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Germany vs. Europe: The Principle of Democracy in German Constitutional Law and the Troubled Future of European Integration

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ARTICLE

Germany vs. Europe: The Principle of Democracy in German Constitutional Law and the Troubled Future of European Integration

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INTRODUCTION

Germany has been an essential contributor to, and an energetic participant in, the project of European integration. Germany lends Europe the force of its national political will.[1] It has helped conceptualize and theorize — through the work of generations of its intellectuals and scholars — a framework for supranational governance at the European level.[2] And its indomitable industrial economy has helped to bankroll the costly process of inching ever closer toward unity in Europe.[3] To paraphrase the French

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1.

> Das europäische Einigungswerk bleibt die wichtigste Aufgabe Deutschlands . . . .
>
> Unser Land muss in dieser Situation als Gründungsmitglied der EU und vertrauensvoller Partner eine verantwortungsvolle und integrationsfördernde Rolle in Europa wahrnehmen. Deutschland wird alle seine Möglichkeiten nutzen und ausschöpfen, das Vertrauen in die Zukunftsfähigkeit des europäischen Einigungswerkes wieder zu stärken und auszubauen.
>
> (The work of uniting Europe remains Germany's most important project . . . .
>
> In this context, as a founding member of the EU, our land must embrace its role as a trustworthy partner in a responsible process of integration. Germany will seize and exhaust every possibility to strengthen and reinforce confidence in the forward-looking potential of the work of uniting Europe.)

Deutschlands Zukunft Gestalten: Koalitionsvertrag Zwischen CDU, CSU und SPD 109 (Dec. 14, 2013) (Russell Miller trans.), *available at* https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf. *See, e.g.*, Klaus Scharioth, Letter to the Editor, *Germany's Commitment to European Integration*, N.Y. TIMES, May 27, 2010, *available at* http://www.nytimes.com/2010/05/28/opinion/l28germany.html?_r=0. *See also* TIMOTHY GARTON ASH, IN EUROPE'S NAME: GERMANY AND THE DIVIDED CONTINENT (1994); GISELA HENDRIKS & ANNETTE MORGAN, THE FRANCO-GERMAN AXIS IN EUROPEAN INTEGRATION (2001).

2. *See* JÜRGEN HABERMAS, *Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts — Ein Essay zur Verfassung Europas, in* ZUR VERFASSUNG EUROPAS: EIN ESSAY 39, 64 (2011). *See, e.g.*, Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L.J. 282 (1995); Jürgen Habermas, *Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'* 1 EUR. L.J. 303 (1995); Armin Von Bogdandy, *Founding Principles of EU Law: A Theoretical and Doctrinal Sketch*, 16 EUR. L.J. 95 (2010); PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., 2d ed. 2009).

3. "Germany has been a net contributor to the [European Communities and European Union] budget for many years. As a wealthy Member State with a relatively small farming sector, Germany has over the years received only meagre resources from the structural funds and the [Common Agricultural Policy]. Moreover, in the nineties, the negative German balance became even larger for a number of reasons. In 1990 and 1991 economic growth in the Federal Republic far outstripped growth in other Member States. This resulted in an increase in Germany's relative share of GNP and hence in the financing of the Community." Herman Matthijs, *The Budget of the European Union* 13 (Inst. For European Studies, IES Working Paper No. 4/2010, 2010), *available at* http://www.ies.be/files/WP-4-2010-FINAL_0.pdf. *See* Bernd Riegert, *The EU Budget: Who Pays What?*, DEUTSCHE WELLE, June 11, 2012, http://www.dw.de/the-eu-budget-who-pays-what/a-16359517 ("According to the European Commission, the largest net contributors include Germany (at 9 billion euros), France (6.4 billion), Italy (5.9 billion), Great Britain (5.6 billion) and the Netherlands (2.2 billion)."); *EU budget: who pays what?*, BBC NEWS, http://news.bbc.co.uk/2/hi/europe/8036097.stm#start (last visited Feb. 28, 2014).

political scientist Maurice Duverger, there can be no Europe without Germany.[4]

But lately it would be fair to wonder if there can be a future for Europe *with* Germany. Germany is increasingly pursuing its own interests, sometimes in conflict with what some see as its European commitments.[5] Perhaps worse, many argue that Germany's *Europapolitik* (European policies) are doing the project of integration grave harm.[6] If Europe stumbles, if it fails to achieve a fuller form of the "progressive federalism" for which Duverger and generations of Europeanists have struggled, then there is a widening conviction that no small measure of blame can be laid at the feet of a newly self-assured Germany. A smoking gun in the critics' case against Germany is the *Demokratieprinzip*, or *principle of democracy*, that is enshrined in Germany's Basic Law. This principle of German constitutional law has been at the center of a series of decisions, issued by the *Bundesverfassungsgericht* (German Federal Constitutional Court) over the last decade, which have presented a profound barrier to European integration. On the one hand, the Constitutional Court's rulings reveal that domestic tribunal's continuing willingness to intervene in and superintend the measures necessary for supranational integration. Summoned to that role by the domestic *Demokratieprinzip*, Germany's high court has not shied away from serving as a master of European integration.[7] On the other hand, the Court's substantive interpretation of the principle of democracy has come to consist in a set of concrete limits on Germany's participation in further European integration. In the *Lisbon Treaty Case* from 2009 giving force to the princi-

4. Maurice Duverger, *Pas d'Europe sans l'Allegmagne*, LE MONDE, Sept. 9, 1947, *translated in* III DOCUMENTS ON THE HISTORY OF EUROPEAN INTEGRATION 51 (Walter Lipgens & Wilfried Loth eds., 1988).

5. *See The Reluctant Hegemon*, ECONOMIST, June 15, 2013, *available at* http://www.economist.com/news/leaders/21579456-if-europes-economies-are-recover-germany-must-start-lead-reluctant-hegemon; Simon Bulmer & William E. Paterson, *Germany as the EU's Reluctant Hegemon? Of Economic Strength and Political Constraints*, 20 J. EUR. PUB. POL'Y 1387 (2013); Andrei S. Markovits et al., *Germany: Hegemonic Power and Economic Gain?*, 3 REV. INT'L POL. ECON. 698 (1996). *But see* Daniela Schwarzer & Kai-Olaf Lang, *The Myth of German Hegemony*, FOREIGN AFF. (Oct. 2, 2012), *available at* http://www.foreignaffairs.com/articles/138162/daniela-schwarzer-and-kai-olaf-lang/the-myth-of-german-hegemony ("Germany's position as the chief backer of the eurozone's stabilization arrangements does not necessarily translate into political supremacy. And as the euro crisis has escalated and Germany has lost political allies, it will now have to accept that the common currency area will only partly conform to its vision.").

6. *See, e.g.*, Jakob Augstein, *Stubborn and Egotistical: Europe Is Right to Doubt German Euro Leadership*, SPIEGEL ONLINE INT'L (Mar. 25, 2013), http://www.spiegel.de/international/europe/opinion-german-euro-leadership-stubborn-and-egotistical-a-890848.html; Stuart Jeffries, *Is Germany Too Powerful for Europe?*, GUARDIAN, Mar. 31, 2013, *available at* http://www.theguardian.com/world/2013/mar/31/is-germany-too-powerful-for-europe.

7. *See, e.g.*, Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe?: Three Concepts of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 351 (1999).

ple of democracy, the Court said definitively: "this much Europe and no more."[8]

All of this justly leads to the inference, blared in an American headline, that the German Constitutional Court judges — as they interpret and enforce the constitutional principle of democracy — "hold Europe's fate in their hands."[9] The future of the centuries-old dream of a united Europe now must travel a road that passes through the German Constitutional Court as it applies the German constitution's principle of democracy.

This Article introduces the *Demokratieprinzip*. In Part II, I begin by more fully documenting the Euro-skeptical turn in Germany's relationship with Europe, paying particular attention to the central role played by the Constitutional Court's interpretation of the *Demokratieprinzip*. Part III, in four subparts, provides a doctrinal introduction to the principle of democracy. First, I map the principle's bases in the text of the German *Grundgesetz* (Basic Law or Constitution). Second, I present the gloss the Constitutional Court has given the principle, making special reference to the Court's recent decisions involving challenges to Germany's participation in measures seeking to advance European integration. Third, I deepen our understanding of the *Demokratieprinzip* by considering the Court's vision of parliamentary democracy, which has developed into a central component of the broader *Demokratieprinzip*. Finally, I rebut claims that, for all its rhetorical bombast and headline-grabbing dramatics, the Court's jurisprudence relying on the *Demokratieprinzip* as the basis for reluctance towards Europe has not served as a practical barrier to further European integration. In Part IV, I provide greater theoretical insight into the Court's interpretation of the *Demokratieprinzip* by demonstrating that it is a nearly complete realization of Jürgen Habermas's theory of discursive democracy. This highlights two important points. First, contrary to Habermas's supranational vision for his discourse theory of politics, the Court insists that the principle of democracy find its expression within the framework of the German state. This might be the final attribute of the doctrine as it has been defined by the Court. Second, to the extent that the Constitutional Court's interpretation of the principle of democracy now constitutes a barrier to European integration, this involves an astounding, historic, and deeply German irony because Habermas has been one of Germany's most determined and visionary advocates for European supranationalism.

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8. *See* Lisbon Treaty Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 123 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267, 2009, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html. *See also* Cornelia Koch, *'Bis hierher sollst du kommen und nicht weiter': The German Constitutional Court and the Boundaries of the European Integration Process*, *in* THE FUTURE OF AUSTRALIAN FEDERALISM: COMPARATIVE AND INTERDISCIPLINARY PERSPECTIVES 197 (Gabrielle Appleby et al. eds., 2012).

9. Henry Chu, *German Judges May Hold Europe's Fate in Their Hands*, L.A. TIMES, Sept. 11, 2012, http://articles.latimes.com/2012/sep/11/world/la-fg-germany-court-20120911.

I. GERMANY'S EURO-SKEPTICAL TURN AND THE CONSTITUTIONAL COURT'S INTERPRETATION OF THE *DEMOKRATIEPRINZIP*

Germany was a founding member of the European Community and,[10] working in conjunction with France, has long been regarded as an essential and unwavering component in the engine at the core of European integration.[11] Enjoying strong support from both sides of the political spectrum in the early days of war-ravaged West Germany,[12] European integration was anticipated by the Basic Law, which declared in its preamble that the German people were "[i]nspired by the determination to promote world peace as an equal partner in a *united Europe*."[13] It was accepted, both inside and outside of Germany, that European integration was the surest way to rehabilitate Germany and to reconcile the country with its neighbors after three-quarters of a century of devastating conflict.[14] Germany has since been at the forefront of each of Europe's most significant developments, including the Schengen Convention,[15] monetary union,[16] and the transition

10. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%20298/v298.pdf. *See* MARK GILBERT, EUROPEAN INTEGRATION: A CONCISE HISTORY (2012); John R. Gillingham, *The German Problem and European Integration*, *in* ORIGINS AND EVOLUTION OF THE EUROPEAN UNION 55 (Desmond Dinan ed., 2006).

11. GAVIN HEWITT, THE LOST CONTINENT 14 (2013) ("The Union had been largely a French and German dream, designed to ensure that war never again returned to the continent."). *See* Jeffrey Vanke, *Charles de Gaulle's Uncertain Idea of Europe*, *in* ORIGINS AND EVOLUTION OF THE EUROPEAN UNION, *supra* note 10, at 141.

12. This commitment within the center-right Christian Democratic Union runs from Konrad Adenauer through Helmut Kohl to Angela Merkel. Carlo Schmid and Willy Brandt carried the European banner for the center-left Social Democratic Party of Germany. "For more than 40 years the cornerstone of foreign policy of all relevant political parties in West Germany had been the unification of Europe as a European Federal State." Joachim Wieland, *Germany in the European Union — The Maastricht Decision of the Bundesverfassungsgericht*, 5 EUR. J. INT'L L. 259, 259 (1994). *See* DIMITRI ALMEIDA, THE IMPACT OF EUROPEAN INTEGRATION ON POLITICAL PARTIES: BEYOND THE PERMISSIVE CONSENSUS (2012); WOLFRAM KAISER, CHRISTIAN DEMOCRACY AND THE ORIGINS OF EUROPEAN UNION (2007); Christoph Egle, *The SPD's Preferences on European Integration: Always One Step Behind*, *in* SOCIAL DEMOCRACY AND EUROPEAN INTEGRATION 23 (Dionyssis G. Dimitrakopoulos ed., 2011).

13. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.), pmbl. (emphasis added), *translated in* Basic Law for the Federal Republic of Germany (Fed. Ministry of Justice & Consumer Prot., 2012), http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf. In its original (1949) version, Article 24 of the German Basic Law granted the Federation the competence to transfer state sovereignty to inter-state institutions. *Id.* art. 24, *available at* http://www.documentarchiv.de/brd.html.

14. "Due to the division of Germany into two States and the traumatic experience of National Socialism, there was no basis for strong *national* feelings among the Germans. Adenauer saw membership in the European Communities as a possibility to bring Germany back into the club of leading Western States." Wieland, *supra* note 12, at 259–60.

