



Transnational Constitutionalism – Conflicts-Law Constitutionalism – Economic Constitutionalism: *The Exemplary Case of the European Union*

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Transnational Constitutionalism – Conflicts-Law Constitutionalism – Economic Constitutionalism

The Exemplary Case of the European Union

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Transnational Constitutionalism is a sociological given and a legal challenge. We observe the emergence of ever more legally-framed transnational arrangements with ever more power and impact. Does this kind of rule ‘deserve recognition’? Is it at all conceivable that the proprium of law can be defended against the rise of its informal competitors? This essay opts for a third way which neither listens to the siren songs on law beyond the state nor to the defences of nation-state constitutionalism as the monopolist of legitimate rule. The alternative submitted suggests that transnational legal ordering of the EU should build upon its re-conceptualisation as a ‘three-dimensional conflicts-law’ with a democracy-enhancing potential. This re-construction operationalises the ‘united in diversity’ motto of the Draft Constitutional Treaty of 2004. It preserves essential accomplishments of Europe’s constitutional democracies. It provides for co-operative problem-solving of transnational regulatory tasks, and it retains supervisory powers over national and transnational arrangements of private governance.

Transnational Political Constitutionalism has developed into a new sub-discipline of international law and European law in an overwhelming multitude of facets. The constitutive communality of all these efforts can be characterised as the search for a constituent power and legitimate transnational political authority that never were. The following deliberations in this essay will continue with this search for legitimate rule in a discipline that is treated in pertinent

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discussions with – at best – benign neglect, namely, conflict of laws, that is to say, private international law (PIL) in continental parlance. The EU is, arguably, a case of exemplary importance in both promising and less fortunate respects. The EU is the most densely juridified of all transnational systems of governance. It has experienced long-lasting efforts to establish a more legitimate or even political constitution, but can better be characterised as a steady strengthening of market governance and a move to a ‘Rule of Economics’,¹ in legal approximation to ‘merely economic’ constitutionalism. The distinctions in the title of this essay indicate a historical sequence and conceptual alternatives. ‘Conflict-law constitutionalism’ is, conceptually speaking, a less ambitious project than state- or federation-building. Elements of this alternative have, in fact, been realised. Today, however, conflicts-law constitutionalism designates a road that has not been taken. The winner in the contest of constitutional alternatives is economic constitutionalism, a system of governance characterised by a striking difference between the strength of its regulatory power and the weakness of its legitimation.

The mentioning of conflicts law and the assertion of a normative quality that would deserve recognition needs to be explained. As indicted, conflict of laws and PIL are not in the mindset of European law scholarship. Some reasons for this ill-fated treatment of PIL seem understandable. PIL is perceived as a province of specialised legal circles operating with opaque terms and methods, which are simply inaccessible not just to many lawyers but even more so to non-lawyers, and, in particular, to political and other scientists. This role of a poor relation in its present academic environment is undeserved. PIL builds upon a fascinating past, and a rich conceptual history. Furthermore, transnational political constitutionalism has become an object of innovative PIL scholarship,² a genuine endeavour ‘to fill the normative and political vacuum of transnational legal theory’.³

*CONFLICTS-LAW CONSTITUTIONALISM AS A CURE: THE DEMOCRATIC
DEFICITS OF BOTH LEVELS OF EUROPEAN GOVERNANCE*

The following deliberations will not even try to do justice to the libraries of literature on transnational legal theories, and even refrain from discussing the recent approaches in PIL scholarship which address - be it explicitly or more implicitly - the concerns of transnational

¹ D. Rodrik, *Economics Rules. The Rights and Wrongs of the Dismal Science* (2018).

² Suffice it to mention Horatia Muir Watt and her PILAG project comprising an impressive range of excellent scholarship; see her ‘Private International Law beyond the Schism’ (2011) 2 *Transnational Legal Theory* 347..

³ G.C. Leonelli, ‘The Postmodern Normative Anxiety of Transnational Legal Studies. The Challenge of Legal Rematerialization beyond the Nation-State’ in P. Zumbansen (ed.) *The Oxford Handbook of Transnational Law* (2021) 112; id., *Transnational Narratives an Regulation of GMO Risks* (2006) 37-65

political constitutionalism. They will instead focus on a summary of the conflicts-law approach, and a defence of its specifics in three steps. The first section will sketch out the notion of conflicts law on which the arguments build (I). The second section will explain how this conflicts-law approach seeks to respond to the legitimacy *problématique* (II). Finally, the third section will deal with the poverty of Europe's economic constitution after the financial crisis (III).

I. The Legacy of Conflict of Laws/Private International Law

Since conflict of laws (PIL) is uncharted territory in European studies, it may be useful to begin with some general, albeit very cursory, remarks. The queries that preoccupy the discipline for hundreds of years are of ever more increasing importance: if, in a forum of law, a dispute between private litigants is connected to a variety of jurisdictions, we need to know to which legal order we should turn to in our search for the correct legal answer. This query comes, however, in varying guises. Its discussion will have to consider the specifics of the potentially applicable legal provisions. 'Classical' PIL, in its authoritative conceptualisation by Friedrich Carl von Savigny back in 1848,⁴ was concerned with the relations between private parties, and understood its mission as ensuring a just resolution of the dispute. It had hence to rely on transnational yardsticks which promised to ensure that the dispute would be handled uniformly in all the concerned jurisdictions. According to the mainstream PIL scholarship, the validity of this *leitmotiv* has remained unaffected in principle by the post-classical transformations of law and legal thought,⁵ whereas the opponents of the dominating tradition argue that PIL must adapt to these transformations and reflect the social and political fabric of constitutional democracies – in what way is, of course, highly controversial.

My resort to private international law in my plea for a re-conceptualisation of European law as conflicts law is indebted to the works of two master thinkers, one from American conflicts law, the other a German PIL scholar. The American is Brainerd Currie, the cheerleader of the so-called American conflicts revolution of the 1960s;⁶ the other is Rudolf Wiethölter, the so-to-speak natural son of Gerhard Kegel, the post-war successor of the legendary Ernst Rabel, a brilliant exponent of the classical Savignyan tradition, probably the

⁴ Friedrich Carl von Savigny, *System des heutigen römischen Rechts* (Vol. 8, 1849) (Engl.: *A Treatise on the Conflict of Laws*, 1869).

⁵ For a seminal analysis, see Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal* (2006) 19.

