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Bader, V.

DOI
10.18352/ulr.364

Publication date
2016

Document Version
Final published version

Published in
Utrecht Law Review

UtrechtLawReview

This article is published in a peer-reviewed section of the Utrecht Law Review

Parliamentary Supremacy versus Judicial Supremacy

How can adversarial judicial, public, and political dialogue be institutionalised?

Veit Bader*

1. Introduction

The battles between proponents and opponents of judicial and parliamentary supremacy have characterized the institutions of supreme constitutional courts right from the beginning, but have intensified in the second half of the 20th century in the US and, more recently, in Europe as well. The aim of this article is not to rehearse the longstanding debates of judicial review in political philosophy, legal theory and comparative constitutionalism, although they will be summarized in Section 2. If it is true that judicial supremacy and parliamentary supremacy are both empirically and normatively indefensible, if there is not one model of liberal–democratic constitutionalism (LDC) but many competing and historically changing institutions and practices of judicial review, then we have to change the terms of the debate. If there is not one, objectively right and context-independent answer, if no one has the last word in LDC, we are not doomed or drowned in scepticism, decisionism, or nihilism. Instead it is a matter of degree, of better or worse (in this context, at this time), and we can learn. Such learning, I submit, can profit from two traditions: firstly, from recent discussions of how to democratize expertise (including judicial expertise) and to expertise democracy in general, particularly under conditions of high complexity, contingency, unpredictability and of contestedness and uncertainty of knowledge in recent societies (the tradition of critical pragmatism and of experimentalist governance); and secondly, from the tradition of democratic institutional pluralism and, in particular, from moderately agonic associative democracy. Democratic institutional pluralism, roughly speaking, refers to an extension of well-known majority-restraining elements of democracies in the field of political/territorial representation – such as executive power sharing, separation of powers, balanced bicameralism, proportional representation, territorial federalism and decentralisation, written constitutions – to social/functional representation (highlighted by associative democracy) and cultural minority representation. These two new approaches have, to my knowledge, not yet been used to deal with problems of judicial review. Both require a shift from abstract discussions of principles to contextualized institutional imagination and learning from developing practices. Before spelling this out in more detail in Section 5, I focus on judicial review in two different contexts. In Section 3, I address judicial review in the traditional context of nation states and ask whether the Canadian notwithstanding clause might provide a rational way forward, if properly amended. In

* Professor Emeritus of Social and Political Philosophy (Faculty of Humanities) and of Sociology (Faculty of Social Sciences) at the University of Amsterdam (the Netherlands), email: V.M.Bader@uva.nl. In memory of Ella van Dommelen. Thanks for comments and suggestions from anonymous reviewers and from Leonard Besselink, Nik de Boer, Bas Schotel, Marcel Maussen and the participants of discussions in Amsterdam in March 2015 organized by the Paul Scholten Centre; in June 2015 on 'Democracy' (organised by NJLP and ASSP) and in March 2016 (organised by 'Philosophy and Public Affairs Colloquium').

Section 4, I sketch out new forms of dialogue, cooperation and competition in the EU between parliaments and constitutional courts in Member States, the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).

2. Parliamentary supremacy versus judicial supremacy in political philosophy, legal theory and comparative constitutional pluralism

Liberal–democratic states and liberal–democratic constitutions are historical compromises and contain principles, rights and institutional arrangements that are in tension with each other.[1] In addition, their legitimacy is complex, containing liberal, democratic and output oriented aspects that are, again, in tension with each other.[2] A famous example are the tensions between the 'liberal' rule of law (quality and security of law and effective guarantee of basic liberal rights) and 'democratic' legitimacy acted out in longstanding and on-going confrontations between traditions, institutions and practices of judicial supremacy and parliamentary supremacy both within and across states. The battles between proponents and opponents of the institution of supreme constitutional courts and, in cases of existing supreme courts, the 'dialectical tug of war'[3] between defenders of judicial supremacy versus weaker forms of judicial review, are endemic from the beginning, but have intensified dramatically in the second half of the 20th Century in the US and, more recently, in Europe as well, due to the role of the highest courts of EU Member States and of the ECJ in response to emerging executive economic and fiscal governance.[4] In this section I do not intend to rehearse the longstanding debates of varieties of judicial review in political philosophy,[5] legal theory and comparative constitutionalism.[6] My modest aims are some conceptual clarifications of 'judicial review' against the background of the huge diversity of historical and actual varieties of judicial review, before I summarize the core arguments in favour of and against judicial and parliamentary supremacy. Because it seems so difficult to escape the totalizing and exclusivist logic of either 'judicial' or 'parliamentary supremacy', however, I want to flag up right from the start my own normative position in favour of minimalist but strong constitutional review.

1 See V. Bader, 'Complex Legitimacy in compound polities', (2010) 46 *Representation*, no. 3, pp. 261-279; V. Bader et al., 'Religious diversity and reasonable accommodation in the workplace in six European countries', (2013) 13 *International Journal of Discrimination and the Law*, no. 2/3, pp. 54-82.

2 See Bader 2010, supra note 1, pp. 263, 266 et seq.; V. Schmidt, 'Democracy and Legitimacy in the European Union Revisited', (2013) 61 *Political Studies*, pp. 2-22; R. Fallon, 'The Core of an Uneasy Case for Judicial Review', (2008) 121 *Harvard Law Review*, no. 7, pp. 1693-1736, at p. 1699, 1715-19.

3 See L. Kramer, 'Popular Constitutionalism, Circa 2004', (2004) 92 *California Law Review*, no. 4, pp. 959-1011 at p. 963.

4 See F. Fabbrini, 'The Euro-Crisis and the Courts', (2014) 32 *Berkeley Journal of International Law*, no. 1, pp. 64-123; C. Harlow, *Accountability in the European Union* (2002); C. Harlow & R. Rawlings, *Promoting accountability in multi-level governance* (2006); C. Joerges, 'Rethinking European Law's Supremacy', (2005) *EUI Working Paper LAW*, No. 2005/12; C. Joerges, 'Is there a Guardian of Constitutionalism in the European Union?', in D. Innerarity et al. (eds.), *The Future of Europe* (2014), pp. 75-93; N. Krisch, *Beyond Constitutionalism* (2010); I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam', (1999) 36 *Common Market Law Review*, pp. 703-750; I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', (2009) 15 *The Columbia Journal of European Law*, no. 3, pp. 349-407; M. Wendel, 'Comparative reasoning and the making of a common constitutional law', (2013) 11 *International Journal of Constitutional Law*, no. 4, http://doi.org/10.1093/icon/mot043, pp. 981-1002; M. Wendel, 'Judicial Restraint and the Return to Openness', (2013) 14 *German Law Journal*, no. 1, pp. 21-52 [Wendel 2013a]; M. Wendel, 'Exceeding Judicial Competence in the Name of Democracy', (2014) 10 *European Constitutional Law Review*, no. 2, pp. 263-307.

5 To name only a few: B. Ackerman, *We The People: Foundations* (1991); B. Ackerman, *We The People: Transformations (*1998); J. Ely, *Democracy and Distrust* (1980); R. Dworkin, *A Matter of Principle* (1985); J. Waldron, 'The Core of the Case Against Judicial Review', (2006*)* 115 *Yale Law Review*, pp. 1346-1406; M. Tushnet, *Weak Courts, Strong Rights* (2008); M. Tushnet, 'Against Judicial Review', (2009) *Harvard Law School. Public Law & Legal Theory Working Paper Series*, paper No. 09-20.

6 N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65 *Modern* Law Review, no. 3, pp. 317-359; N. Walker, 'Beyond boundary disputes and basic grids', (2008) 6 *ICON,* no. 3, pp. 373-96; N. Walker, 'Constitutionalism and the Incompleteness of Democracy', (2010) 39 *Rechtsfilosofie & Rechtstheorie*, no. 3, pp. 206-233; M. Kumm, 'The Jurisprudence of Constitutional Conflict', (2005) 11 *European Law Journal*, no. 3, pp. 262-307; M. Kumm, 'Democracy is not enough: Rights, proportionality and the point of judicial review', (2009) *New York University Public Law and Legal Theory Working Papers*, Paper 18, <http://lsr.nellco.org/nyu_plltwp> (last visited 19 September 2016); M. Kuo, 'In the Shadow of Judicial Supremacy', (2016) 29 *Ratio Juris*, no. 1, http://doi.org/10.1111/raju.12093, pp. 83-104; L. Besselink, 'The Proliferation of Constitutional Law and Constitutional Adjudication', (2013) 9 *Utrecht Law Review*, no. 2, http://doi.org/10.18352/ulr.223, pp. 19-35.

2.1. Varieties of judicial review

2.1.1. 'Judicial review', what's in the name?

First, we have to get the focus of the discussion right because there are many forms or varieties of judicial review.[7] I have omitted judicial review of executive action, of administrative decision-making or of judicial action and only address problems of *judicial review of legislation* (more specifically, of 'primary legislation enacted by the elected legislature of a polity' which, indeed, 'show a variety of practices all over the world').[8] I start with varieties in '*formal*' or 'legal' arrangements before indicating that even strong judicial review can be '*actually*' fairly weak.

(i) *Strong or weak judicial review.* In *strong constitutional review*, courts have the authority to decline to apply a statute or to modify the effect of a statute (to make it conform with individual rights) or, more strongly, to establish that, as a matter of law, a given statute will not be applied (law in effect becomes a dead letter) or even to strike a piece of legislation out of the statute books altogether.[9] In *weak judicial review* courts may scrutinize legislation but may not, on a constitutional basis, decline to apply it or moderate its application. In the UK, a court declaration of incompatibility with a right of the European Convention on Human Rights does not affect the validity, continuing operation or enforcement and is not binding on the parties. In the Netherlands,[10] in Sweden or even less strongly in New Zealand,[11] courts may not decline, on the basis of the constitution, to apply legislation when it violates constitutional rights, but they may strain to find interpretations that avoid the violation and/or use binding international and European human rights law to do so.[12] Canada, with the introduction of the notwithstanding clause, is clearly an *intermediate case* (see Section 3, below).

(ii) Judicial review may be exclusively *rights oriented* or it may, as in *general constitutional review*, include other structural rules of the constitutional system of polities such as federalism, bicameralism or the separation of powers (such as in Germany or the US).

(iii) It may be *a posteriori* after a law or statute has been enacted by the legislative assembly (as in the US) or *ex ante* judicial review[13] by a constitutional court specifically set up to conduct an abstract assessment of a bill in the final stages of its enactment (as in France with the *Conseil Constitutionnel*). This assessment is similar to a multi-cameral legislative process in which the courts operate like a traditional senate (House of Lords) or review by the first chamber and the *Raad van State* in the Netherlands even if the latter, together with the *Hoge Raad*, acquire functions of quasi-constitutional adjudication.[14] Such review by political bodies has to be clearly distinguished from judicial review by courts.[15]

(iv) Judicial review can be carried out by *ordinary courts* (as in Massachusetts) or by a *specialized constitutional court*.

Obviously, formal or legal arrangements are only one factor, though a very important one, impacting on the empirical or *actual strength or weakness of judicial review*, in combination with other factors such as power balances of competing institutions and political and constitutional cultures.[16]

7 Here I follow Kramer, supra note 3, Waldron, supra note 5, Tushnet 2008 and Tushnet 2009, supra note 5, and many others.
8 Waldron, supra note 5, p. 1354.
9 Ibid., pp. 1354 et seq.
10 See Besselink, supra note 6, for the Netherlands and G. van der Schyff, *Judicial Review of Legislation* (2010), in comparison with the UK and South Africa. This non-constitutional review clearly strengthens, e.g., the rights of illegitimate children, the right to strike and measures preventing discrimination against women in social security law. This is one of the many indications that formally 'weak' review may actually be stronger than formally strong review.
11 See Kuo, supra note 6, pp. 12 et seq.; S. Gardbaum, *The New Commonwealth Model of Constitutions* (2013) for 'Westminster Democracies' after parliamentary sovereignty; see C. Bateup, 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue', (2005) *New York University Public Law and Legal Theory Working Papers*, Paper 11, p. 2.
12 See Kramer, supra note 3, pp. 996 et seq.; see Kuo, supra note 6, Section II for 'Westminster Democracies' after parliamentary sovereignty.
13 The German *BVerfG* is not only an exemplar of an extreme lack of judicial deference in general, but is also increasingly used ex ante in the political process of decision-making by parliamentary opposition members when doubting the constitutionality of legislative proposals, see more generally Kuo, supra note 6, pp. 36-40.
14 See Besselink, supra note 6, pp. 28 et seq.
15 See Kramer, supra note 3, p. 997, the *Conseil Constitutionnel* is neither a court nor has it authority over or direct connection to any court, it is rather 'part of the legislative branch'.
16 D. Dyzenhaus, 'Are legislatures good at morality? Or better at it than the courts?', (2009) 7 *International Journal of Consitutional Law*, no. 1, http://doi.org/10.1093/icon/mon036, pp. 46-52, is right in stressing the distinction between strong judicial review 'in fact' and

For our discussion, it seems important to spell out two things. First, strong or weak systems of judicial review are 'not binary alternatives but labels that mark areas along a spectrum'[17] and, secondly, one should clearly distinguish between *strong judicial review* and *judicial supremacy.* Obviously, judicial supremacy requires institutions and practices of strong judicial review, but not all of them amount to judicial supremacy: 'Judicial supremacy refers to a situation in which (1) the courts settle important issues *for the whole political system*, (2) those settlements are treated as *absolutely binding* on all other actors in the political system, and (3) the *courts do not defer* to the positions taken on these matters in other branches (not even to the extent to which they defer to their own past decisions under a limited principle of stare decisis).'[18]

These distinctions will now be used for three purposes: for conceptual clarification; for some historical remarks; and for some initial normative remarks.

2.1.2. Conceptual clarifications

The concept of 'constitutional supremacy versus parliamentary supremacy' misleadingly suggests that the decisive role of legislators would be ipso facto unconstitutional;[19] the concept of 'popular constitutionalism' or 'political constitutionalism' versus 'legal constitutionalism'[20] suggests that a decisive role of legislative assemblies would not be legal. The relevant focus should be on monopoly claims by constitutional or supreme courts ('judicial monopoly on constitutional interpretation'[21]) and 'judicial supremacy' seems the most adequate concept in this regard.