15. *See* Convention Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, 30

from the European Communities to the European Union.[17] German scholars and politicians played a fundamental role in the debate leading to the promulgation of a European Union Constitution.[18] And it was under Germany's rotating Presidency of the Council of the European Union that the failed constitutional project was revived and implemented anew as the Lisbon Treaty.[19] The centrality of the "ever closer" European project for post-war Germany was expressed in clarion terms — until recently shared by nearly all German elites — by Konrad Adenauer, the Federal Republic's long-serving, first post-war chancellor: "European unity . . . is a necessity for all of us. It is . . . necessary for our security, for our freedom, for our

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I.L.M. 84; Aleidus Woltjer, *Schengen: The Way of No Return?*, 2 MAASTRICHT J. EUR. & COMP. L. 256, 257 (1995) ("At the same time, and perhaps in a true European spirit aimed at bringing about closer cooperation between Western European countries, the heads of government of France and Germany agreed, in 1984, to start an inter-governmental initiative to abolish border controls between both countries. Belgium, the Netherlands and Luxembourg . . . soon joined this initiative. Without arousing much public attention the five signed an agreement on 14 June 1985 in Schengen (Luxembourg).").

16. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter Maastricht TEU]. *See* KENNETH DYSON & KEVIN FEATHERSTONE, THE ROAD TO MAASTRICHT: NEGOTIATING ECONOMIC AND MONETARY UNION (1999).

17. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty]. Germany played a leading role in the negotiation and promulgation of the Lisbon Treaty, not the least during Germany's turn in the European Council's rotating presidency in the first half of 2007. *See, e.g.*, Declaration on the Occasion of the 50th Anniversary of the Signature of the Treaties of Rome (Mar. 25, 2007), *available at* http://www.eu-un.europa.eu/articles/en/article_6902_en.htm.

18. A European federal state was the undeniable ambition of the advocates for a European constitution, an old dream that, as it gained significant new momentum with the establishment of the European Union, prompted Federal Constitutional Court Justice Dieter Grimm to pose his famous question, "Does Europe need a Constitution?" *See* Grimm, *supra* note 2. In a widely-discussed speech delivered at Humboldt University in Berlin in May 2000, German Foreign Minister Joschka Fischer answered Justice Grimm's question with an authoritative "yes." After cataloguing the difficulties confronting the project of European integration, Fischer explained that the only viable solution would be "the transition from a union of states to full parliamentarisation as a European Federation . . . ." That remarkable future, Fischer admitted, "will have to be based on a constituent treaty" that "constitutionally enshrine[s]" the principle of subsidiarity. Joschka Fischer, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, Speech at Humboldt University, Berlin, (May 12, 2000), *in* WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? RESPONSES TO JOSCHKA FISCHER 25, 27 (Christian Joerges et al. eds., 2000). The German philosopher Jürgen Habermas influentially argued that, more than a concrete constitution, Europe needed a formal constitutional process as the way to nurture the constitutional prerequisite of a shared European civic identity. Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REV. 5, 15–19 (Sept.–Oct. 2001) (referring to what he calls a "catalytic constitution").

19. *See* Lisbon Treaty, *supra* note 17. *See also* Finn Laursen, *The Lisbon Treaty. The Treaty-Making Process*, *in* THE MAKING OF THE EU'S LISBON TREATY: THE ROLE OF MEMBER STATES 17 (Finn Laursen ed., 2012); Hans J. Lietzmann, *A Symbolic Revocation of Symbolism. The German Path from the EU Constitution to the Lisbon Treaty*, *in* THE MAKING OF THE EU'S LISBON TREATY: THE ROLE OF MEMBER STATES, (Finn Laursen ed., 2012); Frank R. Pfetsch, *Germany's Role with Regard to the Reform Process of the EU*, *in* THE MAKING OF THE EU'S LISBON TREATY: THE ROLE OF MEMBER STATES, (Finn Laursen ed., 2012); DAVID PHINNEMORE, THE TREATY OF LISBON: ORIGINS AND NEGOTIATION (2013).

existence as a nation . . . ."[20] In light of this historical commitment to European integration, how is it that we've now arrived at the conflict suggested by the title of this Article: *Germany vs. Europe*? Polls indicate that Germans are losing faith in the European project.[21] Some Euro-skeptical voices can now be heard above the din of German politics' pro-European consensus.[22] The German popular press — even in more respectable quarters than the incorrigible *Bild-Zeitung* tabloid[23] — is riled with distrust for and exhaustion with the process of European integration.[24] Perhaps there is no better expression of this new mood than *Focus Magazin's* cover from February 2010, which blares "Traitors in the Euro-Family" alongside a photo of the Greek Venus de Milo with an air-brushed arm extending her middle finger towards the magazine's German readers?[25]

A central thread in this complex story — set aflame by the sovereign debt and banking crises that have bedeviled Europe the last several years[26] — involves, to an extraordinary degree, the German Federal Con-

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20. KONRAD ADENAUER FOUNDATION, KONRAD ADENAUER AND THE EUROPEAN INTEGRATION 12, *available at* http://www.kas.de/upload/ACDP/GB_Katalog_KA.pdf (quoting Konrad Adenauer, Chancellor, Fed. Republic of Germany, Speech at the German Bundestag (Dec. 15, 1954)).

21. *See* PEW RESEARCH CENTER, *The New Sick Man of Europe: The European Union*, (2013), *available at* http://www.pewglobal.org/2013/05/13/the-new-sick-man-of-europe-the-european-union/ (showing a 5% decline in Germany from 2012 to 2013 in confidence in the European Union as an economic project and an 8% decline from 2012 to 2013 in Germans who view the EU favorably). *See also* Rainer Buergin, *Most Germans Reject Ceding Sovereignty to EU, Stern Poll Shows*, BLOOMBERG (July 4, 2012), http://www.bloomberg.com/news/2012-07-04/most-germans-reject-ceding-sovereignty-to-eu-stern-poll-shows.html.

22. *See Silent No More: A New Political Party Is the First to Call Openly for Scrapping the Euro*, ECONOMIST, March 21, 2013, *available at* http://www.economist.com/news/europe/21574036-new-political-party-first-call-openly-scrapping-euro-silent-no-more; *What Is the Alternative? Europe Waits as Angela Merkel Faces a New Anti-establishment Party*, ECONOMIST, May 18, 2013, *available at* http://www.economist.com/news/europe/21578105-europe-waits-angela-merkel-faces-new-anti-establishment-party-what-alternative.

23. *See* P. Ronzheimer, *Wie geht es den Griechen mit unseren Milliarden?*, BILD, Aug. 25, 2010, *available at* http://www.bild.de/politik/2010/politik/wie-geht-es-den-griechen-mit-unseren-milliarden-13735554.bild.html; *Verkauft doch eure Inseln, ihr Pleite-Griechen . . . und die Akropolis gleich mit!*, BILD, Oct. 27, 2010, *available at* http://www.bild.de/politik/wirtschaft/griechenland-krise/regierung-athen-sparen-verkauft-inseln-pleite-akropolis-11692338.bild.html; Franz Solms-Laubach, *Wir zahlen und sie bepöbeln uns: Schmeißt die Griechen endlich aus dem Euro!*, BILD, Feb. 17, 2012, *available at* http://www.bild.de/politik/ausland/griechenland-krise/schmeisst-die-griechen-endlich-aus-dem-euro-22678402.bild.html.

24. *See* Bruce Stokes, *Threat to the EU: German Exceptionalism Poses a Challenge*, SPIEGEL ONLINE INT'L (May 14, 2013), http://www.spiegel.de/international/europe/pew-research-study-shows-europeans-are-divided-about-state-of-europe-a-899460.html; Florian Diekmann, *Spar-Entscheidung in Athen: Was für Griechen und Deutsche auf dem Spiel steht*, SPIEGEL ONLINE WIRTSCHAFT (July 17, 2013), http://www.spiegel.de/wirtschaft/soziales/abstimmung-ueber-sparpaket-in-athen-wichtige-fragen-und-antworten-a-911436.html.

25. *See Die Griechenland-Pleite*, FOCUS MAGAZIN, Feb. 22, 2010, *available at* http://www.focus.de/magazin/archiv/jahrgang_2010/ausgabe_8/.

26. *See generally* HEWITT, *supra* note 11, at 13 ("By May 2010, Europe's leaders feared the eurozone might break-up."); MARK BLYTH, AUSTERITY: THE HISTORY OF A DANGEROUS IDEA (2013); DAVID MARSH, EUROPE'S DEADLOCK: HOW THE EURO CRISIS COULD BE SOLVED — AND WHY IT WON'T HAPPEN 62–83 (2013) (documenting the slow emergence and evolution of the crisis over

stitutional Court, which is based in the quiet, southwestern German city of Karlsruhe. This explains why, in a 2012 interview, Christine Legarde — the French Managing Director of the International Monetary Fund (IMF) — declared: *'If I hear the word Karlsruhe one more time, I'm leaving the room.'*[27]

The IMF — along with European states working both from within and outside the EU — has been desperately trying to pull Europe back from the brink of this existential calamity. The German Constitutional Court has been a persistent irritant throughout those efforts. Madame Legarde, for example, was reacting to a 2012 decision of the Constitutional Court in which the Court refused to grant a temporary injunction that would have blocked Germany's participation in the European Stability Mechanism (ESM).[28] She was exercised by the fact that this victory for the ESM — and Europe — was tempered by the Constitutional Court's clearly stated discomfort with the democratic implications of Germany's commitment to the permanent bailout fund.[29]

This "yes . . . but" approach has characterized the Constitutional Court's frequent forays into Germany's European integration.[30] Repeatedly, the Court has allowed Germany to proceed with measures aimed at deepening European integration while at the same time expressing concern about the democratic *qua* parliamentary repercussions of Germany's decision to ratify them.[31] The Court's vacillation is, in part, a consequence of

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the first decade of the twenty-first century); DAVID MARSH, THE EURO: THE BATTLE FOR THE NEW GLOBAL CURRENCY 11 (2011) (describing the high hopes for the Euro as it launched in 1999 and the currency's subsequent fall from grace after the 2008 global economic crisis: "the European common currency has become a saga of Wagnerian intensity . . . ."). *See also* Timothy Garton Ash, *The Crisis of Europe: How the Union Came Together and Why It's Falling Apart*, FOREIGN AFF., Sept.-Oct. 2012, *available at* http://www.foreignaffairs.com/articles/138010/timothy-garton-ash/the-crisis-of-europe; Martin Feldstein, *The Failure of the Euro: The Little Currency That Couldn't*, FOREIGN AFF., Jan.-Feb. 2012, *available at* http://www.foreignaffairs.com/articles/136752/martin-feldstein/the-failure-of-the-euro; Hugo Dixon, *Can Europe's Divided House Stand? Separating Fiscal and Monetary Union*, FOREIGN AFF., Nov.-Dec. 2011, *available at* http://www.foreignaffairs.com/articles/136505/hugo-dixon/can-europes-divided-house-stand; Henry Farrell & John Quiggin, *How to Save the Euro — and the EU: Reading Keynes in Brussels*, FOREIGN AFF., May-June 2011, *available at* http://www.foreignaffairs.com/articles/67761/henry-farrell-and-john-quiggin/how-to-save-the-euro-and-the-eu.

27. Kay-Alexander Scholz, *Karlsruhe's Constitutional Monastery: What Germany's Euro Bailout Ruling Means for ESM*, DEUTSCHE WELLE (Sept. 11, 2012) (emphasis added), http://www.dw.de/karlsruhes-constitutional-monastery/a-16231161.

28. *See* ESM Temporary Injunction Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 12, 2012, 132 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 195, 2012, *available at* http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html.

29. *Id.*

30. *See, e.g.*, *Karlsruhe Has Spoken: "Yes" to the Lisbon Treaty, but . . .*, 46 COMMON MKT. L. REV. 1023, 1023–33 (2006); Karsten Schneider, *Yes, But . . . One More Thing: Karlsruhe's Ruling on the European Stability Mechanism*, 14 GER. L.J. 53 (2013), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=1496.

31. *See* DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 325–52 (3d ed. 2012).

the Basic Law's conflicting commands for European integration, on one hand, and the preservation of Germany's national constitutional identity, on the other hand.[32]

The history of the Court's intervention reads like a Michelin travel guide, with stops in Brussels, Maastricht, Amsterdam, Lisbon, and — with the *ESM Temporary Injunction Case* from 2009 — Luxembourg.[33] Over the course of this European jurisprudence, the Constitutional Court has focused on reaffirming and reimagining the Basic Law's principle of democracy as a foundation of the German constitutional order and, therefore, as a limit on Germany's participation in European integration.[34]

Germany's principle of democracy, as interpreted and applied by the Constitutional Court, has become one of the chief barriers to Germany's essential participation in the European project. It should be noted that the Court's intervention on these terms represents a distinct domestic response to dogged concerns about the EU's "democratic deficit."[35] This broader, enduring critique of the European Union draws attention to the fact that European integration has been driven by, and resulted in, less-than-majoritarian processes and institutions.[36] On the constitutional level,

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32. GG, BGBl. I, pmbl., art. 23, art. 79(3) (Ger.). *See* KOMMERS & MILLER, *supra* note 31, at 302.

33. *See* Solange I Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271, 1974; Solange II Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986, 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 339, 1986; Maastricht Treaty Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, 1993; Banana Market Regulation Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 7, 2000, 102 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 147, 2000; Lisbon Treaty Case, 123 BVERFGE 267; EFSF Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 7, 2011, 129 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 124, 2011; ESM Temporary Injunction Case, 132 BVERFGE 195.

