maarten Hillebrandt I shared the ups and downs of the PhD trajectory in our office E310. I would like to thank them for the many discussions, the jokes and friendship over the years. Anniek de Ruijter read through extensive drafts of this work and provided numerous useful ideas. She regularly brought me coffee when I tried to finish this project and she was always open to listen to my concerns and doubts, even though one could expect her head to be full with more pressing worries. Her resilience and perseverance are admirable. Chris Koedooder sharpened my mind on EMU related issues and many other aspects of EU law. With Anne van Mulligen I shared an avid interest in political and legal philosophy. Throughout the years we have discussed practically all aspects of our research projects, which I have found immensely valuable. Veit Bader I consider an important mentor, first he was an advisor on my Master thesis when I was still a student in Utrecht. Later, when I came to Amsterdam, we regularly interacted and I have greatly benefited from his insights. I imagine he disagrees with many things in this dissertation, but this is all the better, as it means we can continue our discussions in the future. In addition, I would like to thank my fellow PhD researchers, other colleagues at ACELG and at the department of International and European Law, as well as my new
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Finally I want to thank my family and friends. As I was finishing this work, I have not always been in touch as much as I should have. Now I hope to catch up. I would like to thank Jozef Waanders and Karsten Meijer for agreeing to become my paranimfen, a great honour for me. My brother Walt and sister Lorijn deserve my gratitude for their support throughout this process. I want to thank my parents, Anneke and Wim, for always supporting me in all my endeavours, believing in my ability to bring this project to completion and providing me with all the resources to do this. Greatest debt in writing this PhD I owe to Hannah, who did everything to support me, especially in the last stages of this project, when she organised my life while I was stressing out. I could not have completed this project without her. More importantly, she has made the past years better in every way.
APPENDIX 1 – LIST OF INTERVIEWS

The details below provide an overview of all the interviews conducted for this study. Some of these interviews served only as background information to the case studies and are not directly referred to in the text.

Respondents were offered the option of full anonymity, partial anonymity or no anonymity. The details below are a reflection of these choices.

<table>
<thead>
<tr>
<th>Germany</th>
<th>Date Interview</th>
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<tbody>
<tr>
<td>Ingolf Pernice, Professor of Public Law, European law and Public International Law Humboldt-Universität zu Berlin and representative of the German Bundestag in the Lisbon case.</td>
<td>16 April 2015</td>
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<tr>
<td>Former judge at the German Federal Constitutional Court.</td>
<td>29 June 2015</td>
</tr>
<tr>
<td>Former judge at the German Federal Constitutional Court.</td>
<td>20 April 2015</td>
</tr>
<tr>
<td>Christoph Möllers, Professor of Public Law and Jurisprudence, Faculty of Law, Humboldt-University Berlin and representative of the German Bundestag in the ESM case.</td>
<td>20 April 2015</td>
</tr>
<tr>
<td>Franz Mayer, Professor of Public Law at Universität Bielefeld and representative of the German Bundestag in the Lisbon and EFSF cases.</td>
<td>28 May 2015</td>
</tr>
<tr>
<td>Gesine Lötzsch, Bundestag member for Die Linke and chair of the Bundestag’s budget committee.</td>
<td>27 May 2015</td>
</tr>
<tr>
<td>Christoph Thum, advisor for European politics to SPD Bundestagsfraktion.</td>
<td>26 May 2015</td>
</tr>
<tr>
<td>Karl-Albrecht Schachtschneider, legal representative of Manfred Brunner in the Maastricht case and complainant in multiple other EU-related cases before the GFCC.</td>
<td>29 May 2015</td>
</tr>
<tr>
<td>Peter Danckert, former member of the Bundestag for the SPD.</td>
<td>12 May 2015</td>
</tr>
<tr>
<td>Otto Fricke, former Bundestag member for the FDP and chair of the Bundestag’s budget committee between 2005 and 2009.</td>
<td>6 May 2015</td>
</tr>
<tr>
<td>Lothar Binding, Bundestag member for the SPD.</td>
<td>29 April 2015</td>
</tr>
<tr>
<td>Christian Hirte, Bundestag member for the CDU.</td>
<td>24 April 2015</td>
</tr>
<tr>
<td>Peter Huber, Judge at the German Federal Constitutional Court and judge-rapporteur in most EU-related cases.</td>
<td>23 April 2015</td>
</tr>
<tr>
<td>Law clerk at the German Federal Constitutional Court.</td>
<td>23 April 2015</td>
</tr>
</tbody>
</table>
EU level
EU official #1. 3 November 2015
EU official #2. 3 November 2015
EU official #3. 4 November 2015
Former Dutch politician involved in Maastricht negotiations. 20 January 2016
Jean-Paul Jacqué, former Director, Legal Service of the Council of the European Union. 8 December 2015
Tom de Bruijn, former Permanent Representative of the Netherlands at the European Union. 18 November 2015
Luuk van Middelaar, Professor of Foundations and Practice of the European Union and its Institutions and former speechwriter and advisor of the first permanent President of the European Council, H.A. Van Rompuy (2010-2014). 10 November 2015

