2

A Deconstructive Account

Genesis and Critical Assessment of Constitutional Identity in Germany

Only where things can be seen by many in a variety of aspects without changing their identity, so that those who are gathered around them know they see sameness in utter diversity, can worldly reality truly appear.
(Hannah Arendt, *The Human Condition*)

1 Introduction

The concept of national identity has its place in the primary law of the EU.[1] Nowadays, it is often presented as a tool which can accommodate potential conflicts between national and supranational (constitutional) law.[2] Nevertheless, thinking in terms of national constitutional identity is older than the EU and has deep roots in German constitutional jurisprudence.[3] Starting with famous *Solange I*[4] decision, the German Federal Constitutional Court (FCC) continuously developed a rich case law concerning the relationship between national and constitutional law and the parameters for potentially reviewing EU law via identity and ultra vires review, without yet reaching its final mode. The said case law was highly influential and has strongly resonated among the other Member States' apex courts, which often followed their lead.[5] This chapter aims to investigate how the concept initially emerged, and how it was doctrinally developed over the last few decades. It will question the established dogmatic assumptions underlying national constitutional identity jurisprudence and observe how the meaning of identity developed dynamically in parallel with the progressive evolution of the European constitutional framework.

The chapter starts with a short theoretical framework, aiming to highlight three distinctive issues. First, the paradox of constituent power and

1 Consolidated version of the Treaty on European Union (TEU) [2012] OJ C326/13, art 4(2).

2 Gerhard van der Schyff, 'The Constitutional Relationship between the European Union and Its Member States: The Role of National Identity in Article 4(2) TEU' (2012) 37 European Law Review 563. François-Xavier Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (2021) 27 European Public Law 571.

3 Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14 International Journal of Constitutional Law 411, 415.

4 BVerfGE 37, 271 *Solange I* 29 May 1974.

5 Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law Review 96, 99.

its constituted form.[6] This foundational assumption enables the underlying justification of the Eternity Clause,[7] which gives rise to an absolute claim of national constitutional identity against EU law, even though the EU is committed to the same liberal principles and values that the FCC protects. Second, the said paradox can be translated into so-called *constitutional populism*,[8] denoting the constituent power which is not fully consumed by the constitution. German historical and sociological circumstances, especially the downfall of the Weimar Republic, tend to explain why the *popular* power to navigate and manage European integration ended up with the highly influential FCC, based on legal expertise. The historical fear of the almighty executive paradoxically became more real than one may be willing to admit,[9] since the FCC turned into the creative interpreter of the Eternity Clause and the ultimate controller of the limits of European legal integration. Finally, the section explores the initial application of constitutional identity terminology, which can be traced back to Schmitt[10] and Bilfinger.[11] The section shows that Schmitt's voluntaristic account of a constitution in the material sense – beyond a written constitution – must be disassociated from the contemporary understanding of national constitutional identity (Section 2).

The chapter then continues with an analysis of FCC case law concerning national constitutional identity – a tool to review and potentially disapply EU law. It critically engages with identity case law, such as *Solange I*,[12]

6 Monika Polzin, 'Irrungen Und Wirrungen Um Den Pouvoir Constituant: Die Entwicklung Des Konzepts Der Verfassungsidentität Im Deutschen Verfassungsrecht Seit 1871' (2014) 53 Der Staat 61.

7 Matthias Herdegen, 'GG Art. 79' in Theodor Maunz and Günter Dürig (eds), *Grundgesetz-Kommentar* (69th edn, C. H. Beck 2013).

8 Christoph Möllers, '"We Are (Afraid of) the People": Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) 87.

9 Möllers (n 8).

10 Christian Calliess, 'Constitutional Identity in Germany: One for Three or Three in One?' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 155.

11 Polzin (n 3) 416.

12 BVerfGE 37, 271 *Solange I* 29 May 1974.

Solange II,[13] *Maastricht*,[14] *Lisbon*,[15] *Honeywell*,[16] *OMT I*,[17] *OMT II*,[18] *ESM*,[19] *EAW*,[20] and others.[21] The chapter aims to demonstrate the trajectory of the FCC's case law, claiming to have the right to review EU law, as well as the constant changes in its argumentation and interpretation.

In *Solange* jurisprudence, the FCC did not primarily justify the refusal to apply EU law on national constitutional identity. However, it did raise the concept for the first time, mentioning it only in passing. The definition of national constitutional identity was different in *Solange I* and *Solange II*. While in both cases identity concerned only fundamental rights, the former stated that national constitutional identity is part of the Basic Law dealing with fundamental rights,[22] whereas the latter defined it as the legal principles underlying the provisions of Basic Law[23] (Section 3).

The chapter then critically explicates the *Maastricht*[24] decision, which set the argumentative foundations for the contemporary identity review, although not using the terminology of identity whatsoever (Section 4). The subsequent *Lisbon* decision extensively defined two distinctive constitutional reviews – national constitutional identity review and ultra vires review – together with the highly criticised theory of the state. The section summarises the decision and its underlying assumptions, and highlights how the decision differentiates between both constitutional reviews (Section 5).

As a response to the highly disputed *Lisbon*[25] decision, the FCC made one step back and issued its most balanced and self-reserved decision concerning ultra vires review. In the *Honeywell*[26] decision, the FCC established high qualitative standards to potentially review EU law. The violation must

13 BVerfGE 73, 339 *Solange II* 22 October 1986.
14 BVerfGE 89, 155 *Maastricht* 12 October 1993.
15 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009.
16 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.
17 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014.
18 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016.
19 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.
20 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015.
21 BVerfG, 2 BvR 1685/14 *Banking Union* 30 July 2019; BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.
22 Andrew Oppenheimer, *The Relationship between European Community Law and National Law: The Cases* (Cambridge University Press 1994) 447.
23 Ibid. 485.
24 BVerfGE 89, 155 *Maastricht* 12 October 1993.
25 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009.
26 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.

be manifest and structurally significant, and the CJEU must first have an opportunity to issue a preliminary decision, thereby creating an obligation of dialogue between the courts. The *Honeywell* decision is arguably the most appropriate balance, aiming to provide limits to an unrestrained power of the CJEU, but at the same time tolerating the CJEU's own methods and errors[27] (Section 6).

The subsequent section addresses changing interpretations of identity and ultra vires review in relation to fiscal independence, the OMT programme, and the overlapping relationship between fiscal and economic policy. It shows how the FCC is still trying to find the best way of justifying ultra vires and identity review, thereby shifting back and forth in its continuously changing interpretations. Moreover, the section demonstrates how the FCC separated the connection between national identity from the EU perspective and national constitutional identity from the German perspective, determining the absoluteness of its claims and reverting to national exceptionalism rather than constitutional tolerance (Section 7).

Finally, the last section outlines the curious revisit of the FCC in the *EAW*[28] decision, where the FCC decided that it would once again review EU law against national fundamental rights standards, should the EU standards fall below the minimum level of protection. While the FCC in the end did not find any violation of the human dignity by EU law, the said review has been abolished in *Solange II*. As further explicated in Chapter 4, the question remains whether the said case designates only a single deviation or a new normal (Section 8). The chapter wraps up with brief concluding remarks (Section 9).

27 Ibid. para 66.
28 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015.

2 Theoretical Framework: Constituent Power and Constitutional Form

Before a critical analysis of the case law concerning national constitutional identity, justified by the unamendable constitutional amendment, this section highlights the underlying paradox of *pouvoir constituant* and *pouvoir constitué* which enables and facilitates the respective constitutional argument (2.1). Moreover, when searching for the roots of national constitutional identity, one cannot evade the writings of Carl Schmitt. Nonetheless, in a holistic survey of his account of constitutional identity, one must emphasize a substantially different meaning of identity, irreconcilable with liberal constitutional commitments (2.2). Finally, in understanding the pivotal role of the FCC in managing and controlling legal integration from the German perspective, a reflection of *constitutional populism* offers some insights (3.3). All three sub-sections are a necessary overture, setting the stage for the later case law analysis.

2.1 Pouvoir Constituant *and* Pouvoir Constitué *as Ideal Paradox*

The state's power, which determines its functions and institutions and regulates people's interactions and which ultima ratio coerces its citizens and thereby limits their freedom, necessarily must have, or claim to have, some legitimate authority.[29] Whereas the earlier have approaches usually linked a state's power or authority to theological or natural sources of legitimacy, the secularized (liberal) state aims to justify itself without these external references.

The basis of a democratic liberal state, based on the ideas of Enlightenment thinkers and as realized in the French and American Revolutions, is twofold. First, a political order needs legitimation by the subjects it co-

29 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Reprint edition, Oxford University Press 1983). Mattias Kumm, 'The Rule of Law, Legitimate Authority and Constitutionalism' in Christoph Bezemek, Michael Potacs and Alexander Somek (eds), *Legal Positivism, Institutionalism and Globalisation*, vol 1 (Hart Publishing 2018).

erces or over which it claims authority. Second, the exercise of authority is subordinated to, or in compliance with, universal moral principles as concretely articulated by fundamental rights, designed in a system of checks and balances between different branches of power. The tension between the constituted 'Form' and the people's free will therefore is constantly present.[30]

One can observe a similar tension in the ideal theory, which aims to explain the construction of a constitution and its potential limits. The constituent power is the legitimate source of authority that can create the political order. The power of the people (in ideal terms) expresses itself through the constitution's creation. At the time of the constitution's creation, the constituent power immediately transforms itself into the constituted power, which then determines the rules and conditions for how public authority within the newly established state can be exercised.[31] In other words, the political power of the people establishes the system, which is transformed into the legal system at the very moment of its constitution, putting constitutional limitations on its creators, the people. That is the beginning of the constitutional paradox.[32] Moreover, this begs the question: How can a representation of subjects happen without first establishing the content which defines the subjects? Yet, if one needs to define the content first, then it is not the subjects who define their constitution, but rather the constitution which defines their subjects – known as the paradox of representation.[33]

Constituent power can be seen as a power that is ultimately outside the constitutional framework and cannot play any further role once the constitution is created. It is replaced by the constituted power and is thus exhausted by its creation. Only a new (revolutionary) constitutional moment could reawaken the constituent power and create an entirely new

30 Mattias Kumm, 'The Turn to Justification: On the Structure and Domain of Human Rights Practice' in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press 2018) 244.

31 Tamara El Khoury, 'Pouvoir Constituant' in Rainer Grote et al. (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford Constitutional Law 2017).

32 Martin Loughlin, 'Introduction' in Neil Walker, Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).

33 Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).

political order with the new constitution.[34] The idea behind this outlook is that the constituent power can be seen only as an external element that, after the constitution's creation, cannot interfere with or impact on the legal and political life of the constitutional state. The internal constitutional system operates in a conceptually utterly separate space from the political one.[35] To put it differently, one only presupposes the legal validity of the creation of constitution.[36]

However, one may also argue that constituent power does not simply disappear with the constitution's creation. The people, who are the ideal source of constituent power, remain present, and they (can) continue to give legitimacy to the constitutional system and its potential changes. Perhaps it is the next generation of constitutional participants who need to reaffirm and renew the commitments of the previous generation. Or is the legitimation of power a matter which should be reaffirmed continuously through the very existence of its subjects?

Constituent power can legitimately express itself through the existing constituted institutions and constitutional mechanisms: for example, a referendum or plebiscite, where the citizens can directly participate in and decide on questions of public importance or proposed changes to the constitution. Moreover, direct election of a president can manifest the majoritarian political will of the people.

On the contrary, constituent power can latently express itself indirectly through alternative forms, much less unambiguously. In that sense one understands *constitutional populism*,[37] which designates democratic practices which are 'specifically orientated towards constitutional procedures and institutions without formally being part of them'.[38] Constituent power is constantly present without having a specifically defined constituted form, so it can reveal itself and act through alternative forms of power.

If one follows the neo-Kantian account, as articulated most radically by Kelsen, and understands constituent power as legally irrelevant and, above all, as external to the constitutional system, one would evidently overlook the obvious. The law cannot isolate itself from the political as

34 Richard Tuck (ed), 'Preface', *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press 2016).
35 Lindahl (n 33) 238.
36 Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange, Ltd 2005).
37 Möllers (n 8) 87.
38 Ibid.

a purely scientific discipline where the judges carry out subsumptions of the facts to the norms and where the sociological, historical and cultural aspects remain irrelevant for constitutional adjudication. In the neo-Kantian perspective, the constitutional state is seen as a universal moral person, unaffected and distinct from the natural and social facts, giving primacy only to reason. It independently deducts universal moral principles and sees politics only as technical and executive components of the constituted constitutional apparatus.[39] The politics are only justified if in compliance with the universal laws entrenched by the constitution, which is legitimate due to the representation of a hypothetical pure will or universal human interests.[40]

However, this account is strongly contested.[41] Institutions are historically and socially produced, and the constitutional personality is not external to the state but rather the consequence of concrete political will and true politics.[42] Legality, therefore, cannot be simply a formal condition, but it must be given meaning and content by the prior structure of legitimacy, which is obtained through representation.[43] In other words, the law cannot constitute legitimacy on its own, and thus politics comes before the law.[44]

The above-described theoretical and highly abstract paradox of *pouvoir constituant* and *pouvoir constitué* is relevant concerning an unamendable constitutional amendment, or unchangeable constitutional core, which is the underlying presupposition of national constitutional identity, to which we will return in the following sections.

2.2 Constitutional Populism *and Constitutional Form – the Power of the FCC*

Contemporary constitutional thinking acknowledges the paradox of constituent power on the one hand and the liberal constitutional *form* on the

39 Ellen Kennedy, 'Foreword' in Carl Schmitt (ed), Jeffrey Seitzer (tr), *Constitutional Theory* (Duke University Press 2008).
40 Ibid.
41 JM Balkin, 'Deconstructive Practice and Legal Theory', *Derrida and Law* (Routledge 2017); Michel Foucault, *Ethics: Subjectivity and Truth*, vol 1 (New Press 1997).
42 Chantal Mouffe, *The Return of the Political* (Revised ed, Verso Books 2006).
43 Kennedy (n 39) 10.
44 Carl Schmitt, Leo Strauss and Tracy B Strong, *The Concept of the Political* (George Schwab tr, Reprint edition, University of Chicago Press 1996).

other – not as a critique but as its essential feature.[45] The 'form' tames the political democratic power and is, in turn, interpreted and co-shaped in accordance with political and social developments – determining the highly abstract constitutional principles and the system of checks and balances.[46] Christoph Möllers, among others,[47] argued that the said paradox expresses itself through so-called *constitutional populism*.[48] In that sense, one recognizes a constituent power which is not fully consumed by the constitution and not entirely covered by the constituted institutions and forms. According to Ernesto Laclau, that legitimate power cannot be fully absorbed with democratic political practices as constituted in the constitutional forms of self-government. It shows itself as democratic practice beyond the legal form.[49]

Considering *constitutional populism* as defined above, Möllers analyzed different constitutional periods in Germany, trying to identify how the democratic political practice beyond constitutional form had been realized or expressed. He argued that German constitutional history lacks strong majoritarian parliamentarism, effectively reflecting *constitutional populism*. In the German Reich (*Kaiserreich*), organized as a federal constitutional monarchy from 1871 until 1918, the parliament (*Reichstag*) played an essential role in the political discussion of various issues, channelling social movements and their contradictions, and limiting the power of monarchical government. Yet, despite being influential, it was not an institution of democratic self-governing with a parliamentary government.[50] On the contrary, its power was more informal: 'as a populist organ, one that expressed the people's voice in an emerging mass democracy'.[51] The parliament was reflecting *constitutional populism* without being formally transposed into constitutional forms of self-governing.

