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A Question Not for the Courts to Answer: A Thematic Analysis of the Recent Jurisprudence of the German Federal Constitutional Court and the Austrian Constitutional Court through the Lens of the Political Question Doctrine

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Abstract

This article discusses how the German Federal Constitutional Court and the Austrian Constitutional Court have addressed political questions submitted for constitutional review in their jurisprudence from 2017 to 2021. 'Political questions' mainly concern the fields of foreign policy and security, the rules governing the democratic process, core political controversies, and possibly fundamental rights claims. Five themes are identified to discuss the Courts' practices: (a) discussions of legislative margins of appreciation; (b) references to external sources; (c) the offering of constitutionally conforming interpretations and guidelines; (d) the application of holistic policy considerations; and (e) discussions of the relationship between the Courts, and the legislature and the executive. The respective approaches are evaluated by reference to concerns relating to the separation of powers, checks and balances, fundamental rights, and judicial prudence. The evaluation of these practices yielded mixed results, with all practices having advantages and disadvantages. To improve the Courts' approaches, the paper outlines a political question doctrine similar to the one developed in US constitutional law. The political question doctrine renders certain political questions non-justiciable, based on their textual commitment to another branch of government or for prudential reasons. The doctrine proposed for Germany and Austria includes judicial restraint for issues being debated in parliament, and possibly the option for

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the Courts to initiate political discussions or popular consultations. However, if the Courts observe a risk of serious fundamental rights infringements, they should be able to issue a decision remedying the violation, despite the initial applicability of the doctrine.

Keywords: comparative constitutional law, political question doctrine, German Federal Constitutional Court, Austrian Constitutional Court, thematic case law analysis

I. Introduction

'*The law encompasses any action... The fact that an issue is "strictly political" does not change the fact that such an issue is also "a legal issue".*'
Aharon Barak[1]

'[Modern human rights law] *transforms controversial political issues into questions of law for the courts. In this way, it takes critical decision-making powers out of the political process.*'
Jonathan Sumption[2]

Constitutional courts are seen as protectors of human rights, guarantors of the rule of law, and arbiters of constitutional disputes. However, their decisions are not without controversy, and scholars debate their proper functions and powers. Constitutional courts are 'established, independent organ[s] of the state whose central purpose is to defend the normative superiority of the constitutional law within the juridical order'.[3] Constitutional review is one of the key means by which constitutional courts perform this task. It is defined as 'the power of judicial bodies to set aside ordinary legislative or administrative acts if judges conclude that they conflict with the constitution'.[4] In the centralised system of constitutional review, constitutional courts are the only courts that can exercise constitutional review.[5]

Constitutional courts were conceived by Hans Kelsen when framing the Constitution of the First Republic of Austria (1920–34).[6] After the Second World War, the German Federal Constitutional Court was established based on the Austrian model. After the collapse of the authoritarian regimes in Southern and Eastern Europe in the 1970s and 1990s, the majority of the newly founded nations adopted the Austro-German constitutionalist approach. The underlying assumption was that constitutional courts would enable a robust system of rights

[1] HCJ 910/86 *Major (Res) Yehuda Ressler v Minister of Defence* (Israeli High Court of Justice, 12 June 1988) [477].
[2] Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019) 60.
[3] Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 817.
[4] Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2005) 1.
[5] Stone Sweet (n 3) 817–818.
[6] ibid 817–819.

protection, a prerequisite for democracies. However, it is important to recognise that constitutional courts fulfil a legislative function through the exercise of constitutional review, as they have the authority to strike down legislation.[7]

In recent decades, many scholars have observed a 'judicialisation of politics',[8] that is, a global trend towards shifting powers from representative institutions to the judiciary.[9] In his book *Governing with Judges*, Alec Stone Sweet argues that policymaking has been judicialised 'by an ever-expanding web of constitutional constraints' that allows '[c]onstitutional judges [to] routinely intervene in the legislative process'.[10] Some argue that the powers of constitutional courts should be limited by curtailing the justiciability of 'political questions'.[11] This is because there may not be an appropriate legal basis for answering these questions, the executive or legislative branches may have been explicitly tasked with answering them, or the court may suffer negative consequences, such as a decline in its legitimacy, as a result of providing an answer.[12] Therefore, US constitutional law has long developed a political question doctrine which renders certain political questions non-justiciable.[13] However, its precise form is not clear, and its application is inconsistent.[14]

This article aims to examine: (a) how the German Federal Constitutional Court and the Austrian Constitutional Court have addressed political questions submitted for constitutional review between 2017 and 2021; and (b) whether the approaches of the respective courts are desirable when considering aspects such as the separation of powers, checks and balances, fundamental rights, and concerns of judicial prudence. Section II discusses the political question doctrine and defines what constitutes a political question for the purposes of this article. Section III explains the methodology used to select and analyse the Courts' decisions. Section IV provides a brief overview of the history of the German Federal Constitutional Court and the Austrian Constitutional Court and traces the development of the jurisprudence of these courts in relation to political questions. Section V

[7] ibid 819.

[8] See for example Ran Hirschl, 'The Judicialisation of Politics' in Robert E Goodin (ed), *The Oxford Handbook of Political Science* (Oxford University Press 2011) 255; C Neal Tate and Torbjörn Vallinder, 'The Global Expansion of Judicial Power: The Judicialisation of Politics' in C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995) 5; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 1.

[9] Ran Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 Fordham Law Review 721.

[10] Stone Sweet (n 8) 1.

[11] See for example J Peter Mulhern, 'In Defense of the Political Question Doctrine' (1988) 137 University of Pennsylvania Law Review 97, 175–176; Rachel E Barkow, 'More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 Columbia Law Review 237, 330–331.

[12] Zachary Baron Shemtob, 'The Political Question Doctrines: Zivotofsky v. Clinton and Getting beyond the Textual-Prudential Paradigm' (2016) 104 Georgetown Law Journal 1001, 1013, 1017.

[13] Martin H Redish, 'Judicial Review and the "Political Question"' (1984–85) 79 Northwestern University Law Review 1031, 1031.

[14] Alexandra Mercescu and Sorina Doroga, 'Should the European Court of Justice Develop a Political Question Doctrine?' (2021) 7 International Comparative Jurisprudence 15, 21.

answers the first question by identifying five themes of practice that exemplify the approach taken by the Courts in addressing political questions in the past five years. Furthermore, it presents an analysis of the themes according to the evaluative criteria so to answer the second question. Finally, Section VI sets out a possible political question doctrine for Germany and Austria.

II. Theoretical Framework

A. The political question doctrine

(i) The Doctrine's Development in the US Supreme Court

The political question doctrine has primarily developed in the case law of the US Supreme Court. It provides that if a 'political question' is brought before a court, the court ought not to answer the question as it is a non-justiciable matter. It is argued that the doctrine was established in *Marbury v Madison*.[15] In *Marbury*, Chief Justice Marshall held that '[t]he province of the court [was solely] to decide on the rights of individuals, not to enquire [how the other branches] perform duties in which they have a discretion'.[16] Thus, '[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be answered in this court',[17] but 'the decision of the executive is conclusive'.[18] After one and a half centuries, the US Supreme Court in *Baker v Carr* formulated more coherent guidelines on when courts should invoke the doctrine.[19] Justice Brennan identified six factors that indicate a political question:

1. 'A textually demonstrable constitutional commitment of the issue to a coordinate political department';
2. 'A lack of judicially discoverable and manageable standards for resolving it';
3. 'The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion';
4. 'The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government';
5. 'An unusual need for unquestioning adherence to a political decision already made'; and

[15] *Marbury v Madison* 5 US 137 (1803).
[16] ibid [170].
[17] ibid.
[18] ibid [166].
[19] *Baker v Carr* 369 US 186 (1962).

6. 'The potentiality of embarrassment from multifarious pronouncements by various departments on one question'.[20]

However, the subsequent case law of the US Supreme Court has not been consistent and has not, despite *Baker*, brought forward a clear definition of the doctrine. In 2012 and 2015, the Supreme Court created further uncertainty surrounding the political question doctrine through its decisions in *Zivotofsky v Clinton* (*Zivotofsky I*)[21] and *Zivotofsky v Kerry* (*Zivotofsky II*)[22]. In *Zivotofsky I*, the Supreme Court narrowed the political question doctrine, focusing only on the first two *Baker* criteria.[23] In *Zivotofsky II*, the Supreme Court expressed broad and conclusive recognition of exclusive executive power. Thus, even if the political question doctrine is avoided, it does not necessarily lead to greater scrutiny by the Supreme Court. The Supreme Court might still recognise broad executive or congressional power that does not merely remove their acts from judicial review, but also cuts off all scrutiny, thereby constitutionally validating such acts.

The lack of clarity is also reflected in academic debate. Scholarly opinions analysing the US Supreme Court's case law regarding the political question doctrine span from assertions that the doctrine is in decline or has ceased to exist,[24] to views that it is growing,[25] to assertions that, substantively, it has never existed.[26]

(ii) Different Formulations of the Doctrine

Scholarly disagreement extends not only to the current state of the doctrine, but also its formulation and implications. There are multiple formulations of the political question doctrine discussed by legal scholars. Most of them can be categorised as either a textual understanding of the doctrine or a prudential version. According to the textual (or classical) version of the doctrine, a court ought not to make decisions that are explicitly committed by the constitution to another branch of government.[27] The prudential version renders questions non-justiciable if they are not fit for principled judicial decision making because of a lack of institutional competence, or if their answering would lead to political backlash or loss of confidence into the court by the people.[28]

[20] ibid [217], [222].
[21] *Zivotofsky v Clinton* 566 US 189 (2012).
[22] *Zivotofsky v Kerry* 576 US 1 (2015).
[23] Harland Grant Cohen, 'A Politics-Reinforcing Political Question Doctrine' (2017) 49 Arizona State Law Journal 1, 22.
[24] Barkow (n 11) 263ff; Mark Tushnet, 'Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine' (2002) 80 North Carolina Law Review 1203, 1208–1209.
[25] Margit Cohn, 'Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems' (2011) 59 The American Journal of Comparative Law 675, 687.
[26] Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal 597, 600.
[27] ibid 1017; Redish (n 13) 1039–1040.
[28] Shemtob (n 12) 1013–1014; Redish (n 13) 1043–1044.