Netherlands
Mark Harbers, former Member of Parliament for the VVD. 21 January 2016
Jeannette Mak, former EU advisor to the parliamentary committee on financial matters. 7 December 2015
Pieter Omtzigt, Member of Parliament for the CDA. 3 December 2015
Marit Maij, former Member of Parliament for the PvdA. 18 November 2015
Henk Nijboer, Member of Parliament for the PvdA. 16 November 2015
APPENDIX 2 – INTERVIEW QUESTIONS

Germany

Discussion points with German Bundestag Members and Legal Representatives before the Court

Constitutional Deliberation:
- Do you think that the constitutional implications of the Euro crisis’ measures/Lisbon/Maastricht were sufficiently taken into account by the German Bundestag when it debated the various crisis instruments? If not, what do you consider that the main problems were?
  o In particular, were the implications of these instruments for democracy, the right to vote of citizens, the budget rights of the Bundestag, as well as social rights in your view sufficiently considered by the Bundestag? If so, in what sense? If not, what do you consider that the main problems were?
- Did the judgments of the Bundesverfassungsgericht on these measures have consequences for the parliamentary deliberations on these measures? In what way?
- Did the judgments of the Bundesverfassungsgericht on these measures make that parliamentary groups no longer considered certain policy proposals as acceptable or constitutionally permissible? If so for which proposals was this the case?
- Did these judgments of the Bundesverfassungsgericht make that certain parliamentary groups changed their positions? If so, in what way did this occur?
- What is the status of judgments of the Bundesverfassungsgericht in parliamentary deliberations?
  o Do you think that it is possible for politicians to contest a judgment of the GFCC? Does this happen?
- Do you think that the case law of the GFCC on the EU has led to a better consideration of the constitutional issues implicated in European integration? If so, in what way?
- Do you know of any changes to policies or lawmaking at the European level because of the Bundesverfassungsgericht’s interventions?
- What are the ultimate consequences if the German legislature would violate the constitutional limits to European integration? Have these limits in your view come in sight?

Access to information

Eurozone summits and European Council meetings
- How did the Bundestag’s right to access information about European Council meetings and Eurozone summits on the European crisis develop over the course of the Euro crisis? How did they change?
- What role has the Bundesverfassungsgericht played in strengthening access to information for the Bundestag on meetings of the European Council and Eurozone summits?
- What documents does the Bundestag receive relating to European Council meetings and Eurozone summits?
- When does the Bundestag receive such documents?
o Prior to the Bundesverfassungsgericht’s judgment of June 2012, what were the ways in which Bundestag Members could obtain information about European Council meetings and Eurozone summits concerning the Euro crisis? What were shortcomings?

o The Bundesverfassungsgericht judged in June 2012 that the German government had not provided adequate information to the Bundestag about the ESM. What in your view was the impact of this case? Did the information provision by the government change afterwards and if so, what changed?