The subsequent Weimar Republic was occupied with tremendous political and philosophical antagonisms and dissent in society, consequently producing mixed results in parliamentary elections, with volatile and divided coalitions. The instability and inability of the parliamentary power

45 El Khoury (n 31).
46 Nico Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' (2016) 14 International Journal of Constitutional Law 657.
47 Ernesto Laclau, *On Populist Reason* (Reprint edition, Verso Books 2007).
48 Möllers (n 8) 87.
49 Ibid.
50 Ibid.
51 Ibid. 89.

arguably shifted decision-making towards the executive branch, with a soon to become chronic activation of the president's emergency powers due to the creative interpretation of the legal form.[52] The president, who was directly elected by the popular vote, slowly became the holder of the 'informal democratic legitimacy [...] sharply contrasted with the undemocratic liberalism of parliament'.[53] National Socialism arguably exacerbated the role of the Führer as the subject of popular legitimacy by the German people. According to Möllers, critical attitudes towards the form made the 'circumvention of legalism [...] not only legitimate but also legal'.[54]

After the Second World War, a new constitution for West Germany was commissioned by the Allied Powers.[55] West Germany adopted the Basic Law, a constitution with a peculiar name. Contrary to the Weimar Constitution, the Basic Law relinquished the possibility of referendums and direct elections of the Federal President. Moreover, the Basic Law focused firmly on protecting fundamental rights – interpreted and guaranteed by the FCC. The latter became increasingly influential, and even today it holds transformative power.[56] Which partially explains the trust of German citizens – the FCC, according to periodic studies, is continuously considered to be one of the most trustworthy political institutions.[57]

Möllers argues that *constitutional populism* likely shifted from a strong executive to the FCC,[58] finding its expression in arguably depoliticized judicial discourse. In that light one can understand the influential Habermasian account of constitutional patriotism:[59] trying to bring together the 'Form' and the constituent power, thereby formalizing the public sphere, which is

52 Peter C Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Illustrated edition, Duke University Press 1997) 114.
53 Möllers (n 8) 92.
54 Ibid. 93.
55 Donald P Kommers, 'The Basic Law: A Fifty Year Assessment' (2019) 20 German Law Journal 571.
56 Michaela Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism' (2014) 12 International Journal of Constitutional Law 626, 640.
57 André Brodocz and Hans Vorländer, 'Das Vertrauen in das Bundesverfassungsgericht' in Hans Vorländer (ed), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (Verlag für Sozialwissenschaften 2006).
58 Möllers (n 8).
59 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (New edition, Blackwell Publishers 1997) 491–515.

by its nature the very place where the voluntarism of the populist account of the constitutional order finds its fore.[60]

As will be shown in the following, the Basic Law contains an unamendable constitutional core, which the FCC creatively interpreted and developed into a constitutional review of EU law.[61] Considering Möllers' argument of *constitutional populism* above, one could understand the far-reaching interpretation by the FCC as an attempt to formalize and tame the constituent power by the constituted power itself. Moreover, public acceptance may be genuinely connected with the thesis above that the counter-majoritarian constitutional court inhabits *constitutional populism* and is able to define by itself, without any radical contestation, the future limits of self-determination within the EU by determining the meaning of the principle of democracy, due to the formal authorization of the Basic Law.

To conclude, *constitutional populism* in German constitutional history was, according to Möllers, identified as anti-parliamentarist and expressed through charismatic executive characters, which has led to historically well-known abuses. The logical response of the formalistic and dogmatic approach of legal scholarship and judiciary, trying to incorporate legitimacy questions into the constitution itself,[62] is therefore not unreasonable. However, in evading strong executive power, which contrasts with democratic parliamentarism, the FCC might come closer to the object of departure than one would like to think.

2.3 *Carl Schmitt and Identity of* the Constitution – *A Voluntaristic Account*

One of the most eloquent defenders of this voluntaristic account of the constitution, which gives primacy to political authority, was Carl Schmitt, a highly problematic figure in German history. As a legal and political theorist, he actively participated in, and offered his advice and support to, the conservative politics during the final crisis of the Weimar Republic. Moreover, he did not just strongly criticize liberal parliamentary government and advocate for the possibility of instituting a constitutional dictatorship; he

60 Craig Calhoun (ed), *Habermas and the Public Sphere* (1st edn, The MIT Press 1993).

61 Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 95, 203.

62 Möllers (n 8) 105.

also joined and collaborated with the Nazis after their ascension to power until 1936. He had offered support and authored several essays in support of some of the most brutal policies, and even served on the Prussian State Council under Hermann Goering.[63] Furthermore, after the war, Schmitt 'refused to submit to the denazification process or to admit any guilt concerning the regime's actions'.[64] He lost his university post, but could continue to publish his texts and exert 'a considerable influence on young conservative legal thinkers'.[65]

Schmitt is frequently cited[66] and referred to as the one (sometimes with Bilfinger)[67] who first introduced the concept of constitutional identity in German constitutional legal theory. He argued that 'the authority for constitutional amendments contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself'.[68] Constitutional provisions can be substituted 'only under the presupposition that the identity and continuity of the constitution as an entirety is preserved'.[69] As examples of implied limits of constitutional amendments, Schmitt mentioned the right to vote, the federal elements of the state or a change from democracy back to a monarchy, without trying to work out a comprehensive theory of essential constitutional elements which cannot be amended.

However, the notion of constitutional identity, as elaborated by Schmitt, has to be put into perspective and contextualized adequately according to his overall theory of constituted and constituent powers, if one is to refer continuously to his account as the origin of constitutional identity in German constitutional history.[70] Schmitt identified the implied limits to constitutional amendments in his account, but he never concretely defined them in detail, referring solely to the constituted powers. The implied limits

63 Kennedy (n 39) 10.
64 Ibid. 2.
65 Ibid.
66 Polzin (n 3); Calliess (n 10).
67 Karl Bilfinger, *Der Reichssparkommissar* (De Gruyter 1928) 17; Polzin (n 3) 418.
68 Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press Books 2008) 150.
69 Ibid.
70 Polzin (n 3) 418. The difference between fundamental and non-fundamental constitutional provisions was already acknowledged in the Constitution of the German Reich of 1871, concretely referring to the federal principle which could only be amended by the original 'contractors' – the 'Länder' – as the drafters of the constitution, as argued by Georg Meyer.

of constitutional amendments were extended to the established constitutional institutions and procedures in accordance with their constitutionally conferred powers.

Yet, for Schmitt, there was another understanding of *the constitution*, which 'cannot be broken down into norms and normative elements';[71] it presented the political unity of the people prior to any norm. This *constitution* could be protected even if that would result in constitutional norms being invalidated or ignored.[72] He argued that the decision over the type and the form of political existence is the matter of constituent power (constitution-making power), which precedes any foundational norm and remains alongside and above the constitution. Moreover, constituent power does not exhaust itself with the creation of one constitution.[73] 'No constitutional law, not even a constitution, can confer a constitution-making power and prescribe the form of its initiation.'[74] And even though he made a clear distinction between an amendment to the constitution and its elimination, the latter could be replaced by the same constituent power. He wrote:

> 'A constitution that originated as an act of the constitution-making power is derived from this power and can, therefore, not in itself bear the continuity of the political unity. […] The political unity as an entirety can continue despite changes in and changes of the constitution. If a constitution is eliminated […] that is unconstitutional […], for a constitutional law cannot violate itself or eliminate itself under its own power. However, the constitution-making power need not be abolished in the process. If it activates itself anew in response to the new condition, the new constitution rests on the same principles as the previous one […] and is the product of the same constitution-making power as this earlier constitution. The continuity lies in the common foundation, […].'[75]

71 Schmitt (n 68) 166.

72 Ibid. 158. See his account on the state of exception, high treason, state of war or state of siege; where he argued that there is a significant difference between protecting every single constitutional provision and *the constitution*. 'Where every single constitutional provision becomes "inviolable", even in regard to the powers of the state of exception, the protection of the constitution in the positive and substantial sense is sacrificed to the protection of the constitutional provision in the formal and relative sense. […] In other words, the individual constitutional provision is an insurmountable obstacle to an effective defense of the constitution.'

73 Ibid. 125–6.

74 Ibid. 132.

75 Ibid. 141.

In a nutshell, due to Schmitt, constitutional identity or the spirit of a constitution may be the implied limit of constitutional amendments, but only for a constituted power defined according to positive constitutional law. Yet, in addition to constituted power, constituent power constantly remains present and is not eliminated from the equation with the constitution's creation. According to the principle of the political, which is his first legitimation factor, the political unity of people can always find its form of existence and, therefore, change or replace the existing constitution.

The main question for Schmitt was not the identity of an existing (written) constitution, but the identity of *the constitution* – the political unity of people prior to any (constitutional) norm. 'The word identity is useful for defining democracy because it denotes the comprehensive identity of the homogeneous people.'[76] Any reference to Schmitt regarding the terminal constitutional identity, therefore, must be read together with his voluntaristic account of *the constitution* and his understanding of the political unity of people as a homogeneous unity. This is a very different account compared to normative prerequisites of a liberal state, based on universal moral principles.

The theoretical account above likely resulted in, or at least overlapped with, an executive, non-pluralistic and authoritarian statist vision of the state. And the historical events at least took advantage of such a vision, if not being indirectly encouraged by the said political thinking. Yet, his critique of the legal system, which ignores society's social and historical facts and political aspects, is sharp and well-reasoned. It is not surprising that up to this day constitutional and political thinkers find it a powerful critical stimulus for their observations.[77]

76 Ibid. 264.
77 Ibid. 44.

3 Identity Finds its Way into Case Law – The Part and the Legal Principles Underlying Fundamental Rights

German Basic Law contains the so-called Eternity Clause, which prohibits any constitutional amendment capable of changing the protected constitutional core. However, Basic Law omits any specific reference to national constitutional identity (3.1). With the well-known *Solange* case law, the FCC introduced the terminology of national constitutional identity. According to *Solange I*, identity is the part of Basic Law that deals with fundamental rights (3.2). In *Solange II*, the FCC slightly changed the definition of identity to the legal principles underlying fundamental rights (3.3). Although the FCC started reviewing EU law already in *Solange I*, what is nowadays the effect of the identity review, in both cited decisions, national constitutional identity did not play a decisive role. It was mentioned only in passing.

3.1 The Eternity Clause – Identity Terminology Omitted

Basic Law limits the possibility of amending or changing its essential core.[78] Article 79(3) of the Basic Law stipulates the following.[79] First, the amendments affecting the division of federal states and their participation in the legislative processes shall be inadmissible. Second, amendments shall not affect the principles laid down in Articles 1 and 20 of the Basic Law, namely the inviolability of human dignity and human rights as the basis of every community and the constitutional principles of democracy, the social federal state (welfare state), the exercise of the state authority from the people through elections and the separation of powers.[80]

78 Otto Ernst Kempen, 'Historische und Aktuelle Bedeutung der „Ewigkeitsklausel" des Art. 79 Abs. 3 GG. Überlegungen zur Begrenzten Verfassungsautonomie der Bundesrepublik' (1990) 21 Zeitschrift für Parlamentsfragen 354.

79 Michael Sachs, 'GG Art. 79 Änderungen Des Grundgesetzes' in Michael Sachs (ed), *Grundgesetz Kommentar* (8th edn, C.H. Beck 2018) paras 1–85.

80 *Article 1 of the Basic Law* [Human dignity – Human Rights – Legally binding force of basic rights]

The cited Eternity Clause prohibits constitutional amendments limiting the essential principles and commitments of the Basic Law and thereby introducing a two-level hierarchy of constitutional norms. However, the Eternity Clause does not mention *identity*, national or constitutional. The constitutional identity review was introduced solely to case law by the FCC in the context of an ongoing, gradually progressive European legal integration.[81]

3.2 Identity: The Part of the Basic Law Dealing with Fundamental Rights

At the beginning of the European project, the Basic Law did not have a special constitutional provision which would set any special conditions for limiting the scope of the transfer of competences to the supranational European Community. The only relevant constitutional provision was Article 24 of the Basic Law, which generally anticipated Germany's active participation in international organizations in general. The said article provided a legal ground for a transfer of sovereign powers to the EU.[82]

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(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.
Article 20 of the Basic Law [Constitutional principles – Right of resistance]
(1) The Federal Republic of Germany is a democratic and social federal state.
(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.
(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available.
Paragraph 4, the right to resist, is usually not seen as a principle and is thus not immune to change. See also Bernd Grzeszick, 'GG Art. 20' in Theodor Maunz et al. (eds), *Grundgesetz-Kommentar* (C.H. Beck 2022) Rn. 3-12.

81 Mattias Wendel, 'The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany' (2021) 27 European Public Law.

82 Rudolf Streinz, 'GG Art. 24 Zwischenstaatliche Einrichtungen; Kollektives Sicherheitssystem' in Michael Sachs (ed), *Grundgesetz Kommentar* (8th edn, 2018).

As the familiar narrative goes, the ECJ firmly established the principle of primacy and direct effect of EU law through case law,[83] and the FCC, among other apex courts,[84] soon challenged this progressive development. The relationship between the rules of secondary Community Law of the EEC vis-à-vis fundamental rights under the Basic Law was contested by the famous *Solange I* decision in 1974.[85] The decision concerned the Common Agricultural Policy, which demanded that exporters with licence deposit money beforehand. In case of a violation, the deposit could be forfeited. The German company *Internationale Handelsgesellschaft mbH* challenged that system, claiming, inter alia, that this licensing system violated their right to conduct business, because the burden of a deposit and potential forfeiture was not necessary for the objectives at hand. The German Administrative Court consequently issued a preliminary reference procedure to the ECJ. It argued that the current system of deposits contradicted structural principles of national constitutional law. Namely, it ran counter to the principles of freedom of action and economic liberty and proportionality arising from Articles 2(1) and 14 of the Basic Law.[86]

The ECJ found that the system of deposits did not violate the right to conduct business or any other right of a fundamental nature.[87] Moreover, it reiterated that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the community.'[88] It also re-emphasized the importance of the primacy of EU law for the uniformity and efficacy of Community Law, and that all Community measures could only be judged in the light of Community Law.[89] 'Therefore, the validity of a community measure or its

83 Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (*van Gend en Loos*) [1963] ECLI:EU:C:1963:1. Case 6-64 Flaminio Costa v E.N.E.L. (*Costa ENEL*) ECLI:EU:C:1964:66.

