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COURTS ON TRIAL: IN SEARCH OF LEGITIMATE INTERPRETATIONS AND REVIEWS

BOOK REVIEW ESSAY

Davor Petrić*

Martijn van den Brink, *Legislative Authority and Interpretation in the European Union* (Oxford University Press 2024, ISBN: 9780198900085) 272 pp, £90.00.

Nik de Boer, *Judging European Democracy: The Role and Legitimacy of National Constitutional Courts in the EU* (Oxford University Press 2023, ISBN: 9780192845238) 384 pp, £115.00.

The two monographs I discuss in this review are part of a book series published by Oxford University Press in 2023 and 2024, featuring several impressive accounts of the key jurisprudential questions of the European Union (EU) constitutional order.[1] Written by Martijn van den Brink (Leiden University) and Nik de Boer (University of Amsterdam), they stand out for their solid theoretical grounding and ambitious doctrinal approaches. Each author takes one judicial juggernaut – the Court of Justice of the EU (ECJ, the Court) and the German Federal Constitutional Court (GFCC) – and explores their relationship with their respective legislators, using concepts like legitimacy, authority, or institutional capacity as analytical yardsticks.

Both books can roughly be divided into two parts (of unequal length and structure). In the first parts, the authors engage with the *ought*-questions. For instance, van den Brink asks why the ECJ should defer to the EU legislator, whereas de Boer asks why national constitutional courts, including the GFCC, should act with restraint when reviewing the constitutionality of EU law. Here, both authors show great understanding of the main debates in political theory (van den Brink) and philosophy (de Boer), which is a testament to their formation in academic disciplines (formally) outside law. This undoubtedly enriches their contributions to the jurisprudence of EU law. In

* Faculty of Law, Department of European Public Law, University of Zagreb, PhD (Zagreb), LLM (UMich); ORCID: 0000-0001-7737-2150; email: davor.petric@pravo.unizg.hr. I am grateful to Martijn van den Brink and Nik de Boer for allowing me to invite myself to sit as a discussant of their books, alongside Ana Bobić and Cristina Fasone, in their 'Author Meets Reader' session at the European Law Unbound Society (ELU-S) Inaugural Conference 'European Law Unbound – What kind of Europe should we reach for?' held on 25–27 September 2025 at the Charles University Prague. I apologise to both authors if I have misunderstood or misrepresented their thoughts and arguments due to inattentive reading or to the challenge of discussing in fewer than twenty pages what they brilliantly developed in more than 500 pages (jointly). All such unintentional errors and failures are mine.

[1] Besides these two, I would single out *The Jurisprudence of Constitutional Conflict in the European Union* (OUP 2022) by Ana Bobić, *The Legislative Priority Rule and the EU Internal Market for Goods: A Constitutional Approach* (OUP 2022) by Eadaoin Ní Chaoimh, and *EU Values Before the Court of Justice: Foundations, Potential, Risks* (OUP 2023) by Luke Dimitrios Spieker.

the second parts, the authors engage with the *is*-questions. For instance, van den Brink discusses how the ECJ can defer to the EU legislator, ie how the legislative intent is properly identified, and de Boer how the GFCC can monitor the effects of EU law in the German legal system, ie the proper attitude of a national constitutional court towards matters of EU law that have already been approved by the national legislator. With these latter questions, which belong to the domain of legal doctrine, I have certain issues, as I will explain later.

What also brings the two books together is their reliance on the same influential contemporary legal philosophers and their major works, such as Jeremy Waldron and his famous case against judicial review.[2] One of the underlying messages of the books is that we should pay greater attention to the legislatures, a fair point given how court-centric legal scholarship has traditionally been, and not only in Europe. From this follows the call for more judicial deference to the choices made in the political process.[3] Again, this seems reasonable and something that even those courts deemed the most activist, such as the ECJ, would agree on and follow in the majority of their rulings, as van den Brink shows in his case studies. Yet the final step, which was supposed to give us – and the courts – guidance on when and how to defer to the legislators, supranational and national, remains to my mind somewhat questionable and uncertain.

In what follows, I first examine each book in turn and discuss their major arguments, before exploring in more detail what I consider to be their main contributions as well as the points at which, in my view, they fall short or leave us hanging.

The ECJ and the EU legislator's intentions

Van den Brink starts off by giving reasons against normative conceptions of political and institutional legitimacy that are output-based – which would typically be 'team courts' – and in favour of those that are input-based – which would be 'team legislators' (Chapter 2). His problem with output-based legitimacy, often mobilised behind the ECJ and its rulings, is that it seems impossible to agree (morally speaking) on the desirability of any of the outputs produced in the judicial process, which we would take as relevant, be it effectiveness, containment of national externalities, or justice. In his view, it is inevitable that different people will reasonably disagree about all this. Therefore, instrumentalist and outcome-oriented interpretation of EU law will inevitably result in inconsistent methodology, because it is likely that the judgment on what makes an outcome desirable might change from case to case due to the pervasiveness of the said reasonable disagreement.

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[2] Jeremy Waldron, 'The Dignity of Legislation' (1995) 54 Maryland Law Review 633; *Law and Disagreement* (OUP 1999); and 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.

[3] Here it is not difficult to notice, as Ana Bobić remarked in a panel discussion, that both authors are Dutch, given how this national legal tradition typically sees the relationship between the courts and the legislatures and their respective roles and legitimacy.

Instead, van den Brink defends an input-oriented legitimacy of the EU legislature. This is not formulated as democratic legitimacy based on the political equality of EU citizens, on which conception it fails. Rather, it is formulated as demoi-cratic legitimacy based on the 'republican value of freedom as non-domination'. It means that Member States do not dominate their citizens (or minorities) internally, and at the same time are not dominated externally by other States or by the EU itself.

Demoi-cracy at the EU level is contained in the legislative institutions and decision-making procedures, including the Council and the Parliament as co-legislators, as well as in national parliaments in their role as the watchmen of subsidiarity. And the Court of Justice can easily obstruct demoi-cracy, given that national peoples cannot control the EU judiciary in the same way as they can the EU legislature and legislative procedure. Hence, for the sake of increased political legitimacy of EU governance, van den Brink calls for a particular institutional balance where the EU legislature is the main source of EU law-making and the principal arena for exercising EU authority. In this balance, the Court of Justice should in principle defer to the choices made by the EU legislature. Such an approach in the interpretation of EU law should offer more stability and predictability in judicial decision-making, including more methodological coherence and consistency.

After dealing with political and institutional legitimacy, van den Brink turns to institutional capacity (Chapter 3). He shows how on this account, too, the EU legislature is superior to the EU judiciary since it is more capable of achieving both legal and social change. This means that the legislator is better able to generate higher-quality legal output and greater social acceptance of its outputs than the judiciary.