A further discussion concerns the effect of the doctrine. Most scholars argue that the political question doctrine precludes consideration of the merits of the relevant decision. Tara Leigh Grove argues that the meaning of the doctrine has significantly changed with the *Baker* decision.[29] Under the pre-*Baker* doctrine, which she calls the traditional doctrine, the court was required to treat as conclusive certain factual determinations made by the political branches when engaging in a consideration of the merits of the case.[30] According to her, a shift with *Baker* was brought about partially by the academic debate surrounding the doctrine, which construed it in a way that precludes justiciability.[31] However, this modern political question doctrine, as Grove construes it, is not a doctrine of judicial restraint; rather, it is one that follows the trend of judicial supremacy: the court has increased its powers as it now decides legal and factual issues itself, and determines whether, and to what extent, any other branch may be involved in constitutional decision making, often concluding that it is to be the single arbitrator. [32]

B. Political questions

The definitions of what constitutes a 'political question' offered in the formulations of the doctrine provide some guidance but are not conclusive. The scholarship generally agrees that it is not possible to clearly distinguish between the legal and the political sphere.[33] Thus, it is hardly possible to define political questions. Discussions of the political question doctrine mostly revolve around certain policy areas. Typically, these are questions relating to matters of foreign policy and security,[34] or the rules governing the democratic process, such as decisions on the outcome of elections or election processes, access to public office, the (re-)distribution of political power, or the legality of political parties.[35] Another field is what Hirschl calls the realm of pure or 'mega' politics.[36] He understands this as 'core political controversies that define (and often divide) whole polities'.[37] The answer to these questions would 'define a polity's very *raison d'être*'.[38] Lastly, it has been argued that certain right-based claims might be considered as political

[29] Tara Leigh Grove, 'The Lost History of the Political Question Doctrine' (2015) 90 New York University Law Review 1908, 1913.
[30] ibid 1918, 1922–1924.
[31] ibid 1947, 1954–1956.
[32] ibid 1960, 1964, 1967.
[33] Hirschl (n 8) 257–258.
[34] John Harrison, 'The Political Question Doctrines' (2017) 67 American University Law Review 457, 460.
[35] Jesse H Choper, 'The Political Question Doctrine: Suggested Criteria' (2005) 54 Duke Law Journal 1457, 1479.
[36] Hirschl (n 8) 253.
[37] Hirschl (n 9) 727.
[38] ibid 728.

questions, given that they can be ethical questions for which legal texts provide no clear answer.[39]

III. Methodology

A. Comparative constitutional law

The academic field of comparative constitutional law only emerged after the Second World War,[40] and saw a significant growth at the end of the 20th century. One of the aims of the significantly older[41] field of the comparative study of statecraft has always been to design optimal institutions by comparing and understanding the advantages and disadvantages of existing models.[42] In past decades, comparative constitutional law has increasingly become an interdisciplinary field as constitutional questions often intertwine with other related fields including politics, sociology, and economics.[43]

This article analyses how Germany and Austria address political questions, considers the differences and similarities in their approaches, and views their practice through the lens of a doctrine developed in the United States. Simultaneously, the article aims to establish a better understanding of the practice of the German and the Austrian Constitutional Courts, assess it normatively, and provide recommendations for an improved approach.

B. Selection of court documents

(i) Jurisdictions

The German and the Austrian Constitutional Courts are quite similar when viewed from a structural or procedural perspective as well as in their constitutional review powers. However, their approaches to political questions are interesting to compare because of the Courts' significantly different historical underpinnings, their assigned roles within the state, and their different self-conceptions. The Austrian Federal Constitutional Law, enacted in 1919/20, is characterised by compromise and value neutrality.[44] The German Basic Law of 1948 was written to secure democracy as a form of governance and as a value system, and to protect itself

[39] Renata Uitz, 'Constitutional Courts in Central and Eastern Europe' (2007) 13 Judicial International 47, 58.
[40] Michel Rosenfeld and András Sajó, 'Introduction' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 6.
[41] Rosenfeld and Sajó (n 40) 4–5; Rosalind Dixon and Tom Ginsburg, 'Introduction' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 1–2.
[42] Dixon and Ginsburg (n 41) 2.
[43] ibid 1.
[44] Tamara Ehs, 'Der VfGH als politischer Akteur. Konsequenzen eines Judikaturwandels?' (2015) 44(2) Austrian Journal of Political Science 15, 20.

from self-destruction.[45] According to scholars, the German Federal Constitutional Court tends to make general constitutional deductions and fundamental statements with a certain pathos, whereas the Austrian Constitutional Court is more focused on individual case decisions and is more formal.[46] As Michael Holoubek put it: the German Court is more of a *constitutional* court, the Austrian Court rather a constitutional *court*.[47]

(ii) Proceedings and Court Formation

Germany and Austria both follow the Kelsenian model of centralised constitutional adjudication,[48] where both Courts can review the constitutionality of laws.[49] Although the Austrian Constitutional Court can also review the lawfulness of ordinances,[50] these decisions are left out deliberately for matters of comparability. Thus, proceedings before the German Federal Constitutional Court initiated under articles 93(1)(2),[51] 93(1)(4a),[52] or 100(1)[53] of the German Basic Law and proceedings before the Austrian Constitutional Court initiated under article 140 of the Austrian Federal Constitutional Law[54] are considered in this article.

In terms of court formation, this article only considers decisions made by the two Senates of the German Federal Constitutional Court.[55] In Austria, it is the norm that the entire Court decides a case; only if the answer is sufficiently clear will a smaller panel respond.[56] Thus, only decisions by the full Court will be taken into consideration.

[45] Jürgen Jekewitz, 'Bundesverfassungsgericht und Gesetzgeber. Zu den Vorwirkungen von Existenz und Rechtsprechung des Bundesverfassungsgerichts in den Bereich der Gesetzgebung' (1980) 19 Der Staat 535, 538.
[46] Ehs (n 44) 21–22.
[47] Michael Holoubek, 'Wechselwirkungen zwischen österreichischer und deutscher Verfassungsrechtsprechung' in Detlef Merten (ed), *Verfassungsgerichtsbarkeit in Österreich und Deutschland* (Duncker & Humbolt 2008) 111.
[48] Christoph Hönnige, 'Verfassungsgerichte in den EU-Staaten: Wahlverfahren, Kompetenzen und Organisationsprinzipien' (2008) 6 Journal for Comparative Government and European Policy 524, 525.
[49] Germany: Basic Law for the Federal Republic of Germany 1949, arts 93(1)(2), 93(1)(4a), 100(1); Austria: Federal Constitutional Law 1930, art 140.
[50] Austria: Federal Constitutional Law 1930, art 139.
[51] Abstract review initiated by the Federal Government, a Land government, or one-fourth of the Members of the Bundestag.
[52] Individual complaint.
[53] Concrete review initiated by an ordinary court.
[54] In particular, art 140(1)–(3).
[55] Only the Senates are authorised to invalidate laws (Act on the Federal Constitutional Court, art 93c(1)) and Chambers can only grant constitutional complaints that are manifestly well-founded, and the issue has already been decided by the Federal Constitutional Court (Act on the Federal Constitutional Court, art 93c(1)). See also Bundesverfassungsgericht, 'Proceedings – Reaching a Decision' (*Bundesverfassungsgericht*) <www.bundesverfassungsgericht.de/EN/Verfahren/Der-Weg-zur-Entscheidung/der-weg-zur-entscheidung_node.html> accessed 9 April 2022.
[56] Constitutional Court Act 1953, art 7(1) holds that a quorum is given when the chairman and at least eight out of the twelve voting members are present. Article 7(2)(1) holds that the chairman and four voting members constitute a quorum if the legal matter is already sufficiently clarified by a prior decision of the

(iii) Timeframe

The timeframe of publication of the judgements analysed is 1 January 2017 through 31 December 2021. One aim of this article is to consider whether the approaches the Courts take are desirable. To make a meaningful assessment and to give recommendations for possible changes, it is most sensible to consider the Courts' recent decisions.

(iv) Judgement Selection

The advanced search functions of both Court databases were used.[57] In both Courts, decisions will be considered in German, because not all decisions are translated into English. In the database of the German Federal Constitutional Court, the three relevant types of proceedings—Abstract Judicial Review (BvF),[58] Specific Judicial Review of Statutes (BvL),[59] and Constitutional Complaint (BvR)[60]—were selected. In the Austrian Legal Information System under 'Verfassungsgerichtshof', the document type 'decision texts' (*Entscheidungstexte (TE)*) was selected and 'B-VG Art140' was entered as a search term.[61] A first sample was created by filtering for decisions concerning matters of foreign policy and security, rules governing the democratic process, and decisions involving core political controversies and controversial ethical questions often related to fundamental right claims.[62] The final sample was selected by conducting a preliminary analysis of these documents based on the definition of political questions and the evaluative criteria to be applied.[63]

C. Coding and Thematic Analysis

To establish an account of the practices employed by the Courts when approaching political questions the methods of coding and thematic analysis were used. Thematic analysis is a method for identifying and analysing patterns

Constitutional Court. See also Verfassungsgerichtshof Österreich, 'The Court's Bench and its Judicial Activity – Organisation of the Judicial Activity of the Court' (*VFGH: Verfassungsgerichtshof Österreich*) <www.vfgh.gv.at/verfassungsgerichtshof/organisation/the_courts_bench.en.html> accessed 9 April 2022.