⁶ B. Currie, *Selected Essays on the Conflict of Laws* (1963).

most renowned representatives of Germany's post-war PIL scholarship. Wiethölter was to transcend the works and the views of his mentor in fundamental respects without, however, disclaiming his indebtedness to Kegel.⁷

Three aspects of Currie's conflicts law theories have influenced my re-conceptualisation of European law:

- a) All law in Europe, that of the EU as well as those of its Member States, is 'socially embedded'. This is more than a sociological given,⁸ and it carries with it legal messages, which are implicit in the Polanyian understanding of the notion.⁹ It is not to deny that 'the idea of embeddedness lacks theoretical specificity'.¹⁰ My reference is to the objectives of legal rules and the policies underlying them. A conflict of laws decision has then to deal with conflicting policies, and the interests which they promote. Conflict of laws cases are hence inherently political. The challenge that decision-makers have to face is the handling of controversies with political - as opposed to 'purely legal' - dimensions.
- b) Currie's suggestions as to the implications of these anything-but-revolutionary insights initiated the 'American conflicts revolution'. Most provocative was his thesis that controversies over the application of foreign law can be, and, indeed, should be, traced back to the policies underlying the rules in question and re-constructed as controversies over the 'governmental interests' of the concerned jurisdictions. As to the implications of his 'governmental interest analyses' that he differentiated: (a) Often such conflicts are 'false' because the governmental interests of only one of the involved jurisdictions are threatened – in which case that state's law should then be applied; (b) A second category is the constellation in which conflicts can be resolved through restrained and moderate interpretation of governmental interest's ('avoidable conflicts'); and (c) Where this is not possible (in 'true conflicts'), Currie insisted that the forum state applied its own

⁷ R. Wiethölter, 'Begriffs- oder Interessenjurisprudenz: Falsche Fronten im IPR und Wirtschaftsverfassungsrecht - Bemerkungen zur selbstgerechten Kollisionsnorm' in *Festschrift für Gerhard Kegel*, (1977) 213.

⁸ A. Vauchez, 'The Map and the Territory: Re-assessing EU Law's Embeddedness in European Societies' (2020) 27 *Maastricht Journal of European and Comparative Law* 133.

⁹ For a subtle reconstruction see R. Cotterell, 'Rethinking "Embeddedness": Law, Economy, Community' (2013) 40 *Journal of Law and Society* 49.

¹⁰ Cotterell, *ibid.*, 54.

law. True conflicts are of a political nature, he argued, ones which courts are not legitimated to resolve in favour of a foreign state.¹¹

Currie's analytical scheme provides illuminating insights into the *problématique* of legal harmonisation. In each and every harmonisation project, and likewise in controversies over the compatibility of national law with the 'governmental interests' of the concerned jurisdictions, such conflicts are plainly visible. Their legal evaluation, however, has to distinguish between normative concerns and parochial motivations or unwarranted protectionism motivations. By far more problematical and difficult to digest for the European law community are Currie's views on 'true conflicts'.

- c) At first sight, 'true conflicts' have nothing exceptional. As in the magnitude of conflicts cases, decision-makers have to come to terms with the core problem haunting the discipline from time immemorial: two (or more) diverse jurisdictions or non-state orders claim legal governance over a conflict with points of contact to both (or all) of them. The laws of these jurisdictions are both legitimate according to constitutional standards, which they all recognise in principle.¹² Currie's most provocative thesis: the resolution of conflict constellations, in which the policies of the concerned jurisdictions are irreconcilable ("true conflicts") and not amenable to moderate and restrained interpretation, should be left to a higher authority with legislative powers. As long as such responses are unavailable, courts should stick to their domestic law.

This is a provocation not just of for traditionalists.¹³ Unfortunately, Currie did not elaborate on the theoretical premises of his thesis. What may seem somewhat parochial is, however, highly topical and a concern shared by renowned constitutionalists and political

¹¹ B. Currie, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function' in B. Currie, *Selected Essays on the Conflict of Laws* (1963) 188, at 272: '[The c]hoice between the competing interests of co-ordinated states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary: ... the court is not equipped to perform such a function; and the Constitution specifically confers that function upon Congress.'

¹² A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, at 1024: 'Accordingly, the famous "governmental interest approach" developed within conflicts law, which has successfully overcome the formalistic view of mere norm conflicts through the attention it pays to the substantive policy conflicts existing between the states involved, is not helpful in the case of regime collisions.'

¹³ See G. Teubner, 'State Policies in Private Law? A Comment on Hanoch Dagan' (2008) 56 *American Journal of Comparative Law* 835.

scientists. Suffice it here to mention the ‘over-constitutionalisation’ thesis of Dieter Grimm,¹⁴ Fritz W. Scharpf’s life-long concern with the political power of courts,¹⁵ and, most recently, Justice Lübbe-Wolff’s dissent in the OMT order.¹⁶ The *problématique* has assumed dramatic dimensions in the context of the financial and state debt crises, to which we will turn in Section III.

Rudolf Wiethölter, my German key witness, has much more to do with all this than is plainly visible. As already mentioned, Wiethölter started his academic career as a disciple of Germany’s most important PIL scholar.¹⁷ He kept this profile for a good while,¹⁸ before he turned to economic law and legal theory.¹⁹

Of much more importance in the present context are Wiethölter’s later reflections on the state of the discipline in the *Festschrift* for his mentor.²⁰ The one I underline is his insight that the core problem of conflicts law, namely, the claim for the recognition and application of competing legitimated legal provisions is present not only between different jurisdictions but also within constitutionally-consolidated legal orders. Just like Currie, Wiethölter underlines the inherently political quality of conflicts law. He did not, however, subscribe to Currie’s diagnosis that such ‘true conflicts’ are ‘undecidable in a court of law’. Wiethölter’s search of a way out was, in the 1980s, indebted to Habermas’ notion of ‘proceduralisation’.²¹ This

¹⁴ D. Grimm, ‘The Democratic Costs of Constitutionalisation: The European Case’ (2015) 21 *European Law Journal* 460.

¹⁵ F.W. Scharpf, ‘De-constitutionalisation of European Law: The Re-empowerment of Democratic Political Choice’ in S.M.M. Garben and Inge Govaere (eds.), *The Division of Competences between the EU and the Member States* (2019), and, much earlier, id., *Grenzen der richterlichen Verantwortung: Die Political-question-Doktrin in der Rechtsprechung des amerikanischen Supreme-Court* (1965); id., *Die politischen Kosten des Rechtsstaats: Eine vergleichende Studie der deutschen und amerikanischen Verwaltungskontrollen* (1970).