In van den Brink's view, the legislator's capacities are greater than the judiciary's for two reasons. One is the epistemic qualities of the legislative process. The legislator has access to greater expertise and knowledge, more resources (including time), stronger processing and predicting capacities, more deliberative capacities, greater inclusiveness, and so on. The other reason is the rule-of-law qualities of legislative acts. The legislative rules are on average clearer, more coherent, and practical, whereas the judicial 'rules' (ie pronouncements) are on average vaguer, principle-based, built incrementally, and less predictable when it comes to their application.

The legislator is better than the judiciary, van den Brink writes, in achieving social change too, ie inducing compliance from its addressees, be it individuals or Member States, for the following reasons. On one hand, the ECJ case law produces weaker adjustment pressure and can be contained and resisted by domestic actors more than EU legislation. On the other hand, EU legislation is more likely to be complied with by private actors, since it is more easily accessible than the case law, and national judges and lawyers appearing before them are more likely to rely on EU legislation.

Bringing these two lines of argument together – legitimacy which grounds political authority, and capacity which grounds epistemic authority – van den Brink proposes a theory of judicial deference. It requires deference to the

legislator's choices, yet with a particular approach to the interpretation of primary law (the Treaties and the Charter): instead of adopting a rigid approach, the ECJ should rather opt for a lighter, flexible and adaptable one. A rigid approach would leave too much discretion to the Court in the interpretation of primary law, potentially restricting the interpretation of secondary law. By contrast, a flexible approach modifies the traditional view of the Court as the sole, exclusive interpreter of primary law, so that if secondary legislation is incompatible with the primary law as interpreted by the Court there is no other choice but to invalidate it. Now, the picture shows the Court as not being the only interpreter of primary law; other institutions take part in that process as well, resulting in a form of interpretive pluralism.[4]

Martijn van den Brink then gives some examples to show that the ECJ – not only as a normative matter but as an empirical one too – by and large already follows, and has followed from the earliest days, (t)his modified approach. So, in the case law concerning matters such as free movement of goods, free movement of services, and EU citizenship law, he finds proof that the Court as a rule is highly deferential to legislative choices and that deference has always been its default position. By the same token, the Court itself seems perfectly willing to share interpretive responsibility with the EU legislator and act as its faithful agent.

The examples provided concern three different types of review (Chapter 4). The first is the legislative process review, which involves interinstitutional disputes over the legislative procedure and the legal basis. The second is the *ultra vires* review, which concerns the control of the principles of conferral, subsidiarity, and proportionality, which ought to ensure that the EU legislator remains within the limits of EU competence, and which mainly relate to the Union's functional competences such as the internal market legal basis under Article 114 TFEU. And the third is the fundamental rights review, which concerns the compliance of secondary law with the basic human rights guaranteed in the EU constitution.

The standard of review that the ECJ applies, ie its strictness, is context dependent.[5] Of three types of review, van den Brink identifies only the fundamental rights review as being inappropriately exercised given that it is based on too strict scrutiny. Namely, the Court allows the EU legislator to do only what is 'strictly necessary' to achieve the legitimate aim, whereas in other types of review the legislator can do everything except what would be 'manifestly inappropriate' to reach the aim pursued. In van den Brink's assessment, the EU legislator should be granted even greater discretion when it intentionally seeks to strike a balance between fundamental rights

[4] cf Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation' (2018) 24 European Law Journal 358.

[5] It also varies in vertical and horizontal dimensions. For instance, the ECJ reviews national restrictive measures in a stricter manner than the comparable EU measures on account of the differing representation of socio-political interests in the national as opposed to the EU decision-making procedure; and the ECJ applies the same level of scrutiny when reviewing EU legislative and EU executive/administrative measures, although the argument from political (institutional) legitimacy would require the latter to be scrutinised more strictly, whereas the argument from institutional capacity (expertise and resources) would require the same scrutiny or even greater deference to the EU executive/administrative institutions.

restrictions and the protection of other public interests, similar to what we find in the 'margin of appreciation' doctrine of the European Court of Human Rights.

All in all, van den Brink's account challenges previous writings that have viewed the EU legislator as being the subordinated agent of the Court, which merely elaborates the existing case law when adopting subsequent legislation.[6] He shows that the legislator is not acting in the 'shadow of the case law', but has extensively worked on specifying many Treaty provisions, to which the ECJ has responded positively and has mostly deferred to the legislative choices expressed in secondary law. So, in his view, the relationship between the EU's legislative and judicial branches is not as imbalanced as many have suggested, which is a good thing. To improve it further, van den Brink provides a *vade mecum* for the Court on how to correctly identify the legislative intentions in order to defer to them (Chapter 7).

His guideline for the identification of legislative intent in the interpretation of EU law is 'literal meaning in context'. How might that work? First, he dismisses a pure literal interpretation as a way of discerning legislative intent. He does not subscribe to the view that EU law is radically indeterminate. Rather, he notes that more agreement exists on the meaning of EU law than typically thought, which is why an analytically more appropriate and descriptively more accurate term for EU law would be that it is 'underdeterminate'.[7] Van den Brink does admit, though, that literal interpretation in EU law on its own is inadequate given the complexity of legislative language and its multilingual nature, which adds an additional layer of vagueness and the potential for linguistic discrepancies.[8] Limiting ourselves solely to linguistic considerations would, in his view, leave out important contextual information and therefore underestimate the intention of the EU legislator.

So, van den Brink suggests that the legislative context is decisive in concluding whether or not the literal meaning is the *intended meaning*. And what does he include in the legislative context? Everything (or almost everything) that the ECJ itself counts as relevant context, as elaborated in *CILFIT*:[9] other provisions found in the legislative acts in question or other (related) acts, the objectives of those acts, legislative history (*travaux préparatoires*), the state of evolution of EU law, and so on. Basically, everything except the Treaties – or the Court's exclusive interpretation of them – which needs to be loosened when interpreting EU legislation. It also has to be accepted that the EU legislator likewise can interpret the Treaties when

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[6] cf Gareth Davies, 'The European Union Legislature as an Agent of the European Court of Justice' (2016) 54 Journal of Common Market Studies 846.

[7] Meaning that while there may not be *only one right answer*, it does not follow that there are *no wrong answers* to the questions of interpretation of EU law either; besides, the case law of the ECJ adds further to the determinacy of EU law. For a general discussion of this idea of the 'underdeterminacy' of law, see Lawrence Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54 University of Chicago Law Review 462.

[8] Although van den Brink does not tell us in detail how frequent the instances of linguistic discrepancies are (they are very rare), and whether that should play a role in rejecting (or embracing) literal interpretation.

