Articles

What Red Lines, If Any, Do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration?

By Stefan Theil[*]

A. Introduction

The lingering European financial crisis continues to threaten the Eurozone and, in the opinion of German Chancellor Angela Merkel, the very survival of the European idea.[1] With this apocalyptic rhetoric, it is easily forgotten that only nine years earlier Europe overcame a predicament that was, at the time, equally described as the most challenging in its history. Two failed referendums in Member States of the European Union (Member States)—namely, in France and the Netherlands—stopped the Treaty establishing a Constitution for Europe (Constitutional Treaty) in its tracks and led to an extended "period of reflection" for Europe's leaders.[2] From this emerged a reboot of the Constitutional Treaty,[3] now dubbed the Treaty of Lisbon, with few substantial changes,[4] but more success throughout the ratification procedures. The final hurdle presented itself in the form of institutionally strong Constitutional Courts (CC) and Tribunals (CT) of the European Member States. Of these, the following were at one time or another seized with complaints against the ratification of the Lisbon Treaty: The Austrian *Verfassungsgerichtshof* (Austrian CC),[5] the Belgian CC,[6] the *Ústavní soud České republiky*

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[1] Which Merkel epitomized in the phrase: "*Scheitert der Euro, dann scheitert Europa.*" ("If the Euro fails, then Europe fails.") BUNDESREGIERUNG, OFFICIAL GERMAN GOVERNMENT BULLETIN (Oct. 26, 2011), http://www.bundesregierung.de/Content/DE/Bulletin/2011/10/111-1-bk-bt.html.

[2] EUR. COUNCIL, DECLARATION BY THE HEADS OF STATE OR GOVERNMENT OF THE MEMBER STATES OF THE EUROPEAN UNION ON THE RATIFICATION OF THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE (June 18, 2005), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/85325.pdf.

[3] It is debatable whether the term *Constitutional Treaty* was a hint at statehood. See Paul Berman, *From Laeken to Lisbon: The Origins and Negotiation of the Lisbon Treaty*, *in* EU LAW AFTER LISBON 3 (Andrea Biondi, Piet Eeckhout & Stefanie Ripley eds., 2012).

[4] For instance, the European Foreign Minister was recast as the High Representative of the Union for Foreign Affairs and Security Policy. *See* The Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310).

[5] Which dismissed applications against the original Constitutional Treaty, Verfassungsgerichtshof [VfGH] [Constitutional Court], June 18, 2005, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VFSLG] No. G 62/05, *Constitutional Treaty*; against the Lisbon Treaty *ex ante*, Verfassungsgerichtshof [VfGH] [Constitutional Court], Sept. 30, 2009, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VFSLG] No. SV 2/08, *Lisbon I*; and

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(Czech CC), the French *Conseil Constitutionnel* (French CC),[7] the German *Bundesverfassungsgericht* (German CC), the Hungarian CC, the *Latvijas Republikas Satversmes tiesa* (Latvian CC), the Polish *Trybunał Konstytucyjny* (Polish CT), and the *Tribunal Constitucional de España* (Spanish CT).

To great relief, the Lisbon Treaty withstood these challenges, entering into force in December 2009. Nonetheless, European Constitutional Courts did not miss the opportunity to assess the current state of integration, making crucial pronouncements on the limits to the future EU integration arising from domestic constitutions and relevant case law. These limits shall be the subject of this investigation and will be collectively referred to as the *red lines* (or simply *limits*) to deeper European integration. Particularly their scope and rationale as presented in the various Lisbon Judgments will be the subject of this critical evaluation.

Before outlining the general structure, two important constraints must be acknowledged. First, the investigation is constrained to the Lisbon Judgments of the four Constitutional Courts[8] at the center of academic publications: The highly influential[9] judgment of the German CC,[10] the judgments of the Czech CC,[11] the French CC,[12] and the Polish CT.[13] Where

against the Lisbon Treaty *ex post* for lack of a prima facie infringement of rights Verfassungsgerichtshof [VfGH] [Constitutional Court], June 12, 2010, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VFSLG] SV 1/10, *Lisbon II*.

[6] Which engaged primarily with domestic provisions, Cour Constitutionnelle [CC] [Constitutional Court], decision no 58/2009, Mar. 19, 2009 (Belg.) and dismissed the second challenge on procedural grounds, Cour Constitutionnelle [CC] [Constitutional Court], decision no 156/2009, Oct. 17, 2008 (Belg.).

[7] Not to be confused with the *Conseil d'État*, France's highest administrative court and advisory body.

[8] Collectively referred to as *European Constitutional Courts*.

[9] Christian Tomuschat, *The Ruling of the German Constitutional Court on the Treaty of Lisbon*, 10 GERMAN L.J. 1259 (2009).

[10] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1010/08; 2 BvR 1022/08; 2 BvR 1259/08; 2 BvR 182/09, 2009 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 123, (June 30, 2009) [hereinafter German CC, *Lisbon*].

[11] Ústavní soud České republiky (ÚS) [Decision of the Constitutional Court of Nov. 26, 2008] Pl. ÚS 19/08: Treaty of Lisbon I, http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=484&cHash=621d8068f5e20ecadd84e0bae0527552 [hereinafter Czech CC, *Lisbon I*]; Ústavní soud České republiky (ÚS) [Decision of the Constitutional Court of Nov. 3, 2009] Pl. ÚS 29/09: Treaty of Lisbon II, http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=466&cHash=eedba7ca14d226b879ccaf91a6dcb276 [hereinafter Czech CC, *Lisbon II*].

[12] Conseil constitutionnel [CC] [Constitutional Court] decision No. 2004-505DC, Nov. 19, 2004, Treaty establishing a Constitution for Europe (Fr.) [hereinafter French CC, *Constitutional Treaty*].; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2007-560DC, Dec. 20, 2007 (Fr.) [hereinafter French CC, *Lisbon*].

[13] Trybunał Konstytucyjny [Constitutional Tribunal] Nov. 24, 2010, K 32/09 (Pol.) [hereinafter Polish CT, *Lisbon*].

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appropriate, reference will be made to subsequent developments in the case law, but the investigation cannot claim to provide a comprehensive overview of the constitutional jurisprudence of these Courts. Second, the reference material is limited to publications and judgments in the German, English, or French language. Particularly the comments made on the Czech and Polish case law should therefore be taken with a grain of salt.

B. The Red Lines

Section I will give a brief outline of the different concepts of sovereignty, statehood, and "constitutional identity" with which the Courts seek to justify the red lines to European integration. Criticism will focus on the comparatively static and traditionalist concept adopted by the German CC.

Section II will examine the limitations placed on the transfer of sovereign powers as a major red line to European integration. Following a comparative analysis of the Lisbon Judgments, this section will examine whether a fundamental boundary, the transfer of *Kompetenz-Kompetenz*,[14] has been violated through the reforms of the Lisbon Treaty.

Section III focuses on the extensive criticism of the EU's democratic credentials through the German CC. The analysis will show that the line of argument adopted appears to trap the EU in a perpetual democratic deficit. While this could be interpreted as the German CC's "nuclear option" against European integration, it will be argued that it is primarily an attempt to contribute to the wider debate on European democratic development. The section will conclude with a comparative review of the remedy favored by some European Constitutional Courts: Enhanced oversight through national parliaments. While such oversight may slow the pace of integration somewhat, it ultimately does not constitute a red line.

Section IV investigates the *ultra vires* review of EU legislation through Constitutional Courts as a potentially strong limit to integration. Particularly the German CC seems prima facie uncompromising in this regard. Yet the subsequent *Honeywell* ruling appears to push the case law closer to the more nuanced ruling of the Czech CC. Notably, neither the French CC nor the Polish CT unequivocally pronounce a stance on this issue.

Section V examines the limits to European integration arising from a need to safeguard domestic fundamental (human) rights guarantees. For the German and Czech CC, the well-known *Solange* case is the proverbial gold standard in this regard, while the French CC and the Polish CT do not provide more than general statements. Ultimately, integration is unlikely to traverse this red line.

[14] Defined as the power of a body to determine its own powers, adopted from Tobias Lock, *Why the European Union is not a State*, 5 EUR. CONST. L. REV. 409 (2009).

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Section VI evaluates the popular interpretation of Article 4, paragraph 2 Treaty on European Union (TEU) as a *de facto* derogation clause and therefore a further "red line" to European integration. It will be argued that this assertion by European Constitutional Courts is wrought with definitional uncertainties and ultimately draws into question the very foundation of European integration.

I. Statehood, Sovereignty, and Constitutional Identity

This section will first offer a comparative overview of the notions of sovereignty, statehood, and constitutional identity underlying the Lisbon Judgments. Subsequently, the German CC's notion of sovereignty, along with an alternative interpretation offered by Dieter Grimm, will be critiqued, particularly in light of the more flexible notions of other Constitutional Courts.

1. Comparative Overview

All red lines drawn by European Constitutional Courts arise under, and are ultimately justified by, reference to sovereignty, statehood, and constitutional identity, or variants thereof. Throughout the Judgments, the precise contours drawn by the Courts remain, perhaps intentionally, obscure.[15]

1.1 German Constitutional Court

The German CC views the states as the "ultimate form of a political community"[16] which must remain the overall "masters of the Treaties."[17] It bases the red lines on the *Kerngehalt der Verfassungsidentität*—the core of national constitutional identity.[18] This is said to primarily encompass the eternity clause of Article 79, paragraph 3 of the German Basic Law, protecting the principle of democracy, as well as, *inter alia*, statehood and

[15] Attempts at clarification are undertaken by Armin von Bogdandy, *Europäische und Nationale Identität: Integration durch Verfassungsrecht?*, 62 VVDStRL 164 (2003); Jan-Herman Reestman, *The Franco-German Constitutional Divide*, 5 EUR. CONST. L. REV. 384 (2009); Mattias Wendel, *Lisbon Before the Courts: Comparative Perspectives*, 7 EUR. CONST. L. REV. 131 (2011).

[16] Roland Bieber, *An Association of Sovereign States*, 5 EUR. CONST. L. REV. 392 (2009); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community*, 99 COLUM. L. REV. 628, 738 (1999).

[17] German CC, *Lisbon*, *supra* note 10, at para. 231. This is correctly critiqued as missing an essential component, namely "*if and when acting jointly*" with the other Member States. *See* Bieber, *supra* note 16, at 397.

[18] German CC, *Lisbon*, *supra* note 10, at paras. 216–218.

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fundamental human rights. Yet the precise content remains vague,[19] not least because the German CC tends to read the scope of the eternity clause as exceptionally broad.[20]

Generally speaking, the German CC's understanding of statehood follows the classic three elements theory developed by Georg Jellinek: Requiring a territory, a people, and sovereignty.[21] Territory is deemed not at risk through European integration,[22] while challenges to the second element are dismissed by postulating the absence of a constituent European "People,"[23] a challenge that shall be examined more closely below. Sovereignty, therefore, rose to great prominence, and was perhaps the central theme of the German *Lisbon* judgment, with the Court adopting a static and traditional understanding of the term.[24] Crucially, for the purposes of this investigation, sovereignty is said to rest with either the Member State or with the EU; it is regarded as an indivisible principle that cannot be shared between entities.[25] This legally and factually debatable statement is tempered somewhat through the recognized *Europarechtsfreundlichkeit*, the general openness and friendliness of German Basic Law towards European Law.[26]

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[19] Ingolf Pernice, *Motor or Brake for European Policies? Germany's New Role in the EU After the Lisbon-Judgment of Its Federal Constitutional Court*, *in* EUROPE'S CONSTITUTIONAL CHALLENGES IN THE LIGHT OF THE RECENT CASE LAW 372 (José Maria Beneyto & Ingolf Pernice eds., 2011).

[20] Bodo Pieroth, Art. 79, *in* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND KOMMENTAR no. 6 (Hans D. Jarass & Bodo Pieroth eds., 12th ed. 2012).

[21] German CC, *Lisbon*, *supra* note 10, at paras. 224–226; subscribing to GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 183 (1922).