2.1.3. 'Judicial supremacy' does not exist[22]

The distinction between institutions and practices of strong judicial review and judicial supremacy allows us to show that countries such as the US, with institutions of strong judicial review, are also characterized by an ongoing war between defenders and critics of judicial supremacy. Even the briefest summary of Larry Kramer's *American constitutional history in a nutshell*[23] can show this: the US Constitution originated within a system of 'popular constitutionalism' but a competing model of judicial supremacy was formulated in the mid-1790s by the conservative Federalists (as against the French revolution and the 'baneful influence of Faction' and majoritarian threats to minority rights). It was repudiated in 1800-1802 (repeal of the Judiciary Act) but re-emerged in the early 1830s, in a different guise, emphasizing the 'settlement function' of law and arguing that there would be no end to controversy on slavery, tariffs, banks, and states' rights unless judges had the final say. Yet the Jacksonians challenged judicial authority and won the 1832 presidential election by a landslide. From then on, one finds periodic confrontations with no clear victor or predominant underlying understanding. This pattern began to change only in the second half of the 20th century. From 1958 (*Cooper v. Aaron)* onwards, the idea of ideal of judicial supremacy found active and widespread acceptance by conservatives (using the traditionally liberal rhetoric of counter-majoritarianism as well as that of judicial restraint developed against the New Deal Court) and, more reluctantly and ambivalently, by liberals as well, particularly from the mid-1960s onwards. The Warren Court's liberal activism encouraged a liberal philosophy of broad judicial authority by adding a new argument to the '*precautions* against majoritarianism' and to '*settlement*': namely that 'courts are better and more trustworthy than electorally accountable bodies in *questions of principle*'.[24] Yet older concerns for judicial restraint survived.[25] For the

'in form' (p. 49) as well as the importance of political and judicial 'culture' (p. 50) but it is misleading to mix up legal form and 'fact' conceptually and it is premature to claim that culture 'is far more important than the institutional form' (p. 50).

17 Fallon, supra note 2, p. 1733.

18 Waldron, supra note 5, p. 1354, referring to Barry Friedman.

19 Besselink's criticism of an earlier draft of this paper.

20 Kramer, supra note 3, p. 959. For 'political constitutionalism' see R. Bellamy, *Political Constitutionalism* (2007) and 'The Limits of Lord Sumption: Limited Legal Constitutionalism and the Political Form of the ECHR' (2015), unpublished paper.

21 Kramer, supra note 3, pp. 960-962, 992.

22 See Bateup, supra note 11, p. 37: The 'bulk of normative constitutional theory begins from the premise of Judicial Supremacy and rarely questions whether this is a correct description' which it clearly is not.

23 Ibid., all following quotes from Kramer, supra note 3, pp. 962-967; see Kuo, supra note 6, in Section III on 'constitutional departmentalism vs. judicial supremacy'.

24 See Dworkin, supra note 5 and R. Dworkin, *Taking Rights Seriously* (1977). See C. Eisgruber, *Constitutional Self-Government* (2001).

25 E.g. Ely, supra note 5.

first time in American history, conservatives and liberals found themselves in agreement on the principle of judicial supremacy which came to monopolize constitutional theory and discourse, a monopoly that thrived during the tenure of Chief Justice Burger and persisted into the early years of the Rehnquist Court.[26]

2.1.4. 'Strong but minimalist' judicial review?

If and as long as the respective defenders of judicial or parliamentary supremacy think that these are logically opposite and mutually exclusive arrangements and that one has to play a zero-sum game, this belief has important effects not only theoretically but also in the 'real world'. It excludes productive forms of contestation/dialogue and institutional co-decision arrangements from the start. Only if strong and weak forms of judicial review are not seen as exclusive alternatives but as 'areas along a spectrum' (see text and note 17 above), can a debate that matters in the real world get off the ground. In this regard, it is important to note that even defenders of a strong and maybe ultimately supreme role of legislation and/or 'the people' such as Jeremy Waldron or Richard Bellamy, are conceding that in some circumstances – not 'healthy' but 'pathological' polities/societies – and in some cases weak review is needed (see note 53 below). If one brackets the construction of ideal or 'nearly ideal' worlds/circumstances and focuses on real worlds and if one recognizes that even under ideal circumstances we seriously disagree, then it seems plausible to develop two connected types of theories: (i) *substantive* theories of *moral minimalism* aiming at 'preventing malfare' and 'serious injustices' instead of 'maximizing welfare' or 'justice in the ideal world' (see Section 2.2.4 below), and (ii) *proceduralist* theories of *adversarial communication* including deliberation, dialogue/multilogue, contention, arbitration and strategic argument instead of consensus and ideal deliberation (see Section 2.3.3 below). Together, these theories can be used to defend *strong but minimalist judicial review* (see Fallon and others).

A detailed and necessarily contextualized discussion of the advantages and disadvantages of different varieties of strong judicial review and of weak or absent judicial review is way beyond this article.[27] Instead I present the most well-known advantages and disadvantages of both (see Sections 2.2 and 2.3 below), as claimed by their respective proponents based upon their respective normative tasks or functions under ideal conditions (what supreme courts/judges and legislators ought to do and are in the best position to do). This is followed by a slightly debunking assessment of what both have done and do in the real world and by a sober discussion of their comparative institutional competences in gradational terms of 'better/worse'. I end with a brief discussion of the institutional and cultural conditions for realistic improvement, given the conclusion that both monopoly claims are empirically unsound as well as normatively unwanted.

2.2. Advantages of strong judicial review

The core arguments in favour of judicial supremacy or, more modestly, of strong judicial review have already emerged from my summary of Kramer's historical sketch (see above Section 2.1.3): the 'settlement function', the guarantee of basic rights and, in particular of minority rights, and the superiority of supreme courts as a 'forum of principle'.

2.2.1. The settlement function

In general, the normative claim that there has to be some settlement of contested issues is fairly uncontentious.[28] Yet the claim that judicial supremacy is the best way to settle such issues is as contested as the empirical claim

26 Kramer, supra note 3, p. 967. See also D. Halberstam, 'Constitutional Heterarchy', in J. Dunoff & J. Trachtman (eds.), *Ruling the World* (2009), pp. 326 et seq, in Section II. In explaining this 'extraordinary development' Kramer refers to the liberal activism of the Warren Court and to 'the general scepticism about popular government (...) after WW II' (p. 964) which was particularly strong in Germany, the country with maybe the strongest and most uncontested predominance of judicial supremacy (see also Kuo, supra note 6, pp. 36 et seq.).

27 See for more details the works by Kramer, supra note 3, and Tushnet, Waldron and others mentioned in note 5, supra. See C. Bateup 'Expanding the Conversation', (2006) *New York University Public Law and Legal Theory Working Papers*, Paper 44. Fallon, supra note 2. Cf. infra, Section 3 for the Canadian debate.

28 See Kramer, supra note 3, pp. 987 et seq. See N. Luhmann, *Das Recht der Gesellschaft* (1993). Yet 'some settlement' is not the same as 'final': 'at best they momentarily resolve the dispute immediately before the Court' (Bateup, supra note 11 p. 35, see pp. 11 et seq. in discussing the 'assumption of judicial finality': 'binds the parties to the action' but is 'rarely the final word in relation to the broader

that it actually does settle them. Empirically, there is clearly 'some settlement without judicial supremacy' (e.g. by parliament and weak judicial review) and there is no 'final settlement' by rulings of supreme courts (supreme courts revising earlier rulings, parliaments amending constitutions etc.). And normatively, Liberal–Democratic Constitutionalism is an open-ended and ongoing normative project characterized by inherent tensions and by deep and reasonable disagreement (better dealt with and 'settled for the time being' in a democratic process) and legal systems and laws have to tolerate some uncertainty, lack of clarity and stability: how much and what kind of stability and security are the contested, important questions.

2.2.2. The guarantee of basic rights

The pre-commitment justification for judicial supremacy[29] may be plausible for those constitutional questions having clear answers, yet the distinction between clear and unclear answers is contested and, if anything, this can be and is provided by weak judicial review as well. In addition, most of these questions require choices among plausible alternatives in general, and particularly in a context of uncertainty. 'Subsequent developments may sometimes come to make one of the alternatives appear wrong, even preposterous.'[30] There is not only the 'risk that people (or the politically accountable institutions through which they speak) will make bad decisions'[31] because of irrational and biased impulses, but also judges and supreme courts have done and do so.

2.2.3. The forum of principle

Counter-majoritarianism and who is the 'best interpreter'?[32] The supremacy of judges and supreme courts is justified either by the claim that they guarantee *best results* in terms of social justice and protection of individual liberties as well as a counterweight against democratic excesses: namely, it may be counter-majoritarian 'but this is good because it checks "the tyranny of the majority"'.[33] Or the supremacy is justified by a claim about 'the general nature of legal versus political institutions: the *structure of the judiciary* – its independence, the setting in which it deliberates, the requirement of drafting an opinion, and so forth – is said to give us confidence that judges can generally be expected to do a better job'[34] compared with other political actors, particularly parliaments.

The first *empirical claim* (better or best results) can be countered by reference to more or less extreme bias and prejudice in historical[35] or actual Supreme Court rulings in different countries. In fair historical and contemporary comparisons – and the *comparative perspective is crucial* – countries with weaker or even without judicial review (such as the UK, New Zealand, the Netherlands, Sweden or France) demonstrate that this generalized claim is unfounded and untenable: they may be 'at least as free and just as the US'.[36] As I have already indicated above (Section 2.1.1), institutions of 'parliamentary sovereignty' (lacking constitutional review) vary according to the following variables: (i) whether or not parliaments are bound

constitutional issues'); see also N. Devins & L. Fisher, *The Democratic Constitution* (2004), pp. 230-233 listing 10 qualifications to the 'last word' doctrine. See A. Hogg et al., 'Charter Dialogue revisited: Or "Much Ado About Metaphors"', (2007) 45 *Osgood Hall Law Journal*, no. 1, pp. 1-65, at p. 31: 'final arbiter' or 'final authority' otherwise 'interpretive anarchy'; no 'judicial monopoly on correct interpretation'; 'penultimate (not final)' (p. 34).

29 See Kramer, supra note 3, pp. 990 et seq.

30 Ibid., p. 991.

31 Ibid., p. 991.

32 Ibid., pp. 992-1001.

33 Ibid., p. 992.

34 Ibid., p. 992. See for a wide discussion of the comparative advantages and disadvantages of judges/courts and legislators in terms of better/worse instead of 'best': P. Hogg & A. Bushell, 'The Charter Dialogue between Courts and Legislatures', (1997) 35 *Osgood Hall Law Journal*, no. 1, pp. 75-124; P. Hogg & A. Thornton, 'Reply to "Six Degrees of Dialogue"', (1999) 37 *Osgood Hall Law Journal*, no. 3, pp. 529-536; Hogg et al., supra note 28; K. Roach, *The Supreme Court on Trial. Judicial Activism or Democratic Dialogue* (2001); K. Roach, 'Constitutional and Common Law Dialogues Between Supreme Court and Canadian Legislatures', (2001) 80 *Canadian Bar Review*, pp. 481 et seq. [Roach 2001a]; J. Hiebert, *Charter Conflicts: What is Parliament's Role* (2002); Bateup, supra note 11.

35 Kramer, supra note 3, p. 997 for a short list of judicial excesses of the American Court.

36 Waldron, quoted in Kramer, supra note 3, at p. 997. This claim, however, can be contested: see C. Gearty 'Beyond the Human Rights Act', <http://www.law.leeds.ac.uk/assets/files/research/events/geary-chapter.pdf> (last visited 6 October 2016); and K. Ewing & J. Tham, 'The Continuing Futility of the Human Rights Act', (2008) *Public Law*, pp. 668-693 <https://www.monash.edu/__data/assets/pdf_file/0016/140524/ewing-tham-article.pdf> (last visited 22 September 2016).

by a written Bill of Rights – whether a national or supra-national one (regional conventions such as the European Convention on Human Rights (ECHR)) or an international one (UN Charta); (ii) whether legislative power is bound (as in the Netherlands or Canada) by a written constitution or not (as in the UK); (iii) whether there are competing, more or less representative political institutions – usually first chambers (as in the UK (the House of Lords) or in the Netherlands (*Eerste Kamer*)) or additional controlling bodies (such as the *Conseil Constitutionnel* in France) – checking the legal quality of legislative decisions but not formally or actually having the powers of constitutional review (which is, after all, the decisive distinction between parliamentary and judicial 'supremacy'). Together with more or less vibrant, even activist jurisprudential traditions (as is usual in case-law systems), these variables impact on both the quality of legislation and the effectiveness of rights protection. In addition, the quality of rights protection very much depends on other aspects, such as predominantly legal and cultural traditions, habits and virtues of judges, voluntary or enforced traditions of deference, lively public debate, etc.

The *second claim*, to start with, is not in itself an argument in favour of the supremacy of constitutional courts but of the judiciary in general (judges as heroes). It has been countered on many empirical grounds such as the kinds of reasons and deliberative settings ('good academic workshop'); the kinds of allowable reasons (judges are not experts in relevant social, political, cultural arguments in changing societal conditions); professionalism, institutional insulation of judges and courts – not in dialogue and hence often uninformed, in the rear-guard.[37] Yet the core arguments by Waldron and others challenge the philosophical defenders of judicial supremacy on their own turf: the 'existence and persistence of pervasive disagreement'. No one is or can be in possession of the 'truth' about rights because there are no 'objectively right answers out there'.[38] Also, there is no shared method or technique for resolving normative disagreements because we disagree as much about what counts as a justification as we do about what rights we ought to have (see Section 2.3.2 below).

2.2.4. Defending 'strong but minimalist' judicial review

These are indeed strong arguments against judicial supremacy but, to repeat, not necessarily against any form of judicial review, as is also clear in Waldron's and Kramer's writings that allow for weak judicial review. Nor do they disqualify all arguments in favour of *strong but minimalist judicial review* which do not presuppose or depend on an ideal moral consensus or any 'objective truth' about what 'justice requires', but on much less demanding agreement on preventing serious injustice and serious violations of core fundamental or basic rights, even if their interpretation and application may also be contested. On the basis of such a substantive theory of moral minimalism[39] one has good reasons to defend strong but minimalist review. According to Fallon, the crucial question is not whether courts or legislators are better at 'defining rights correctly' or are 'less likely to err' but 'which kinds of errors are most important to avoid'. If the task is to 'minimize the most morally grievous errors' or to prevent the violation of 'fundamental rights', these rights 'deserve to be protected by multiple safeguards',[40] and strong but minimalist judicial review is

37 For an analytical discussion of Waldron's criticism of 'judges as moral reasoners' see the contributions by W. Sadurski, O. Beaud and D. Dyzenhaus in (2009) 7 *International Journal of Constitutional Law*, no. 1. I agree with Dyzenhaus that Waldron stages the debate in terms of 'either judges or legislators' and claims 'that legislatures should have final authority in moral matters' or a 'monopoly on constitutional interpretation' (p. 48) rather than 'to work out how these institutions should interact' (p. 51) best or to answer 'the difficult questions regarding the design of legal order, including the appropriate institutional relationships of comity, deference, as well as deciding which institution will act as a final authority' (p. 52), though it would be clearer to spell it out as a provisionally 'final' one.