Financial Assistance by the EFSF and ESM
- In your view, what has been the impact of the Bundesverfassungsgericht’s judgments on the Bundestag’s ability to influence decisions of the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM)?
  o Prior to the change of the European Financial Stability Facility debated by the Bundestag in September 2011, what where the ways in which Bundestag Members could obtain information about decisions of the EFSF?
  o Why were the information rights of the Bundestag in relation to the EFSF initially more limited?
  o Why did the legislative framework regulating Germany’s participation in the European Financial Stability Facility subsequently provide a much more elaborate framework for the information rights of the Bundestag?
  o What do you consider that the effect was of the Bundesverfassungsgericht’s judgment on the EFSF of 7 September 2011?
  o What do you consider that the effect was of the Bundesverfassungsgericht’s judgment of 28 February 2012 concerning the 9er Gremium?
  o What was the effect of the interim judgment of the Bundesverfassungsgericht of 12 September 2012 on the ESM for the provision of information to the German Parliament concerning decisions of the ESM?

- What in your view would have been the situation with regards to access to information of the Bundestag, if the if Bundesverfassungsgericht had not ruled on this issue in its various judgments?

- How has the Bundestag’s access to information changed in practice? Has it changed?
  o EFSF: Greece, Ireland and Portugal.
  o ESM: Ask about how this worked with assistance to Cyprus and Spain.
  o When does the Bundestag receive information about aid programmes?
  o What types of documents does the Bundestag receive concerning these aid programmes?
  o What other ways in practice have been adopted by the Bundestag and/or its committees to obtain information?

Influence of the Bundestag on European decision-making
Eurozone summits and European Council meetings
- In your view, what has been the impact of the Bundesverfassungsgericht’s judgments on the Bundestag’s ability to influence European Council meetings and Eurozone summits on the European crisis?

- [more indirect] How did the Bundestag’s abilities to influence the government’s position in European Council meetings and Eurozone summits on the European crisis develop over the course of the Euro crisis? Did this change and if so how? Have judgments by the Bundesverfassungsgericht influenced the rules and practices in this regard?
Is it possible for the Bundestag to issue voting instructions to the government in European Council meetings and Eurozone summits? Has this happened and how? Have judgments by the Bundesverfassungsgericht influenced the rules and practices in this regard?

- Does the government report on the outcomes of European Council meetings and Eurozone summits? Has this changed during the crisis?
  - Have judgments by the Bundesverfassungsgericht influenced the rules and practices of the Bundestag in this regard?
- What in your view would have been the situation with regards to the Bundestag’s abilities to influence the government’s position in European Council meetings and Eurozone summits on the European crisis, if the Bundesverfassungsgericht had not ruled on this issue in its various judgments?
- What has the practical effect been of these changes? Have the judgments of the Bundesverfassungsgericht really improved the participation rights of the Bundestag? What has changed?