[22] German CC, *Lisbon*, *supra* note 10, at paras. 344–345.

[23] *Id.* at para. 346.

[24] Dimitrios Doukas, *The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty, but Don't Do It Again!*, 34 EUR. L. REV. 886 (2009). For similar criticism on the preceding Maastricht Judgment, see Joseph H. Weiler, *The State "Uber Alles": Demos, Telos and the German Maastricht Decision* (EUR. UNIV. INST. Working Paper No. 95/19, 1995), http://www.jeanmonnetprogram.org/archive/papers/95/9506ind.html; and Julio Baquero Cruz, *The Legacy of the Maastrict-Urteil and the Pluralist Movement*, 14 EUR. L.J. 389, 411 (2008). On more flexible notions, see Robert Schütze, *On the "Federal" Ground: The European Union As an (Inter)national Phenomenon*, 46 COMMON MKT. L. REV. 1069 (2009). On origins of the debate in general, see Frederico Mancini, *Europe: The Case for Statehood*, 4 EUR. L.J. 29 (1998); Joseph H. Weiler, *Europe: The Case Against the Case for Statehood,* 4 EUR. L.J. 43 (1998); Paul Craig, *The Nature of the Community: Integration, Democracy and Legitimacy*, *in* THE EVOLUTION OF EU LAW 23 (Paul Craig & Gráinne de Bùrca eds., 1999).

[25] Lock, *supra* note 14, at 408. *See also,* Ulrike Liebert, *More Democracy in the European Union?! Mixed Messages from the German Lisbon Ruling*, *in* THE GERMAN CONSTITUTIONAL COURT'S LISBON RULING: LEGAL AND POLITICAL-SCIENCE PERSPECTIVES 79, 80 (Andreas Fischer-Lescano, Christian Joerges & Arndt Wonka eds., 2010); Daniel Thym, *From Ultra-Vires-Control to Constitutional Identity Review: The Lisbon Judgment of the German Constitutional Court*, *in* EUROPE'S CONSTITUTIONAL CHALLENGES IN THE LIGHT OF THE RECENT CASE LAW OF NATIONAL CONSTITUTIONAL COURTS—LISBON AND BEYOND 36 (Jose Maria Beneyto & Ingolf Pernice eds., 2011).

[26] German CC, *Lisbon*, *supra* note 10, at para. 225.

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The Court further considers the right of withdrawal found in Article 50 TEU, as an expression of this ultimate Member State sovereignty.[27] This may, prima facie, appear to bolster the German CC's argument for enduring Member State sovereignty.[28] However, there is a degree of ambiguity in that assertion,[29] as it could equally support the proposition of growing EU autonomy. One might argue that it is ultimately EU law that determines the requirements for a legal withdrawal,[30] and not national constitutions.

1.2 Czech Constitutional Court

The Czech CC also took the classic understanding of statehood as its starting point, in a manner not unlike the German CC. However, it strayed from this line of argument, in deeming a binary, indivisible, understanding of sovereignty unsuitable in a globalized world.[31] State sovereignty is not seen as "an aim in and of itself, in isolation, but a means of fulfilling . . . fundamental values, on which the construction of a constitutional, law-based state stands."[32] The Court therefore advocated the notion of pooled sovereignty[33] between the EU and its Member States. The retention of some degree of national sovereignty requires a state to be "an actor, not an object" on the international stage,[34] but crucially not to the exclusion of the EU. Accordingly, the "transfer of certain state competences . . . is not a conceptual weakening of the sovereignty of a state, but, on the contrary, it can lead to its strengthening within the joint actions of an integrated whole."[35]

[27] *Id.* at para. 329.

[28] As a right to withdrawal from an existing federation is typically limited under International Law to the right of self-determination in the context of decolonization, see Susanna Mancini, *Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination*, 6 INT'L J. CONST. L. 553 (2008).

[29] Lock, *supra* note 14, at 414.

[30] Lock, *supra* note 14, at 414; Christoph Möllers, *Pouvoir Constituant – Constitution – Constitutionalisation*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 201, 202 (Armin von Bogdandy & Jürgen Bast eds., 2006).

[31] Czech CC, *Lisbon I*, *supra* note 11, at paras. 100–101.

[32] *Id.* at para. 209.

[33] Czech CC, Lisbon II, *supra* note 11, at para. 147. *See also,* Jan Komárek, *The Czech Constitutional Court's Second Decision on the Lisbon Treaty*, 5 EUR. CONST. L. REV. 345, 350 (2009); Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 375 (2009).

[34] Czech CC, *Lisbon I*, *supra* note 11, para. 107.

[35] *Id.* at para. 108.

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The right of withdrawal contained in the provision of Article 50 TEU is again seen as evidence of enduring state sovereignty.[36] The ambiguity of which has been hinted at above. The term "constitutional identity," though raised by the applicants, as well as Article 4, paragraph 2 TEU, is not elaborated on.

1.3 Polish Constitutional Tribunal

The Polish CT, like its Czech counterpart, acknowledges the dynamic developments in meaning of the terms "sovereignty" and "statehood."[37] While the Court affirms sovereignty as an indispensable characteristic of statehood, it perceives it as manifested, rather than diminished, in European Union membership and the ratification of the Lisbon Treaty.[38] The right to withdraw from the EU is again afforded an indicative function for Member State sovereignty.[39]

In terms of constitutional identity the Polish CT defined it as the "reflect[ion] [of] the values the Constitution is based on,"[40] flowing primarily from Article 90 of the Polish Constitution. It is said to encompass a prohibition on transferring the "competence to confer competence" (*Komptenz-Kompetenz*) to the EU in subject matters which constitute the "fundamental basis of the political system."[41] The identity clause of Article 4, paragraph 2 TEU is viewed as the "equivalent of the concept of constitutional identity in the primary EU law."[42] In turn, the Polish CT recognizes a "favourable predisposition towards the process of European integration and cooperation between States,"[43] arising from the Preamble, in conjunction with Article 90 of the Polish Constitution. This is strikingly reminiscent of the German *Europarechtsfreundlichkeit*.

[36] *Id.* at para. 106.

[37] Polish CT, *Lisbon*, *supra* note 13, at para. 2.1.

[38] *Id.* at para. 2.1.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at para. 2.2.

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1.4 French Constitutional Court

Sovereignty, though mentioned in the French CC's Lisbon ruling, is not elaborated on as a concept, and is mainly utilized as a label to justify the necessity of amendments to the French Constitution. It is said to primarily manifest itself in the *conditions essentielles d'exercice de la souveraineté*—essential requirements of the exercise of sovereignty—and serves as the standard of review for EU treaty revisions.[44]

Constitutional identity is understood by the French CC to refer to its specific case law on the limits of the applicability of EU law in France. The so-called *identité constitutionelle de la France*[45] draws limits to European integration and to the direct effect of EU Directives.[46] The scope is, however, not specified in more detail,[47] and arguably the principle does not hinder deeper European integration through Treaty revisions. In France, these are typically facilitated by adding catch-all provisions to Article 88, paragraph 1 of the French Constitution,[48] which effectively excludes conflicts between EU primary law and the French Constitution.

2. Critique

In its *Lisbon* Judgment, the German CC has failed to substantively engage with alternative models of statehood. This was already a criticized feature[49] of the previous Maastricht

[44] French CC, *Lisbon*, *supra* note 12, at para. 9.

[45] This was preceded by the earlier concept of an "express contrary provision of the Constitution." *See* Reestman, *supra* note 15, at 386; Chloé Charpy, *The Status of (Secondary) Community Law in the French Internal Order: The Recent Case-Law of the Conseil Constitutionnel and the Conseil d'Etat*, 3 EUR. CONST. L. REV. 436 (2007); Bertrand Mathieu, *Les Rapports Normatifs Entre le Droit Communautaire et le* Reestman *Droit National. Bilan et Incertitudes Relatifs aux Evolutions Récentes de la Jurisprudence des Juges Constitionnel et Administrative Français*, RFDC 675 (2007).

[46] Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006-540DC, Nov. 19, 2004, para. 19, *Société de l'information* (Fr.) [hereinafter French CC, *Société de l'information*]; French CC, *Constitutional Treaty*, *supra* note 12, at para. 13.

[47] Though it has been suggested as limited to those principles specific to the French constitutional order. *See* Conseil d'Etat, Assemblée - Arrêt du 8 février 2007 (req. 257341 et 257534), Société Arcelor Atlantique et Lorraine et autres, *Conclusions de Mattias Guyomar et Note de Paul Cassia, "Le droit Communautaire dans et sous la Constitution Française*," 43 Q. REV. EUR. L. 378, 385 (2007).

[48] Jacqueline Dutheil de la Rochère, *French Conseil Constitutionnel: Recent Developments*, *in* EUROPE'S CONSTITUTIONAL CHALLENGES IN THE LIGHT OF THE RECENT CASE LAW OF NATIONAL CONSTITUTIONAL COURTS: LISBON AND BEYOND 18, 21 (José Marian Beneyto & Ingolf Pernice eds., 2011).

[49] Peter Lerche, *Die Europäische Staatlichkeit und die Identität des Grundgesetzes, in* RECHTSSTAAT ZWISCHEN SOZIALGESTALTUNG UND RECHTSSCHUTZ, FESTSCHRIFT FÜR KONRAD REDEKER 131 (Bern Bender, Rüdiger Breuer, Fritz Ossenbühl & Horst Sendler eds., 1993).

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judgment.[50] In contrast to the ruling, many commentators hold the view that the EU's complex constitutional[51] and federal[52] structures elude classification under traditional international law,[53] especially with regard to the evolving competences in external relations.[54] Regrettably, the German CC was unwilling to refine its understanding in light of these developments.[55]

Grimm has suggested a different reading of the German CC's approach to sovereignty. Rather than the "all or nothing" approach commonly identified, he suggests the issue is one of degree of sovereignty, expressible in terms of "more or less."[56] The central fallacy is that this assumes that sovereignty—or individual sovereign powers—is measurable by a commensurable metric that allows comparisons between the Member State and EU levels.[57] Ultimately, Grimm attempts to side step this issue, by arguing that surely the entity that "decides about the allocation of sovereign powers"[58] retains sovereignty. This

[50] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2134/92; 2 BvR 2159/92; (Oct. 12, 1993) 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 [hereinafter German CC, *Maastricht*].

[51] Koen Lenaerts, *De Rome à Lisbonne, la Constitution Européenne en Marche?*, 44 C.D.E. 229, 241 (2009); Koen Lenaerts & Marlies Desomer, *New Models of Constitution-Making in Europe: The Quest for Legitimacy*, 39 COMMON MKT. L. REV. 1243 (2002).

[52] Schütze, *supra* note 24, at 1069.

[53] Michael Dougan, *The Treaty of Lisbon 2007: Winnings Minds, not Hearts*, 45 COMMON MKT. L. REV. 692, 698 (2008).

[54] Which are still dominated by inter-governmental action. Franz Cromme, *Eine Konsequenz aus der Krise: Fortentwicklung der EU als Staatenverbund?*, 6 DIE ÖFFENTLICHE VERWALTUNG [DÖV] 212 (2012). On the current state of the CFSP, see Piet Eeckhout, *The EU's Common and Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism*, *in* EU LAW AFTER LISBON 265 (Andrea Biondi, Piet Eeckhout & Stefanie Ripley eds., 2012).

[55] On the rich debate in this area, see FLORENCE CHALTIEL, LA SOUVERAINETÉ DE L'ETAT ET L'UNION EUROPÉENNE, L'EXEMPLE FRANÇAIS (2000); NEIL MACCORMICK, QUESTIONING SOVEREIGNTY (1999); ANNE PETERS, ELEMENTE EINER THEORIE EINER VERFASSUNG EUROPAS 163 (2001); UTZ SCHLIESSKY, DIE WEITERENTWICKLUNG VON BEGRIFFEN DER STAATSLEHRE UND DES STAATSRECHTS IM EUROPÄSICHEN MEHREBENENSYSTEM (2004); SOVEREIGNTY IN TRANSITION (Neil Walker ed., 2006).