38 Waldron restricts his argument on disagreement about norms, but it could productively be extended to knowledge more generally, including cognitive and specifically 'scientific' knowledge, because the consequences for claiming expertise are analogous (see V. Bader, 'Sciences, politics, and associative democracy: democratizing science and expertizing democracy', (2013) *Innovation: The European Journal of Social Science Research*, http://dx.doi.org/10.1080/13511610.2013.835465; see infra, Section 4, for the EU). The control of non-majoritarian judicial experts, of 'juristocracy' (see R. Hirschl, *Towards Juristocracy* (2004)) then is seen as part of the wider problem of the control of non-majoritarian expert bodies.

39 See V. Bader, *Secularism or Democracy?* (2007), Chapter 2.

40 Fallon, supra note 2, pp. 1694 et seq., the following quotes from pp. 1705 et seq. and p. 1700. Waldron's 'fallacy' is that 'if errors of underprotection – that is infringements of rights – are more morally serious than errors of overprotection' and if a few other plausible conditions obtain, then there 'could be outcome-related reasons to prefer a system with judicial review to one without it' (p. 1699). Yet, Fallon simplistically translates 'multiple safeguards' into 'multiple vetoes' (that lead into joint decision traps) and he holds on to the dichotomy of 'nonpathological' or 'well ordered' vs. 'pathological or non well ordered societies'.

preferable given the following conditions or premises: (1) 'Even if courts are no better overall at identifying rights violations than are legislatures, courts have a distinctive perspective that makes them more likely than legislatures to apprehend serious risks of rights violations in some kinds of cases. (2) Legislative action is more likely to violate fundamental rights than legislative inaction. (3) Some rights are more important than others and, accordingly, are more deserving of protections against infringement. (4) A system of judicial review can be so designed that the moral costs of such over-enforcement of rights as judicial review would produce will likely be lower than the moral costs that would result from such under-enforcement of rights.'[41] Such a design has to answer three difficult questions: First, 'which claims of rights'? (minimalism of fundamental rights). Secondly, 'what should be the scope' or 'how searching' and 'stringent'? (deference and self-restraint; see Section 2.3.2 below). Thirdly, 'should judicial review be entrenched against legislative override ("strong") or subject to legislative displacement ("weak")'?[42]

2.3. Disadvantages of judicial supremacy

Thus, arguments against the philosophical defenders of judicial supremacy are not in themselves arguments against any form of judicial review, nor are they arguments in favour of 'parliamentary supremacy' or even for something like 'popular constitutionalism' (as it seems to be for Kramer)[43] or for 'political constitutionalism' (Bellamy).[44] They are directed against judicial monopoly claims and, at least in my version, against any supremacy or monopoly claims whatsoever. In this section, I will briefly address two well-known core arguments against judicial supremacy, the 'democratic legitimacy' argument (Section 2.3.1) and the 'separation of powers' argument (Section 2.3.2) before discussing the 'reasonable disagreement' argument (Section 2.3.3) and how to deal with it substantively and institutionally (Section 2.3.4).

2.3.1. Weak or non-existent democratic legitimacy

The democratic legitimacy of judges and constitutional courts is non-existent or weak.[45]

Following the old distinctions between '*legitima auctoritas*, *legitima potestas* and *legitima decisio*' one can distinguish institutional, personal, and substantive democratic legitimacy.[46] Democratic legitimacy requires that the *institutions* of constitutional review and constitutional courts should be in line with the political sovereignty of the people – established either through referenda, or elected constitutional assemblies or by qualified majority voting (QMV) decisions of parliaments in cases of amending constitutions – and that the organization and competences of constitutional courts are regulated in constitutions. Democratic institutional legitimacy is absent or 'weak if constitutional review is not contained in the constitution and further elaborated in law but rather imposed by judiciary power'[47] as, for example, in the US or in the Weimar Republic. Judges ought to be independent and this inherently limits traditional measures to increase *personal democratic legitimacy* either through direct election of judges of supreme courts by the people (which does not exist anywhere), or dismissal – both measures are inimical and incompatible with independence. Yet there can and should be something like an 'uninterrupted chain of legitimation'[48] with a double focus: firstly on election by parliament (versus selection through co-optation by constitutional courts or nomination/appointment by executive powers (president, government)) and, secondly, for a limited time instead of life-time appointments (e.g. a maximum of 9 years for the ECtHR or 12 years for the

41 Ibid., pp. 1705 et seq., and p. 1700.
42 Ibid., pp. 1715, 1728-1735.
43 See infra note 70.
44 See infra note 53.
45 See Waldron, supra note 5, Tushnet 2008 and Tushnet 2009, supra note 5, and Kramer, supra note 3 for this most crucial argument of critics of judicial supremacy. Cf. Section 2.3.4 infra for critical remarks: Hogg et al. (supra notes 28 and 34), Fallon, supra note 2, and others.
46 See German *BVerfGE* 83, 60, 72; E. Böckenförde, 'Demokratie als Verfassungsprinzip', in J. Isensee & P. Kirchhoff (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (1987), pp. 887-956 at p. 896; E. van Dommelen, *Constitutionele rechtspraak vanuit rechtsfilosofisch perspectief* (2003), pp. 194 et seq.
47 Van Dommelen, supra note 46, p. 196 (my translation).
48 Böckenförde, supra note 46.

German *Bundesverfassungsgericht*), and by qualified majority voting.[49] Concerning *substantive democratic legitimacy* of the content or result of decisions, it seems plain that judges ought to be/are bound by laws and the constitution cannot provide more than formal legitimacy, particularly because constitutional rights and principles leave wide margins of discretion/appreciation and because (as I have already stated above and will explain in Section 2.3.3), constitutional rights and principles conflict with each other and need to be weighed and balanced. However, the argument that the democratic legitimacy of constitutional courts/judges is non-existent or weak does not mean that constitutional judicial review could not or does not contribute to the *political* legitimacy of liberal–democratic states, because protecting the rule of law and fundamental rights against violations is one crucial element of 'liberal' or 'outcome'/'output' legitimacy.[50]

2.3.2. Judicial activism and violation of the separation of powers

The main danger of judicial supremacy and of institutions and traditions of strong non-minimalist judicial review is that *courts overstep the formal competences*[51] *of the judiciary* and violate basic principles of the separation of powers. Under the impact of predominant theories and traditions of judicial supremacy, courts are not only tempted to violate legislative political powers but often explicitly do so, doing 'ordinary politics' in the guise of protection of the constitution and, by doing so, close the legitimate open space that LDC should create and leave for important economic (e.g. 'market socialist'), societal (e.g. associative democracy) and cultural alternatives. In this regard, it does not matter whether this *judicial activism* is motivated by and connected with conservative and/or libertarian[52] or progressive/egalitarian or socialist ideologies/politics. All are equally incompatible with traditions and practices of stronger *judicial restraint* required by open democratic politics. Under conditions of LDC, judicial review may be strong but it has to be minimalist (see above Section 2.2.4).[53] Obviously, institutions of strong constitutional review can go hand in hand with practices of judicial restraint[54] but, comparatively speaking, the danger of illegitimate judicial activism by constitutional courts is much weaker and more easily countered in countries with weaker constitutional review.

2.3.3. Why persistent reasonable disagreement?

The three most important reasons are as follows. Firstly, constitutional principles and basic rights are, by their very nature, abstract, general and *underdetermined* – containing not enough constraints to specify a unique solution – and this includes that there is not and cannot be 'one right interpretation' independent of context. Secondly, and in addition, basic rights are not only underdetermined but also conflict with each other (famously: conflicts between different freedom rights and between 'liberty' and 'equality'; *pluralism*

49 See Van Dommelen, supra note 46, pp. 197 et seq. for the various existing regulations mixing nomination and election. See Kumm 2009, supra note 6, pp. 37 et seq. See Besselink, supra note 6, pp. 20, 30 et seq. for the importance of fair appointments of juridically qualified judges 'by or with a significant say of all three branches' for the democratic legitimacy of constitutional courts, particularly in the 'Kelsenian continental model of constitutional adjudication and under recent conditions of dispersed or decentralized constitutional adjudication'. These measures seem preferable to 'judge or court bashing' in cases of life-time appointments in the US (Hogg et al., supra note 28, p. 42) or to organizing referenda on specific rulings which, as far as I can see, has not been proposed by anybody.

50 See generally: Bader 2010, supra note 1. See for constitutional review in a sound criticism of Waldron: Fallon supra note 2, pp. 1718 et seq.

51 And, obviously, their actual expertise, knowledge etc. See supra note 34 with Hogg et al., supra note 28, Bateup, supra note 11 and note 27, Fallon, supra note 2 and others for a comparative discussion of competences of judiciary and legislators in terms of better/worse.

52 Such as the anti-New Deal American Supreme Court or the German Constitutional Court against the development of social security and welfare arrangements in the 1950s or, recently, the ECJ under the impact of neo-liberal 'free market' ideologies/politics replacing the progressive 'anti-discrimination' judicial activism of the 1970s (cf. infra, Section 4). This holds equally against 'conservative' as well as 'progressive' judicial activism.

53 See for different traditions of weak versus strong judicial restraint or deference: Tushnet 2008, supra note 5. His scepticism regarding weak constitutional review can be countered by arguments in favour of strong but minimalist constitutional review legitimated by 'moral minimalism' (see above Section 2.2.4, see also infra, note 111, for the Czech Constitutional Court). Obviously, the list of 'basic rights' (see Bader 2007, supra note 39, p. 72) or 'fundamental rights' and their interpretations are also 'controversial' (see Bellamy, supra note 20, p. 5 versus Lord Sumption). Yet, if 'a minimalist reading may be as contentious as a maximalist reading' (ibid.) we would be, in my view, in dire straits because there would not even be less disagreement on what minimal morality requires. Bellamy himself is clearly in favour of a very weak version of judicial review and opposed to all versions of 'strong review' but still, hesitantly, seems to allow for 'a "soft" version of strong review' (ibid., p. 15) regarding 'basic rights' (p. 12). Yet, he does not deal in any detail with the crucial question as to how to 'envisage how courts and legislatures might work in tandem to improve the public deliberation' (p. 16) or 'engage in an on-going dialogue' (p. 4).

54 See Kramer, supra note 3, for the US.

of rights) which means that rights are not just trumps – either trumping other rights or outranking all other considerations – but have to be weighed and balanced and this weighing and balancing, again, is context-dependent and reasonably contested. Thirdly, constitutional principles and rights, as well as their underlying moral principles spelled out by LDC, are not only in tension with each other but also *explicitly open-ended*. Constitutions and human rights conventions (such as the ECHR) are 'living instruments which have to be interpreted in the light of prevailing conditions and ideas in democratic states' (ECtHR)[55] and they are *embedded in changing societal, political and legal cultures*. This means that there cannot be one ultimate or 'final' interpretation and, also, that 'original intent' approaches and an exclusive focus on written law and 'texts' have to be rejected. For these reasons, no one is in the possession of 'truth', no one 'has the last word' and there is no consensus even under ideal conditions, let alone under more realistic conditions. *Institutionally*, this means, as already stated, the final flaw of judicial supremacy.[56]

Theoretically, this is the common ground and core insight of critical pragmatism and realist deliberation, as well as, more radically, critical legal studies in opposition to both Dworkinian and Habermasian deliberative democracy.[57] Demanding theories of 'deliberative consensus' in ideal worlds should be replaced by *proceduralist theories of moderately agonic contestation* in the real world under conditions of power-asymmetries and are explicitly critical with regard to the 'rationalist' and 'exclusivist bias'. Adversarial public talk (Barber) or, more broadly, *adversarial communication*, ranges from actual 'deliberation' and 'talk' via 'dialogue or multilogue', 'contention' and 'arbitration' to 'strategic contestation'.[58]

2.3.4. How to deal with reasonable disagreement and to increase substantive democratic legitimacy

The respective mechanisms range from dissenting opinions and from competition/cooperation between constitutional courts (both internal to judicial institutions but less shielded against non-legal institutions and politics) through competition/cooperation between supreme courts and with political institutions – most importantly legislators – to broader public talk and politicization. Following on from the seminal article by Peter Hogg and Allison Bushell in 1997, a broad and sophisticated *debate on constitutional dialogue* developed,[59] focusing on six issues. (i) The *concept itself*: opposing monologue by dialogue, multilogue or polylogue. (ii) Its *aim*, *quality* or *character*: a 'process of reaching consensus' – even if 'dynamic'[60] – or an ongoing *adversarial compromise* and modus vivendi; 'one-way' versus 'two or many ways'; explicit or implicit, formal or informal. (iii) The involved *actors* or *participants*: inside courts (amongst judges), between

55 See ECtHR judgment of 7 July, 2001 in *Bayatyan v. Armenia* (Application no. 23459/03). See also the EU Charter of Fundamental Rights (Nice 2000): 'strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments'; cf. infra, Section 3.1 for Section 1 of the Canadian Charter.

56 Besselink (L. Besselink & B. van Mourik, 'The Parliamentary Legitimacy of the European Union: the Role of the States General within the European Union', (2012) 8 *Utrecht Law Review*, no. 1, http://doi.org/10.18352/ulr.179, pp.28-50) also accepts that a constitution is a living instrument and 'is to function within time, not beyond it. Its interpretation needs to take account of this.' It is questionable whether 'the term of the justices sitting in a constitutional court, provide a better outlook than that of the members of the legislature' (p. 33). Yet this also works against the democratic legitimacy of judicial supremacy in the 'Kelsenian' model, defended by Besselink, in which it is, ultimately, 'derived' from 'popular sovereignty'. Under conditions of a vibrant liberal–democratic 'political culture' and of',deference to the legislature' (p. 33) this 'tension between the legislature and the judiciary' may, indeed, be softened but it should be acknowledged as a matter of principle before one goes into comparative discussions of alternative institutional settings that, indeed, 'require a delicate balance' (p. 35). See more critically: Dyzenhaus, supra note 37, and also Fallon, supra note 2, for 'democratic legitimacy'.