[57] Decisions are published on the website of the Federal Constitutional Court <https://www.bundesverfassungsgericht.de/DE/Entscheidungen/Suche/suche_node.html> and in the Legal Information System of the Republic of Austria <https://www.ris.bka.gv.at/Vfgh/>.

[58] German Basic Law, art 93(1)(2); 13 results.

[59] Germany: Basic Law for the Federal Republic of Germany 1949, art 100(1). 55 results.

[60] Germany: Basic Law for the Federal Republic of Germany 1949, art 93(1)(4a). 1445 results.

[61] 638 results, the majority of which bore the relevant classificatory sign G of proceedings initiated under article 140 of the Federal Constitutional Law. Because it is not possible to search directly for the classificatory sign G the search was conducted for the relevant article in the Constitution. Decisions bearing another classificatory sign were filtered out by the researcher herself.

[62] Sample of 99 decisions.

[63] Final sample of 54 decisions.

(themes) within qualitative data.[64] A theme captures something important about the data in relation to the research question and represents a level of patterned response or meaning within the data. The research mostly followed an inductive approach, meaning that the themes emerged from the data themselves. To establish the themes, the documents were coded—that is, analysed—according to relevant features reappearing in the decisions. The themes of practices established based on the codes were subsequently evaluated according to the criteria set out below.

D. Evaluative criteria

The evaluative criteria have been chosen because they refer to classical critiques of constitutional review and constitutional courts' essential tasks. Prudential concerns has been chosen as an evaluative criterion because they relate to one of the formulations of the political questions doctrine and are interesting to consider in response to critiques of judicialisation.

(i) Separation of Powers

The principle of the separation of powers means that state power is divided between the three different branches of government.[65] The engagement of constitutional courts with political questions bears the risk of breaching the principle as they might answer questions designated for the other branches.[66] At the same time, judicial abstention draws the line between political and judicial power in favour of the political decision-maker.[67] This could also be contrary to the principle.[68]

(ii) Checks and Balances

The principle of checks and balances holds that the different branches of government are responsible for controlling each other and ensuring each branch does not overstep its mandate.[69] It has been argued that with the political question doctrine, courts leave potentially unconstitutional governmental or legislative

[64] David E Gray, *Doing Research in the Real World* (4th edn, Sage Publications 2018) 692–694.

[65] Merriam-Webster, 'Separation of Powers' (*Merriam-Webster*) <www.merriam-webster.com/legal/separation%20of%20powers> accessed 12 June 2022.

[66] *Baker* (n 19) [210], [217]; Ariel L Bendor, 'Are There Any Limits to Justiciability: The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience' (1997) 7 Indiana International & Comparative Law Review 311, 328.

[67] Harrison (n 35) 506.

[68] Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' (Congressional Research Service 2014) <https://sgp.fas.org/crs/misc/R43834.pdf> 25 accessed 12 June 2022.

[69] 'Checks and Balances' (*Merriam-Webster Online*) <www.merriam-webster.com/dictionary/checks%20and%20balances> accessed 12 June 2022.

action unchecked.[70] Thus, judicial abstention might violate the principle, because the courts do not carry out their assigned task.[71]

(iii) Fundamental Rights Protection

The development of fundamental rights and their increasing importance made it possible for constitutional courts to deal with politically sensitive questions.[72] It has been argued that certain fundamental right claims lead courts to engage in possibly inappropriate policymaking.[73] Nonetheless, the protection of fundamental rights is one of the key tasks of constitutional courts and must be preserved.

(iv) Concerns of judicial prudence

Some authors have grounded the political question doctrine on prudential concerns. They refer to instances where courts lack institutional competence because there is no clear legal basis, and where interference could cause backlash from the other branches and decrease citizens' trust in the court.[74] Arguably, courts should act prudently to remain legitimate.

E. LIMITATIONS

This research is limited by the ambiguity of the political question doctrine and the term 'political question'. This influences the selection of decisions considered in this research. Because objective criteria do not exist, which decisions qualify for consideration under the political question doctrine depends on a degree of subjective judgment by the author. Furthermore, because the selection was mostly conducted by the author herself, the risk of missing a case that would have met the selection criteria remains. Additionally, the cases considered represent instances where the Courts did issue a decision. The Courts may have rejected questions for being non-legal, but this is not represented in this research as rejections are not considered in the sample. Lastly, the inductive approach chosen for the thematic analysis leaves open the possibility that a potentially relevant theme was missed or that aspects of decisions could be categorised differently.

[70] Redish (n 13) 1054.
[71] Martin H Redish, 'Abstention, Separation of Powers, and the Limits of the Judicial Function' (1984) 94 Yale Law Journal 71, 74.
[72] Uitz (n 40) 58.
[73] See for example Hirschl (n 9) 276; Uitz (n 40) 54.
[74] See for example Shemtob (n 12) 1013.

IV. Development of Constitutional Review in Germany and Austria

Judicial decisions usually follow case precedents. Thus, before discussing the analysis of the case law from the past five years, a brief overview of the development of constitutional review at the two Courts and their jurisprudence concerning political questions is appropriate. The aim is to provide an understanding of how the two Courts have developed and acted, so to put their more recent decisions in context.

A. Developments in germany

It has been argued that the German Federal Constitutional Court entered its most formative years immediately after it was set up in 1951,[75] when the Court laid the foundations of its fundamental rights jurisprudence.[76] When Willy Brandt became Chancellor in 1969, the Court suddenly found itself in the conservative role of the guardian of constitutional 'values' against the politics of 'progress'.[77] During the 1970s and 1980s, the Court arguably withdrew from the high political stage by assuming a more doctrinal rhetoric.[78] However, on multiple occasions, the Court has been criticised for arbitrary decisions,[79] taking political sides, or abandoning a basic political consensus.[80] Scholars now see increasing indications that the Court has passed its zenith.[81] This is explained by the stability and prosperity of the Federal Republic over the past decades, and the Court's loss of charisma through routinisation.

B. Developments in austria

The development of constitutional adjudication in Austria can be described in different phases.[82] In the First Republic, the Constitutional Court was hesitant

[75] Florian Meinel, 'The Constitutional Miracle on the Rhine: Towards a History of West German Constitutionalism and the Federal Constitutional Court' (2016) 14 International Journal of Constitutional Law 277, 283.
[76] ibid 284.
[77] ibid 286.
[78] ibid 288.
[79] Dietmar Willoweit, 'Rechtsprechung und Staatsverfassung: Zur Geschichte und Gegenwart einer ambivalenten Beziehung' (2016) 71 JuristenZeitung 429, 432.
[80] Christoph Schönberger, 'Karlsruhe' in Matthias Jestaedt and others (eds), *The German Federal Constitutional Court: The Court Without Limits* (Oxford University Press 2020) 23.
[81] ibid 27.
[82] Heinz Schäffer, 'Verfassungsgericht und Gesetzgebung' in W Berka, H Schäffer, and J Werndl (eds), *Staat – Verfassung – Verwaltung* (Springer 1998) as cited in Ehs (n 44) 19; see also Theo Öhlinger, 'Die Verfassungsgerichtsbarkeit in Österreich – Der Wandel von Funktion und Methode in einer neunzigjährigen Geschichte' in Christian Boulanger and Michael Wrase (eds), *Die Politik des Verfassungsrechts* (Nomos 2013).

towards scrutinising legislation based on fundamental rights. After World War II, the Court continued to practice judicial self-restraint, although it tentatively began to show the legislature its limits, though the legislator's realm of policymaking remained untouched. Only since the 1980s did the Court start to interpret fundamental rights more substantively, when it became in part judicially activist and started determining the limits of legal intervention by applying the principle of proportionality. However, in the past ten years, the Court seems to have become less activist again.[83] While maintaining its role as the guardian of the constitution and fundamental rights, the Court has ceased to further develop its principles.

V. Thematic Analysis and Evaluation

The literature suggests that both Courts answer at least some political questions.[84] The research conducted confirmed this. Although not all of the decisions now discussed as potential cases for the doctrine might be considered as such by a court, they concern the fields defined pertaining to political questions as set out in the Theoretical Framework above,[85] and are thus deemed relevant to the present analysis. The analysis and evaluation that follow discuss how the Courts approach these questions on an exemplary basis.

A. Legislative margin of appreciation

(i) Theme: Legislative Margin of Appreciation

Both Courts refer to the concept of a legislative margin of appreciation and use it quite similarly, in that the legislator has some freedom in making policy decisions. If contested legislation falls within the legislator's margin of appreciation, it will not be found unconstitutional. This concept mirrors a formulation of the political question doctrine whereby the court accepts certain decisions of the legislative branch and treats them as facts.[86]

Both Courts recognise that the legislator has a margin of appreciation when having to make complex decisions,[87] these being decisions involving the balancing

[83] Konrad Lachmayer, 'Formalism and Judicial Self-Restraint as Tools Against Populism? Considerations to Recent Developments of the Austria Constitutional Court' in Fruzsina Gárdos-Orosz and Zoltán Szente (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Pre-print version, Routledge 2021) 15.

[84] See for example Thomas M Franck, *Political Questions/Judicial Answers* (Princeton University Press 1992) 108; Rudolf Streinz, 'The Role of the German Federal Constitutional Court: Law and Politics' (2014) 31 Ritsumeikan Law Review 95, 101; Lachmayer (n 83) 17; Öhlinger (n 82) 251.

[85] See Section II.B.

[86] Grove (n 29) 1924.