¹⁶ G. Lübbe-Wolff, Dissenting Opinion, available at: http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html.

¹⁷ See his *Einseitige Kollisionsnormen als Grundlage des Internationalen Privatrechts* (1956), reprint 2017.

¹⁸ His essay ‘Zur Frage des internationalen ordre public’ (1967) 7 *Berichte der Deutschen Gesellschaft für Völkerrecht* 133 crossed the disciplinary boundaries between PIL and international law; in the introduction to ‘Gutachten zum “Internationales Nachlaßverfahrensrecht”’, in W. Lauterbach (ed.), *Vorschläge und Gutachten zur Reform des deutschen internationalen Erbrechts* (1969) 141-184, it took him a couple of pages in the introduction to uncover the theoretical foundations of PIL.

¹⁹ It may be worth mentioning that it was Wiethölter who made me aware of Brainerd Currie and supervised my thesis *Zum Funktionswandel des Kollisionsrechts. Die ‘Governmental Interest Analysis’ und die ‘Krise des Internationalen Privatrechts’* (1971); reprint 2020.

²⁰ N. 7 above.

²¹ R. Wiethölter, ‘Proceduralisation of the Category of Law’ in C. Joerges and D.M. Trubek (eds.), *Critical Legal Thought: An American-German Debate* (1985) 501; id., ‘Materialization and Proceduralization in Modern Law’ in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (1986) 221.

commitment²² he has later restated as the quest for a societal *Recht-Fertigungs-Recht* (law of law production).²³ In a trivialising reading, this means the taming of the unruly political dimension of the economy and society through legal operations. Two aspects of this are important for my argument. (1) Much more than Habermas, Wiethölter is aware of the political dimension of ‘the economic’. (2) He defends the idea of a law-mediated legitimacy of political ordering, albeit one that is intimately both linked to and dependent upon societal processes.²⁴

These methodological remarks should help to explain my plea for the re-construction of European law as a ‘new type of conflicts law’ and its specific ideational background. The EU harbours a variety of legitimate legal orders. A political authority, comprehensively legitimated to replace this diversity is, however, unavailable. Europe must hence cope with its diversity and the conflict constellation that this diversity brings with it.

II. From ‘Deliberative Supranationalism’ to a ‘Three-dimensional Conflicts Law’

When Jürgen Neyer and I first submitted the vision of ‘deliberative supranationalism’ as a counter-concept to the orthodox understanding of the supremacy of European law, Europe was then on its way to the ‘completion of the internal market’, and the consummation of this market-building by the Maastricht Treaty and the EMU. Fritz W. Scharpf had, along with many others, raised very critical concerns about the neoliberal drift of this integration mode.²⁵ However, European market-building, after the Single European Act and President Jacques Delors’ White Paper,²⁶ was, in essential respects, a modernising project, initiating in particular a turn to ‘social regulation’, i.e., initiatives in the fields of consumer health and safety, safety at work, and environmental protection.²⁷ It was our objective, when launching the idea of deliberative supranationalism, to explore the potential of this move. Foodstuffs regulation was a field which

²² The discussions on proceduralisation are alive and quite well; see T. Sheplyakova (ed.), *Prozeduralisierung des Rechts* (2018) with an instructive survey on the main proponents at 19 ff., incidentally also with a defence against the wide-spread perception of proceduralisation as a sociologically overly naïve exercise at 21; on this latter point, see I. Maus, ‘Habermas – Zur Rezeption von Theorie’, (1999/6) *Blaetter für deutsche und internationale Politik* 727.

²³ R. Wiethölter, ‘Justifications of a Law of Society’ in O. Perez and G. Teubner (eds.), *Paradoxes and Inconsistencies in the Law* (2005) 65, available at: www.jura.uni-frankfurt.de/ifawz1/teubner/RW.html.

²⁴ For a sufficiently sophisticated account, see G. Teubner, ‘Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter’ in O. Perez and G. Teubner (eds.), *On Paradoxes and Inconsistencies in Law* (2006) 41.

²⁵ See, e.g., his ‘Negative and Positive Integration in the Political Economy of European Welfare States’ in M. Rhodes and Y. Mény (eds.), *The Future of European Welfare: A New Social Contract?* (1998) 157.

²⁶ White Paper on the Completion of the Internal Market, COM (85)310 final of 14 June 1985.

²⁷ Suffice it here to recall G. Majone’s powerful promotion of this development: see his ‘The European Community as a Regulatory State’, *1994-VII Collected Courses of the Academy of European Law*, (1996), and his *summa: Regulating Europe* (1996).

suggested itself for an exemplary analysis for a variety of reasons. The market for foodstuffs is economically of utmost importance, characterised by both intense interdependences and socio-economic varieties, as well different regulatory and cultural traditions. The need for a Europeanisation not only of the functioning of food markets, but also of the responses to the quest for the safety of foodstuffs seemed obvious. The European institutional response to this twofold challenge was the establishment of a bundle of networks in which officials of the Member States, expert communities, and, to some degree, the representatives of ‘social interests’ participated, under the guidance of the Commission, in the elaboration of risk assessments and standard-setting.²⁸ The operation of these networks did not fit into the doctrinal world of European law, let alone into the hierarchical understandings of the relations between the Community and its Member States. What we observed, instead, were co-operative efforts to search for mutually-acceptable responses to concerns for health and safety. We were impressed by the qualities of these processes and characterised this mode of European governance as ‘deliberative’, as opposed to confrontational bargaining, adding confidently and somewhat provocatively that we had discovered a new version of legitimate transnational governance. We underlined, in that ‘foundational’ essay and often enough thereafter, that we pursued a non-technocratic democratisation agenda. Our core concern and argumentation were, and continue to be, in our view, crystal clear:

We must conceptualize supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state’s constitutional legitimacy but at the same time clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires. The legitimacy of supranational constraints imposed upon the sovereignty of constitutional states can in principle be easily understood. Extra-territorial effects of national policies may be intended or not, they are real and unavoidable in an economically and socially interdependent community...What supremacy requires, then, is the identification of rules and principles ensuring the coexistence of different constituencies and the compatibility of these constituencies’ objectives with the common concerns they share. Community law is to lay down a legal framework which structures political deliberation about exactly these issues. It is a constitutional mandate