[9] Case 283/81 *CILFIT* ECLI:EU:C:1982:335, para 20.

enacting secondary law. In van den Brink's words, 'the *CILFIT* requirement that legislation must be interpreted "in light of provisions of EU law as a whole" must be construed narrowly' (at 221), so that the Treaties should be left out of this 'whole'.[10] In other words, the Treaties should not count as part of the relevant legislative context, and there should be no obligation to interpret secondary law in conformity with the Treaties if doing so would prejudice the legislative intent.

And here is van den Brink's crucial contribution to the vast literature on the interpretation of EU law: the intention of the EU legislator should be ascertained by excluding primary law (and the ECJ's interpretations of it) in the interpretation of secondary law, so that greater deference could be given to the EU legislator.

The GFCC and the constitutional review of EU law

Nik de Boer examines the legitimacy of national constitutional courts in reviewing the application of EU law in their domestic legal orders. Unsurprisingly, his study focuses on arguably the most influential national court and the one most capable of affecting the course of EU integration. But tying his account to a judicial outlier is at the same time a limitation of his study, which de Boer himself acknowledges. Indeed, the apex courts of other Member States are unlikely to possess the same political clout and institutional authority as their German counterpart, which reduces the generalisability of the book's argument.

In any event, de Boer's point of departure is the critique of constitutional pluralism.[11] His main concern with this school of thought is its celebration of resistance to, and contestation of, EU law that comes from the highest national courts and of the dialogue between these courts and the ECJ that follows from there, which supposedly drives integration forward. This enthusiasm overlooks the fact that judicial process can disable political debate and legitimate disagreement on matters of EU and national constitutional orders. Much like van den Brink, de Boer shares the view that political institutions are generally better placed than judiciaries – given the greater political legitimacy and institutional capacity of the former – to deal with key constitutional questions. This is despite the fact, which he rightly acknowledges, that the EU political process is characterised by the domination of national executives over their respective legislators, and that national courts' reactions are often not aimed against outcomes produced in

[10] Typically, the Treaties as the 'higher law' would count as the relevant context (even the most relevant context) for the interpretation of hierarchically lower secondary law, under the assumption that lower law must be interpreted in conformity with the higher law, which is a condition of its validity; and also, under the assumption that the (EU) legislator intends to enact valid or constitutional legislation, which is compatible with the higher law. cf Case 218/82 *Commission v Council* ECLI:EU:C:1983:369, para 15; and Joined Cases C-402/07 and C-432/07 *Sturgeon* ECLI:EU:C:2009:716, para 47.

[11] Note that van den Brink is likewise critical of constitutional pluralists (Chapter 6), but on account of their purported overemphasis on the indeterminacy of EU law and the 'incompletely theorised agreements' which EU decision-making, in their view, dominantly produces.

the political process but against judicial lawmaking, as many things are settled before the ECJ.[12]

The introductory parts discuss in great detail the legitimacy of judicial (constitutional) review in general (Chapter 2) and in the EU context more specifically (Chapter 3). For me, the most interesting and useful point is the juxtaposition of two opposite approaches to these questions. As de Boer argues, 'legal constitutionalists' who defend the judicial review and its legitimacy typically paint a distorted picture of the legislative process and at the same time an idealised picture of the judicial process. And vice versa, 'political constitutionalists' idealise the legislative process and misrepresent the workings of the judicial process. The former put great faith in courts as counter-majoritarian institutions which are there to safeguard individual rights and prevent the tyranny of the majority. The latter hail legislatures as public forums in which elected representatives of the people come together to deliberate rationally and in good faith and decide on matters of the common good. The democratic credentials of the legislatures are undoubtedly much greater than those of the judiciary. But which branch of government is better suited to decide on constitutional questions, be it fundamental rights, division of powers, democracy, sovereignty, or identity?

De Boer continues his argument by saying that constitutions can be seen to be institutionalising certain preconditions for just and legitimate democratic governance. These are, most importantly, institutions and procedures that enable the formation of popular will and individual rights and mechanisms for their protection. This is where the tension inherent in every liberal constitutional democracy lies: the tension between 'liberal', particular, rights, and individual interests on one hand, and 'democratic', general, majoritarianism, and collective interests of society on the other – which are all ingrained in the same constitutional document.

In de Boer's view, the meaning, import, and requirements of these preconditions are not self-evident from the constitutional text, nor can they be fully articulated in advance or in the abstract. Rather, they are inevitably subject to different reasonable interpretations. As such, these fundamental constitutional preconditions should remain within the democratic process and be subject to political debate. Citing Jürgen Habermas, he agrees that 'the preconditions for democratic legitimacy must themselves be subject to ongoing political deliberation' (at 19). For this reason, de Boer argues that judicial review cannot be justified just by saying that constitutional courts safeguard the preconditions for just and legitimate democratic governance. Instead, the justification for judicial review should be that courts are better than the legislature at ensuring that the political process takes place in accordance with these preconditions. So, the key is to compare the abilities of the judiciary with the abilities of the legislature and to determine who is more successful in performing the task of deliberating and deciding on the constitutional preconditions.

[12] Although de Boer notes that the book discusses the case law of national courts as a response to the ECJ's lawmaking, this aspect remains somewhat in the background.

Against this background, de Boer approaches the case law of the GFCC, and questions how this court's review of EU law has affected the democratic process in Germany. In particular, he examines three famous episodes featuring constitutional review: namely, review of the ratification of the Maastricht Treaty (Chapter 4), review of the Union's response to the euro crisis (Chapters 5 and 6), and review of the Union's handling of the Covid-19 pandemic which came in the aftermath of the ruling on the European Central Bank's (ECB) Public Sector Purchase Programme (PSPP) (Chapter 7).

It can immediately be noticed that, besides being limited to an extraordinary court, the examples de Boer gives are all extraordinary cases, which occurred in exceptional or even emergency circumstances – and it is not without reason that we are warned that '[g]reat cases, like hard cases, make bad law'[13] (and, by extension, could it be that they make equally bad material for scholarly observations?). Moreover, all these cases were decided by the Second Senate, so we hear only one half of the GFCC; hence, it would be interesting to see whether and how the First Senate's landmark rulings, such as in *Solange I* and *II*, which likewise addressed democracy issues in the context of EU integration, would fit the same narrative.