Financial Assistance by the EFSF and ESM

- In your view, what has been the impact of the Bundesverfassungsgericht’s judgments on the Bundestag’s ability to influence decisions of the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM)?
  - Why were the participation rights of the Bundestag in relation to the European Financial Stability Facility initially more limited?
  - Why did the legislative framework regulating Germany’s participation in the European Financial Stability Facility after its change in September 2011 subsequently provide a much more elaborate framework for the participation rights of the Bundestag?
  - What do you think would have happened to the information and participation rights of the Bundestag if the German Federal Constitutional Court had not ruled on this issue in its various judgments?
  - What do you consider that the effect was of the Bundesverfassungsgericht’s judgment on the EFSF of 7 September 2011 on the Bundestag’s rights to influence decisions on the EFSF?
  - Do you think that the constitutional concerns that the Bundesverfassungsgericht expressed in relation to 9-er committee in its judgment of 28 February 2012, had previously been taken into account already by the Bundestag? If so, in what manner? If not, why not?
  - What do you consider that the effect was of the Bundesverfassungsgericht’s judgment of 28 February 2012 concerning the 9er Gremium? What do you think would have happened if the Bundesverfassungsgericht had not ruled on this committee? Why?
  - What was the effect of the interim judgment of the Bundesverfassungsgericht of 12 September 2012 on the ESM for the provision of information to the German Parliament concerning decisions of the ESM?
- What has the practical effect been of these changes? And have the judgments of the Bundesverfassungsgericht really improved the participation rights of the Bundestag? What has changed?
  - EFSF: Greece, Ireland and Portugal.
  - ESM: Ask about how this worked with assistance to Cyprus and Spain.
  - What is the role of the special confidential committee (sondergremium) in relation to the EFSF and ESM been in practice?
How have the participation rights of the Bundestag in relation to the EFSF, ESM and Fiscal Compact been used in practice?

- Have the Bundestag’s plenary and the budget committee used their powers to provide voting instructions to the German representative on the EFSF and/or the ESM?

What in your view is the perfect metaphor to describe the role of the Bundesverfassungsgericht in relation to the German EU politics?

Discussion points with constitutional judges and court officials:

**Constitutional Deliberation:**

- What in your view is the main concern of the Bundesverfassungsgericht about European integration?
- Do you think that the constitutional implications of the Euro crisis’ measures/Lisbon Treaty/Maastricht Treaty were sufficiently taken into account by the German Bundestag when it debated these instruments? If not, what do you consider that the main problems were?
  - In particular, were the implications of these instruments for democracy, the right to vote of citizens and budget rights of the Bundestag sufficiently considered by the Bundestag? If so, in what sense? If not, what do you consider that the main problems were?
- At whom is the Court’s review directed?
  - CJEU?
  - National government or parliament?
  - European Council or Council or European Parliament?
- Why did the Court decide as it did? What goals (and motivations) did the Court have?
- Did the judgments of the Bundesverfassungsgericht on the Euro crisis measures have consequences for the parliamentary deliberations on these measures? In what way?
- Did the judgments of the Bundesverfassungsgericht on the Euro crisis make that certain parliamentary groups changed their positions about how to solve the Euro crisis? If so, in what way did this occur?
- Did the judgments of the Bundesverfassungsgericht on the Euro crisis/Maastricht Treaty/Lisbon Treaty make that parliamentary groups no longer considered certain policy proposals to solve the crisis as acceptable or constitutionally permissible? If so for which proposals was this the case?
- What is the status of judgments of the Bundesverfassungsgericht in parliamentary deliberations?
  - Who has the last word on the constitution in Germany?
    - And in Europe?
  - Do you think that it is possible for politicians to contest a judgment of the GFCC? Does this happen?
    - In what manner?
- Do you think that the case law of the GFCC on the EU has led to a better consideration of the constitutional issues implicated in European integration among German politicians? If so, in what way?
- What about politicians and judges at the European level? What effects did it have in your view?
What are the ultimate consequences if the German legislature would violate the constitutional limits to European integration? Have these limits in your view come in sight?
  - What is the added value of a referendum?

Access to information

EUROZONE SUMMITS AND EUROPEAN COUNCIL MEETINGS
  - What do you consider the main problems were with the Bundestag’s right to access information about European Council meetings and Eurozone summits on the European crisis during the Euro crisis?
  - How did they change as a result of the Bundesverfassungsgericht’s interventions?
  - What in your view would have been the situation with regards to access to information of the Bundestag, if the Bundesverfassungsgericht had not ruled on this issue in its various judgments?
  - Why do you think that the Bundestag did not strengthen these rights themselves?
  - Do you think the Bundestag’s access to information has really changed in practice?
    - If so, what changed?