²⁸ For detailed updated accounts, see E. Vos, ‘50 Years of European Integration, 45 Years of Comitology’, in A. Ott and E. Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives* (2020), 31-56; C. Joerges and J. Falke (eds.), *Das Ausschußwesen der Europäischen Union. Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung* (2000).

of the ECJ to protect such legal structures and principles and to resolve controversies surrounding their contents.²⁹

We neither insinuated that ‘deliberative supranationalism’ should be equated with the political democracy established in the Member States³⁰ nor did we suggest that deliberations between experts would overcome conflicts over the distributional implications of regulatory standards in the foodstuffs sector or anywhere else.³¹ Two clarifications or corrective addenda should nevertheless be underlined:

- (1) The discrepancy between democratic constitutionalism and deliberative supranationalism does not discredit the latter’s democratic credentials.³² The passage from the 1997 essay just cited is in my view still valid. To cite just one among a good number of approving comment: ‘Only through transnational co-operation can, under conditions of interdependency, the domination of others be transformed into legitimate rule. In this understanding, the integration project, if properly institutionalised, is not democratically deficient, but a necessary precondition of democratic rule within constitutional democracies’ (my translation).³³
- (2) ‘Deliberative Supranationalism’ has been institutionalised in the fields of regulatory politics. It represents a post-conventional mode of legal governance: a ‘second order (dimension of) conflict of laws’.³⁴ This institutional mode of

²⁹ ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’ (1997) 3 *European Law Journal* 273; [‘Transforming Strategic Interaction into Deliberative Problem-solving: European Comitology in the Foodstuffs Sector’, (1997) 4 *Journal of European Public Policy* 609]; the argument on the limitations of the democratic legitimacy of national governance has been defended by J. Habermas; see his ‘Does the Constitutionalization of International Law Still Have a Chance?’, C. Cronin (trans) in J. Habermas, *The Divided West* (2007) 113–93, 176.

³⁰ R. Schmalz-Bruns, ‘Deliberativer Supranationalismus’ (1999) 6 *Zeitschrift für Internationale Beziehungen* 185-242.

³¹ But see F.W. Scharpf, ‘Introduction: The Problem-solving Capacity of Multi-level Governance’ (1997) 4 *Journal of European Public Policy* 520-538.

³² For an adequate re-construction (not a defence), see F. Rödl, ‘Democratic Juridification without Statisation: Law of Conflict of Laws Instead of a World State’ in C. Joerges, P.F. Kjaer and T. Ralli (eds.), ‘A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation’, (2011) 2 *Transnational Legal Theory* 193-214.

³³ U.K. Preuß, ‘Gibt es eine völkerrechtliche Demokratietheorie?’ in H.M. Heinig and J.P. Terhechte, *Postnationale Demokratie, Postdemokratie, Neoetatismus* (2013), 169-78. But see for a strong critique A. Somek, ‘The Darling Dogma of Bourgeois Europeanists’, (2014) 20 *European Law Journal*, 688.

³⁴ See, e.g., C. Joerges, P.F. Kjaer and T. Ralli, ‘A New Type of Conflicts Law as Constitutional Form in the

governance ‘proceduralises’ the conventional modes of European governance.³⁵

This characterisation is certainly not sufficiently substantiated to overcome the concerns with an overburdening of deliberative exchanges in which regulatory politics have to cope with the divergencies of policy orientation, socio-economic differences, and distributional implications. This, however, is not a failure of the category, but a reminder of both the pre-conditions for its functioning and the mode of its operation in a ‘discovery procedure of practice’.³⁶

II.1 The ‘Three Dimensions’

The many steps taken in the further development of the conflicts law approach have generated a comprehensive idea of a ‘three-dimensional conflicts law as Europe’s constitutional form’.³⁷

This idea in a nutshell:³⁸

- a) *Conflicts law of the first dimension.* The European multilevel system generates a variety of conflicts: (1) Vertical conflicts between the various levels of European governance; (2) horizontal conflicts which are produced in the interactions between Member States; and (3) diagonal conflicts which result from the fact that the regulatory competences of the national and European level typically cover

Postnational Constellation’, (2011) 2 *Transnational Legal Theory*, 153-165, at 160 f.; C. Joerges and A. Herwig, ‘The Precautionary Principle in Conflicts-law Perspectives’, in G. Van Calster and D. Prévost (eds.), *Research Handbook on Environment, Health and the WTO* (2013) 3-40; the distinction is indebted to J.H.H. Weiler’s notion of ‘international law as regulation’; see his ‘The Geology of International Law - Governance, Democracy and Legitimacy’ (2004) 64 *Heidelberg Journal of International Law (ZaöRV)* 547.

³⁵ Joerges and Neyer, n. 29, at 276, 281.

³⁶ On this notion, see II.2 below and the references to ‘proceduralisation’ in n. 22 above.

³⁷ See, e.g., ‘United in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form’, in R. Nickel and A. Greppi (eds.), *The Changing Role of Law in the Age of Supra- and Transnational Governance* (2014) 125.

³⁸ There is no need and no space here to explore tensions and affinities with similar approaches such as, e.g., F.W.Scharpf’s search to reconcile community and national autonomy (see his ‘Community and Autonomy: Multilevel Policy-making in the European Union’ (1994) 1 *Journal of European Public Policy* 219), K. Nicolaïdis’ notion of *demoicracy* (for recent restatements see ‘The Idea of European Demoicracy’ in J. Dickson and P.Z. Eleutheriadēs (eds.), *Philosophical Foundations of European Union Law* (2012) , 254; ‘European Demoicracy and its Crisis’ (2013) 51 *JCMS* 351), R. Bellamy’s plea for a ‘republican Europe of sovereign states’ (*A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (2019)), F. Schimmelfennig’s observations on differentiated integration (F. Schimmelfennig, D. Leuffen and B. Rittberger, ‘The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation’, (2015) 22 *Journal of European Public Policy* 764, and last, but not least, the literature on constitution pluralism; plurality can be understood as a conflict constellation. To argue that political constitutionalism and economic constitutionalism operate in different spheres is to avoid the crucial issue, namely, the conflict between democratic and economic ordering; see J. Přibáň, ‘The Concept of Self-Limiting Polity in EU Constitutionalism: A Systems Theoretical Outline’, in J. Přibáň (ed.), *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* (2016) 37, at 51, and R. Michaels, ‘Global Legal Pluralism and Conflict of Laws’ in P. Schiff Berman (ed.), *The Oxford Handbook of Global Legal Pluralism* (2020), 23.1.

only one aspect of the problems to be resolved. In diagonal conflict constellations, it is particularly apparent why the conflicts law approach cannot be reduced to the choice of one particular legal order. In horizontal conflict constellations, as the jurisprudence of the ECJ/CJEU on reciprocal recognition substantially attests, autonomy-sensitive and community-prone mitigation of interests is often possible. The responses to diagonal conflicts require co-operative efforts. The example - to which I will return - is the division of the European and national competences in the EMU.