[56] Dieter Grimm, *Defending Sovereign Statehood Against Transforming the European Union into a State*, 5 EUR. CONST. L. REV. 366 (2009); Armin Steinbach, *The Lisbon Judgment of the German Federal Constitutional Court*, 11 GERMAN L.J. 372 (2010). The approach has tentatively featured in the preceding Maastricht ruling, which was heavily criticized. *See* Meinhard Schröder, *Das Bundesverfassungsgericht als Hüter des Staates im Prozeß der Europäischen Integration - Bemerkungen zum Maastricht-Urteil*, 6 DVBl 318 (1994); Hermann-Josef Blanke, *Der Unionsvertrag von Maastricht*, 46 DÖV 421 (1993).

[57] Thym, *supra* note 25, at 42. Similarly, but referring to the specific difficulty in determining if a shift of an individual power to the EU has occurred, see Gunnar Beck, *The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict Between Right and Right in Which There is no Praetor,* 17 EUR. L.J. 482 (2011).

[58] Grimm, *supra* note 56, at 367.

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approach, though, appears too broad to adequately account for the German CC's argument. If a Member State were to retain the single power to independently re-claim all other transferred powers from the EU, that would arguably suffice to preserve state sovereignty under Grimm's test. As shall be explored below, though, it seems highly unlikely the German CC would endorse such a minimalistic red line. Strikingly, Miriam Aziz's account of the dividing line in the German academic debate on this issue in essence still rings as true today as it did in 2001, almost eight years before the *Lisbon* Judgment of the German CC.[59]

Little has changed since then and, indeed, the German CC's discussion of sovereignty, at times, reads like a textbook lecture[60] from the Westphalian era of international law. The realities of globalization have, fortunately, long overtaken this antiquated framework and call the enduring relevance of the single nation state into question.[61] The eroding influence of individual European nations in the face of the rising economic powers in Asia and global challenges such as climate change more than ever demand solutions of a divided international community.

A meaningful European voice in these debates may be secured through the combined influence and "pooled" sovereignty that European integration offers,[62] as the Czech CC and the Polish CT have indeed acknowledged. This will, however, inevitably require certain limitations on *national* sovereignty[63] in favor of coordinated action, as otherwise meaningful international cooperation,[64] particularly through a deepening legal commitment to the European Union, cannot be achieved.

II. Limited Transfer of Sovereign Powers

The European Constitutional Courts are in agreement that the transfer of sovereign powers, or "competences," to the EU is limited. This section will, therefore, commence with a comparative view on these red lines to integration. There is an equally strong agreement that the essential *Kompentenz-Kompetenz* has not been transferred to the EU.

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[59] *See Sovereignty Lost, Sovereignty Regained? The European Integration Project and the Bundesverfassungsgericht* (EUR. UNIV. INST. Working Paper No. 2001/31, 2001).

[60] Thym, *supra* note 25, at 33.

[61] *See* PETER SALADIN, WOZU NOCH STAATEN? (1995).

[62] Bieber, *supra* note 16, at 398.

[63] *Id.* at 400 (rejecting the use of this term in a European context).

[64] Carl Lebeck, *National Constitutionalism, Openness to International Law and Pragmatic Limits of European Integration – European Law in the German Constitutional Court from EEC to the PJCC*, 7 GERMAN L.J. 907 (2006).

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However, Lock determines that this assertion is untenable in light of the Lisbon Treaty. An analysis of the soundness of his argument will conclude this section.

1. Comparative Analysis

1.1 German Constitutional Court

The German CC has used the eternity clause of Article 79, paragraph 3 of the German Basic Law in conjunction with the principle of democracy to deduce an arbitrary[65] catalogue of non-transferable subject matters that are enforceable through a constitutional identity review.[66] It stated that "substantive and formal criminal law," "the monopoly on the use of force," both internal and external, the "fundamental fiscal decisions on public revenue and public expenditure . . . ," as well as "decisions on the shaping of living conditions in a social state" and "decisions of particular cultural importance" must remain the prerogative of individual states.[67] This catalogue was partially foreshadowed by an earlier paper[68] by former Judge Di Fabio. The German CC further mandates that a transfer of individual sovereign powers be limited, narrowly tailored and, in principle, repealable.[69] A blanket authorization that constitutes a transfer of *Kompetenz-Kompentenz* would be held unconstitutional.[70]

Criticism of this reading of the eternity clause has been vocal. Article 79, paragraph 3 of the German Basic Law was intended to prevent a recurrence of dictatorship,[71] not provide "protection from Europe."[72] It does not afford protection of German sovereign statehood

[65] Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja zu Deutschland!",* 10 GERMAN L.J. 1241, 1250 (2009); Doukas, *supra* note 24, at 882.

[66] German CC, *Lisbon*, *supra* note 10, at para. 240.

[67] *Id.* at paras. 252–260; Rike U. Krämer wonders whether even these matters can be adequately dealt with in national isolation, see *Looking through Different Glasses at the Lisbon Treaty: The German Constitutional Court and the Czech Constitutional Court*, *in* THE GERMAN CONSTITUTIONAL COURT'S LISBON RULING: LEGAL AND POLITICAL-SCIENCE PERSPECTIVES 18 (Andreas Fischer-Lescano, Christian Joerges & Arndt Wonka eds., 2010).

[68] Udo Di Fabio, *Some Remarks on the Allocation of Competences between the European Union and its Member States*, 39 COMMON MKT. L. REV. 1289, 1297 (2002).

[69] German CC, *Lisbon*, *supra* note 10, at paras. 236–239.

[70] *Id.* at para. 233.

[71] Matthias Herdegen, *Article 79, in* GRUNDGESETZ-KOMMENTAR para. 63 (Theodor Maunz & Günter Dürig eds., 67th ed. 2013).

[72] Tobias Herbst, *Legale Abschaffung des Grundgesetzes nach Art. 146 GG?*, ZEITSCHRIFT FÜR RECHTSPOLITIK 33, 35 (2012).

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as such, and certainly does not create individual *Kompetenzreservate*–reservations of competence.[73]

The catalogue is difficult to reconcile with the present level of integration and leads to the paradoxical conclusion that the supposed "Masters of the Treaties" require protection from an overbearing European Union. The German CC conveniently ignores significant transfers of power that have already taken place.[74] For instance, European States that adopted the Euro as their common currency have, arguably, already relinquished a multitude of historic sovereign rights, such as those to mint and issue coins.[75] No calls of objection were uttered in Karlsruhe, the seat of the German CC, on this point, perhaps precisely because this sovereign power had already been transferred.[76] This has led to the not wholly unjustified accusation that the German CC tailored its argument to the realities of European integration at the time of the *Lisbon* Judgment,[77] rather than bothering with objective standards of review.

It would be alarmist to suggest that the German CC has established an absolute red line with regard to the sensitive subject matter catalogue, though.[78] Considering the vaguely sketched principles and the general mindfulness of the present integration level that the Court displays, it is unlikely that this was the intent. Rather, integration that touches upon these areas will likely require more expansive justification and safeguards in order to be constitutionally acceptable.[79] Arguably, the Court merely wished to prevent an integration process that deteriorates to automatic and self-fulfilling transfer of sovereign powers to the EU, removed from adequate control through the Member States, and especially their Constitutional Courts.[80]

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[73] *See id.* at 35; *see also* Mathias Jestaedt, *Warum in die Ferne schweifen, wenn der Maßstab liegt so nah? Verfassungshandwerkliche Anfragen an das Lissabon-Urteil des BVerfG*, 48 STAAT 505 (2009); *see also* Dieter Grimm, *Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union. Zum Lissabon-Urteil des Bundesverfassungsgerichts*, 48 STAAT 490 (2009).

[74] *See* Beck, *supra* note 57, at 481.

[75] JEAN BODIN, 10 LES SIX LIVRES DE LA RÉPUBLIQUE ch. XX (10th ed. 1986) (1583) (describing it as the "*marque de souverginetéʺ*). *See also* TOMMASO PADOA-SCHIOPPA, THE ROAD TO MONETARY UNION IN EUROPE 35 (1994).

[76] *See* Wendel, *supra* note 15, at 126; *see also* Arnold Schönberger, *Lisbon in Karlsruhe: Maastricht's Epigones at Sea*, 10 GERMAN L.J. 1209 (2009).

[77] *See* Bieber, *supra* note 16, at 392.

[78] *See* Beck, *supra* note 57, at 483; *see also* Christian Wohlfahrt, *The Lisbon Case: A Critical Summary*, 10 GERMAN L.J. 1285 (2009).

[79] *See* Frank Schorkopf, *The European Union as An Association of Sovereign States*, 10 GERMAN L.J. 1230 (2009).

[80] *See* Paul Kirchhof*, Die Wahrnehmung von Hoheitsgewalt durch Mitgliedstaaten und Gemeinschaftsorgane*, HUMBOLDT FORUM RECHT 13 (1997).

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1.2 Czech Constitutional Court

The Czech CC somewhat departed from the review of European law against the "fundamental core" of the Czech Constitution that it had previously established in the *Sugar Quotas* case, relying on Article 9, paragraph 2 of the Czech Constitution.[81] By expanding the test to the constitutional order as a whole, the court avoided the need to specify in more detail which constitutional provisions were encompassed by this fundamental core.[82] Instead, it concluded that pursuant to Article 10(a), paragraph 1 of the Czech Constitution, read in conjunction with Article 1, paragraph 1 and Article 9, paragraph 2, the conferral of powers onto the EU may not violate "the Czech Republic [as a] sovereign and unitary state governed by the rule of law, established on respect for the rights and freedoms of the human being and citizens."[83]

From this, the Czech CC drew core areas of subject matters that were particularly sensitive, but explicitly refused to identify individual, non-transferable powers as limits to EU integration, even when specifically invited to do so by the petitioners in the *Lisbon II* ruling.[84] This is another marked difference to the German ruling. Any transfer of power is further required to be sufficiently clear to allow for accurate predictions of which powers have been conferred onto the EU.[85] The Czech CC, similar to its counterparts, also prohibits handing over *Kompentenz-Kompetenz* to the European Union.[86] Following a general stance of judicial "minimalism,"[87] the Czech CC left its Parliament a wide margin of discretion in determining the limits of EU integration.[88] Institutionally, the Court clearly perceives itself as an *ultima ratio* intervener;[89] the contrast to German CC's self-perception could hardly be more pronounced.

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[81] Ústavní soud České republiky 08.03.2006 (ÚS) [Czech Constitutional Court decision of Mar. 8, 2006], PL. ÙS 50/04 (hereinafter Czech CC, *Sugar Quotas*).

[82] Petr Briza, *The Constitutional Court on the Lisbon Treaty, Decision of 26 November 2008*, 5 EUR. CONST. L. REV 148 (2009).

[83] Czech CC, *Lisbon I*, *supra* note 11, at para. 130.

[84] *Id.* at para. 111 (showing that applicants evidently had the German CC's ruling in mind when making this request).

[85] *See* Briza, *supra* note 82, at 152.

[86] Czech CC, *Lisbon I*, *supra* note 11, at para. 146.

[87] *Id.* at para. 113.

[88] *See id.* at para. 109; *see also* Czech CC, *Lisbon II*, *supra* note 11, at para. 111.

[89] Czech CC, *Lisbon I*, *supra* note 11, at para. 109.