[87] BVerfG, Beschluss des Ersten Senats vom 19 November 2021 - 1 BvR 781/21, 1 BvR 889/21, 1 BvR 860/21, 1 BvR 854/21, 1 BvR 820/ 21, 1 BvR 805/21, 1 BvR 798/21 - Rn (1 - 306) [171].

of different rights,[88] multiple possible options to choose from,[89] or different concerns to be taken into consideration.[90] The German Federal Constitutional Court has further held that the legislator is allowed to make generalisations for reasons of predictability and simplicity of the law.[91] For example, when discussing the constitutionality of contact restrictions and curfews as a response to the COVID-19 pandemic, the German Federal Constitutional Court held that for measures concerning the pandemic, the legislator has a wide margin of appreciation because of the complexity and unforeseeability of the issue.[92] Thus, the Court found the measures to be overall constitutional.[93] Similarly, the Austrian Constitutional Court left a wide margin of appreciation to the legislator when countering the economic impact of the pandemic,[94] holding that the measures taken were constitutional.[95]

Both Courts, furthermore, recognise that the extent of the legislator's margin of appreciation depends on the severity of the infringement of fundamental rights.[96] Hence, there is a wider margin when there is no or only limited infringement. When discussing the prohibition of assisted suicide, the Austrian Constitutional Court held that there is no wide legislative margin of appreciation in this respect.[97] This is because the matter concerns an existential decision on the shaping of one's life and death and, thus, quite essentially the individual's right to self-determination. Similarly, the German Federal Constitutional Court held that the penalisation of commercialised assisted suicide, whilst following a legitimate aim and being as such a suitable instrument,[98] is not proportionate.[99] The regulation as discussed was found to completely empty the right to suicide as a manifestation of the right to a self-determined death in certain situations.

The German Federal Constitutional Court further grants the legislator a wide margin of appreciation when fulfilling its duty to protect.[100] Hence, the Court

[88] BVerfG, Urteil des Zweiten Senats vom 26 Februar 2020 - 2 BvR 2347/ 15, 2 BvR 2527/16, 2 BvR 2354/16, 2 BvR 1593/16, 2 BvR 1261/16, 2 BvR 651/16 - Rn (1 - 343) [224].

[89] BVerfG, Urteil des Zweiten Senats vom 19 September 2018 - 2 BvF 1/ 15, 2 BvF 2/15 - Rn (1 - 357) [171], [173], [284].

[90] VfGh 18.06.2019, G 150-151/2018-34, G 155/2018-32 [63], [64].

[91] BVerfG, Urteil des Ersten Senats vom 19 Dezember 2017 - 1 BvL 3/14, 1 BvL 4/14 - Rn (1 - 253) [187].

[92] BVerfG, Beschluss des Ersten Senats vom 19 November 2021 - 1 BvR 781/21, 1 BvR 889/21, 1 BvR 860/21, 1 BvR 854/21, 1 BvR 820/ 21, 1 BvR 805/21, 1 BvR 798/21 - Rn (1 - 306) [205].

[93] ibid [305].

[94] VfGH 14.07.2020, G 202/2020-20, V 408/2020-20* [118].

[95] ibid [135].

[96] VfGH 14.03.2017, G 164/2016-12 [108]; BVerfG, Beschluss des Zweiten Senats vom 23 Mai 2017 - 2 BvL 10/ 11, 2 BvL 28/14 - Rn (1 - 104) [97]; BVerfG, Beschluss des Ersten Senats vom 19 November 2021 - 1 BvR 781/21, 1 BvR 889/21, 1 BvR 860/21, 1 BvR 854/21, 1 BvR 820/ 21, 1 BvR 805/21, 1 BvR 798/21 - Rn (1 - 306) [204].

[97] VfGH 11.12.2020, G 139/2019-71 [83].

[98] ibid [227], [260].

[99] ibid [267].

[100] BVerfG, Beschluss des Ersten Senats vom 16. Dezember 2021 - 1 BvR 1541/20 - Rn (1 - 131) [99]; BVerfG, Beschluss des Ersten Senats vom 24. Mäṙz 2021 - 1 BvR 2656/ 18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 - Rn. (1 - 270) [152].

will only find a violation if no measures were taken, or if the measures taken are obviously unsuitable, completely inadequate, or fall considerably short.[101] Both Courts allow for a margin of appreciation when assessing social needs,[102] or counteracting poverty, for example through minimum subsistence laws.[103] The German Federal Constitutional Court had to assess the constitutionality of the reduction of minimum subsistence payments in case of non-cooperation of the recipient in entering the labour market. In this context, it held that it is not the task of the Court to examine whether the legislator has chosen the most just, expedient, and reasonable solution to fulfil its tasks as this is for politics to try and achieve.[104] Rather, the Court must only ensure that the minimum subsistence level does not fall below a certain threshold and that the amount paid can be justified.[105] A similar sentiment was expressed by the Austrian Constitutional Court when discussing the merger of regional health insurance funds (*Gebietskrankenkassen*). In this context, the Court noted that it was not its appropriate role to review the political merit of the legislator's decisions.[106]

The Courts have referred to further policy areas where the legislator has a certain margin of appreciation, examples being when granting permanent residence and permissions to work for foreign nationals,[107] when creating taxes or charges and setting their rates,[108] or creating legislation for civil servants.[109] However, despite granting the legislator a margin of appreciation, the Courts have reviewed their actions according to standards of proportionality,[110] equality,[111] or other constitutional standards.[112]

[101] BVerfG, Beschluss des Ersten Senats vom 16. Dezember 2021 - 1 BvR 1541/20 - Rn (1 - 131) [98].

[102] VfGH 07.03.2018, G 136/2017-19 ua* [95].

[103] BVerfG, Urteil des Ersten Senats vom 5 November 2019 - 1 BvL 7/16 - Rn (1 - 225) [121].

[104] ibid [122].

[105] ibid [122].

[106] ibid [84].

[107] VfGH 04.10.2018, G 133/2018-12 [43]; VfGH 11.10.2017, G 56/2017-14, G 199/2017-8 [42].

[108] BVerfG, Beschluss des Zweiten Senats vom 13. April 2017 - 2 BvL 6/13 - Rn (1 - 45) [68]; BVerfG, Beschluss des Zweiten Senats vom 8 Dezember 2021 - 2 BvL 1/13 - Rn. (1 - 94), [55]; BVerfG, Urteil des Ersten Senats vom 18 Juli 2018 - 1 BvR 1675/16, 1 BvR 981/17, 1 BvR 836/17, 1 BvR 745/17 - Rn (1 - 157) [65], [71].

[109] BVerfG, Beschluss des Zweiten Senats vom 23 Mai 2017 - 2 BvL 10/ 11, 2 BvL 28/14 - Rn (1 - 104) [47].

[110] BVerfG, Urteil des Ersten Senats vom 18 Juli 2018 - 1 BvR 1675/16, 1 BvR 981/17, 1 BvR 836/17, 1 BvR 745/17 - Rn (1 - 157) [71], [106].

[111] VfGH 11.10.2017, G 56/2017-14, G 199/2017-8, [44], [47]; VfGH 07.03.2018, G 136/2017-19 ua* [104], [109]–[112], [114]; BVerfG, Beschluss des Zweiten Senats vom 8. Dezember 2021 - 2 BvL 1/13 - Rn (1 - 94) [53].

[112] BVerfG, Beschluss des Zweiten Senats vom 13 April 2017 - 2 BvL 6/13 - Rn (1 - 45) [128] (creation of taxes limited by types of taxes provided for in the constitution); BVerfG, Beschluss des Zweiten Senats vom 23 Mai 2017 - 2 BvL 10/ 11, 2 BvL 28/14 - Rn (1 - 104) [52] (take into consideration actual necessities and the development of financial and economic circumstances when setting deciding on the structure and the amount of remuneration for civil servants); BVerfG, Beschluss des Ersten Senats vom 16 Dezember 2021 - 1 BvR 1541/20 - Rn (1 - 131) [122], [130] (legislator did not take sufficient measures to fulfil their duty to protect).

(ii) Evaluation: Legislative Margin of Appreciation

In granting the legislator a margin of appreciation, the Courts adhere to the principle of the separation of powers to a large extent. They leave complex decisions to the legislative branch because of the legislator's democratically legitimated responsibility to decide conflicts between important interests, as noted by the German Federal Constitutional Court.[113] Furthermore, the Courts leave freedom to the legislator to undertake political reforms.

Nonetheless, the Courts also adhere to the principle of checks and balances, reviewing the merits of decisions even when the legislator has a margin of appreciation. By applying constitutional principles to these decisions, the Courts make it clear that it is still possible to overstep the margin they grant. Adherence to the principle of checks and balances is, however, slightly limited given that the Courts in some cases refrain from review or apply very low standards.

This links to the third criterion, the protection of fundamental rights. Despite the Courts' insistence on the protection of a right's core in any case, they do allow for some infringements by granting a wider margin for less severe infringements. Particularly, in granting a wide margin of appreciation in relation to the duty to protect and only mandating minimum standards for social needs, the German Federal Constitutional Court does not offer full protection of fundamental rights.

However, these and other concessions are most likely in line with prudential concerns. By refraining from reviewing the merits of political decisions and whether they are the best possible solutions, or only applying a limited review to some, the Courts limit themselves and avoid potential backlash.

B. Reference to External Sources

(i) Theme: Reference to External Sources

Both Courts regularly refer to external sources, which include decisions from other jurisdictions, especially international courts, as well as reports and academic literature. It is not uncommon for courts to do so. Smyth, in a study of secondary source citation by the Australian High Court, mentions multiple reasons why courts refer to non-binding sources.[114] He notes the wish of a court to provide further justification for an interpretation or decision, and to refer to social sciences and other non-legal authorities to 'examine the "legislative fact" that underpins legal rules'.[115]

[113] BVerfG, Beschluss des Ersten Senats vom 19 November 2021 - 1 BvR 781/21, 1 BvR 889/21, 1 BvR 860/21, 1 BvR 854/21, 1 BvR 820/ 21, 1 BvR 805/21, 1 BvR 798/21 - Rn (1 - 306) [171].