- b) *Conflicts law of the second dimension* concerns a replacement of national by transnational solutions. This goes beyond the harmonising function that the conflicts law of the first dimension can produce. As early as 1958, Ernst Steindorff had argued that there was a class of ‘international material conduct’, which would be impervious to ‘nationalisation’ through the application of a particular law, in which case international substantive norms must take the place of the referential norm of private international law.³⁹

In the EU, this kind of substitution seems imperative with the interdependence of problem scenarios, the erosion of national regulatory potential, and the concomitant necessity of and duty of co-operation. Most important here is the field of social regulation, which has seen the establishment of complex transnational regimes. European Comitology is an early example. The irrefutable need for a transnational, socially regulative policy alone has furthered the co-operation of bureaucracies, the establishment of agencies, and the passing of decision-making tasks (or their preparation) to epistemic communities. The ensuing conceptual, institutional, and normative problems are enormous. At stake is the idea of law-mediated legitimacy and legitimate governance against the ‘lure of technocracy’.⁴⁰ The second dimension is correspondingly concerned with the elaboration of these decision-making processes, the organisation of the decision-maker, and the recognition and delimitation of exit options for the participating

³⁹ E. Steindorff, *Sachnormen im internationalen Privatrecht* (1958).

⁴⁰ J. Habermas, *The Lure of Technocracy* (2015).

jurisdictions – in short, a constitutionalisation of transnational forms of co-operation.⁴¹

- c) The *third dimension of conflicts law* reacts to the ‘privatisation’ of regulative tasks and the development of new ‘governance arrangements’, which can be observed at all levels of governance. A sharp differentiation (primarily) of all the administratively anchored regulative forms with which the conflicts law of the second dimension is concerned appears neither possible nor necessary. At international level, the name of the game is not to discredit or to block inevitable developments. The conflicts law approach does not, however, relinquish its normative claims. It can be deployed against interpretations involving a self-justifying ruling power, which no longer distinguishes between the facticity of transnational governing infrastructure and the recognisable worth of transnational governance. The conflicts approach can be interwoven with international civil procedural law and the recognition of judgments and arbitration.

The most recent further development of the conflicts law approach concerns the supranational correction of the democracy failures of nation states.⁴² It builds upon suggestions submitted by political economist Dani Rodrik,⁴³ which take up ideas of the political scientists Robert Keohane, Stephen Macedo, and Andrew Moravcsik.⁴⁴ These authors all question the viability of the widely-shared expectations of the problem-solving potential of transnational governance. They promote, instead, a model of ‘democracy-enhancing global governance’. Affinities, in particular with Rodrik’s argument of the democratic concerns of the conflicts-law approach seem obvious. Rodrik submits that ‘the policy failures that exist arise not from weaknesses of global governance, but from distortions of domestic governance’. He adds: ‘As a general rule, these domestic failures cannot be fixed through international agreements or multilateral cooperation. This twofold reserve is an innovative move. Governance failures must

⁴¹ On all this C. Joerges, ‘Deliberative Supranationalism’ - Two Defences’, (2002) 8 *European Law Journal* 133; ‘Rethinking European Law’s Supremacy: A Plea for a Supranational Conflict of Laws’, in B. Kohler Koch and B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union* (2007) 311.

⁴² The following remarks draw on C. Joerges, ‘Responding to Socioeconomic Diversity in the European Union (and to Steven Klein’s Essay) with Democracy-Enhancing Conflicts Law’, *Global Perspectives* <https://doi.org/10.1525/gp.2021.18788>. *Global Perspectives* (2021) 2 (1): 18788 at 4-5.

⁴³ D. Rodrik, ‘The Future of European Democracy’, in L. van Middelaar and Ph. Van Parijs (eds.), *After the Storm. How to save democracy in Europe*, Tielt (2015) 53.

⁴⁴ R.O. Keohane, S. Macedo, and A. Moravcsik, ‘Democracy-Enhancing Multilateralism’ (2009) 63 *International Organization* 1.

be corrected where they occur. In view of their manifold causes and the varieties of national failures, they cannot be expunged by some uniform transnational fiat. What the supranational level should do, instead, is to encourage self-corrections at the national level – with global oversight restricted to procedural safeguards – such as transparency, accountability, use of scientific evidence–intended to reinforce democratic deliberation’.⁴⁵ Jürgen Neyer and I had focused on the external effects of nation-state governance and their control through European prerogatives. The idea of democracy enhancing conflicts law seems softer but reaches deeper. It seeks to correct not only the outcome of national policy-making, but to extend transnational co-operation to interventions into the processes of policy formation.

II.2 A Methodological Addendum

An essential element of all these suggestions is the re-construction of problem-solving through law as a ‘discovery procedure of practice’ in diagonal conflicts and in both the second and the third dimensions of conflicts law. They all have in common that legal responses cannot rely on ready given rules. Such responses must, instead, be creative innovations. As such, they cannot rely on competitive processes and the type of innovations that markets can generate. The ‘discovery procedure of practice’ is hence a counter-concept to F.A. von Hayek’s famous theorizing on ‘competition as a discovery procedure’.⁴⁶ I first used it in national contexts as an alternative not only to Hayek but also to interventionist law and policy,⁴⁷ thereafter in the analysis of European decision-making,⁴⁸ and, in particular, of analyses of the integration process as such.⁴⁹ The latter move is important. Its messages: We cannot separate European law-making and national processes, but we have to analyse their interaction. This methodological approach is of substantive importance. It reminds us that neither a supranational state nor a defence of the nation state can be a legitimate *finalité* of the integration process.

⁴⁵ D. Rodrik, *ibid.*,

⁴⁶ F.A. von Hayek, ‘Competition as Discovery Procedure’ (Wettbewerb als Entdeckungsverfahren, 1968), (2002) 5 *The Quarterly Journal of Austrian Economics* 9.

⁴⁷ See ‘Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples’ in T. Daintith and G. Teubner (eds.), *Contract and Organization* (1986) 142.