FINANCIAL ASSISTANCE BY THE EFSF AND ESM
  - What do you consider that the main problems were with the Bundestag’s right to access information about decisions of the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM) during the Euro crisis?
  - What do you consider the impact of the Bundesverfassungsgericht’s judgments on this development were?
  - What in your view would have been the situation with regards to access to information of the Bundestag, if the Bundesverfassungsgericht had not ruled on this issue in its various judgments?
  - Why do you think that the Parliament did not strengthen these rights themselves?
  - Do you think that the Bundestag’s access to information has really changed in practice?

INFLUENCE OF THE BUNDESTAG ON EUROPEAN DECISION-MAKING

EUROZONE SUMMITS AND EUROPEAN COUNCIL MEETINGS
  - What do you consider that the main problems were with the Bundestag’s abilities to influence the government’s position in European Council meetings and Eurozone summits on the European crisis during the Euro crisis? How do you think that the judgments of the Bundesverfassungsgericht have influenced the rules and practices in this regard?
  - What in your view would have been the situation with regards to the Bundestag’s abilities to influence the government’s position in European Council meetings and Eurozone summits on the European crisis, if the Bundesverfassungsgericht had not ruled on this issue in its various judgments?
  - Why do you think that the Parliament did not strengthen these rights themselves?
  - Do you think the Bundestag’s access to information has really changed in practice?

FINANCIAL ASSISTANCE BY THE EFSF AND ESM
- What do you consider that the main problems were with the Bundestag’s abilities to influence the government’s position in the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM) develop during the Euro crisis?
- What role has the Bundesverfassungsgericht in your view played in this process?
- What do you think would have happened to the information and participation rights of the Bundestag if the German Federal Constitutional Court had not ruled on this issue in its various judgments?
- Why do you think that the Parliament did not strengthen these rights themselves?
  - [What do you consider that the effect was of the Bundesverfassungsgericht’s judgment on the EFSF of 7 September 2011 on the Bundestag’s rights to influence decisions on the EFSF?
  - Do you think that the constitutional concerns that the Bundesverfassungsgericht expressed in relation to 9-er committee in its judgment of 28 February 2012, had previously been taken into account already by the Bundestag? If so, in what manner? If not, why not?
  - What do you consider that the effect was of the Bundesverfassungsgericht’s judgment of 28 February 2012 concerning the 9er Gremium? What do you think would have happened if the Bundesverfassungsgericht had not ruled on this committee? Why?]
- Do you think the Bundestag’s access to information has really changed in practice? What has changed?

What in your view is the perfect metaphor to describe the role of the Bundesverfassungsgericht in relation to the German EU politics?

Netherlands

Discussion points with Dutch Members of Parliament and Experts of the Parliamentary Registry

Constitutional Issues:
- What does the democratic deficit of the EU mean to you? How do you see the role of national parliaments in this respect?
- Do you think that the constitutional implications of the Euro crisis’ measures were sufficiently taken into account by the Tweede Kamer when it debated the various crisis instruments, in particular the European Financial Stability Facility, the subsequent change in the European Financial Stability Facility, the European Stability Mechanism and the Fiscal Compact? If not, what do you consider that the main problems were?
  - In particular, were the implications of these instruments for democracy, the right to vote of citizens, the budget rights of the Tweede Kamer, as well as social rights in your view sufficiently considered by the Tweede Kamer? If so, in what sense? If not, what do you consider that the main problems were?]
- Does the Dutch constitution play a role in debates over the handling of the Euro crisis? If so, in what way?
- How do you regard the opinions of the Council of State? What do you think their role is in parliamentary discourse in relation to the EU?
- Are you familiar with the judgments of the Bundesverfassungsgericht on the Euro crisis measures? If yes, what is your opinion on these judgments?

**Access to information**

*Eurozone summits and European Council meetings*
- How did the Tweede Kamer’s right to access information about European Council meetings and Eurozone summits on the European crisis develop over the course of the Euro crisis? How did they change?
- Do you think there are shortcomings in the provision of information, if so which?
- Do you think there is adequate support in selecting the relevant information?
- Do you think that a general scrutiny reserve procedure (instemmingsrecht) could improve the information position of the Dutch Parliament?