84 Giacomo Delledonne and Federico Fabbrini, 'The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence' (2019) 44 European Law Review 178.

85 BVerfGE 37, 271 *Solange I* 29 May 1974.

86 Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Internationale Handelsgesellschaft)* [1970] ECLI:EU:C:1970:114, para 2.

87 Ibid. para 20.

88 Ibid. para 4.

89 Ibid. para 3.

effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.'[90]

After obtaining the decision from the ECJ, the German Administrative Court asked the FCC to issue a ruling on the matter to avoid a conflict between the supranational secondary and national constitutional law.[91] In its reply, the FCC invented its famous *Solange* sentence. As long as the Community does not receive a catalogue of fundamental rights, a democratically legitimate parliament elected directly by general suffrage which possesses the legislative power and politically accountable Community organs, the guarantee of fundamental rights under the Basic Law prevails.[92]

In *Solange I* the FCC, for the first time, applied the terminology of constitutional identity, although only briefly in passing. Concerning the above-cited Article 24 of the Basic Law, it determined that transferring sovereign rights to inter-state institutions cannot be taken literally – that is, without any limitation. Article 24 must be understood and construed in the overall context of the Basic Law as a whole. That means that Article 24 'does not open the way to amending the basic structure of the Basic Law, which forms its identity, without a formal amendment. It does not open any such way through the legislation of the inter-state institution.'[93] The FCC furthermore wrote: 'The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law […] and one which forms part of the constitutional structure of the Basic Law.'[94]

Notably, the reason for the self-acclaimed limited acceptance of the primacy of the secondary Community Law was not a loss of national self-determination and state-centred conception of democracy, but the lack of democratic structures and institutions on the side of the Community.[95] The limitation of transfer of sovereign powers due to Article 24 was not on

90 Ibid.
91 Oppenheimer (n 22) 422.
92 Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany: Third Edition, Revised and Expanded* (Duke University Press 2012) 326.
93 BVerfGE 37, 271 *Solange I* 29 May 1974, 279: 'Das heißt, er eröffnet nicht den Weg, die Grundstruktur der Verfassung, auf der ihre Identität beruht, ohne Verfassungsänderung […] ändern'.
94 Oppenheimer (n 22) 447.
95 In comparison with the subsequent case law concerning identity, such as *Maastricht* and *Lisbon* decisions.

the part of the German state – because it would transfer too much – but due to the (yet) insufficiently established fundamental rights protection on the part of the Community. As the FCC wrote, the 'current status of the integrative process play[ed] the decisive role'.[96]

The *Solange I* decision was heavily contested in scholarly writings in Germany[97] and by the sitting judges. The majority decision was accompanied by three sitting judges dissenting from the above-cited position. 'The basic structure of the constitution on which its identity is based is not at stake',[98] the dissenting judges wrote. 'The protection of fundamental rights afforded within the Community does not differ in its nature and structure from the fundamental rights system of the national constitution.'[99] The community's fundamental rights are 'based on the constitutional traditions common to the Member States – their recognition is based on the same values and concepts. That is enough. No Member State can demand that fundamental rights be guaranteed at the Community level precisely in the form the national constitution guarantees them.'[100]

The dissenting judges also clearly wrote that the majority's objections were mistaken when asserting that Article 24(1) of the Basic Law opened the way to change 'the basic structure of the constitution on which its identity is based'[101] by the legislation of intergovernmental institutions. Article 24(1) of the Basic Law does not permit the transfer of sovereign rights without any restrictions, which must be interpreted consistently with the Basic Law's system of values which aims to preserve a liberal and democratic order, but also with the 'commitment to a united Europe in the preamble'.[102] The integration into a supranational community is therefore permissible if it is subject to the same fundamental and indispensable principles as provided by the Basic Law: 'this includes, in particular, the protection of the core element of fundamental rights'.[103] The dissenting judges argued that this requirement was already fulfilled in the case of the EEC. The position of the majority, they wrote, led to unacceptable results.

96 BVerfGE 37, 271 *Solange I* 29 May 1974, p 280.
97 Robert Christian van Ooyen, *Die Staatstheorie des Bundesverfassungsgerichts und Europa* (2nd edn, Nomos 2008) 11–18.
98 BVerfGE 37, 271 *Solange I* 29 May 1974, p 297.
99 Ibid.
100 Ibid.
101 Ibid.
102 Ibid.
103 Ibid. 296.

The secondary legislation of the Community simply could not be subject to national constitutional scrutiny.[104]

To sum up, the central message of *Solange I* was the following. Sovereign competences might be freely transferred to the supranational European Community, providing that through the legislation of the intergovernmental institution, the basic structure of the constitution – on which its identity was based – was not changed.[105] As long as the European political and constitutional structures cannot sufficiently guarantee that condition, the potential conflict between the Community secondary rules and the national constitutional fundamental rights has to be resolved in favour of the latter. The opposition in the minority, however, already in that early stage of the EU development (before the Maastricht Treaty), refused the possibility that the structure of the Basic Law and, thereby, its identity could be affected due to the existing safeguard of common constitutional traditions of the Member States upon which the Community is based.

Finally, when the FCC made the connection between the scope of the transfer of competences due to Article 24 of the Basic Law and the unamendable constitutional structure which defines its unchangeable constitutional identity, no reference was made to the Eternity Clause (Article 79, referring to Articles 1 and 20 of the Basic Law). Identity was only connected with the part of the Basic Law dealing with fundamental rights. Although Christian Calliess argued that German national constitutional identity was initially understood in a much broader sense, incorporating all fundamental rights and not just the principle of human dignity under the Eternity Clause,[106] one can alternatively interpret the meaning of national constitutional identity under *Solange I* not as *all* fundamental rights, but merely as a general commitment to fundamental rights protection.[107]

3.3 Identity: The Legal Principles Underlying Fundamental Rights

Political accountability and commitment to fundamental rights in the EU gradually but steadily increased. Since 1979, EU citizens directly elect their

104 Ibid. 299.
105 Ibid. 280.
106 Calliess (n 10) 159.
107 The BVerfG did attach these commitments to a substantive meaning of fundamental rights. But that was not the basic essence of identity, only mentioned in passing.

representatives in the European Parliament, and the ECJ has considerably strengthened their commitment to the protection of fundamental rights.[108] In the *Nold* decision,[109] it was reassuring that 'fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States. It cannot, therefore, uphold measures incompatible with fundamental rights recognized and protected by the Constitutions of those States.'[110]

The FCC consequently acknowledged this essential shift and unanimously withdrew from the possibility of fundamental rights review as reserved and established in *Solange I*. In the no less famous *Solange II*[111] decision, it then decided that 'as long as the European Communities, in particular, the case law of the ECJ, generally guarantee an effective protection of fundamental rights which is to be regarded as essentially equivalent to the protection required by the Basic Law as indispensable, the FCC will no longer review the Community law against the national standards of fundamental rights; especially since the ECJ generally guarantees the essence of fundamental rights.'[112]

Solange II also mentioned, in an *obiter dictum*, the national constitutional identity of the Basic Law, but the given description was not precisely the same. *Solange I* defined national constitutional identity as an essential part of the constitutional structure, specifically the part on fundamental rights. *Solange II* redefined national constitutional identity as the basic structure of the Basic Law, specifically the legal principles underlying fundamental rights.

The FCC stated: 'The power conferred by Article 24(1) [...] does not confer a power to surrender [...] the identity of the prevailing constitutional order [...] by breaking [...] into the structure which makes it up. [...] That [...] would undermine essential structural parts of the Basic Law. [...] An essential part which cannot be dispensed with and belongs to the basic

108 William Phelan, 'The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: A Response to Delledonne & Fabbrini' [2020] TRiSS Working Paper Series.

109 Case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* (*Nold*) [1974] ECLI:EU:C:1974:51.

110 Ibid. para 13.

111 BVerfGE 73, 339 *Solange II* 22 October 1986.

112 Ibid. 387. See also Oppenheimer, who translated 'im Wesentlichen gleich zuachten' as 'substantially similar'. Oppenheimer (n 22) 494.

framework of the constitutional order in force is constituted in any event by the legal principles underlying the provisions of the Basic Law on fundamental rights.'[113]

Finally, although both decisions, *Solange I* and *II*, concern domestic judicial power which presupposes potentially reviewing EU law, they did not justify it with the argument of national constitutional identity or with a referral to the Eternity Clause as their main rationale. Rather they mentioned identity only in passing, the first time as the part of the Basic Law dealing with fundamental rights,[114] and the second time as the legal principles underlying the provisions of the Basic Law on fundamental rights.[115]

113 Ibid. 485.
114 Calliess (n 10) 159.
115 Ibid. 160.

4 The Birth of the Contemporary Constitutional Review of EU Law

With the new institutional step in the European integration, the Maastricht Treaty, the Member States had to amend their constitutions. This section explains the constitutional change with the European Article in Germany (4.1). Consequently, the FCC reviewed the said amendment and the compatibility of the Maastricht Treaty with the Basic Law. In doing so, the FCC established a new constitutional review of EU law (4.2).

4.1 The Maastricht Treaty and the European Article

In 1992, with the adoption of the Maastricht Treaty,[116] the German Basic Law was amended to provide a specific constitutional authorization to a much deeper European integration – the Community being called the European Union ever since. Indeed, the Maastricht Treaty made a giant leap forward for European integration. Among many other aspects, it introduced European citizenship and allowed people to move and reside freely within the EU; it also established a common foreign and security policy, and closer cooperation between police and the judiciary in criminal matters.[117]

Accordingly, the Member States assumed it necessary to provide a more concrete constitutional authorization for the anticipated enhanced integration. An explicit constitutional endorsement would acknowledge the evident transformation of the EU beyond the classical international cooperation as an international organization, and it would give the EU the necessary constitutional legitimation to fulfil its purpose.[118] Germany

116 Treaty on European Union (*Maastricht Treaty*) [1992] OJ C191/1.
117 Robert Schütze, 'Constitutional History: From Paris to Lisbon' in Robert Schütze (ed), *European Constitutional Law* (2nd edn, Cambridge University Press 2015).
118 Kommers (n 55) 577.

amended its Basic Law with Article 23[119]– the European Article,[120] which can be summarized in five steps.

First, Germany shall participate in the development of the EU, committed to the principle of democracy, welfare, principles of federalism, the rule of law and subsidiarity, which guarantee a comparable level of fundamental rights protection. Second, to this end, Germany can transfer its sovereign powers to the EU. Third, the EU and its future development must be subject to the Eternity Clause – Article 79(2)(3) of the Basic Law. Fourth, the parliament has the right to challenge European legislation for infringing the principle of subsidiarity before the CJEU. Fifth, parliament shall actively participate and be heard in matters concerning the EU as further regulated by the national legislation.

The new constitutional amendment confirmed two crucial issues. First, it incorporated the FCC's *Solange II* jurisprudence in the Basic Law: not as an authorization to review EU law, but as a confirmation that the EU guarantees an essentially comparable level of fundamental rights protection.[121] Hence, a national review of EU law from the fundamental rights perspective by the FCC would no longer be an option, in line with *Solange I*, which is now also codified in the Basic Law. The constitutional amendment acknowledged that the EU is committed to the same universal basic principles as the Basic Law.

One can understand the new constitutional amendment as a convergence between the various constitutional systems dedicated to the same principles and values. The commitments of the EU overlap with the commitments of Articles 1 and 20 of the Basic Law. Yet, the FCC did not take that path. In its view, the principle of democracy as a commitment of the EU cannot be compared to the narrowly understood state-centred democracy in Germany.[122] The legitimacy of the EU is only derivative,[123] and the European Article's reference to the Eternity Clause enabled the FCC to present a new jurisprudential account to review EU law, as further explained thereinafter.

119 In addition to the other constitutional changes. Art 28 (1), Art. 52 (3a), and Art. 88 (second sentence).

120 Horst Dreier (ed), *Grundgesetz Kommentar*, vol 2 (2nd edn, Mohr Siebeck 2006).

121 Art 23(1) GG: '[…] die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen und dem Grundsatz der Subsidiarität verpflichtet ist und einen diesem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz gewährleistet.'

122 Calliess (n 10) 161.

123 Ulrich Everling, 'Das Maastricht-Urteil des Bundesverfassungsgerichts und seine Bedeutung für die Entwicklung der Europäischen Union' (1994) 17 Integration 165, 168.

4.2 *The* Maastricht *Decision: The New Constitutional Review of EU Law*

In the *Maastricht* decision,[124] challenging the European Article and the incompatibility of the Maastricht Treaty with the Basic Law, the FCC developed a new constitutional review of EU law. The *Maastricht* decision in 1993 established the constitutional basis and the meticulous dogmatics for the contemporary German constitutional review of EU law.[125] The FCC created for itself a power to examine 'whether legal acts of the European institutions and bodies remain within the limits of the sovereign rights granted to them or break out of them'.[126] At the same time, the *Maastricht* decision did not yet *call* the newly established constitutional review identity review.

This section briefly outlines the basic arguments of the *Maastricht* decision – in the name of national democracy and the right to vote (4.2.1). Moreover, it illuminates the factual and normative assumption underlying the decision (4.2.2), as well as the inner contradictions of the theory of national democracy (4.2.3). Finally, it adressess the neologism of the newly introduced concept of *Staatenverbund* (4.2.4).

4.2.1 The Principle of National Democracy and the Right to Vote

The FCC construed the *Maastricht* review of EU law around two basic norms: the right to vote and the principle of national democracy.[127]

The right to vote under Article 38(1) of the Basic Law plainly states: 'Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience.' Based on this norm, the FCC developed the 'fundamental democratic content of this right',[128] arguing that every citizen gets to coop-

124 BVerfGE 89, 155 *Maastricht* 12 October 1993.

125 Steve J Boom, 'The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?"' (1995) 43 The American Journal of Comparative Law 177.

126 BVerfGE 89, 155 *Maastricht* 12 October 1993, p 156.

127 Karl M Meessen, 'Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany' (1993) 17 Fordham International Law Journal 511, 514.

128 BVerfGE 89, 155 *Maastricht* 12 October 1993, p 171.

erate in legitimizing state power and to co-influence its concrete implementation.[129] In other words, citizens must be able to exercise a substantial political influence on public authorities.