57 Still visible in Kumm's 'rational standards' of 'Socratic contestation' (Kumm 2009, supra note 6, pp. 15 et seq.). Here I disagree explicitly with the 'Dworkinian' remnants in Waldron, supra note 5, and with R. Bellamy, *Defending Sovereignty: A European Republic of States* (2015) unpublished ms. Chapter 3. Consensus is unachievable even under ideal conditions: the more ideal, the more reasonable dissensus we can expect. Under real world conditions, consensus works as a mechanism of generalisation of normative expectations in the social dimension with conservative or even repressive consequences (this is the crucial insight of Luhmann's criticism of Habermas).

58 See B. Barber, *The Conquest of Politics* (1989); J. Tully, *Strange multiplicity* (1995); J. Tully, *Public philosophy in a new key* (2008); A. Wiener, *A Theory of Contestation* (2008). This is, obviously, not the place to go into any detail. In my view, a reappraisal of 'moderately agonic reasonable compromise' is also called for: see Bader 2007, supra note 39, pp. 179-85; V. Bader, 'Secularism, Public Reason or Moderately Agonistic Democracy?', in G. Levey & T. Modood (eds.), *Secularism, Religion, and Multicultural Citizenship* (2008), pp. 110-135 at pp. 131-35, and V. Bader, 'Crisis of political parties and representative democracies', (2014) 17 *CRISPP*, no. 3, pp. 360 et seq., p. 370. See also J. Horton, 'Modus Vivendi and Religious Conflict', in M. Mookherjee (ed.), *Democracy, Religious Pluralism and the Liberal Dilemma of Accommodation* (2010), pp. 121-136; A. Klinke & O. Renn, 'Expertise and experience', (2014) 27 *Innovation*, no. 4, pp. 442-465. F. Wendt, *Compromise, Peace and Public Justification* (2016).

59 Hogg & Bushell, supra note 34, spreading from Canada to the US: Hogg & Thornton, supra note 34; Hogg et al., supra note 28; Roach, supra note 34; K. Roach, 'Dialogic Judicial Review and its Critics', (2004) 23 *Supreme Court Law Review* (2nd), pp. 49-104; Hiebert, supra note 34; Bateup, supra note 11; Bateup, supra note 27.

60 Bateup, supra note 11, p. 60 quoting B. Friedman.

courts, between courts and legislators (parliaments, sub-committees etc.), government and executive committees, and between 'non-judicial actors' and 'citizens' or broader political, societal and cultural actors (social movement organisations, NGOs, political parties etc.) and networks.[61] (iv) *Levels:* from state/ *Länder* via federal to supra-state jurisdictions and polities. (v) *Time*: short-, medium-, long-term. (vi) Its contested *effects:* from symbolic window-dressing (either favouring judicial or parliamentary supremacy) to important juridical, political and socio-cultural effects in interpretations and changes of constitutions and constitutional review. Even a short overview of these debates is way beyond the limits of this article.[62] Instead I present some of the *promising potential* emerging from actual experiences and theoretical discussions of constitutional dialogue.

(1) *Democratic habits* of judges and the *careful argumentation and justification of decisions* (e.g. by reasonable balance tests and proportionality tests)[63] can contribute a lot to increasing substantive legitimacy, but the main internal seedbed may be the toleration and flourishing of *dissenting opinions* (first in the United States, later in Germany, Spain, Portugal and Greece and by the ECtHR). The main advantages of this tradition are:[64] (i) dissenting judges force the majority of judges to argue and justify their position carefully. It serves as an important internal mechanism of control. (ii) It contributes to '*rechtsvorming*' (developing law) because dissenting opinions may become dominant or majority opinions. (iii) It may increase the societal and political acceptance of decisions because the arguments of losing parties are spelled out. Far from undermining the authority of constitutional courts, the publication of dissenting opinions and voting ratios may actually help to increase the quality and persuasiveness of the decision and, hence, the substantive legitimacy of constitutional review.[65] It also makes it easier to bring hidden political judgments and biases (e.g. class, gender, ethno-racial, religious) to the fore, making them vulnerable in public and political debate and increasing 'difference-sensitivity'. All in all, it may help to increase the judicial literacy of the (interested) public and contribute to learning about the open, flexible, plural character of Liberal–Democratic Constitutions, to acknowledge the legitimacy of deep diversity of perspectives and in the finding of reasonable compromises. It is one of the most important *internal* means to fight isolated, overassertive and rigid courts and strategies of caste-like self-isolation of the dominant judiciary or, conversely, to strengthen 'passive virtues'.[66]

(2) *Competition/cooperation between multiple jurisdictions*,[67] particularly under conditions of more 'horizontal coupling', less clear or contested 'hierarchy' or explicit 'heterarchy'[68] actually contributes to the perception of reasonable, deep disagreement amongst judges[69] and amongst legal experts from courts,

61 Hogg and Bushell-Thornton (supra note 34) focus on courts and legislators; Hiebert, supra note 34, on courts and the executive branch; so-called 'equilibrium theories' (see Bateup, supra note 11, pp. 57 et seq. for Barry Friedman and Robert Post/Reva Siegel) focus on 'institutional interactions between the judiciary, the political branches and the people' (p. 57) stressing the role of public opinion, 'society-wide dialogue' and cultural dialogue 'grounding in constitutional culture' (p. 63) but 'underplay the institutional aspects of constitutional dialogue' (p. 69); 'partnership theories' highlight the distinct contributions of differently situated branches of government' in a way that does not privilege the judicial role (p. 70). The 'strongest normative account of the role of judicial review (...) emerges when the equilibrium and partnership understandings of dialogue are combined' (p. 76) by a 'dynamic fusion' (pp. 76-83, referring to K. Whittington, 'Extrajudicial Constitutional Interpretation', (2002) 80 *N.C.L. Review*).

62 A. Meuwese & M. Snel, ''Constitutional Dialogue': An Overview', (2013) 9 *Utrecht Law Review*, no. 2, http://doi.org/10.18352/ulr.231, pp. 123-140, have provided an excellent discussion of definitions and theories. Their working definition is useful: 'a sequel of implicitly or explicitly shaped communications back and forth between two or more actors characterized by the absence of a dominant actor – or at least by a bracketing of dominance – with the shared intention of improving the practice of interpreting, reviewing, writing or amending constitutions' (p. 126) because it is open and not too 'harmonious' (though it clearly allows for less argument than my approach), and the same holds for their distinction of theories, inspired by Bateup (see as a summary: Table 1, p. 134).

63 See Kumm 2009, supra note 6, pp. 3, 9 et seq.; M. Klatt, 'Positive rights: Who decides? Judicial review in balance', (2015) 13 *International Journal of Constitutional Law*, no. 2, pp. 354-382.

64 See Van Dommelen, supra note 46, pp. 199 et seq.

65 See supra note 40 with Fallon versus Waldron.

66 A. Bickel, *The Last Dangerous Branch* (1962).

67 B. Schotel, 'Legal Protection as Competition over Jurisdiction', (2015) unpublished paper. See Meuwese & Snel, supra note 62, pp. 130 et seq. with Rosas for five different categories of such judicial dialogue between courts.

68 'Horizontal coupling' and 'heterarchy' are well-known concepts in sociology of organizations (see H.A. Simon, 'The Organization of Complex Systems', in H.H. Pattee (ed.), *Hierarchy Theory. The Challenge of Complex Systems* (1973), pp. 1-27) and political theory. See Halberstam, supra note 26, pp. 2 et seq.: conflicts resulting from 'concrete institutional and intergovernmental contestation in times of deep disagreement about final legal authority within constitutional systems'.

69 See Wendel 2013 and 2014, supra note 4, for judicial publics.

parliamentary committees, the legal profession generally, and human rights NGOs. Under favourable conditions it also may help to increase public and political awareness (see Section 5).

(3) Opening up forms of *dialogue/contestation and co-decision with non-judicial, political institutions*, particularly with *legislators*, is crucial to combat judicial supremacy, to increase or even enforce traditions and practices of judicial deference in constitutional courts, and to increase substantive democratic legitimacy (see Section 2.3.1). Particularly under 'non-ideal' conditions they are not meant to replace all forms of constitutional review but to complement them,[70] because there is a clear need to counter the three well-known dangers of parliamentary sovereignty or supremacy. The first danger is that the quality of laws is not checked for the standards of the rule of law by an independent body. The second is that the rights and freedoms of citizens (and residents) may not be effectively protected by the legislative body.[71] The third is that simple legislative majorities are vulnerable when it comes to overriding minority rights.

(4) Opening up forms of *dialogue with* and contestation by a broader range of *societal, political and cultural actors* (such as social movement organisations, civil society organisations, NGOs, political parties and a variety of interested stakeholders in the specific issue-areas at stake,[72] various media and the general public) may help to create and stimulate informed and critical democratic politicization of jurisdiction.

2.4. Concluding remarks

Let me finish by summarizing my main general conclusions. Firstly, in constitutional issues there is not and cannot be 'one', best, optimal and ultimate interpretation and decision. Secondly, in LDC no one – neither judiciary, nor politicians, nor other experts – should have the 'last word' and all monopoly claims or supremacy claims should be rejected, whether by supreme courts or parliaments. Thirdly, decisions and institutional arrangements depend on contexts. There is no one best or optimal arrangement, neither for democracy more generally[73] nor for constitutional review and amendment. This also speaks against the export/import of – usually idealized – 'models', but it does not prevent comparisons, modest lessons as guidelines, and learning from each other. Fourthly, the most important thing is to counter insulation and closure by opening up, stimulating and institutionally anchoring broad judicial, political and societal dialogue/contestation. Fifth, in this regard competition amongst institutions with similar, overlapping competences – such as overlapping multiple jurisdictions but also multiple legislative institutions – should be reconsidered or re-evaluated. Finally, the main problem is how adversarial dialogue, cooperation and competition can be made more clearly focused, informed and reasonable: how and by whom can it be organized and orchestrated in such a way?

3. Lessons from the Canadian notwithstanding clause

As we have seen, institutions and traditions of strong and extensive or unlimited judicial review make any substantive dialogue with or control by legislative bodies very difficult and ideologies/practices of judicial supremacy do not allow it. In this sense constitutional courts and parliaments are completely asymmetrical and the decisions by supreme courts are unimpeachable. The legislature is bound by court decisions, not vice versa. In this section I address constitutional review within nation states and discuss the Canadian notwithstanding clause which seems to provide opportunities to avoid a stand-off and for opening up substantive communication between Parliament and Supreme Court. It can be seen as an 'intermediate form' or a 'halfway house'[74] between judicial and parliamentary supremacy or sovereignty, or between strong and extensive judicial review (as in the US or Germany) and weak or even non-existent judicial review. I start with

70 Unfortunately, this is not spelled out clearly enough by Bellamy, supra note 57, nor by Waldron, supra note 5, and Kramer, supra note 3, though all direct their attack against judicial supremacy and make it clear that different forms of weaker judicial review may be necessary.

71 See Ewing &Tham, supra note 36, for a 'weak conception of the rule of law in practice' and 'a correspondingly weak commitment to the substance of human rights' (p. 688), together with a very strong judicial deference to 'parliamentary sovereignty' in the UK in cases of detention without trial.

72 See V. Bader, 'Eurosphere(s)?', (2008) *Working Paper: WP 1, Eurosphere*. See Meuwese & Snel, supra note 62, for 'new governance theories' and 'non-judicial actors' (pp. 132 et seq.).

73 Forms of direct and/or representative democracy; of parliamentary or presidential democracy; of proportional and/or majoritarian electoral systems, etc. See V. Bader & M. Maussen, *Renewing Democracy* (2015) book project.

74 Hogg et al., supra note 28, p. 29.

minimal introductory remarks (3.1), present arguments against (3.2) and in favour of the clause (3.3) and suggest some proposals for revision and improvement (3.4) before outlining some preliminary lessons.

3.1. The Canadian notwithstanding clause

Here is a brief, authoritative summary of the Canadian notwithstanding clause or override clause in Section 33 of the revised Canadian Charter of Rights and Freedoms (1982) by Johansen and Rosen:[75]

> 'Section 33(1) permits Parliament or a provincial legislature to adopt legislation to override section 2 of the Charter (containing such fundamental rights as freedom of expression, freedom of conscience, freedom of association and freedom of assembly) and sections 7-15 of the Charter (containing the right to life, liberty and security of the person, freedom from unreasonable search and seizure, freedom from arbitrary arrest or detention, a number of other legal rights, and the right to equality). Such a use of the notwithstanding power must be contained in an Act, and not subordinate legislation, and must be express rather than implied. Under section 33(2) (…) the overriding legislation renders the relevant Charter right or rights "not entrenched" for the purposes of that legislation. In effect, parliamentary sovereignty is revived by the exercise of the override power in that specific legislative context. Section 33(3) provides that each exercise of the notwithstanding power has a lifespan of five years or less, after which it expires, unless Parliament or the legislature re-enacts it under section 33(4) for a further period of five years or less. A number of rights entrenched in the Charter are not subject to recourse to section 33. These are democratic rights (sections 3-5 of the Charter), mobility rights (section 6), language rights (sections 16-22), minority language education rights (section 23), and the guaranteed equality of men and women (section 28). Also excluded (…) are section 24 (enforcement of the Charter), section 27 (multicultural heritage), and section 29 (denominational schools) – these provisions do not, strictly speaking, guarantee rights.
> All rights and freedoms set out in the Charter are guaranteed, subject to reasonable limitations under the terms of section 1. This has the effect, in combination with section 32 of the Charter (making the Charter binding on Parliament and the legislatures) and section 52 of the Constitution Act, 1982 (making the Constitution, of which the Charter is a part, the supreme law of Canada), of entrenching the rights and freedoms set out in the Charter. The invocation of section 33, and especially of section 33(2), pierces the wall of constitutional entrenchment and resurrects, in particular circumstances, the sovereignty of Parliament or a legislature. Consequently, the Charter is a unique combination of rights and freedoms, some of which are fully entrenched, others of which are entrenched unless overridden by Parliament or a legislature.'