*Financial Assistance by the EFSF and ESM*
- How is the Tweede Kamer informed about operations of the EFSF and the ESM?
- What documents does the Tweede Kamer receive?
- When does the Tweede Kamer receive information about aid programmes?
- What other ways in practice have been adopted by the Tweede Kamer and/or its committees to obtain information?
- How has the Tweede Kamer’s access to information changed over the course of the Euro crisis? Has it changed?
  - EFSF: Greece, Ireland and Portugal.
  - ESM: Ask about how this worked with assistance to Cyprus and Spain.
- Do you think there are shortcomings in the provision of information, if so which?

**Influence of the Tweede Kamer on European decision-making**

*Eurozone summits and European Council meetings*
- What are ways for the Tweede Kamer to influence European Council meetings and Eurozone summits on the European crisis?
- [more indirect] How did the Tweede Kamer’s abilities to influence the government’s position in European Council meetings and Eurozone summits on the European crisis develop over the course of the Euro crisis? Did this change and if so how?
- Does the government report on the outcomes of European Council meetings and Eurozone summits? Has this changed during the crisis?
- Do you think there are shortcomings in the abilities of the Tweede Kamer to influence the government’s position, if so which?
- Do you think that other mechanisms, such as a mandating system could be an addition?

*Financial Assistance by the EFSF and ESM*
- What are ways for the Tweede Kamer to influence decisions by the EFSF and the ESM?
- How did the Tweede Kamer’s abilities to influence the government’s position in in the EFSF and ESM develop over the course of the Euro crisis? Did this change and if so how?
- What has the practical effect been of these changes?
  - EFSF: Greece, Ireland and Portugal.
  - ESM: Ask about how this worked with assistance to Cyprus and Spain.
o Is there a regime for confidentiality (sondergremium) in relation to the EFSF and ESM?

o How have the participation rights of the Tweede Kamer in relation to the EFSF, ESM been used in practice?

- Do you think there are shortcomings in the abilities of the Tweede Kamer to influence the government’s position, if so which?

**EU level**

Questions for EU and national government officials involved in the relevant EU negotiations or with a more general insight in EU negotiations:

1. Do you recall/know of any instances where in European negotiations national constitutional constraints were invoked/had an impact on the negotiations?
   a. Do you recall/know of any instances where in European negotiations national constitutional case law – including anticipation of possible constitutional complaints - was invoked?

2. What was the instrument under discussion? How was the constitutional court constraint/constitutional judgment used? Did it help the position of the negotiating party? What were its consequences?

3. More specifically, do you recall any instances in relation to the Maastricht Treaty/ EFSF/ESM/Fiscal Compact/ Euro crisis more generally in which a constitutional court judgment was invoked?

4. What was the instrument under discussion? How was the constitutional court judgment used? What were its consequences?

5. Do you recall/know of any instances where in European negotiations other constitutional actors such as Councils of State, parliamentary constitutional committees and CJEU judgments were invoked?

6. What was the instrument under discussion? How was the constitutional opinion/judgment used? What were its consequences?
   a. Ask about: which judgment, status judgment, possibility to contest?

   Ask particularly about difference with constitutional court judgments.

7. Much of the case law by the German Constitutional Court concerns the issue of democracy. Would you say that discussions on the issue of democracy on the European level have been influenced by the position of the German constitutional court? If so, how?

8. Much of the case law by national courts in debtor states concerns the issue of social rights. Would you say that discussions on the issue of social rights on the European level have been influenced by the position of these national courts? If so, how?

9. What consequences more generally do you think that constitutional case law of national courts has for the future of European integration?

What in your view is the perfect metaphor to describe the role of the Bundesverfassungsgericht/national constitutional courts in relation to the EU?