34. Davor Jančić, *Caveats From Karlsruhe and Berlin: Whither Democracy After Lisbon?*, 16 COLUM. J. EUR. L. 337, 340 (2010) ("[A]lthough the principle of democracy has almost always been an explicit or implicit litmus test of the BVerfG, the significance of this principle reached its apex with the *Lissabon-Urteil*. Unlike in its previous case law, the BVerfG unambiguously and conclusively refused to endorse the European Parliament as a primary institution of E.U. democracy.").

35. The term "democratic deficit" is generally attributed to David Marquand, who served as a member of the British Parliament and as an EC Commission official. DAVID MARQUAND, PARLIAMENT FOR EUROPE 64–66 (1979). *See also* Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451 (1999); Stephen C. Sieberson, *The Treaty of Lisbon and Its Impact on the European Union's Democratic Deficit*, 14 COLUM. J. EUR. L. 445 (2008).

36. *See* Francis Fukuyama, *European Identities Part II*, AM. INT. (Jan. 12, 2012), http://blogs.the-american-interest.com/fukuyama/2012/01/12/european-identities-part-ii/ ("And to be quite honest, the whole European project has been an elite-driven affair."); Jürgen Habermas, Professor, Lecture in Leuven, Belgium: Democracy, Solidarity and the European Crisis (Apr. 26, 2013), *available at* http://www.kuleuven.be/communicatie/evenementen/evenementen/jurgen-habermas/en/democracy-solidarity-and-the-european-crisis ("The European Union owes its existence to the efforts of political elites who could count on the passive consent of their more or less indifferent populations as long as the peoples could regard the Union as also being in their economic interests all things considered.").

European elites and the European Council have pushed unification ahead through incremental projects (such as monetary union and expansion) that were meant to reaffirm the logic and boost the momentum of integration. Neill Nugent has explained:

> The integration process has been characterized by an almost constant edging forward, with "advances" followed by pressures for more advances. Phases and forms of integration have frequently followed almost inevitably and logically from earlier — and often less significant — phases and forms. In a pattern well understood by those who are persuaded by historical institutionalist interpretations of the evolution of the integration process . . . , and especially by the importance of "path dependence" in shaping the nature of the evolution, the treaty architects have, as Wessels . . . has shown, developed an almost ideal three-step type of integration cascade. In the first phase, governments realize the advantages of cooperating with other EU countries in a particular policy area and attempt to do so on a very loose intergovernmental basis, often on the margins of, or even outside, the EU framework. When this form of cooperation proves to be insufficient, the governments move to the second phase, which sees the policy area given clear treaty recognition and moved firmly into the organizational framework of the Union, but still on an essentially intergovernmental basis in that the role of the Commission is limited, the EP is at best given only consultative rights, Council decision are by unanimity, and the Court has few — if any — powers. In the third phase, governments realize they must permit stronger decision-making processes if aims are to be achieved, so the supranational route is taken with more effective powers and roles assigned to the Commission, EP and Court and, most importantly, QMV permitted in the Council. . . . It is unlikely in the foreseeable future that [the treaties] will be changed in the manner that was attempted by the Constitutional Treaty process. In all there will be a turning away from the grandiose and highly symbolized approach of the CT and a return to steady and understated incrementalism.[37]

37. NEILL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION 136, 146 (6th ed. 2006). *See* Geoffrey Edwards, *Common Foreign and Security Policy: Incrementalism in Action?*, *in* INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 3 (Martti Koskenniemi ed., 1998).

Jürgen Habermas acknowledged the elite character of the European project, complaining that

At the regulatory level, domestic executive power (exercised at the European level by the Member States' representatives to the Council of the European Union), aided by the European Commission's technocracy, promulgates a large percentage of all law spanning across Europe.[38] This European governing reality has been advanced by the Court of Justice of the European Union, which has aggrandized itself and asserted the supremacy of European law over domestic law. Sadly, a directly-elected but weak European Parliament has little authority to check these forces and burnish Europe's democratic legitimacy. Two responses to the growing problem of Europe's democratic deficit have emerged. First, there has been a push for more democracy at the European level, including a more powerful and relevant European Parliament, as well as experimental measures of direct democracy.[39] Second, there is recognition that Member States' democratically legitimate national parliaments must have a greater role in European affairs.[40] The Constitutional Court's recent reinforcement

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the "Union's constitution is the work of political elites." HABERMAS, *supra* note 2, at 78 (Russell Miller trans.). *See also* Alan Cowell, *A Challenge to European Political Elite*, N.Y. TIMES, Sept. 26, 2013, *available at* http://www.nytimes.com/2013/09/27/world/europe/a-challenge-to-european-political-elite.html; Judy Dempsey, *E.U. Elites Keep Power from the People*, N.Y. TIMES, Aug. 22, 2011, *available at* http://www.nytimes.com/2011/08/23/world/europe/23iht-letter23.html; MAX HALLER, EUROPEAN INTEGRATION AS AN ELITE PROCESS: THE FAILURE OF A DREAM? (2008).

38. Some put the percentage as high as 80%. *See, e.g.*, Roman Herzog & Lüder Gerken, *The Spirit of the Time: Revise the European Constitution to Protect National Parliamentary Democracy*, 3 EUR. CONST. L. REV. 209, 210 (2007). But this is often based on Jacques Delors' dramatic prediction from 1988. *See* Remarks of Mr. Jacques Delors, EUR. PARL. DEB. (2-367) 140 (July 6, 1988). This claim, although often repeated, is now disputed. *See* Andrew Moravcsik, *The Myth of Europe's "Democratic Deficit,"* 43 INTERECONOMICS 331, 332 (2008) ("In 1988, Jacques Delors famously predicted that 'in 10 years . . . 80 percent of economic, and perhaps social and fiscal policy-making' would be of EU origin. Today Delors' statement is often misquoted as a 'factoid' in public discussion: one often hears that 80 per cent [sic] of *all* European policy-making on *every* issue *already* comes from Brussels."). *See also* Vaughne Miller, *How Much Legislation Comes from Europe?* 1 (House of Commons Library, Res. Paper No. 10/62, 2010), *available at* www.parliament.uk/briefing-papers/RP10-62.pdf ("Using statistics from national law databases and the EU's *EUR-Lex* database, it is possible to estimate the proportion of national laws based on EU laws. In the UK data from these sources provided estimates that suggest that over the twelve-year period from 1997 to 2009 6.8% of primary legislation (Statutes) and 14.1% of secondary legislation (Statutory Instruments) had a role in implementing EU obligations, although the degree of involvement varied from passing reference to explicit implementation. . . . The British Government estimates that around 50% of UK legislation with a significant economic impact originates from EU legislation. Estimates of the proportion of national laws based on EU laws vary widely in other EU Member States, ranging from 6.3% to 84%. However, there is no totally accurate, rational or useful way of calculating the percentage of national laws based on or influenced by the EU.").

39. *See* Lisbon Treaty, *supra* note 17, art. 1(12) (amending TEU articles 8A(1)–(2), 8B(1)–(3), and 8B(4), *inter alia*, regarding democratic principles). *See also* JEAN-CLAUDE PIRIS, THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS 114–121, 133 (2010); JEAN BLONDEL, RICHARD SINNOTT & PALLE SVENSSON, PEOPLE AND PARLIAMENT IN THE EUROPEAN UNION: PARTICIPATION, DEMOCRACY, AND LEGITIMACY (1998); Sieberson, *supra* note 35, at 452–54, 463.

40. *See* Lisbon Treaty, *supra* note 17, art. 1(12) (amending TEU article 8C, *inter alia*, regarding the role of National Parliaments in the European Union). *See also* Ian Cooper, *A 'Virtual Third Chamber'*

of the German principle of democracy in its European jurisprudence is a decided endorsement of the latter and, in itself, represents a challenge to the power and autonomy of supranational European institutions to resolve Europe's democratic deficit.[41]

But what is the principle of democracy? What is the Constitutional Court's vision and theory of democratic legitimacy as it operates as part of Germany's constitutional identity and, therefore, as a limit on Germany's participation in the European project?

III. THE PRINCIPLE OF DEMOCRACY IN GERMAN CONSTITUTIONAL LAW

A. Textual Basis

The principle of democracy is derived from provisions that are not located in the Basic Law's first section, labeled "Basic Rights" (*Grundrechte*) and spanning the constitution's first nineteen articles.[42] This "bill of rights" is where one finds the traditional subjective, negative rights — seasoned with a sprinkling of positive rights — securing liberalism's political and economic freedom.[43] Instead, the principle of democracy is grounded in Article 20(1) and (2) of the Basic Law, provisions that identify Germany as a "democratic and social federal state" and, at the same time, make the exercise of state authority a matter of Germans' electoral expression.[44] Article 38 of the Basic Law completes the content of Article 20 by channeling Germans' franchise into the "general, direct, free, equal, and secret" election of representatives to the *Bundestag* (Federal Parliament).[45] Significantly, Article 20 is part of Germany's constitutional identity secured for eternity — even against constitutional amendment — by Article 79(3) of the Basic Law.[46] All of this, especially in the light of the Basic Law's self-

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for the European Union? National Parliaments after the Treaty of Lisbon, 35 W. EUR. POL. 441 (2012); Tapio Raunio, *National Parliaments and European Integration: What We Know and Agenda for Future Research*, 15 J. LEGIS. STUD. 317 (2009); Philipp Kiiver, *The Treaty of Lisbon, The National Parliaments and the Principle of Subsidiarity*, 15 MAASTRICHT J. EUR. & COMP. L. 77 (2008); PIRIS, *supra* note 39, at 122–133; Sieberson, *supra* note 35, at 462.

41. *See* Jančić, *supra* note 34.

42. GG, BGBl. I, arts. 1–19 (Ger.).

43. KOMMERS & MILLER, *supra* note 31, at 59–62.

44. GG, BGBl. I, art. 20 (Ger.). *See* Bodo Pieroth, *Art. 20: Demokratieprinzip und Republik*, *in* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR 479 (Hans D. Jarass & Bodo Pieroth eds., 10th ed. 2009); Horst Dreier, *Artikel 20 — Demokratie*, *in* II GRUNDGESETZ KOMMENTAR 20 (Horst Dreier ed., 1998).

45. GG, BGBl. I, art. 38 (Ger.). *See* Bodo Pieroth, *Art. 38: Wahlrechtsgrundsätze und Rechtsstellung der Abgeordneten*, *in* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR, at 670 (Hans D. Jarass & Bodo Pieroth eds., 10th ed. 2009); Martin Morlok, *Artikel 38 — Wahlrechtsgrundsätze/Abgeordnete*, *in* II GRUNDGESETZ KOMMENTAR (Horst Dreier ed., 1998).

46. GG, BGBl. I, art. 79(3) (Ger.). *See* Bodo Pieroth, *Art. 79: Änderung des Grundgesetzes*, *in* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR, at 843 (Hans D. Jarass

conscious renunciation of the Nazi tyranny and counterpoise to the socialist experiment that was unfolding just across the Wall, makes the principle of democracy "the very heart of the constitutional system."[47] This helps explain why, when considering the transfer of sovereign state authority to the democratically deficient European Union that is at stake in each additional step towards Europe's integration, the Constitutional Court has taken refuge in this jurisprudence. For example, in the *ESM Temporary Injunction Case* from 2012, the Court brushed aside the complainants' creative assertion of basic rights (such as the right to property) and focused again on the principle of democracy.[48] In refusing to grant a temporary injunction blocking Germany's participation in the permanent bailout mechanism, the Court concluded that "the European Stability Mechanism essentially takes account of the requirements of Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law."[49]

B. Recent European Jurisprudence

The Constitutional Court has built a complex framework upon the principle's textual foundation. Its recent European cases are representative of this jurisprudence. For example, in rejecting the application for a temporary injunction in the 2012 *ESM Temporary Injunction Case*, the Court reaffirmed its well-settled rule that the right to elect members of the *Bundestag* guarantees citizens self-determination as well as free and equal participation in the state authority exercised by Germany.[50] It follows from this, the Court explained, that transfers of essential public competencies from the *Bundestag* to European institutions — budgetary decisions in the *ESM Temporary Injunction Case* — could be incompatible with the structural principles of the Basic Law, especially the principle of democracy.[51] In the con-

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& Bodo Pieroth eds., 10th ed. 2009); Horst Dreier, *Artikel 79 III — Änderung des Grundgesetzes*, *in* II GRUNDGESTEZ KOMMENTAR, at 1503 (Horst Dreier ed., 1998).

47. Eckart Klein & Thomas Giegerich, *The Parliamentary Democracy*, *in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 141, 152 (Ulrich Karpen ed., 1988).

48. Some of the complainants joined for hearing by the Court in the *ESM Temporary Injunction Case* asserted a violation of the Basic Law's property-rights protections (Article 14) on the basis that Germany's participation in the ESM would contribute to an inflationary policy that would degrade Germans' wealth. The Court found it unnecessary to decide whether this claim justified a temporary injunction blocking Germany's participation in the ESM because "negative consequences for monetary stability" may constitute a constitutional violation "at most in cases of a clear reduction of monetary value." The Court found that the complainants had not submitted sufficient facts to justify a review of this issue. ESM Temporary Injunction Case, 132 BVERFGE 195 (¶¶ 146, 200) (citing EFSF Case, 129 BVERFGE 124 (¶ 174)), *available at* http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html.