The first example – the Maastricht Treaty ruling that introduced the *ultra vires* review of EU law[14] – had in de Boer's view a negative impact on the political process in Germany. True, the GFCC did provide a forum for Euro-sceptics to voice their concerns about the progress of integration and challenge the constitutionality of the EU Treaties, which somewhat shook the otherwise uniformly pro-EU domestic politics. This was made possible through a wide interpretation of the right to vote guaranteed under the German Basic Law, based on a very Germany-first understanding of democracy, which is a piece of the 'eternity clause' that contains unamendable constitutional principles. By setting out in this ruling several important constitutional limits to future EU integration, the GFCC became the favourite door for Euro-sceptics to knock on. However, with such a strict and defensive interpretation of the German constitution, the GFCC went beyond providing an additional avenue for political contestation and in effect put a straitjacket on German politics for decades to come. As de Boer writes, by 'elevat[ing] the Euro-critical viewpoint to the level of unamendable constitutional law', the GFCC 'ultimately end[ed] up constraining the room for political debate in the Bundestag' (at 282).

The second example – events that coincided with the euro crisis, such as the establishment of the European Financial Stability Facility, the European Stability Mechanism, and the banking union – had mixed outcomes. On one hand, constitutional reviews of several measures adopted at the EU or intergovernmental level remained largely uncontested in the German political arena. Hence, the GFCC's interventions limited the space for democratic debate on integration in economic and monetary matters. Consequently, the GFCC's interpretations of the questions of democracy and competences

[13] US Supreme Court, *Northern Securities v United States*, 193 US 197 (1904) 400 (Justice Oliver Wendell Holmes, dissenting).
[14] BVerfG, 2 BvR 2134/92, 2 BvR 2159/92, Order of the Second Senate of 12 October 1993, ECLI:DE:BVerfG:1993:rs19931012.2bvr213492.

seemed to have 'reified' the politics of austerity, fiscal discipline, and budgetary sovereignty, thus exhausting every constitutional reserve for further EU integration in these areas. On the other hand, as a side effect of this succession of cases, the Bundestag scored some important points. The GFCC's interventions made a decisive contribution to the strengthening of parliamentary oversight over executive actions at the EU level. The Karlsruhe court relentlessly insisted on the Bundestag's information and participation rights in EU affairs. This made the German parliament one of the strongest national parliaments when it comes to a voice in EU affairs, and blunted executive dominance over parliament, thereby saving (some) room for politics.

The third and final example was a culmination of the earlier interventions and brought the most dramatic moment – the GFCC's *ultra vires* ruling in *PSPP*.[15] Yet this turned out to be a storm in a teacup. For their part, German elected politicians and executive officials openly challenged and contested the Karlsruhe court's reading of the provisions of the Basic Law and the EU Treaties as well as its application of the proportionality principle. The GFCC itself closed the judgment with a rather weak cry, instructing the federal government, the Bundestag, and the Bundesbank to resolve the issue. At the same time, it raised legitimate concerns about the ECB's mandate, actions, and lack of democratic oversight, which contributed to political debate not only in Germany but also elsewhere in the EU.

De Boer sees the *PSPP* ruling as a form of weak constitutional review, which for him is a blueprint for the legitimate engagement of constitutional courts in EU affairs. In situations like this, judges only signal constitutional problems that are caused by action at the EU level and thus trigger political debate – but, crucially, do not impose a solution themselves. Rather, they invite elected politicians to work out a solution through the democratic process, and at the same time do not tie their hands in contesting judicial interpretations, thereby recognising that constitutional interpretation is a task jointly shared by the political and judicial branches. So, de Boer's suggestion is that the national constitutional review should as a rule be weak, ie limited and deferential. In this way, constitutional courts can enable democratic deliberation and contestation instead of constraining the political process and over-judicialising fundamental questions of EU integration. In his view, questions concerning the limits of EU integration (the *ultra vires* review) and national identity (constitutional identity review) are primarily political questions, which require a judgment formed through the political process by democratically legitimated institutions that possess greater resources, and not in courtrooms. But he still accepts that in exceptional cases strong constitutional review may be justified to question issues of the democratic legitimacy of Union institutions and decision-making 'that are beyond reasonable disagreement' (at 291).

To align constitutional review with this model, de Boer in the end discusses possible institutional adaptations. The one concerning the practice of constitutional courts is the 'declaration of incompatibility': after finding that

[15] BVerfG, 2 BvR 859/15, Judgment of the Second Senate of 5 May 2020, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

EU law and national constitutions cannot be interpreted as coexisting in harmony, constitutional courts should merely declare the incompatibility – but stop short of disapplying EU law. Such a declaration would highlight serious constitutional issues without simultaneously undermining the primacy of EU law. The next step would be to initiate the preliminary ruling procedure and enter into a dialogue with the ECJ. And if following the ECJ's ruling the same constitutional concerns persist, constitutional courts should still not hit the emergency brake but pass the buck to the legislator for a final call. In this setup, the authority of constitutional courts would shift from the power of ultimate sanction (disapplying EU law) to the power of reasoned argument, which is meant to force the national legislature to act.

On the flipside, de Boer also suggests that Member States could introduce domestic political overrides of judicial rulings that interfere with EU integration, or simplify constitutional amendment procedures for matters falling within the scope of EU law. And at the EU level, Member States could strengthen political safeguards to keep the Union's powers in check in a more efficient and legitimate manner, for example by finding ways for the greater involvement of national parliaments in EU affairs or by introducing political overrides of the ECJ's interpretations of the Treaties, so that constitutional courts would less frequently be forced to act as the last line of defence. This is where this author comes back to one of the ideas underlying both books – moving beyond court-centric solutions to explore political options.

Of jurisprudential weaknesses...

The two books are, among other things, about judicial reasoning, and in both we find suggestions on how the courts should interpret the law and review legislation. Each author agrees that since the ECJ and the GFCC should be more deferential to the political process, they should also be more open towards political reasons when interpreting the Treaties and the Basic Law.

For his part, Martijn van den Brink rightly notes the overlap between law and politics, and even claims that legal positivism – and the ECJ is for good reasons considered to be a positivist court[16] – should openly embrace the political dimension. However, in his book, it is not always clear whether he distinguishes between different contexts of interpretation, so-called 'discovery' and 'justification',[17] a distinction commonplace in jurisprudence. There is a significant difference between how a court *makes* a judgment and how it *justifies* that judgment. Similarly, there is a difference between how a court finds (or should find) the legislative intent and how it justifies (or should justify) that finding. Greater clarity and precision regarding these dimensions of judicial decision-making would strengthen van den Brink's account. As it stands, it is not clear how he would evaluate the following scenarios: having the ECJ in practice show greater deference to the EU legislator yet with limited reasoning and narrow justification that include strictly legal arguments; or having the ECJ adopt elaborate reasoning with proper justification that

[16] cf Giulio Itzcovich, 'The European Court of Justice' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (CUP 2017) 277, 302ff.
[17] cf Bruce Anderson, *'Discovery' in Legal Decision-Making* (Springer 1996).

includes political and moral arguments, even if in some cases it would end up being less deferential?