The establishment of the clause has been a 'uniquely Canadian development with no equivalent in either international human rights documents or Western democratic human rights declarations'.[76] Yet there are a number of Canadian legislative precedents in the Canadian Bill of Rights, the Saskatchewan Human Rights Code, the Alberta Bill of Rights and the Quebec Charter of Human Rights and Freedoms.[77] In addition, there are a few later similar clauses such as in Israel 1992 (limited to the right to work) and in Australia in 2006 in the revised Victorian Charter of Human Rights and Responsibilities Act, Section 31. According to Johansen and Rosen:

> 'Experience so far has shown at least three situations where section 33 was used in a way not foreseen by those participating in the 1981 First Ministers' Conference or by commentators: the omnibus, routine invocation of section 33 by the Quebec National Assembly between 1982 and 1985; the preventive use of section 33 by Saskatchewan in relation to back-to-work legislation; and the adoption of Bill 178 by the Quebec National Assembly following the 15 December 1988 Supreme Court of Canada decisions in *Ford* and in *Devine*.'[78]

75 D. Johansen & P. Rosen, 'The Notwithstanding Clause of the Charter', (2012) *Library of Parliament Research Publications* <http://www.lop.parl.gc.ca/content/lop/researchpublications/bp194-e.pdf> (last visited 23 September 2016).

76 Ibid., p. 2

77 See ibid. on the 'origins of section 33' and the lively and controversial debate.

78 Ibid., 'Section 33 Invocation'; see also T. Kahana, 'The notwithstanding mechanism and public discussion: Lessons from the ignored practice of section 33 of the Charter', (2001) 44 *Canadian Public Administration*, no. 3, http://doi.org/10.1111/j.1754-7121.2001.tb00891.x, pp. 255-391. See Kuo, supra note 6, pp. 14 et seq. for an 'obvious decline in the interaction between the court and the legislature in recent years': from 1983 to 1996, 66 cases of Section 1 were held to be in breach of the Charter, approximately 80% generated some legislative response; from 1996 to 2006 this percentage declined to 61%. The notwithstanding clause (Section 33) has become a rarity: never above the provincial level and not at all since 2000, effectively fallen into 'desuetude' or 'constitutional atrophy'. See Hogg et al., supra note 28, pp. 51-54; Bateup, supra note 27, p. 53; Roach 2001a, supra note 34, p. 487: normatively it 'should therefore only be used in exceptional circumstances'.

Outside the Quebec Language Law issues, the clause has been used only three times. The first such use was in Yukon's Land Planning and Development Act in 1982, the second was in Saskatchewan to protect back-to-work legislation which was declared contrary to the freedom of association in Section 2(d) of the Charter by the Court of Appeal. The third use was in Alberta where the conservative provincial government considered using the notwithstanding clause against a ruling by the Canadian Supreme Court in April 1998 in the case of *Delwin Vriend v. Alberta*. Vriend had been dismissed by the Christian King's College in 1991 because he was gay and this was taken to appeal by the Alberta Human Rights Commission. The Supreme Court, eventually, decided in favour of Vriend and stated that the right to equality in Alberta's Human Rights Act had to protect against discrimination on the ground of sexual orientation. Because of popular pressure, however, the Alberta government, led by Premier Ralph Klein, did not use the clause. Eventually the province of Alberta introduced a law allowing a veto in the legislative assembly against the notwithstanding clause and requiring a referendum for its use.[79]

3.2. Arguments against the clause

During the history of the debates on the introduction of the clause and its application in Canada, the old and well-known arguments for and against are used by judicial supremacy absolutists and by parliamentary supremacy absolutists.[80]

Critics argued that the clause is inconsistent with the entrenchment of human rights and freedoms, most simply because 'rights are rights'. (i) Rights are, indeed, subject to judicial interpretation 'but must be protected *against legislative transgression*'. (ii) Generally governments and legislative assemblies do not violate 'rights in defiance of public opinion; rather, it is precisely when the majority of the public is in favour of, or at least not opposed to, the *limitation or elimination of the rights of a minority* that constitutional constraints are needed'. (iii) 'The Charter does not create absolute rights and freedoms that must be applied literally; section 1 of the Charter provides that the rights and freedoms guaranteed are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This (…) should *permit the courts enough flexibility to accommodate legislative goals that infringe a guaranteed right or freedom*.' (iv) The clause 'creates a *hierarchy of rights*' 'because the legislative override is applicable to only the fundamental freedoms and legal and equality rights'. (v) The clause raises questions about the nature of the *freedom that remains* because the 'rights and freedoms that can be overridden are so significant.'[81] (vi) The *mere existence* of the override power can *entice governments to use it*.[82] (vii) The clause might be *used in cases where rights and freedoms are most in need of protection*.[83]

3.3. Arguments in favour of the clause

The most important *arguments in favour* of the clause have been the following:[84]

Those who argue in favour of Section 33 do not see it as inconsistent with entrenched rights and freedoms and contend that (i) it provides a mechanism whereby, in exceptional circumstances, the *elected legislative branch* of government may make important policy decisions and *isolate them from review by the unelected judicial branch* of government. (ii) They argue that the *threat to individual rights is not great because there*

79 See Van Dommelen, supra note 46, p. 205; Hogg et al., supra note 28, pp. 8 et seq.; extensively: Bateup, supra note 27, pp. 49-53.

80 Johansen & Rosen, supra note 75; my numbering and italics.

81 'If our freedom of conscience or religion can be taken away by a law which operates notwithstanding the Charter, if our right to life or liberty can be taken not in accordance with the principles of fundamental justice, what freedom do we have?' (Morris Manning, quoted by Johansen & Rosen, supra note 75).

82 'The Canadian Bar Association argued that section 1 of the Charter provides ample protection for legislative authority, and therefore recommended that section 33 be repealed.' Also, the dangers of an 'open horizon' should not be underestimated because 'five years' may easily become permanent.

83 In 1985, Herbert Marx – the Liberal Opposition Justice Critic in Quebec – stated that 'the danger of having a "notwithstanding clause" will become evident when we need protection most, referring to the October crisis of 1970, when the federal government set aside the Canadian Bill of Rights by enacting the Public Order (Temporary Measures) Act. Clearly, then, it gives federal and provincial legislators very wide powers to do as they see fit in limiting or denying those rights and freedoms. Perhaps none of our legislatures will use the notwithstanding clause again. But it is there. And if this dagger is flung, the courts will be as powerless to protect our rights as they were before there was a Charter of Rights.'

84 Johansen & Rosen, supra note 75, my numbering and italics.

is a five-year limit on any use of the notwithstanding power. (iii) Any such legislative override will be *subject to public debate* at the time of its first enactment and at the moment of any subsequent re-enactment. (iv) They also point out that *only some, not all, rights are subject* to a possible legislative override. (v) (They) maintain that, while it is useful and, indeed, very valuable for the *courts to play a role in the elaboration of the rights and freedoms* that Canadians should enjoy, it is *not proper for them to act as legislators*. Judges may remain in office for many years after their appointment, long after the government that appointed them has left. That they do so now is not questioned; however, if they had a greater 'political' role, their non-accountability to the electorate might well be a source of controversy. (vi) Closely linked to this is the assertion that a *policy-making role would compromise the independence and impartiality of the courts* and would hasten their *politicization*. It may thus be argued that a legislative override, by allowing final political decisions to be made by the elected representatives, mitigates the politicization of the courts. (vii) Closely linked to the submission that legislators, and not judges, should have the final word on public policy matters is the 'safety valve' or '*unintended consequences*' *argument*. Simply put, this suggests that the notwithstanding clause is needed where a judicial decision based on Charter guarantees might result in a *threat to important societal values or goals*. Because the Charter rights and freedoms are generally stated and are susceptible to varying constructions and interpretation, the courts may render judgments that the drafters did not anticipate ('unintended consequences').

In short, Section 33 has been justified on the grounds that it preserves the principle of 'parliamentary sovereignty'. As well, legislators, unlike judges, are electorally accountable. Section 33 also makes it possible for Parliament or a provincial legislature to correct any unfortunate judicial interpretation of the Charter.

Even such a brief oversight of these arguments demonstrates, as is only to be expected, that we have to deal with serious issues and that it is rather difficult to find an institutional arrangement promising better or more 'reasonable balances'.

3.4. Some proposals

Some of the most serious objections against Section 33 might be addressed by the following *proposals*. I start with *procedural proposals* before dealing with the *open, pluralist and changing character of LDC* and some remarks on a *hierarchy of rights*, if any.

3.4.1. Procedural proposals

A serious fault in the construction of the clause is that laws are declared valid even if they violate certain basic rights.[85] This could be remedied, and the protection of basic rights could be considerably strengthened by two changes elaborated by Van Dommelen: (1) by allowing an override clause *not before but only after a judgment* of the Constitutional Court[86] and, (2) by explicitly stating that parliament is *not allowed to suspend certain categories of basic rights* (except in cases of obvious emergency)[87] *but only to overrule the interpretations and balancing of rights in judgments* of the Constitutional Court (Van Dommelen's first proposal). This would also correct the impression that only judges but not legislators think that Charter rights are important.[88]

85 Van Dommelen, supra note 46, p. 204.

86 Van Dommelen's third proposal; see Bateup, supra note 11, p. 74 with Hiebert: 'should only be used following a decision'; Bateup, supra note 27, p. 13 'only subsequent to a judicial decision', not 'pre-emptively' (see also Kahana, supra note 78 and Roach 2001 and 2001a, supra note 34). See for the importance of this: D. Halberstam, '"It's the Autonomy, Stupid!"', (2015) 16 *German Law Journal*, no. 1, pp. 105-46.

87 The suspension of rights by the clause is different from and much stronger than emergency cases and regulations, though the frequent reference to 'public order' (see Marx, supra note 83) demonstrates the similarity. The importance of emergency for overruling rights is more well-known and common, cf. infra, Section 4.3 for 'emergency and executive federalism' in the EU.

88 See also Waldron's response to Goldsworthy's suggestion that the notwithstanding clause 'provides a sufficient answer to those of us who worry, on democratic grounds, about the practice of strong judicial review' (J. Goldsworthy, 'Judicial Review, Legislative Override, and Democracy', (2003) 38 *Wake Forest Law Review*, p. 451): 'I believe that the real problem is, that section 33 requires the legislature to misrepresent its position on rights. To legislate notwithstanding the Charter is a way of saying that you do not think Charter rights have the importance that the Charter says they have.' (Waldron, supra note 5, p. 1357). My second proposal clearly addresses and resolves this problem.

In addition to Van Dommelen's changes, a third change could be that parliament should not be allowed to *overrule* a court decision by a simple majority but *only by a qualified majority*, e.g. 60%, and, indeed, for a limited timespan such as three or five years and a limited number of rounds, instead of 'try, try, again'. This would strengthen minority rights[89] against the whims of simple majority decisions.

A fourth change could be that if – after intense public debate stimulated by this procedure[90] – constitutional courts (Grand Chamber, last instance) were still to declare the respective or an appropriately revised law unconstitutional, such a judgment could only be overruled after detailed procedures (second and third readings, timespan) with *even more demanding QMV* comparable to the constitutional requirements for amending the constitution or, alternatively, by directly amending the constitution.

A fifth change could be that if one were to consider strengthening the democratic legitimacy of such decisions by *referenda* (as in Alberta) these, and the preceding public debate, could be more focused and detailed[91] compared with encompassing amendments of the constitution. *Vetoes*, however, would create joint-decision traps and generally work in favour of the status quo.

3.4.2. The open, pluralist and changing character of liberal–democratic constitutions

Critics are right to point out that rights are not absolute rights but 'subject to reasonable limits' (Section 1 of the Charter, quoted above in Section 3.1) but their claims that courts would have enough flexibility for interpreting the inherent conflicts, tensions with other rights and with common interests/goods in accordance with changing societal conditions and evaluations is clearly an overoptimistic *petitio principii*. The strongest arguments of defenders of the clause result from a combination of the 'unintended consequences and unforeseeable changes' arguments with the lack of democratic legitimacy and implicit politicization arguments. In their weighing and balancing of rights against each other, in their strict scrutiny tests and in their interpretations of politics/policies aimed at the 'common good' (in contextualized 'all things considered' judgments), courts depend, on the one hand, on meta-legal and meta-constitutional second order principles and, on the other hand, they depend on social and cultural values. Both are, more or less rapidly, changing. If there does not exist a vibrant tradition of dissenting opinions and, more broadly of judicial and public political debate, courts tend to be, other things being equal, isolated and rigidly conservative (in cases of lifelong appointment of judges, even more so). An appropriately fine-tuned override clause forces them to listen, to open up to dialogue and to learn.[92] It puts their implicit political biases to the test and demonstrates the impossibility of 'completely independent', 'impartial' and 'purely legal/juridical' judgments. *Politicization* in the service of 'relational neutrality', 'embedded impartiality' and 'difference sensitivity'[93] is required and parliaments, amongst other democratically accountable institutions, are better able to achieve this.

3.4.3. Hierarchy of rights?

Critics have argued either that the clause allows the override of the wrong categories of rights (Section 2 and Sections 7-15 of the Charter)[94] or more generally that there should be no hierarchy amongst basic

89 See supra Section 2.3.4 and 3.2, see also Eugene Forsey (quoted in Johansen & Rosen, supra note 75).

90 This is the common core of all varieties of 'theories of constitutional dialogue' referred to above, see Hogg & Bushell, supra note 34, pp. 79-81 'catalyst for a two-way exchange'; Bateup, supra note 11, pp. 58 et seq.): courts as 'shaper and facilitator of society-wide discussion about constitutional values', 'channels and fosters'; 'how judicial and non-judicial actors come to learn, debate and adapt or modify their view due to their interdependent participation in constitutional dialogue' (p. 60).

91 Here I do not share the optimism of Van Dommelen favouring these measures as 'an important correction of the Clause' (…) because of the positive consequences for public debate' (Van Dommelen, supra note 46, p. 205). The referenda on the EU Constitutional Treaty clearly speak against this hope.

92 See supra note 86 with Bateup. Ironically, one could say that an override clause and critical public debate put the interpretations of rights, their weighing and balancing and their interpretations of politics of the common good under a 'strict scrutiny test'.

93 See Bader 2007, supra note 39, Chapter 2. This strategy is, as already indicated above, different from political decisionism – from Schmitt to Unger (see V. Bader, 'The Constitution of Empowered Democracy: Dream or Nightmare?', in R. Lange & K. Raes (eds.), *Plural Legalities* (1991), pp. 6-22) – and from relativism.