49. *Id.* ¶ 239.

50. *Id.* ¶ 208.

51. *Id.* ¶¶ 209, 212.

text of Germany's significant bailout commitments under the ESM,[52] the Court noted that the principle of democracy prevents the *Bundestag* from giving European institutions "blanket" or "dynamic" grants of authority without safeguards that ensure the continuing, effective exercise of German state power that has been democratically legitimated by the parliament in keeping with Articles 20 and 38 of the Basic Law.[53] A violation of the principle of democracy would result, the Court explained, if the *Bundestag* relinquished its parliamentary budgetary responsibility so that it (or future parliaments) could no longer determine the budget "on its own responsibility."[54] The Court also emphasized that the principle of democracy requires that the *Bundestag* be fully informed[55] about Germany's budgetary commitments so that it can effectively remain the permanent master of this core piece of public authority.[56] In its summary review of Germany's commitment to the ESM, the Court found that these parliamentary prerogatives had not "completely failed" and, for that reason, the merits challenges to the ESM had such minimal chances of success that a temporary injunction blocking Germany's participation in the ESM was not justified.[57]

There was little that was new in the 2012 *ESM Temporary Injunction Case.* The Court pressed an identical line of reasoning a year earlier in its ruling on a challenge to Germany's participation in the European Financial Sta-

52. Germany's commitment to the ESM consisted in nearly €22 billion to be paid into the capital of the ESM with an additional callable contribution to the ESM's capital of nearly €170 billion. ESM-Finanzierungsgesetz [ESMFinG] [ESM Financing Act], Sept. 13, 2012, BGBl. I at 1918 (Ger.), *available at* http://www.gesetze-im-internet.de/bundesrecht/esmfing/gesamt.pdf. *See* ESM Temporary Injunction Case, 132 BVERFGE 195 (¶ 113) (Ger.). The total risk to which Germany is exposed pursuant to its ESM commitments (nearly €192 billion) would equal nearly half the country's annual budget. *See* BUNDESMINISTERIUM DER FINANZEN, BUNDESHAUSHALT 2013, *available at* http://www.bundeshaushalt-info.de/startseite/#/2013/soll/ausgaben/einzelplan.html. Otherwise, Germany's largest budget commitment is the Federal Ministry for Work and Social Welfare, which, at nearly €120 billion, constitutes almost 40% of the budget. *Id.* While it is very unlikely that Germany would have to meet the full amount of its callable commitment to the ESM in a single budget cycle, the press has reported that the €4 billion call from the ESM it will answer in 2014 (a sum larger than the 2013 budget lines for the Foreign Ministry and the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety) will prevent Germany from achieving a balanced budget this year. James Angelos, *Germany Settles on Budget*, WALL ST. J., Mar. 13, 2013, *available at* http://online.wsj.com/article/SB10001424127887324077704578358181614522580.html. Germany's contribution to the ESM is roughly 27.1%. *Key Euro-Zone Country Contribution to the European Stability Mechanism (ESM)*, STATISTA, 2011, http://www.statista.com/statistics/201810/european-stability-mechanism-contribution-of-eu-countries/.

53. ESM Temporary Injunction Case, 132 BVERFGE 195 (¶ 209).

54. *Id.* ¶ 210.

55. *Id.* ¶ 215 (citing GG, BGBl. I, arts. 43(1) & 44).

56. *Id.* ¶ 215 (citing EFSF Case, 129 BVERFGE 124 (179–80)).

57. *Id.* ¶ 271. Elsewhere the Court described the relevant standard as an "impairment," *id.* ¶ 274, and an "adverse effect." *Id.* ¶ 315. The clearest statement of the relevant standard is that the surrender of national, parliamentary budgetary autonomy must consist in a "manifest overstepping of extreme limits" or that "at least for an appreciable period of time, [budgetary autonomy] was not merely restricted but effectively failed." *Id.* ¶ 216 (citing EFSF Case, 129 BVERFGE 124 (183)).

bility Facility (EFSF), the provisional bailout program for Greece that preceded the permanent ESM. In the 2011 *EFSF Case*, the Constitutional Court also insisted that core governing competencies — such as budgeting for public expenditures — are the absolute prerogative of the *Bundestag* because only the democratically elected parliament can legitimate those decisions.[58] The *Bundestag* serves this role in two ways, the Court explained. First, it is the only public institution that enjoys a direct electoral, representative nexus with the people.[59] Second, the *Bundestag* is privileged with respect to the exercise of these powers as a result of its uniquely deliberative processes. The Court referred to parliament's deliberative processes as "conceptual political decisions . . . regarded as general debate on policy."[60] In the *EFSF Case*, the Constitutional Court found no constitutional violation in Germany's role in the provisional bailout for Greece, but it forcefully noted the limits on Germany's further participation in European integration arising from the principle of democracy. The Court explained that the principle of democracy unalterably requires *Bundestag* approval of budgetary commitments, even in the framework of Germany's European obligations.[61] In particular, the Court insisted that Germany's participation in the bailout could not involve automatic or irreversible budget decisions taken at the supranational level, where they lie beyond the reach of parliament. "Every individual disposal [of public revenue]," the Court explained, "requires the consent of the *Bundestag*."[62] Moreover, it is from the *Bundestag* — and the parliaments of the other Member States — that European initiatives derive "direct democratic legitimation."[63]

The *ESM Temporary Injunction Case* and *EFSF Case* build on the Constitutional Court's seminal *Lisbon Treaty Case* from 2009,[64] in which the principle of democracy also played a fundamental role. In that decision, the

58. EFSF Case, 129 BVERFGE 124 (179–80).

59. *Id.* at 168–69.

60. *Id.* at 178 (citing Lisbon Treaty Case, 123 BVERFGE 267 (411)).

61. *Id.* at 178 ("As representatives of the people, the elected Members of the German Bundestag must retain control of fundamental budgetary decisions even in a system of intergovernmental administration.").

62. *Id.* at 180–81.

63. *Id.* at 181.

64. Lisbon Treaty Case, 123 BVERFGE 267. *See Special Section: The Federal Constitutional Court's* Lisbon Case, 10 GER. L.J. 1201–1308 (2009); Dieter Grimm, *Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union — Zum Lissabon-Urteil des Bundesverfassungsgerichts*, 48 DER STAAT 475 (2009); Jo Eric Khushal Murkens, *Identity Trumps Integration: The Lisbon Treaty in the German Federal Constitutional Court*, 48 DER STAAT 517 (2009); Christoph Schönberger, *Die Europäische Union zwischen "Demokratiedefizit" und Bundesstaatsverbot — Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts*, 48 DER STAAT 535 (2009); DER VERTRAG VON LISSABON VOR DEM BUNDESVERFASSUNGSGERICHT (Karen Kaiser ed., 2013); *The German Constitutional Court's Lisbon Ruling: Legal and Political-Science Perspectives* (Andreas Fischer-Lescano et al. eds., Ctr. of European Law & Politics, ZERP Discussion Paper 1/2010, 2010), *available at* http://www.mpifg.de/people/mh/paper/ZERP%20Discussion%20Paper%201.2010.pdf.

Court considered challenges to Germany's ratification of the Lisbon Treaty, which sought to implement much of the significant structural reform of the European Union that the failed European Constitution would have achieved. The integration implicated by the ESM and EFSF, although by no means trivial, was nevertheless discretely concerned with supranational transfers of Germany's budgetary authority. The Lisbon Treaty, to the contrary, involved integration's "big bang,"[65] including the dissolution of the European Union's pillar structure,[66] conferring the European Union with autonomous legal personality,[67] making the Charter of Fundamental Rights binding,[68] further developing the European Parliament's law-making authority,[69] establishing the President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy,[70] and expanding and cataloguing the European Union's competencies. If the Court was moved to worry about the principle of democracy in the narrower context of Euro-zone bailouts, it should not be surprising that it expressed apprehension about the *Bundestag*'s integrity and policy-making prerogative in the context of the far-reaching transfers of German sovereign authority implicated by the Lisbon Treaty.

Again, the Court resorted to its "yes . . . but" formula. *Yes*, German ratification of the Lisbon Treaty could proceed within the framework of the Basic Law. *But* only after the enacting legislation that accompanied ratification had been amended to ensure the *Bundestag*'s prerogative over the exercise of the core competencies of state authority. The principle of democracy, alongside other parts of the constitutional identity framed by the Basic Law, served as one of the chief bases for the Court's reservations about further integration. The Court made the *Bundestag* the centerpiece of that constitutional commitment. The right to vote for members of the *Bundestag*, the Court explained, establishes democratic self-determination through free and equal participation in the state authority exercised by Germany.[71] In turn, the popular sovereignty secured by this guarantee is to be expressed through the right to elect members of the *Bundestag*, through which the people exercise their political will.[72] "The election of the members of the German *Bundestag*," said the Court, "is the source of state authority."[73] The Court's recognition of the "major importance" of the election of

65. *See* Lisbon Treaty, *supra* note 17, art. 1(22) (introducing a new Article 10 providing "enhanced cooperation" with the expectation that enhanced cooperation will further the objectives of the Union, protect its interests, and reinforce its integration process).

66. *Id.* art. 1(2)(b) (amending art. 1(3)).

67. *Id.* art. 1(55) (introducing new art. 46A).

68. *Id.* art. 1(8) (introducing new art. 6(1)).

69. *Id.* art. 1(15–16) (introducing new art. 9A–9B).

70. *Id.* arts. 1(16), (19) (introducing new arts. 9B and 9E).

71. Lisbon Treaty Case, 123 BVERFGE 267 (340).

72. *Id.*

73. *Id.*

members of the parliament for the principle of democracy was reinforced by its conclusion that the franchise has significance for fundamental, basic individual rights, including personal freedom and human dignity.[74]

Straying into the realm of political philosophy, the Court found confirmation for these conclusions in general democratic theory. "In modern territorial states," the Court explained, "the self-determination of the people is mainly realized in the election of bodies of a union of rule, which exercise public authority . . . either in a single parliamentary representative body . . . or in a presidential system."[75] Citing its 1956 decision in which it imposed a ban on the German Communist Party, the Court recalled that the exclusion of the Communist Party from political life — especially parliamentary politics — was necessary because the threat the party posed to the "free democratic basic order" would have corrupted "the procedurally regulated battle for political power that is waged to gain the majority" in parliament.[76] As it would do again in the *EFSF Case*, the Court also made general claims in the *Lisbon Treaty Case* about the democratic merits of the parliamentary prerogative it was articulating on the basis of parliaments' reliance on public discourse — in the "party political and parliamentary sphere" — for the development of public policy.[77]

The Court forcefully asserted that these principles — free and equal parliamentary elections serving as the basis for state power and constituting a significant component of human dignity — are elements of the eternal and unamendable constitutional identity secured by Article 79(3) of the Basic Law.[78] "The principle of democracy," the Court insisted, "may not be balanced against other legal interests; it is inviolable."[79] And it is the preservation of this constitutional identity — consisting, to a significant degree, in the principle of democracy — that animates the Court's insistence on a clear outer limit to German participation in European integration. Of great relevance for the subsequent Euro-crisis cases, the Court in the *Lisbon Treaty Case* identified revenue-raising and budgetary authority amongst a catalogue of core competencies of state authority over which parliament "must retain sufficiently substantial responsibilities and competencies of its own" in order to realize the Basic Law's commitment to the principle of democracy.[80] This is the basis for the Court's insistence in the *ESM Temporary Injunction Case* and *EFSF Case* that the *Bundestag* must re-

74. *Id.* at 340–41.

75. *Id.* at 366–67.

76. *Id.* at 367 (citing Communist Party Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 17, 1956, 5 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 85 (198)).

77. Lisbon Treaty Case, 123 BVERFGE 267 (358).

78. *Id.* at 344.

79. *Id.* at 343.

80. *Id.* at 370.

main the "permanent master" of Germany's sovereign budgetary competence. Several of the other non-transferable core competencies identified by the Court in the *Lisbon Treaty Case* also have a unique nexus with parliament, including the state's monopoly on the use of military force over which, in the German constitutional scheme, the *Bundestag* exercises exclusive control.[81] The Court — and German political actors — regularly refer to the *Bundeswehr* (German Federal Armed Forces) as a *Parlamentsarmee* (parliamentary army).[82] Drawing on that terminology, the logic of the Court's reasoning in the *Lisbon Treaty Case*, the *EFSF Case*, and the *ESM Temporary Injunction Case* suggests that we might refer to Germany's authority to tax and spend as a *Parlamentsbudget* (parliamentary budget). In this way, the Court creates a virtuous circle that reaffirms the parliamentary quintessence of the principle of democracy: the people are the authors of state authority through their right to vote for the *Bundestag*, and the democratically elected *Bundestag* must remain the master of the core expressions of state authority. "The election of the members of the German *Bundestag* by the people," the Court urged, "fulfills a central role in the system . . . [and] the German *Bundestag* must retain a formative influence on political developments in Germany."[83]

The principle of democracy, as interpreted and enforced by the Court in these recent European cases, marks a strict outer limit to Germany's integration into the European Union. It is part of Germany's inviolable and unalterable constitutional identity. And the principle of democracy, it seems, is chiefly a commitment to parliamentary governance.