[114] Russell Smyth, 'Other Than "Accepted Sources of Law"? A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 University of New South Wales Law Journal 19, 22–24.

[115] ibid 24.

Both Courts refer to case law from international courts, particularly the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Most references are made to the case law of the ECtHR, especially by the Austrian Constitutional Court. In multiple cases concerning security measures, the Austrian Constitutional Court has referred to the case law of the ECtHR, especially cases concerning article 8 (the right to respect for private and family life) of the European Convention on Human Rights (ECHR). Furthermore, both Courts refer to case law from the ECtHR on articles 2 (the right to life) and 8 ECHR when discussing the prohibition of assisted suicide.[116] In the cases concerning the official registration of non-binary genders, the German Federal Constitutional Court refers to case law from the CJEU,[117] while the Austrian Constitutional Court refers to the case law of the ECtHR.[118] In a case concerning the constitutionality of the European Public Sector Asset Purchasing Programme, the German Court engaged with the CJEU's case law concerning the matter.[119] However, the Court found that the CJEU did not deal with the case adequately,[120] and found the programme to be unconstitutional.[121]

Both Courts refer to international conventions, and may hold that certain measures are unconstitutional and also violate international laws.[122] On a number of occasions, the Austrian Constitutional Court referred to the International Convention on the Elimination of all Forms of Racial Discrimination.[123] At times, it also referred to the Geneva Refugee Convention[124] and the Convention on the Rights of the Child.[125] The German Federal Constitutional Court referred to violations of the Convention on the Rights of Persons with Disabilities once in the sample, as well as the International Covenant on Civil and Political Rights.[126] The court also made reference to General Comments by the Committee on Economic, Social, and Cultural Rights when discussing the prohibition and restriction of face-to-face teaching at general education schools to protect against infection during the COVID-19 pandemic.[127] Furthermore, when discussing measures for the

[116] VfGH 11.12.2020, G 139/2019-71 [67]–[71]; BVerfG, Urteil des Zweiten Senats vom 26 Februar 2020 - 2 BvR 2347/ 15, 2 BvR 2527/16, 2 BvR 2354/16, 2 BvR 1593/16, 2 BvR 1261/16, 2 BvR 651/16 - Rn (1 - 343) [305].

[117] BVerfG, Beschluss des Ersten Senats vom 10 Oktober 2017 - 1 BvR 2019/16 - Rn (1 - 69) [63].

[118] VfGH 15.06.2018, G 77/2018-9 [17], [18], [23].

[119] BVerfG, Urteil des Zweiten Senats vom 5 Mai 2020 - 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 - Rn (1 - 237) [181]–[183].

[120] ibid [184]–[191].

[121] ibid [234].

[122] It should be noted that the Conventions referred to here have constitutional standing in Austria.

[123] VfGH 11.10.2017, G 56/2017-14, G 199/2017-8 [47]; VfGH 07.03.2018, G 136/2017-19 ua*, [131]; VfGH 12.12.2019, G 164/2019-25, G 171/2019-24 [131]; VfGH 26.06.2020 G 298/2019-11, G 117-121/2020-5 [31].

[124] VfGH 07.03.2018, G 136/2017-19 ua* [112], [114].

[125] VfGH 12.12.2019, G 164/2019-25, G 171/2019-24 [131].

[126] BVerfG, Beschluss des Ersten Senats vom 16 Dezember 2021 - 1 BvR 1541/20 - Rn (1 - 131) [100]–[107].

[127] BVerfG, Beschluss des Ersten Senats vom 19 November 2021 - 1 BvR 971/21, 1 BvR 1069/21 - Rn (1 - 222) [69], [172].

collection of intelligence, the Court highlighted letters from the UN High Commissioner for Human Rights, who had already criticised measures authorising the Federal Intelligence Service to engage in foreign-to-foreign telecommunications reconnaissance, the transmission of the information obtained to domestic and foreign agencies, and cooperation with foreign intelligence services.[128]

Both Courts further referred to the findings of expert reports. For example, in a case on the wearing of ideologically or religiously influenced clothing at school, the Austrian Constitutional Court referred to a report by the European Commission against Racism and Intolerance.[129] The report stated that the prohibition of wearing ideologically or religiously influenced clothing at school was unable to reach the legislator's goal of social integration. In a case concerning the constitutionality of measures taken in response to climate change, the German Court extensively discussed the findings of the reports by the Intergovernmental Penal on Climate Change (IPCC).[130]

The German Federal Constitutional Court on multiple occasions referred to secondary literature. For example, the Court referred to experts in statistics when assessing the constitutionality of the new method for establishing the national census.[131] In a case concerning the prohibition of commercialised assisted suicide, the Court referred to statistics of assisted suicide in other countries.[132] The Austrian Constitutional Court also referred to the prevailing view in literature to support its opinion[133] in holding that the prohibition of adoptive parenthood for non-married couples was unconstitutional.[134]

(ii) Evaluation: Reference to External Sources

Although not acting as positive policymakers, both Courts use external sources quite actively to engage in negative policymaking by holding that laws are unconstitutional. This can be seen as limiting the separation of powers. What is arguably more critical is the use of non-judicial sources as the bases of the Courts' argumentation. Although certain sources, such as the IPCC report, might be accepted as authoritative, references made to them might still be seen as policymaking rather than judicial decision-making.

Conversely, by considering multiple sources, the Courts ensure thorough scrutiny of the legislator. The practice ensures that the legislator not only adheres

[128] BVerfG, Urteil des Ersten Senats vom 19 Mai 2020 - 1 BvR 2835/17 - Rn (1 - 332) [240], [305], [325].
[129] VfGH 11.12.2020, G 4/2020-27 [144].
[130] BVerfG, Beschluss des Ersten Senats vom 24 März 2021 - 1 BvR 2656/ 18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 - Rn (1 - 270) [159]–[62], [178], [211], [215]–[223].
[131] BVerfG, Urteil des Zweiten Senats vom 19 September 2018 - 2 BvF 1/ 15, 2 BvF 2/15 - Rn (1 - 357) [167].
[132] BVerfG, Urteil des Zweiten Senats vom 26 Februar 2020 - 2 BvR 2347/ 15, 2 BvR 2527/16, 2 BvR 2354/16, 2 BvR 1593/16, 2 BvR 1261/16, 2 BvR 651/16 - Rn (1 - 343) [253]–[254].
[133] VfGH 06.12.2021, G 247/2021-12 [37].
[134] ibid [45].

to immediate national legal standards but also follows international and scholarly trends and is thus in line with the principle of checks and balances.

The extensive reference to and discussion of the case law of the ECtHR demonstrate a strong commitment to fundamental rights protection by both Courts. Interestingly, the German Federal Constitutional Court seems to refer to the ECtHR less often than the Austrian Constitutional Court. This might be because of fundamental rights provided by the German Constitution, whereas Austria's development of human rights law has always been interlinked with the ECHR.[135]

As to concerns of prudence, it can be positively noted that the Courts provide backing for their argumentation from other courts as well as non-judicial sources. However, as stated before, the Courts are also cognisant of the risks of engaging with broader external sources insofar as doing so may lead to the perception that they are no longer seen as engaging in a legal discussion, but explicitly engaging in policymaking through engaging with various sources, which might go beyond what is considered a legal discussion of the question and could be perceived negatively.

C. Constitutionally conforming interpretations and guidelines

(i) Theme: Constitutionally Conforming Interpretations and Guidelines

In response to non-conforming legislation, both Courts attempt to first provide a constitutionally compliant interpretation of the legislation, with the German Federal Constitutional Court doing so more often. Regardless, both Courts also provide recommendations or guidelines for the legislators on how to remedy the violation identified.

As to the provision of constitutionally compliant interpretations, one example is that the prohibition of certain associations in Germany was found to be constitutional.[136] In making such a finding, the German Federal Constitutional Court referred to the fact that even though a regulation lacked an explicit reservation of proportionality, the constitutional requirement of proportionality could be taken into account through interpretation.[137] The Austrian Constitutional Court, in a case concerning the possibility of officially registering one's gender as non-binary, likewise found it was possible to come to a constitutionally conforming interpretation of the current legislation.[138] This was because, in its view, the term 'gender' was broad enough to encompass non-binary genders, and thus the legislation

[135] See discussion on the matter in Section V.D.
[136] BVerfG, Beschluss des Ersten Senats vom 13 Juli 2018 - 1 BvR 1474/ 12, 1 BvR 57/14, 1 BvR 57/14, 1 BvR 670/13 - Rn (1 - 167) [96].
[137] ibid [118].
[138] VfGH 15.06.2018, G 77/2018-9 [45].

allowed people identifying as non-binary to be registered accordingly.[139] Furthermore, this broad interpretation recognises that someone's gender can be unidentified or changed.