In the second step, the FCC connected the right to vote with the principle of democracy, arguing that 'it is the inviolable element of the principle of democracy that the performance and the exercise of the state functions and power derive from the people and must be justified to that people'.[130] Because the European Parliament is, under the Maastricht Treaty, merely a supplementary and advisory body, without serious political influence and democratic accountability, its legitimation is primarily incumbent upon the sovereign nation states and therefore its national parliaments.[131]

Consequently, if only the citizens, via their national elections through the national parliaments within the Member States, can fulfil the legitimation of public authority and exercise political influence on it, only the national parliaments can carry out and complete this function also within the EU. Hence, the German parliament must retain its predominant political influence concerning EU legislation. Moreover, the principle of democracy 'sets limits for the expansion of the functions and competencies of the European Union'[132] and 'by the principle of democracy the limits are imposed on the extension of the functions and powers of the European Communities'.[133]

The FCC creatively built a dogmatic chain: every German citizen has the right to vote; the right to vote means that the public authority is legitimized by the voters and they retain the power to substantially influence the public authority; the legitimation of public authority by the citizens is an element of the principle of democracy; the principle of democracy is a constitutive part of the Eternity Clause; one cannot impact the Eternity Clause – even by EU law, having the primacy over national constitutional law.

Henceforth, the FCC 'must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the limits of the sovereign rights accorded to them, or whether they may be considered to exceed those limits'.[134] To put it simply, the FCC claimed to have the power to review EU law.

129 Ibid.
130 Ibid. 172.
131 Ibid.
132 Ibid. 187.
133 Ibid.
134 Ibid. 189.

4.2.2 Maastricht's Empirical and Normative Assumption

The *Maastricht* decision contains an empirical and normative assumption: the legitimacy of public authority in the EU, at that time, could only come from the Member States.[135] In other words, European democracy was empirically too weak, and normatively not possible.

As to the latter – European democracy did not exist. Despite apparent imperfections of the democratic features of the EU in 1993,[136] its perceived distance from ordinary citizens and still predominantly local public sphere, it would still be erroneous to reduce the democratic legitimacy in the EU solely to its Member States. The Maastricht Treaty introduced common Union citizenship and granted those citizens the right to vote and stand as a candidate at elections to the directly elected European Parliament. Due to the Maastricht Treaty, the European Parliament already at that time had the power to scrutinize the executive power relating to budgetary issues, the right to consent to several legislative areas, where the Council acts by unanimous decision, and the right to cooperate in most areas of legislation where the Council acts by majority. Furthermore, the European Parliament had the right of a legislative initiative, even if only limited: it can ask the Commission to put forward a proposal.[137] Finally, the European Parliament also got the right of investiture within the Commission. Before the appointment of the President and the Members of the Commission as a collegiate body, the approval of the European Parliament was required. If all legitimation of the EU solely came from the Member States, what was the nature of all these mechanisms of checks and balances, supported by the direct election of the European Parliament?

As to the normative assumption, as a matter of principle, why could the principle of democracy not work beyond a national state, and function, *mutatis mutandis*, among many peoples?[138] The power and influence of one people may be reduced in the supranational EU. However, working together in accord with many peoples also strengthens the position and power of the said individual people in the globalized world. In other words, acting together may increase the benefits even if it is counterbalanced with

135 Everling (n 123) 168.

136 Roland Bieber and Elizabeth Kopp, 'The EC's Democratic Deficit: Maastricht Is Only a Step in the Right Direction' (2019) 40 Harvard International Review 44.

137 Sergio Fabbrini, 'Between Power and Influence: The European Parliament in a Dual Constitutional Regime' (2019) 41 Journal of European Integration 417.

138 Christoph Möllers, 'Multi-Level Democracy' (2011) 24 Ratio Juris 247.

necessary compromises, which one could avoid in solely national self-governance.

In addition, the claim of the legitimate authority of the EU could be based on an entirely different normative account, perhaps shared among the EU and the Member States.[139] One could understand the normative power of the EU from the normative awareness of every state that interconnectivity and mutual dependence requests integration into a larger community.[140] Measuring and evaluating the political entity and its legitimacy, as the EU, with the tools developed for the sovereign nation states, likely misses the genuine features of the object of inquiry.

4.2.3 Inner Contradiction of the Maastricht Argumentation

The FCC created a contradiction between the principle of national democracy and the anticipated trajectory of the EU's democratic evolvement. It recognized that 'it is anticipated that enhancement of the principle of democracy [of the EU] will improve the functioning of all institutions on a Community level'.[141] Moreover, 'the principles of democracy upon which the Union is based are extended in step with its integration and that [until then] a living democracy is retained in the Member States while the process of integration is proceeding'.[142]

Accordingly, the FCC did not overlook the commitment to the principle of democracy on the Union level. The quality and intensity of supranational democracy was just not adequate yet. In the words of the FCC: 'These functions and powers [of the Union due to the Maastricht Treaty] have not, as yet, been supported at the treaty level by a corresponding intensification and extension of the principles of democracy.'[143]

However, a more democratic Union needs more competences for the European Parliament, more accountability of the executive, and inevitably less governmental decision-making by the Member States. But that would directly contradict the main line of argumentation due to the *Maastricht*

139 Joseph HH Weiler, 'Der Staat "über Alles" Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts' (Jean Monnet Chair 1995) 7.
140 Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 European Journal of International Law 907.
141 BVerfGE 89, 155 *Maastricht* 12 October 1993.
142 Ibid.
143 Ibid.

decision, which suggests that the national principle of democracy in Germany requires that the state *retains* functions and powers of substantial importance.[144] Even if the EU could establish and exercise the best democratic practice, that could not remedy the reservations of the FCC that the principle of national democracy requires a certain amplitude of powers.

The *Maastricht* decision committed itself to the (insufficient) status quo. One can have legitimate power if being more democratic, yet one cannot become more democratic because that would remove substantial powers from the national parliaments. Hence, the *Maastricht* decision was a de facto commitment to maintain the state of affairs, which contradicted the constitutional commitment of the Basic Law as well as the aim of the Union: to progressively develop an ever-closer Union.[145]

4.2.4 Neologism of Staatenverbund

In light of the principle of national democracy, requiring from the Member States to maintain substantial political influence, the *Maastricht* decision introduced the neologism of *Staatenverbund*,[146] broadly translated as a 'compound of states'. The EU as *Staatenverbund* resonated widely in Germany among the legal scholars, and it slowly became the terminological tool which described the nature of the EU.[147]

144 BVerfGE 89, 155 *Maastricht* 12 October 1993.

145 Matthias Herdegen, 'Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union" and Document "Extracts from: Brunner v. The European Union"' (1994) 31 Common Market Law Review 235.

146 Its implied understanding is likely just to have 'a certain form of merger or cooperation among the units' or 'a connection of parts, similar to a unit'. See Duden: 1. bestimmte Form des Zusammenschlusses bzw. der Zusammenarbeit von Unternehmen; 2. feste Verbindung von Teilen, Werkstoffen o. Ä. zu einer Einheit.

147 Bruno Kahl, 'Europäische Union: Bundesstaat–Staatenbund–Staatenverbund? Zum Urteil des BVerfG vom 12. Oktober 1993' (1994) 33 Der Staat 241; Johannes Schwehm, *Theorie und Kontext: Reflexionen über Demokratie und Frieden zu Beginn des 21. Jahrhunderts* (Nomos 2008) 58–75; Jürgen Bast and Armin von Bogdandy (eds), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* (2nd edn, Springer 2009); Georg K Kampfer, *Die Europäische Union auf dem Weg zu einem Bundesstaat? Von der föderalen Struktur der Europäischen Union und der Europäisierung der Außenpolitik* (Nomos 2010) 72–74; Stefan Oeter, 'Bundesstaat, Föderation, Staatenverbund - Trennlinien und Gemeinsamkeiten föderaler Systeme' (2015) 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,

One could understand this description as a prelude to subsequent decisions, where the FCC tried to develop a theory of a state, as explicated further below. At this point in the *Maastricht* decision, it only paved the way for this by emphasizing the nature of the EU as a cooperation of *states* and its prerequisites to remain that. With the reference to Heller, the FCC wrote: 'The States require sufficient areas of significant responsibility of their own [...] to give legal expression to those matters which concern the people on a relatively homogenous basis spiritually, socially, and politically.'[148] And also: 'Germany is therefore maintaining its status as a sovereign State in its own right', and 'the authority of the *Staatenverbund* is derived from the Member States and has binding effect in German sovereign territory only by virtue of the German command to apply the law. Germany is one of the Masters of the Treaties.'[149]

Heidelberg Journal of International Law 733. Johannes Schwehm, 'Die EU als „Staatenverbund"', *Theorie und Kontext* (Nomos 2008).

148 BVerfGE 89, 155 *Maastricht* 12 October 1993, p 186.

149 Ibid. 191.

5 Constitutional Identity and Ultra Vires Review: National Democracy and Five Essential Areas of State

This section outlines the *Lisbon* decision[150] (5.1), which introduced constitutional identity and ultra vires review (5.2). Furthermore, it explicates how the FCC developed a new theory of state, based on five essential areas under national control (5.3), excluded the possibility of any democratic legitimacy by the EU (5.4), and determined that the EU can never reflect the federal state (5.5).

5.1 The Lisbon *Decision*

In reviewing the constitutionality of the Lisbon Treaty in 2009,[151] which is still the European constitutional basis of the EU today, the FCC issued its notorious and lengthy *Lisbon* decision.[152] This decision reflected the arguments from the *Maastricht* decision considerably, while introducing two arguably distinctive constitutional reviews: constitutional identity and ultra vires. Moreover, it newly determined five areas of essential state functions which Germany cannot confer on the EU.

Much ink has been spilt on this decision.[153] The focus here is not to summarize the decision in detail nor to outline all the critical responses within

150 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009.

151 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

152 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009.

153 Philipp Kiiver, 'German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures' (2009) 10 German Law Journal 1287; Christoph Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea' (2009) 10 German Law Journal 1201; Stefan Theil, 'What Red Lines, If Any, Do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration?' (2014) 15 German Law Journal 599; Elisabetta Lanza, 'Core of State Sovereignty and Boundaries of European Union's Identity in the Lissabon – Urteil' (2010) 11 German Law Journal 399; Matthias Niedobitek, 'The Lisbon Case of 30 June 2009 - A Comment from the European Law Perspective' (2009) 10 German Law Journal 1267; Cornelia Koch, '"Bis hierher sollst du kommen und nicht weiter": The German Constitutional Court and the Boundaries of the European Integration Process' in Gabrielle Appleby, Nicholas

and beyond German academic scholarship. This section solely presents the main arguments of the decision in so far as they relate to the new constitutional identity and ultra vires review, as developed by the FCC. Moreover, this section also highlights some of the most convincing critical observations concerning the theory of a state and its essential areas, which cast serious doubts on the plausibility of the arguments in the said decision.

In the *Lisbon* decision, the FCC confirmed the constitutional conformity of the Lisbon Treaty with the German Basic Law. However, the argumentation was far from furthering the constitutionally placed commitment of Germany to participate actively in the progressive development of the EU. The FCC argued that the EU had too little democratic legitimacy to constitute independently the public authority on its part. At the same time, in line with the *Maastricht* decision, it also claimed that the EU cannot and shall not democratically improve and evolve further, since that would violate the State's sovereign ability to shape its own political and social living conditions and, in addition to that, the German constitutional identity.

According to the FCC, the EU remains and must remain solely 'an association of sovereign states'.[154] The EU is a derived constitutional order,[155] where the exercise of public authority is subjected to the Member States, which are the only subjects of democratic legitimation.[156]

5.2 Constitutional Identity and Ultra Vires Review Introduced

The FCC established the foundations for the constitutional review of EU law already in the *Maastricht* decision, as illustrated above.[157] As seen from the German perspective, reviewing EU law is possible, when the FCC deter-

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Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press 2012); Möllers (n 8); Wendel, 'Lisbon Before the Courts' (n 5).

154 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 229.

155 Ibid. para 231.

156 Ibid. para 229.

157 BVerfGE 89, 155 *Maastricht* 12 October 1993, p 188: 'Die deutschen Staatsorgane wären aus verfassungsrechtlichen Gründen gehindert, diese Rechtsakte in Deutschland anzuwenden. Dementsprechend prüft das Bundesverfassungsgericht, ob Rechtsakte der europäischen Einrichtungen und Organe sich in den Grenzen der ihnen eingeräumten Hoheitsrechte halten oder aus ihnen ausbrechen (vgl. BVerfG 58, 1 [30 f.]; 75, 223 [235, 242]).'

mines that the 'Community and Union institutions transgress the boundaries of their competences […] accorded to them by way of conferral'.[158]

In the *Lisbon* decision, the above-cited review got two new names. The FCC asserted that it would carry out an ultra vires and identity review. In the former review, it 'examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral […] whilst adhering to the principle of subsidiarity under Community and Union law.'[159] In the latter, the identity review, the FCC protects and 'preserve[s] the inviolable core content of the Basic Law's constitutional identity'[160] under Article 23(1) in conjunction with Article 79(3) of the Basic Law. This ensures, argued the FCC, that 'the primacy of application of Union law only applies by virtue and in the context of constitutional empowerment that continues in effect'.[161]

In addition, the FCC openly suggested and invited the German legislature to provide a statute which would directly empower the FCC to carry out both reviews as tailored in the *Lisbon* decision.[162]

5.3 Five Essential Areas of a State – A Theory of State Introduced

The *Lisbon* decision straightforwardly defined five areas of national democratic formative action which are particularly sensitive and thus must remain under the exclusive control of the State. In other words, the FCC worked out nothing less than a constitutional theory of necessary state functions.[163] The following sub-section outlines these five essential areas (5.3.1), and demonstrates the ambiguity as to whether a state must retain exclusive or merely substantial control over the said areas (5.3.2).

158 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 240.
159 Ibid.
160 Ibid.
161 Ibid.
162 Ibid. para 241.
163 Christoph Schönberger, 'Identitäterä: Verfassungsidentität zwischen Widerstandsformel und Musealisierung des Grundgesetzes' (2015) 63 Jahrbuch des öffentlichen Rechts der Gegenwart 41, 60.