94 See also Manning, supra note 81, and Van Dommelen, supra note 46, p. 204 (her second correction) which argues in favour of a special protection for freedoms of political communication from the perspective of deliberative democracy, or see my arguments from the perspective of moderately agonistic democracy (V. Bader, 'Free Speech or Non-Discrimination as Trump?', (2014) 40 *JEMS*, no. 2, pp. 320-338). Fallon (supra note 2, p. 1713) is right that some 'liberal' individual rights belong to the core, but he is wrong in debunking certain 'democratic' rights.

rights. From my perspective (LDC as a conflictual historical, developing compromise with two pillars), the old conflicts about primacy of 'liberal' rights (roughly speaking: rule of law, judicial rights, life and liberty) or of 'democratic rights' (equal active and passive voting rights, freedoms of political communication), or the idea of a strict, context-independent hierarchy or lexical ordering of rights, are not promising but rather misleading. As if one could achieve consensus on such an ordering, as if such an ordering would be immune from contexts and changes, as if it would be informative to decide specific cases. Instead we have to live with ongoing dissensus even on basics and we have to raise the standards and develop the arts of reasonable contestation (deliberation cum negotiation), of reasonable balancing, of proportionality and strict scrutiny of all infringements or limitations, and of context-sensitive decisions 'all things considered'. A revised override clause might promise to achieve just this.[95]

3.5. Some lessons

Let me finish by outlining some preliminary general lessons. If, as already stated, 'consensus' is unachievable, if serious tensions and conflicts have to be acknowledged, if security of the law and effective rights-protection (better guaranteed by courts and constitutional review) are in tension with democratic legitimacy of making and changing the law (better guaranteed by democratically elected and accountable institutions), if the cooperation of the intertwined institutions of constitutional courts and parliaments cannot be productively regulated by simple 'supremacy', a lot depends on smart institutional design. Unfortunately, the very limited application of the clause also means that not many lessons can be learned up to now from its practice. As should be clear by now, not one institutional model fits all circumstances and there are no best or optimal practices that could be exported, but we can compare and learn. Learning can start from one end of the spectrum, as in the UK by adding weak forms of constitutional review or from the other end, as in Canada, by adding elements of 'parliamentary sovereignty' to stronger constitutional review from the American tradition. Yet also in this case, obviously, the notwithstanding clause cannot and should not be exported – not only but particularly also because of its focus on cultural minorities and language rights and weak attention for basic civil rights that has provoked the expected criticism, by defenders of strong constitutional review, as weakening Charter rights and undermining the authority of judges/courts. Still, it opens ways of informed and reasonable, adversarial dialogue through competition and cooperation between constitutional courts and parliaments, particularly if some of the suggested amendments were to be taken seriously.[96] Compared with *internal* mechanisms to increase substantive democratic legitimacy (such as dissenting opinions and competition/dialogue between state courts and federal courts which are present in the US and Canada) the dialogue, competition and cooperation between the Supreme Court and Parliament as one of the ways to add *external* democratic legitimacy is fairly new in this context.[97] In my view, this dialogue is very promising because it may also open up constitutional debates and judicial dialogues to a broader political and societal public and the respective interested stake-holders,[98] a claim that is difficult

95 In line with Peter Hogg and others; see also J. Koshan, 'Peter Lougheed and the Constitution, Notwithstanding', *University of Calgary Faculty of Law Blog* (2012) pp. 4-5: 'Section 33 has also been used (…) to illustrate the notion of a dialogue between the courts and legislatures. For example, in Vriend, Justice Iacobucci stated that: "a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it."' See the extensive discussion in Hogg et al. and Bateup (supra note 59).

96 In the heated debate on EU accession to the ECHR, Besselink proposed signing a protocol declaring that accession must take place 'notwithstanding Article 6(2) Treaty on European Union, Protocol No 8 relating to Article 6(2) of the TEU and Opinion 2/13 of the ECJ of 18 December 2014' (L. Besselink 'Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13' (2014), <http://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/> (last visited 23 September 2016), but he has recently reconsidered this proposal by discussing the notwithstanding protocol in terms of a proper amendment under Art. 48 TEU (L. Besselink, 'The EU's Accession to the ECHR – a "NO" from the ECJ', (2015) 52 *Common Market Law Review*, no. 1, pp. 1-15, at p. 14), see Halberstam, supra note 26.

97 'The unsettled nature of the relationship between the President, the Congress, and the Supreme Court' in the US has been rightly analysed by Halberstam, supra note 26 as being 'more important than the "federalism" discussion, though almost completely neglected or uniformly overlooked' (but see Hiebert and Bateup, supra note 59).

98 The integration of 'interested stakeholders' is particularly important in cases of thoroughgoing cultural changes such as the revolution in family and marriage relations (see Hogg et al., supra note 28, pp. 9 et seq. and p. 43; see extensively Bateup, supra note 27, p. 3 and Part V: 'Positive Constitutional Dialogue in Action: Gay Rights and Same-Sex Marriage in Canada' (pp. 53-65) for court decisions at state and federal levels and parliamentary debates). See V. Bader, 'Legal Pluralism and Differentiated Morality: Shari'a in Ontario?', in R. Grillo et al. (eds.),

to test empirically because of the limited number and character of cases in Canada. This should, however, not be a reason to underestimate the 'mere existence'[99] of such an institutionalized dialogue because its mere existence, even if not used, makes revitalization much easier. This underestimation is motivated by two arguments: first by sweeping statements on a predominant 'contemporary political-legal culture' and, second, by sweeping statements on a 'general trend toward a judicialization of constitutional politics' and 'law-making' and, hence 'judicial supremacy' (instead of departmentalism or judicial dialogue) all over the world.[100] The competition/cooperation between state constitutional courts and federal constitutional courts in Canada and the US – as, maybe, the most effective way to increase judicial and political dialogue[101] – is however fairly weak compared with the European Union under the condition of dispersed and decentralized constitutional adjudication, which is a laboratory and hotbed of overlapping and competing jurisdictions, as I indicate in the next section.

4. New forms of cooperation and competition between parliaments and highest or supreme courts in Member States of the EU, the ECJ, and the ECtHR

Even in so-called 'unitary' nation states the unity, finality, comprehensiveness, coherence and consistency of law, as claimed and normatively promoted by traditional legal monism or *Rechtsformalismus* (legal positivism) is a more or less effective myth masking different degrees and sorts of actual legal pluralism.[102] As we all (should) know: not all law is written law (customary law), not all written law is made by (differentiated) legislative bodies (judges make and change law by applying it) and there is competition between legislative bodies, most obviously in explicitly non-unitarian, federalist states amongst first and second chambers or in presidential democracies (president versus congress, '*la cohabitation*' in France). Also from a normative perspective, competition of courts and overlapping, competing and cooperating multiple jurisdictions do not necessarily spell disorder or disaster (stand-off, joint decision-traps, deadlock) but can, under certain conditions, be productive. For the new, highly pluralist polity of the EU, this age-old discussion acquires new and contemporary urgency.

4.1. Multi-level constitutionalism in EU demoi-cracy

The EU is in many regards still an enigmatic, new type of polity. It is the most complex, multi-level polity, neither an intergovernmental organization nor a new federal state. In my view, it may be best called a 'complex' or 'compound democracy' or a 'demoi-cracy'[103] characterized by multiple (local, provincial,

Legal Practice and Cultural Diversity (2009), pp. 49-72 and V. Bader, 'Individual and/or Associational Autonomy?', in D. Borchers & A. Vitikainen (eds.), *On Exit* (2012) pp. 116-139; for recommendations to make Christian based state law more 'secular' and include same-sex spouses and cohabitants versus the still dominant exclusion of civil partnerships and other forms of living together.

99 By Kuo, supra note 6, pp. 40, 44, Section III from a normatively contrary perspective. See Hogg et al., supra note 28, p. 42: 'The existence of this legal power – however rarely it may be exercised – forces politicians to take responsibility for their decisions'.

100 Kuo's analysis of the actual practices and, particularly, his theoretical stress on the importance of cultures, virtues, habits and practices is more than welcome, but does not legitimize downplaying the importance of existing institutional structures, let alone the development of institutional alternatives.

101 However, in this regard as well it is plain that such a productive adversarial judicial dialogue is possible without an institutional import of a notwithstanding clause. Other institutional arrangements may be available.

102 See Bader, supra note 93. These positivist myths of finality, supremacy, and comprehensiveness regarding 'Sovereign' Rule, Polity, Regime and People (Bellamy, supra note 57, Ch. 3 Section 1, also pp. 20 et seq.) can only be rescued if sovereignty is understood as a matter of degree, limited, delegated, devolved, in short by invoking the old strategies of rescuing positivism already applied by Kelsen and Hart. If combined with an intrinsic link between 'democracy' and the 'nation-state' – as it is by Bellamy and by Besselink, supra note 6, p. 32 – democratic institutional pluralism, including supra-state levels, is declared impossible in principle. Yet the 'We the people' as the constituent power is normatively (see Kumm 2005, supra note 6, p. 275) as well as empirically dubious. The same holds for the confrontation of 'National Constitutional Supremacy (NCS)' and 'European Constitutional Supremacy (ECS)' sharing this 'statist character' and excluding 'Constitutionalism Beyond the State (CBS)' (Kumm ibid., pp. 266 et seq.; see Pernice 2009, supra note 4, pp. 383 et seq.). European constitutional practice is pluralist in a specific way, potentially able to avoid conflicts by invoking either a 'principle of constitutional tolerance' (Weiler) or 'procedures of mutual engagement of national and European legal orders' (Maduro) or because of the 'convergence on common constitutional principles (...) and their inter-institutional deliberative explication' (Kumm ibid., p. 267) by which, again potentially, 'remaining constitutional conflicts are procedurally transformed into moments of constructive deliberative engagement' (p. 269) based on 'principles of political morality' (p. 268; see Bader, supra note 94, pp. 332-334). For the logical status of LDC, see Halberstam's 'three primary values of constitutionalism' (supra note 26, Section III).

103 For an extensive criticism of the trench warfare between the exclusive alternatives of 'inter-governmentalism' and 'federalism' and for conceptual and theoretical alternatives, see V. Schmidt, *Democracy in Europe* (2006); S. Fabbrini, 'The Euro Crisis and the Constitutional

state, European), overlapping, shifting and contested (legislative, executive and judicative) powers and competences. Predominantly, the overlap of all these competences is seen as negative (endless strife, institutional and political deadlock),[104] but it can also work productively and transformatively.[105] This all is way beyond the scope of this article.

Here the focus is on '*Constitutional Pluralism*' or '*Multilevel Constitutionalism*' as 'an interactive process of establishing, dividing, organizing, and limiting powers, involving national constitutions and the supranational constitutional framework, considered as two interdependent components of a legal system governed by constitutional pluralism instead of hierarchies';[106] and, more particularly, on the specific role of judicial review by constitutional courts of Member States and of European courts in relation to legislative bodies in the development of European law and politics in general, more specifically under the conditions of the recent financial and Euro-Crisis and strengthening of executive federalism. In general, we can see two opposing but interlinked developments. On the one hand the *emergence of new forms of dialogue and cooperation* between courts, starting from the 1970s onwards which, on the other hand, is *threatened by* two recent developments: by *competing judicial supremacy claims* in response to executive monetary and fiscal federalism, and by judicial supremacy claims of the ECJ in the debate on the accession of the EU to the ECHR.

4.2. The emergence of dialogue and cooperation

The complex relationship between courts in the EU generally and particularly regarding constitutional adjudication has been contested right from the start and the 'primacy' or 'supremacy' and 'direct effect' of European law and European courts has been understood differently.[107] Under the impact of globalization and, particularly, the EU, the Kelsenian model of constitutional adjudication by centralized and specialized constitutional courts as 'ultimate arbiters' – predominant in continental Europe – gives way to a more radically dispersed and decentralized constitutional adjudication (compared with the US model). A new dynamics of dialogue and competition developed in three ways (in reverse order) as shown below.

(1) The *Simmenthal* ruling (1978)[108]'revolutionized national constitutional law and in particular constitutional adjudication by taking away the monopoly of centralized constitutional courts to review the constitutionality of an Act of Parliament. In addition, non-specialized courts and bodies have also acquired new functions of constitutional review in European countries with weak or non-existent constitutional review (the UK, Finland, Denmark, Sweden, the Netherlands) resulting in competition between national constitutional courts and other courts and councils.

(2) *Competition between European courts and national constitutional courts*. After *Simmenthal* some kind of equilibrium had developed 'in which national courts allowed the ECJ space for some of its claims to priority while the ECJ allowed space for some of the most fundamental and cherished national constitutional

Disorder of the European Union' (2015) unpublished Paper (ACCESS Europe); for 'compound democracy' see V. Bader, 'Building European Institutions', in S. Benhabib & I. Shapiro (eds.), *Identities, Affiliations, and Allegiances* (2007) pp. 113-135; V. Bader, 'Komplexe Bürgerschaft', in S. Zurbuchen (ed.), *Bürgerschaft und Migration* (2007), pp. 53-90; Bader, supra note 1; see D. Innerarity, 'What Must Be Democratized?', in D. Innerarity et al. (eds.), *The Future of Europe* (2014), pp. 171-194; for 'demoicracy' see K. Nicolaidis, 'The New Constitution as European Demoi-cracy?', (2004) 7 *CRISPP*, no. 1, pp. 76-93, K. Nicolaidis, 'European Demoicracy and Its Crisis', (2013) 51 *JCMS*, no. 2, pp. 351-369, F. Schimmelfennig, 'The normative origins of democracy in the European Union', (2010) 2 *European Political Science Review*, no. 2, pp. 211-233; D. Leuffen et al., *Differentiated Integration* (2013); F. Chevenal & F. Schimmelfennig, 'The Case of Demoicracy in the European Union', (2013) 51 *JCMS* , no. 2, pp. 334-350; and J. Beetz, 'Stuck on the Rubicon?', (2014) 22 *Journal of European Public Policy*, no. 1, pp. 37-55.

104 See A. Benz, *Politik im Mehrebenensystem* (2009) for examples: namely, executive powers of Member States, council of ministers (unanimity or QMV), commission, committees.

105 See Schmidt, supra note 103, and Leuffen et al., supra note 103; S. Kropp, 'Federalism and subnational parliaments – a delicate relationship?', in F. Abels & A. Eppler (eds.), *Subnational parliaments in an EU multi-level parliamentary system* (2015). For 'governance' and 'comitology' much earlier, see A. Héritier, 'New modes of governance in Europe', in A. Héritier (ed.), *Common Goods* (2002), pp. 185-206; A. Héritier, 'Composite democracy in Europe', (2003) 10 *Journal of European Public Policy*, no. 5, pp. 814-33; P. Schmitter, *How to Democratize the European Union – and Why Bother?* (2000) for many.