⁴⁸ ‘The Market without the State? The “Economic Constitution” of the European Community and the Rebirth of Regulatory Politics’, EUI Working Paper Law 1996/2.

⁴⁹ In particular: ‘Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example’, (2008) 8 *European Review of Private Law* 1; ‘What is left of the European Economic Constitution? A Melancholic Eulogy’ (2005) 30 *European Law Review* 46.

The specifics and the potential of the notion can be substantiated further with the help of the distinction between the knowledge generated by markets, by expert communities, and deliberative exchanges, which Lisa Herzog has developed in a critique of Hayek's seminal essay on 'The Use of Knowledge in Society'⁵⁰ and the elaborated further in her recent monograph.⁵¹ In all of the conflict constellations just mentioned, and likewise in the case studies of the domestic conflicts cited above,⁵² the search for responses has to weigh and synthesise normative deliberations, the views of experts, and market-generated knowledge. These processes are sociological but always have normative and political imprints. Due to their multi-faceted embeddedness, they have democratic credentials. They deserve legal recognition, so we submit, where the discovery process has to go through multiple stages of legal examination of the deliberative quality of its operation.

There is certainly utopianism in the preceding analyses and suggestions. Nevertheless, they also share some merit in their refusal to become bogged down in undemocratic transnational technocracy. The topicality of such merits seems obvious in view of Europe's turn to authoritarian managerialism triggered by the financial and public debt crisis. To this state of the integration project we turn in the next section.

III. The Poverty of Post-ordoliberal Economic Constitutionalism

Transnational political constitutionalism and conflicts-law constitutionalism are competing projects in an uneven competition. This final section will argue that both of them have been *de facto* outcompeted. The winner, so we submit, is economic constitutionalism.⁵³ This notion has attracted much attention after the retraction of the Treaty of Lisbon from the constitutional ambitions of the ill-fated Constitutional Treaty of 2004. Economic constitutionalism promises to provide a much-needed alternative to a democratic legitimation of Europe's precarious legitimacy.

⁵⁰ American Economic Review (1945) 35, 519.

⁵¹ L.M. Herzog, 'Markt oder Profession? Die Politik zweier Wissenslogiken', *Leviathan* (2018), 46, 189 and id., *Citizen knowledge. Markets, experts, and the infrastructure of democracy* (2022, forthcoming with OUP), in particular, Chapter III.

⁵² Nn. 11 et seq.

⁵³ For a recent comprehensive reconstruction of its conceptual history and the present debate see G. Grégoire and X. Miny (eds.), *The Idea of Economic Constitution in Europe* (2022), available at <https://brill.com/view/title/63005?language=en> (open access).

The legitimacy crisis of Europe's post-Maastricht legal framework and system of governance as established by the EUM and its implementation after the financial crisis and system of governance is manifold. To name just three concerns:⁵⁴

- 1) A democracy concern: unlike all constitutional democracies, including those of the EU, the EMU is devoid of an explicit social dimension. 'The social' has remained a primarily national prerogative based upon and requiring democratic legitimation. Non-majoritarian institutions cannot generate this legitimacy.
- 2) A rule of law concern: the ECB exercises broad discretionary powers which cannot be guided by legal rules and are subject only to limited judicial control.
- 3) Constitutional amendment concerns: The assignment of monetary policy and fiscal policy powers to different masters is a constitutive feature of the EMU. Democratically-legitimated responses to the conflicts between fiscal/economic and monetary policies have not been established.⁵⁵

A system of governance with such deficiencies is no longer compatible with the reference in Article 2 TEU to democracy and the rule of law – at least in the inherited understandings of these notions. To be sure, recourse to these constitutional traditions as they have been realised in the constitutional democracies of the Member States has fallen into some disregard after the failure of the Constitutional Treaty of 2004. Under the Lisbon Treaty, it has become more common to employ the more cautious labels such as 'constitutionalisation' or 'constitutionalisation processes'. A further candidate for a reorientation of the European commitments is 'economic constitutionalism', the third constitutional variety mentioned in the title. It is unsurprising that this notion has, after decades of benign neglect by European law scholarship, attracted much interest in the post-2004 constitutional debates.⁵⁶ Indeed, it does

⁵⁴ For a concise summary see A.J. Menéndez, 'The Unconstitutional Mutation of the European Union', in D. Innerarity, J. White, C. Astier and A. Errasti (eds.), *A New Narrative for a New Europe* (2021) 161. For a abrief and illuminating account of a renowned economist to the OMT controversy see A. Mody, 'Did the German Court do Europe a Favor?', Bruegel Working Paper 2014/09, available at: [aei.pitt.edu/52709/1/Did_the_German_court_do_Europe_a_favour%2D_\(English\).pdf](http://aei.pitt.edu/52709/1/Did_the_German_court_do_Europe_a_favour%2D_(English).pdf), at 4 and 6: Did 'the OMT [try to] bypass the intent of the Treaty by creating a de-facto fiscal union [...]. If so, without their explicit authorisation, countries had become fiscally responsible for the mistakes of other member countries [...] Can such a fiscal union be implicitly located in the ECB without the political willingness to transparently achieve that elusive goal?'

⁵⁶ The literature is abundant. Suffice it to mention a leading constitutional theorist: N. Walker, 'Where's the "E" in Constitution? A European Puzzle', in A. Skordas, G. Halmai and L. Mardikian (eds.), *Economic Constitutionalism in a Turbulent World* (forthcoming); available at: <https://ssrn.com/abstract=3642534>.

deserve close scrutiny. Such closer inspection, we submit, will reveal that economic constitutionalism is unfit to provide an *Ersatz* for constitutional democracy or conflicts-law constitutionalism.

Our argument will take a detour and start with a brief excursion into conceptual history.