5.3.1 Five Essential Areas 'Since Always' (seit jeher)

The *Lisbon* decision determined five essential areas which have to remain under national control and must not be conferred to the EU: first, substantial and procedural criminal law; second, monopoly on the use of force by the police and the military – war and peace; third, taxation, public revenue and expenditures, and fiscal decisions; fourth, social policy considerations or welfare; and finally, culture, education and religion.[164]

Conspicuously, the cited areas almost fully overlap with the competences which, under the Lisbon Treaty, still remain under national control. As Halberstam and Möllers argued, it is 'a negative reading of the European Treaties'.[165] Moreover, the theory of state is substantiated with nearly no serious normative arguments.[166] The FCC merely argued that these areas 'are important'[167] and that it always has been that way: that cultural, historical and religious practices are so sensitive and rooted in tradition that only the people themselves can regulate these issues.[168] These types of political decisions, where sufficient space must be left to the Member States for the political formation of economic, cultural and social living conditions,[169] have to 'rely especially on cultural, historical and linguistic perceptions […] within public discourse in the party political and parliamentary sphere of public politics'.[170]

Concerning criminal liability and penalization of anti-social behaviour, the FCC argued that the respective legal norms can only partially be derived from values and moral premises shared Europe-wide. For the rest, they must be left to the democratic decision-making process, which depends on 'cultural processes of previous understanding that are historically grown and also determined by language'.[171]

164 Ibid. paras 249, 252.
165 Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court Says "Ja zu Deutschland!"' (2009) 10 German Law Journal 1241, 1251.
166 Calliess (n 10) 164. Christoph Ohler, 'Herrschaft, Legitimation und Recht in der Europäischen Union–Anmerkungen zum Lissabon-Urteil des BVerfG' (2010) 135 Archiv des öffentlichen Rechts 153, 176.
167 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 249.
168 Ibid.
169 Ibid. para 4.
170 Ibid.
171 Ibid.

Finally, the FCC stated that democratic self-determination needs 'to assert oneself in one's own cultural area'[172] concerning education, family law, language, media regulation and the status of churches or ideological communities. In that area, 'fundamental political decisions are closely connected to the cultural roots and values of every state; [and…] affect established rules and values rooted in specific historical traditions and experience [hence]; democratic self-determination requires that a political community bound by such traditions and convictions remains the subject of democratic legitimation'.[173]

It is not clear why these sensitive areas could not be addressed within the European accord, if so preferred. Moreover, why is democratic self-determination bound by historical traditions, cultural roots and values? Why can a democratic legislative body not choose to determine these areas anew, perhaps in cooperation and in concert with other Member States within the established European institutions, including the European Parliament?

Additionally, none of the given reasons explains the choice of those specific five areas or clarifies why the required conditions cannot not be, at least partially, satisfied within the EU. The FCC explicitly justified the five essential areas of state by historical argument: they have *always* been a state's functions. It stated that the five chosen areas are particularly sensitive for a constitutional state to democratically shape itself 'since always' (*seit jeher*).[174] And elsewhere: '[C]riminal law has always been a central duty of state authority.'[175]

Scholars were quick to show that this implied historical argument is not persuasive, especially in the light of the already constitutionally confirmed Maastricht and Lisbon Treaties. For example, according to the said treaties, the EU already holds control over the common euro currency, although coining the money has traditionally been understood, *since always*, as one of the classical prerogatives of a state.[176]

172 Ibid. para 260.
173 Ibid.
174 Ibid. paras 252, 355. The English translation curiously omits the translation of '*seit jeher*'.
175 Ibid. para 355.
176 Halberstam and Möllers (n 165) 1250.

5.3.2 Exclusive Control or Substantial Freedom of Action

Must a state exercise absolute control over the cited essential areas, or does it suffice to have a substantial freedom of national democratic action to influence them? The *Lisbon* decision is somehow ambiguous on that issue.

The argument that named five specific areas which must remain under the exclusive control of a state is inconsistent in several places. Sometimes the FCC briefly, and as it seems exhaustively, named all five areas reserved solely for national democratic regulation; at other times the FCC argued only about 'sufficient space'[177] for Member States to (co-)shape these areas. The signals are mixed and ambiguous.

The FCC stated: 'The safeguarding of sovereignty, demanded by the principle of democracy, […] does not mean that a pre-determined number or certain types of sovereign rights should remain in the hands of the state.'[178] And also: '[T]he participation of Germany in developing the European Union […] also comprises a political union. […] Political union means the joint exercise of public authority, including legislative authority, even reaching into the traditional core areas of the state's area of competence.'[179]

Elsewhere, the FCC suggested quite the opposite: 'Accordingly, the *essential* decisions in social policy must be made by the German legislative bodies on their own responsibility.'[180] Or: 'What is decisive, however, is that the overall responsibility, with *sufficient* political discretion regarding revenue and expenditure, can still rest with the German Bundestag.'[181] Along with: 'In this area, it is particularly necessary to draw the limit where the coordination of cross-border situations is factually required.'[182] And lastly: 'In this important area for fundamental rights any transfer of sovereign rights beyond intergovernmental cooperation may only lead to harmonization for specific cross-border situations on restrictive conditions; in principle, substantial freedom of action must remain reserved to the Member States here.'[183]

One could explain the cited inconclusive statements as due to the length of the document, which undoubtedly results in repetitive and somewhat

177 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 249.
178 Ibid. para 248.
179 Ibid.
180 Ibid. para 259 (emphasis added).
181 Ibid. para 256 (emphasis added).
182 Ibid. para 251.
183 Ibid. para 253.

unclear language. Alternatively, the inconsistent statements may be the consequence of the lack of a persuasive theory,[184] which may offer substantial normative arguments as to why the chosen areas must remain under exclusive national legislative control.

5.4 The Lack of Democratic Legitimacy of the EU

Regardless of the numerous new empowerments of the European Parliament according to the new Lisbon Treaty to elevate its political and legislative influence in the EU, the FCC categorically rejected the European Parliament's independent source of legitimation.[185] The argumentation is similar to that in the *Maastricht* decision, although the FCC notably disregarded the progressive institutional development and the newly conferred competences on the European Parliament under the Lisbon Treaty.

The European Parliament cannot, and need not, fulfil the conditions of one national system of democratic representation. Due to the lack of electoral equality in the European elections and the non-existing European people, the European Parliament fails to achieve its democratic legitimation of public authority exercised within the EU, according to the FCC. It wrote: 'there can be no independent subject of legitimation for the authority of the European Union which would constitute itself, so to speak, on a higher level, without being derived from an external will, and thus of its own right.'[186]

According to the FCC, the EU's legitimation of authority is exercised predominately through the Member States via their national parliaments. The principle of democracy requires that people, via their democratic representation in the respective parliament(s), effectively influence political decisions and hold their representatives accountable through periodic elec-

184 The BVerfG explicitly determined the culture, or decisions of particular cultural importance, as the fifth area of essential areas of a state. Elsewhere, however, it elaborated on this area as 'school and education system, family law, language, certain areas of media regulation, and status of churches and religious and ideological communities'. One can be easily puzzled as to where this classification and systematization of culture comes from, and whether one can simply reduce the complexities of media law, family law and the educational systems together with the relation of church and state to one simple buzzword, 'culture'. See BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, paras 252, 260.

185 Ibid. para 271.

186 Ibid. para 232.

tions. Since the FCC declared the European Parliament unable to fulfil these requirements, the Member States, via their national parliaments, have to maintain this function concerning EU matters effectively. Henceforth, national parliaments must retain their political and social ability to shape citizens' living conditions by their own responsibility.[187]

Indeed, the European Parliament is not elected by universal electoral equality – one person, one vote – since the seats are not designated by the number of European citizens eligible to vote. The European elections currently reflect the principle of equality of the Member States. Accordingly, they accord a smaller Member State a proportionately higher number of parliamentary seats, because even the smallest populations of Malta, Luxembourg and Cyprus get six MEPs each.

Scholars have convincingly argued that the FCC completely overlooked 'the particularities of democratic legitimacy in federal states […] and lacks the categories to assess the particularity of democratic legitimacy in federal systems in general'.[188] The US Constitution, for example, guarantees to each state at least one Member in the House of Representatives. For instance, the small state of Vermont would otherwise not be accorded a Member according to population criteria.[189] The Swiss system similarly does not have a majoritarian parliamentary government, so the small states are over-represented in the second chamber of the Federal Parliament.[190] Yet it would be implausible to deny the political legitimacy of both these democracies. Even the German federal system has one body with egalitarian representation, the *Bundestag*, and the other, the *Bundesrat*, which represents the German federal states. Since both chambers often have to consent to new legislation, the 'egalitarian legitimacy necessary disappears in the joint decision-making procedure'.[191]

Finally, although the European Parliament certainly has a long way to go to establish itself as an important European institution which genuinely represents the European peoples and holds other European institutions accountable, the reasons for the FCC relating to electoral (in)equality appear weak and unpersuasive.

187 Ibid. para 226.
188 Schönberger (n 153) 1215.
189 Ibid. 1216.
190 Ibid. 1214.
191 Halberstam and Möllers (n 165) 1248.

5.5 Staatenverbund *Intensified and Impossibility of the EU as a Federation*

One of the core elements of the German constitutional identity is to remain a state. In turn, that means that the EU cannot become one. The EU must not replace the national state and hollow out its essential state features. Consequently, the EU design cannot correspond to the level of federalism. The FCC derived this argument under the Eternity Clause. It determined: '[I]f the extent of competences, the political freedom of action and the degree of independent opinion-formation on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for example the legislative competences, essential for democratic self-determination, were exercised mainly at Union level,'[192] a structural democratic deficit would be unacceptable.

The necessity to remain a state corresponds with the *Staatenverbund*, which the FCC in the *Lisbon* decision evolved further. It stated: 'The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States.'[193] Then the FCC connected the term with the Basic Law, arguing that Article 23(1) underlines that the EU is 'designed as a *Staatenverbund* to which sovereign powers are transferred'.[194]

Then the president of the FCC explained in a scholarly article why he finds the concept useful: 'The term *Verbund* makes it possible without oversimplistic spatial and hierarchic concepts such as "superiority" and "subordination". Instead, it opens up the possibility of a differentiated description based on different systematic aspects such as unity, difference and diversity, homogeneity and plurality, delimitation, interplay and involvement. The idea of *Verbund* equally contains autonomy, consideration and ability to act jointly.'[195]

192 Ibid. para 264.
193 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 229.
194 Ibid.
195 Andreas Voβkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 6 European Constitutional Law Review 175, 184.

5.6 Concluding Remarks

The *Lisbon* decision further disregarded the possibility of democratic realization beyond the nation state, and it introduced two constitutional review mechanisms: ultra vires and the constitutional identity review.[196] The ultra vires review examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral. The constitutional identity review protects and preserves the inviolable core content of the Basic Law's constitutional identity. Both reviews are based on the principle of democracy, which is part of the Eternity Clause.

To give the constitutional identity concrete meaning, the FCC further specified five essential areas of the state's functions that must remain under national exclusive control. Criminal law, war and peace, taxation and spending, social policies, and culture (including education and religion). Furthermore, it refused the possibility that the EU would institutionally and empirically evolve into the Union corresponding to the federal level.[197]

Finally, the *Lisbon* decision fortified the arguments from the *Maastricht* decision and even more firmly established its general, self-acclaimed competences to scrutinize and review EU law. For the FCC, the EU must remain a merely derivative system of cooperation of the sovereign states, without its own legitimacy and subordinated to the Masters of the Treaties.[198]

196 Bobić (n 61) 98.

197 Koch (n 153) 199.

198 Lanza (n 153); Koch (n 153); Erich Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' (2013) 14 German Law Journal 75.

6 Finding Appropriate Self-Restraint – The Criterion of Manifest and Structurally Significant Violations

After the *Lisbon* decision, the FCC took one step back and re-evaluated its position. While it did not yield its judicial resistance against the EU, it also revised the attitude and dogmatics expressed in *Lisbon* (6.1). The opportunity occurred concerning the *Mangold* decision, where the CJEU arguably erred (6.2). The FCC developed a new approach, stating that it will only exercise an ultra vires review of EU law should the violations of conferred competences occur manifestly and in a structurally significant matter, and only after first referring to the CJEU (6.3). The sub-section wraps up with some preliminary conclusions (6.4).

6.1 Introduction – Continuity and Revisions

As explicated in Chapter 1 concerning the questions of constitutional pluralism,[199] national constitutional identity has a role in managing the relationship between utmost important national constitutional law on the one side, and on the other, European constitutional law which is based on the principle of primacy.[200] That means that EU law, within the scope of conferred competences, trumps every legal norm, even constitutional, and even if enacted as *lex posterior*. The proponents of national constitutional identity believe that identity can mitigate, balance and eventually resolve any constitutional tensions within the multilevel constitutional orders, if only applied in constructive and dialogic way.[201]

199 Miguel Poiares Maduro, 'Three CLaims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

200 Luke D Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts' (2020) 57 Common Market Law Review 361.

201 François-Xavier Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (Lextenso editions et Karine Roudier 2013) 239–56.

The *Lisbon* decision cannot qualify as a dialogic and constructive mechanism in the light of constitutional pluralism.[202] While the FCC has always been a strong court with its own indomitable spirit, and not a stranger to judicial resistance against the CJEU, as illustrated by the *Solange I* decision in 1974, the said decision occurred in a historically different context. The EU was genuinely without adequate fundamental rights protection, a codified charter of human rights or a directly elected parliament.

Can we observe the respective FCC's case law as a coherent trajectory of resistance against EU law? On the one hand, the FCC has always reviewed EU law – it just shifted from fundamental rights protection in the 1970s to the protection of national democratic institutions. As Huber argued, 'the FCC's approach to European integration have remained unaltered: national legislation as a basis of European integration, the principle of conferral as an emanation of national sovereignty and the maintenance of the national constitutional identity'.[203] On the other hand, the *Lisbon* decision encountered opposition from all sides – the main point being that rather than constitutional openness, German sovereignty became the leitmotif for European integration.[204]

The first German case law reviewing EU law after having forcefully criticized the *Lisbon* decision was thus a step back from *Lisbon* – but a step forward for European integration. In what followed, the FCC developed its best case law in relation to EU law – a plausible, balanced and constructive solution.[205]

202 Giuseppe Martinico, 'What Lies Behind Article 4(2) TEU?' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013).

203 Peter M Huber, 'The Federal Constitutional Court and European Integration' (2015) 21 European Public Law 83, 83.

204 Christian Tomuschat, 'The Defence of National Identity by the German Constitutional Court' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National constitutional identity and European integration* (Intersentia 2013) 211.

205 Torsten Stein, 'Always Steering a Straight Course? The German Federal Constitutional Court and European Integration' (2011) 12 ERA Forum 219, 227.

6.2 Mangold *and the Right to Err*

The *Mangold* decision[206] is often quoted as proof of how the CJEU overstepped its boundaries and, with its overstretching teleological and legally questionable arguments, gave the EU more competences as initially conferred and agreed upon.[207] What should be the reaction of the Member States and their apex courts in a situation where the CJEU evidently goes too far?

Moreover, what is *evident* in the legal argumentation, and what kind of criteria can one apply to be able to call a judgment evidently wrong and arbitrarily overstepping the tolerable? The *Mangold* decision gave the FCC an opportunity to try to find an answer to these questions.