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1.3 Polish CT

To the Polish CT, certain inalienable competences are an expression of Polish sovereignty and therefore constitute, *inter alia*, the constitutional identity of Poland.[90] While the Court recognized the difficulty in setting a "detailed catalogue of inalienable competences,"[91] it did specify certain sensitive subject matters that are resistant to European integration. These were, namely, fundamental principles of the constitution, individual rights, national identity, human dignity, social justice, associated principles required for a democratic state, the principle of subsidiarity, and the prohibition against transferring *Kompetenz-Kompetenz*.[92]

Pursuant to Article 90 of the Polish Constitution, any transfer of individual, sovereign powers must only occur in certain, limited subject matters. This is said to encompass a prohibition to "confer all the competences of a given organ of the state, confer competences in relation to all matters in a given field and confer the competences in relation to the essence of the matters determining the remit of a given state organ."[93] However, the Polish CT sees the ultimate responsibility for safeguarding sovereignty and democratic legitimacy in the hand of the legislature.[94]

1.4 French CC

The Lisbon judgment of the French CC also established certain sensitive subject matters that had already been hinted at in the previous Maastricht ruling.[95] The Court drew up barriers when a transfer of competences to the EU (1) renders France incapable of opposing an EU decision, (2) confers decision making power onto the European Parliament (EP), or (3) deprives France of any effective decision making power in general.[96] Additionally, the transfers of competences relating to border control, as well as "judicial cooperation in civil" and "criminal matters" were identified as necessitating further constitutional amendments.[97]

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[90] Polish CT, *Lisbon*, *supra* note 13, at para. 2.1.

[91] Polish CT, *Lisbon*, *supra* note 13, at para. 2.1.

[92] *See id.* at para. 2.1.

[93] *See id.* at paras. 2.1, 2.5.

[94] *See id.* at paras. 2.1, 2.6.

[95] Conseil constitutionnel [CC] [Constitutional Court], decision No. 92-308 DC, Apr. 9, 1992, para. 14 [hereinafter French CC, *Maastricht I*].

[96] French CC, *Lisbon*, *supra* note 12, at para. 20.

[97] French CC, *Lisbon*, *supra* note 12, at paras. 18, 19.

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That being said, none of these limits truly endanger European integration. They may be overcome through revisions of the French Constitution, which is a routine affair in the run-up to major treaty revisions in France. Once such an amendment has passed, there is generally no further legal recourse. The French CC has long ruled itself incapable of reviewing constitutional amendments as to their constitutionality.[98] The last word is thereby effectively left to the *pouvoir constituent dérivé*. This is all the more remarkable as Article 89, paragraph 5 of the French Constitution could conceivably be interpreted as setting an enduring limit to European integration, much like the eternity clause of the German Basic Law. However, the French CC, possibly due to differences in its institutional self-perception, does not appear to consider this an interpretative possibility.

2. Has Kompetenz-Kompetenz *Been Transferred?*

Whether European Constitutional Courts are correct in determining that *Kompetenz-Kompetenz* has not yet been transferred to the EU shall now be critically examined. Particularly the simplified revision procedures of Article 48, paragraph 6(a), paragraph 7 TEU (b), as well as the provisions of Article 352 Treaty on the Functioning of the European Union (TFEU) (c) and Article 3, paragraph 2 and Article 216 TFEU (d) raise doubts in this regard, which also feature prominently in the Lock's account.

2.1 Article 48, Paragraph 6 TEU

Concerns regarding Article 48 paragraph 6 TEU can be dismissed as it expressly states that it cannot increase European Union powers. While it does change the requirements for amending the EU treaties, approval by Member States remains necessary, pursuant to national constitutional requirements.[99]

2.2 Article 48, Paragraph 7 TEU

The situation with the provision of Article 48, paragraph 7 TEU is more complicated. It allows the Council to, *inter alia*, introduce a qualified majority requirement for certain decisions. National parliaments are afforded a veto power against such amendments. Lock alleges that this constitutes two significant shifts in paradigm that have, in his view, led to a de facto transfer of *Kompetenz-Kompetenz*.

[98] *See* Conseil constitutionnel [CC] [Constitutional Court], decision No. 2003-469 DC, Mar. 26, 2003, paras. 2, 3 (hereinafter French CC, *L'organisation décentralisée de la République*); *See* Reestman, *supra* note 15, at 389; French CC, 92-313 DC, *Maastricht Treaty III*, paragraph 2 (hereinafter French CC, *Maastricht Treaty III*); Jacques Ziller, *Sovereignty in France: Getting Rid of the Mal de Bodin*, *in* SOVEREIGNTY IN TRANSITION 271 (Neil Walker ed., 2003).

[99] *See* Lock, *supra* note 14, at 411.

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First, he laments the fact that only national parliaments, as opposed to Member States, may exercise the veto power.[100] However, there appears to be no significant difference between the two. Generally speaking, a government representing a Member State must enjoy the confidence of its national parliament in order to remain in power and determine foreign policy. Perhaps Lock intends to make a broader point about a possible disconnect between a government advocating a move to qualified majority vote on the Council and the opinion of the respective national parliament. Yet the decision to move from unanimity to qualified majority, and the authority to vote accordingly on the Council, often engages national constitutional safeguards,[101] which may include mandatory parliamentary consultations. Even if there should be no such safeguards, one can assume that the government would assure itself of a majority in Parliament in order to avoid the embarrassment and political backlash associated with a subsequent veto. It is therefore difficult to see where a significant institutional disconnect between parliament, government, and the Member State they represent should arise. While the shift is correctly observed by Lock, the postulated difference seems to be confined primarily to semantics.

Second, Lock points to the fact that, instead of requiring an affirmative vote, a veto must be exercised by national parliaments in every individual case. However, nothing in the Lisbon Treaty prevents the national constitutional order from imposing further safeguards in favor of national parliaments. In fact, the Lisbon Treaty has little to say about national procedures, particularly on the introduction of a simplified treaty revision mechanism.[102] This is hardly surprising, as the European lawmaker is generally not in the habit of prescribing procedural rules for the national implementation of EU law.[103] Undoubtedly, once adopted, a move to a qualified majority decision would diminish an individual Member State's overall influence in the EU. This would logically require the Member State to have consented beforehand. Under these circumstances, it would appear possible to interpret it as an ordinary conferred competence from the Member State onto the EU, rather than one of *Kompetenz-Kompetenz*.

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[100] *Id.*

[101] For a comparative analysis, see Phillip Kiiver, *German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures*, 10 GERMAN L.J. 1287 (2009).

[102] *See* Lock, *supra* note 14, at 411 (seeming to acknowledge that this is not an obvious example).

[103] Phillip Kiiver, *The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU*, 5 EUR. L.J. 580, 587 (2010).

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2.3 Article 352 TFEU

While Article 352 TFEU mandates a decision by the Council and the EP, it forgoes approval by Member States. Ultimately, this provision may enable the EU, with endorsement of the Council, to expand its powers independently from Member States, a significant concern to the German CC.[104] However, the national legal order is again free to prescribe additional safeguards and Member States' approval on the Council remains a requirement. The argument advanced by Lock that there is a significant difference between the Council and the Member State perhaps suffers from a similar "formalistic"[105] understanding of the Council that he previously dismissed with regard to the German CC's understanding of sovereignty. While it is beyond reproach to state that in a formal sense the Council is an organ of the EU, it must be noted that the bodies' decisions are conceived, lobbied, and eventually pre-determined on an inter-governmental level, much to the detriment of the non-governmental European Commission and Parliament. Lock appears to conveniently disregard this fact in his assertion that Article 352 TFEU has led to a shift in the balance of power between Member States and the EU. The reality is that the Member States remain the dominant actors in European politics, even if they are somewhat obscured by Council.

2.4 Article 3, Paragraph 2 and Article 216 TFEU

Finally, the provisions of Article 3, paragraph 2 and Article 216, paragraph 1 TFEU merit closer examination. These provisions codify the ECJ case law on implied powers of the European Union in external relations.[106] While it is certainly difficult to predict whether this will inflate the powers of the EU in the future,[107] it is clear that there is considerable potential for such a scenario. Ultimately, though, power is only transferred subject to the support of Member States and is certainly not beyond revision should undesirable consequences ensue. In closing, Lock concludes that *Kompetenz-Kompetenz* has been transferred through the provisions of the Lisbon Treaty.[108] Upon closer examination, it appears more accurate to hold that while there are tangible areas of concern, for the time being the verdict is premature. The EU may arguably enjoy a degree of *Kompetenz-*

[104] German CC, *Lisbon*, at para. 328.

[105] *See* Lock, *supra* note 14, at 412; *see also* Grimm, *supra* note 56, at 369.

[106] Comm'n v. Council, CJEU Case 22/70, 1971 E.C.R. 263.

[107] Marise Cremona, *Defining competence in EU external relations: lessons from the Treaty reform process*, *in* LAW AND PRACTICE OF EU EXTERNAL RELATIONS - SALIENT FEATURES OF A CHANGING LANDSCAPE 61 (Alan Dashwood & Marc Maresceau eds., 2008)

[108] *See* Lock, *supra* note 14, at 413, 415.

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Kompetenz in certain narrow and previously conferred areas.[109] The provisions of the Lisbon Treaty, however, do not conclusively support this claim, nor do they bring about a fundamental shift in the overall legal framework of the EU or its politics, which both continue to be dominated by the Member States.

III. The Democratic Deficit of the European Union

Once again, it is the German CC that overshadows its European counterparts with the depth of its analysis. The German ruling, with its bleak outlook on the EU's democratic credentials, will be the focus of this section (1). Criticism will focus on the concept of democracy (1.1) expressed in the German ruling, particularly the national quotas of the European Parliament (EP) (1.2), and the alleged lack of a constituent European People (1.3). The argumentative line of the German CC appears to trap the EU in a perpetual democratic deficit, constituting a potentially insurmountable red line to integration (2). The section will then compare parliamentary oversight as mandated by some European Constitutional Courts, but ultimately conclude that these do not constitute red lines to integration (3).

1. As Seen from Karlsruhe: The State of European Democracy

The German CC acknowledges that democratic principles may be implemented differently than German constitutional principles on a European level.[110] Nonetheless, it views the impact of the transfer of powers on democratic legitimacy in familiar binary dynamics.[111] Based on a vague conception of democracy,[112] the Court argues that the only alternative to German sovereignty and statehood is a European state with a constituent European people.[113]

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[109] Jochen Abr. Forwein, *Das Maastricht Urteil und die Grenzen der Verfassungsgerichtsbarkeit*, 54 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 7 (1994); Udo Di Fabio, *Der neue Art.23 des Grundgesetzes*, 13 STAAT 197 (1993).

[110] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] 2 BVR 2134/92, 89 BVERFGE 155 (Oct. 12, 1993).

[111] *See* Bieber, *supra* note 16, at 403.

[112] *See* Erik Oddvar Eriksen & John Erik Fossum, *Bringing European Democracy Back In – Or How to Read the German Constitutional Court's Lisbon Treaty Ruling*, 17 EUR. L.J. 153 (2011) (discussing possible conceptions).

[113] German CC, *Lisbon*, *supra* note 10, at paras. 276–281.

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1.1 Conception of Democracy

What can be discerned is that the German CC appears to emphasize egalitarian, deliberative,[114] and majoritarian elements of democratic theory, which, in the *Lisbon* Judgment, seem modeled after a centralized state.[115] Domestically, under the German mixed-member proportional representation system, the German CC certainly does not require perfect proportional representation.[116]

On a European level, the German CC translates this to a commitment to an instrumentalist function of national sovereignty as a safeguard for democratic participation with regard to the EU.[117] One of the most convincing challenges to a supposed connection between national sovereignty and democracy is that elected officials must, as their *raison d'être*, secure meaningful influence in order to shape the policy and conduct in areas of concern to society.[118] As these areas of concern are being further globalized throughout the past decades, political influence must likewise find ways to expand beyond the limitations of the individual state and beyond national sovereignty.

This is, perhaps, best illustrated against the backdrop of global climate change. For instance, a nation that is threatened by the rising sea levels, but itself does not produce any significant greenhouse emissions, must seek, through its elected officials, meaningful influence over global climate policy. As the influence of individual nations is continuously eroding, particularly for smaller countries with limited economic weight, this translates into a positive obligation for politicians to seek deeper international engagement and integration wherever feasible. Otherwise, the democratic elections held in the nation would not be meaningful in a sense that they cannot, as a matter of *Realpolitik*, shape policy in a matter of utmost importance to the people. This would render the much-scorned project of European integration, and the related increase in influence of the unified Member States, the savior, rather than the bane of meaningful democratic participation.