106 Pernice 2009, supra note 4, pp. 349, 372-83; see Pernice 1999, supra note 4, p. 707; see N. MacCormick, *Questioning Sovereignty* (1999), Kumm 2005, supra note 6; Walker 2002, 2008, 2010 (all supra note 6), Wendel 2014, supra note 4.

107 In my brief sketch, I follow Besselink, supra note 6, quotes from pp. 24-27.

108 Judgment of the Court of 9 March 1978, Case 106/77, *Simmenthal*, [1978] ECR 00629, ECLI:EU:C:1978:49.

values', yet in the *Winner Wetten* judgment[109] it is suggested that the *BVerfG* 'should and could not be trusted to protect and apply EU law'.

(3) *Competition between European courts* (ECJ versus ECtHR). The ECJ claims and tries to enforce new and unprecedented prerogatives at crucial moments in the negotiation, claiming 'the monopoly to interpret EU law itself by side-lining the ECtHR and imposing the obligation that national constitutional courts must refer the case to the ECJ. The ECJ fears that ECtHR will tread on issues of EU law which it feels it should have unfettered discretion and full autonomy in deciding', 'it fears the ECtHR as a competitor in an area where an overlap of jurisdiction may arise'. This competition acquired a new quality in the debate as to whether the EU should ratify the ECHR.[110] Contested supremacy claims of defenders of national or of European constitutional supremacy may, and actually do stimulate dialogue and reasonability. National constitutional courts not only should but also do talk and listen to each other and may learn from each other,[111] and European courts may do so as well.

At the same time it is important to see that not only is the same old game of competing supremacy claims being played, but also that, even under conditions of weakly formalized supremacy, *new forms of dialogue and cooperation* have developed between Member State courts themselves and also between the ECJ and the ECtHR.[112] These new forms of *horizontal or heterarchical relations*, of informal and formalized or institutionalized judicial and non-judicial dialogue among judges in 'European Judicial Networks' but also of Courts of Audit and of Ombudsmen may have two results. On the one hand, they may and do contribute to reasonability in constitutional and judicial dialogue and 'trigger a political debate about legislative activities at the European level'.[113] On the other hand, they also open it up to non-legal experts and a broader public of interested politicians and other relevant stakeholders. Hence, courts should not only listen to and talk with other courts and legal experts without claiming supremacy, but also with legislators, politicians and other experts.

109 Judgment of the Court (Grand Chamber) of 8 September 2010, Case 409/06, *Winner Wetten*, ECLI:EU:C:2010:503.

110 See Pernice 2009, supra note 4, p. 393. See L. Besselink 'Should the European Union Ratify the European Convention for Human Rights?' (2013) <http://dare.uva.nl/document/2/132373> (last visited 5 October 2016): prior to the accession, the relationship between the courts had been asymmetrical, the ECJ unilaterally adopted a standard of fundamental rights protection based on the rights of the constitutional traditions common to the Member States and on the HR treaties. These rights had to be transformed into EU law by incorporating them as general principles of the Union's law (EU Treaty Maastricht 6(3)). The ECJ developed 'from fundamental rights rejection to full scrutiny' (pp. 2 et seq.) via 'the co-respondent mechanism' and the 'comity between the courts' (p. 20). 'Accession to the ECHR, however, seems to have triggered a very different dynamics' in which the objective of 'improving the judicial protection of the fundamental rights' seemed to have been lost from sight, replaced by 'diplomacy of high politics'. 'The ECJ has found it necessary to protect its autonomy, perceived uniqueness and the fear for upsetting its prerogatives' in a rather jealous manner echoing 'the quasi sovereigntist objection of some states against the introduction of the ECtHR and later of EU member-states' in a political climate in which the court has become the object of strong semi-sovereigntist criticism. According to Besselink 2015 (supra note 96, pp. 14 et seq.) the inflexible defence of the judicial powers by the ECJ 'at the expense of an accession of the EU to the ECHR may (…) lead to an (unexpected) backlash in the relationship between the ECJ and the constitutional courts of the Member States' which 'may be willing to defend their judicial powers (...) vis-à-vis the ECJ in a fashion parallel to the ECJ vis-à-vis the ECtHR'. I fully agree with Besselink's normative conclusion (Besselink 2014, supra note 96, p. 22): 'the ECtHR has a useful role to play in reminding the EU and member state authorities (…) that mutual recognition may be good for European integration, but that it should not undermine core values on which it is founded: respect for the minimal rights contained in the ECHR.' Making the EU live up to 'do this is the particular contribution which the ECtHR has to make within a mature mutual relationship with the EU and its Court of Justice'. See also Schimmelfennig, supra note 103, pp. 227-229; Nicolaidis 2004, supra note 103, p. 8; Chevenal & Schimmelfennig, supra note 103, pp. 343-346. See C. Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation', (2013) 76 *Modern Law Review* 21, pp. 254-285 for the role of 'external pressure' by the ECtHR in criticizing the Common European Asylum System.

111 This is excellently analysed by Wendel (2013 and 2014, supra note 4) for the *recent Europe-decisions of national constitutional courts in a transnational perspective* which demonstrate a more elaborate use of comparative legal reasoning, including in-depth and sometimes even critical evaluations of foreign jurisprudence in the ratio decidendi'. See, for a prominent example, the criticism of the *BverG* by the Czech Constitutional Court: 'substantive limits to the transfer of powers require "restraint and judicial minimalism which is perceived as a means of limiting the judicial power in favour of political processes" (Lisbon II, para 113), and by taking an active role in an EU-wide process of shaping a common constitutional law' (p. 981) in a spirit of cooperation or of competition (p. 983, 1001).

112 See M. Claes & M. de Visser, 'Are you networked yet? On dialogues within European judicial networks', (2012) 8 *Utrecht Law Review*, no. 2, http://doi.org/10.18352/ulr.197, pp. 100-114; Harlow, supra note 4, Harlow & Rawlings, supra note 4 for judicial dialogue generally. See Besselink 2013, supra note 110, pp. 4 et seq., for regular meetings between the members of the two European courts from the 1990s onwards, to the Joint Communication by the Presidents in 2011 or the Conference of European Constitutional Courts, or the European Constitutional Law Network (Wendel 2014, supra note 4: comparative reasoning as a 'breeding ground' of a veritable 'European Area of Constitutional Scholarship'). In this regard, the 'new deliberative multi-level parliamentary space' (see B. Crum & J. Fossum, 'The Multilevel Parliamentary Field: a framework for theorizing representative democracy in the EU', (2009) 1 *European Political Science Review*, no. 2, pp. 249-271) can be productively compared with the multi-level space for judicial dialogue.

113 See Pernice 2009 supra note 4, p. 393.

In sum, multiple and overlapping jurisdictions and competition between all sorts of courts may not only be positive for 'liberal' constitutionalism or principles and practices of the rule of law[114] but also more demandingly for LDC, minimally understood.[115] The most important and until now fairly neglected issue is to *specify the social, political and cultural conditions under which these negative or positive effects can be expected* (see Section 5, Conclusion).

4.3. Executive federalism or judicial supremacy?

Under the conditions of the *recent crisis of financialized capitalism and the Euro-Crisis* the discussion on courts' supremacy acquired a new quality and urgency both within Member States and in their relation with European courts. Situations of crisis and – declared, perceived, actual – *emergency* always have worked and work in favour of executive powers,[116] particularly if the legislative powers are weak and if mechanisms of legislative and judicial oversight are underdeveloped or non-existent (as is still the case in the EU even after the introduction of co-decision). As is well known and well documented, the two interlinked crises have led to '*executive federalism*' within less than five years, to an 'unprecedented rise and exercise of executive powers',[117] to 'audacious new modes of governance and regulatory powers' in a new regime of financial and economic governance. This 'new constitution of the EMU'[118] contains three components all involving 'novel competences for the EU institutions': (i) *budgetary constraints,* (ii) *financial stabilization*, (iii) *economic adjustment*.

According to Joerges,[119] this new regime is characterized by 'necessarily indeterminate general clauses', it is 'regulatory in its nature, establishing a transnational executive machinery outside the realm of democratic politics and the form of accountability which the rule of law used to guarantee': the 'rule of law and legal protection requirements are being suspended'. This is all seemingly incompatible with the EU's commitment to democracy and the rule of law. Hence it is 'brought to trial at both national and European levels' and this jurisprudence is, indeed 'an acid test of constitutional guardianship', courts trying to counter this new executive federalism in the EU as well as the non-existent or weak control by Member State parliaments and the ECJ. Yet this '*Judicial Scrutiny*'[120] eventually resulted in a '*Crisis of Jurisprudence*'.[121]

Space prevents me from giving a summary of the detailed analysis of the divergent rulings of constitutional courts in five EU Member States (Estonia, France, Germany, Ireland, Portugal), and of the ECJ.[122] According to Fabbrini,[123] the outcome is, on the one hand, a clear '*trend of increasing judicial involvement* across Europe' and, on the other hand, that courts have, with the exception of the latest decision of the Portuguese Constitutional Court, validated the legal measures under review, although with two caveats: first, they have expressed 'more discomfort towards measures of financial stabilization and economic adjustment' compared with those of tighter budgetary restraints and, second, 'over the years courts have also revealed

114 As highlighted by Schotel, supra note 67. See above Section 2.2.4 for the hard substantive core of minimalist but strong judicial review.
115 As is highlighted by Kumm 2005, supra note 6, p. 303, by Halberstam, supra note 26, by Leuffen et al., supra note 103, pp. 4 et seq., and others. See supra note 53 for the hard core or the substance of moral minimalism in relation to more demanding notions of liberal–democratic morality and LDC.
116 See supra note 83 for Canadian debate. See generally for literature and discussion from Schmitt and Kelsen: M. de Wilde, 'Uit nood geboren: Constitutionele veranderingen in tijden van crisis', inaugural lecture University of Amsterdam (2013). See W. Scheuermann, 'Crises and Extralegality from Above and from Below', in P. Kjaer & N. Olson (eds.), *Critical Theories of Crisis in Europe* (2016), pp. 197-212.
117 Joerges 2014, supra note 4, p. 75, see K. Dyson, 'Sworn to Grim Necessity?', (2013) 35 *Journal of European Integration*, no. 2, pp. 207-222. Fabbrini, supra note 4, D. Curtin, 'Challenging Executive Dominance in European Democracy', (2014) 77 *Modern Law Review*, no. 1, pp. 1-33. See more particularly: J. Zeitlin, 'EU Experimentalist Governance in Times of Crisis', (2015) 39 *West European Politics*, no. 6, pp. 1073-1094.
118 See extensively: Fabbrini, supra note 4, pp. 67 et seq.; see also Joerges 2014, supra note 4, p. 77, and C. Joerges 'What is Left of the European Economic Constitution', in P. Kjaer & N. Olson (eds.), *Critical Theories of Crisis in Europe* (2016), pp. 143-160, p. 154 et seq., on 'the law in crisis'.
119 Joerges 2014, supra note 4, pp. 78-80.
120 Fabbrini, supra note 4, pp. 74 et seq.
121 Joerges 2014, supra note 4, pp. 79 et seq. Courts are confronted with four veritable challenges: (i) difficulties in delineating their mandates; (ii) issues at the borderlines of the legal system, i.e. fiscal and economic policy and parliamentary budgetary autonomy have no predefined legal contours; (iii) acting in a state of utmost uncertainty about the effects on crisis management; (iv) an inability to rely on the kind of legislative guidance on which the ideas of representative democracies and separation of powers build.
122 See Fabbrini, supra note 4, pp. 74-103, see Joerges 2014, supra note 4, pp. 82-84 on Pringle.
123 Fabbrini, supra note 4, pp. 105-113.

a greater unwillingness to let political branches have it their way'. The increasing judicial involvement is largely a consequence of the 'intergovernmental approach' because in most state jurisdictions, supreme or constitutional courts are empowered to review *a priori* international treaties (such as the Fiscal Compact and the European Stability Mechanism (ESM)), but not the legality of EU legislation; only the ECJ can declare an EU act void, the reason why such legislation – the 'Six Pack',[124] the 'Two Pack'[125] and the European Financial Stabilisation Mechanism (EFSM) – 'has entirely escaped judicial review'. Hence, the shift from 'legislation to contract' paid a high price in terms of judicialization: 'the choice by the EU member states to respond to the Euro-Crisis through a strategy of intergovernmental governance, and with systematic recourse to international agreements outside the EU legal order, has resulted in increasing judicial involvement in fiscal affairs'. The *paradoxical outcome* is: 'One of the central tenets of intergovernmentalism in EU governance is that the executive branches (acting within the European council) will dominate decision-making to the detriment of legislatures and courts.[126] Yet the outcome of intergovernmentalism has been an increasing involvement of courts' even far greater and stronger than that which one finds 'in a country such as the United States which is generally credited as having one of the strongest systems of judicial review worldwide'.[127]

4.4. Consequences of strong judicial involvement

Let me point out some more general *consequences of this strong judicial involvement*, approaching judicial supremacy, at the level of Member States and at the EU level.

(1) The effort by national constitutional courts, particularly the German court, to protect democracy against European executive powers and judicial supremacy claims by the ECJ, leads them to *overstep their competences and tends to weaken their liberal–democratic legitimacy* by countering expertocracy with national juristocracy.[128]

(2) *Substantively*, the competing supremacy claims in matters of fiscal and economic policies by the German court and the ECJ are both dominated by a *neoliberal ideology* that serves as a background to fill the indeterminacy and internal inconsistency of economic and fiscal legislation – only the Portuguese Constitutional Court in its latest ruling objected explicitly.[129] This same 'Merkelantist'[130] paradigm also served as the background for the new EMU constitution:

> 'the new authorization of "the logic of the market" and its austerity requirements' was an open replacement of the original Maastricht philosophy. Courts, in these cases, however 'should turn to the legislature and respect its messages. In the present case, however, the political emperor seems to have absolutely no clothes. Its promise that crisis law will bring economies in difficulty "back on track" lacks plausibility. The suffering imposed on a large number of European citizens may be merely senseless. The departure from Europe's commitments to the rule of law and democracy comes at a high price.'[131]

(3) *Against such absolutist, non-deferential claims to judicial supremacy* in the fiscal and economic area, 'strong constitutional arguments plead in favour of letting the political branches, rather than the courts,

124 Regulations (EU) No. 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011 and Council Directive 2011/85/EU of 8 November 2011, OJ L 306, 23.11.2011, pp. 1-47.