Similarly, Nik de Boer argues that constitutional courts, when performing an *ultra vires* or identity review of EU law, would do better if they engaged openly with arguments that arose in prior political debates, because political institutions might have reasonably thought of and raised sound constitutional points. From this, it seems that de Boer is talking about the justification, and that in his view courts should include in their reasoning more moral and political arguments for the sake of legitimacy, transparency, and efficiency. The problem with this, however, is that not many political arguments can be directly or easily translated into legal discourse, and that many (if not all) courts are suspicious of such kinds of arguments – as most (continental, civil law) European courts are strongly positivist in their reasoning practices. And the reason for their suspicion might be precisely the desire not to overstep what is formally considered to be the judicial function, and hence to preserve the (illusion of) separation of powers between the lawmakers and the courts. Likewise, some would not want to see the courts (if only the apex courts) becoming openly *political*; they would say that the courts need to stay (boringly) *legal*, and that it is important for them to keep alive the fiction of 'objective law that is separate from politics' in order to preserve the foundations of society.

Another challenge for van den Brink's argument more specifically concerns the central concept he works with – the legislative intent – which was rejected a while ago by all serious legal theorists, some of whom considered it to be theoretically indefensible, deceptive, 'conceptually confused' and 'empirically impossible'.[18] He takes on the main criticism of the legislative intent in (EU) law, which says that, first, collective actors cannot form intentions at all; and second, even if they could, their intentions could not be ascertained. Van den Brink finds a way out of these problems in the social choice theory (see Chapter 5, replete with details), which in his view extends to the legislatures. Basically, what could, building on this theory, enable the formation of collective intent in the legislature are things like the delegation of power to political parties, the role of agenda-setters, the workings of the legislative committees, and so on. However, precisely these things detract from the democratic legitimacy of the legislator, which is one of the grounds (next to institutional capacity) of van den Brink's theory of legislative primacy over the judiciary. Jeremy Waldron, whose case against judicial review both books heavily rely on, would agree that the very reasons we have for granting authority to the legislature and the legislation it enacts are the same reasons for not granting authority to the views or intentions of particular legislators.[19] Van den Brink seems to admit this problem himself, when noting that it is

[18] Although it is constantly present in legal scholarship, then as well as now. See Heidi M Hurd, 'Interpreting Authorities' in Andrei Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1997) 405. For a recent take that I ran into, see Francesca Poggi and Francesco Ferraro, 'From the Ideal Legislator to the Competent Speaker: Uncovering the Deception in Legislative Intent' (2024) 15 Jurisprudence 464.

[19] See Jeremy Waldron, 'Legislators' Intentions and Unintentional Legislation' in Andrei Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1997) 329, 348–349.

the inequality among individual legislators that makes the legislature capable of reasoned collective action (at 156). If I understand correctly, his comeback is that although some individual intentions (political majority, agenda-setters, legislative committees …) may be decisive in the *formation* of legislative intentions which influence the content of legislation, they are irrelevant for the *identification* of legislative intent. (Recall: it is identified by figuring out 'literal meaning in context'). So, to determine legislative intent, we do not have to know the individual intentions of anyone involved in the formation of that intent. Convinced?

… and moral uncertainties

The two books share the same assumption, which anchors their accounts: the notion of 'reasonable disagreement', and, by extension, what would, and what would not, go beyond this. Since in a democratic society we cannot avoid reasonable disagreement over things like justice, sovereignty, power, identity, democracy, or rights, those that decide on these moral and ethical questions should have legitimacy and authority; hence, since the political process is superior to the judicial process on those two counts, judicial review should be more limited and exceptional, and judges should be more deferential to the elected legislators. But neither of the authors gives enough space to explain how we can know when a disagreement is 'reasonable' and when 'unreasonable', and who is to tell what kind of '(dis)agreement' we are talking about – between lawyers, politicians, scholars, laypeople – and what they consider 'reason(able)' in the first place? This raises questions about some of their specific claims and arguments.

For instance, de Boer suggests that in exceptional situations, constitutional courts would be justified in exercising a strong review if they step in to address problems that are 'beyond reasonable disagreement'. Otherwise, they should settle for a weak and limited review. Let us say that judicial review addresses democratic legitimacy problems at the EU level, and as a result we get a stronger national parliament with greater information and participation rights in EU decision-making. The outcome would thus be more democracy, a stronger democratically legitimated national legislator, and a more democratised EU. That such an outcome is a good and desirable thing should be 'beyond reasonable disagreement'.[20] So far, so good.

However, things become less clear when de Boer moves from the general to the specific. The example he gives to describe a situation in which a strong review is justified does not help, in my view, to distinguish between what is 'beyond reasonable disagreement' and what is not. The case in question is *Neuner Gremium*.[21] The issue concerned the delegation of budgetary powers by the Bundestag to a special parliamentary subcommittee made up of nine

[20] Although here de Boer, for some reason, does not say 'beyond reasonable disagreement', which is a phrase he repeats twenty or thirty times in the book, but 'less subject to reasonable disagreement'. I cannot be sure whether or not this (subtle?) difference changes the entire meaning or perhaps reveals that he is aware of the difficulty of distinguishing between 'reasonable' and 'unreasonable disagreement' – and all the degrees in between.

[21] BVerfG, 2 BvE 8/11, Judgment of the Second Senate of 28 February 2012, ECLI:DE:BVerfG:2012:es20120228.2bve000811.

members of the budgetary committee, which was supposed to decide on measures concerning the EU's financial assistance ('bailouts') to eurozone countries in cases of urgency and confidentiality, thereby replacing the decision of the parliamentary plenary. The GFCC unanimously found that such an extensive delegation of the Bundestag's powers and budgetary responsibility to a smaller group of parliamentarians was unconstitutional. The judicial intervention to safeguard the parliament's decision-making powers was, in de Boer's view, beyond reasonable disagreement. But it is interesting to see how the original decision was made and how it ended up before the Karlsruhe court. During the debate on the legislative proposal, the governing coalition parties – at that time the Christian democrats (CDU/CSU) and liberals (FDP) – and the Greens did not see any constitutional issues, unlike the left (Die Linke) and social democrats (SPD). The meeting with constitutional experts saw 'a heated exchange' (at 224). The social democrats proposed an amendment to limit the special subcommittee's powers and the situations in which it could act, but it was rejected. Yet they eventually voted for the proposed legislation, as did all the other parties apart from the left. After the vote in the Bundestag, two members of the social democrats challenged the legislation before the GFCC against the position of their own party, claiming that the rules concerning the special subcommittee violated their rights as members of the Bundestag under Article 38 of the Basic Law which enshrines the principle of representative democracy. And, as we have seen, the GFCC ruled in their favour. But I wonder how that ruling was beyond reasonable disagreement, when almost 90 percent of elected parliamentarians thought that the legislation was constitutional, and legal scholars were divided (as they always are) on the question of its constitutionality.