1.2 National Quotas for the EP

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[114] Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REV. 5 (2001).

[115] *See* Doukas, *supra* note 24, at 873; *see also* Tomuschat, *supra* note 9, at 1260; *see also* Schorkopf, *supra* note 79, at 1224.

[116] The tolerance of the 5 percent hurdle (*Sperrklausel*) alone attests to that.

[117] *See* DIETER GRIMM, SOUVERÄNITÄT – HERKUNFT UND ZUKUNFT EINES SCHLÜSSELBEGRIFFS 123 (2009) ("*Souveränität ist heute auch Demokratieschutz*" ["These days, sovereignty also safeguards democracy"]).

[118] *See* Fritz Wilhelm Scharpf, *Demokratie in der transnationalen Politik*, *in* POLITIK DER GLOBALISIERUNG 228, 236 (Ulrich Beck ed., 1998); *see also* MICHAEL ZÜRN, REGIEREN JENSEITS DES NATIONALSTAATES 9 (1998).

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To the German CC, European democracy in general shows "an assessment of values in contradiction to the basic concept of a citizens' Union"[119] and an "excessive degree of federalisation."[120] This democratic deficit of the EU is said to rest in no small part on the shoulders of the European Parliament. This structure is said to unduly emphasize the equal treatment of states over equal representation of voters. Particularly national quotas based on population size are deemed in conflict with democratic principles. Pursuant to Article 14, paragraph 2 TEU, each Member State is afforded a minimum of six seats and no more than 96 seats on the EP. This equates to a German MEP representing about 857,000 voters, while a Maltese MEP represents only 67,000.[121]

Rejecting this as democratically deficient, as Wohlfahrt does, is certainly a defensible position.[122] Taken as an abstract rule, however, this benchmark would attest a democratic deficit to many liberal democracies. The US Senate, for instance, suffers from a similar distortion, where every state is represented by two Senators, regardless of population size. The German CC itself tolerates such a practice for the smaller German States on the German Federal Council.[123] It is somewhat perplexing why the Court does not transfer this reasoning to the European Parliament, thereby acknowledging the need to fulfill two separate goals: To respect, in principle, the equality of the Member States, regardless of population size and equally respect the weight of an individual vote. Barring the introduction of a second chamber, the European Parliament will continue to be torn between these principles and that as such does not render it democratically deficient.

The fact that the German CC would beg to differ on a European level shows that it disregards the need to afford minorities special representation,[124] the inherent flaws of the majoritarian premise,[125] and is overly nation state centered.[126] More importantly, it fails to adequately discuss alternative models of democracy,[127] more flexible conceptions of

[119] German CC, *Lisbon*, *supra* note 10, at para. 287.

[120] *Id.* at para. 288.

[121] *Id.* at para. 285.

[122] *See* Wohlfahrt, *supra* note 78, at 1279.

[123] German CC, *Lisbon*, *supra* note 10, at para. 286.

[124] *See* Schönberger, *supra* note 76, at 1207; *see also* Bieber, *supra* note 16, at 402.

[125] *See* RONALD DWORKIN, FREEDOM'S LAW – THE MORAL READING OF THE AMERICAN CONSTITUTION 15 (1996) (critiquing extensively).

[126] *See* Tomuschat, *supra* note 9, at 1261.

[127] *See* Stefan Haack, *Demokratie mit Zukunft? Zwei Alternativen der Neukonzeption einer Staatsform*, 67 JURISTENZEITUNG 753 (2012); *see also* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 193 (1989); *see also* DAVID HELD, MODELS OF DEMOCRACY 337 (1996); *see also* ANGELA AUGUSTIN, DAS VOLK DER EUROPÄISCHEN UNION (2000); PETER HÄBERLE, EUROPÄISCHE VERFASSUNGSLEHRE (2007); *see also* UTZ SCHLIESSKY, SOUVERÄNITÄT UND LEGITIMITÄT VON

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democratic principles[128] and dismisses out of hand arguments emphasizing the *sui generis* nature of the EU.[129]

One of the central arguments of the Court further appears circular in nature. In essence, the German CC is stating that a transfer of competences to the EU, even where duly authorized by the German Parliament, inevitably leads to a loss of national democratic accountability. At a certain point, this must be compensated by infusing the democratically deficient European Union with national democratic legitimacy, which the Court suggests is primarily achieved through more national, parliamentary oversight. To the Court, the EP is a mere supplemental source of democratic legitimacy.[130] The essence of this argument, though, is that, regardless of efforts to delegate to the EU, the German Parliament is eventually forced to either meticulously oversee the exercise of powers by the EU through additional parliamentary oversight, or continue to exercise the powers itself.[131]

1.3 A Constituent European People?

Further developing its bleak assessment, the German CC denies the existence of a constituent European People of which the EP can legitimately claim to represent. This additionally serves the function of dismissing claims that the existence of a constituent European People threatens German statehood. While the Court is certainly correct to point out that there is, at least currently, no such thing as a European "public"[132] that engages in political debate as within a nation state, this does not rule out the existence of a European People.

HERRSCHAFTSGEWALT: DIE WEITERENTWICKLUNG VON BEGRIFFEN DER STAATSLEHRE UND DES STAATSRECHTS IM EUROPÄISCHEN MEHREBENENSYSTEM (2004); *see also* Anne Peters, *European Democracy after the 2003 Convention*, 48 COMMON MKT. L. REV. 37 (2004); *see also* Giadomenico Majone, *Europe's Democratic Deficit: The Question of Standards*, 4 EUR. L.J. 5 (1998).

[128] FRITZ WILHELM SCHARPF, DEMOKRATIETHEORIE ZWISCHEN UTOPIE UND ANPASSUNG (1970)*;* Fritz Wilhelm Scharpf, *Democratic policy in Europe*, 2 EUR. L.J.136 (1996); Martin Nettesheim, *Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie – Wechselwirkungen bei der Herausbildung eines europäischen Demokratieprinzips*, *in* DEMOKRATIE IN EUROPA (Hartmut Bauer, Peter M. Huber & Karl Peter Sommermann eds., 2005).

[129] *See* Stefan Oeter *Federalism and Democracy*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 55, 56 (Armin v. Bogdandy & Jürgen Bast eds., 2009); *see also* Schönberger, *supra* note 76, at 1211, 1212; *see also* Halberstam & Möllers, *supra* note 65, at 1248; *see also* A. Moravcsik, *In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603 (2002).

[130] German CC, *Lisbon*, *supra* note 10, at para. 262.

[131] *See* Michael Blauberger, *Reinforcing the Asymmetries of European Integration*, in THE GERMAN CONSTITUTIONAL COURT'S LISBON RULING: LEGAL AND POLITICAL-SCIENCE PERSPECTIVES, 49 (Andreas Fischer Lescano, Christian Joerges & Arndt Wonka eds., 2010).

[132] German CC, *Lisbon*, *supra* note 10, at paras. 250–251.

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First, the German CC is mistaken in claiming that representation on the EP is inextricably linked to Member State nationality, as opposed to EU citizenship.[133] As Halberstam and Möllers have pointed out, an Italian citizen living in Lithuania votes for a representative on the Lithuanian contingent for the EP by virtue of his European, and not Italian, citizenship.[134] Furthermore, reference to a European People is made in various Articles of the Treaties, namely Article 9, paragraph 1 TEU, Article 10, paragraph 2 TEU and Article 14, paragraph 2 TEU. Even if this should only amount to tentative evidence of a European People, it is certainly more than non-existence.[135]

Second, it must remain doubtful that a European People can only come into being through a common language, history, and culture, as the German CC has asserted.[136] This "ethno-cultural approach"[137] is certainly a German peculiarity. In fact, historically, many European states have not achieved cultural homogeneity before statehood.[138] They remained multi-ethnic, often encompassing a wide variety of territory-based nationalities.[139] Furthermore, it is by no means evident that a high degree of homogeneity is at all desirable in a European Union that seeks to be "united in diversity,"[140] even if it were achievable. The modern phenomena of immigration and globalization are further eroding the antiquated belief in homogenous populations. Modern (western) societies are rapidly evolving under diverse cultural influences and even though many problems remain to be resolved, they can generally claim to embrace immigration in an atmosphere of overall tolerance, respect, and cooperation. Over time, these developments will hopefully render appearance, race, cultural heritage, language, religion, and many other supposed indicators less indicative of a given individual's "people."

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[133] *Id.* at para. 287.

[134] *See* Halberstam & Möllers, *supra* note 65, at 1242, 1249; *see also* CHRISTOFER LENZ, EIN EINHEITLICHES VERFAHREN FÜR DIE WAHL DES EUROPÄISCHEN PARLAMENTS 279, 280 (1995).

[135] The discussion is in fact much older than the Lisbon Judgment. *See* Dieter Grimm, *Does Europe need a Constitution?,* 1 EUR. L.J. 282, 295 (1995); *see also* Mancini, *supra* note 24, at 35.

[136] For a critical analysis see Tom Eijsbouts, *Wir sind das Volk: Notes about the Notion of "The People" as Occasioned by the Lissabon-Urteil*, 6 EUR. CONST. L. REV 199 (2010).

[137] Peter Van Elsuwege and Anneli Albi, *The EU Constitution, national constitutions and sovereignty: an assessment of a "European constitutional order"*, 29 EUR. L.J. 757 (2004).

[138] For instance the United Kingdom and France, see HOWARD RICHARDS, UNDERSTANDING THE GLOBAL ECONOMY 344 (2004).

[139] *See* Phillip White, *Globalization and Mythology of the Nation State*, *in* GLOBAL HISTORY: INTERACTIONS BETWEEN THE UNIVERSAL AND THE LOCAL 257 (Anthony Hopkins ed., 2006) (listing Belgium, Spain, Finland and Switzerland as examples).

[140] *The EU Motto*, EUROPEAN UNION, http://europa.eu/about-eu/basic-information/symbols/motto/index_en.htm. (last visited May 31, 2014).

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Third, it appears evident that in a globalized world "no entity can pretend to represent totally and exclusively its component individuals."[141] This does not render the state as such a "myth,"[142] as the German CC correctly points out, but it demonstrates that tight cultural homogeneity is certainly not an essential requirement for a constituent "People." After all, the notion of a pre-constitutional German *Kulturgemeinschaft*[143] (cultural community) which, united as one "People" gave itself the "Basic Law,"[144] was, even at the time, little more than an exercise in constitutional fiction. The German Basic Law, apart from never being put to a referendum, in fact built upon a conception of a German "People"[145] that was at the time hardly 100 years old and was limited essentially to those central European States of the dissolved Holy Roman Empire that would constitute the German Empire in 1871. In one sense, this original approach was fairly broad by supposing widespread cultural homogeneity where, for centuries, populations had lived in a multitude of largely independent states. However, at the same time, even this broad approach was limited to exclude several historically German populations in other States of the former Holy Roman Empire for largely political reasons.[146] If one accepts that there was such a thing as a homogenous *Kulturgemeinschaft* of Germans within the Holy Roman Empire before the eighteenth century, then it appears that many were excluded for arbitrary reasons. Regardless, even if one assumes a core *Kulturgemeinschaft* formed the basis of the German "People," the Basic Law at first only applied to those Germans in the Western-occupied sectors; the arguably equally constituent people in the Soviet sectors were not a part of the original deliberation process.[147]

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[141] *See* Bieber, *supra* note note 16, at 400.

[142] German CC, *Lisbon*, *supra* note 10, at para. 224.

[143] Paul Kirchhof, *Die Identität der Verfassung in ihren unabänderlichen Inhalten*, *in* 1 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 775 (Josef Isensee & Paul Kirchhof eds., 1987).

[144] *See Basic Law for the Federal Republic of Germany*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, http://www.gesetze-im-internet.de/englisch_gg/. (last visited May 31, 2014) (displaying the English translation).