The Courts sometimes also discuss why a constitutionally conforming interpretation is not possible. This is mostly because a constitutionally conforming interpretation would be contrary to the clear wording of the legislation[140] or the legislator's evident intent.[141] For example, the German Federal Constitutional Court found that that insofar as the gender registry referred clearly to 'male' and 'female',[142] it was unconstitutional.[143] Further, when discussing commercial assisted suicide, the German Federal Constitutional Court explicitly discussed the impossibility of a constitutionally conforming interpretation insofar as it would directly contradict the intent of the legislature on this area, and emphasised that any attempted constitutionally conforming interpretation would be tantamount to original judicial law-making and incompatible with the requirement of legal certainty.[144]

Where a provision has been declared constitutionally incompatible, both Courts sometimes prescribe requirements for the legislator to adhere to when creating new legislation on the matter discussed in a case. In holding that it has to be possible for someone to legally have access to assisted suicide, the Austrian Constitutional Court noted that the legislator had to consider that ways in which social and economic circumstances, and other circumstances outside of the person's control, can hamper a person's free self-determination.[145] Meanwhile, the German Federal Constitutional Court, in holding that the measures taken to combat climate change were insufficient, and therefore unconstitutional,[146] stated that one generation should not be allowed to consume large parts of the CO_2 budget under a comparatively mild reduction burden if this would leave a radical reduction burden to following generations and exposed their lives to severe losses of freedom.[147] Following this, the Court laid down certain requirements for the design of the CO_2 reduction scheme.[148]

[139] ibid [37], [38], [43].
[140] VfGH 08.03.2017, G 399/2016-8 [26]; BVerfG, Urteil des Ersten Senats vom 19 Dezember 2017 - 1 BvL 3/14, 1 BvL 4/14 - Rn (1 - 253) [151]; BVerfG, Beschluss des Zweiten Senats vom 8 Dezember 2021 - 2 BvL 1/13 - Rn (1 - 94) [90]; BVerfG, Beschluss des Ersten Senats vom 27 Mai 2020 - 1 BvR 1873/ 13, 1 BvR 2618/13 - Rn (1 - 275) [158].
[141] VfGH 11.12.2019, G 72-74/2019-48, G 181-182/2019-18 [224]; BVerfG, Beschluss des Zweiten Senats vom 8 Dezember 2021 - 2 BvL 1/13 - Rn (1 - 94) [90]; BVerfG, Beschluss des Ersten Senats vom 27 Mai 2020 - 1 BvR 1873/ 13, 1 BvR 2618/13 - Rn (1 - 275) [158].
[142] BVerfG, Beschluss des Ersten Senats vom 10 Oktober 2017 - 1 BvR 2019/16 - Rn (1 - 69) [42].
[143] ibid [65].
[144] BVerfG, Urteil des Zweiten Senats vom 26 Februar 2020 - 2 BvR 2347/ 15, 2 BvR 2527/16, 2 BvR 2354/16, 2 BvR 1593/16, 2 BvR 1261/16, 2 BvR 651/16 - Rn (1 - 343) [334].
[145] VfGH 11.12.2020, G 139/2019-71 [99]–[101].
[146] BVerfG, Beschluss des Ersten Senats vom 24. März 2021 - 1 BvR 2656/ 18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 - Rn (1 - 270) [266].
[147] ibid [192].
[148] ibid [151]–[155].

(ii) Evaluation: Constitutionally Conforming Interpretations and Guidelines

Both Courts have stated that they will not interpret a provision in a way which is manifestly contrary to the legislator's intent as part of respecting the principle of the separation of powers. However, the constitutionally conforming interpretations provided by the Courts sometimes seem rather far-fetched, one example being when the Austrian Constitutional Court held that a same-sex parent adopting a child would step into the role of the parent of the other sex, thereby not replacing the biological parent.[149] Furthermore, they then provide an outright solution to cure the unconstitutional provision, implicitly circumscribing the legislator's scope to cure the defect themselves. Although constitutionally conforming interpretations do not inhibit the legislator from passing new legislation, issues with regards to judicial law-making and thus the separation of powers could arise. This is also the case when the Courts prescribe requirements as to how the legislator must remedy certain unconstitutionalities. Despite not legislating themselves, the Courts might still significantly limit the legislator's room for manoeuvre, especially as the requirements prescribed are often rather technical and might go beyond what is necessary for securing the legislation's constitutionality.[150]

On one hand, providing a constitutionally conforming interpretation is a sign of thorough scrutiny of the legislation and thus adherence to the principle of checks and balances. On the other hand, as has been seen, the Courts sometimes go rather far in their interpretation to avoid a finding of unconstitutionality and a repeal of the legislation. This could signal to legislators that the Courts, after a thorough review, will uphold the constitutionality of the legislation and thereby avoid damaging legislators' reputation. Thus, the legislator might perceive the Courts' acceptance of responsibility as a signal that they can give less consideration to the constitutionality and potential harm of legislation. Furthermore, a finding that a provision is constitutional may be misunderstood by the legislator, insofar as the court arrived at the conclusion via interpreting the provision in a way radically different from how the legislation is worded or previously understood.

Constitutionally conforming interpretations are mostly aimed at providing a solution that is more protective of fundamental rights. Similarly, the requirements for the legislator the Courts prescribe are meant to offer stronger protection of fundamental rights. However, they might not be the only or most desired rights-protecting solution, and can disincentivise the legislator from taking further action because it is seen to be unnecessary.

For prudential concerns, constitutionally conforming interpretations might make a court look modest because it does not strike down legislation as often.

[149] VfGH 03.102018, G 69/2018-9 [46]–[47].

[150] For example, the requirements for the design of the German CO_2 reduction scheme laid down by the German Federal Constitutional Court (BVerfG, Beschluss des Ersten Senats vom 24 März 2021 - 1 BvR 2656/ 18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 - Rn (1 - 270) [192], [266].

However, upon closer consideration, the constitutionally conforming interpretation might amount to something close to policymaking, thus leading to potential political backlash.

D. Holistic policy considerations

(i) Theme: Holistic Policy Considerations

To discern the constitutionality of certain measures that could fall under the political question doctrine, both Courts resort to holistic policy considerations. This means that the Courts do not only consider the legislation in question but also its broader context. This can lead to both the declaration of constitutionality of a rather intrusive measure, or a finding of unconstitutionality in respect of measures which, viewed by themselves, seem constitutional. It appears that the Austrian Constitutional Court more often considers policies holistically, while the German Federal Constitutional Court tends to focus mainly on the legislation in question.

Both Courts refer to the 'fundamental characteristics' of the state or constitution. When discussing the expropriation of Hitler's birthplace, the Austrian Constitutional Court held that the uncompromising rejection of National Socialism was a fundamental characteristic of Austria.[151] Thus, it found the expropriation of the building to be constitutional for the purpose of eliminating the special symbolic power associated with the house through a profound architectural redesign.[152] When discussing the constitutionality of the establishment of an EU unified patent court, the German Federal Constitutional Court held that this would change the integration programme of the Treaty of Lisbon and create the possibility of a new type of unified jurisdiction in industrial property protection.[153] Further, it held that a transfer of jurisdictional tasks away from German courts would cause a change in the content of the Basic Law.[154] Hence, it held that the relevant law should not be passed.[155] It should have been treated as a constitutional amendment and would have needed a qualified majority in the Bundestag.[156]

As part of this holistic approach, the Austrian Constitutional Court also considers the constitutionality of the provision in question with reference to whether it is part of a broader policy package. When discussing the reduced time limit to appeal against return decisions, the Court found the measure to be unconstitutional because the public interest of clarifying the foreigner's status of residence as

[151] VfGH 30.06.2017, G 53/2017-23 [28].
[152] ibid [33].
[153] BVerfG, Beschluss des Zweiten Senats vom 1 Februar 2020 - 2 BvR 739/17 - Rn (1 - 168) [155].
[154] ibid [157].
[155] ibid [164].
[156] ibid [126].

soon as possible was not served by the measure taken.[157] This was the case because no other measures were taken that would accelerate the process in other stages of the proceedings, thereby rendering the measure incoherent.[158] Conversely, when discussing the absence of compensation for entry bans to businesses as a measure to curb COVID-19 infections, the Court did not find the legislation to be unconstitutional because, among other reasons, the measure had been taken as part of a comprehensive policy package with the overall aim of financial hardship of business owners.[159] Furthermore, the Austrian Constitutional Court considers how a matter is treated generally and refers to substantively similar situations. For example, when discussing same-sex marriage, the Court held that civil partnerships had been created for same-sex couples and that both marriage and civil partnerships signified an equal partnership and institutionalised a strong connection,[160] and that the two had been largely treated the same.[161] It therefore concluded that the unequal treatment of heterosexual and homosexual couples in marriage could no longer be upheld.[162]

Both Courts review measures in relation to their overarching goals. If this goal is not met by the measure, they find them to be unconstitutional even if the measure, by itself, would not be such. When discussing the constitutionality of reducing the minimum subsistence payments for non-cooperation, the German Federal Constitutional Court found that if the legislator pursued the legitimate goal of helping people avoid or overcome their own need for assistance, punitive measures to encourage such must be proportionate,[163] which was not the case.[164] The Austrian Constitutional Court, similarly, discussed a Viennese minimum income scheme which was held unconstitutional because it failed to achieve its actual purpose, namely the elimination of existing hardship.[165]

Lastly, as part of the Courts' endeavour to discern relevant policy considerations, they may have recourse to the history of certain laws when determining their meaning or proper interpretation. In a case concerning the use of juries in criminal proceedings and the right of a professional judge to bring a case before the Supreme Court if they doubt the judgement of a jury, the Austrian Constitutional Court discussed rules of criminal procedure from 1850, 1873, 1934, and their current version from 1950.[166] Reference is also made to instances where the meaning of terms can change. For instance, in the case of registering non-binary genders in Germany, the German Federal Constitutional Court held that the

[157] VfGH 26.09.2017, G 134/2017-12, G 207/2017-8 [66].
[158] ibid [52], [64].
[159] VfGH 14.07.2020, G 202/2020-20, V 408/2020-20* [100]–[106].
[160] VfGH 04.12.2017, G 258-259/2017-9 [10].
[161] ibid [11]–[12].
[162] ibid [15]–[17].
[163] BVerfG, Urteil des Ersten Senats vom 5 November 2019 - 1 BvL 7/16 - Rn (1 - 225) [128].
[164] ibid [189], [210].
[165] VfGH 27.06.2018, G 415/2017-12 [25].
[166] VfGH 27.06.2018, G 28/2018-13 [35]–[38].

usage of only 'men' and 'women' in the German Basic Law only reflected earlier societal understandings and did not limit contemporary interpretations.[167]

(ii) Evaluation: Holistic Policy Considerations

It seems that the Courts do not see the holistic consideration of policies as an interference with the separation of powers; or at least they do not see it as an interference of an unacceptable degree. However, this is not so simple. One possible criticism is that the Courts go beyond what they are asked to do in their analyses given that they might implicitly pass judgement on the policy at large. For example, when the Austrian Constitutional Court discussed the reduced times for appeals against return decisions, it did more than just assess the legislation in question but essentially judged the entire policy package as insufficient for its proclaimed goal. Furthermore, the intention behind a certain measure might not be clear, and it could be problematic for the Court to define one in its analysis and on its own accord. However, in the cases considered, the Courts usually referenced policy documents or what has been argued during the proceedings when defining a policy's aim.