In preliminary ruling proceedings, referenced by the German Labour Court in Munich in 2005, the CJEU decided that the national provision authorizing the conclusion of fixed-term contracts of employment, once a worker reaches the age of 52, has to be precluded. The CJEU based its decision on the general principle of non-discrimination on the grounds of age as a general principle of Community Law and according to Article 6(1) of Directive 2000/78, establishing a general framework for equal treatment in employment and occupation.[208] The transposition of the Directive 2000/78 at the time in question had not yet expired. However, the CJEU argued that the Directive exceptionally provided the Member States an additional period of three years to transpose the directive, and in the meantime report annually to the Commission on the concrete measures taken to tackle age discrimination and towards implementing the directive. Accordingly, 'that obligation would be rendered redundant if the Member States were to be permitted, during the period allowed for the implementation of the

206 Case C-144/04 *Werner Mangold v Rüdiger Helm (Mangold)* [2005] ECLI:EU:C:2005:709.

207 Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 229. Matthias Mahlmann, 'The Politics of Constitutional Identity and Its Legal Frame – the Ultra Vires Decision of the German Federal Constitutional Court' (2010) 11 German Law Journal 1407, 1408; Malte Beyer-Katzenberger, 'Judicial Activism and Judicial Restraint at the Bundesverfassungsgericht: Was the Mangold Judgement of the European Court of Justice an Ultra Vires Act?' (2011) 11 ERA Forum 517, 518.

208 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

directive, to adopt measures[209] incompatible with the objectives pursued by that act'.[210]

Although the question of prohibition of discrimination, based on age, was firmly set before the CJEU in several cases,[211] the decision was forcefully debated and criticized.[212] The general principle of non-discrimination on the grounds of age was not yet formally established by the Treaties, since the EU Charter formally came into force only in December 2007. The said principle was therefore binding only in the light of common constitutional traditions and the EU Charter as the soft law. Finally, the said principle had been neither explicitly named in binding applicable international treaties nor enacted in a significant number of constitutions of the Member States, including the Basic Law. The latter does not include age as one of the qualifying characteristics pursuant to Article 3(3).[213]

Henceforth, despite the conflicting arguments, one can understand the claim that the CJEU decided inadequately. In that light, what is the reaction of national apex courts, when the CJEU presumably errs? Concerning the *Mangold* decision, the FCC decided on the constitutional complaint, carrying out an ultra vires review of EU law.

6.3 Ultra Vires Only as Manifest and Structurally Significant Violations

The German Federal Labour Court respected the CJEU's *Mangold* decision and disapplied the respective national provisions accordingly. The latter decision was challenged by constitutional complaint. Almost five years later, the FCC issued a response in the *Honeywell* decision.[214]

209 The new 'measure' here refers to the change of legislation in 2003 which had reduced the age of workers from 58 to 52 in relation to a conclusion of a fixed-term employment contract.

210 Case C-144/04 *Mangold* [2005] ECLI:EU:C:02005:709, para 72.

211 Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECLI:EU:C:2007:604; Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* (*Bartsch*) [2008] ECLI:EU:C:2008:517; Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* (*Kücükdeveci*) [2010] ECLI:EU:C:2010:21.

212 Marlene Schmidt, 'The Principle of Non-Discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment' (2006) 7 German Law Journal 505.

213 Lerke Osterloh and Angelika Nußberger, 'GG Art. 3 Gleichheit Vor Dem Gesetz' in Michael Sachs (ed), *Grundgesetz Kommentar* (8th edn, C.H. Beck 2018).

214 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.

Honeywell is the first constitutional complaint since the *Lisbon* decision, where the FCC conducted an ultra vires review of EU law. On the merits, the claimed breach of competences was unfounded. Nonetheless, the FCC used this opportunity to define in more detail under what conditions it can render EU law inapplicable. It put the bar considerably higher and showed mature self-restraint, known from the *Solange II* jurisprudence.[215]

It determined three concrete conditions for ultra vires review leading to disapplication of EU law in Germany, which sufficiently qualify the scope of potential breaches. First, it established a necessary condition to engage in dialogue with the CJEU via preliminary reference procedure prior to any EU law review. The CJEU must be afforded the opportunity to interpret the Treaties or to rule on the validity and interpretation of the legal acts in question in the context of preliminary ruling proceedings before any national constitutional review.[216]

Second, the breach of competences must be manifestly violated.[217] A breach of competences is only manifest if the EU acts are taken outside the transferred competences 'in a manner specifically violating the principle of conferral';[218] in other words, if the breach of competences is 'sufficiently qualified'.[219] The FCC further qualified what it means by a *manifest* transgression, referring to several scholarly writings: namely, drastic acts and considerable transgressions of competence (Kokott),[220] the case of a gross, manifest transgression of competences (Isensee),[221] evident errors (Ukrow),[222] grievous, manifest and across-the-board offences (Pernice),[223]

215 Stein (n 205) 227.
216 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para 60.
217 Ibid. para 61.
218 Ibid. para 61.
219 Ibid. para 61.
220 Juliane Kokott, 'Deutschland im Rahmen der Europäischen Union – Zum Vertrag von Maastricht' (1994) 119 Archiv des öffentlichen Rechts 207, 220.
221 Josef Isensee, 'Vorrang des Europarechts und Deutsche Verfassungsvorbehalte: Offener Dissens' in Joachim Burmeister (ed), *Verfassungsstaatlichkeit: Festschrift für Klaus Stern zum 65. Geburtstag* (C.H. Beck 1997) 1255.
222 Jörg Ukrow, *Richterliche Rechtsfortbildung durch den EuGH* (Nomos 1995) 283.
223 Ingolf Pernice, in Horst Dreier (ed), *Grundgesetz Kommentar*, vol 2 (2nd edn, Mohr Siebeck 2006) art 23 para 32.

complete departures from the basis of the Treaties (Oeter),[224] and acts which are manifest, consistent and grievous (Scholz).[225]

Finally, the impugned act must be 'highly significant in the structure of competences between the Member States and the Union concerning the principle of conferral and to the binding nature of the statute under the rule of law'.[226] A manifest and evident shortcoming is therefore not enough – it would have to be structurally significant.

The revised ultra vires review departs from the *Lisbon* decision, and it significantly increases the threshold for national constitutional courts to review EU law and potentially declare it inapplicable in their respective legal orders. Moreover, one can observe it as a promising approach which could serve as an additional safety net to protect democratic commitments from the national perspective, while applied only as the ultima ratio measure. Finally, the potential manifest and structurally significant breach of competences by the CJEU, remedied by the national constitutional review, seems a proportionate response against the principles of effectiveness and unity of EU law.

The *Honeywell* decision raised the question of how ultra vires and constitutional identity review relate to one another. Calliess writes that the exact relationship remains blurred; it is therefore not clear if the FCC must submit a preliminary reference question before conducting an identity review.[227] Concerning the relations between both reviews, the FCC stated that the expansion of competences does not apply only for 'areas which are counted among the constitutional identity of the Member States or depend particularly on the process of democratic discourse in the Member States, albeit any transgression of competence weights particularly heavily here.'[228]

One way of understanding this line of argument is that the qualified ultra vires review could be either within the previously defined reserved areas or without, but the transgression of conferred competences must be qualified in either way. In that way, a review of EU law is not limited to

224 Stefan Oeter and Franz Merli, 'Vierter Beratungsgegenstand: Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte' in Stefan Kadelbach et al. (eds), *Bundesstaat und Europäische Union zwischen Konflikt und Kooperation*, vol 66 (De Gruyter 2007) 361.

225 Rupert Scholz, in Günter Dürig and Theodor Maunz (eds), *Grundgesetz Kommentar*, vol 55 (C.H. Beck 2009) art 23 para 40.

226 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para 61.

227 Calliess (n 10) 171.

228 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para 65.

the reserved essential areas of national constitutional identity. From this understanding it would logically follow that any review of EU law must be qualified according to the *Honeywell* decision, even if it concerns national constitutional identity. The FCC would not otherwise say that ultra vires review can also concern constitutional identity areas, but rather that in these essential areas the respected qualified conditions do not need to be applied.

If this reading is correct, then there is essentially no difference between both constitutional reviews, because they both must fulfil the qualifying conditions from *Honeywell*. One can argue that ultra vires review concerns structural violations of conferred competences and national constitutional identity relates to essential or sensitive areas of the Member States,[229] but in practice – according to the reading above – the said differentiation would be legally irrelevant.

Finally, *Honeywell*'s change of heart is a welcome departure from the *Lisbon* decision. The dissenting opinion of Justice Landau acknowledged the change well.[230] Landau rightfully observed that 'excessive requirements on the finding of an ultra vires act […] deviates from the Senate's judgment on the Treaty of Lisbon'.[231] Moreover, the *Honeywell* decision 'contradicts the core statement of the Senate's judgment'[232] because the majority went beyond the consensus on which the *Lisbon* judgment was based, requiring a sufficiently qualified violation of competences which is not only manifest but which also leads to a structurally significant shift in the structure of competences between Member States and a supranational organization.'[233] Thereby, he claimed, 'instead of making these means an effective control instrument, the court practically returned to the status quo of the *Solange II* ruling'.[234]

229 Bobić (n 61) 23; Calliess (n 10) 169.
230 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, Dissenting opinion of Justice Landau, para 96.
231 Ibid. para 96.
232 Ibid. para 102.
233 Ibid. para 102.
234 Ibid. para 104.

6.4 Concluding Remarks

With the qualifications of manifest and structurally significant transgression of conferred competences to carry out an ultra vires review, the FCC found a new balance. It displayed self-restraint vis-à-vis the Union and thereby unequivocally acknowledged 'respect for the Union's own methods of justice' and 'a right to the tolerance of error'.[235] German national constitutional ultra vires review was no longer defined as an absolute claim of the last arbiter – having the final say – nor enforcing upon the CJEU the parochial national understandings of hair-splitting legal approaches.

As Paul Craig put it, every polity with limited power faces an endemic problem of the scope of intra vires action.[236] The tacit existence of external control of the EU is thus, in principle, accorded, if not welcomed. The normative rationale of resistance due to the manifest transgression of conferred powers, violating the principle of conferral and acting outside the given competences, is plausible.

The important question is, however, under what kind of conditions? The German *Honeywell* decision arguably found a plausible, balanced and constructive solution. In exceptional circumstances, an apex court may declare a judgment of the CJEU as inapplicable if the following conditions are fulfilled: first, the respective court has expressed its concerns and issued a preliminary question to the CJEU;[237] second, the matter must be *structurally important*, 'highly significant in the structure of competences between the Member States and the Union';[238] third and most important, the CJEU would have to *manifestly* violate the competences 'in a manner specifically violating the principle of conferral'.[239]

The strong responses and criticism concerning the *Lisbon* decision influenced the reserved approach in the *Honeywell* case, but the attitude did not last long. Regrettably, the FCC soon de facto softened the introduced qualifications, as will be shown in the following.

235 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para. 66.
236 Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395, 436.
237 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para 60.
238 Ibid. para 61.
239 Ibid.

7 The OMT Saga and Fiscal Independence – About Money

The new qualifying standards for an exceptional review of EU law as the ultima ratio as determined in the *Honeywell* decision did not prevent the FCC from exercising its previous (rebellious)[240] attitude before long. The following section analyzes the FCC's case law concerning the national constitutional identity and ultra vires reviews in relation to fiscal autonomy: namely, the first FCC referral for a preliminary ruling concerning the Outright Monetary Transactions, *OMT I*,[241] and the response to the CJEU's ruling in the *Gauweiler* decision,[242] *OMT II*;[243] also, the FCC's decision on the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Stability Treaty).[244] The survey does not include yet the *Banking Union*[245] decision responding to the CJEU's *Weiss*,[246] and the recent *PSPP*[247] decision, which is addressed in Chapter 7.

This section first outlines the context of the sovereign debt crisis and the corresponding Outright Monetary Mechanism (7.1). It continues with the first preliminary reference procedure by the FCC (7.2) and the shifting relationship between identity and the ultra vires review (7.3). Moreover, this section illustrates the unsurmountable differences between national identity under Article 4(2) TEU from the European perspective and national constitutional identity according to FCC (7.4). It concludes with the intensely criticized dogmatic approach concerning the right to vote in relation to ultra vires review, varying through the case law of the *OMT I*,

240 Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might Do About It' (2014) 15 German Law Journal 203.
241 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014.
242 Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag (Gauweiler)* [2015] ECLI:EU:C:2015:400.
243 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016.
244 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.
245 BVerfG, 2 BvR 1685/14 *Banking Union* 30 July 2019.
246 Case C-493/17 *Proceedings brought by Heinrich Weiss and Others* (*Weiss*) [2018] ECLI:EU:C:2018:1000.
247 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

ESM and *OMT II* decisions (7.5), and wraps up with concluding remarks (7.6).

7.1 The Context of the Outright Monetary Mechanism

The global financial crisis, starting in 2007–8, was remedied by many states through enormous financial capital increases in the banks. Due to incredibly high 'injections', the financial crisis had by 2010 been transformed into a sovereign debt crisis for several Member States of the euro area. In 2012, many investors lost confidence in the survival and further existence of the euro area. Moreover, the financial difficulties of several Member States in maintaining further sustainable access to financial markets, and their ability to issue government bonds due to the pressures on price, led to a negative spiral. Uncertainty about the further existence of the euro area resulted in higher prices of bonds, which had, in turn, worsened the respective Member States' financial positions and 'seemed destined to become a self-fulfilling prophecy'[248] that the individual Member States of the euro area would return to their previous national currencies and thus impair the euro area.

The famous and bold response to this deteriorating situation by the then-president of the European Central Bank, Mario Draghi, is widely known. 'Whatever it takes.'[249] The political or institutional commitment to restore confidence in the single euro currency was meant, in practice, to be implemented by the announcement of the Outright Monetary Mechanism. In the press release issued on 6 September 2012, the Governing Council of the European Central Bank shared its decision on the technical features of the Eurosystem's outright transactions in secondary bond markets to protect the single monetary policy and safeguard appropriate monetary policy transmission.[250] The Outright Monetary Transactions (OMT) were a commitment of the European Central Bank, within the scope of the conferred monetary policy mandate, to undertake outright transactions (mak-

248 Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:7, Opinion of AG Villalón, para 3.

249 Mario Draghi, Speech by Mario Draghi, President of the European Central Bank (Global Investment Conference, London 26 July 2012) < https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> accessed 24 February 2023.

250 ECB, Eurosystem, Technical features of Outright Monetary Transactions (6 September 2012) <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 24 February 2023.

ing purchases) of sovereign bonds issued by the Eurozone Member States on the secondary markets under specific conditions. The respective states would have to be in the bail-out programme due to the established European Financial Stability Facility/European Stability Mechanism programme (EFSF/ESM). Furthermore, they would have to comply with the thereby agreed structural reforms – macroeconomic adjustment or precautionary programme – and have regained access to the bond markets.[251]

The OMT programme was, up to this day, never executed. The robust commitment to the irreversibility of the euro and the explicit readiness to do 'whatever it takes' were enough to regain trust and calm the markets. Many economists post-festum confirmed the programme's effectiveness in its own right.[252] And indeed, soon after, the spread of government bonds decreased considerably.