C. *The Principle of Democracy as Parliamentary Democracy*

To say that the principle of democracy is realized in elections for the members of the *Bundestag* merely begs the question: what vision of democracy has the Court sought to advance with respect to the power and function of the *Bundestag*? What is the Court's vision of parliamentary democracy? Answering this question requires consideration of the Court's jurisprudence in a broad range of topics, including executive-legislative checks and balances; the rights and duties of the majority and opposition in parliament; the nature and function of Germany's electoral system; the political role and sources of funding for political parties; and Germany's illiberal

81. *Id.* at 360–61 (citing AWACS I Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 12, 1994, 90 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 286 (382)).

82. *Id. See also* Russell A. Miller, *Germany's Basic Law and the Use of Force*, 17 IND. J. GLOBAL LEGAL STUD. 197, 204 (2010); Angela Merkel, Chancellor of Germany, Germany's Foreign and Security Policy in the Face of Global Challenges, 42nd Munich Conference on Security Policy (Feb. 4, 2006) (transcript available at http://www.european-security.com/n_index.php?id=5509).

83. Lisbon Treaty Case, 123 BVERFGE 267 (356).

"militant democracy."[84] I will not tell that full, complex story here, although I want to acknowledge that it is a subject made all the more remarkable by Germany's troubled democratic heritage.[85] A more complete version of that jurisprudence has been presented elsewhere.[86] But in summarizing the field, I can highlight two contrasting themes. On one hand, the Court has sought to ensure broad, diverse, and plural representation in the *Bundestag* through political parties that enjoy quasi-public status and a near monopoly on what the Court has called popular or political "will formation." In this vein the Court has vigilantly nurtured lively political debate in the *Bundestag* by shielding minority and unconventional parties against legislation or practices that would have chilled or inhibited their role, particularly with regard to participation in parliamentary activities,[87] party financing,[88] and requirements for gaining access to the ballot.[89] On

84. *See* KOMMERS & MILLER, *supra* note 31, at 216–301.

85. *See* GERT-JOACHIM GLAESSNER, GERMAN DEMOCRACY: FROM POST-WORLD WAR II TO THE PRESENT DAY (2005); ROBERT ROHRSCHNEIDER, LEARNING DEMOCRACY: DEMOCRATIC AND ECONOMIC VALUES IN UNIFIED GERMANY (1999); HANS MOMMSEN, THE RISE AND FALL OF WEIMAR DEMOCRACY (Elborg Forster & Larry Eugene Jones trans., 1996).

86. *See* KOMMERS & MILLER, *supra* note 31, at 216–301; Donald P. Kommers, *The Federal Constitutional Court: Guardian of German Democracy*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 111 (2006); DAVID P. CONRADT & ERIC LANGENBACHER, THE GERMAN POLITY (10th ed. 2013); Michael Bernhard, *Democratization in Germany: A Reappraisal*, 33 COMP. POL. 379 (2001); ARMIN GRÜNBACHER, THE MAKING OF GERMAN DEMOCRACY: WEST GERMANY IN THE ADENAUER ERA, 1945-65 (2010); GLAESSNER, *supra* note 85.

87. *See* Schleswig-Holstein Investigative Committee Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 2, 1978, 49 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 70; Green Party Exclusion Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 14, 1986, 70 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 324; Minority Rights in Investigative Committees Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] April 8, 2002, 105 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 197.

88. *See* Party Finance II Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 19, 1966, 20 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 56; Party Finance III Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 3, 1968, 24 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 300; Party Finance VI Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 26, 1991, 85 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 264. *See also* MICHAEL KOß, THE POLITICS OF PARTY FUNDING: STATE FUNDING TO POLITICAL PARTIES AND PARTY COMPETITION IN WESTERN EUROPE (2010); Thomas Gede, *Comparative Study of U.S. and West German Political Finance Regulation: The Question of Contribution Controls*, 4 HASTINGS INT'L & COMP. L. REV. 543 (1980–1981).

89. *See* Ballot Admission Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 1, 1953, 3 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 19; Stovesandt Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 15, 1960, 12 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 10; Independent Workers Party Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 21, 1993, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 266. *See also* JOACHIM LEGE, UNTERSCHRIFTENQUOREN ZWISCHEN PARTEIENSTAAT UND SELBSTVERWALTUNG (1996); UWE W. KITZINGER, GERMAN ELECTORAL POLITICS: A STUDY OF THE 1957 CAMPAIGN 206–07, 209–10 (1960) (explaining party fundraising activities and the issue of tax-exemption as it relates to

the other hand, the Constitutional Court enforces a limited set of illiberal provisions meant to protect German democracy from its past failures. This means that the Court has upheld the statutorily imposed requirement that a party achieve a five percent threshold of electoral success before it can enter parliament.[90] And, as suggested above by reference to the *Communist Party Case*, in extremely rare instances the Court has banned political parties that sought to "undermine or abolish the free democratic basic order."[91] The German past is poignantly present in both of these jurisprudential currents.[92]

Beyond this summary, I want to highlight one recent case because it reveals a very distinctive feature of the Constitutional Court's understanding of the principle of democracy as it is embodied by the *Bundestag*. I have in mind the Court's *Hartz IV Case* from 2010.[93] The term "Hartz Four" refers to the extensive and controversial reform of the German social welfare system proposed by a commission led by former Volkswagen executive Peter Hartz and implemented as law by Chancellor Gerhard Schröder's center-left coalition in 2002. The Hartz IV reform still inflames passions. Some credit the policy for reviving Germany's now-sizzling export economy and helping secure the country's budgetary soundness.[94] Others

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party elections of the *Bundestag*).

90. *See* Bavarian Party Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 23, 1957, 6 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 84; Danish Minority Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 11, 1954, 4 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 31. *But see* National Unity Election Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 29, 1990, 82 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 322.

91. *See* Socialist Reich Party Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1952, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1; Communist Party Case, 5 BVERFGE 85. *But see* NPD Party Ban Dismissal Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] March 18, 2003, 107 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 339.

92. The "malfunction of parliament" is seen as one of the main explanations for Hitler's rise to power. As Klein and Giegerich explain, "the executive could rather seldom rely on a stable majority in the Diet, multiparty coalitions followed one another in rapid sequence, and soon a 'negative' majority of extreme left wing and right wing parties united for destroying the constitutional system." Klein & Giegerich, *supra* note 47, at 143. In explaining the democratic failures that enabled Hitler's rise to power, these authors also note that a "lack of democratic consciousness, widespread among the population, was also apparent among its representatives." *Id.* Klein and Giegerich link these phenomena to the development of Germany's post-war democracy. "After World War II," they explain, "a new and more successful attempt was made to reconstruct a German state on the basis of democracy." *Id.*

93. Hartz IV Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 9, 2010, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 175. *See* Claudia Bittner, *Casenote — Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010*, 12 GER. L.J. 1941 (2011); Stefanie Egidy, *Casenote — The Fundamental Right to the Guarantee of a Subsistence Minimum in the Hartz IV Decision of the German Federal Constitutional Court*, 12 GER. L.J. 1961 (2011).

94. *See, e.g.*, Guido Bohsem, *Zehn Jahre nach Schröders Reform: Warum Hartz IV gelungen ist*, SÜDDEUTSCHE (Aug. 14, 2012, 10:33 AM), http://www.sueddeutsche.de/wirtschaft/zehn-jahre-na

decry the program as a neo-liberal assault on Germany's cherished social solidarity, epitomized by its longstanding commitment to a *social* market economy.[95] In practical terms, one part of the reform merged welfare and unemployment benefits, leaving recipients with considerably less government support than they enjoyed under the previous regime. The reduction in benefits was challenged before the Constitutional Court as a violation of the state's obligation, under Articles 1 and 20 of the Basic law, to "guarantee a subsistence minimum" of support for the disadvantaged in German society.[96] The Court sided with the complainants and found that the Hartz IV reform violated this guarantee.[97]

This case is discussed here to draw attention to the reasoning the Court employed in reaching its decision. The Court did not conclude that the real amount of support provided by the Hartz IV law (roughly €350/month) fell short of the constitutional guarantee as a substantive matter. That is, the Court did not identify a fixed sum that would be necessary to fulfill the constitutional right to a subsistence minimum. Instead, the Court objected to the unsystematic, inconsistent, and irrational method the *Bundestag* used in settling on the amount of support to be paid. No matter how much support the parliament chooses to provide — even if it were less than the figure originally legislated — the Court insisted that the *Bundestag* must employ a rational and consistent calculation procedure that ensures that the parliament has "completely and correctly ascertained the necessary facts and . . . kept within the bounds of what is justifiable in all calculation steps with a comprehensible set of figures within this selected procedure and its structural principles."[98]

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ch-schroeders-reform-warum-hartz-iv-gelungen-ist-1.1440740; Lisa Nienhaus, *Der Hartz-Erfolg: Zehn Jahre sind die Arbeitsmarktreformen alt. Nie waren sie beliebt. Aber sie wirken, Fazit — Das Wirschaftsblog*, FRANKFURTER ALLGEMEINE ZEITUNG, (Mar. 15, 2013, 4:22 PM), http://blogs.faz.net/fazit/2013/03/15/der-hartz-erfolg-1190/; Judy Dempsey, *German Unemployment Down for 12th Straight Month*, N.Y. TIMES, June 30, 2010, *available at* http://www.nytimes.com/2010/07/01/business/global/01eu econ.html.

95. *See, e.g.*, Peter Bofinger, *Die Mythen um Hartz IV*, TAZ.DE (Mar. 14, 2013), http://www.taz.de/!112801/; THOMAS MAHLER, IN DER SCHLANGE: MEIN JAHR AUF HARTZ IV (2011); Hans von der Hagen, *Sozialrichter Jürgen Borchert "Warum die Agenda 2010 als Erfolg begriffen wird, ist mir ein Rätsel"*, SÜDDEUTSCHE, (Mar. 14, 2013, 3:06 PM), http://www.sueddeutsche.de/wirtschaft/sozialrichter-juergen-borchert-warum-die-agenda-als-erfolg-begriffen-wird-ist-mir-ein-raetsel-1.1623776 (explaining how German companies have benefited from the decision).

96. Tax-Free Subsistence Minimum Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1990, 82 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 60 (85) (citing GG BGBl. I, arts. 1, 20 (Ger.)).

97. *See* Hartz IV Case, 125 BVERFGE 175. *See also* Tax-Free Subsistence Minimum Case, 82 BVERFGE 60; KOMMERS & MILLER, *supra* note 31, at 50, 623; Knut Hinrichs, *Die Entwicklung des Rechts der Armut zum modernen Recht der Existenzsicherung, in* HANDBUCH ARMUT UND SOZIALE AUSGRENZUNG 195, 203 (Ernst-Ulrich Huster et al. eds., 2008).

98. Hartz IV Case, 125 BVERFGE 175 (238).

With respect to the constitutionally invalid Hartz IV calculation, the Court found that the *Bundestag* ran afoul of this *principle of legislative consistency* because, without further research or an empirical basis, it had withdrawn or reduced the value of some of the goods and services it considered when calculating the amount of support to be provided.[99] The Court explained that these freely-formed estimates, fashioned by the parliament seemingly at random, violated the guarantee of a subsistence minimum because they could not be empirically and rationally justified.[100]

The remarkable lesson to be learned from the Court's *Hartz IV Case* with respect to the German principle of democracy is that "rational" decision-making — understood as objective, systematic, consistent, and empirically justifiable policy choices — also must be counted as one of the doctrine's constituent elements. This is a revolutionary demand to make of a parliament, which ought to function at the irrational nexus of politics, power, and persuasion within the process of republican, majoritarian decision-making. Indeed, political science research, relying on game theory and social choice theory, urges us to view legislators as self-interested, "goal-seeking agents who choose from available strategic alternatives to further their ends."[101] In this view, each individual representative actualizes his or her self-interest, demanding enough personal benefit from a proposed norm in order to justify his or her vote.[102] The regard representatives are likely to give to the objective integrity and methodological consistency of their choices (the very demands made by the Constitutional Court's *Hartz IV Case*) competes with other, often more pressing factors.

These other considerations that influence representatives' choices involve interwoven personal and institutional dynamics. On the personal side are a respective legislator's interest in: winning re-election, which produces shifting degrees of risk-taking and risk-aversion; minimizing costs in time, energy, reputation, and other resources needed for his or her work; winning favor from party leaders or maintaining the favor of the party's rank-and-file membership; and any personal affinity for other legislators involved or for particular subjects.[103] Among the institutional dynamics informing a representative's strategic approach to a particular policy debate

99. *Id.* at 211.

100. *Id.* at 237 ("The valuing decision as to what expenditure is counted among the subsistence minimum is to be taken by the legislature handing down the provision in an expedient, justifiable manner. Reductions in expenditure items in the divisions of the sample survey on income and expenditure require an empirical basis for their justification.").