A similar issue I found in van den Brink's account, in part where he explains why his proposed theory of interpretation in accordance with the legislative intent is preferable to competing theories of interpretation that are purposive.[22] Here, following Frederick Schauer's work,[23] he introduces a fine distinction between the different purposes pursued by the EU legislator when enacting legal rules. Some purposes are individual and substantive, like non-discrimination, free movement, or fair treatment, which the EU legislator may aim to fulfil with specific rules in EU legislation. But other purposes are broader and more systemic, and the EU legislator may be aiming to fulfil them as a general matter with every rule in the act (and with every act in the same manner). Think of efficiency (say, of decision-making), clarity (certainty and predictability for the individuals), the reduction of arbitrariness (of public authorities vis-à-vis individuals), and separation of powers (between decision-makers), which are all important components of the rule of law. It is undeniable that the EU legislator, when enacting legislation, pursues all of these goals and purposes. But van den Brink's theory puts greater premium on systemic purposes. He argues that the ECJ should interpret EU law to reflect these systemic purposes, even if such interpretation were contrary to

[22] As the most influential account of purposivism in the interpretation in EU law, he cites Miguel Maduro's 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 European Journal of Legal Studies 137.
[23] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1991, reprinted in 2002).

a specific substantive purpose, because in this way the Court better honours the political authority of the EU legislator. So, rules should generally be followed, and they must constrain the ECJ, even if following them would lead to bad outcomes in individual cases.

Although such an interpretive directive could be criticised, I have no issues with it. But consider the follow up: van den Brink later writes that rules should be followed, but not if the outcome would be 'grossly unfair or otherwise nonsensical' (at 179) – in other words, if it would be 'beyond reasonable disagreement' that the outcome is wrong and reprehensible. The question then becomes how to know which outcomes are 'grossly unfair' or 'arbitrary' or 'nonsensical', and which not. What are the criteria for assessing this? And if there is an unavoidable disagreement in democratic societies about moral and ethical questions, would it even be possible to know when van den Brink's theory of interpretation reached its limit? I did not find answers to these questions or practical examples to help and enable interpreters to follow van den Brink's directive.

Context always helps

Certainly, the more context, the better, in everything, including in legal scholarship. I do not think that either of the books is dramatically short of relevant context. But still, it is always possible that some readers will miss some important background to help them better understand the main points.

What I missed in particular in de Boer's account is more discussion of the unique German legal context. For instance, he discusses how some of the GFCC's rulings effectively foreclosed political debate on certain questions of EU integration. But the question that always came back to me was how the Karlsruhe court became so exceptionally authoritative, influential, respected, and dominant that some of its judgments were able to pass virtually uncontested by the political elites. The reasons go back well before the Maastricht Treaty ruling in the early 1990s, which is basically when de Boer's case study starts. And this question is even more important when you remember that no (constitutional) court controls either the 'sword' or the 'purse'. As the 'the least dangerous branch', courts cannot impose or force their choices on the political branches of the government or the public. They can only persuade the relevant audience in the rightness of their interpretations of the constitution and the law. And moreover, constitutional justices are elected by the very same parliamentarians, whose acts they are supposed to control.

These are relevant points if we want to generalise de Boer's account and apply it to other national constitutional courts. There is arguably no high court that holds the same authority or occupies the same position in the domestic legal and political order. Therefore, in other Member States, high courts may already be showing proper deference to the democratic process and reviewing matters pertaining to EU affairs in a limited manner, hence not constraining the debate on EU integration; and vice versa, the rulings of high courts concerning EU affairs may be regularly (and successfully) contested by the political branches.

I am aware that this critique may not be fair, because a detailed historiography and sociology of the GFCC would probably require a whole new monograph. And de Boer does recognise that constitutional justices enjoy exceptional authority in Germany (and not only there, I would add, because high courts in other Member States love referring to their rulings). He also mentions that constitutional interpretation in Germany is a matter largely viewed as the exclusive province of legal experts (at 290), and references interesting titles that contain more background on this point. One of the referenced works is by Michaela Hailbronner, who wrote that such an emphasis on expert authority in the interpretation of the Basic Law 'mak[es] German constitutional patriotism a rather Catholic affair and heighten[es] risks of policy distortion'.[24] It is true that one could read these works to learn more about this German specificity (I have not). But I still think that had we heard a little more on this question in de Boer's book, it would have added significantly to the whole story. The same applies to the discussion of whether and in what ways the changes at the bench during the three decades covered by de Boer affected the GFCC's attitude and exercise of the constitutional review of EU law; as well as to the question of whether the Karlsruhe court's emergence as a favourite door for Euro-sceptics and populists to knock on somehow contributed to their rise in the political arena, and whether this ultimately brought more scepticism within the judicial branch and greater contestation of its judgments.

The specific German legal and political context made me wonder about the democratic credentials of courts. Both authors argue (and I agree) that legislators have greater democratic legitimacy than courts. This holds especially when we look at the matter horizontally, ie the ECJ vis-à-vis the EU legislator,[25] or the GFCC vis-à-vis the Bundestag. But what if we look at things vertically? How much lower is the democratic legitimacy of national constitutional courts vis-à-vis the EU legislator? Constitutional justices are usually selected via qualified majorities through national parliaments although they are not directly accountable to them. But what about the EU legislator? We have the European Parliament as the only institution that is directly elected in a democratic process (although in a number of Member States voter turnout is disappointingly low); indirectly selected commissioners that are accountable to the European Parliament; and indirectly 'delegated' ministers that are accountable to their national parliaments. How legitimate is this legislator from a national perspective? Germany certainly has a strong voice in EU affairs, with the most seats in the European Parliament and greater influence on the voting in the Council. But there, German

[24] Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (OUP 2015) 176; another work by the same author that de Boer cites is 'We the Experts: Die geschlossene Gesellschaft der Verfassungsinterpreten' (2014) 53 Der Staat 425 (the German title translates into 'the closed society of constitutional interpreters').

[25] Note, however, that the ECJ is usually considered to enjoy the greatest trust of EU citizens among all EU institutions, as shown by Eurobarometer public opinion surveys. The reasons may be found in its perceived independence, impartiality, or expertise, or lesser exposure to partisan politics. See eg R Daniel Kelemen, 'The Political Foundations of Judicial Independence in the European Union' (2012) 19 Journal of European Public Policy 43; or Eurofound, *Societal Change and Trust in Institutions* (Publications Office of the EU 2018). However, it is also true that 'trust' does not necessarily translate into '(democratic) legitimacy'.

representatives sit alongside others from different Member States – including some countries that can no longer be considered democratic! Does this matter?