The practice appears to have a positive effect on checks and balances because it, on one hand, provides a very thorough check of measures by reviewing not only the specific provision in isolation, but also by reference to its broader aims. On the other hand, this check also grants a certain leeway to the legislator by considering their actions in its entirety.

In terms of protecting fundamental rights, to take the 'holistic policy' approach might result in less protection overall, as the Courts often balance the measure at issue with others. This more relative approach has led the Courts to declare measures that present an encroachment on fundamental rights to be constitutional. Conversely, this approach also allows for the finding of violations of fundamental rights based on the wider context in which the measure is situated. Thus, measures that might be constitutional by themselves have been nevertheless declared unconstitutional by reference to legislation in similar situations or the overall policy approach (or lack thereof).

Nevertheless, the practice does not seem problematic in terms of the separation of powers, though one possible criticism is that a court might not be the most competent body to undertake policy evaluations, and therefore, decisions based on policy evaluations might be less well-received.

E. The Relationship between the Court and the Legislator

[167] BVerfG, Beschluss des Ersten Senats vom 10 Oktober 2017 - 1 BvR 2019/16 - Rn (1 - 69) [42]–[43].

(i) Theme: The Relationship between the Court and the Legislator

This final subsection draws attention to the relationship between the Courts and the legislators. First, it considers whether the Courts, when answering political questions, side more often with the government or the applicants. Second, the cases where the government did not make any statements on the case will be explored. Ran Hirschl argues that judicial empowerment often supports political interests.[168] He says the 'source of evil' of judicialisation is the prevalence of 'self-interested, risk averse politicians'.[169] According to him, governments are only willing to allow extensive power shifts to courts if they benefit from the courts taking decisions they are unwilling to take, and which might be politically costly.[170] Another reason he discusses is political elites hoping to secure their policy preferences.[171]

Although it is outside the scope of this research to assess opinions and political preferences in individual decisions, it might be interesting to note that in the cases considered both the Austrian Constitutional Court and the German Federal Constitutional Court decided significantly more often in favour of the applicants.[172] This includes findings of (partial) unconstitutionality and constitutionally conforming interpretations which, although upholding the constitutionality of legislation, nonetheless bring about the desired change. Thus, this superficial analysis indicates that the German and Austrian Courts do not necessarily decide in favour of political elites when discussing political questions.

The assertion Hirschl makes, which is that political stakeholders defer politically salient decisions to courts, partially corresponds to the findings of this research. In three cases involving politically charged questions, the Austrian government did not make any statements during the proceedings. In all three instances, the Court either declared the legislation to be unconstitutional or provided a constitutionally conforming interpretation. The first concerned same-sex marriage.[173] The Court found the law prohibiting same-sex marriage unconstitutional. The second the possibility of registering non-binary genders, the Austrian government did not make a statement.[174] The Court did not find the legislation to be unconstitutional but provided a constitutionally conforming interpretation, which allowed for the registration of non-binary genders.[175] The third discussed the minimum pecuniary penalty for unlawful entry or stay (set at €5,000), which

[168] Ran Hirschl, '"Juristocracy"—Political, not Juridical' (2004) 13(3) The Good Society 6, 9.
[169] ibid 6.
[170] ibid 8.
[171] ibid 9.
[172] The German Federal Constitutional Court sided with the applicants 18 times and with the government 7 times. The Austrian Constitutional Court sided with the applicants 18 times (including 3 constitutionally conforming interpretations) and sided with the government 11 times.
[173] VfGH 04.12.2017, G 258-259/2017-9.
[174] VfGH 15.06.2018, G 77/2018-9 [5].
[175] VfGH 15.06.2018, G 77/2018-9 [38], [45], and [46].

was found to be unconstitutional.[176] In Germany, either the Federal government or State governments, depending on whether the case concerned Federal or State legislation, have always made statements. Only in one case discussing the possibility of officially registering non-binary genders, which was regulated by Federal law (*Personenstandsgesetz*) did the German Federal Government not make a statement (though the State Government of Thuringia did make a statement in support of the possibility of officially registering non-binary genders).[177]

(ii) Evaluation: The Relationship between the Court and the Legislator

That the Constitutional Courts tend to rule in favour of the applicants is not a problem for the principle of the separation of powers. However, as discussed above, depending on how the Courts make these decisions, they may risk overstepping their boundaries if they do not accept certain political certitudes. If the Courts show a tendency to uphold the constitutionality of the laws under review, this could indicate a lack of checks and balances. However, because the opposite is the case, the Courts clearly engage in thorough and critical scrutiny in this regard. Similarly, as to the protection of fundamental rights, the Courts indeed often find legislation to be unconstitutional because of a lack of fundamental rights protections, and therefore their practice of tending to side with the applicants indicates strong fundamental rights protection. As to prudential concerns, the Courts might be weakened and be subject to criticism if they disagree too much with the political stakeholders. However, given that the German Federal Constitutional Court has, for the past decades, enjoyed the highest levels of trust among the constitutional bodies,[178] such disagreement seems to not have affected Court negatively. Similarly, the Austrian Constitutional Court's decisions are generally accepted, and the use of constitutional review is viewed rather positively.[179]

The deferral of politically salient decisions to the Constitutional Courts, which seems to be more prevalent in Austria as indicated by the government making no statements in some proceedings, is a clear problem for the principle of the separation of powers. The Court is somewhat forced to make decisions that might be more suited for the political process, but in relation to which the government is unwilling to take a stance. That said, though such decisions might ideally be placed elsewhere, the Court is still fulfilling its obligations under the principle of checks and balances by scrutinising the laws under consideration and providing answers the government is unwilling to give. This, in the examples discussed here, is always in favour of greater human rights protection. The deferral of political questions to

[176] VfGH 10.03.2020, G 163/2019-16 ua* [37].
[177] BVerfG, Beschluss des Ersten Senats vom 10 Oktober 2017 - 1 BvR 2019/16 - Rn (1 - 69) [18].
[178] Internetredaktion der LpB BW, '70 Jahre Bundesverfassungsgericht 1951–2021' (*Landeszentrale für politische Bildung Baden-Württemberg*, 2021) <www.lpb-bw.de/bundesverfassungsgericht#c67178> accessed 12 June 2022.
[179] Lachmayer (n 83) 14.

the Courts might be viewed critically for prudential reasons as the Courts might be forced to answer questions not best placed with them. However, the Courts might also be perceived as the party that truly protects fundamental rights and makes more radical changes that have been requested from certain societal groups that politician cannot agree upon.

VI. A Political Question Doctrine for Germany and Austria

The preceding Section presented the practice of the German Federal Constitutional Court and the Austrian Constitutional Court when considering political questions based on five themes. These themes were each evaluated according to the criteria of the separation of powers, checks and balances, protection of fundamental rights, and prudential concerns. First, Section VI.A summarizes how the Courts' practices affect the selected evaluative criteria. It is clear that no practice is able to fully satisfy all criteria and that concessions will always have to be made. Nevertheless, Section VI.B explores what a political question doctrine might look like for Germany and Austria, drawing inspiration from Cohen's 'politics-reinforcing political question doctrine'.[180]

A. The courts' practices in light of the evaluative criteria

Overall, the Courts' practice yields mixed results for all evaluative criteria. Requirements of the separation of powers are often not fully met when discussing political questions. Reference to external sources may be overly restrictive of national policymaking and may amount to policymaking by the Courts, especially when they refer to non-judicial sources. That both Courts tend not to side with the government and accept the government's deferral of decisions, which is particularly the case in Austria, suggests they are quite willing to interfere in the policy arena. Constitutionally conforming interpretations and guidelines by the Courts can be problematic, though the Courts indicate that they respect the intentions of the legislature. This attitude is also reflected in the Courts' application of a legislative margin of appreciation, which supports the separation of powers. The Courts' practice of holistically considering policies may amount to political decision-making. However, it appears to be largely non-invasive into the political realm.

Court practices mostly adhere to the principle of checks and balances. The use of multiple external references enhances a thorough review of the legislation under consideration. Similarly, holistic policy considerations allow for a more in-depth, but also more nuanced, examination of the legislation. The Courts' tendency to side with the applicants further indicates thorough constitutional review.

[180] Cohen (n 23).

Deferral of questions by the government and legislature may also enhance scrutiny. The practice of providing constitutionally conforming interpretations or guidelines is an expression of scrutiny, albeit a possibly less clear one than a declaration of unconstitutionality. Finally, only the use of a legislative margin of appreciation somewhat limits checks and balances as the Courts accept certain legislative decisions and apply rather low standards of review.