101. John A. Ferejohn & Morris P. Fiorina, *Purposive Models of Legislative Behavior*, 65 AM. ECON. REV. 407, 407 (1975). *See also* JOHN FEREJOHN, PORK BARREL POLITICS (1974); Manfred Prisching, *The Limited Rationality of Democracy: Schumpeter as the Founder of Irrational Choice Theory*, 9 CRITICAL REV. 301 (1995); Richard F. Fenno, Jr., *U.S. House Members in Their Constituencies: An Exploration*, 71 AM. POL. SCI. REV. 883 (1977); BRIAN BARRY, THE POLITICAL ARGUMENT (1965).

102. Ferejohn & Fiorina, *supra* note 101, at 411.

103. Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 249–253 (1979).

is the centralized or decentralized nature of the legislative body, with the U.S. Congress representing the former and parliamentary bodies, such as the German *Bundestag*, representing the latter. Parliamentary systems, under the cudgel of no-confidence votes, exhibit significant party cohesion and discipline amongst legislators.[104] But even in decentralized legislative institutions, "party-membership is the single most important predictor of roll call votes . . . ."[105] A representative's choices are also colored by the particular institution's socialization and sanctioning techniques.[106] Institutional arrangements, such as committee assignments, committee expertise, and preliminary review by committees also influence a representative's legislative choices.[107] Additionally, the role of ministries and lobbyists must be accounted for as part of the institutional framework that will shape a representative's legislative strategy.[108] Significantly, the application of rational choice theory to illuminate both the personal and institutional dynamics shaping legislative decision-making depends on the highly questionable assumption of perfect or near-perfect information flows about each of these factors to and amongst legislators.

This, of course, is not an exhaustive catalogue of the factors that inform a representative's decision-making. I raise them here only to establish that legislative practice is dominated by factors that have little to do with a policy's objective integrity, internal coherence, or methodological consistency. But these are the very elements that the Constitutional Court's principle of legislative consistency elevates to a constitutional mandate.

This is an almost naïve vision of politics and lawmaking, which lends the Court's assertion of these demands even greater weight. Against all of the unseemly expectations that we have for our lawmakers, the Constitutional Court has insisted upon an ideal of democracy that involves rational and coherent decision-making.

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104. Daniel Diermeier & Timothy J. Feddersen, *Cohesion in Legislatures and the Vote of Confidence Procedure*, 92 AM. POL. SCI. REV. 611 (1998); André Bächtiger & Marco R. Steenbergen, *The Real World of Deliberation: A Comparative Study of its Favorable Conditions in Legislatures* 6 (Eur. Univ. Inst., EUI Working Paper No. 2004/17, 2004), *available at* http://cadmus.eui.eu/bitstream/handle/1814/2634/sps2004-17.pdf?sequence=1.

105. Ferejohn and Fiorina find this to be true in the "centralized" American Congress. *See* Ferejohn & Fiorina, *supra* note 101, at 411–13. Others have made a similar finding with respect to "decentralized" parliaments, such as the German *Bundestag*. *See, e.g.*, Michael Becher & Ulrich Sieberer, *Discipline, Electoral Rules and Defection in the Bundestag — 1983-1994*, 17 GER. POL. 293, 294, 297 (2008) (finding, for example, that "more than seventy per cent of all legislators never deviate from the line of their party"); William M. Chandler, Gary W. Cox & Mathew D. McCubbins, *Agenda Control in the Bundestag, 1980-2002*, 15 GER. POL. 27–48 (2006); CHRISTOPHER KAM, PARTY DISCIPLINE AND PARLIAMENTARY GOVERNMENT (2009).

106. Weingast, *supra* note 103, at 259 (citing RICHARD F. FENNO, JR., THE POWER OF THE PURSE 128, 208 (1966)).

107. *Id. See also* Becher & Sieberer, *supra* note 105, at 293–94.

108. *See, e.g.*, Morten Bennedsen & Sven E. Feldmann, *Lobbying Legislatures*, 110 J. POL. ECON. 919 (2002).

D. "Yes . . . But" or "So . . . What"?

It is reasonable to wonder, however, whether the Court's objections to further European integration — invoking the principle of democracy — amount to anything more than "*Sturm und Drang*."[109] After all, the "yes" in what I have described as the Court's "yes . . . but" jurisprudence means that, in almost every case and despite its profound anxiety, the Court has approved of Germany's participation in the most significant steps toward deeper European integration.[110] It certainly has done so with respect to the Euro-crisis bailouts, which were seen as (the latest) very real, existential turning-points in the history of the European project. For all of its democratic bluster, the Court's reinforcement of the principle of democracy has not been an actionable limit on European integration in the cases with which it has been presented. This suggests that, if it is faced with the cold, hard choice between German democracy as an expression of Germany's constitutional identity and the fate of Europe, then the Court will always blink, finding ever-more creative ways to permit the latest European initiative while taking solace in an increasingly alarming but impotent rhetoric about the *Demokratieprinzip*. This is neither a fair nor accurate critique.

First, it is not fair to accuse the Court of a lack of sovereigntist resolve in the face of ever-deeper European integration. The Basic Law has left the Court with the unenviable task of negotiating a seemingly irresolvable conflict between maintaining Germany's constitutional identity (marked to a significant degree by the principle of democracy and secured for eternity by Article 79(3)) and, alternately, Germany's constitutionally mandated participation in European unification (demanded by the Basic Law's preamble and Article 23).[111] The Court could no more jeopardize the Europe-

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109. "'*Sturm und Drang*' [Storm and Stress] is the name of a fairly brief (approximately 1767-1786) but highly productive period in German literature situated between the literary manifestations of the Enlightenment and Weimar Classicism. This period is also called *Geniezeit* [the era of 'universal', 'original' or 'powerful' genius]. The established English translation 'Storm and Stress' is not entirely felicitous: 'passion and energy' or 'energy and rebellion' would be more appropriate." Gerhard P. Knapp, *Sturm und Drang [Storm and Stress]*, *in* THE LITERARY ENCYCLOPEDIA (Feb. 13, 2003), *available at* http://www.litencyc.com/php/stopics.php?rec=true&UID=1266 (last visited Feb. 3, 2014). *See* Edward P. Harris, *Friedrich Maximilian von Klinger*, *in* GERMAN WRITERS IN THE AGE OF GOETHE: STURM UND DRANG TO CLASSICISM (James N. Hardin & Christoph E. Schweitzer eds., 7th ed. 1990); MAX RIEGER, KLINGER IN DER STURM- UND DRANGPERIODE (1880).

110. An exception is the Court's *European Arrest Warrant Case* from 2005, in which the Court ruled that Germany's participation in the European Arrest Warrant system would violate Article 16(2) (prohibiting the extradition of Germans except to other European states that observe the rule of law). This, however, is not a perfect analogy because the arrest warrant functioned on the basis of the European Union's "third pillar," intergovernmental authority, and not its "first-pillar," supranational authority. European Arrest Warrant Case, Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] July 18, 2005, 113 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 273. *See* FRANK SCHORKOPF, DER EUROPÄISCHE HAFTBEFEHL VOR DEM BUNDESVERFASSUNGSGERICHT (2006).

111. *See* Jančić, *supra* note 34, at 340–41 ("The Basic Law (*Grundgesetz*) does not even permit the European Union to become a state. The relinquishment of German sovereignty to an international or

an project by preventing Germany's participation in fundamental initiatives such as the ESM than it could utterly neglect the principle of democracy in a head-long rush to European sovereignty. Confronting this Scylla and Charybdis, the Court cannot be faulted for trying to navigate its way through the conflicting constitutional commands, even if to this point that has meant listing in the direction of the swirling abyss of European integration.

Second, the critique is also not entirely accurate, as it ignores the fact that the Court has now mapped an unambiguous range of absolute outer limits on Germany's participation in European integration. It may have shaped this doctrine in a series of cases in which those limits were not exceeded, and thus, Germany was allowed to proceed with its involvement in the ESM, EFSF, and Lisbon Treaty. Yet, with the "... *but*" element of its European jurisprudence, the Court has established a number of increasingly concrete limits that leave no further room for maneuver when it is confronted with the inevitable next phases of European integration. The desperate and creative measures being pursued by Europe as the Euro-crisis drags on — measures that often involve previously unimagined degrees of political union — suggest that it is only a matter of time until these more concrete limits are reached.

The Court's brinkmanship in this regard can be illustrated by a few examples. In ruling that Germany's participation in the EFSF was constitutional, the Court nevertheless declared that

> "the German *Bundestag* may not transfer its budgetary responsibility to other entities by means of imprecise budgetary authorisations .... [It] may not deliver itself up to any mechanisms with financial effect which ... may result in incalculable burdens with budget significance without prior mandatory consent, whether these are expenses or losses of revenue."[112]

This characterization of Germany's domestic constitutional limitations on European integration was informed and reinforced by the Court's conclusions about parallel boundaries at the supranational level that also make the "direct or indirect communitarisation of state debts" unacceptable as a

supranational organization beyond an association of sovereign states is prohibited. It would only be permitted if the German people, acting jointly as *pouvoir constituant*, decided so by adopting a new constitution pursuant to Article 146 of the Basic Law. Therefore, as long as the current Basic Law is in force, the national parliaments of the Member States will remain the primary source of the Union's democratic legitimization and the European Parliament the secondary one.") (footnotes omitted).

112. EFSF Case, 129 BVERFGE 124 (179).

matter of European law.[113] This cryptic language has been widely interpreted as a firm prohibition on German participation in a Euro-Bonds scheme through which the Euro-Zone countries would mutualize debt, thereby making Germany (and other countries with stable budgets) liable for the budgetary decisions of other Member States. If these commentators are correct, the Court will have to refuse Germany's participation in a "transfer union."[114]

Another, more incendiary example of the concrete boundaries the Court has set — and will presumably enforce when confronted with the relevant circumstances — involves the persistent, albeit still-distant, goal that ongoing processes of ever-closer European integration will serve as steps leading inevitably and inexorably towards comprehensive European political union in the form of a European federal state. The Court's conclusive rejection of that possibility under current domestic and European legal frameworks in the *Lisbon Treaty Case* was such a decisive, disruptive blow to the European dream that it left some commentators struggling to find words strong enough to properly characterize their shock. French sociologist Alfred Grosser, for one, called the Court's decision "a black day in the history of Europe" and "bizarre," and left him questioning whether Germany had ever been "serious about Europe."[115] The Court earned this ire by concluding that the European unification achieved by the Lisbon Treaty constituted a *Staatenverbund* (an association of sovereign states) under traditional public international law, and not a *Staatsverband* (an autonomous state polity consisting in federal sub-sovereigns).[116] As the only achievable response to the failed European Constitution, the Court underscored that "the Treaty of Lisbon decided against the concept of a European federal state."[117]

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113. *Id.* at 181.

114. *See "Urteil ist klare Absage an Euro-Bonds"*, HANDELSBLATT (Sept. 7, 2011, 11:32 AM), http://www.handelsblatt.com/politik/deutschland/reaktionen-urteil-ist-klare-absage-an-euro-bonds/4584524.html; Franz C. Mayer & Christian Heidfeld, *Eurobonds, Episode I: The Phantom Menace*, VERFASSUNGSBLOG (May 30, 2012), http://www.verfassungsblog.de/de/eurobonds-episode-i-the-phantom-menace/#.UY66WOzD_Z4; Franz C. Mayer & Christian Heidfeld, *Eurobonds, Episode II: "Bail out Member States you not must!"*, VERFASSUNGSBLOG (May 31, 2012), http://www.verfassungsblog.de/de/eurobonds-episode-ii-bail-out-member-states-you-not-must/#.UY65vOzD_Z4; Franz C. Mayer & Christian Heidfeld, *Eurobonds, Episode III: Don't underestimate the Force — Eurobonds und Verfassung*, VERFASSUNGSBLOG (June 1, 2012), http://www.verfassungsblog.de/en/eurobonds-episode-iii-dont-underestimate-the-force-eurobonds-und-verfassung/#.Ux0ewGCYaM8; Franz C. Mayer & Christian Heidfeld, *Eurobonds, Episode IV: A New Hope?*, VERFASSUNGSBLOG (June 3, 2012), http://www.verfassungsblog.de/en/eurobonds-episode-iv-a-new-hope/#.Ux0itmCYaM8; Franz C. Mayer & Christian Heidfeld, *Eurobonds, Episode VI — The Return of the Jedi: Projektbonds*, VERFASSUNGSBLOG (June 5, 2012), http://www.verfassungsblog.de/de/eurobonds-episode-vi-the-return-of-the-jedi-projektbonds/#.UY67WezD_Z4.

115. Alfred Grosser, *The Federal Constitutional Court's* Lisbon Case*: Germany's "Sonderweg" — An Outsider's Perspective*, 10 GER. L.J. 1263, 1263, 1264, 1266 (2009), *available at* http://www.germanlawjournal.com/pdfs/Vol10No08/PDF_Vol_10_No_08_1263-1266_Lisbon%20Special_Grosser.pdf.

116. Lisbon Treaty Case, 123 BVERFGE 267 (350).

117. *Id.* at 370–71.