III.1 Weimar Revisited: Ordoliberalism as a Counter-concept to Democratic Constitutionalism

Economic constitutionalism is the trademark of Germany's ordoliberalism, a transdisciplinary theory of law and economic. This school of thought originated in the turmoil of Weimar, Germany's first democratic republic. There is no space and no need here to summarise its ideational history.⁵⁷ In the light of the above-cited deficiencies of European rule, we have to underline, however, the strong ordoliberal commitment to the rule of law and the specifics of the kind of economic governance that ordoliberalism has sought to promote. Two elements deserve particular attention:

- (1) The functioning of the economy and society should rely on a general political decision in favour of *competitive ordering*. This ordering function should be realised 'through law' and supervised by non-majoritarian institutions. The synthesising of law and economics is the trademark of the ordoliberal tradition. As Michel Foucault commented: 'The juridical gives form to the economic, and the economic would not be what it is without the juridical.'⁵⁸
- (2) Competitive ordering must not be interfered with by political interventions in favour of social justice or other distributional objectives.⁵⁹

These harsh postulates were originally directed against the advocates of a *Wirtschaftsdemokratie* (economic democracy) such as Hugo Sinzheimer, the key social democratic figure in the Weimar Republic who had coined the notion of the economic constitution.⁶⁰ This origin is widely forgotten. It explains, however, the insistence of the ordoliberal countermove and tradition on a normative framing of economic governance. This

⁵⁷ See, for a comprehensive critical account, T. Biebricher and F. Vogelmann (eds.), *The Birth of Austerity German Ordoliberalism and Contemporary Neoliberalism*, (2017).

⁵⁸ The Birth of Biopolitics. Lectures at the Collège de France 1978-79 (2014) 163.

⁵⁹ See, e.g., with particular clarity, F. Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' (1966) 17 *ORDO-Jahrbuch* 75.

⁶⁰ See E. Christodoudilis, *The Redress of Law. Globalisation, Constitutionalism and Market Capture* (2021), 368 ff; G. Grégoire, "'The Economic Constitution under Weimar. Doctrinal Controversies and Ideological Struggles', in id. and X. Miny (eds.) *The Idea of Economic Constitution in Europe* (2022), n.53 above.

commitment remained alive in the successive conceptual history of ordoliberalism, as elaborated by the Freiburg School in the early years of the Federal Republic. Ordoliberal theorems were highly influential at that time. However, by the 1950s, the movement had experienced very considerable setbacks. The Federal Constitutional Court rejected the theory of the economic constitution explicitly,⁶¹ social interventionism became strong, and Antitrust Law was weakened by the revival of Germany's corporatist tradition. All of these setbacks contributed to the ordoliberal turn to Europe.

III.2 The so-called Ordoliberalisation of Europe

Leading ordoliberal scholars and adherents of the school - in particular in DG IV - persistently defended ordoliberal theorems from the 1960s onwards. Outside the Federal Republic, hardly anybody took notice of the ordoliberal reading of the EEC Treaty as an economic constitution which could claim supremacy over the welfare constitutions of the Member States. And, indeed, national social constitutions were only marginally affected. It took the so-called 'Laval Quartet',⁶² with its spectacular promotion of the 'marketisation' of the EU to change the prevailing neglect of ordoliberal messages. These concerns were intensified by the austerity politics triggered by the financial crisis.

The academic community followed suit. In February 2012, S. Dullien and U. Guérot published a much-noted paper in which they diagnosed a 'long ordoliberal shadow' over Germany's crisis politics.⁶³ From then on, the 'ordoliberalisation of Europe' became a very widely invoked characterisation of the new economic governance of the Union. And indeed, important features of the emerging system had an ordoliberal imprint.

1. This system of economic governance was not a political democracy.
2. The system deepened the disaggregation of 'the economic' and 'the social'.

Social policies were subjected to the command of economic competitiveness.

⁶¹ See the Investment Aid I case of 20.07.1954, 4 BVerfGE 7.

⁶² Case C-341/05, *Laval un Partneri Ltd*, ECR 2007, I-11767; Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECR 2007, I-10779; Case C-446/06 *Rüffert v. Land Niedersachsen* [2008] ECR I-1167; 4 Case C-319/06 *Commission v Luxembourg* [2009] ECR I-4323.

⁶³ 'The Long Shadow of Ordoliberalism: Germany's Approach to the Euro Crisis', European Council on Foreign Relations Policy Brief 22 (2012).

3. The most important actor in the new system of economic governance was a non-majoritarian institution; the independence of the ECB is, in fact, of unprecedented strength.

Is ordoliberal economic constitutionalism compatible with the commitments enshrined Art. 2 TEU? No, in my view. However, this is a somewhat idle query. TEU economic constitutionalism, as it is exercised, is a neoliberal variant without the normative commitments that ordoliberals have consistently defended, in particular, the interdependence of law and economics and the rule of law.⁶⁴ Even the term ‘liberalism’ is misleading if associated with market governance.⁶⁵ Crisis politics is an authoritarian and discretionary aberration from the rule of the market.⁶⁶

This theoretical rebuttal is less important than the discrepancy between ordoliberal theorems and Germany’s *Realpolitik*. Particularly significant in this respect are the explanations of L.P. Feld, a former member and head of the Economic Ministry’s Council of Economic Advisors (*Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung*) and Director of the Walter Eucken Institut in Freiburg. Two of his contributions on the financial crisis deserve attention in the present context. The first is a talk given in 2011.⁶⁷ There, Feld explains that essential provisions of the EMU were inspired by ordoliberal principles only to add that they were never implemented. The second discusses the role of Germany in the financial crisis.⁶⁸ He succinctly re-constructs ordoliberal legacies, discusses the recent critique of ordoliberalism by political scientists, and concludes with the argument submitted in much brevity in the *Impulsrede* of 2011. Germany’s officious talk is ordoliberal. Germany’s *Realpolitik*, however, is something else. Feld defends this as political pragmatism.

⁶⁴ Out of the enormous oeuvre of the uncontested head of the school’s jurisprudential branch, see E.-J. Mestmäcker, ‘Power, Law and Economic Constitution’, (1973) 11 *The German Economic Review*, 177-192 at 183; id., *A Legal Theory without Law – Posner v. Hayek on Economic Analysis of Law* (2007), available at: <https://ssrn.com/abstract=1168422>.

⁶⁵ M. Wilkinson agrees in principle with this distinction, without, however taking the differences as seriously as I do; see his *Authoritarian Liberalism and the Transformation of Modern Europe* (2021) 125 ff.

⁶⁶ See C. Joerges and M. Weimer, ‘A Crisis of Executive Managerialism in the EU: No Alternative?’ in G. de Búrca, C. Kilpatrick and J. Scott (eds.), *Liber Amicorum for David M Trubek* (2014) 295-322.

⁶⁷ ‘Ein Scheitern ist nicht eingeplant. Oder: Ordnungspolitische Prinzipien der Europäischen Währungsunion’, *Impulsreden zur Sozialen Marktwirtschaft* (2011), available at: www.wpcd.de/fi/leadmin/user_upload/Impulsreden_2011_und_20.