[145] *See* Hans D. Jarass, *Art. 116*, *in* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND KOMMENTAR para. 4a. (Hans D. Jarass & Bodo Pieroth eds., 12th ed. 2012) (explaining that German Basic Law limits the attribute "German" to those with German nationality or so-called *Status-Deutsche* [status Germans], which, *inter alia*, require a vaguely defined *deutsche Volkszugehörigkeit* [German ethnic origin], supposedly expressed through descent, language, upbringing, and culture).

[146] On this historical debate between a *Großdeutsche* [grand German] or *Kleindeutsche* [small German] solution, see Hans-Christof Kraus, *Kleindeutsch – Großdeutsch – Gesamtdeutsch? Eine Historikerkonktroverse der Zwischenkriegszeit*, *in* DEUTSCHE KONTROVERSEN – FESTSCHRIFT FÜR ECKHARD JESSE 71 (Alexander Gallus, Thomas Schubert & Tom Thieme eds., 2013); The Frankfurt Assembly in fact excluded the German speaking parts of the Austrian Empire in a failed attempt to secure overall Prussian leadership under a constitutional monarchy.

[147] Though it must be added in fairness that the German Basic Law was intended as a provisional constitution to be replaced in the event of reunification. *See* Hans D. Jarass, *Einleitung*, *in* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND KOMMENTAR para. 1 (Hans D. Jarass & Bodo Pieroth eds., 12th ed. 2012).

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Rather than requiring a constituent *Kulturgemeinschaft* and the myth of cultural homogeneity, statehood is and has been a product of *Realpolitik*, a consensus of broadly shared values and cultural similarities. In this regard, much the same can be said of the European Union.

2. The German Nuclear Option?

After the aforementioned argument, one would have expected the German CC to mandate fundamental reforms before permitting ratification of the Lisbon Treaty. Astonishingly, the German CC arrives at a very different and somewhat paradoxical conclusion: Because the EU is not a state, it must only fulfill the democratic requirements of the Basic Law to a lesser degree, which, it is followed, the EU adequately accomplishes.[148] This surprising conclusion, though, appears to lead the EU to an argumentative pitfall. The German CC forbids European integration to a point that would raise the EP to rival the *Bundestag*, and the EU to the level of German statehood. Therefore, even if the EU's democratic deficit could conceivably be overcome through democratic reform and statehood as the German CC contends, Germany is constitutionally forbidden from supporting such democratic reforms. In other words, the very path that would render deeper integration democratically permissible, namely by democratically reforming the EU, is forbidden under the German Basic Law and the EU is therefore left frozen in what appears to be a perpetual "democratic deficit."[149] Whether this necessarily equates to a "red line" to integration is more difficult to discern. The Court essentially indulges in a discussion of integration steps that are neither "taken, nor envisaged by the Lisbon treaty,"[150] and speculation as to possible reactions to deeper integration leaves the solid ground of scientific inquiry.

That being said, it is certainly conceivable that the democratic deficit will be used to prevent further integration. Thym speculates that both *ultra vires* and human rights considerations[151] may eventually be merged by the German CC into an expanded version of the constitutional identity review.[152] Considering the expansive reading afforded to Article 38 (Right to Vote) and the democratic principle of Article 20, paragraph 3 of the German Basic Law,[153] this could potentially amount to a German "nuclear option," to be used at the

[148] *See* German CC, *Lisbon*, *supra* note 10, at paras. 261–264, 278.

[149] *See* Doukas, *supra* note 24, at 886; *see also* Halberstam & Möllers *supra* note 65, at 1252.

[150] *See* Grimm, *supra* note 56, at 365.

[151] *See* Thym, *supra* note 25, at 39, 40.

[152] German CC, *Lisbon*, *supra* note 10, at para. 240.

[153] *See* Wendel, *supra* note 15, at 110; *see also* Halberstam & Möllers, *supra* note 65, at 1256; Bieber, *supra* note 16, at 396; *see also* Christian Tomuschat, *Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts*, EuGRZ 489 (1993).

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sole discretion of the Court. Should, for instance, unwelcome reforms arise that the German CC deems threatening to German constitutional identity, it could either freeze integration or mandate that a key Member State withdraw from the EU. In spite of this potential, there is also a considerably less dramatic interpretation: The German CC merely intended to issue a warning that deeper integration will require remedies for the perceived democratic deficit, and that this may eventually necessitate a fundamental revision of the German Basic Law pursuant to Article 146 in order to accommodate the loss of German statehood.[154]

If that was truly the German CC's motive, however, the less stringent standard of review chosen should have rendered further investigation into the EU's democratic credentials superfluous. Instead, the unrestrained *obiter dicta* may perhaps be accounted for by a need to accommodate eurosceptics, both inside and outside of the Court. For if the intention truly was to establish a nuclear option against integration, it is not readily apparent why the Court should have found its existing arsenal lacking. Both *ultra vires* and the other existing reviews of EU law seem adequate to accommodate the need for credible threats towards deeper integration. Consequently, it is perhaps more likely that the Court intended to contribute to the wider debate surrounding the EU and its democratic credentials. The underlying, and perhaps never-ending, search for a comprehensive theory of EU democracy was not well served by the German CC. It primarily pointed out alleged deficits in evolving European institutions[155] and gave few practical guidelines for improvements, perhaps even freezing integration in certain regards.

Hopefully the discussion as to where exactly the EU is situated on a scale from international organization to full statehood will eventually be put to rest.[156] The discussion is wrought with domestically-inspired *a priori* assumptions of essential democratic principles and how they are best fulfilled on an a European level, thereby often blatantly ignoring the plurality of opinion on these matters among the democratic states of Europe. It has, furthermore, not proven particularly helpful in advancing new conceptions of European democracy, nor has it facilitated meaningful democratic reforms of the existing treaties.[157] Instead, the focus should be placed on the complicated interactions between national and international law embodied in the EU, the democratic common denominators of its Member States, and the question to which degree the EU can and should live up to

[154] *See* Lock, *supra* note 14, at 418. There is significant debate as to whether Germany could thusly join a European Federal State. *See* Hans D. Jarass, *Art. 146*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND KOMMENTAR no. 3 (Hans D. Jarass & Bodo Pieroth eds., 12th ed. 2012).

[155] *See* Bieber, *supra* note 16, at 402.

[156] Though plainly that leaves the task of politically engaging European voters, see Giadomenico Majone, *The Common Sense of European Integration*, 13 J. EUR. PUB. POL. 607 (2006).

[157] *See* Bieber, *supra* note 16, at 402.

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them. The closely related political question of whether European statehood is ultimately the desired goal of the integration project also begs a clear answer, even if popular opinion in many Member States is currently best described as ranging from skeptical to outright dismissive.

3. Comparative Analysis

The German *Bundestag*, according to the German CC, has a special *Integrationsverantwortung*—a responsibility towards this process of European integration.[158] Against the backdrop of a supposedly democratically deficient EU, the German CC felt that the *Bundestag* had not adequately lived up to that responsibility.[159] Accordingly, it mandated that ratification procedures must be upheld not only for amendments to the EU Treaties, but also the *Passerelle* clause,[160] the Flexibility Clause,[161] and the so-called Emergency Brake Procedure.[162,163] In addition, any military action of Member States on behalf of the EU would always require German parliamentary approval.[164] Some authors allege that the real reason behind the expansive Parliamentary oversight is to ensure the continuing engagement of the Court with European integration.[165]

By contrast, the Czech CC appears more inclusive in terms of the democratic credentials of the EU. According to the Court, the democratic legitimacy of the EU arises from two equal sources: The parliaments of Member States and the European Parliament.[166] Interestingly, the Court dismissed objections raised against the EP by referring to precisely this dual nature. Only if the EP were the sole source of democratic legitimacy would the Court find

[158] German CC, *Lisbon*, *supra* note 10, at para. 236.

[159] On the complicated interactions between national parliaments and the EP, see Richard Corbett, *The Evolving Roles of the European Parliament and of National Parliaments*, *in* EU LAW AFTER LISBON 248 (Andrea Biondi, Piet Eeckhout & Stefanie Ripley eds., 2012).

[160] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 48, para. 7, Dec. 13, 2007, 2007 O.J. (C 306).

[161] Consolidated Version of the Treaty on the Functioning of the European Union art. 352, May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU].

[162] *Id.* art. 48, para. 2; *id.* art. 82, para. 3; *id.* art. 83, para. 3.

[163] German CC, *Lisbon*, *supra* note 10, at paras. 307–321.

[164] German CC, *Lisbon*, *supra* note 10, at para. 388.

[165] Mathias Ruffert, *Nach dem Lissabon Urteil des Bundesverfassungsgerichts – zur Anatomie einer Debate*, 7 ZSE 388 (2010); Claus Dieter Classen, *Legitime Stärkung des Bundestages oder verfassungsrechtliches Prokrustesbett? Zum Urteil des BVerfG zum Vertrag von Lissabon*, JZ 881, 886 (2009).

[166] Czech CC, *Lisbon II*, *supra* note 11, at paras. 134–139.

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fault with the provision of Article 14, paragraph 2 TEU.[167] For the Czech CC, true democracy is not solely achievable within the confines of sovereign statehood.[168] As a consequence, the Court recommended, but did not impose,[169] stronger parliamentary involvement.[170]

The Polish CT was urged by the applicants to mandate stronger parliamentary oversight of European integration. The Court, however, refused this request, holding that it was a task for the "legislator to resolve the problem of democratic legitimacy of the measures provided for in the Treaty."[171] The democratic credentials of the EU were not further discussed in the Lisbon Judgment.

To the French CC, the new supranational modes of decision-making, as well as the general bridge clause of Article 48, paragraph 7 TFEU and the powers given to national parliaments, necessitated constitutional amendments.[172] However, it did not mandate additional parliamentary oversight.[173]

While these clearance procedures could potentially slow the day-to-day business of European integration, in their current incarnations they do not constitute red lines of Constitutional Courts to European integration.

IV. Ultra Vires *Review*

The general concept of an *ultra vires* review of EU legislation originated in the case law of the German CC. It serves as a potentially powerful tool to curtail an expansive reading of conferred powers, and thus deeper integration, particularly through the ECJ. This section will begin by sketching the origins and development of the *ultra vires* review standard in the German CC's case law (1.) and conclude with a comparative perspective on the reception by the Czech CC, the French CC and the Polish CT (2.).

[167] Czech CC, *Lisbon II*, *supra* note 11, at para. 140.

[168] *Id.* at para. 139.

[169] Czech CC, *Lisbon I*, *supra* note 11, at paras. 174–175. *See also* Jini Zemánek, *The Two Lisbon Judgments of the Czech Constitutional Court*, *in* EUROPE'S CONSTITUTIONAL CHALLENGES IN THE LIGHT OF THE RECENT CASE LAW OF NATIONAL CONSTITUTIONAL COURTS – LISBON AND BEYOND 57 (José Marian Beneyto & Ingolf Pernice eds., 2011).

[170] Czech CC, *Lisbon I*, *supra* note 11, at paras. 153, 165–167.

[171] Polish CT, *Lisbon*, *supra* note 13, at para. 2.6.

[172] French CC, *Lisbon*, *supra* note 12, at paras. 18, 19, 26.

[173] *Id.* at paras. 23, 27.

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1. Ultra Vires Review Under a Solange Presumption?

The German CC first established the possibility of *ultra vires* review of EU legislation in the *Maastricht* ruling,[174] which was then affirmed and expanded upon in the *Lisbon* Judgment.[175] The Court limited the scope of *ultra vires* review to "obvious transgressions" where "legal protection cannot be obtained" through the EU.[176] Additionally, it reserved the exercise of this review power to itself, even suggesting a special proceeding could be established,[177] though this has not been implemented thus far.