The Court's characterization of the European project as an undertaking in international law and not supranational constitutional law led the Court to two absolute limits on Germany's participation in the European project. First, the Court insisted that all deeper levels of integration must be achieved by transfers of sovereign authority through the mechanisms of public international law, and that these transfers must be susceptible to revocation, even to the point of secession.[118] The European Union, the Court said, remains the creation of sovereign democratic states and is governed by the classical principles of public international law.[119] The Court identified a number of European and domestic legal devices through which this principle is expressed and reinforced, including the principle of conferral,[120] the principle of subsidiarity,[121] limits on the European Union's authority to work independent changes to its primary law,[122] depriving the European Union of the authority to expand its competence,[123] and the principle that European Union law does not enjoy unrestricted preemptory force over the law of the Member States (as it would in a federal state).[124] Second, the Court concluded that the Basic Law — or its ordinary amendment procedures — could not accommodate Germany's participation in a European Union enjoying the character of a federal state. The fundamental loss of state sovereignty involved in this development, the Court explained, "would require a free decision of the people in Germany beyond the present applicability of the Basic Law."[125] There can be no dissolution of the Federal Republic of Germany, even through the processes of European integration, except via the impossible-to-imagine dissolution of the Basic Law itself.[126] The Court summed up this absolute limit on Germany's participation in European integration in these terms: "The Basic Law strives to integrate Germany into the legal community of peaceful states, but does not waive the sovereignty contained in the last instance in the German constitution as a right of the people to [m]ake constitutional decisions concerning fundamental questions [such] as its own identity."[127]

Finally, the "much ado . . . but nothing" critique of the Court's European jurisprudence is inaccurate because it discounts the expressive contribution that the Court's rhetoric has made to the German debate over Euro-

118. *Id.* at 350, 395–96.
119. *Id.* at 378–79.
120. *Id.* at 381–82.
121. *Id.* at 383–84.
122. Lisbon Treaty Case, 123 BVERFGE 267 (384, 434).
123. *Id.* at 392–93.
124. *Id.* at 400.
125. *Id.* at 364.
126. *Id.* at 343, 370.
127. *Id.* at 400–01.

pean integration. Even if it is hard to establish causality, it is meaningful that Germans — especially German elites — are increasingly voicing their skepticism towards European integration at the same time that the cautionary tone offered by the Constitutional Court — one of Germany's most respected social institutions — has come to attract increasing attention in the German media. This nascent political movement invokes the Constitutional Court's framework for European reluctance, emphasizing Europe's democratic deficit and the risks of integration for Germany's constitutional identity. This, in turn, makes the Constitutional Court a preferred forum for the assertion of these concerns. The civil society organization *Mehr Demokratie* (More Democracy) was supported by more than 37,000 Germans when filing one of the complaints that led to the Court's *ESM Temporary Injunction Case.*[128] The rhetoric was also discernible in the 2013 election platform of the newly-formed political party *Alternative für Deutschland* (Alternative for Germany), which advocated "an orderly dissolution of the Euro-Currency Zone," "the unrestricted budgetary authority of the national parliaments," and "the strengthening of democracy and democratic civil rights."[129] In a survey taken just weeks after the new party's founding, nearly a fifth of the Germans polled said that they would give Alternative for Germany their votes.[130]

The breadth of the reception of the Court's expressed, yet unrealized, hesitance towards Europe is further confirmed by the fact that, in the midst of the series of cases described in this Article, Justice Udo Di Fabio retired. Justice Di Fabio, a nominee to the Court from the center-right Christian Democratic Union, had been described by one commentator as the Constitutional Court's "most Eurosceptic judge."[131] He was the Second Senate's Rapporteur for International and European Law, and it is widely accepted that the *Lisbon Treaty Case* largely bears his influence.[132]

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128. *See* Mehr Demokratie zur EZB-Entscheidung des Bundesverfassungsgerichts, MEHR DEMOKRATIE (Feb. 7, 2014), http://www.mehr-demokratie.de/6033.html?&tx_ttnews%5BbackPid%5D=5859&tx_ttnews%5Btt_news%5D=15038&cHash=228f440adf2537374ba51af21de1a5b5.

129. *Wahlprogramm Parteitagsbeschluss vom 14.04.2013*, ALTERNATIVE FÜR DEUTSCHLAND, https://www.alternativefuer.de/pdf/Wahlprogramm-AFD.pdf (last visited Mar. 10, 2014).

130. Dietmar Neuerer, *19 Prozent würden die Anti-Euro-Partei wählen*, HANDELSBLATT (Apr. 22, 2013, 6:18 AM), http://www.handelsblatt.com/politik/deutschland/repraesentative-umfrage-19-prozent-wuerden-die-anti-euro-partei-waehlen/8094336.html. As it turned out, the party won just 4.7% of the vote in the September 2013 election. *See Narrow Failure — Will Germany's Anti-Euro AFD Party Implode?*, SPIEGEL ONLINE INT'L (Sept. 25, 2013, 4:15 PM), http://www.spiegel.de/international/germany/german-euroskeptic-party-afd-could-unravel-after-election-a-924498.html (Ella Ornstein trans.).

131. Arthur Dyevre, *The Czech Ultra Vires Revolution: Isolated Accident or Omen of Judicial Armageddon?*, VERFASSUNGSBLOG (Feb. 29, 2012), http://www.verfassungsblog.de/en/the-czech-ultra-vires-revolution-isolated-accident-or-omen-of-judicial-armageddon/#.UYhO2-zD_Z4.

132. Reinhard Müller, *Das Bundesverfassungsgericht und der EU-Vertrag: Entscheidung über Deutschlands "existentielle Staatlichkeit,"* FRANKFURTER ALLGEMEINE ZEITUNG, June 17, 2008, *available at* http://www.faz.net/aktuell/politik/staat-und-recht/das-bundesverfassungsgericht-und-der-eu-vertrag-entscheidung-ueber-deutschlands-existentielle-staatlichkeit-1539978.html ("Berichterstatter Udo Di

But the subsequent *EFSF Case* and *ESM Temporary Injunction Case* were decided by the Second Senate after Justice Di Fabio's retirement and after the Senate came under the reins of the Court's new President, Andreas Voßkuhle. Nominated by the center-left Social Democratic Party, Justice Voßkuhle comfortably fits with Germany's pro-European consensus,[133] notwithstanding his role in deciding the *EFSF* and *ESM Temporary Injunction* cases. But Justice Voßkuhle's Court has faithfully maintained Justice Di Fabio's Euro-cautious jurisprudence, especially its emphasis on the principle of democracy. In an interview given shortly after the Court published its EFSF judgment, Justice Voßkuhle declared: "the Basic Law won't admit of much more Europe."[134]

More than "so what," the Court's European jurisprudence would be better understood as "yes . . . but with grave reservations for the future."

E. Summary

The Court's recent European decisions, its jurisprudence involving the broad range of issues concerning democratic and political representation, and the Court's recent *Hartz IV Case* provide us with the contours of the principle of democracy. It is chiefly a valorization of fully-informed, rational, parliamentary governance exercised on behalf of the electorate by a plurality of widely representative political parties in open debate over public policy. The Court has vigilantly applied this vision of democracy as the standard against which Germany's participation in the project of European integration will be tested. Despite the equivocal "yes . . . but" posture the Court strikes in those cases, the principle of democracy functions as the primary limitation on Germany's role in a Europe that needs the country's deep involvement and leadership. Among the many forces arrayed against

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Fabio ist aber nicht nur für das Verfahren zum Vertrag von Lissabon zuständig, in dem es etwa um demokratische Defizite gehen wird, sondern auch für ein weiteres heißes europäisches Eisen: Es geht um den Kompetenzstreit zwischen Bundesverfassungsgericht und Europäischem Gerichtshof." ["But Rapporteur Udo Di Fabio is not only responsible for the case involving the Lisbon Treaty, which will be somewhat preoccupied with the 'democratic deficit'. He is also responsible for a slightly hotter European topic: the competence struggle between the German Federal Constitutional Court and the European Court of Justice."]).

133. *See, e.g.*, Andreas Voßkuhle, *Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, 6 EUR. CONST. L. REV. 175, 196, 197 (2010) (referring to a German "responsibility for integration" and a "common European constitutional order"); Andreas Voßkuhle, *Das Leitbild des "europäischen Juristen" — Gedanken zur Juristenausbildung und zur Rechtskultur in Deutschland*, *in* 1 RECHTSWISSENSCHAFT 326 (2010) (arguing for legal training that abandons the parochial, national, and positivisitic orientation of the German tradition and instead pursues an education that prepares European, cosmopolitan lawyers equipped to engage in and lead the Europeanization and globalization of the law).

134. Melanie Amann & Inge Kloepfer, *Im Gespräch: Andreas Voßkuhle — "Mehr Europa lässt das Grundgesetz kaum zu"*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 25, 2011, *available at* http://www.faz.net/aktuell/wirtschaft/europas-schuldenkrise/im-gespraech-andreas-vosskuhle-mehr-europa-laesst-das-grundgesetz-kaum-zu-11369184.html.

Europe's future, the German principle of democracy, as it is currently understood and enforced by the Constitutional Court, will remain a persistent irritant — if not an existential threat — to the project of European integration.[135]

III. HABERMAS'S TRAP: EUROPE IN THE VISE OF GERMAN DISCURSIVE DEMOCRACY

The German Court's interpretation of the principle of democracy is no improvised democratic theory. It is a nearly complete realization of German philosopher Jürgen Habermas's discourse theory of democracy. I substantiate this claim in the following Part and, by doing so, I am able to provide theoretical grounding to the picture of the principle of democracy painted above. One fundamental departure in the Court's deployment of Habermas's theory — the insistence that democratic discourse take place within the framework of a traditional state — provides a final, significant element to our understanding of the *Demokratieprinzip*. But recognizing the Habermasian heritage of the Court's interpretation of the principle of democracy casts light on an astounding, historic, and deeply German irony. I am suggesting that the Constitutional Court's Habermasian, albeit state-centric, understanding of the *Demokratieprinzip* constitutes one of the chief obstacles to European integration, despite the fact that Habermas has been one of Germany's most determined and visionary advocates for European supranationalism.

It is easy to see the Habermasian orientation of the Court's framing of the principle of democracy, and there is every reason to believe that the justices at Germany's highest court — many of whom are themselves constitutional law scholars of the first rank — might be (consciously or unconsciously) engaged with Habermas's theoretical work. In fact, Habermas's influence on the Court's jurisprudence has been considered by many scholars.[136] Of course, Habermas is extensively, and censoriously, occupied

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135. Should there be any doubt, the Court is once again considering a challenge to a dramatic measure of European integration. In June 2013, the Court heard arguments on a challenge to the European Central Bank's declared intention to buy, if necessary to salvage the Euro, the bonds of Euro-zone countries whose crippling debt prevents them from effectively participating in the bond market. *See* Jack Ewing, *Debate on the Euro's Future in a German Courtroom*, N.Y. TIMES, June 11, 2013, *available at* http://www.nytimes.com/2013/06/12/business/economy/german-court-weighs-bond-buying-by-european-central-bank.html?_r=0; Stefan Kaiser, *Crisis Course: High Court Skeptical of ECB Bond Buys*, SPIEGEL ONLINE INT'L (June 12, 2013, 11:40 AM), http://www.spiegel.de/international/europe/german-high-court-skeptical-of-ecb-bond-buying-a-905246.html.

136. *See* HUGH BAXTER, HABERMAS: THE DISCOURSE THEORY OF LAW AND DEMOCRACY (2011); MATTHEW SPECTER, HABERMAS: AN INTELLECTUAL BIOGRAPHY (2010); András Sajó, *Constitutional Adjudication in Light of Discourse Theory*, *in* HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 336 (Michel Rosenfeld & Andrew Arato eds., 1998); Bernhard Schlink, *The Dynamics of Constitutional Adjudication*, *in* HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 371 (Michel Rosenfeld & Andrew Arato eds., 1998).

with the Constitutional Court in Chapter Six of his seminal work, *Between Facts and Norms*.[137] He describes the Court as "the reflexive apex in the hierarchy of adjudication" and acknowledges its role in increasing the clarity of the law and safeguarding the coherence of the legal order.[138] The greater portion of Chapter Six, however, reveals Habermas's disapproving view of the Constitutional Court. On the basis of a comparison with the jurisprudence of the U.S. Supreme Court, Habermas concludes that the Constitutional Court suffers from a "legitimacy problem" that is rooted, above all, in the Court's values jurisprudence.[139]

Habermas's discourse theory of democracy sits uncomfortably alongside the Constitutional Court's values jurisprudence — what Constitutional Court Justice Böckenförde called a "tyranny of values"[140] — which is applied chiefly to the interpretation and enforcement of the Basic Law's fundamental rights. But this order of "material value ethics," or "objective order of values," gives way in the structural constitutional sphere in which the principle of democracy operates.[141] The Court's decisions in this area, as outlined in the earlier portions of this Article, speak to procedural guarantees in parliamentary practice, including rights of participation, rights of full information, and an obligation to pursue rational decision-making. This aligns with Habermas's discursive politics, which argues that only those laws are legitimate to which all members of the community can assent in a discursive process.[142] The key features of the theory are participation, full information, rational decision-making, and a deliberative infrastructure (such as a parliament) that is established by the constitution.[143] Especially the latter — deliberative infrastructure — is achieved by the priority the Constitutional Court has given the *Bundestag* in its interpretation of the principle of democracy. Habermas speaks favorably of a higher-level intersubjectivity of communication that unfolds in parliamentary bodies pursuing modes of communication in a process of more or less rational opinion- and will-formation concerning issues and problems affecting society as a whole.[144] As outlined above, in its recent European ju-

137. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 238–286 (William Rehg trans., 1996).