125 COM(2011) 821 final and COM(2011) 819 final.

126 See also Joerges 2014, supra note 4, p. 77: 'the current crisis-driven striving for strong economic and technocratic governance lacks a consolidated constitutional form'. The democratic legitimacy of the EP and, particularly, of the Commission and the numerous executive bodies is weak or non-existent. The ECJ 'has never been formally established as a "constitutional body"' 'and national constitutions are not prepared to subject the exercise of this authority to the ECJ'.

127 See Wendel 2014, supra note 4, pp. 263-300, for the German *BverfG*: on the 'sad irony of the OMT reference that, in a doubtlessly well-intentioned effort to protect the principle of democracy against an alleged excess of competences at the EU level, the FCC itself exceeds the limits of its judicial mandate under German constitutional and EU law' (p. 265) by an expansion of ultra vires review (pp. 271 et seq.) to legal prohibitions, leading to 'manifest violation of its competences, claiming extraordinary legal protection under extraordinary circumstances'. See also Joerges 2014, supra note 4 , pp. 80-82. Besselink, supra note 6.

128 See Kuo, supra note 6, and Hirschl, supra note 38, p. 33; see also Innerarity, supra note 103, pp. 181-192 (but extremely weak when it comes to institutional alternatives!) and R. Bellamy & D. Castiglione, 'Three models of democracy, political community and representation in the EU', (2013) 20 *Journal of European Public Policy*, no. 2, pp. 206-223, at pp. 216 et seq.

129 See Wendel 2013a, supra note 4: Section 3.1(aa); Joerges 2014, supra note 4, p. 88.

130 This apt phrase was coined by Heiner Ganssmann in an article on 'Merkelantismus' in *Le Monde Diplomatique*, September 2012.

131 Joerges 2014, supra note 4, p. 86.

take fundamental decisions'.[132] Three main considerations should guide the allocation of competences among alternative institutions in separation-of-power systems.[133] First, with regard to *expertise*, political institutions (governments, parliaments and central banks) are endowed with greater expertise than courts in the fiscal domain both at Member State and at EU level. They can and do mobilize more specialized, expert knowledge, they are under more political pressure and scrutiny, and they can adopt proactive approaches. Second, with regard to *voice*, there is undeniably a 'democratic deficit' of intergovernmental decision-making and the democratic legitimacy of the European Parliament – compared with parliaments of Member States – is still weaker, but, compared with courts at both levels, the political branches enjoy greater voice.[134] Third, the major weaknesses of the EU political process from a democratic perspective ought to be addressed by *institutional reforms of the EMU*, yet it is dubious, to say the least, whether this deficit would be cured by greater oversight by institutions like courts because of weak or non-existent democratic legitimacy.[135] 'An intergovernmental system of governance suffers from major legitimacy gaps': 'the *political process ought to maintain the lead* in the fiscal and economic field'. Hence, we should '*reform the EU political process without the courts*'.[136]

(4) Both the EMU regime and the extremist judicial review destabilize the still weak constitutional balance[137] in the EU as well as its liberal–democratic legitimacy. Hence, they *contribute to a deep and serious crisis* not only of the *Eurozone* but of the *EU itself*, as is clearly demonstrated by the never-ending Greek tragedy.

5. Conclusion: institutionalizing adversarial dialogue. Learning from critical pragmatism, democratic experimentalism, democratic institutional pluralism and associative democracy

The outcome of my discussion is that judicial supremacy is indefensible on many grounds and that courts/judges cannot and should not try to speak legal truth to political powers by analogy with the increasing insight that science cannot and should not speak 'truth to power'.[138] Particularly under conditions of complex societies, it becomes plain that we have to deal with pervasive reasonable disagreement and with perceived contestedness and uncertainty of all cognitive knowledge,[139] yet the criticism of objectivist truth claims does not imply scepticism, decisionism, radical constructivism or 'it's all politics'. Instead, we have to 'democratize science' (or, more broadly, all kinds of expertise) in order to 'expertise democracy'. There are *three main mechanisms for democratizing science and, by analogy, 'law and jurisprudence'*.[140]

(1) *Democratic self-organization of science.* The ethos of truth-finding needs backing by cultural, legal and institutional safeguards insuring free criticism, pluralism and lively internal debate counteracting power asymmetries. Rivalry and competition between individuals, schools, disciplines, and research institutions help considerably to counter monopolistic claims. No one model of the internal organization or governance of science fits all countries, disciplines and issues, and the main problem is reframing the legal and institutional guarantees of the 'relational autonomy' of science while also recognizing a legitimate role for outsiders (versus absolute autonomy and insulation).

(2) *Inclusion of experience-based expertise, stakeholders and their organizations* and unorganized public groupings and media.

132 Fabbrini, supra note 4, pp. 116-118.
133 See Halberstam, supra note 26. See with Hogg et al., supra note 28, Bateup, supra note 11, and others.
134 Yet co-decision is evolving and the rejection of the multi-annual financial framework of the Council and Commission is a sign of presenting an alternative and, in that way, politicizing fundamental decisions of fiscal issues.
135 Fabbrini, supra note 4, p. 118 where one finds the well-known arguments summarized above in Section 1.
136 Ibid., pp. 119 et seq. This is clearly not the place to discuss such reforms (strengthening co-decision, direct election of Commission President, or to do away with the unanimity rule and replace it instead with 'supermajorities' in the EU context (see Schmidt, supra note 2, pp. 16 et seq.)), let alone alternative models of democratic institutional pluralism for the EU (see Bader & Maussen, supra note 73). Yet the perspectives of Besselink (supra note 6, p. 32) and of Bellamy (supra note 54) suffer from remnants of sovereigntism and republican statism.
137 M. Dawson & F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis', (2013) 76 *Modern Law Review*, no. 5, pp. 817-844.
138 This analogy is not often recognized let alone explicitly dealt with (but see Joerges 2014, supra note 4, p. 87 for the regulation of risks and the affinities of legal, scientific, economic and social uncertainties).
139 See V. Bader, 'Sciences, politics, and associative democracy', (2014) 27 *Innovation*, no. 4, pp. 420-441.
140 Ibid., pp. 430-433.

(3) The problematic *inclusion of lay public groupings* that, under appropriate institutional conditions, can beneficially contribute to increase the relational objectivity of science as well as the embedded impartiality of norms and values.

In addition, there is clearly a limited but important and democratically legitimate role for *external political institutions* (both legislators and government/administrations) in framing the governance of science and for control by courts. Here the problem of finding the right balance of relational autonomy is even tougher.

Obviously, the *analogy* between science and law/jurisdiction is circumscribed or *limited* because science flourishes by ongoing, increasing dissensus while law/jurisdiction has to find, at least for the time being and all things considered, the 'right decision'. However, at least in the case of constitutional law, this 'closure', as we have seen, has to go hand in hand with openness and ongoing legitimate dissensus. In this regard, some of the *measures for* '*expertising democracy*'[141] may also be relevant because they help to develop *mutual relations and dialogue*: attempts to enhance the scientific and judicial literacy of the public by 'scientists and judges going public'; presentation of scientific results and court decisions in generally accessible media; broad societal and political discussions on deeply controversial issues; science hearings – and judicial hearings – organized and conducted by legislative powers, expert witnesses in court cases, and the inclusion of (cognitive and normative) experts of all sorts and relevant stakeholders in public administration, in issue definition, decision-making alternatives and even in decision-making and implementation.[142]

My *main claim* is that the principles and the institutional and policy repertoire of *democratic institutional pluralism*, particularly of adversarial *associative democracy, provide better practical alternatives* to democratize expertise as well as to expertise democracy compared with the better known competing democratic theories and practices of 'thin liberal', 'strong republican', 'deliberative' or 'participatory' democracy.[143] *Complex* or *compound, multi-level democracy* promises huge *advantages* compared with more unitary forms of political democracy in terms of higher degrees of information and of relevant knowledge, of reasonable contestation and deliberation, of more adequate problem definitions and solutions, of stakeholder involvement and of ongoing, reiterative learning. Associative democracy, as a specific variety of Democratic Institutional Pluralism, combines government *by* the people (through political participation and elections), *of* the people (through representation), *for* the people (through effective government/governance) and *with* the people (through interest consultation and stakeholder representation). It combines multi-level 'political' democracy with multi-level 'social' democracy.[144]

Its *problems* – well known from the huge literature on existing governance arrangements – are along the following lines: overwhelming institutional complexity, opacity, highly selective inclusion, lack of legal and democratic accountability and control (even in 'the shadow of hierarchy') and rigidity, joint-decision traps and deadlock, very time-consuming and conflict ridden.[145] The traditional *mechanisms* to overcome negative competition and endless conflict are, on the one hand, a far-reaching (constitutional, legal, administrative) ex ante specification of the respective powers and competences and their inter-relations and, on the other hand, their strict hierarchical ordering or coupling (in terms of 'supremacy'). Yet, it is well known that these mechanisms have their inherent limitations, which are getting increasingly serious in our complex societies: an exploding complexity of legal and administrative rules; rigidity, unworkability; serious limitations in terms of information, knowledge and capacities to learn and adapt; and the rules intended to overcome conflict

141 Ibid., pp. 433 et seq.

142 See H. Trute, 'Democratizing Science', in H. Novotny et al. (eds.), *The Public Nature of Science under Assault* (2005), pp. 85-139, for administrative law and the importance of creating 'an intermediate deliberative arena', and of reflexive (anticipating the consequences of regulation) and iterative procedures.

143 Bader, supra note 139, p. 421. In a more detailed discussion of t*he question as to which institutional arrangements and proposed reforms promise better, more productive, more reasonable outcomes*, one should clearly distinguish empirical and theoretical perspectives. An *empirical* comparison of the huge variety of constitutional arrangements is obviously way beyond the scope of this article. The *theoretical* criteria can be either procedural or substantive. The *procedural* inclusion of more perspectives, more stakeholders, more people, and a multiplicity of competing reasons at least increases the chances that better informed, more long-term oriented and more socially robust decisions will be taken. In addition, it is intimately connected with substantive criteria (such as the guarantee of minimal justice) that, at least in my view, depend on such a multi-vocal democratic process and decision-making.

144 Schmidt, supra note 2; see Bader & Maussen, supra note 73.

145 See Bader 2010, supra note 1, pp. 264 et seq. for the 'Distribution of Competences' in Multi-level Polities, particularly the EU.

themselves become seedbeds of (political, administrative, legal, and constitutional) battles. While multi-level-polities, democratic-institutional-pluralism and associative democracy should not be equated with destructive competence disputes, rigidity and inability to reform, these dangers are not easy to avoid to say the least, and advocates should be quite outspoken in recognizing them which, unfortunately, is often not the case.[146] Fairness requires explicitly stating that these problems are not easily, if at all, avoidable. However, a conclusion is not the place to discuss this.[147]

Space also precludes more than a very rough indication of the *conditions* under which institutionalized competition among courts may have the positive results highlighted by theorists of constitutional dialogue and constitutional pluralism.[148] Cooperation in the spirit of mutual trust is obviously much easier in positive than in zero- or negative-sum games. Apart from such *economic* and *political* conditions, *social* and *cultural conditions* are crucial: the broader the recognition of reasonable disagreement even on basic constitutional issues is – among justices, among politicians and the wider interested public – the easier it becomes to tolerate and eventually also respect deeply divergent perspectives and contested decisions and to develop the respective cultural practices, virtues and habits of toleration, civility, sensibility and the arts of listening, of moderately agonistic 'dialogue cum negotiation', of searching for and finding reasonable compromises instead of repeating and strengthening monopolistic supremacy claims.[149]

There is at least some hope that we might learn from new practices of developing 'Governance-Arrangements'[150] and institutions of 'social' democracy and that the literature on *experimentalist governance*,[151] *associative democracy* and *realist, deliberative risk governance*[152] might show ways in which existing hard trade-offs – e.g. effectiveness/ efficiency versus transparency/accountability and democratic legitimacy – can be transformed into softer ones and how, at the same time, the information (fact base) and knowledge base can be strengthened and the deliberative and inclusive quality of practices can be drastically increased. In this regard, the general *core questions* concern the development, orchestration or *organization of inclusive and adversarial*, but focused and determined *public, political talk or dialogue*. This is the common core of theories and traditions of *critical pragmatism, realist deliberation* and *moderately agonic democracy.* In our case, instead of the competing claims of judicial or parliamentary supremacy, the crucial questions are, as I hope to have shown, *how to organize and orchestrate iterative, adversarial public, political and judicial dialogue* between courts, parliaments and a broader judicial, political and societal public and the respective interested stake-holders, in order to increase the diversity of reasonable perspectives, the information base on all relevant kinds of circumstances, particularly of changing societal conditions and social, political and cultural values and practices. Who is or should be organizing these dialogues? Who is allowed or invited to talk and listen? When and with whom? And how long should such dialogue go on in specific cases and issues?

146 This weakness characterizes nearly all general accounts of legal and constitutional pluralism or multi-level constitutionalism as discussed in this article. In addition, I should at least mention that the proposed forms of adversarial dialogue can be, and actually are, often extremely demanding, time-consuming and irritating, because they require a change of habit and the learning of new virtues of listening, and of paying regard to others etc., as is also spelled out by defenders of 'realist' deliberative democracy.

147 See Bader 2010, supra note 1, pp. 265 et seq. for a brief discussion of the problems and the mechanisms to overcome them. See more generally: A. Benz & J. Sonnicksen, 'Patterns of federal democracy: tensions, friction, or balance between two government dimensions', (2015) *European Political Science Review*, pp. 1-23; see the contributions by A. Benz & C. Colino, J. Erk, J. Broschek, and J. Bednar in (2011) 21 *Regional & Federal Studies*, no. 4/5; see S. Kropp, 'How to participate in federations?' (2015), unpublished manuscript.

148 According to A. Bächtinger & D. Hangartner, 'When Deliberative Theory Meets Empirical Political Science', (2010) 58 *Political Studies*, pp. 609-629: competitive orientations can be – e.g. under conditions of veto powers – productive for dialogue/deliberation.

149 Beyond institutional ('freedoms of political communication') and procedural conditions, so often highlighted exclusively by defenders of deliberative democracy. Such deep-seated virtues (*ethoi*) are not only the result of open and adversarial democratic talk, but a certain minimum is clearly its precondition.

150 See Héritier 2003, supra note 105 for many examples.

151 See C. Sabel & J. Zeitlin (eds.), *Experimentalist Governance* (2012).

152 Klinke & Renn, supra note 58; see also: J. Dryzek & S. Niemeyer, 'Discursive Representation', (2008) 102 *American Political Science Review*, no. 4, pp. 481-493 for 'chambers' of discourse and selection of representatives (pp. 485 et seq.).