We can also factor in the spatial and cultural proximity of these institutions. EU decision-making is typically seen as more remote from the everyday lives of EU citizens, who are less familiar with the political discussions in Brussels or Strasbourg due to (among other things) a lack of common European media space. However, national constitutional courts (certainly the German one) might be a more regular feature for citizens – eg German citizens are more likely to follow more closely the German media and to be more familiar with political disputes that end up in Karlsruhe. Besides, there is a very liberal interpretation of the rules on standing (*locus standi*) which allows many individuals and groups to bring constitutional challenges in Germany, and so on. Could any of this matter when we discuss the democratic legitimacy of national constitutional courts' review of EU law?

Let us take some examples from de Boer's book. The Maastricht Treaty was agreed unanimously by all Member States, including Germany. In the process of national ratification, which ended up with parliamentary approval, there was political discussion about the merits of the new treaty. So, the national democratic process clearly expressed a (positive) view on the matter. And only then did the GFCC step in to express its own view, which, as we have seen, was based on a defensive and not particularly EU-friendly interpretation of the Basic Law. But other cases were different. In the *PSPP* ruling, the GFCC was not reviewing an EU decision that had been approved in a democratic process in Germany or adopted by the EU legislator. It was a decision made by the unelected and unaccountable European Central Bank (whose validity was subsequently confirmed by the ECJ).[26] Can we say that in this setting it was the GFCC that can be called democratically illegitimate?

This problem raises some interesting questions for de Boer's theory of legitimate constitutional review of EU law, according to which national courts should be deferential to the national political process and democratic choices made therein. So, when it comes to unanimously adopted EU acts – certain regulations, directives, and decisions, including the Treaties – we know that the political branches have already endorsed them. There is therefore something for constitutional courts to defer to. But when it comes to EU acts that do not require unanimity, things may be a bit different. Let us say that a Member State in the Council was against some proposed secondary legislation but ended up among the outvoted. Assuming that the national minister's mandate was deliberated and determined by the national parliament, which happens,[27] should a constitutional court take that into account when presented with a challenge to the adopted EU legislation and defer to the democratic choices expressed in the domestic political process? Although such a scenario might sound hypothetical – but what about Hungary or PiS-

[26] In Case C-493/17 *Weiss* ECLI:EU:C:2018:1000.

[27] Or worse, if the national legislator objected to the proposed legislation on account of an alleged violation of the principles of subsidiarity and proportionality, as envisaged in Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the TEU and TFEU by the Treaty of Lisbon.

ruled Poland? – de Boer's theory invites further exploration in this respect, both as a general matter as well as at the level of individual Member States.

The cure

The last set of remarks I have concern the precepts the authors offer for legitimate judicial interpretation of EU law and for its review by national constitutional courts.

Let us take van den Brink's percept first, his 'golden rule' of interpretation and how to identify legislative intent, which are two prongs of his theory that he considers to be 'better than other theories at prescribing how meaning must be ascribed to EU law' (at 17).[28]

Firstly, as I have already explained, van den Brink suggests that EU law needs to be interpreted in a way that reflects systemic purposes, even if the outcome is incompatible with a specific substantive purpose. This is how, he continues, the authority of the EU legislator is best respected. So, his theory gives weight to different criteria or standards of interpretation – systemic concerns outweigh the particular. But what he does not develop are meta-criteria for choosing amongst different systemic purposes that in a particular case may pull the ECJ in opposite directions. For instance, if one outcome of interpretation is aligned with legal certainty, hence making the legal obligations predictable, and the other outcome leads to more efficient decision-making which is another important systemic concern, how can we decide which interpretation better represents the political authority of the EU legislator? And can there even be interpretive directives that are both intelligible and useful for the interpreters in these situations (situations that are, I suspect, probably exceptional)?

Secondly, van den Brink's formula for ascertaining the intent of the EU legislator is, as mentioned above, 'literal meaning in context'. And the 'context' includes everything (except in certain cases the Treaties), from related legislative acts, the objectives of those acts, preambles, legislative history, and so on. But here again, what we do not have are criteria for 'breaking the tie' when different pieces of this context point to different conclusions. For instance, the literal meaning of a provision may indicate one thing about the legislative intent, whereas its objective or legislative history or other provisions may suggest another.[29] There is nothing in van den Brink's theory to assist us or the ECJ in navigating this interpretive difficulty, except perhaps to say the following: 'when the theory runs out, anything goes, but these are

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[28] Among these other theories, he counts instrumentalism, purposivism, and textualism.

[29] The only thing I could distinguish is between legally binding and legally non-binding elements of legal context: the enacted text of legal provisions and their objectives clearly stated in the operative parts of the legislative acts would belong to the former, whereas the preambles of legislative acts and their legislative history would belong to the latter. cf Case C-162/97 *Nilsson and Others* ECLI:EU:C:1998:554, para 54: '[T]he preamble to a [Union] act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question'; and Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit Internationaal* ECLI:EU:C:1996:387, para 29: 'Expressions of intent on the part of Member States in the Council […] have no legal status if they are not actually expressed in the legislation'.

extremely rare cases in which there is nothing anyway to constrain judicial discretion'. Perhaps in those cases we enter 'into the deepest waters of normative constitutional and political theory'[30] in which no legal theory can offer conclusive solutions.

Van den Brink's theory of interpretation of EU law raises additional important questions. These concern the claim that the Treaties (and the ECJ's interpretations of them) should not count as part of the relevant legislative context if this prejudices the legislative intent. One potential issue, in my view, is not that this approach would reverse the traditional hierarchy of sources – making secondary law, in a sense, superior to primary law,[31] but that the political authority of the (current) legislator would seem to count for more than the authority of the (historical) Treaty-maker (ie constitution-maker). There may be a way out for van den Brink's theory on this point, but I am not sure that he goes on to address it adequately in the book. After all, the Treaty-makers have established a system in which it is the task of the ECJ to 'ensure that in the interpretation and application of the Treaties the law is observed'. And the Treaties have been subjected to constitutionally defined ratification procedures in every Member State, involving either qualified majorities in the parliament or popular referenda. I wonder what van den Brink's take would be on this question of political authority of the EU constitution-maker and whether it affects his theory of interpretation.