7.2 OMT I – *FCC's First Reference 'Dictate' to the CJEU*

Concerning the unconventional and disputed OMT programme, in particular in Germany,[253] the FCC issued the preliminary reference procedure to the CJEU under Article 267, *OMT I*.[254] The FCC asked the CJEU whether the OMT programme's conditionality, selectivity, parallelism, bypassing, volume, market pricing, interference with the market logic, default risk and debt cut exceeded the ECB's monetary policy mandate under Article 119 and 127 TFEU and violated the prohibition of monetary financing under Article 123 TFEU.

Rather than a question of interpretation, the *OMT I* reads as a dictate:[255] the FCC 'considers the OMT [Programme] incompatible with Art. 119 and Art. 127 sec. 1 and 2 TFEU and Art. 17 et seq. of the ESCB Statute because it

251 ECB, Eurosystem, Technical features of Outright Monetary Transactions, Press release (6 September 2012) <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 24 February 2023.

252 Carlo Altavilla, Domenico Giannone and Michele Lenza, 'The Financial and Macroeconomic Effects of OMT Announcements' (2014) 1707 ECB Working Paper. Elena Elena, Orkun Saka and Ana-Maria Fuertes, 'How Did the ECB Save the Eurozone without Spending a Single Euro?' *Centre for Economic Policy Research (CEPR)* (26 March 2015).

253 'Anleihekäufe: Kassiert Schäuble die Wunderwaffe der EZB?' *FAZ* (24 May 2014).

254 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014.

255 Matthias Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' (2014) 15 German Law Journal 265,

exceeds the mandate of the European Central Bank [and …] incompatible with the prohibition of monetary financing of the budget […].'[256] The FCC argued that the OMT programme, as a decision about purchase of government bonds, which is politically motivated, aimed at reducing the interest rates of these bonds in the selected Member States and thus infringed the responsibility of the Member States for their own sound economic policies.[257] The lower interest rates would benefit the individual Member States, which in turn remedied and supported the inadequate economic policy for which the Member States were alone responsible.

According to the Treaties, the competences in the area of economic policy mainly rested with the Member States. The EU has in this area only limited special competences, which enable the EU to take measures to ensure that the EU countries coordinate their economic policies at the EU level.[258] Moreover, the European System of Central Banks (ESCB) shall only support the general economic policies in the Union to contribute to the achievement of the objectives of the Union under Article 3 TEU.[259] The main concern for the FCC was, therefore, how to understand the monetary measures that concurrently and partially impacted the economic area. Since the Treaties do not define the term 'monetary policy', the FCC referred to the CJEU's *Pringle* decision[260] and argued that monetary stability should be determined due to its primary objective to maintain price stability, the

265. Franz C Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) 15 German Law Journal 111, 119.

256 Ibid. para 55.

257 Ibid. The BVerfG also argued that the government bonds of other Member States are eventually placed at a disadvantage (para 73). That was however not the case as the research on financial effects on OMT has indicated. See above Altavilla, Giannone and Lenza (n 252) 164.

258 See Art 127(1), 119(1), 5(1), 2(3) TFEU.

259 Art 3(2) (sent. 2) TEU: 'It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.' Art 3(2) (para. 3) TEU: 'It shall promote economic, social and territorial cohesion, and solidarity among Member States.'Art 3(4) TEU: 'The Union shall establish an economic and monetary union whose currency is the euro.'

260 C-370/12 *Thomas Pringle v Government of Ireland and Others* (*Pringle*) [2012] ECLI:EU:C:2012:756, paras 53, 56, 60, 97. The situation was reversed. The ECJ held that 'an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro'.

instruments applied, and the link to other provisions.[261] The FCC concluded that the OMT programme exceeded the ESCB's competence to support general economic policies and was probably not covered by the mandate of the ECB.

The second of the FCC's objections concerned the prohibition of monetary financing of the budget as determined in Article 123 TFEU. The Article forbids the purchase of government bonds directly from the Member States – buying on the primary markets. If purchases on the secondary markets, as anticipated by the OMT programme, become functionally equivalent measures, the programme would circumvent the prohibition of monetary financing of the budget due to the teleological interpretation of Article 123 TFEU.

Finally, the FCC argued that any limitation on the right to independent decisions on the budget or any assumption of financial liability for other Member States constitutes an element of German national constitutional identity. The argument was not entirely new in the *OMT I* decision, but it goes back to 2011, when the FCC deliberated on financial aid to Greece as part of the EU's coordinated bilateral loans.[262]

The FCC then wrote that budget sovereignty politically determines the correlation between the burdens and privileges specified by the state, and thus must be kept under parliamentary control. 'The German *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental administration.'[263] The FCC further stated that the principle of democracy could only be observed if the parliament remained autonomous, even concerning international and European commitments; and that the necessary condition to preserve 'the core of identity of the constitution [...] is that the budget legislature makes its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union and remains permanently "the master of its decisions"'.[264]

In the *OMT I* decision, the FCC once again pronounced budgetary autonomy and budgetary responsibility as guaranteed by Article 20(1)(2)

261 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, para 63.
262 Währungsunion-Finanzstabilitätsgesetz vom 7. Mai 2010 (BGBl. I S. 537).
263 BVerfG, 2 BvR 987/10 *Euro-Rettung* 7 September 2011, para 124.
264 Ibid. para 127. The BVerfG in the end did not find the respective measures affecting the welfare principle and consequently infringing on national constitutional identity.

in conjunction with Article 79(3) of the Basic Law, subsequently forming the content of national constitutional identity. 'The decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself […]. The German Bundestag must therefore make decisions on revenue and expenditure with the responsibility to the people. Insofar, the right to decide on the budget is a central element of the democratic development of informed opinion.'[265]

Concerning financial liability for other Member States, the FCC stated that the OMT programme 'could violate the constitutional identity of the Basic Law if it created a mechanism which would amount to an assumption of liability for decisions of third parties which entail consequences that are difficult to calculate'.[266]

7.3 Relationship Between Constitutional Identity and Ultra Vires Review

The FCC redefined the relationship between national constitutional identity review and ultra vires review as determined in the *Lisbon* decision. In *OMT I*, it argued that every substantial change of the conferred competences from the EU would violate the principle of conferral and, thereby, the German Constitution; whereas identity review did not examine whether the competences were transgressed or not.

Relating to ultra vires, Article 23(1) of the Basic Law 'sets out the programme of integration'.[267] 'An essential element of this programme of integration is the principle of conferral under Article 5(1)(2) TEU.'[268] This implies that the Act of Assent[269] no longer covers subsequent substantial changes of the programme of integration, and therefore would not be legally binding within the area of German sovereignty.[270] Henceforth, the FCC 'examines whether the legislative instruments of European agencies and institutions remain within the limits of the sovereign powers conferred

265 Ibid. para 28.
266 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, para 102.
267 Ibid. para 20.
268 Ibid.
269 Zustimmungsgesetz zum Vertrag über die Europäische Union und zum Vertrag über die Arbeitsweise der Europäischen Union [2008] OJ C115/01.
270 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, para 21.

upon them or whether they transgress those limits',[271] concluding that 'the precedence of Union law […] cannot be comprehensive'.[272]

In the next step, the FCC connected the qualifying condition of *structurally significant* transgression of competences with the essential areas of national constitutional identity. It stated: 'Transgressions of the mandate are structurally significant especially (but not only) if they cover areas that are part of the constitutional identity of the Federal Republic of Germany, which is protected by Art. 79 sec. 3 of the Basic Law or if they particularly affect the democratic discourse in the Member States.'[273] And elsewhere, concerning ultra vires review: 'This applies not only if independent expansions of powers affect areas which are part of the constitutional identity of the Member States or particularly depend on the process of democratic discourse in the Member States […], though transgressions of powers weigh particularly heavy here.'

Responding to *OMT I*, the AG Villalón wrote that ultra vires and identity review 'converge in the main proceedings [and …] are inextricably linked'.[274] The FCC then clarified its position, separating both reviews even more.[275] Reacting to CJEU's *Gauweiler* decision,[276] which clarified the *OMT I* preliminary questions, the FCC wrote in its *OMT II* decision: 'Unlike the ultra vires review, the identity review does not examine whether the transferred competencies were exceeded or not. Rather, it examines the respective act of the European Union in a substantive sense as to whether the "ultimate limit" of the principles of Arts. 1 and 2 of the Basic Law has been exceeded.'[277]

7.4 Article 4(2) and National Constitutional Identity by the FCC

As mentioned above, several scholars saw national constitutional identity as a mechanism for balancing national and supranational tensions, a tool

271 Ibid. para 22.
272 Ibid. para 26.
273 Ibid. para 37.
274 Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:7, Opinion of AG Villalón, paras 55, 57.
275 Andreas Voßkuhle, '"European Integration Through Law": The Contribution of the Federal Constitutional Court' (2017) 58 European Journal of Sociology 145, 154.
276 Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:400.
277 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016, para 153.

to resolve European constitutional disputes.[278] Although Article 4(2) TEU has not yet played a significant role in that regard, as Millet acknowledges despite his further advocation for its bolder use,[279] national constitutional identities of the Member States and the requirement of the EU to respect national identities under Article 4(2) TEU shall be recognized as one and the same thing from two perspectives, two sides of the same coin: a Member State which claimed its national constitutional identity, and the EU, under Article 4(2) TEU, would potentially recognize that claim.

The FCC similarly recognized the said connection between identity from a national, and identity from a European perspective in the *Lisbon* decision. It stated: The 'guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area'.[280]

Nonetheless, the FCC completely changed its attitude in *OMT I*. It argued that the EU's obligation to respect national identities under Article 4(2) TEU must be seen only 'as a "legitimate aim" which must be taken into account when legitimate interests are balanced against the rights conferred by Union law'.[281] On the contrary, German national constitutional identity under Article 79(3) of the Basic Law sets an 'ultimate limit' which cannot be balanced against any other legal interests. German national constitutional identity does not correspond to the duty of the EU to respect national identities.[282]

The absoluteness of the cited understanding of national constitutional identity deviates from the primacy principle of EU law: the commitment of the FCC to seek dialogue via preliminary reference procedure in the light of loyal cooperation as the guiding principle of EU law, and the possibility that identity would indeed manage and potentially solve European constitutional conflicts.

278 Anita Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019); Pietro Faraguna, 'Constitutional Identity in the EU–A Shield or a Sword?' (2017) 18 German Law Journal 1617; Giacomo Di Federico, 'The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards' (2019) 25 European Public Law, 347.

279 Millet (n 2).

280 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 240.

281 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, para 29.

282 Ibid.

Finally, one cannot overlook the inner inconsistencies of the cited argumentation of the FCC, even beyond the highlighted change of the case law. National constitutional identity is dogmatically construed via the principle of democracy. The principle of democracy is a highly abstract principle, the realization of which is always a matter of context and degree. The FCC recognized that itself when it acknowledged the need for an effective monetary policy, independent from political independence which 'needs to rely on short-term approval by political forces',[283] although the cited independence 'affects the principle of democracy'.[284] Despite the absolute nature of Article 79(3) of the Basic Law and the principle of democracy, the FCC accepted this compromise and concluded that this limitation 'satisfies the constitutional requirements according to which the principle of democracy may be modified'.[285]

7.5 *The Right to Vote and Constitutional Review* – OMT I, ESM *and* OMT II

In the German constitutional review of EU law, the right to vote under Article 38 of the Basic Law plays a decisive role, opening the possibility of accepting a constitutional complaint directed against EU law[286] (*Integrationsverfassungsbeschwerde*).[287] In *OMT I* the FCC expanded the right to vote, also in relation to ultra vires review, which caused sharp criticism among scholars[288] as well as among the sitting judges.[289] The section shows how the FCC afterwards seemingly took a step back in the subsequent *ESM* decision,[290] but subsequently in the *OMT II* decision found a new way to keep ultra vires review under Article 38(1) of the Basic Law.

283 Ibid. para 32.
284 Ibid. para 59.
285 Ibid. para 32.
286 Dietrich Murswiek, 'Art. 38 GG Als Grundlage eines Rechts auf Achtung des Unabänderlichen Verfassungskerns' (2010) 65 JuristenZeitung 702.
287 Roman Lehner, 'Die "Integrationsverfassungsbeschwerde" nach Art. 38 Abs. 1 S. 1 GG' (2013) 52 Der Staat 535.
288 Mattias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) 10 European Constitutional Law Review 263, 265. Mayer (n 255) 145.
289 Two dissenting opinions by justices Gerhardt and Lübbe-Wolff.
290 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.

According to *OMT I*, every German citizen can challenge an allegedly unlawful act of EU law in front of the FCC, if the European institutions supposedly acted beyond their conferred competences. The ultra vires review is justified by the right to vote, because the FCC determined that the said right also contains a substantive right, which enables citizens not just to legitimize the state power, but also to 'influence the political formation of opinions with his or her vote and to have an impact on them'.[291] The right to vote is especially violated when 'the vital political decisions can no longer be made independently'.[292]

The decision was criticized because it equates the admissibility criteria concerning the right to vote for both identity and ultra vires review.[293] The difference between the two reviews is as follows. In an identity review, the respective competences concerning the essential areas can *never* be transferred to the EU. Accordingly, when the EU acts in these areas, it directly violates the substantive element of the right to vote. Whereas in an ultra vires review, when the EU allegedly acts beyond the conferred competences, these competences might not have been transferred to the EU, but they could have been. In other words, the EU violates the rights of the German parliament, rather than the substantial right to vote.

The violation of conferred competences – which could have been transferred to the EU, but might not have been – cannot be substantiated on the grounds of Article 38(1) of the Basic Law, because the said article only reassures that the 'legitimation and influence on state authority is not depleted by a transfer of power to a degree, that the democratic principle is violated.[294] That was also the main argument of both dissenting justices, Gerhardt and Lübbe-Wolff.

Justice Lübbe-Wolff strongly highlighted the need for the FCC's self-restraint in light of what is elsewhere understood as a political question of doctrine or recognition of the margin of appreciation.[295] She wrote that the admission of challenges of ultra vires acts based on Article 38(1) of the Basic Law is 'a novelty without a basis in earlier case law'.[296] Finally, she ended her dissenting opinion with strong words: 'That some few indepen-

291 Ibid. para 51.
292 Ibid. para 52.
293 Wendel, 'Exceeding Judicial Competence in the Name of Democracy' (n 288) 279.
294 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2013, para 17.
295 Mayer (n 255) 115.
296 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, Dissenting opinion of justice Lübbe-Wolff, para 16.

dent German judges – invoking the German interpretation of the principle of democracy, the limits of admissible competencies of the ECB following from this interpretation, and our reading of Article 123 et seq. TFEU – make a decision with incalculable consequences for the operating currency of the eurozone and the national economies depending on it appears as an anomaly of a questionable democratic character.'[297]

In the light of the criticism above, the FCC concluded the next decision unanimously, taking into consideration the expressed inconsistencies and narrowing the scope of the right to vote. The *ESM* decision[298] concerned an amendment of the TFEU in Article 136, which provided a treaty authorization for a stability mechanism to safeguard the stability of the euro area as a whole, while granting financial assistance subject to conditionality; the establishment if the European Stability Mechanism[299] (ESM) as an intergovernmental organization under public international law, to replace the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM); and establishing the Fiscal Stability Treaty.[300]

The FCC stated: 'The substantive content of the right to vote is protected by Article 38 […] of the Basic Law *only* [to the extent that it is in danger of being rendered ineffective] in an area that is essential for the political self-determination of the people, i.e. if the democratic self-government of the

297 Ibid. para 28.

298 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.