Both Courts protect fundamental rights. The cases in which the Courts side with the applicants rather than the government usually involve the finding of a violation of fundamental rights. When the Courts make decisions that the government was seemingly unwilling to make, they also opt for a rights-affirming ruling. In addition, the external sources referred to by both Courts often support stronger rights protection; both Courts, the Austrian Constitutional Court in particular, extensively engage with the case law of the ECtHR. Constitutionally conforming interpretations are usually formulated in a way that secures fundamental rights. However, protection could be more comprehensive if it were enshrined in legislation. Holistic policy considerations can ensure the protection of fundamental rights because they provide a more comprehensive view of the matter. However, they can also have a limiting effect in some cases. For example, when the balancing of the various interests leads the Courts to conclude that certain rights can indeed be restricted. The use of a legislative margin of appreciation has a similar effect, where the Courts give the legislator leeway to restrict or not actively promote fundamental rights.

The Courts' practices often appear to have little regard for prudential concerns. The constitutionally conforming interpretations and guidelines offered may amount to policymaking and may be outside the purview of the Courts. Holistic policy considerations pose similar risks. However, this does not appear to impact the Courts negatively. Reference to external sources, on the other hand, pays respect to prudential concerns as it lends legitimacy to the Courts' decisions. Nevertheless, it can be viewed critically as the Courts' engagement with non-legal sources might be beyond their proper realm. Disagreeing too frequently with legislators and accepting deferred questions carries the risks of backlash, but this does not seem to be the case in either Germany or Austria. Appeal to a legislative margin of appreciation is a sign that the Courts are proceeding prudently.

B. COHEN'S POLITICS-REINFORCING POLITICAL QUESTIONS DOCTRINE

Cohen's pluralist or politics-reinforcing political question doctrine aims to protect the channels of democratic debate rather than shield government decisions from judicial review.[181] He bases his doctrine on three arguments from

[181] Cohen (n 23) 32.

constitutional theory:[182] first, that a democratic constitution should guarantee that diverse voices are heard in public debate; second, that judicial review should monitor and uphold fairness and openness of the political process; and third, that courts should not shut down political debates without good reasons. According to Cohen, the US Supreme Court should refrain from exercising constitutional review when the executive branch (the President and Cabinet) and the legislative branch (Congress) are in opposition and each branch can make a credible case that it has the independent power to determine the policy in the case.[183] However, even if this is the case, the Court must assess whether judicial intervention is necessary to respond to a possible violation of an important right.[184] If intervention is necessary, the Court should intervene minimally and render a narrow decision.

C. Sketching a doctrine for Germany and Austria

It is beyond the scope of this research to propose a fleshed-out political question doctrine for Germany and Austria. I will nevertheless endeavour to offer some thoughts on what a politics-reinforcing doctrine, to borrow Cohen's term, might look like and what should be considered when drafting such a doctrine. First, it should be noted that Cohen's doctrine cannot be simply transferred to the German or Austrian context. The political branches are structured differently and supreme courts like the one in the US are somewhat different from constitutional courts like the ones in Germany and Austria. An important aspect of the political question doctrine, as discussed in the US context, is the delimitation of power between Congress and the executive. Although this question of the delimitation of power between the legislative and the executive has also been considered before the German Federal Constitutional Court and the Austrian Constitutional Court,[185] it does not play such a significant role in the Courts' decisions. Moreover, the balance of power and the functioning between the executive and the legislative branches are different. One of the reasons for this is that in Germany and Austria the executive and the legislature are 'elected' at the same time.[186] The government in both countries is usually formed by the strongest party in the first chamber of parliament (the Bundestag in Germany and the Nationalrat in Austria) and possibly one or multiple coalition partners.[187] In both countries, these parliamentary

[182] ibid 33–41.

[183] ibid 41–44, 48.

[184] ibid 44, 48.

[185] See for example BVerfG, Urteil des Zweiten Senats vom 19 September 2018 - 2 BvF 1/ 15, 2 BvF 2/15 - Rn (1 - 357) [242]–[243].

[186] Note that the president in Austria is elected separately and directly by the Austrian people (Austrian Federal Constitutional Law, art 60), as it follows a semi-presidential system. Germany has a parliamentary system where the president is elected by a Federal Convention composed of all members of the current Bundestag and an equal number of state electors (German Basic Law, art 54).

[187] Germany: arts 63(2), 64(1), 69(1); see also Bundeszentrale für politische Bildung, 'Bundesregierung' (*Bundeszentrale für politische Bildung*) <www.bpb.de/kurz-knapp/lexika/pocket-politik/16360/bundesregierung/> accessed 7 June 2022. Austria: art 70(1); see also Demokratiezentrum Wien, 'Bundes-

chambers are elected by direct popular vote.[188] Thus, political differences between the executive and the legislative are rarer, because the majority of the legislative body also forms the executive (except for the Austrian President who is elected separately). In contrast, in the US, the executive and the legislature are elected in separate elections, which can lead to greater political differences between the two.[189]

As to the differences between supreme courts and constitutional courts, it has been argued that 'it is the job of a constitutional court "to choose and impose values" as they are positioned outside of the regular court system'.[190] This perception of constitutional courts as political actors would justify them answering political questions more frequently.[191] Supreme courts are not necessarily viewed as naturally having this power. One reason why political decision-making of the US Supreme Court seems to be viewed more critically and has been limited by a political question doctrine could be its initial design as a federal court of last instance. The German and the Austrian Constitutional Courts have been designed with their task of constitutional review in mind and on the basis of a deliberate choice of the constitution drafters to create an institution to keep the legislative and executive in check.

A politics-reinforcing political question doctrine for Germany and Austria could, as a first criterion, consider whether a discussion on the matter is currently taking place in parliament. There are several influential parties in the parliaments of both countries and different lines of argument will roughly correspond to the division between government and opposition. If the matter is debated, the Courts might decide not to intervene in the political process, unless, as Cohen suggests, the matter requires intervention to protect fundamental rights. In addition, it might be useful to oblige governments to make statements in cases involving political questions that the Courts decide to answer, to avoid deferral of these questions. Furthermore, in case one of the Courts is faced with a political question, they could be given the power to initiate parliamentary discussions on the issue, or even to initiate public consultations or to propose to parliament to do so, rather than provide an answer themselves. Public consultations exist in Austria. They are non-binding votes concerning questions of fundamental importance or importance for the whole country.[192] Currently, they can only be initiated by a majority vote in the

regierung' (*Demokratiezentrum Wien*) <www.demokratiezentrum.org/bildung/angebote/lernmodule/das-politische-system/bundesregierung/> accessed 7 June 2022.

[188] Germany: Basic Law, art 38; Austria: Federal Constitutional Law, art 26.

[189] Constitution of the United States, arts 1(2), 1(3), 2(1), Amendments XII, XIV(2), XVII.

[190] David Robertson, *The Judge as Political Theorist* (Princeton University Press 2010) as cited in Tamara Ehs, 'Felix Frankfurter, Hans Kelsen, and the Practice of Judicial Review' (2013) 73 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 451, 455.

[191] Ehs (n 190) 455.

[192] Austrian Federal Constitution, art 49b.

Nationalrat and are officially issued by the Federal President.[193] A comparable mechanism in Germany does not yet exist.[194]

A political question doctrine, as outlined above, would be consistent with the principle of the separation of powers, as it aims to preserve the democratic process and leave political decisions to the legislative and executive branches or facilitate their involvement. Nevertheless, by deciding to declare a question non-justiciable, the Courts would have to engage with the relevant legislation, thereby adhering to the principle of checks and balances. Given that severe fundamental rights infringements would allow the Courts to issue a ruling on the merits despite political discussions on the matter, fundamental rights protection would be guaranteed. Finally, this approach seems to address prudential concerns, as the Courts would be less likely to overstep the mark but rather facilitate the political process.

VII. Conclusion

This article has discussed how the German Federal Constitutional Court and the Austrian Constitutional Court have addressed political questions submitted for constitutional review in their jurisprudence from 2017 to 2021. It has evaluated their respective approach in light of the separation of powers, checks and balances, fundamental rights, and concerns of judicial prudence. Generally, despite the Courts' different origins, they approach political questions very similarly. Five themes were identified to discuss the Courts' practices: (a) discussions of legislative margins of appreciation; (b) references to external sources; (c) the offering of constitutionally conforming interpretations and guidelines; (d) the application of holistic policy considerations; and (e) discussions of the relationship between the Courts, and the legislature and the executive. The evaluation of these practices yielded mixed results, with all the practices having advantages and disadvantages.

One possible way of improving the Courts' approaches to political questions is to introduce a political question doctrine. The doctrine, which originated in US constitutional law, requires a declaration of non-justiciability of certain political questions. However, there is much academic debate about the precise meaning and implications of the doctrine. Cohen has proposed a politics-reinforcing political question doctrine that aims to strengthen and facilitate the democratic process. His doctrine will require judicial restraint in situations where the democratic process is functioning well whilst still always protecting against grave human rights violations. The exact contours of a similar doctrine applied in the German or Austrian context need to be explored in further research. However, this paper has presented an outline of a possible doctrine. This includes judicial restraint for issues being debated in parliament and possibly the option for the Court to initiate political discussions or popular consultations. However, if the Courts see the risk

[193] ibid.

[194] The only somewhat comparable mechanism is a referendum concerning the revisions of the existing division into Länder under art 29 of the German Basic Law.

of serious fundamental rights infringements, they should be able to issue a decision remedying the violation, despite the initial applicability of the doctrine. If the Courts do accept the question, government should be required to make a statement in the proceedings.

The questions of how to approach increasing judicialisation and what the appropriate role of constitutional courts in an ever-changing society is are complex. Multiple perspectives can and must be considered. This research offers one novel perspective on two European courts that have served as inspiration for many courts to follow. It has hopefully provided some insight into the complexity of the matter and some ideas for how we can think about and examine constitutional courts in their multifaceted beauty.