The subsequent ruling in the *Honeywell* case[178] significantly decreased the practical likelihood of an *ultra vires* review. The case concerned itself primarily with the implications of the landmark ECJ ruling in *Mangold*.[179] In 2003, Werner Mangold (born 1950) was employed on the basis of limited term contract, a practice that was legal under German law for employees over 52 years of age. Relying on Directive 2000/78/EC, Mangold sued his employer for age discrimination. At the time, the Directive had not yet been implemented into German law. Engaged through a preliminary reference, the ECJ held that both Article 6, paragraph 1 of the Directive, as well as the ECJ's recent discovery—a general principle of EU law against age discrimination—were incompatible with the German legislation.[180] Furthermore, the Directive was deemed applicable with horizontal effect, even though the deadline for implementation had not yet lapsed at that point.[181]

In *Honeywell*, the German CC, to the surprise of many, stressed the cooperative relationship between the EU and the German legal order, while highlighting the role of the ECJ in the development of EU law. From this, it derived further restrictions for the exercise of *ultra vires* review: The ECJ must "have an opportunity to rule on the questions of Union law . . ." through a preliminary reference prior to any *ultra vires* review, and any act must "be manifestly in violation of competences and . . . highly significant in the structure of

[174] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] 2 BVR 2134/92, 89 BVERFGE 155 (Oct. 12, 1993).

[175] German CC, *Lisbon*, *supra* note 10, at paras. 240, 338.

[176] *Id.* at para. 240.

[177] Which could lead to infringement proceedings under Article 258 TFEU. *See* Wendel *supra* note 15, at 129.

[178] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] 2 BVR 2661/06, 126 BVERFGE 286 (July 6, 2010).

[179] Mangold v. Helm, ECJ Case No. C-144/04 (Nov. 22, 2005).

[180] *Id.* at para. 75.

[181] *Id.* at para. 78.

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competences between the Member States and the Union . . ."[182] before the Court would take action. Furthermore, the ECJ is afforded a considerable "right to tolerance of error,"[183] meaning that individual deviations, even if the other requirements are met, may be tolerated nonetheless.

Commentators have correctly pointed out that *Honeywell* was, in fact, the first time a Constitutional Court, albeit tentatively, exercised an *ultra vires* review.[184] Nonetheless, the ruling is understood as minimizing the chances of a successful review.[185] The ultimate objective of the Court was likely not to draw a red line but rather to raise awareness and sensitivity on the part of the ECJ for the "constitutional grievances"[186] of Member States. The more recent and unprecedented reference of the German CC to the ECJ on the matter of the outright monetary policy of the European Central Bank will again put this arrangement to the test.[187]

In conclusion: Much ado about nothing? For the time being, that certainly seems to be the case. One may certainly view this as a further example of the "court's bark being worse than its bite,"[188] or simply as a more nuanced presentation of the Lisbon argument. Without a doubt, the requirements for the exercise of *ultra vires* review have been further bolstered.[189] The *Honeywell* decision indeed appears as a kind of *Solange II* ruling for the purposes of the *ultra vires* review.[190] Critics can hardly be blamed for wondering whether

[182] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] 2 BVR 2661/06, 126 BVERFGE 286, paras. 60–61 (July 6, 2010).

[183] *Id.* at para. 66.

[184] There is debate as to whether a previous decision may also be qualified as *ultra vires* review, see Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] Case No. 2 BVR 687/85, 75 BVERFGE 223 (Apr. 8, 1987).

[185] *See* Wendel, *supra* note 15, at 129 (particularly criticized by Judge Landau in his dissent); *see also* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] 2 BVR 2661/06, 126 BVERFGE 286, paras. 94–116 (July 6, 2010).

[186] Christoph Möllers, *Constitututional Ultra Vires Review of European Acts Only Under Exceptional Circumstances, Case Note to Decision of July 6, 2010*, 2 BvR 2661/06, 7 EUCONST 166 (2011).

[187] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2728/13; 2 BvR 2729/13; 2 BvR 2730/13; 2 BvR 2731/13; 2 BvE 13/13 (Jan. 14, 2014), *available at* https://www.bundesverfassungsgericht.de/entscheidungen.html.

[188] Möllers, note 186, at 161; Joseph H. Weiler, *Editorial. "The Lisbon Urteil" and the Fast Food Culture*, 20 EJIL 505 (2009); Schönberger, *supra* note 76, at 1201.

[189] Möllers, *supra* note 186, at 166; Thym, *supra* note 25, at 38.

[190] *Id.* at 165

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the German CC has indeed refined this approach at all in the intervening twenty years of its jurisprudence.[191]

2. Comparative Analysis

The German CC is, however, not alone in its reluctance to exercise its *ultra vires* review power. Many European Constitutional Courts are in agreement that the review power must be handled restrictively.[192] After all, it puts them on a collision course with the ECJ, as any review necessarily entails an interpretation of the Treaties.[193]

While the Czech CC sees no need to exercise an *ultra vires* control of EU legislation, it plainly reserves itself this right to safeguard the Czech Constitutional order. The Court points out that this power is "more in the nature of a potential warning, but need not ever be used in practice."[194] Reminiscent of the *Solange* case law of the German CC, but applied to competences, the Court "generally recognises the functionality of the EU institutional framework for ensuring the review of the scope of the exercise of conferred competences . . . ." It would change its position only if "it appears that this framework is demonstrably non-functional."[195] The Court turns to the example of the Tobacco Advertising case[196] to exemplify the quality of ECJ control over the exercise of conferred powers. The main criticism is that the Czech CC is essentially cherry picking a case where the ECJ has, in fact, limited and not expanded the scope of EU powers.[197] It is legitimate to question whether, overall, this trust in the ECJ to limit EU excesses of power is well placed.[198]

The Polish CT makes no mention of a possible *ultra vires* review, in spite of the fact that it had previously hinted at introducing such a standard.[199] One can, however, infer from the

[191] *Id.* at 167 (describing it as an unnecessary detour that has yielded little fruit).

[192] *See* Wendel, *supra* note 15, at 128.

[193] *See* Grimm, *supra* note 56, at 357.

[194] Czech CC, *Lisbon I*, *supra* note 11, para. 139.

[195] Czech CC, *Lisbon I*, *supra* note 11, paras. 120, 139.

[196] Case C-376/98, Germany v. Parliament & Council, 2000 E.C.R. 1-8149; Opinion Pursuant to Article 300(6) EC, Opinion 1/03, 2006 E.C.R. 1-01145.

[197] The subsequent, Case C-380/03, Germany v. Parliament & Council, 2006 E.C.R. I-11573, arguably expanded EU competences.

[198] *See* Briza, *supra* note 82, at 154.

[199] Trybunał Konstytucyjny [Constitutional Tribunal], Case No. K 18/04, para. 15 (May 11, 2005) (Pol.) [hereinafter Polish CT, *Accession Treaty*].

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limits the Court places on the transferal of sovereign powers that it would step in to prevent European institutions from encroaching on these limits, albeit with significant deference to the Polish legislative branch.

The French CC makes no mention of an *ultra vires* review of EU legislation in its Lisbon Judgment. This is likely a result of the above-mentioned constitutional amendments that are passed before any major Treaty ratification. Thereby, EU Primary Law effectively forms a part of the French Constitution through Article 88, paragraph 1. It is therefore unlikely that any secondary law measure will violate the Constitution, specifically the *identité constitutionelle*. This further illuminates why the French CC, in principle, defers to the ECJ to ensure that the EU remains with the limits of conferred powers.[200] From a French perspective, the ECJ is constitutionally mandated to perform precisely this task. This is a proposition that must, to the other Constitutional Courts, appear inherently counterintuitive, akin to putting the fox in charge of the henhouse.

V. Fundamental Rights Protection

There is no consensus amongst European Constitutional Courts on whether European integration is limited by requirements for the protection of domestic fundamental rights. The German CC is at the forefront of this discussion, with the Czech CC drawing much inspiration from the *Solange* rulings. Therefore, the investigation shall begin by introducing this cornerstone of German constitutional case law, before considering the positions of the other Constitutional Courts.

To the German CC, a crucial, if in the end merely hypothetical, limitation to integration arises from a need to safeguard the German fundamental rights guarantees at an EU level. This stance is expressed in the *Solange*[201] rulings, which were affirmed by the *Lisbon* judgment.[202] The *Solange* saga has its origins with the landmark *Solange I* judgment,[203] where the outright supremacy of EU law was rejected by the Court and instead conditioned on compliance with German fundamental rights. These rights would prevail as long as the EU—then the European Community—did not introduce a Bill of Rights that

[200] Conseil constitutionnel [CC] [Constitutional Court] decision No. 2004-498DC, July 29, 2004, paras. 4–7 (Fr.); *see also* Reestman, *supra* note 15, at 390; Anne C. Becker, *Vorrang versus Vorherrschaft*, EUR 355 (2005); *see also* Tribunal Constitucional de España [Constitutional Tribunal of Spain] Case No. 1/2004, Dec. 13, 2004, para. II-3 (Sp.) [hereinafter Spanish CT, *Constitutional Treaty*]; Castillo de la Torre, *Case Note*, *in* 42 CMLR 1169 (2005).

[201] Literally: "As long as."

[202] German CC, *Lisbon*, *supra* note 10, at para. 337.

[203] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] Case No. 2 BvL 52/71, 37 BVERFGE 271, 279 (May 29, 1974).

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afforded an equivalent standard of protection. In the subsequent *Solange II* judgment,[204] the German CC ruled that a sufficient standard had been established through the ECJ and consequently it would refrain from reviewing EU legislation for compliance with German fundamental rights. The Court reserved to itself, though, the right to reintroduce the control mechanism if the standard was not maintained.[205] The idea that the EU should drop below this standard is, however, not a particularly likely scenario.[206] The Lisbon ruling expressly deemed the Charter of Fundamental Rights of the European Union, as well as the planned accession to the ECHR,[207] as sufficient evidence to dismiss allegations of dwindling fundamental rights protection on a European level.

The Czech CC also required a certain standard of rights protection in order to justify its continuing refrain from reviewing EU legislation against Czech fundamental rights guarantees. In this regard, the Czech CC affirmed the review standard of its *Sugar Quotas Case*[208] in the Lisbon judgment, stating that if "the standard of protection ensured in the European Union were unsuitable, the bodies of the Czech Republic would have to again take over the transferred powers, in order to ensure that it was observed."[209] This essentially leaves the Czech CC in a position similar to that of the German CC under *Solange*.

The Polish CT did not expressly mention the possibility of a *Solange* style review. Still, one can infer that there appears to be no great concern regarding EU fundamental rights protection. The Polish CT held that "[t]he draft of economic, social and political systems contained in the Treaty, which stipulates the respect for dignity and freedom of the individual, as well as respect for the national identity of the Member States, is fully consistent with the basic values of the Constitution . . . ."[210] While the Polish CT may very well change its stance should the EU systematically violate fundamental rights, this does not appear to be a particularly likely scenario.

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[204] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] Case No. 2 BvR 197/83, 73 BVERFGE 339, 375 (Oct. 22, 1986).

[205] *Id.* at 339, 387.

[206] Andreas Voßkuhle, *Multilevel Cooperation of the European Constitutional Courts*, 6 EUCONST 175 (2010); Monika Polzin, *Das Rangverhältnis von Verfassungs- und Unionsrecht nach der neuesten Rechtsprechung des BVerfG*, 52 JURISTISCHE SCHULUNG 1, 3 (2012).

[207] The draft Accession Agreement has been finalized, see COUNCIL OF EUROPE, FINAL REPORT TO THE CDDH (2013), http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf, and is currently being considered by the ECJ under the procedure provided by Article 218, paragraph 11 TFEU.

[208] *See* Czech CC, *Sugar Quotas*, *supra* note 81.

[209] Czech CC, *Lisbon I*, *supra* note 11, at paras. 196, 197.

[210] Polish CT, *Lisbon*, *supra* note 13, at para. 2.2.