299 The European Stability Mechanism (ESM) was set up as an international financial institution by the euro area Member States to help euro area countries in severe financial distress. It provides emergency loans, but in return, countries must undertake reform programmes. With a paid-in capital of more than €80 billion, the ESM is one of the largest international financial institutions in the world. The ESM is the only official institution of the euro area. It is one of the largest issuers of euro-denominated debt in the world. No taxpayer money is spent in ESM or EFSF assistance programmes. Both institutions obtain their funds in financial markets. Since they are financially backed by euro area countries, they can borrow money at very favourable rates. These are then passed on to programme countries. See European Stability Mechanism <https://www.esm.europa.eu> accessed 24 February 2023.

300 The Fiscal Stability Treaty is an intergovernmental treaty which was introduced as a new and stricter version of the previous Stability and Growth Pact. The 'Fiscal Pact' is part of the treaty which requires that all national budgets have to be in balance or surplus. This means that a general budget deficit cannot exceed a certain percentage of the gross domestic product (GDP), and a structural deficit cannot exceed respective budgetary objectives.

people is permanently restricted in such a way that vital political decisions can no longer be made independently.'[301] The argumentation suggests that one can only trigger the right to vote in a constitutional complaint against EU law concerning the issues which cannot be transferred to, or regulated by, the EU.

The suggested limitation of the right to vote in the *ESM* decision did not last long. In the subsequent *OMT II* decision,[302] when both previously dissenting justices had already left the senate, the BVerG found a new way to connect the right to vote and ultra vires review. It argued that constitutional complaint is 'admissible to the extent that it challenges unconstitutional inaction on the part of the Federal Government regarding a possible impairment of the overall budgetary responsibility of the *Bundestag*'.[303] This includes, in particular, the Federal Government bringing legal actions before the CJEU, exercising veto rights, proposing treaty amendments, adopting its voting policy etc.[304] The *Bundestag* can, in particular, debate, exercise its right to ask, bring legal actions etc.[305] This specific 'duty to act'[306] can be reviewed by the FCC via constitutional complaint under the right to vote, if the particular requirements of ultra vires are met.[307]

7.6 Concluding Remarks

The red thread of outlined case law establishing highly specific considerations to justify reviewing EU law is twofold. First, apart from *Solange II*, the FCC never entirely gave up the self-acclaimed right to review EU law and reject its application in Germany. In that sense one observes a strong continuity of judicial resistance. Second, the exact contours of identity and ultra vires review are not yet settled. In fact, as highlighted above, they are

301 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014, para 125 (emphasis added).
302 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016.
303 Ibid. para 94.
304 Ibid. para 171.
305 Ibid.
306 Ibid. para 172.
307 Ibid. paras 167, 171.

changing in every single decision, shifting back and forth, and searching for the most appropriate justification.[308]

Moreover, in all the cited cases, the FCC only prepared the ground for actually disapplying EU law. In *OMT II*, the FCC still stated that the CJEU 'has a right to tolerance of error'.[309] It was only in the latest *PSPP* decision[310] concerning the CJEU's *Weiss*,[311] as further illustrated in Chapter 7, that the FCC fulfilled its threats.

Finally, as noted above, the *Honeywell* decision could have served as a reasonable and self-restrained approach. However, in *OMT II* the FCC softened its qualifying conditions. While it reiterated that the tolerance of error 'reaches its limit only when an interpretation of the Treaties is manifestly utterly incomprehensible and thus objectively arbitrary',[312] it immediately thereafter relativized the condition of *manifest* violation. It stated: 'An exceeding of competences can be "manifest" even if it results from a careful and meticulously reasoned interpretation.'[313]

308 Mehrdad Payandeh, 'The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture' (2017) 13 European Constitutional Law Review 400, 401.
309 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016, para 149.
310 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.
311 Case C-493/17 *Weiss* [2018] ECLI:EU:C:2018:1000.
312 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016, para 149.
313 Ibid. para 150.

8 Since Solange II

Thirty years after the *Solange II* decision, the FCC once again argued in the *EAW* decision that it can review EU law against the national fundamental rights standards in the name of identity review (8.1). While it did not find any conflict at the end, the identity review in the name of fundamental rights standards raises serious concerns. Yet, as explained in Chapter 5, the new constitutional paradigm directly applying the EU Charter redefines and challenges the cited regressive attempt (8.2).

8.1 EAW – *Human Dignity and the Principle of Individual Guilt*

In 2015, the FCC unequivocally departed from the *Solange II* decision, deciding in the *EAW* decision[314] to once again review EU law against German standards of fundamental rights. The decision concerned a request for extradition from Germany to Italy of the US national R., convicted *in absentia* with a sentence of 30 years' imprisonment for participating in a criminal organization and possessing cocaine. According to the European Arrest Warrant under the Framework decision,[315] the convicted person shall *in absentia* have the right to request a retrial or an appeal if the person was not personally served with the decision. That shall include the right to participate in, and present fresh evidence at, the trial, which allows the case's merits to be examined and may lead to the original decision being reversed.[316]

The convicted R. argued that the Italian legal system would only allow him to file an appeal, which would only in exceptional circumstances allow him to present new evidence and be heard. Moreover, the convicted R. was also likely to have to carry the burden of proof at the appeal proceedings

314 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015. Note that in one of the earlier decisions concerning European Arrest Warrant the FCC only interpreted national law, avoiding declaring EU law as incompatible with the German Basic Law. See BVerfG, 2 BvR 2236/04 *Citizen D* 18 July 2005. See also Bobić (n 61) 49.

315 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States: Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1.

316 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015.

relating to the reasons for his absence, which set additional conditions for a retrial or an appeal. That would limit his procedural rights as guaranteed under the European Arrest Warrant.

8.2 Reviewing EU Law Against German Fundamental Rights Standards

In the *Solange II* decision, the FCC stated that as long as the ECJ guarantees adequate protection of fundamental rights, which is to be regarded as essentially equivalent to the Basic Law, the FCC will no longer review the Community Law against the national standards of fundamental rights.[317] Moreover, the Basic Law specifically states in Article 23(1) that the EU 'guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law'.[318]

Yet, in the *EAW* decision, the FCC changed its position established in 1986, while clearly recognizing the turn: 'The constitutional complaint is admissible [...] notwithstanding its past jurisprudence declaring inadmissible both constitutional complaints and referrals in specific judicial review proceedings that assert a violation of fundamental rights under the Basic Law by secondary Community law or Union law respectively.'[319]

In the name of constitutional identity review, the FCC once again claimed the right to review and disapply EU law, specifically to protect fundamental rights in every individual case if the standards fall below the minimum threshold required by the Basic Law. The FCC wrote: 'The FCC, by means of the identity review, guarantees without reservations and in every individual case the protection of fundamental rights[320] [and that is] also protected against interferences by public authority exercised supranationally.'[321]

Under *Solange II* jurisprudence, the FCC could not review a particular case, even if the matter at hand exceptionally went below the standards of protection in Germany. The CJEU would have a tolerance of error in an individual case. But that is no longer the case in the name of national

317 BVerfGE 73, 339 *Solange II* 22 October 1986, p 388.
318 Rupert Scholz, 'GG Art. 23' in Theodor Maunz and Günter Dürig (eds), *Grundgesetz-Kommentar* (69th edn, C.H. Beck 2013).
319 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015, para 34.
320 Ibid. para 49.
321 Ibid. para 53.

constitutional identity, even though at the end the FCC stated that '[i]n the case at hand, there is no conflict between Union law and the protection of human dignity under Article 1(1) of the Basic Law'.[322]

To conclude, reviewing EU law against national fundamental rights standards in the name of national constitutional identity does not stop here. As will be elaborated in Chapter 4, the first senate of the FCC recently issued a new case law, *Right to be forgotten I* and *II*, which constructively offers a new constitutional paradigm and challenges the above cited identity review of EU law.

322 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015, para 125.

9 Conclusion

This chapter started with theoretical considerations regarding constituent power and constitutional form. The constitutional paradox concerning *pouvoir constituant* and *pouvoir constitué* justifies a constitutional limitation to amend the essential constitutional core.[323] Yet, in the light of the common and shared constitutional commitments in the Member States and in the EU, namely, the protection of fundamental rights, the rule of law, and the commitment to democracy, how can a national constitutional court plausibly argue that it would disapply EU law to protect these same values?

The said paradox of constituent power, invested in the people, may express itself through so-called *constitutional populism*, the power which is not fully consumed by the constitution. Drawing on the argument of Möllers,[324] the FCC as the body of legal experts at least partially embodies *constitutional populism* in Germany, which explains the considerable trust that it enjoys and the self-acclaimed managing role concerning the scope of European integration from the German perspective. Accordingly, it is the FCC, together with its highly meticulous scientific dogmatics, which is the object of inquiry when searching for the meaning of national constitutional identity, understood as the limits of European legal integration.

Finally, the first section on theoretical considerations concluded with the likely progenitor of the account of national constitutional identity in (German) constitutionalism since the Weimar Republic: the controversial and historically problematic Carl Schmitt. The section illustrated the context of his identity account, and on that account dissociated the contemporary national constitutional identity therefrom.[325]

The subsequent sections analyzed the case law concerning the conditions for reviewing EU law by the FCC. Section 3 demonstrated the beginnings of the FCC's resistance against the primacy of EU law and the CJEU. In the famous case law *Solange I* and *II*, the FCC mentioned national constitutional identity in passing, but it did not justify its resistance on these grounds.

323 El Khoury (n 31).
324 Möllers (n 8).
325 Schmitt (n 68) 140–150. See also Martin Mlynarski, *Zur Integration Staatlicher und Europäischer Verfassungsidentität*, vol 37 (1st edn, Mohr Siebeck 2021) 148–55.

Rather it simply argued that the EU lacks the necessary democratic features and equivalent protection of fundamental rights. Notably, even in the two mentioned decisions, the FCC defined national constitutional identity in different terms: first, as the 'part of the Basic Law dealing with fundamental rights';[326] second, as the identity of the prevailing constitutional order, by 'the legal principles underlying the provisions of the Basic Law on fundamental rights'.[327]

The *Maastricht* decision marked the birth of contemporary argumentation concerning a review of EU law, though without mentioning national constitutional identity terminology just yet.[328] To justify the said review, the FCC introduced the principle of (national) democracy and the right to vote. Comparing with the *Solange* jurisprudence, where the focus of the FCC relied on democratic features of the EU, or lack of them, the *Maastricht* decision shifted the focus back to the nation state. The FCC meticulously interpreted the principle of democracy as setting the 'limits for the expansion of the functions and competencies of the European Union'.[329] Finally, the section highlighted the factual and normative assumptions underlying the new identity review, as well as the inner contradictions accompanying the said argumentation. On the one hand, the EU could only have more competences if it was democratically more advanced; on the other hand, we cannot democratically develop the EU further, because that would in turn endanger the democratic powers of the Member States.

The new Lisbon Treaty brought about considerable structural reforms of the EU. The following section thus examined the *Lisbon* decision, which introduced two specific constitutional reviews: constitutional identity review and ultra vires review. The section showed how the underlying basic normative assumptions of the FCC's reasoning stayed essentially the same as in the *Maastricht* decision. Nevertheless, the *Lisbon* decision went one step further and introduced what one may call a theory of state.[330] It introduced five essential areas of state which cannot be conferred on the EU, allegedly constituting the national constitutional identity. The section highlighted the

326 Oppenheimer (n 22) 447.
327 Ibid. 485.
328 The BVerfG addressed identity only as the responsibility of the EU to respect national identities.
329 BVerfGE 89, 155 *Maastricht* 12 October 1993, p 187.
330 Schönberger (n 153) 60.

criticism of the said account and outlined the main differences between both newly introduced constitutional reviews.[331]

In response to the tough criticism concerning the *Lisbon* decision, the subsequent *Honeywell* decision articulated arguably the most constructive and Europe-friendly contours of potential review of EU law, in the case of manifest and structurally significant transgression of conferred competences by the CJEU. Understood as a highly exceptional mechanism preventing the EU from deteriorating into a non-democratic, unaccountable or abusing Leviathan, the new qualifications for ultra vires review exhibited a balanced and self-restrained approach vis-à-vis the EU, where the FCC respects 'the Union's own methods of justice' and 'a right to the tolerance of error'.[332]

As Section 7 demonstrated, the above-celebrated attitude did not last for long: the questions concerning national fiscal independence and potential financial liabilities for the other Member States in the light of economic and subsequent sovereign debt crisis raised the stakes. In the series of decisions concerning the OMT programme, fiscal independence, and the overlapping relationship between monetary and economic policy, namely, the *Euro-Rettung*,[333] *OMT I*,[334] *ESM*[335] and *OMT II*[336] decisions, the FCC once again strengthened its position in relation to EU law. This section showed how the relationship between both reviews, identity and ultra vires, continuously shifted back and forth, and how the FCC broke a previously assumed connection between the EU's responsibility under Article 4(2) TEU to respect national identities and German national constitutional identity. The section argued that the said identity account, indicating parochial exceptionalism rather than constitutional tolerance, cannot plausibly serve as an archetypical comprehensive account across the Member States.

Finally, the last section briefly explained how the FCC in the *EAW*[337] decision reverted to its pre-*Solange II* position, asserting to review EU law even against the German fundamental rights standards in the name

331 Calliess (n 10) 164.
332 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para. 66.
333 BVerfG, 2 BvR 987/10 *Euro-Rettung* 7 September 2011.
334 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014.
335 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.
336 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016.
337 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015. See also Robert Pracht, *Residualkompetenzen des Bundesverfassungsgerichts ultra vires, Solange II, Verfassungsidentität* (1. edn, Mohr Siebeck 2022) 386.

of national constitutional identity, should the EU standards fall below the minimum standard of protection. Yet, in the light of the recently issued case law *Right to be Forgotten I* and *II* by the first senate of the FCC, it remains to be seen whether the above-mentioned case law will entirely change the paradigm – omitting fundamental rights identity claims from identity review – or continue the contours of the *EAW* decision, as will be explained in more detail in Chapter 4.