The claim that the Treaties (and the ECJ's interpretations of them) should not feature in the determination of the legislative intent also leaves us with the following question – what about the Charter? The Charter, after all, has the same legal value as the Treaties. Van den Brink's theory suggests that the Charter forms an important part of the relevant context, but likewise needs to be construed narrowly – again, in order not to prejudice the legislative intent. In reality, as van den Brink himself shows (Chapter 4), the ECJ regularly leaves the Treaty somewhat aside when interpreting secondary law. But in my estimate, it never (or very exceptionally) leaves out the Charter, either when interpreting legislation in conformity with the Charter or in subjecting legislative choices to the proportionality test. Does this make the Charter hierarchically superior to the Treaties? Is the Charter, perhaps in conjunction with the values enumerated in Article 2 TEU – which mostly lists fundamental rights anyway, which make up more than half of the twelve values found in that provision – the real *Grundnorm* of the EU legal order?[32]

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[30] The phrase is from Neil MacCormick, 'Argumentation and Interpretation in Law' (1995) 9 Argumentation 467, 479.

[31] And the explanation van den Brink offers is that the interpretation of the Treaties is not an exclusive domain of the ECJ, but that the EU legislator legitimately co-interprets it. In this sense, we would only have primary law being interpreted to accommodate a particular formulation of secondary law and thus retain its validity; or, the EU legislator's version of primary law, in which the adopted legislation would fit, would be higher than the ECJ's version of primary law.

[32] cf the discussion in Luke Dimitrios Spieker, 'A Turn to Hierarchy: Conceptualising Substantive Hierarchies in EU Primary Law' in Luigi Lonardo and Alezini Loxa, *The Reasoning of the Court of Justice of the EU: A Normative Assessment* (OUP 2026, forthcoming), who proposed a hierarchical, pyramidal reorganisation of EU primary law: the founding values from Article 2 TEU as the EU's constitutional core at the top, the provisions of the Treaty and Charter that give specific expression to EU values as the EU's 'proper' constitutional law at

Let us move on to de Boer's precept for the legitimate constitutional review of EU law, which requires greater judicial deference to the choices made in the democratic political process. His general claim is that we need 'more room for political decision-making that allows for conflict and disagreement' as well as 'more democratic politics, not more courts' in the EU (at 296). (Martijn van den Brink would probably agree and for his part say that we need more demoicracy in the EU.)

Our understanding of democracy (and politics) is probably conceived with the historical experiences of European nation-states in mind. But there is always the question of the 'translatability' of normative concepts from the national/state context to the EU setting.[33] How successfully can we transfer the concept of democracy from national contexts – requiring, among other things, political equality, accountability, majority rule, and a certain proximity of decision-making to the citizenry – to a specific supranational context where all those things are lacking, and where we have no European demos nor a proper political sphere in the first place? And what can we expect from attempts to inject more democracy of this sort into the Union, especially in an era of lasting crisis of liberal constitutional democracy everywhere? An era in which at least one legislative seat (in the Council) is permanently occupied by a State which no one considers to be democratic anymore… Perhaps the solution for the EU lies in less traditional democracy (although not necessarily in more judge-made law).

At the same time, some could argue that EU integration was launched and developed precisely to escape the (democratic) conflicts, disagreements, and contestations that de Boer calls for, for better or for worse. They may say that the EU was made to prevent clashes over political ideologies and different theories of democratic or 'good' society, which would lead to its collapse.[34] Therefore, we have the central role of law, legalism, and courts (European and national),[35] all in the service of economic integration built around a common market, which ought to guarantee the survival of sovereign European nations in a globalised world. Perhaps van den Brink and de Boer are right when they say that we have reached the limits of the idea of 'integration through law' in the EU, and that things need to be changed, democratised, and politicised. But perhaps they are not right. Either way, the debate is far from over.

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the level below, and the remaining provisions of EU primary law as the EU's 'ordinary' constitutional law at the third and final level.

[33] Discussed recently by none other than Martijn van den Brink, 'Political, Not (Just) Legal Judgement: Studying EU Institutional Balance' (2024) 3 European Law Open 89.

[34] cf Andrew Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549.

[35] cf Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84 Modern Law Review 477, 482ff, describing the EU's constitutionalism as a variation of a post-fascist constitutionalism, which is borne out and grounded in a 'fear of the people' and works to prevent 'an "excess" of democracy', and whose characteristics are strong counter-majoritarian institutions, extensive judicial review, '[a] highly formalised, legalised and depoliticised [and hence constrained] understanding of democracy' in which 'the Constitutional Court [in the EU, the ECJ] is the unequivocal guardian of the constitution'.

The two monographs I have discussed in this review are exceptional pieces of scholarship. They complement and build upon each other so well that they can be read side by side, almost as if they were the product of a single mind.

The opening chapters are particularly strong, where the authors expound on the theoretical backgrounds to their analyses. Yet they do not merely reproduce existing knowledge in legal theory and the philosophy of legal interpretation, judicial review, or the legitimacy of courts and legislators. They offer many original insights, and link general points found elsewhere to the EU multi-level legal and institutional context. For this reason, both books can be recommended to anyone interested in these fundamental topics of EU constitutional law (and everyone should indeed have an interest in them). The authors address complex topics in clear and elegant prose, making the books suitable for both students and senior scholars. Given their extensive use of case law, they should be interesting and useful material for legal practitioners, too, including judges.

Some minor issues I had upon completing both books, as I have described them here, left me slightly underwhelmed. After they started so strongly, drawing me in with carefully constructed arguments from chapter to chapter and progressing without losing momentum or thrill, I expected a finale that would knock me off my feet. That did not happen, alas! But this is no fault of van den Brink or de Boer. Perhaps it is unreasonable to expect that there will come a book to completely transform one's thinking about law and courts. Still, these two kept me thinking hard, as I hope can be seen from these lines.

A thought that captures what I want to convey is: 'The Holy Grail, once we have obtained it, always becomes a tin cup'.[36] Yet these books are fascinating and graceful cups indeed.

A final reflection concerns the common theme of these books – what Jeremy Waldron calls 'against judicial review'. One of the classic comebacks of those who do not trust courts to keep the democratic political process in check and save us from slipping into the abyss is that, in the darkest of times, judges remained motionless. They could do little to prevent what was coming, be it the extreme examples of the rise of national-socialism or fascism in the first half of the twentieth century, or some milder examples of democratic and rule-of-law 'backsliding' in certain countries (and not only in the EU) in the early decades of the twenty-first century. I think that as things stand most would agree with this description of historical examples of judicial power(lessness). But I also believe that a better question is this: would people who lived through such times agree? The individuals who went before the courts seeking justice? The dictators-in-the-making or wannabe authoritarians who had to answer some annoying questions coming from the bench, or find a legal argument to evade judicial control, or a way to capture, 'stuff', and subjugate the courts? Were they all indifferent to the judicial

[36] Found in JC Smith, 'Machine Intelligence and Legal Reasoning' (1998) 73 Chicago-Kent Law Review 277, 309.

branch, convinced that judges are, by and large, irrelevant and impotent, and thus nothing to be worried about? That, to me, is the question that matters.