138. *Id.* at 240, 243.

139. *Id.* at 253, 261.

140. *Id.* at 254 (citing ERNST-WOLFGANG BÖCKENFÖRDE, GRUNDRECHTE ALS GRUNDSATZNORMEN, STAAT, VERFASSUNG, DEMOKRATIE 186 (1991)).

141. *Id.* at 254. *See* Lüth Case, Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198 (205); JÖRN IPSEN, STAATSRECHT II: GRUNDRECHTE 30–31 (15th ed. 2012); CHRISTOPH MÖLLERS, DAS GRUNDGESETZ: GESCHICHTE UND INHALT (2009); THILO RENSMANN, WERTORDNUNG UND VERFASSUNG (2007); Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131, 133 (2003). *See also* KOMMERS & MILLER, *supra* note 31, at 57–58.

142. HABERMAS, *supra* note 137, at 110.

143. *Id.* at 299.

144. JÜRGEN HABERMAS, *Three Normative Models of Democracy*, *in* THE INCLUSION OF THE OTH-

risprudence, the Constitutional Court has offered the *Bundestag* its vigilant constitutional protection. The parliament, the Court insisted in the *ESM Temporary Injunction Case*, must remain "permanently the master of its decisions."[145] Underscoring another element of Habermas's discourse theory of democracy, the Court also insisted that the *Bundestag's* "democratic development of informed opinion" requires that the *Bundestag* "have access to the information it needs to assess the fundamental bases and consequences of its decision."[146] Emphasizing yet another element of Habermas's discourse theory in the *Hartz IV Case*, the Constitutional Court spectacularly insisted on rational — as opposed to power-oriented or strategic — justifications in parliamentary decision-making.[147] Finally, the Court's broader treatment of parliamentary democracy and political representation under the Basic Law strongly reinforces Habermas's insistence on broad participation in the *Bundestag*.[148] All of the elements of discourse theory are thus present in the Court's interpretation of the principle of democracy: fully-informed, rational, parliamentary governance exercised on behalf of the electorate by a plurality of widely representative political parties in open debate over public policy.

Many scholars have seen a potential link between the Basic Law's principle of democracy and Habermas's discourse theory.[149] In at least one instance, Habermas's influence has been attributed more specifically to the Court's application of the *Demokratieprinzip* in the context of its European cases. Frank Schorkopf noted that, in the pivotal *Lisbon Treaty Case*, the German Constitutional Court's "reasoning refers to a discursive process — possibly a reference to the much-lauded deliberative model of society."[150] Schorkopf means to draw attention to a passage in the *Lisbon*

ER: STUDIES IN POLITICAL THEORY 239, 248–49 (Ciaran Cronin & Pablo De Greiff eds., 1998).

145. ESM Temporary Injunction Case, 132 BVERFGE 195 (¶ 213) (quoting EFSF Case, 129 BVERFGE 124 (179–80) (internal quotation marks omitted)).

146. *Id.* ¶ 210, 215.

147. Hartz IV Case, 125 BVERFGE 175 (238). *See* ANDREW EDGAR, HABERMAS: THE KEY CONCEPTS 40 (2006) ("In effect, [according to Habermas] the constitution guarantees that all citizens have equal rights to challenge any legal reform, and to receive a *reasoned* reply to their objections. . . .") (emphasis added).

148. KOMMERS & MILLER, *supra* note 31, at 300–301. *See* Michael Brenner, *The Constitutional Framework of Democratic Representation*, *in* CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY: A COMPARATIVE ANALYSIS 135 (Christian Starck ed., 1999); Helmut Steinberger, *Political Representation in Germany*, *in* GERMANY AND ITS BASIC LAW 121 (Paul Kirchhof & Donald Kommers eds., 1993); Georg Ress, *The Constitution and the Requirements of Democracy in Germany*, *in* NEW CHALLENGES TO THE GERMAN BASIC LAW 111 (Christian Starck ed., 1991); Klein & Giegerich, *supra* note 47.

149. *See* BAXTER, *supra* note 136; SPECTER, *supra* note 136; BURKHARD WILK, DIE POLITISCHE IDEE DER INTEGRATION (2011); SILJA VÖNEKY, RECHT, MORAL UND ETHIK (2010); Niels Petersen, *Demokratie und Grundgesetz: Veränderungen des Demokratieprinzips in Art. 20 Abs. 2 GG angesichts der Herausforderungen moderner Staatlichkeit*, 58 JAHRB. ÖFFENTL. RECHTS GEGENWART 137 (2010); MARCEL KAUFMANN, EUROPÄISCHE INTEGRATION UND DEMOKRATIEPRINZIP (1997); Albert Bleckmann, *Das Demokratieprinzip der Europäischen Gemeinschaft*, *in* STUDIEN ZUM EUROPÄISCHEN GEMEINSCHAFTSRECHT 175 (Albert Bleckmann ed., 1986).

150. Frank Schorkopf, *The European Union as an Association of Sovereign States: Karlsruhe's Ruling on*

Treaty Case in which the Court concludes that the new possibilities for civil society engagement in European policy-making established by the Lisbon Treaty are not enough to fulfill the constitutional obligation imposed by the principle of democracy. The Court explained that the deliberative participation of citizens and their civic organizations allowed by the Lisbon Treaty "cannot replace the legitimizing connection based on elections and other votes," even as those "elements of participative democracy can . . . complement the legitimation of European public authority" by making "the primary representative and democratic connection of legitimation more effective."[151] It would be wrong to read this as the Court's general rejection of, or disregard for, Habermasian discourse theory in relation to the principle of democracy. Here, the Court merely concludes that one facet of the theory operating alone — broad public participation in decision-making — will not be enough to fulfill the demands of the *Demokratieprinzip*. The Court insists upon a fuller form of discursive democracy, including full information leading to rational decisions in a parliament in which political parties play a leading role in political opinion- and will-formation.

It is a breathtaking irony that the Constitutional Court's insistence on the elements of discourse theory in its interpretation of the principle of democracy should now serve as an obstacle to deeper European integration. After all, Jürgen Habermas is one of the most devoted advocates for European supranationalism.[152] Among the many honors his decades of work have won him, Habermas is also the 2013 Erasmus Prize laureate, which recognizes his "exceptional contribution to culture, [through] scholarship, in Europe."[153] Habermas's commitment to Europe has theoretical and political bases.

As a theoretical matter, Habermas sees a supranational institution, such as the European Union, as the necessary response to what he refers to as the "postnational constellation."[154] For Habermas, the postnational constellation is a matter of historical fact. It is the contemporary consequence of market, political, communication, and technological developments often characterized as "globalization" that have led to a "relentless process of

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the Treaty of Lisbon, 10 GER. L.J. 1219, 1224 (2009).

151. Lisbon Treaty Case, 123 BVERFGE 123 (369).

152. *See* HABERMAS, *supra* note 2. *See also* EDGAR, *supra* note 147 ("Habermas thus remains a forceful proponent of international organisations, such as the United Nations and the European Community." (citation omitted)).

153. *Erasmus Prize*, PRAEMIUM ERASMIANUM FOUND., http://www.erasmusprijs.org/index.cfm?lang=en&page=Erasmusprijs; *Former Laureates: Jürgen Habermas 2013*, PRAEMIUM ERASMIANUM FOUND., http://www.erasmusprijs.org/index.cfm?lang=en&page=Prijswinnaars&mode=detail&itemID=53AFB450-04FC-1371-9AE18BB1978B2677.

154. JÜRGEN HABERMAS, *The Postnational Constellation and the Future of Democracy*, *in* THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 58 (Max Pensky trans., 2001).

dissolution" of familiar governing structures such as the traditional nation-state.[155] On the one hand, the forces of globalization have produced increasingly plural and heterogeneous societies (if the old myth of homogeneous nations were ever true) that displace the old social structures that informed "national consciousness," including descent, language, and shared history.[156] On the other hand, globalization has eroded the state's capacity to compensate for the loss of national consciousness through a program of tax-based sacrifice and social redistribution that ensured citizens' equal enjoyment of individual rights and, thereby, purchased their loyalty to the state.[157] Habermas accepts that "states no longer have control over their national territories; and [that] territorial and political boundaries are increasingly permeable . . . ."[158] His vision of the postnational constellation is that of "overflowing rivers, washing away all the frontier checkpoints and controls, and ultimately the bulwark of the nation itself."[159]

The postnational constellation also has a normative basis, rooted in the war generation's yearning for European peace and in the social democratic politics of redistribution. That is, even if Habermas did not believe that the process of de-nationalization was a matter of historical fact, he would nevertheless advocate for supranationalism as a necessary "great transformation" capable of "pacifying a blood-drenched continent"[160] and providing a geopolitical counterbalance to the Anglo-American, neo-liberal commodification of the life-world.[161]

Thus, for Habermas, the facts and norms point to European supranationalism *qua* the European Union (if not a broader, Kantian international order) as the functional equivalent of the old nation-state. Habermas's struggle has been to defend the democratic potential of supranational governance. According to the skeptics, the democratic deficit attributable to the European Union — particularly in practice — results from the elite-driven nature of the process of European integration and the lack of a proper European *demos*, or society capable of participating in a European democracy.[162] Habermas does not dispute these critiques. But neither does he see them as inevitable. And because they can be remedied, they do not categorically exclude supranational democracy. He urges us to overcome

155. *Id.* at 87–88.

156. *Id.* at 64.

157. *Id.* at 76–77.

158. *Id.* at 61 (quoting Anthony McGrew, *Globalization and Territorial Democracy: An Introduction*, *in* THE TRANSFORMATION OF DEMOCRACY? 12 (Anthony McGrew ed., 1997).

159. *Id.* at 67.

160. HABERMAS, *supra* note 2, at 39, 61.

161. *See* Jürgen Habermas, *February 15, or: What Binds Europeans*, *in* THE DIVIDED WEST 39 (Ciaran Cronin trans. and ed., 2006); Jürgen Habermas, *Core Europe as a Counterpower?*, *in* THE DIVIDED WEST, *supra*, at 49.

162. *See supra* note 37. *See also* HABERMAS, *supra* note 154, at 68–80.

the mental habit of thinking of democracy as an exclusively state-based institution in order to imagine democratic processes that transcend the borders of the nation-state.[163]

This, however, is where his understanding differs fundamentally from that of the Constitutional Court. As it gives force to Habermasian discourse theory in its interpretation of the principle of democracy, the Court has done so in a way that thoroughly rejects Habermas's vision for the supranational potential of discursive democracy. The discursive democracy that the Constitutional Court has articulated is imagined as a set of processes suited exclusively for the nation-state. There are doctrinal as well as ideological explanations for this. As a national institution interpreting a national constitution, the Constitutional Court can be forgiven for clinging to a state-centric jurisprudence. This is especially true considering that, as noted above, the German Basic Law imposes a doctrinal obligation on the Court to preserve Germany's national, constitutional identity. But it is also possible to read the Constitutional Court's *Demokratieprinzip* jurisprudence as a political rejection of the grander ambitions for European political union.

This, then, must be the final defining feature of the Constitutional Court's interpretation of the principle of democracy. The discursive democracy achieved by the *Demokratieprinzip*, contrary to the hopes advanced for the theory by Habermas himself, is a distinctly state-centered political ideal. The statist orientation of the Court's understanding of discursive democracy is underscored by the fact that it has chosen its Euro-cautious jurisprudence as the forum for its clearest articulation of the meaning of the principle of democracy. No wonder that, when reacting to the Constitutional Court's *ESM Case*, Habermas complained that the Constitutional Court hoped to rescue the nation-state when it claimed to be about the business of defending democracy.[164]

CONCLUSION

Germany, the old stalwart of European integration, is increasingly an impediment to closer European unity. In large measure, this is due to the German Federal Constitutional Court's continuing efforts to enforce the German constitution's principle of democracy. No plan for further inte-

163. *See* HABERMAS, *supra* note 154; HABERMAS, *supra* note 2.

164. *See* Jürgen Habermas, *Merkels von Demoskopie geleiteter Opportunismus*, SÜDDEUTSCHE (Apr. 7, 2011, 5:09 PM), http://www.sueddeutsche.de/politik/europapolitik-merkels-von-demoskopie-geleiteter-opportunismus-1.1082536 ("Zum neudeutschen Mentalitätswandel passt übrigens das Europa-unfreundliche Lissabon-Urteil des Bundesverfassungsgerichts, das sich gegen weitere Integrationsbestrebungen mit einer willkürlichen Festlegung unverrückbarer nationaler Zuständigkeiten zum Hüter der nationalstaatlichen Identität aufwirft.").

gration, no measures of deeper political union, can ignore this. The Constitutional Court will continue to insist that European integration respect the *Demokratieprinzip*. This means that the *Bundestag* must exercise public authority with respect to a wide swathe of issues. That is necessary, the Court has explained, because only the *Bundestag* — and no European institution — can deliver the central elements of the principle of democracy, including fully-informed, rational, parliamentary governance exercised on behalf of the electorate by a plurality of widely representative political parties in open debate over public policy. Finally, and despite Habermas's commitment to European integration, it is the Constitutional Court's insistence on the state orientation of its nearly complete implementation of his discursive democratic theory that now stands in the way of the European dream.