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The French CC appears to show a high degree of deference to the EU on the issue of fundamental rights protection. It refused to examine an act of the French Parliament implementing an EU Directive against French fundamental rights guarantees.[211] The reasoning was that the right in question, freedom of expression,[212] is also protected on an EU level. Therefore, whenever a "principle is common to both legal orders," the French CC seems to support the view that the ECJ is called upon to provide protection.[213] Against the backdrop of this case law and in light of the Charter, as well as the upcoming EU accession to the ECHR, it is hard to see what role may be left for the French CC in fundamental rights protection against EU action.

In conclusion, no European Constitutional Court seriously contemplated the exercise of a fundamental rights review. The threat is effectively moot, as any remaining red line would require a systematic violation of fundamental rights and a blind eye from the ECJ in order to be conceivably engaged.

VI. Protection of the Constitutional Identity

Even though the understanding of constitutional identity among European Constitutional Courts remains strikingly variable in scope and meaning,[214] there is, nonetheless, wide support for the proposition that Article 4, paragraph 2 TEU limits integration.[215] The Courts allege that the provision holds the EU under a duty to respect the constitutional identity,[216] and thereby the constitutional peculiarities of individual Member States.[217] It shall be argued that this is a dubious interpretation of the provision.

The content of the term "identity" is far from settled in domestic law and much less in Article 4, paragraph 2 TEU. In 2010, for instance, the citizens of France were polled on,

[211] French CC, *Loi relative à la bioéthique*, *supra* note 200, at paras. 4–7.

[212] DECLARATION OF THE RIGHTS OF MAN AND CITIZENS art. 11 (1789).

[213] *See* Reestman, *supra* note 15, at 387.

[214] Franz C. Mayer, *Rashomon in Karlsruhe – A Reflection on Democracy and Identity in the European Union* 33 (5/10 Jean Monnet Program, Working Paper No. 05/10, 2010).

[215] German CC, *Lisbon*, *supra* note 10, at para. 240.

[216] Armin von Bogandy & Stephan Schill, *Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag*, ZAÖRV 711, 727 (2010).

[217] A phenomenon that to Pedro Cruz Villalón attributes to globalization and Europeanization. Pedro Cruz Villalón, *Grundlagen und Grundzüge staatlichen Verfassungsrecht: Vergleich*, *in* 1 HANDBUCH IUS PUBLICUM EUROPAEUM 772 (Armin von Bogdandy et al. eds., 2007).

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essentially, what constitutes the French identity.[218] The varied answers given are a testament to the fact that the term "identity" is essentially a projection screen[219] for personal impressions, stereotypes, prejudices, and oversimplifications. The cultural and personal diversity of individuals is only rarely fully encompassed in broad national identities. Beyond this, "national identity" in Article 4, paragraph 2 TEU does not necessarily equate to "constitutional identity" as implied by European Constitutional Courts. Undoubtedly, "national identity" will encompass central elements of the constitution, but, as Article 4, paragraph 2 points out, it also comprises political elements. The terms "constitutional identity" and "national identity" can therefore hardly be described as synonymous. Overall, the precise connection and content is tentative and unclear.[220]

Additionally, even if Constitutional Courts could determine with certainty the precise legal content of their respective "national identity," the ECJ remains tasked to interpret EU law and thus determine the extent to which Article 4, paragraph 2 TEU limits integration. After all, content is one thing, its legal relevance, is quite another.[221] This separation of competences is further supported by the deliberations of the European Convention, which asserts that Article 4, paragraph 2 TEU is not to be viewed as a "derogation clause"[222] from EU law. This is a reasonable approach in terms of the relationship between the Member States and the EU. The alternative, leaving the provision under the complete interpretative *aegis* of Constitutional Courts, would otherwise open a Pandora's box of legal uncertainty and thus undermine a core tenant, the uniform application of EU law.[223] Essentially any problem with integration would then conceivably be recast as an issue of "national identity."[224] In order to prevent this, EU law must be interpreted autonomously from

[218] The full question was: "What does being French mean to you?" *See Besson relance le débat sur l'identité nationale*, LE MONDE (Oct. 25, 2009), http://www.lemonde.fr/politique/article/2009/10/25/besson-relance-le-debat-sur-l-identite-nationale_1258628_823448.html.

[219] Thomas Risse & Daniela Engelmann-Martin, *Identity Politics and European Integration: The Case of Germany*, *in* THE IDEA OF EUROPE: FROM ANTIQUITY TO THE EUROPEAN UNION 289 (Anthony Pagden ed., 2002). *See* Reestman, *supra* note 15, at 379.

[220] Referring to the old provision: Albert Bleckmann, *Die Wahrung der "nationalen Identität" im Unions-Vertrag*, JZ 265 (1997); Ernst Steindorff, *Mehr Staatliche Identität, Bürgernähe und Subsidiarität in Europa?*, ZHR 395 (1999).

[221] *See* Wendel, *supra* note 15, at 135.

[222] EUROPEAN CONVENTION, FINAL REPORT OF WORKING GROUP V 11 (2002).

[223] *See* Mayer, *supra* note 214, at 38.

[224] *See* Reestman, *supra* note 15, at 380.

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domestic law, but also requires the sole jurisdiction of the ECJ to determine the validity of acts of the Union.[225]

C. Conclusion

The relationship of European Constitutional Courts with European integration is well described as continuous "shadow boxing."[226] Both the national and the European legal order cannot deny the impact the other has on the overall development in Europe. Yet, both systems ultimately owe allegiance to different fundamental documents, which often allow for widely differing opinions on jurisdiction, competences and powers, with no "*praetor*" in sight to settle the differences.[227] There is, however, mutual respect, an informal dialogue,[228] and the pragmatism of a European *Realpolitik,* which serves to minimize the impact of these seemingly insurmountable red lines to European integration. All-out judicial conflict generally only exists in the realm of theoretical scenarios.

On the ground, far removed from conceptual disputes over sovereignty, supremacy, statehood, identity, and democracy, open clashes are generally avoided.[229] The European Constitutional Courts have given the EU significant breathing room, while equally safeguarding their own interpretative relevance in the ongoing European integration process.[230] The envisaged red lines naturally vary from Court to Court, but many concepts have been developed and refined through an inter-European constitutional dialogue,[231] a "cross border migration" of constitutional ideas.[232] In the end, none of the judgments held

[225] Case C-6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585. *See* Alfred Grosser, *The Federal Constitutional Court's Lisbon Case: Germany's "Sonderweg" – An Outsider's Perspective*, 10 GERMAN L.J. 1264 (2009); Case C-314/85, Foto-Frost, 1987 E.C.R. 4199.

[226] *See* Thym, *supra* note 25, at 36.

[227] *See* Beck, *supra* note 57, at 480.

[228] See, for example, the back and forth between the Spanish Constitutional Court and the ECJ: Aida Torres Perez, *Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door*, 8 EUCONST 105 (2012).

[229] *See* Beck, *supra* note 57, at 485.

[230] *See* Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 CML REV. 1795 (2009) (describing how the author sees room for, "tangible judicial conflicts"). Similarly bleak is Wolfgan Münchau, *Berlin Has Dealt a Blow to European Unity*, FINANCIAL TIMES (July 12, 2009). *See also* Beck, *supra* note 57, at 480.

[231] *See* Voßkuhle, *supra* note 206, at 175; *see also* Ferdinand Kirchhof, *Die Kooperation zwischen Bundesverfassungericht und Europäischem Gerichtshof*, in STAATSRECHT UND POLITIK: FESTSCHRIFT FÜR ROMAN HERZOG ZUM 75. GEBURTSTAG 155 (Matthias Herdegen et al. eds., 2009).

[232] *E.g.*, Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 1 (Sujit Choudhry ed., 2007).

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the Lisbon Treaty unconstitutional or otherwise prevented its implementation. The red lines that are drawn up remain largely abstract and their decisive application, for the most part, a mere hypothetical scenario.

Certainly, this does not amount to a *carte blanche* for the EU. European Constitutional Courts are likely to intervene if the EU significantly oversteps the boundaries of conferred powers, systematically encroaches on fundamental rights, or violates the, as yet, obscure concept of constitutional identity. Likewise, Member States will be prevented from overzealously transferring sensitive competences to a still democratically evolving EU. Apart from these limits, however, this investigation has mainly exposed differences in institutional self-perception among the Constitutional Courts within their domestic constitutional framework.

Particularly the self-perception of the German CC and its approach to European integration remains puzzling.[233] It appears caught between a general willingness to support European integration, while stubbornly asserting its dominance in the German constitutional order.[234] A significant puzzle piece is a long-standing tradition among the political class in Germany to avoid prolonged debate in favor of a decisive word from Karlsruhe on contentious matters. After all, broad individual access all but guarantees a ruling either way. Even if, at times, the Court has difficulty resisting the urge to impose its own agenda,[235] it cannot be accused of a lack of sensitivity to popular opinion. Both on the street and in academic circles, the judgments are generally assured respect and significant support. This is in part due to the significant social and political advancement that its rulings can bring about, particularly those that would not have otherwise been achieved so rapidly through the political process alone.[236] The downside is, however, a noticeable patronizing of the German *Bundestag*,[237] not solely but crucially in matters of EU integration. In the eyes of Karlsruhe, the *Lisbon* judgment had to bring the *Bundestag* back in line, as it had failed to reclaim the reigns of European integration.

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[233] *See* Möllers, *supra* note 186, at 167.

[234] *See* Beck, *supra* note 57, at 478; Grosser, *supra* note 225, at 1263; Matthias Niedobitek, *The Lisbon Case of 30 June 2009 – A Comment From the European Law Perspective*, 10 GERMAN L.J. 1269 (2009); *see* Christopher Klotz, *Die Machtbalance zwischen Politik und verfassungsgerichtlicher Rechtsprechung*, ZRP 5 (2012) (discussing the current balance of power between the German CC and the other branches of German government).

[235] *See* Tomuschat, *supra* note 9, at 1259 (deeming the Lisbon Judgment a "political manifesto").

[236] A recent example is the equal treatment of same sex couples in tax matters. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 909/06, 2 BvR 1981/06, 2 BvR 288/07, 2013 NJW 2257 (May 7, 2013).

[237] *See* Christoph Möllers, *Was ein Parlament ist, entscheiden die Richter*, FRANKFURTER ALLGEMEINE ZEITUNG, July 16, 2009.

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By contrast, other European Constitutional Courts present themselves with a relative abundance of self-restraint and deference to their legislature.[238] The Czech CC was adamant that the pace of European integration and particularly the transfer of sovereign powers is, prima facie, a political question. The Court views itself only as a last minute *ultima ratio* intervener. In a similar vein, the Polish CT equally affirmed its deference to the legislature on the pace of European integration, but perhaps under the impression of the German ruling was more willing to set specific boundaries. The strongest form of deference is, however, expressed by the French CC. Owing to the peculiarities of the French constitutional order, any conflict between an envisaged European treaty and the French Constitution can be resolved *ex ante* through an appropriate amendment. This puts France in a position where the pace and depth of European integration is almost entirely a political, rather than a legal, question. The French CC will decline to review any constitutional amendment, therefore negating definite red lines almost entirely. In this regard, the French CC has been, quite accurately, described as a "legal traffic warden."[239]

Overall, the Constitutional Courts leave much hope for an enduring legal development of the EU. The only definitive red line is not of a legal, but of a moral nature. As long as the EU continues to exist for the sake of the European People,[240] and the common good is truly best served by it, then deeper integration can be morally justified, politically achieved, and legally implemented. This conception of the European idea, this dream of Europe, can be defended in the face of critics, regardless of the red lines to integration.

[238] *See* Grosser, *supra* note 225, at 1263 (attesting the German CC a general loss of self-restraint altogether).

[239] *See* LOUIS FAVOREU, LA POLITIQUE SAISIE PAR LE DROIT 30 (1988).

[240] Adapted from: Peter Bucher, *Der Parlamentarische Rat 1948–1949. Akten und Protokolle*, *Volume 2*, *in* DER VERFASSUNGSKONVENT AUF HERRENCHIEMSEE 580 (1981).

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