⁶⁸ L.P. Feld, E.A. Köhler and D. Nientedt, ‘Ordoliberalism, Pragmatism and the Eurozone Crisis: How the German Tradition Shaped Economic Policy in Europe’, CESifo Working Paper Series No. 5368, 2015, available at: <https://ssrn.com/abstract=2613901>.

This pragmatism is, however, indicative of a deeper conceptual flaw. This flaw results from the assignment of monetary and fiscal/economic policy powers to competing authorities. Budgetary profligacy causes external effects in a monetary union. As we have noted, democratically legitimated responses to the conflicts between fiscal/economic and monetary policies were not established in the Maastricht Treaty. Thus, a mechanism would indeed be superfluous if market governance could be entrusted with the appropriate disciplining effects. Armin Steinbach has explained the pertinent rules of the EMU lucidly: ‘[T]he principal rules under EU law – the no-bailout principle and the ban on monetary state financing – aim to maintain budgetary pressure on states and subject them to market discipline’.⁶⁹ This is indeed a conceptual basis for a replacement of political governance. The problem with it, however, is that it cannot function in the assumed mode. The objections raised by L. Herzog against widely assumed potentials of market governance⁷⁰ are valid also in macro-economic contexts. Markets can exert all sorts of pressure, but they cannot generate reliable knowledge about the performance of an economy. Only this potential would render the philosophy underlying the core provisions of the EMU plausible.

III.3 Neoliberal Economic Constitutionalism and the Quest for a New Alignment with Democracy

The irreconcilabilities of the EMU with both (democratic) political and (ordoliberal) economic constitutionalism necessitate a new re-alignment between the democratic and economic governance in the EU. ‘Democracy-enhancing conflicts law’, as sketched out above,⁷¹ would be my preferred alternative. Among a broad range of further proposals is Marco Dani’s quest for a targeted treaty change which he has submitted in his contribution to the ‘ECB Legal Conference 2021’.⁷² Contrary to my suggestion, they contain substantiated policy proposals.

⁶⁹ A. Steinbach, ‘EU Economic Governance after the Crisis: Revisiting the Accountability Shift in EU Economic Governance’ (2019) 26 *Journal of European Public Policy* 1354.

⁷⁰ L.M. Herzog, n. 54 above, Chapter VII.

⁷¹ Text accompanying nn 42 et seq.

⁷² ‘Deconstitutionalising the Economic and Monetary Union’ in, *Continuity and change – how the challenges of today prepare the ground for tomorrow - ECB Legal Conference 2021* (2022) 282; Dani submits: at 304: ‘a) The goals enshrined in article 119(3) TFEU – stable prices, sound public finances and monetary conditions and a sustainable balance of payments – would remain the guiding principles of both the monetary and economic policy of the EU. The objective of full employment would be added to the list; b) Monetary policy would be defined as a sector specific competence without any constitutional prioritisation of price stability (or any other policy goal). Both the goals and the scope of ECB action would be decided by the Council and the European Parliament 246 on the basis of the ordinary legislative procedure after consulting the ECB; 247 c) The no bail-out clause and the prohibition of direct purchases of debt instruments should be replaced with legal bases enabling the Council and the European Parliament to specify the conditions for, respectively, debt mutualisation and direct and indirect purchases of debt instruments; d) The EU framework for economic policies should be based on a clearer distinction between shared constitutional principles (e.g., the prohibition

Both of our arguments are somewhat utopian. Both of us need to explain how a process might be initiated which would loosen the grip of the CJEU over Europe's economic constitution. My alternative to Dani's insistence on changes to the Treaty may be a touch more realistic. They depart from the insistence of the conflicts law scholar on the primacy of legitimated political authority over judicial law-making. As already stated, there are renowned legal scholars and political scientists who share these reserves. It is, of course, highly unlikely that the CJEU would endorse such departures from the judicial *acquis*. It seems equally unlikely that controversies like the one Germany's constitutional court (FCC) has initiated in its 'first reference ever'.⁷³ The outcry which followed was not a call for political initiative and learning, but quests for further petrification of judicial rule. The opinions of two dissenters of the Second Senate of the FCC might have been a better option.⁷⁴ To be sure, judges Michael Gerhard and Gertrude Lübke-Wolff in the reference order addressed only their colleagues in the Second Senate.⁷⁵ It is difficult to understand, however, why their *monita* should only apply to the German Court. Is there no alternative to an unconditional support of austerity conditionality and the whole range of crisis politics? The CJEU could consider more nuanced strategies. To acknowledge that it is not the mandate of the judicial branch to reverse the political and economic constitution in favour of a technocratic regime might not open a renaissance of politics, but, similarly, might strengthen the Court's authority.

excessive government deficit and excessive trade imbalances), to be retained in the treaties, and more contingent fiscal targets, to be defined by the Council and the European Parliament with the ordinary legislative procedure; 248 e) The focal point of fiscal surveillance by EU institutions should remain narrow (the size of government deficits 249 and trade imbalances). In a context in which national demoi are entrenched and salient policy choices on economic and social affairs are taken at state level, EU institutions seem ill equipped to veto specific policy measures. In this respect, the Commission should be assigned a more general ex ante suspensive veto on national budgets, with the possibility for the Council to override it with a qualified majority vote; f) Similarly, EU institutions seem also ill equipped to impose specific policy measures on member states. To encourage the adoption of their preferred economic and social policies, they could provide incentives in the form of conditional spending programmes funded by the EU budget'.

⁷³ BVerfG, 2 BvR 2728/13 vom 14.1.2014, §§ 1–105, available at: www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html.

⁷⁴ BVerfG, 2 BvR 2728/13 vom 14.1.2014, available at: www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html. The reference has caused an outcry; the dissenters have attracted limited attention; but see D. Adamski, 'Economic Constitution of the Euro Area after the Gauweiler Preliminary Ruling' (2015) 52 *Common Market Law Review* 1451, at 1479, 1490.

⁷⁵ To cite just three points: 'The more far-reaching, the weightier, the more irreversible – legally and factually – the possible consequences of a judicial decision, the more judicial restraint is appropriate' (para. 7). 'Where for reasons of law the judges' courage must dwindle when it comes to the substance, they ought not to go into the substance at all' (para. 27). 'The democratic legitimacy which the decision of a national court may draw from the relevant standards of national law (if any) will not, or not without substantial detriment, extend beyond the national area' (para. 28).